

65037-8

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NO. 65037-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 286,

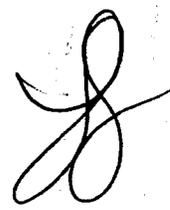
Appellant,

v.

PORT OF SEATTLE,

Respondent.

**AMICUS BRIEF OF WASHINGTON STATE
LABOR COUNCIL IN SUPPORT OF
APPELLANT OPERATING ENGINEERS, LOCAL 286**



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ORIGINAL

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT5

 A. This Case Is Not About Mr. Cann’s
 Misconduct.....5

 B. The Standard Of Review Of Labor
 Arbitration Awards Is “Extremely Limited,”
 And Particularly So With Respect To An
 Arbitrator’s Formulation Of An Appropriate
 Remedy.7

 C. The Arbitration Award Did Not Violate
 Public Policy.....10

 D. The Trial Court Impermissibly Redesigned
 The Arbitral Remedy.12

 E. The Trial Court’s Post-Hearing Order
 Undermines Stable Labor Relations In This
 State.....16

IV. CONCLUSION.....17

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union v. Aztec Bus Lines</i> , 654 F.2d 642 (9 th Cir. 1981)	12
<i>City of Hartford v. Casati</i> , 2001 WL 1420512 (Conn. Super. Ct. Oct. 25, 2001)	14
<i>Clark County Public Utility Dist. No. 1 v. Int'l Bhd. Of Electrical Workers, Local 125</i> , 150 Wn.2d 237, 76 P.3d 248 (2003).....	7, 8
<i>Eastern Associated Coal Corp. v. UMW, Dist. 17</i> , 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed.2d 354 (2000)	5, 6
<i>Endicott Education Ass'n v. Endicott School Dist. No. 308</i> , 43 Wn. App. 392, 717 P.2d 763 (1986)	8
<i>Federal Aviation Administration and National Air Traffic Controllers Ass'n</i> , 109 LA 699 (BNA) (1999)	11
<i>Kiessling v. N.W. Greyhound Lines</i> , 38 Wn. App. 289, 229 P.2d 335 (1951).....	15
<i>Kitsap County Deputy Sheriff's Guild v. Kitsap County</i> , 167 Wn.2d 428, 219 P.3d 675 (2009)	passim
<i>State v. AFSCME Council 4, Local 387, AFL-CIO</i> , 747 A.2d 480 (Conn. 2000)	14
<i>Stead Motors of Walnut Creek v. Automotive Machinists, Local 1173</i> , 886 F.2d 1200 (9 th Cir. 1989)	12
<i>United Paperworkers, Int'l Union v. Misco, Inc.</i> , 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).....	9, 10
<i>United Steelworkers of America v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).....	7

*United Steelworkers of America v. Warrior & Gulf
Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347,
4 L. Ed.2d 1409 (1960)..... 4, 8, 13

*Yakima County v. Yakima County Law Enforcement
Officers Guild*, 157 Wn. App. 304, 237 P.3d 316 (2010)..... 7

Statutes

RCW 49.60 2

Other Authorities

CR 59(a)(5) 15

I. IDENTITY AND INTEREST OF AMICUS

Amicus Washington State Labor Council (“State Labor Council”) is the largest and most prominent advocate for the interests of working people in the State of Washington. It represents approximately 550 local and state-wide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members.

Thus, the Labor Council represents employees throughout the state who have a strong interest in the issue presented to this Court for review, namely, the proper analysis for reviewing a remedy ordered by a labor arbitrator chosen by both parties to resolve a dispute. The trial court’s approach is inconsistent with established law and if adopted would encourage the losing party to arbitrations to challenge arbitration decisions.

II. STATEMENT OF THE CASE

According to the arbitration award at issue here,

On December 12, 2007, a noose was found tied in a rope hanging over a rail overlooking an open work area. Grievant Mark Cann was identified as the employee who tied the noose in the rope. Grievant Mark Chapman, [a lead employee with whom Mr. Cann worked] was identified as having assisted him....Following the Port’s “Zero Tolerance” policy, the event led to the termination of Mr. Cann, and a ‘verbal warning’ for Mr. Chapman....

