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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001167-MR

NORTHERN KENTUCKY AREA
DEVELOPMENT DISTRICT — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 14-CI-01622

DANIELLE SNYDER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Danielle Snyder filed an action in the Boone Circuit Court asserting claims under the Kentucky Whistle Blower Act and the Kentucky Wages and Hours Act after her employer, the Northern Kentucky Area Development District (NKADD), terminated her employment. NKADD filed a motion to stay the proceedings and compel arbitration based on an arbitration agreement executed

by it and Snyder as a condition of Snyder's employment. The circuit court denied the motion and NKADD appealed. The issues on appeal concern the application of the Federal Arbitration Act (FAA); whether the FAA pre-empts Kentucky statutory law which prohibits arbitration as a condition of employment as applied to a public employment contract; and whether the arbitration agreement is otherwise void. We conclude NKADD did not have authority to enter into the arbitration agreement as a condition of Snyder's employment and affirm.

NKADD is a political subdivision created pursuant to Kentucky Revised Statutes (KRS) 147A.050 *et seq*. Pursuant to KRS 147A.070(2)(a), it has the authority to "employ such staff members as may be required for the operations of the district [.]" The legislature also expressly conferred the power upon NKADD to "[s]ue and be sued" and to "[m]ake and enter into all contracts or agreements necessary or incidental to the performance of its duties[.]" KRS 147A.080 (2) and (4).

NKADD is funded by taxpayers for the purpose of administering social programs in an area of Northern Kentucky comprising eight counties. It receives federal funds for various social programs including an Elder Abuse Program, a Long Term Ombudsman Program, and a National Family Caregiver Program. Additionally, through federal funds, NKADD partners with local food banks to distribute food to lower-income households and administers a small business lending fund. NKADD also provides services through its Northern Kentucky Workforce Investment Board to supply workers to businesses and

participates in a regional public-private partnership working to supply businesses with employees needed to grow businesses in Kentucky, Indiana, and Ohio. In Fiscal Year 2014, federal funds totaled $4,221,895, nearly one-quarter of NKADD's total revenues.

Snyder worked for NKADD as an administrative purchasing agent. In connection with her employment, on October 18, 2011, Snyder signed an arbitration agreement which provides:

> This agreement applies to all legal claims or disputes which have not been or were not resolved by you and the District informally in the normal course of business. Accordingly, you and the District are required to use this Agreement to resolve employment related legal disputes. By accepting employment with the District, you will have accepted this Agreement under the Federal Arbitration Act, and it will be binding on claims relating to your employment.

The arbitration agreement identifies the claims subject to arbitration, including:

> Any and all employment claims under….the Kentucky Wages and Hours Act, KRS 337.010 et seq.; … any statutory claims relating to public employment, and any claims of employment discrimination, retaliation, … wrongful termination … claims or demands arising under … public policy, the common law, or any federal state or local statute, ordinance, regulation, or constitutional provision ... or other … controversies of every kind or description …

On August 11, 2014, NKADD terminated Snyder's employment. Snyder filed this action in the Boone Circuit Court asserting NKADD violated the Kentucky Whistleblower Act, KRS 61.102 *et seq.*, and the Kentucky Wages and Hours Act, KRS 337.285. NKADD filed a motion to stay the proceedings and

compel arbitration arguing that the arbitration agreement was valid and enforceable and the FAA pre-empted any contrary state law.

The Boone Circuit Court denied the motion. NKADD renewed its motion and included the affidavit of its executive director, Lisa Cooper. In her affidavit, Cooper attested that Snyder was at all times an Indiana resident and that NKADD and Snyder regularly engaged in interstate commerce. She described the numerous federal agencies that provided funding for NKADD's operations, established that NKADD regularly purchased supplies and other items from out-of-state vendors and that Snyder, as purchasing agent for NKADD, routinely placed these orders.

After the original judge recused, the case was reassigned to another division of the Boone Circuit Court. In addition to ruling that the arbitration agreement was unenforceable under Kentucky statutory law, the circuit court ruled that Snyder's claims under the Whistleblower Act are wholly within the province of the Commonwealth and its police powers. It further held that because Snyder's claims do not have substantial effect on interstate commerce, application of the FAA would violate the Tenth Amendment to the United State Constitution. For slightly different reasons, we affirm.

Preliminary to our discussion, we note that although an order denying arbitration is interlocutory, "an ordinary appeal at the close of litigation will not often provide an adequate remedy for the wrongful denial of a right to arbitrate[.]" *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001).

