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SUPREME COURT
OF THE STATE OF WASHINGTON

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 286,

Appellant,

v.

PORT OF SEATTLE,

Respondent.

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

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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 pursuant to a collective bargaining agreement (hereinafter sometimes referred to as “labor agreement”) to resolve a dispute. The appellate court’s approach is inconsistent with established law and if adopted would encourage losing parties to arbitrations to challenge arbitration decisions.

II. STATEMENT OF THE CASE

The parties have already stated the procedural and factual background of the case, which need not be repeated here.

III. ARGUMENT

The Labor Council believes that the appellate court’s decision in *International Union of Operating Engineers, Local 286 v. Port of Seattle*, 164 Wn. App. 307, 264 P.3d 268 (2011) (“Decision”) misapplies the

extremely limited standard of review of a labor arbitrator's award, particularly with respect to his or her choice of remedies, and cannot be squared with the U.S. Supreme Court precedent on which this Court relied in *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 435, 219 P.3d 675 (2009) (establishing in Washington the public policy exception to labor arbitration awards). Further, the Decision will have the undesirable effect of encouraging lawsuits seeking to overturn labor arbitration awards.

In sum, if upheld, the approach taken by the Court of Appeals would undermine the relationship between the courts and the labor arbitration process, invite further unsupported judicial revisions to "final" arbitration awards, and disrupt the critical 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).

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

The Labor Council wishes to make clear that it does not condone the behavior of Mr. Cann, which it finds totally unacceptable, and readily agrees that the placing a noose in the workplace is misconduct that warrants discipline. Arbitrator Vivenzio found it to be so, held that Mr.

Cann violated the Port's anti-harassment policy, and was therefore deserving of "substantial discipline." CP 657.

However, as the Court of Appeals here recognized, the issue is not whether the underlying employee conduct violates public policy. When reviewing an arbitration award on public policy grounds, courts do not consider the employee's conduct but rather whether the award itself violates "explicit," "well defined," and "dominant" public policy. 164 Wn. App. at 315, *quoting Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 435, 219 P.3d 675 (2009) and *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). Thus, 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. Thus, the terms of the Arbitration Award here, including its choice of appropriate discipline, must be viewed as if were an explicit provision of the labor contract negotiated by the

parties. Any disturbance of that agreement should occur only in the very rarest of circumstances.

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.

This Court, following the principles of federal law and of the U.S. Supreme Court, 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...

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, this 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).

Here, the Decision is at war with itself. In one portion of the opinion, it recognizes that an arbitrator's choice of remedies is not to be disturbed by the courts. And, it held that the trial court exceeded its authority when it prescribed the type of penalty Mr. Cann should have received. 164 Wn. App. at 323-24. On the other hand, its other holding --

finding that the 20-day (*i.e.*, four-week) suspension violates the WLAD -- in effect mandates a stronger disciplinary penalty, but without giving meaningful guidance on what specific penalty should be issued.

Because the 20-day suspension was drawn from Arbitrator Vivenzio's authority under the labor agreement, the Court of Appeals should have affirmed his Award. The Decision's rejection of the 20-day suspension reflects the Court's intent to replace the arbitrator's remedy with one of its liking. This is precisely what a reviewing court cannot do when analyzing an arbitration award.

C. The Decision Is Inconsistent With U.S. Supreme Court's Public Policy Cases.

In *Kitsap County*, this Court recognizes that it turns to federal law for guidance in analyzing labor law. 167 Wn.2d at 436. In reviewing this case, it would be useful to look again to the leading U.S. Supreme court cases in this area.

One of the earliest cases is *W.R. Grace v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), which also involved the interplay between labor arbitration and anti-discrimination law (there, Title VII of the Civil Rights Act of 1964). In *W.R. Grace*, an arbitrator awarded back pay damages to male employees who alleged they were laid off in violation of the labor agreement's seniority provisions, despite the

fact that the layoffs were implemented to comply with the terms of a federal court order. The court order had adopted a conciliation agreement between the company and the federal Equal Employment Opportunities Commission (“EEOC”) in order to settle claims of sex discrimination. The Court found that the arbitration award did not violate public policy even though “it is beyond question that obedience to judicial orders is an important public policy.” 461 U.S. at 766. The Court found that the company had placed itself in a dilemma by agreeing to two conflicting obligations, namely, the labor agreement’s seniority provisions and the conciliation agreement with the EEOC.

The approach taken in *W.R. Grace* is at odds with the one taken by the Court of Appeals here. In *W.R. Grace*, the Court approved of the fact that arbitrator limited his review to the terms of the collective bargaining agreement and found that the agreement “provid[ed] that the District Court’s order did not extinguish the Company’s liability for its breach [of the agreement].” 461 U.S. at 764. In contrast, the Decision here criticizes Arbitrator Vivenzio for not taking into account “the dominant public policies of the WLAD” when analyzing and applying the traditional seven-part test for “just cause.” 164 Wn. App. at 320. By doing so, the Decision incorrectly expands judicial review of arbitration awards and, in essence, requires labor arbitrators to henceforth add an eighth factor (on

public policy) in their review of discipline cases. Such a requirement intrudes on the right of parties to bargain for an arbitration process and undermines the finality of arbitration awards.