CP 636. The arbitration decision and award was issued on February 2, 2009 by mutually selected Arbitrator Vivenzio (“Arbitrator Award” or

“Award”). CP 633-658. In his Award, the Arbitrator reinstated Mark Cann, a Port of Seattle (“Port”) employee who had 12 years of service without prior discipline, to his former position and directed that his termination be converted to a “twenty (20) day suspension [*i.e.*, one month] without pay or other accrual of benefits for that period.” CP 658. The Arbitrator also ordered that Mr. Cann be otherwise “made whole” for all other lost wages and other benefits,¹ and recommended that both Mr. Cann and Mr. Chapman “retake the training modules [on the Port’s anti-harassment policy], perhaps with mentoring, and not during work hours.” CP 657.²

With respect to the remedy, the Arbitrator stated:

The Arbitrator will retain jurisdiction of the present grievance until March 31, 2009, solely to resolve disputes regarding the remedy directed herein, if any. If the Arbitrator is advised by telephone or other means of any dispute regarding the remedy directed on or before 4:30 p.m. on March 31, 2009, the Arbitrator’s jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Arbitrator is not advised of the existence of a dispute regarding the remedy directed herein by that time and date, the Arbitrator’s jurisdiction over this grievance shall then cease.

¹ The Arbitrator also upheld the discipline of Mark Chapman who received a verbal warning. CP 658. The Arbitrator’s treatment of Mr. Chapman is not at issue in this appeal.

² Arbitrator Vivenzio held that Mr. Cann violated the Port’s anti-harassment policy, and observed that he was not being asked, and was not deciding, whether Mr. Cann violated the Washington Law Against Discrimination (“WLAD”), RCW 49.60. CP 645-48.

Id. The record reveals no contact by either party with the Arbitrator after the Award. In its brief, the Port concedes that “the arbitrator had the authority under the CBA and the parties’ pre-hearing stipulation to decide the appropriate discipline for Cann if the arbitrator found that termination was inappropriate.” Brief of Respondent, at 15.

On February 25, 2009, the Port filed a constitutional writ of certiorari in King County Superior Court, arguing that the Award should be vacated and that its decision to terminate Mr. Cann should be upheld. On April 22, 2009, Local 286 filed its own lawsuit in King County Superior Court to confirm the arbitration award. The two actions were consolidated before Judge Steven C. Gonzalez.

On cross-motions for summary judgment, the trial court vacated the Award but only in certain respects. In his “Post-Hearing Order,” dated February 4, 2010, Judge Gonzalez did not disturb the Arbitrator’s reinstatement of Mr. Cann, but imposed the following further requirements as conditions for Mr. Cann’s reinstatement: (a) an unpaid suspension of approximately six (6) months (replacing the one-month suspension); (b) a “sincere letter of apology;” (c) attendance at diversity and anti-harassment training; and (d) a four (4) year probationary period during which time any violation by Mr. Cann of the Port’s anti-harassment

policy would result in a “final” termination that would be unreviewable under “any further process.” CP 726-727.

The trial court gave the following reasons for its decision:

Employers have an affirmative duty to provide a workplace free from racist harassment and discrimination. Employees have a right to such a workplace. The Award undermined the well-defined, explicit and dominant public policy expressed in the WLAD [Washington Law Against Discrimination] because it was excessively lenient. Under the Award Mr. Cann was ordered back to work with back pay and without significant consequence, without training or other warning.

CP 727 (emphasis added).

The Labor Council believes that the trial court’s decision is based on a misunderstanding of the extremely limited standard of review of a labor arbitrator’s award, particularly with respect to his or her choice of remedies. While no doubt well-intentioned, the trial court’s decision does precisely what the Washington Supreme Court and the U.S. Supreme Court have stated should not be done when a court reviews an arbitration award, namely, replacing the agreed-upon arbitrator’s remedy with one of its own liking. If upheld, this approach would undermine the relationship between the courts and the labor arbitration process, invite further unsupported judicial revisions to “final” arbitration awards, and disrupt the important role played by labor arbitrators in the “continuous collective bargaining process.” *See United Steelworkers of America v. Warrior &*

Gulf Navigation Co., 363 U.S. 574, 581, 80 S. Ct. 1347, 4 L. Ed.2d 1409 (1960).