Consequently, KRS 417.220(1)(a) provides that an appeal may be taken from "[a]n order denying an application to compel arbitration made under KRS 417.060[.]" Having stated our basis for exercising jurisdiction, we address the issues presented.

Section 250 of the Kentucky Constitution provides: "It shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment." To comply with that duty, the General Assembly adopted the Uniform Arbitration Act.

KRS 417.050 provides:

> A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. *This chapter does not apply to:*
>
> (1) *Arbitration agreements between employers and employees or between their respective representatives[.]*

(emphasis added). Not only does Kentucky statutory law exclude employment contracts from the Arbitration Act, but our statutory law prohibits employers from making an agreement to arbitrate rights arising under state and federal law as a condition of employment. KRS 336.700(2) states:

> Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or

> benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

Based on KRS 417.050(1) and KRS 336.700(2), the arbitration agreement executed as a condition of Snyder's employment would be void as contrary to this Commonwealth's statutory law. Nevertheless, NKADD argues the FAA, 9 U.S.C. § 1 *et seq*., pre-empts Kentucky statutory law and, therefore, Snyder's claims under the Whistleblower Act and the Wages and Hours Act must be submitted to arbitration.

The pre-emption doctrine is based on the Supremacy Clause of Article VI clause 2 of the United States Constitution, which provides that the "Laws of the United States…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Under the doctrine, to the extent Kentucky statutory law conflicts with federal law, it is pre-empted.

9 U.S.C. § 2 of the FAA states:

> A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

By enacting Section 2, Congress declared a national policy favoring the arbitration of disputes when the parties have agreed to that method of dispute resolution. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 983, 169 L.Ed.2d 917 (2008).

That national policy "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984). Stated simply, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011).

With the caveat that the FAA is applicable only to a contract evidencing a transaction involving interstate commerce, the United States Supreme Court has held that the scope of the FAA is broad. *See e.g.*, *Preston,* 552 U.S. 346, 128 S.Ct. 978 (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); *Perry v. Thomas,* 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA pre-empts state-law requirement that litigants be provided a judicial forum for wage disputes); *Southland Corp.,* 465 U.S. 1, 104 S.Ct. 852 (FAA pre-empts state franchise investment statute's prohibition of arbitration of claims brought under that statute). In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), the Supreme Court held that with the exception of transportation employees, Section 2 of the FAA applies to all written employment contracts. The Court noted the benefits to arbitration in the

employment context, including avoidance of litigation costs. *Id*. at 123, 121 S.Ct. at 1313.

In the context of private employers, this Court has specifically held KRS 417.050(1) and KRS 336.700(2) are pre-empted by the FAA. In *Vossberg v. Caritas Health Servs., Inc.*, 2004-CA-000204-MR, 2005 WL 497255, 2 (Ky.App. 2005), although we agreed "that Kentucky law does not favor arbitration in the context of employment disputes[,]" we held that "this matter has been pre-empted by the [FAA][.]" While an unpublished case is not afforded the weight of published precedent, based on federal precedent, we see no reason to deviate from that holding.

However, simply because we agree with the result reached in *Vossberg* does not mean we must reach the same result here where the facts are readily distinguishable from *Vossberg* and from those cases cited by NKADD. Pivotal to our discussion is that NKADD is not a private employer but a public employer. Snyder argues this fact is crucial in that NKADD's actions were *ultra vires* and render the arbitration agreement invalid, void, and unenforceable. She contends that an *ultra vires* contract is not pre-empted by the FAA because it is a general rule of contract law as opposed to a specific law disfavoring arbitration. In other words, Snyder submits that what is at issue is not a state law that limits the availability of arbitration but, instead, the general principle that a creature of statute, such as NKADD, cannot exercise authority by contract which has been declared illegal by the legislature.

Despite its broad scope, the threshold question of whether a valid arbitration agreement exists is not governed by the FAA. The FAA and the Kentucky Arbitration Act contain saving clauses providing that arbitration agreements may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2; KRS 417.050. The United States Supreme Court explained the meaning of the saving clause in the FAA: "The FAA directs courts to place arbitration agreements on equal footing with other contracts, *but it 'does not require parties to arbitrate when they have not agreed to do so.'*" *E.E.O.C. v. Waffle House Inc.,* 534 U.S. 279, 293-94, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (2002) (emphasis added) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). In this case, the question is whether NKADD had authority to enter into the arbitration agreement.

