STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 31, 2013)

JOHNSTON SCHOOL COMMITTEE	:	
	:	
v.	:	**C. A. No. PM 12-2558**
	:	
JOHNSTON FEDERATION OF TEACHERS, LOCAL 1702	:	

DECISION

LANPHEAR, J. This Court should be reluctant to vacate a decision by an arbitrator, particularly where the parties have voluntarily agreed that their disputes should be arbitrated. Unfortunately, errors may occur. Where fundamental Due Process Rights are denied in the process, the statutes direct this Court to act. During this particular arbitration hearing, the Arbitrator issued a significant ruling on a preliminary issue. Unfortunately, he then deprived the parties of a hearing on the merits.

This matter came on for consideration before the Court on the School Committee's motion to stay and vacate an arbitration award of April 27, 2012.

I

Facts and Travel

The School Committee and the Johnston Federation of Teachers, Local 1702 (Union) are parties to a collective bargaining agreement (CBA) in duration from September 1, 2008 through August 31, 2011. Pursuant to Article II, Section 1, a grievance is:

> A written complaint by the Federation or by a teacher and the Federation that there has been a violation, misinterpretation, or inequitable application of any of the provisions of this Agreement, or that a member

> of the bargaining unit has been treated unfairly or inequitably or discriminated against for any reason.

The School Committee alleges that a middle school student informed a guidance counselor that Mr. Carmine Giarrusso, a teacher, called a student "gay" in front of other students moments after a school assembly on tolerance. The Assistant Principal of the school promptly interviewed Mr. Giarrusso, and students who were in the classroom during the incident. The Assistant Principal then placed a letter of reprimand in Mr. Giarrusso's file. The Union appealed and the grievance was denied by the Superintendent and then the Johnston School Committee. It is that reprimand which Mr. Giarrusso and the Union grieved before the Arbitrator.

Upfront, the School Committee noted that it did not intend to call the individual middle school students to testify.[1] The Committee took the position, before the Arbitrator and then before the Court, that protecting the interests of the students was a major priority. Subjecting students to testifying at a teacher's disciplinary hearing seemed inappropriate to the Committee. This was no surprise at the arbitration hearing, as the parties and the Arbitrator recognized this preliminary issue should be decided prior to the merits of the controversy:

> THE ARBITRATOR: But I also understand that having spoken with the two advocates that there is also a preliminary matter that is to be addressed. And, Mr. Conley, I believe you are going to take the lead on this at this point.
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> ***
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> MR. CONLEY: . . . And I'm going to make a narrowly limited offer of proof addressing a procedural issue in this matter. That offer of proof is that that conduct was brought to the attention of one of Mr. Giarrusso's colleagues, a fellow teacher, by students who were witnesses . . .
>
> I will, again, narrowly focus on the pre-hearing issue. I will represent to the Arbitrator that Mr. Murano's investigation did include the interviewing of a number of students; not only those students who initially brought Mr. Giarrusso's conduct to the attention of his colleague, but Mr. Murano then also interviewed additional students for purposes of corroborating the initial information brought to Ms. Pezzullo's attention.

[1] As the identities of the students had never been disclosed, presumably the students did not testify before the Superintendent or the School Committee during the previous grievance levels.

> It is the position, as the Union knows as this has progressed through the grievance process, it is the position of the District that it will not disclose the identity of those students who were interviewed and will not require those students to testify at this hearing. It is the position of the District that we are asking for a ruling <u>before going to the merits of the case</u>, from the Arbitrator, that the non-disclosure of the students' identities and their not testifying in this case will not result in an adverse interest being made against the District's case by the fact finder. Therefore, we are, essentially, looking for a pre-hearing ruling from the Arbitrator . . .

Arbitration tr., Jan. 20, 2012, at page 5, line 24 to Page 8, line 4, emphasis added. After an extensive "offer of proof" outlining the School Committee's desire to protect the students from testifying, the School Committee's counsel continued:

> We would respectfully request the opportunity to provide a brief legal memo to the Arbitrator and ask you to rule on it <u>prior to proceeding with the merits</u> of this arbitration.
> Arbitration tr., page 11, lines 19-20, emphasis added.

At the conclusion of the parties' remarks, the Arbitrator declared:

> THE ARBITRATOR: . . . I should say on the record that in our preliminary discussion with the advocates that the parties have <u>agreed to bifurcate</u> this proceeding, which goes — which mean that we will, we are not going to hear the case on the merits today. Instead, what will happen is well, after we hear the arguments, we will adjourn. The Arbitrator has indicated that I will not make a ruling today because the parties — I will give the parties the opportunity to present legal or any kind of memorandum that they want to present to me in terms of why their positions are right.
> Page 16, line 22; page 17, line 9, emphasis added.

Presumably, the parties then submitted the issue to the Arbitrator, and the Arbitrator reviewed the record, the contract and the memoranda submitted.

Four months after the initial hearing, the Arbitrator issued a written award. The Arbitrator then noted the limited use of offers of proof at arbitrations, particularly where non-disclosure results. He discussed the use of hearsay pursuant to the Federal Rules of Evidence and customary arbitration practice, and the significance of the students' potential testimony. The Arbitrator then concluded: Although it is the determination of the Employer as to who it will

call as witnesses and the Employer cannot be compelled to present certain evidence, the arbitrator ultimately determines the admissibility and (2) sufficiency of such evidence. Arbitration tr., page 11.

> It is hereby ruled that … If the School Committee wishes to proceed it must reveal the names of the student accusers and provide direct testimony in this arbitration hearing as to the events … Arbitration tr., page 12.

The Arbitrator, without holding a hearing on the merits, entered an Award that if the Committee did not introduce the students' testimony, the discipline would be overturned automatically by a set date. There would be no hearing, and no opportunity to present alternative evidence.