III. ARGUMENT

A. This Case Is Not About Mr. Cann's Misconduct.

At the outset, the Labor Council wishes to make clear that it does not believe the outcome of this appeal turns on how one views Mr. Cann's inappropriate behavior. We can all agree that placing a noose in the workplace was misconduct deserving of discipline. Certainly, the Arbitrator found it to be so, and he held that it violated the Port's anti-harassment policy and was therefore deserving of "substantial discipline." CP 657. He also found that it was directed to another white employee and was "more clueless than racist." *Id.*

However, the case law is clear that in reviewing any arbitration award on public policy, the court does not consider the employee's conduct but rather whether the award itself violates "explicit," "well defined," and "dominant" public policy. *See Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 435, 219 P.3d 675 (2009), quoting *Eastern Associated Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed.2d 354 (2000).

This approach is taken because it is understood that the parties to a collective bargaining agreement "have bargained for the arbitrator's

construction of their agreement.” *Eastern Associated Coal Corp., supra*, at 62 (quotations omitted). When parties agree to binding labor arbitration, “they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution of their dispute.” *Kitsap County Deputy Sheriff’s Guild, supra*, at 435. The arbitration award must be “treat[ed] as if it represented an agreement between [the employer] and the union as to the proper meaning of the contract’s words ‘just cause.’” *Eastern Associated Coal Corp., supra*, at 62. Stated otherwise, “the federal courts treat the [arbitration] decision as if it were part of the contract.” *Kitsap County Deputy Sheriff’s Guild, supra*, at 435. Accordingly, the terms of the Arbitration Award here, including its choice of appropriate discipline for Mr. Cann, must be viewed as one would an explicit provision of the labor contract negotiated by the parties, and any disturbance of that agreement should only occur in the very rarest of circumstances.

Thus, the only question to be answered here is whether the Arbitrator’s remedy -- namely, a one-month suspension with a recommendation of further training -- violated a “clearly defined,” “explicit,” and “dominant” public policy of this state. Plainly, it did not and therefore the trial court’s decision should not stand.

B. The Standard Of Review Of Labor Arbitration Awards Is “Extremely Limited,” And Particularly So With Respect To An Arbitrator’s Formulation Of An Appropriate Remedy.

The Washington Supreme Court, following the principles of federal law, has explained that the policy of “settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.” *Clark County Public Utility Dist. No. 1 v. Int’l Bhd. Of Electrical Workers, Local 125*, 150 Wn.2d 237, 246, 76 P.3d 248 (2003), quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). See also *Yakima County v. Yakima County Law Enforcement Officers Guild*, 157 Wn. App. 304, 332, 237 P.3d 316 (2010) (“We...do not sit in review. We do not reach the merits of the case even if we think the arbitrator was wrong”). The standard of review is “extremely limited” because “it highlights the importance of supporting the finality of bargained for, binding arbitration.” *Clark County, supra*, 150 Wn.2d at 247. It is even more limited than the “arbitrary and capricious” standard, because that standard would impermissibly “require an examination of the merits” of the arbitration award. *Id.*

The unique role of the labor arbitrator in collective bargaining was recognized and discussed by the U.S. Supreme Court more than 60 years

ago. In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, *supra* at 581-82, the Court explained:

A collective bargaining agreement is an effort to erect a system of self-government...

Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators....But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties...

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment...The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

(Emphasis added.)

Regarding particular remedies ordered by the arbitrator, our Supreme Court has held: "The parties are bound by their consent to have the arbitrator fashion an appropriate remedy. Courts will not overturn the arbitrator's remedy when it is drawn from the essence of the collective bargaining agreement." *Clark County, supra*, at 249 (citations omitted). This is long established Washington law as well. In *Endicott Education Ass'n v. Endicott School Dist. No. 308*, 43 Wn. App. 392, 717 P.2d 763

(1986), the employer challenged an arbitration award because it awarded more damages than was requested in the original grievance. The court confirmed the award holding that “[i]nherent in the [arbitrator’s] authority to adjudicate the breach is the power to remedy it.” *Id.* at 394.

Here, there is no dispute that the arbitrator acted within the authority granted to him, both under the labor agreement and the pre-hearing submission by the parties of the issue to be decided at the arbitration. Significantly, the Port of Seattle acknowledges this fact in its brief: “The Port agrees that the arbitrator had the authority under the CBA and the parties’ pre-hearing stipulation to decide the appropriate discipline for Cann if the arbitrator found that termination was inappropriate.” Brief of Respondent, at 15 (emphasis added).

Accordingly, because it is not disputed that the Arbitrator acted within his authority, the trial court was barred from revisiting and revising the arbitrator’s choice of remedies. This is true regardless whether the challenge to the award is based on public policy or any other grounds. In the U.S. Supreme Court’s seminal public policy case, *United Paperworkers, Int’l Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), the Court made precisely this point:

where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have

no authority to disagree with his honest judgment in that respect.