Political subdivisions "represent no sovereignty distinct from the state and possess only such powers as the state through its Legislature has expressly or impliedly conferred upon them." *City of Pineville v. Meeks*, 254 Ky. 167, 71 S.W.2d 33, 35 (1934). It is settled, that as a creation of the legislature, a political subdivision's "continued existence and the purview of its authority are dependent upon the will and discretion of the Legislature." *Sanitation Dist. No. 1 of Shelby Cty. v. Shelby Cty*., 964 S.W.2d 434, 437 (Ky.App. 1998). When a political subdivision acts in contravention of a statute, it is said to have acted *ultra vires* and, generally, its actions are void. *See Stierle v. Sanitation Dist. No. 1 of*

Jefferson Cty., 243 S.W.2d 678 (Ky.App. 1951) (a contract between a sewer district and sanitation district was *ultra vires* as to both entities and was, therefore, void). NKADD's authority to enter into the arbitration agreement with Snyder, if it exists at all, must be derived from the enabling legislation because, as a political subdivision of the state, it has only those powers conferred on it by the legislature.

The enabling statute applicable to the NKADD expressly confers the power to hire employees and to enter contracts and, therefore, the express power to enter into employment contracts. Generally, the power to contract, and to sue or be sued, conferred by statute to government bodies includes the authority to arbitrate disputes. "[T]he veracity of this proposition cannot be reasonably doubted." *Southern Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 716 (Tenn. 2001).

However, the implied authority to arbitrate is limited by another general principle that such power exists "in the absence of a statutory prohibition." *City of Madison v. Frank Lloyd Wright Found*., 20 Wis.2d 361, 373, 122 N.W.2d 409, 416 (1963) (quoting *Power of municipal corporation to submit to arbitration*, 40 A.L.R. 1370 (1926)). We conclude that although pre-empted by federal laws, KRS 417.050(1) and KRS 336.700(2) declare an express legislative intent to deprive state agencies and political subdivisions the power to enter into arbitration agreements as a condition of employment. That express denial of power is not pre-

empted by any federal law, including the FAA. We find persuasive the reasoning applied in analogous cases.

In *W.M. Schlosser Co. Inc. v. School Bd., of Fairfax Cty. Va.,* 980 F.2d 253 (4th Cir. 1992), the court held that under Virginia law, a local school board did not have authority to arbitrate a dispute arising out of a construction contract. The school board argued the power to arbitrate was implied from the power to contract. The Court held that the Virginia Public Procurement Act reflected a policy to withhold from local governments the power to arbitrate disputes by requiring disputes to be resolved by an administrative tribunal. *Id*. at 256.

Addressing the pre-emption argument, the Court held that the rule that local governmental power is limited by the express or implied powers conferred by the enabling statutes is not one pre-empted by the FAA. It reasoned that it "does not single out and disproportionately burden arbitration provisions. It is a rule of general applicability that defines and invalidates all *ultra vires* acts of local governing bodies." *Id*. at 259. Therefore, the Court concluded it is a "ground [ ] as exist[s] at law or in equity for the revocation of any contract[.]" *Id*. (quoting 9 U.S.C. § 2).

A similar result was reached in *D.C. v. Greene*, 806 A.2d 216 (D.C. 2002), which again addressed the potential conflict between a procurement code's provisions for resolution of contractual disputes that effectively excluded

arbitration. The Court held that although the statute withheld from the District's contracting officers the power to agree to arbitrate, it was not pre-empted by the FAA. Like any corporation or individual, the government may refuse to arbitrate and, therefore, the procurement code was "untouched by the FAA's general command that private arbitration agreements be enforced." *Id*. at 223. The Court pointed out the distinction between "the authority of a state to bar enforcement of otherwise valid arbitration agreements—a power denied the state except insofar as § 2 [of the FAA] permits—for the authority of a government contracting for goods or services in its own behalf to refuse to agree to arbitrate disputes." *Id.* at 221.

In *Bank of Am., N.A. v. D.C.*, 80 A.3d 650 (D.C. 2013), the Court reaffirmed its holding in *Greene*. It held the Procurement Practices Act "does not bar enforcement of valid arbitration agreements or impose conditions upon such agreements not applicable to other contracts." *Id*. at 675. It only "withheld from contracting officers the authority to bind the District to arbitration, just as any private corporation or individual might limit an agent's contracting authority." *Id*.

In this case, the Commonwealth has expressly prohibited political subdivisions from requiring arbitration as a condition of employment, specifically including those submitting future actions for violations of state and federal statutory rights to arbitration. While in the private employment context federal law prevails, that federal law does not pre-empt the authority of the Commonwealth to deny the authority of its political subdivisions to enter into arbitration agreements

in the employment context. Consequently, NKADD had no authority to enter into the arbitration agreement and the trial court properly ruled it is unenforceable.

Based on the foregoing, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

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