II

Analysis

The award stated upfront that "The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence." Arbitration Decision and Award, Apr. 27, 2012, page 3. Simply put, that is untrue. While the parties had an opportunity to present an offer of proof, and the Arbitrator willingly recessed to consider the offer, the Arbitrator never gave the Committee an opportunity to present any alternative evidence or to build a record.

As stated, this Court is well aware of its limited power to vacate arbitration decisions and does so with great caution. See Wheeler v. Encompass Insurance Co., 2003 W.L. 2285092, 3 (R.I., May 24, 2013). In Burns v. Segerson, 122 R.I. 123, 129-131, 404 A.2d 500, 503-504 (R.I. 1979) a union official neglected to inform a member that an arbitration proceeding was being held for a non-disciplinary grievance. Our high court noted the importance of a full and fair arbitration hearing:

> Although the union did not fulfill its duty to represent the interests of one of its members fairly, we will not vacate an arbitration award when each interested party has enjoyed the opportunity to be heard and the arbitrator has considered all of the relevant information in reaching his decision. Foley was given the

> opportunity to present his case and to argue the issue that was presented for arbitration.

Burns v. Segerson, 122 R.I. 123, 130, 404 A.2d 500, 504 (R.I. 1979), citation omitted.

In denying recovery for Mr. Foley, our Supreme Court noted

> Foley was foreclosed from raising this issue as a result of the provisions in sections 28-9-13(a) and 28-9-18(c). Section 28-9-13(a) disallows a party from attacking the validity of arbitration proceedings if that party has participated in any of the proceedings before the arbitration panel with notice of the facts or defects upon which his objection is based. Section 28-9-18(c) permits a party to object to an invalid submission to arbitration only if that party has complied with sec. 28-9-13. Foley participated in the arbitration hearing with notice of the facts . . .

Burns v. Segerson, 122 R.I. 123, 130-131, 404 A.2d 500, 503-504 (R.I. 1979), footnotes deleted.

The School Committee's position here is quite different. The Arbitrator accepted an issue and agreed to make a preliminary ruling, then decided it while short-circuiting the hearing process. The School Committee, in all fairness, cannot be said to have participated in any hearing.

After such a ruling, the hearing on the merits may have taken a different twist: The Committee may have located a new witness; as seventeen months had passed between the alleged remark, a student may now be anxious to testify; the parties may have crafted a new settlement; the Committee may have devised a new tactical strategy to prove its case;[2] or, the teacher may have opted to accept a reprimand. While these are all speculative possibilities, none can be foreclosed. A hearing on the merits was never conducted.

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[2] The preliminary issue decided by the arbitrator was whether or not to accept the hearsay testimony of the students. The arbitrator ruled that the hearsay was prohibited. However, the Collective Bargaining Agreement provides "The arbitrator shall not be bound by formal rules of evidence. . . ." Paragraph 3.4.5.

A recognized treatise on arbitration states:

"Arbitrators are not in the position of lay jurors; they are expected to possess the cultivated judgment necessary to fairly determine the testimonial trustworthiness of the hearsay in questions…

Evidence of a hearsay character is often presented at arbitration hearings." How Arbitration Works, Elkouri and Elkouri, 6th ed., p. 366.

Rhode Island General Laws chapter 28-9 directs agreements to arbitrate to be enforced. Section 28-9-18 provides few reasons for vacating an Arbitrator's Award in a labor controversy:

> (a) In any of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:
>
> (1) When the award was procured by fraud.
>
> (2) Where the arbitrator or arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (3) If there was no valid submission or contract, and the objection has been raised under the conditions set forth in § 28-9-13. Sec. 28-9-18.

The School Committee asserts that the Award should be vacated because it was procured by fraud. No intent to deceive was ever demonstrated. See Women's Development Corp. v. Central Falls, 764 A.2d 151, 160 (R.I. 2001). However, the same statute limits arbitrators from "exceeding their powers, or so imperfectly execut[ing] them, that a mutual, final and definite award" is not made. Section 28-9-18(a)(2). "The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (U.S. 1976), citations omitted.

The same decision declared:

> All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S., at 268-269, 90 S. Ct., at 1021 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. Mathews v. Eldridge, 424 U.S. 319, 349, 96 S. Ct. 893, 909–910 (U.S. 1976).

Not only is a hearing encouraged by case law, the presumption of a hearing is clear in the contract itself. "The arbitrator shall render his/her decision within thirty (30) school days after hearing the grievance. . . ." Collective Bargaining Agreement, ¶ 3.4.2.

Where there is such a distinct error in procedure so that one party is denied their opportunity to be heard on the merits, the Arbitrator's error is tantamount to a denial of due process, and the award should be vacated. The Arbitrator exceeded his powers and imperfectly executed his powers to too great an extent.

Simply put, the Johnston School Committee never was given the opportunity to present its case or argue the issue for arbitration. They were never put to the test, the Arbitrator accepted a preliminary issue by agreement of the parties, decided it, and then used it to prevent the parties from proceeding to a hearing on the merits. The arbitration clause of their contract entitled them to have an arbitration hearing, and presumed a fair arbitration where each party has minimal procedural rights such as the opportunity to call witnesses and be heard.

III
Conclusion

As the Arbitrator never allowed a hearing on the merits after stating that he intended to do so, this Court vacates the Award and directs a rehearing pursuant to §28-9-19. Counsel for Plaintiff shall present an appropriate order and a judgment within ten days of the entry of this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Johnston School Committee v. Johnston Federation of Teachers, Local 1702
CASE NO:	PM 12-2558
COURT:	Providence County Superior Court
DATE DECISION FILED:	May 31, 2013
JUSTICE/MAGISTRATE:	Lanphear, J.

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