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LEGAL NOTE

Arbitrators may not apply contractual standards to teacher dismissal as Appeals Court rules statutory standards prevail; reinstatement overturned.

**School Committee of Chicopee v. Chicopee Education Association,
Decided September 8, 2011**

In Chicopee an arbitrator relying on contract language reinstated a PTS teacher who had been discharged for abuse of sick leave, insubordinate conduct and past discipline. The case illustrates the usual thrust, block and parry associated with appeals of arbitration awards.

The Appeals Court has determined that an arbitrator may not apply contractual just cause standards in determining whether a teacher has been properly dismissed. This ruling, unless appealed, may resolve an ongoing controversy between teacher unions and school committees. Since about 2001 many teacher dismissal cases have been processed on two tracks. The union frequently files a demand for statutory arbitration under M.G.L. c. 71, §42 and simultaneously files under the contractual just cause standards. Often the union will then ask the DESE/Commissioner to defer or put in abeyance the statutory demand, preferring to proceed on the contractual theory. It is generally assumed by management attorneys that the collective bargaining standard is more favorable to employees than the statutory review – thus the requests to put DESE proceedings in abeyance.

A. BACKGROUND

The grievant had been a special education teacher at Chicopee High School since about 2000. His disciplinary record involved previous use of profanity in front of students and other teachers. He also had some mental health issues, including a diagnosis of Attention Deficit Hyperactivity Disorder, and he required a leave of absence for depression. There was some evidence that he also suffered from anxiety, which may have led to his profanity.

Chicopee High School was sponsoring an Arms Service Career Day in May of 2007. Students were required to attend. The teacher decided to organize a protest about the Arms Service Career Day. Between the time when he began planning the protest and the event the high school was defaced with anti-war sentiments. Believing he might be a suspect in the defacement, the teacher attempted to call off the protest. When he realized that students had already appeared at the protest he decided to attend, albeit from the perimeter of the event. The principal noticed the teacher at the event and directed him to return to his class. The teacher complied with the directive.

Later that night the teacher called in sick for the following day. He was able to contact and convince the student who he thought might have been responsible for the building defacement to turn himself in. He appeared with the student in court on the day he called in sick and also continued his anti-war protest outside the court.

The next day he began to engage in odd behavior at school, leaving notes alleging the high school administration had committed certain moral crimes relative to the theft of a computer. On the same day he continued his anti-war protests outside of school, walking in bare feet with his pant legs rolled up and dressed in a military coat and hat. He was carrying a protest sign and beating a bongo drum. The principal instructed him to return to class, at which point the teacher said that "I am not Gary Sroka, I'm Sergeant Pepper," presumably referencing the old Beatles album. The principal gave the teacher several warnings to return to class and advised him that his refusal to comply would constitute insubordination and result in disciplinary action. The teacher declined to return to class and he was placed on administrative leave that day.

Several days later he was terminated for insubordination, improper use of a sick day and based on his prior disciplinary record.

He was then diagnosed with a bi-polar disorder after on two brief sessions with a psychiatrist. The psychiatrist maintained that the teacher was "hypomaniac" but acknowledged that he was examining the teacher and providing assistance so that the teacher could get his job back.

B. PROCEDURAL HISTORY

1. ARBITRATION PROCEEDINGS

The discharge was processed under the terms of the grievance and arbitration provisions of the collective bargaining agreement. The union alleged that once the committee became aware of the teacher's mental health issues the committee should have provided accommodations for the disability. They also argued that the punishment was too harsh, and that the grievant's past disciplinary record should not have been considered by the arbitrator because it did not relate to the issues at hand. The committee noted that on the day the teacher had called in sick he was engaged in many activities, including attendance at the courthouse, and he had actually used an online grading system. According to the committee, this indicated the teacher was not sick. The committee challenged the mental health diagnosis and questioned the psychiatric report.

The arbitrator accepted into the record certain deposition testimony of the psychiatrist, and considered the parties' post-hearing briefs.

The arbitrator's award was issued in September of 2008, approximately six months after the hearing. The issued framed for resolution was whether there was just cause to discharge the teacher. The arbitrator referred to the contract language requiring that just cause be established prior to disciplining a staff member. Reviewing the evidence, the arbitrator concluded that there were sufficient facts to establish "a sick leave violation and the insubordination in response to various directives to return to class." Notwithstanding the proof of the facts alleged by the committee, the arbitrator substituted his judgment for that of the committee based on a lack of progressive discipline. The arbitrator concluded, according to the court, that "the punishment imposed was not commensurate with the violations committed."¹ In part the arbitrator also based the ruling on the disciplinary history cited by the committee, which history the arbitrator concluded was not related to this incident.

