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Judge rules 'side award' cannot be arbitrated

A Superior Court decision reversing an arbitration award in a dispute between the city of Providence and a labor union could mean that, for the first time in Rhode Island, stipulated awards negotiated on the side of collective bargaining agreements are not binding.

In C*ity of Providence v. Rhode Island Laborer's District Council, Local Union 1033,* the plaintiff argued the union's grievance — that Providence had violated a police control center staffing agreement which was settled in "stipulated award" — was not arbitrable.

That award, arising out of a dispute in 1993 and 1994, required the city to assign a specific number of union employees to work at specified times during the week. The city allegedly violated the agreement by failing to have the agreed-upon number of employees at the control center for 20 minutes at one point. Up until then, the city had been staffing the center accordingly.

The arbitrator ruled that the alleged violation was de minimus and relief was not warranted. Still, the city sought to have the award vacated, contending that it had not violated any provision of the collective bargaining agreement.

In his ruling, Judge Daniel A. Procaccini found that the stipulated award was a separate side agreement from the CBA, but it was no longer valid because it had not been renewed after three years. Additionally, he said, the continued staffing practice did not infer anything other than a managerial choice on the part of the city.

"The most accurate description of this agreement is that it was an outlier. There is nothing before the court to suggest otherwise," Procaccini wrote. "No one's interests are served by leaving the negotiated settlement of a seemingly significant labor contract issue outside of the contract's purview it purportedly relates to for seventeen years."

James A. Musgrave, an attorney at Robert, Carroll, Feldstein & Peirce in Providence, represents labor unions in arbitration. Musgrave, who was not involved in the case, recently spoke to Lawyers Weekly reporter Julie McMahon about Procaccini's ruling.

Q. *How does the decision impact attorneys practicing in this area?*

A. The decision has the potential to be disruptive. Collective bargaining agreements are rare in their length and complexity. Typically, contracts in other settings are different: If a vendor supplies your business with coffee and you don't like your coffee, you find somebody else. But unions and businesses are together for a long time, and that's why you have disagreements. You could never write an agreement that covers every grievance that could come up. And that's why you end up developing stipulated awards, side letters and side agreements. To the extent that this decision sticks, you could see a lot more decisions to follow regarding the side bargains.

Q. *So should unions and employers act differently in future negotiations?*

Attorney James A. Musgrave

A. I'd be cautious about resolving disputes with just a stipulated award. The side letters that I usually deal with are literally stapled to the back of the contract. To take care of the arbitrability issue, now there needs to be a provision that specifically states the side letter is subject to the agreement's grievance and arbitration clause. When it comes to the issue of the three-year bar, in renegotiating you have to incorporate that side letter somehow. That's the best practice anyway.

Q. *Why wouldn't the parties have done that in the first place?*

A. When collective bargaining negotiation and arbitration was originally conceived, the idea was that lawyers wouldn't be involved, so often they aren't. Unions without in-house attorneys will have an experienced representative negotiate contracts, and cities and com-

panies don't always have lawyers involved either. So you don't always tie up every single loose end.

Q. *Why would both parties continue to act in accordance with the content of the stipulated award if it wasn't binding?*
A. By the time the decision was rendered, it was close to 20 years that [the staffing arrangement] had been in place. The judge seems to suggest at one point in his decision that the city might offer an alternative explanation for that, but normally you would think that the fact that the parties lived under the agreement for two decades was a pretty significant piece of evidence. It wasn't clear to me why the judge didn't think so.

Q. *What did you think of the judge's criticism of the parties' negotiations?*
A. Something that jumped out at me was a public policy argument that the judge seemed to be making — that it was in the public's interest that unions and municipalities not reach "hidden" or side agreements. On the one hand, I think that's a valid concern, but there's nothing that would prevent the city from making those agreements available to the public. The idea that the union was keeping that hidden, I don't get that. I'm not sure if maybe a new administration or turnover in city staffing is what the judge was talking about. Usually you keep all of those contracts and side letters together.

Q. *How often are collective bargaining agreement disputes heard before a judge?*
A. It's much more likely to happen with agreements between public sector employers and unions. In the time that I've been practicing, I've never seen a private sector employer challenge an arbitration award. Sometimes a judge will become involved when it's in the union's best interest to try to enforce an award. If it's an arbitration award saying that the company can't do X or has to do Y in the future, you have to get to a point where that prospective award is violated. And, it's a Goldilocks phenomenon where the facts have to be just right, or they'll make you go back to an arbitrator. However, in Rhode Island, I think it's relatively common for the state to enforce or challenge arbitration awards for public sector disputes.

Q. *Why the public sector and why Rhode Island in particular?*
A. One part to that is that in a private sector case, there's no publicity. It doesn't end up in the newspaper. Public sector employers are under public pressure so they may feel the need to go to court to try to vacate an award, even if the legal grounds aren't really there. And the financial distress felt by cities and towns everywhere are felt particularly acutely in Rhode Island. That has created a need or desire on their part to look for concessions from unions. I think the courts are more willing to hear disputes here at the state level than at the federal level. I don't have the numbers, but Rhode Island courts on the whole seem to be more likely to overturn arbitration decisions.

Q. *Do you think this is the final word in this case?*
A. I strongly suspect that Procaccini's decision will get appealed to the Rhode Island Supreme Court. It doesn't seem that the violation itself was that significant. But the greater implications of the decision would apply to stipulation agreements for many collective bargaining agreements, both public sector and potentially private sector, too. I don't know how the parties will deal with the staffing agreements otherwise. RLW