J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 10(1) 3-23, 2002-2003

ARBITRAL FINALITY: THE CURRENT INTERPRETATION OF THE PUBLIC POLICY EXCEPTION

KATHLEEN L. PERELES
Rowan University, Glassboro, New Jersey

EDWARD A. PERELES
Arbitrator/Mediator, Philadelphia, Pennsylvania

ABSTRACT

Since the decisions in the *Trilogy* cases were handed down by the Supreme Court on June 23, 1960, the dominant policy of the courts has been to defer to the decision of the arbitrator and uphold the arbitration award. However, there have always been reasons for judicial review of arbitration rewards; and, in some cases, reasons to vacate or overturn an award. This article focuses on the interpretation and status of a rationale often used by the courts when overturning or vacating an arbitration award: the public policy exception. We present the current interpretation of the public policy exception in the unionized segment of the private sector and the historical evolution of the exception, and we focus on strategies for both parties (employers and unions) to either use or defend against the public policy exception.

The purposes of the arbitration provision in collective bargaining agreements (CBAs) negotiated by the employer and the union which represents the employees are to preserve labor peace and to provide industrial justice. Typically, the employer's acceptance of the arbitration clause is considered a quid pro quo for the union's acceptance of a no-strike clause, that is, the union gives up its right to strike during the period of the contract and the employer agrees to take disputes to arbitration and to abide by the decision made by the jointly selected arbitrator [1, 2]. To preserve these objectives, the dominant policy of the courts has been to

defer to the decision of the arbitrator and uphold enforcement of arbitration awards. This policy is expressly stated in the decisions in the *Trilogy* [3], which were handed down by the U.S. Supreme Court on June 23, 1960. However, the judiciary has never espoused the position of absolute deference to the arbitrator [2, 4, 5]; and there have always been grounds for judicial review of arbitration awards and, in some cases, to vacate or to overturn an award.

Four valid reasons to overturn arbitration awards have been identified. First, the award was not drawn from the essence of the collective bargaining agreement (CBA) negotiated by the parties. Under the principles expressed in the *Trilogy*, arbitrators—when making their decisions—are restricted to interpreting and applying the specifics of the CBA as crafted by the parties. The arbitrator cannot dispense his/her own concepts of industrial justice [4, 5, 6]. Second, arbitrators must decide only the specific issues submitted to them; they cannot exceed the boundaries of those issues [1, 7]. Third, awards can be overturned as a result of misconduct on the part of the arbitrator or because the arbitrator knowingly disregarded the law [5]. Finally, the court can vacate or overturn an arbitration award on the principle that the award violates public policy—*the public policy exception* (e.g., [1, 2, 4, 6-8]).

Since the *Trilogy*, the public policy exception has been the predominant reason that courts have overturned arbitration awards [4, 9]. The number of arbitration awards being appealed on the basis of the public policy exception is increasing [4]. Although the public policy exception can be used by both unions and employers, the majority of the cases consist of employers challenging arbitration awards that reinstate workers who were terminated for specific behaviors and for unions seeking enforcement of arbitration awards [6].

Before continuing this discussion of the public policy exception, it is important to differentiate between the different types of public policy violations that have been heard and decided by the courts and delineate the focus of this article. The first type of public policy violation is often termed a "wrongful discharge." In this situation, the worker has been terminated either in violation of his/her statutory rights (e.g., the worker was terminated for religious, racial, or gender reasons or for participating in protected concerted actions) or because s/he refused to comply with an order that violated the law (e.g., for refusing to commit perjury or for refusing to sell adulterated products) [10, 11]. The second type of public policy violation occurs when the reinstatement of a terminated worker would require that the employer violate public policy (e.g., when reinstating a worker would prevent the employer from fulfilling its obligations to provide a safe working environment [10, 11].

This article focuses on the second type of public policy exception as applied in the unionized segment of the private sector. The major sections of this article examine: 1) the current interpretation of the public policy exception in a unionized private sector workplace; 2) the historical evolution of the exception; and 3) strategies for each party to use or to defend against the public policy exception.