(Emphasis added.)

Because the 20-day suspension indisputably represented Arbitrator Vivenzio's "honest judgment" of the appropriate discipline, the trial court's analysis should have stopped there. In other words, a trial court is not permitted to replace arbitrator's formulation of remedies with its own choice of remedies.

C. The Arbitration Award Did Not Violate Public Policy.

The Washington Supreme Court adopted the "public policy exception" to the finality of arbitration awards in *Kitsap County Deputy Sheriff's Guild, supra*. In that case, the employer sought to vacate an award in which the labor arbitrator reinstated a terminated sheriff's deputy who had been untruthful and displayed erratic behavior. The Washington Supreme Court adopted the same approach as our federal courts in finding that "like any other contract -- an arbitration decision can be vacated if it violates public policy." *Kitsap County Deputy Sheriff's Guild, supra*, at 435. This approach is "rooted in the common law, that a court may refuse to enforce contracts that violates law or public policy...That doctrine derives the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act...." *United Paperworkers, Int'l Union v. Misco, Inc., supra* at 42 (emphasis added).

The trial court here did not find that the Arbitration Award was “illegal or immoral.” The court found that it was “excessively lenient” and that it “undermined” the right of all employees to a workplace that is “free of racial harassment and discrimination.” CP 727. However, it never identified the “explicit,” “well-defined,” or “dominant” Washington law or policy that addresses the fundamental issue here, namely, the degree of discipline that must be issued when an employee violates an employer’s anti-harassment policy.

To be sure, Washington law and policy prohibits any type of discrimination in employment and, as the trial court observed, employers have a duty to create a safe and nondiscriminatory workplace. However, nothing in the Arbitrator’s award is inconsistent with any of these laws and policies. Arbitrator Vivenzio found Mr. Cann’s conduct to be inappropriate and violative of the Port’s anti-harassment policy, and issued a 20-day suspension, which was described as “substantial discipline.” CP 657. In fact, the Arbitrator contrasted his decision with that of the arbitrator in *Federal Aviation Administration and National Air Traffic Controllers Ass’n*, 109 LA 699 (BNA) (1999), where the termination of an employee who displayed a noose in the workplace was converted to a two-day suspension.

As stated by the Washington Supreme Court, a trial court is not permitted to vacate an arbitration award merely because the decision is “not good public policy” or “distasteful.” *Kitsap County Deputy Sheriff’s Guild, supra*, at 439. This approach follows the lead of the federal courts:

Even if we agreed with the employer that a more severe sanction was appropriate [*i.e.*, a two-week suspension of a bus driver for negligent driving], we are not permitted to review the merits of an arbitral award. Public policy should be turned into a facile method of substituting judicial for arbitral judgment.

Stead Motors of Walnut Creek v. Automotive Machinists, Local 1173, 886 F.2d 1200, 1212 (9th Cir. 1989), quoting *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642, 643-44 (9th Cir. 1981) (citation omitted) (emphasis added).

Neither the trial court nor respondent point to any case law, statute, or regulation on the question at issue here: whether a contractual provision (here, an arbitration award) requiring a 20-day suspension for a violation of an employer’s anti-discrimination policy itself violates the Washington law on discrimination. Because the Award does not violate any law or explicit public policy, the trial court should have upheld it.

D. The Trial Court Impermissibly Redesigned The Arbitral Remedy.

Faced with an arbitral remedy it disliked, the trial court did what courts are prohibited from doing: it revised it. As stated above, the trial

court's approach ran afoul of the great deference that must be paid to an arbitrator's formulation of appropriate remedies. The arbitrator's choice of discipline -- one month of unpaid time -- may seem "excessively lenient" to some, but it is the Arbitrator who is presumed to know the "common law of the shop," not the courts. *See United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. at 582. It is the Arbitrator's judgment for which the parties bargained, not the viewpoint of a judge.

A review of the Post-Hearing Order makes it clear that the trial court used its own subjective judgment. First, the trial court replaced the Arbitrator's one-month unpaid suspension with a six-month suspension. This remedy revision is not compelled by any Washington statute or regulation. Certainly, the general principle of nondiscrimination in the workplace does not dictate this result.