At no point in the arbitration proceedings did the committee or the association make reference to the provisions of Section 42 of Chapter 71, which outline the statutory process for dismissal for teachers with PTS. The law requires arbitrators to consider the best interests of pupils in the district and the need for elevation of performance standards.

In a classic inversion of the rule requiring one to "take the bitter with the sweet" the arbitrator spared the bitter and piled on the sweet. He concluded that the teacher must face up to his wrongdoing, but also decided that he was likely to be entitled to accommodations under the ADA or c. 151B, the federal and Massachusetts statutes prohibiting discrimination against handicapped individuals. The arbitrator observed that the teacher, according to the Appeals Court, "could not be fired for conduct that was the result of that medical condition." The teacher was reinstated.

2. SUPERIOR COURT ACTION TO VACATE

The committee properly appealed to the Superior Court seeking to vacate the award pursuant to M.G.L. c. 150C, §11. The committee argued that reinstatement exceeded the arbitrator's authority and that such action violated public policy. Further, the committee argued that the statutory provisions of c. 71, §42 precluded the arbitrator from applying a contractual just cause analysis to a §42 termination. The committee claimed that "once it had proven Sroka engaged in the conduct in question, the arbitrator had no choice but to uphold the dismissal." The committee cited the Geller decision issued by the Supreme Judicial Court in 2001. See School District of Beverly v. Geller, 435 Mass. 223, 231-232 (2001), in which Justice Cordy, for a plurality of the court, wrote that an arbitrator may not substitute his or her judgment as to the degree of discipline imposed if the facts as alleged have been established. Because it was a plurality, Justice Cordy's opinion has generated much controversy.

¹ The "punishment does not fit the crime" justification for exercise of an arbitrator's remedial authority has been a feature in the industrial just cause model for decades. The theory allows arbitrators to substitute their judgment for that of the employer. It was an aspect of Arbitrator Archibald Cox's rationale for overturning the discharge of a tenured teacher in the well-known Needham case, decided by the SJC in 1986. See School Committee of Needham v. Needham Education Association, 398 Mass. 709 (1986).

In the Superior Court a judge confirmed the arbitration award based on the long-line of cases requiring deference to arbitration decisions. The Superior Court judge did not agree that the Geller decision was applicable and, reflecting on the uncertain affect of a plurality decision, the Superior Court judge wrote that in Geller “more questions are left open than answered.”

3. APPEALS COURT

The Appeals Court acknowledged the judicial doctrine of deferral to arbitration awards, except in those cases where the arbitrator lacked jurisdiction, or upon the determination that the award was procured by fraud. Indeed, “a foundational step in any arbitration case is determining the source and limits of an arbitrator’s authority. Ordinarily, the authority of an arbitrator is derived entirely from the parties’ collective bargaining agreement, and is accordingly limited by the terms of that agreement.” In sum, the arbitrator and the motion judge in Chicopee, wrote the Appeals Court, assumed that the arbitrator’s authority was derived from the contract.

In fact the Geller decision requires a contrary conclusion. Appeals Court Justice Smith stitched together elements of Justice Cordy’s plurality opinion with elements of the minority opinion in Geller, written by Justice Cowin, to conclude that Geller stands for the proposition that arbitrators’ jurisdiction in dismissal cases is limited to application of the statutory process and elements. In reviewing a dismissal of a PTS teacher the arbitrator has no authority under the collective bargaining agreement. The provisions of Section 42 apply in such cases – not the contractual standard.

The judgment of the Superior Court confirming the arbitration award was vacated as the arbitrator based his decision “entirely from the assumption that the parties’ collective bargaining agreement controlled, and apparently [was] unaware of the authority, standards of review and dictates of §42.” The arbitrator’s award failed to reference the statute and, importantly, failed to reference the best interests of pupils and the need to elevate performance standards, terms that had been added to the statute by the Education Reform Act in 1993. The arbitrator’s award was “fatally flawed from the start.”

C. CONCLUSION

Ten years after Geller we can comfortably say arbitral authority in discharge cases involving teachers with PTS is limited to the statutory framework. This case should help end 15 years of disputes about the scope of arbitrators’ authority in reviewing dismissal under the ERA. Because the relevant inquiry will be on whether the facts giving rise to the discharge are established, even more care should be taken to develop and document the facts and the investigatory process.