

ARBITRATION – REVIEW OF ARBITRATION AWARD

Summary

Appeal from district court order vacating arbitration awards and denying attorney fees.

Disposition/Outcome

Affirmed the district court's order denying Defendants' request for attorney fees, reversed the district court's decision vacating the arbitration awards, and imposed sanctions upon defendants' attorney for improper appellate conduct.

Factual and Procedural History

This case arises from the discharge of Michael Thomas and John Armstrong from their employment as police officers with the North Las Vegas Police Department (NLVPD). Thomas was terminated in August of 1999 for associating with known offenders, unprofessional conduct, and noncompliance with orders, public statements, and media releases. Armstrong was terminated in May of 1999 for alleged sexual harassment towards coworkers.

The exclusive bargaining representative for the officers of the NLVPD was their union, the North Las Vegas Police Officers Association (NLVPOA). The City and the NLVPOA had negotiated a collective bargaining agreement (CBA) which governed the employment of the officers. Under the CBA, the officers could not be terminated other than for just cause.

The CBA included a grievance and arbitration procedure, which was the exclusive remedy for any dispute under the CBA. The procedure contended that the NLVPOA's grievance committee would review all employee grievances, and if the committee determined a grievance existed, the grievance would be submitted to the city. The CBA at the time of this action provided that the NLVPOA had the right to submit matters where settlement could not be reached between the city manager and the NLVPOA to arbitration.

Following their terminations, Thomas and Armstrong retained counsel and requested NLVPOA representation. The NLVPOA denied Thomas's and Armstrong's requests for representation because the NLVPOA's Constitution prohibited it from representing them.

Thomas and Armstrong then appealed to the North Las Vegas Civil Service Board, and were denied. They then filed petitions with the district court to compel arbitration. The petitions were consolidated and the district court granted the petitions. The NLVPOA then issued a position statement stating that it believed that its initial position denying the representation had been erroneous, and that it now believed that Thomas and Armstrong were entitled to arbitration.

Thomas and Armstrong then moved for attorney fees. The district court denied their motion and they appealed to this court.

The CBA mandated that arbitrations be conducted by the Federal Mediation and Conciliation Services (FMCS). The parties agreed on Matthew Goldberg as arbitrator for Armstrong's arbitration, and he was also assigned to Thomas's arbitration when agreement on

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an arbitrator could not be reached. Goldberg found the city had just cause to terminate Thomas and Armstrong in January of 2003 and June of 2003, respectively. In March of 2003, Thomas called the FMCS to complain about Goldberg's service as arbitrator, and the FMCS alerted Thomas to the fact that Goldberg served as a neutral arbitrator on a permanent panel of arbitrators for the Las Vegas Metropolitan Police Department and its unions, the Police Protective Association, and the Las Vegas Metropolitan Police Manager's and Supervisor's Association. The resume which Goldberg had provided to Thomas and Armstrong had not disclosed that panel membership.²

Thomas and Armstrong then moved to vacate the arbitration awards. The district court granted the motions to vacate the arbitration awards. The city appealed.

Discussion

Attorney Fees

The decision denying attorney fees was reviewed de novo because the matter implicated questions of law. The court held that attorney fees are not awarded absent an exception. The Defendants first argued that they were entitled to attorney fees under the substantial benefit doctrine, which states that attorney fees will be awarded "when a successful party confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."³ The exception is normally applied in cases involving shareholders and unions.

There are three requirements which must be met in order to recover attorney fees under the substantial benefit doctrine: 1) the class of beneficiaries is small and identifiable, 2) the benefit can be traced with some accuracy, and 3) the costs can be shifted with some exactitude to those benefiting. The court held that although Thomas and Armstrong met the first two factors, they failed the third factor, thereby making the substantial benefit doctrine inapplicable. Thomas and Armstrong failed the third factor because the City's citizens did not benefit from the order compelling arbitration, and therefore the City as a whole cannot be ordered to bear the cost of the litigation. The court strengthened this decision by citing that although his issue was a matter of first impression in this court, other courts that have addressed the matter have held that the substantial benefit doctrine does not usually apply to a municipality when the taxpayers as a whole will not benefit from the litigation.