The Port argues (and apparently the trial court believed) that a one-month suspension was so lenient as to violate this statutory objective of nondiscrimination. This type of argument was rejected by the Supreme Court in *Kitsap County*, where the Court did not find an explicit public policy in favor of a specific type of discipline where none exists:

Washington statutes prohibit making false statements to a public officer but there is no statute or other explicit, well defined, and dominant expression of public policy that

requires automatic termination of an officer found to have been untruthful.

167 Wn.2d at 437-38.

In this case, it is not a question of whether Mr. Cann should be reinstated. The Arbitrator found, and the trial court did not disagree, that Mr. Cann's termination violated the "just cause" provision of the labor agreement.³ The only issue here is whether the Award's one-month unpaid suspension violates Washington law and policy. Because there is no Washington law on the severity of discipline that must be issued when an anti-harassment policy is violated, the trial court had no legal basis for increasing the period of unpaid suspension.

There is likewise no legal basis for the trial court's requirement of a "sincere letter of apology" or that Mr. Cann attend diversity training.⁴ Again, while these requirements (in place of the Arbitrator's suggestion of

³ The Port cites several cases in which employees committed egregious acts of racism or displayed an inclination for doing so where the courts rejected the reinstatement remedy of the labor arbitrator. *See City of Hartford v. Casati*, 2001 WL 1420512 (Conn. Super. Ct. Oct. 25, 2001); *State v. AFSCME Council 4, Local 387, AFL-CIO*, 2523 Conn. 467, 747 A.2d 480 (Conn. 2000); *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009). Those cases are readily distinguishable both in the nature of the discriminatory acts found to have occurred, and in the fact that the issue was whether the employee should be working at all in positions of great trust. Here, reinstatement is not at issue at all, but rather the financial penalty and other conditions associated with the reinstatement.

⁴ Arbitrator Vivenzio's Award stated that "it might be productive for both of these employees to retake the training module, perhaps with mentoring, and not during work hours." CP 657.

further training) may be sensible and even desirable, their absence in the Award is not illegal or in violation of explicit policy.

Furthermore, the trial court imposed on Mr. Cann an extraordinary, four-year non-reviewable probationary period. There is a substantial question whether the trial court had the authority to impose such a requirement which directly interferes with the parties' right to contract for arbitration. However, that question need not be decided here. It suffices that Washington law or policy is not violated when an arbitration award lacks a provision imposing an unreviewable four-year probationary period as a condition for reinstatement.

The only case law cited by the Port to support its contention that trial courts have the right to "fashion alternative relief" (POS Brief, at 28) is *Kiessling v. N.W. Greyhound Lines*, 38 Wn. App. 289, 229 P.2d 335 (1951), an appeal from a personal injury verdict. That case has nothing to do with the issues here, and the quoted passage refers not to review of labor arbitration awards but instead refers to the right of a trial judge to amend a verdict inflamed by "passion or prejudice." *See* CR 59(a)(5).

In sum, while well-intentioned, the Post-Hearing Order is inconsistent with Washington law because it revises an arbitral remedy that was bargained for by the parties to the labor agreement and that does not violate an explicit, well-defined, dominant public policy.

E. The Trial Court's Post-Hearing Order Undermines Stable Labor Relations In This State.

While the Labor Council does not compile data on the occurrence of arbitration decisions, it is no exaggeration to state that hundreds of grievances are filed each year, and that many are not resolved during the grievance procedure and are processed to arbitration. It has long been understood by both management and labor that the arbitration result is final, and that it is fruitless to attempt to overturn the award. Consequently, it is very rare for either party to file suit in court challenging an arbitration award. This finality directly contributes to stable labor relations in this state, and great care should be taken before permitting any change in the courts' deference to labor arbitration awards.

Further, if employers (or unions, for that matter) have reason to expect that the courts will entertain requests to adjust arbitration remedies, the utility of the labor arbitration process will be diminished. Employers and unions will no longer view arbitration decisions as final and binding, and will no doubt turn to the courts as the decision-maker of last resort. Accordingly, for all of the reasons stated above, the public policy exception to the finality of bargained for arbitration awards is very narrow, and should remain so.

IV. CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief of Operating Engineers, Local 286, the decision of the trial court should be reversed and the Arbitration Award should be confirmed in its entirety.

Respectfully submitted this 30th day of November, 2010.

SCHROETER, GOLDMARK & BENDER

A handwritten signature in black ink, appearing to read 'M. S. Garfinkel', written over a horizontal line.

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