(The information reported in this article applies only to private sector unionized workplaces. Unionized public sector workplaces are regulated by state legislation and, therefore, any exceptions that exist would be specific to the state statute. Such cases would be heard by state courts.)

DEFINING THE PUBLIC POLICY EXCEPTION

Because the courts ultimately have the responsibility to protect the well-being of the general public, they have an obligation to review contracts between private parties to ensure that these contracts are neither illegal nor condone illegal behavior [5]. This obligation arises from the recognition that the interests of the general public may not be adequately represented in a private contract [12]. This dual responsibility/obligation of the court system was explicitly described in *Muschany v. U.S.* in 1945, when the Supreme Court stated that contracts inimical to public interest can be set aside as contrary to public policy [13], and the principle has come to be known as *the public policy exception*. This concept provides the employer an avenue to challenge an arbitrator's award that the employer believes violates a public policy.

For the parties to know when the use of the public policy exception is appropriate, they need to be able to answer the question, "What criteria are used to determine when a public policy violation has occurred?" Unfortunately, the courts have never answered this question unambiguously by identifying and itemizing the specific criteria necessary to demonstrate a violation [6, 14]. Instead, the courts have upheld the existence of the public policy [4, 15], while articulating and delineating its limits only by identifying when a public policy violation has or has not occurred in a specific case.

This lack of a clear definition has resulted in an ongoing discussion within the legal and arbitral communities about how the exception should be interpreted. At one extreme, some argue that any award which reinstates a worker whose conduct is antithetical to the broader goals of society should be vacated [10], while at the other extreme, some contend that an award should be vacated only if the ordered reinstatement is a violation of the law [6, 16]. In between are the interpretation that no worker who committed a wrongful act should be reinstated [6] and the interpretation that only awards which require the organization to commit an illegal act or an act which violates the rule of positive law should be overturned [4, 6, 8].

An examination of the current interpretation of the public policy exception reveals that at this time, the Supreme Court has

- clearly upheld the position that the judiciary has the authority to invoke the public policy exception (in *Eastern Associated Coal* [17] and *Misco* [18]);
- stated that the public policy exception is narrow but is not limited only to instances in which the award violates positive law (in *Eastern Associated Coal* [17]);

- limited the public policy exception to situations in which the arbitration award contravenes an explicit, well-defined, and dominant public policy (in *Misco* [18], and *Grace* [19]);
- specified that the public policy must be ascertained by reference to law and legal precedent and not to general considerations of supposed public interest (in *Misco* [18] and *Grace* [19]).

However, there is still no checklist by which the parties can gauge whether a specific arbitration award meets the requirements of the public policy violation. Therefore, the parties must rely on their own analysis of the courts' interpretation of the public policy exception when making a decision to appeal a specific award.

EVOLUTION OF THE PUBLIC POLICY EXCEPTION

The evolution of the public policy exception adheres to the pattern that most policy positions develop through case law. Once the public policy exception was identified in *Muschany* [13], additional cases were brought. However, as a result of the narrow perspective of judicial review and the inconsistency of district and circuit court decisions, broad policy positions are difficult to infer from an analysis of the case law. The current difficulty in deciding what criteria determine when the application of the public policy exception is appropriate can be attributed to the lack of specificity of the circuits' and Supreme Court's decisions. No case decided by the Supreme Court includes a description of the elements necessary to demonstrate a *per se* public policy exception. Rather, the totality of the cases confirms that a public policy exception exists, but that its application is narrow. The cases described in this section are not a complete list of all cases decided on the basis of the public policy exception. These cases were selected because they articulate broad philosophies by incorporating key principles or affirming primary positions; they set precedent by delineating the boundaries of the interpretation and application of the exception; or they illustrate the inconsistency of the decisions of the circuit courts. As appropriate, commentary about how the public policy exception has been interpreted is included.

City of Muschany v. U.S.