Next the Defendants argued that they should be entitled to recover attorney fees under NRS 18.010(2)(a), which states that the court may award attorney fees when the party has not recovered more than \$20,000. However, the court held that this exception has always been interpreted to apply only when the party first obtains a money judgment.

Finally, the Defendants requested attorney fees under NRS 18.010(2)(b), which allows the award of attorney fees when the opposing party's defense was brought without reasonable ground or for the purpose of harassing the prevailing party. However, the court held that the

² Goldberg had three versions of his resume, and only the one provided to the National Mediation Board disclosed the panel memberships.

³ Polonski v. Trump Taj Mahal Associates, 137 F.3d 139, 145 (3d Cir. 1998) (quoting Hall v. Cole, 412 U.S. 1, 5 (1973) (quoting Mills v. Electric Auto-Lite, 396 U.S. 375, 393-94 (1970))).

Defendants were making bare accusations and did not support their statements by any citation to the record, and also misinterpreted the facts.

Accordingly, the court affirmed the district court's holding denying attorney fees.

Sanctions for Appellate Misconduct

The court held that sanctions were appropriate for Defendants' counsel, John Benedict, according to NRAP 28(a) and (e), which state that an appellant's brief shall contain "the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes, and parts of the record relied upon," and that "every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found." The court held that Benedict rarely cited to the 1407 page appendix in his the opening brief's statement of facts and the opening and reply brief's discussion sections. Further, Benedict accused the City and NLVPO of conspiracy, fabrication of charges against the Defendants, retaliation, harassment, racial and ethnic slurs, physical assault, and attempted vehicular homicide, none of which were supported by facts in the record. For these reasons the court fined Benedict \$1000.

Vacatur of the Arbitration Awards

The standard of review for district court orders vacating or confirming an arbitration award for evident partiality is de novo. NRS 38.145 allows the court to vacate an arbitration award where there was evident partiality by an arbitrator appointed as neutral. In *Commonwealth Corp. v. Casualty Co.*,⁴ the court set forth the standard for claims of evident partiality, stating that they fall into two categories, actual bias and nondisclosure of information. This case falls into the second category, nondisclosure, where the standard is that the arbitrator "not only must be unbiased but also must avoid even the appearance of bias."⁵ Other courts adopting this standard have interpreted it to mean that whether an arbitrator has shown evident partiality by the nondisclosure of a relationship is whether the nondisclosure gives rise to a "reasonable impression of partiality."⁶

Whether Goldberg's nondisclosure resulted in a reasonable impression of partiality had to be determined under the FMCS guidelines, since the parties agreed to arbitrate under those rules. Under the Code utilized by the FMCS,⁷ section 2(B)(1), an arbitrator has a duty to disclose any "current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest." The Defendants argue that Goldberg had a duty to disclose his membership on the panel because he had a continuing pecuniary relationship with Metro and the PPA/PMSA.

The court held that Goldberg did not have a duty to reveal his panel membership because he was not in a managerial, representational, or consultative position, which is a prerequisite under section 2(B)(1) before disclosure is mandatory.

⁴ 393 U.S. 145 (1968).

⁵ *Id.*

⁶ *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994).

⁷ Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

Under section 2(B)(3), an arbitrator must also disclose “any close personal relationship or other circumstance...which might reasonably raise a question as to the arbitrator’s impartiality.” In *Opinion No. 22*, the National Academy of Arbitrators interpreted this section and held that “[p]revious or current service as a neutral arbitrator for a particular employer and/or union is not a relationship requiring disclosure under the Code.” Therefore, the court held that Goldberg did not have a duty to disclose his Metro PPA/PMSA panel membership because this nondisclosure did not demonstrate evident partiality.

Consequently, the court found that the district court had erred in vacating the arbitration awards.

Conclusion

The court held that Thomas and Armstrong were not entitled to attorney fees, and Goldberg did not have a duty to disclose his panel membership. Therefore, the district court’s decision denying attorney fees was affirmed, its decision vacating the arbitration awards was reversed and remanded to district court to confirm the arbitration awards, and attorney John Benedict was sanctioned \$1000 for improper appellate conduct.