In *United Paperworkers, Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), the Supreme Court again upheld an arbitration award, and discussed the extremely limited parameters of the “public policy” exception. The holding recognizes that the public policy exception derives from the common law doctrine under which a court may refuse to enforce a private agreement only if it is “illegal” or “immoral.” *Id.* at 42. The Court held that the public policy at issue must “well defined and dominant” and “is to be ascertained by reference to laws and legal precedents and not general consideration of supposed public interests.” *Id.* at 43 (citation omitted).

In *Misco*, an employee who operated a potentially dangerous paper cutting machine and had a history of poor performance, was terminated after the company discovered that he was in his car in the company parking lot when a lit marijuana cigarette was smoked. After the termination but before the arbitration hearing, the company became aware that the police had found a marijuana cigarette in his car. The arbitrator found no just cause for the termination, or for any other discipline, reasoning that the company failed to prove that the grievant had possessed

or used marijuana while on company property. He refused to admit into evidence the discovery by police of the presence of marijuana in the car because the company was not aware of it at the time of the termination.¹

The Court's decision in *Misco* to uphold the arbitration award was rooted in its view that the court's review of arbitrations is extremely limited:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Id. at 37-38 (emphasis added). Thus, as long as the arbitrator's decision "is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38.

Again, the Decision below is at odds with the *Misco* holding. The Decision would require arbitrators to analyze discipline to ensure that his or her arbitration award accounts for the policies of the WLAD, regardless of whether the law is incorporated into the labor agreement. And, the Arbitrator is to design his Award so as to "send a strong message"

¹ One of the recognized rules of labor arbitration and of the "just cause" standard for discipline is that the proposed discipline must rise or fall based on the knowledge of the company at the time the discipline is issued. *See Misco*, 484 U.S. at 34 n. 6.

adequate to ensure that “potential violators”...refrain from unlawful conduct.” 164 Wn. App. at 321. While these are unquestionably laudable goals, they are inconsistent with the role assigned to arbitrators by parties to labor agreements. If that were not the case, the U.S. Supreme Court in *Misco* surely would have overturned an award that reinstated an employee (without any discipline) who was found by police to have brought an illegal substance onto the company parking lot.

This is not to say that there are no limits to what an arbitration award may provide without turning the award into an illegal act. For example, it is certainly conceivable for an arbitrator to issue an unlawful award. For example, one would have a different situation if an arbitrator were to approve or ratify a discriminatory act. In such a case, the arbitrator’s decision would run afoul of Washington public policy. However, that is not what happened here: Arbitrator Vivenzio did find cause for discipline (even though he did not conclude that Mr. Cann was guilty of racism), and imposed a lengthy suspension, albeit not as lengthy as the trial court or the Court of Appeals would have liked to see.

Finally, in *Eastern Associated Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed.2d 354 (2000), the U.S. Supreme Court again reinstated an arbitration award over a public policy objection. In that case, a repeat drug offender who drove heavy trucks (and therefore

worked in a safety sensitive position) was reinstated due to his lengthy job tenure and because he was experiencing personal problems at the time of the latest offense. *Id.* at 466. In spite of strong arguments that permitting a recidivist drug offender to be reinstated to a safety sensitive job would violate public policy, the Court found that

Both the employer and union have agreed to entrust this remedial decision to an arbitrator. We cannot find in the Act [Omnibus Transportation Employee Testing Act of 1991], the regulations, or any other law or legal precedent an “explicit, “well defined,” “dominant” public policy to which the arbitrator’s decision “runs contrary.”

Id. at 469 (citations omitted).

In sum, U.S. Supreme Court precedent contains a strong aversion to second-guessing labor arbitration awards that draw their essence from the labor agreement, except in cases where the award is itself unmistakably unlawful. The Decision below holds that the 20-day discipline to Cann was too “lenient” and was not “substantial enough to discourage repeat behavior.” 164 Wn. App. at 321. However, there is no basis in this record for this finding. There is no evidence that the discipline was viewed by grievant Mr. Cann or by his co-workers as approving of or condoning the conduct at issue, or suggesting that the behavior was acceptable. Reasonable people will disagree about what level of discipline could or should have been issued to Mr. Cann.

However, this type of "judgment call", *i.e.*, the degree of discipline, cannot be the basis for overturning labor arbitration awards.

D. The Decision 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 virtually 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.

This problem is compounded by the approach taken by the Decision below. It found that Arbitrator Vivencio acted within his

authority to reinstate Cann (to give him “a second chance”), but held that a 20-day suspension to be insufficient. At the same time, it neglects to give Arbitrator Vivenzio (and other arbitrators in future cases) any meaningful guidance as to what would be lawful discipline under the WLAD (or under other statutes, for that matter). It is no exaggeration to say that this approach will leave parties and arbitrators confused and uncertain. And, this confusion and uncertainty will no doubt lead to greater difficulties in settling grievances prior to arbitration, and many more lawsuits to overturn arbitration awards.

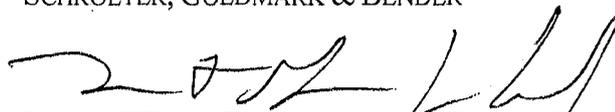
Accordingly, for all of the reasons stated above, the Vivenzio Award is not unlawful, and should not be overturned. The Decision below should be reversed and the Arbitration Award should be reinstated.

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 12th day of October, 2012.

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