As stated earlier, the existence of the public policy exception was first recognized in *Muschany v. U.S.* [13]. In *Muschany*, the Supreme Court made three points. First, the courts have the authority to set aside contracts contrary to public policy. Second, public policy is to be ascertained by reference to laws and legal precedents and not from general considerations of the supposed public interest. Third, in the absence of plain indications of public policy, that policy is indicated by the longevity of relevant government practices, statutory enactments, and violations of obvious ethical or moral standards [2, 6, 13].

Kane Gas v. International Brotherhood of Firemen and Oilers

One of the earliest possible policy exception cases is *Kane Gas v. International Brotherhood of Firemen and Oilers* [20]. In this situation, an employee shut off the gas supply of an entire community on an extremely cold day. The employee was terminated for insubordination and sabotage but was reinstated by the arbitrator on the grounds that there was no just cause for termination. The district court and the Third Circuit, using the principles of the *Trilogy*, upheld enforcement of the arbitrator's award, observing that "[T]he scope of our review in this case is an exceedingly narrow one, and employing that standard, we conclude that we are obliged to enforce the arbitrator's award, whatever misgivings we may have about its merits or wisdom" [20, at 675]. The Supreme Court denied certiorari after the employer sought review of whether commitment to the finality of the labor arbitration awards is more important than the requirement of public safety.

Grace v. Rubber, Cork, Linoleum and Plastic Workers

The first major public policy exception case heard by the Supreme Court was *W. R. Grace v. Rubber, Cork, Linoleum and Plastic Workers* [19]. In 1973, the Equal Employment Opportunity Commission (EEOC) found Grace had discriminated against women in violation of Title VII. The EEOC and Grace began the process of conciliation to remedy the Title VII violation. The union was not a part of the conciliation process [19].

In 1974, when the contract between the parties expired (and before the conciliation process was completed), the union struck, and Grace hired striker replacements—some of whom were female. When the strike was resolved by the negotiation of a new contract in which all strikers were returned to work, some of the replacement female workers were retained and kept in jobs that some male strikers with more seniority claimed. As a result of this action by the employer, affected male workers filed a grievance [19].

Grace went to court seeking an injunction to prohibit arbitration until the conciliation process was complete. The union went to court seeking to force Grace to abide by the contract and proceed with arbitration. Before the court decided either of these claims, the conciliation process between the EEOC and Grace was completed. The conciliation agreement included provisions that Grace remain in compliance with Title VII provisions—i.e., to continue 1) to provide employment opportunities for women and 2) to maintain the existing status of female employees [19].

In considering the appeal of the union, the district court decided that the seniority provisions negotiated by the parties and set forth in the collective bargaining agreement could be set aside, under specific circumstances, to alleviate past discrimination and, therefore, no arbitration hearing need be held. The union appealed this decision to the Fifth Circuit [19].

Eventually, the Fifth Circuit reversed the decision of the lower court and ordered arbitration of the grievance. In resolving this grievance, the arbitrator ruled that under the new contract the male workers were due an award but that he could not penalize the employer for complying with the conciliation agreement (i.e., a governmental order); and therefore he denied the grievance [19].

During the appeals process of this [first] grievance, Grace laid off workers. Some of the laid-off workers were male workers with greater seniority than female workers who were retained. As a result of the lay-off action, the union filed a second grievance [19].

In resolving the second grievance, the arbitrator determined that the collective bargaining agreement did not include any good-faith exceptions to the seniority provisions and, therefore, upheld an award of damages—in the form of back pay—to the male workers. Grace appealed the arbitrator's decision and eventually the case was heard by the Supreme Court, which upheld the arbitrator's award [19].

Speaking for the Court, Justice Blackmun stated that, consistent with *Muschany*, no court may enforce a collective bargaining agreement (i.e., a contract) that is contrary to public policy. However, Blackmun also stated 1) that since Grace had created its own dilemma in this situation and 2) that because the monetary damages award was not in itself in violation of any public policy, the Court [using the principles of the *Trilogy*] would defer to the arbitrator and enforce the award. Blackmun wrote:

> . . . if the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obligated to refrain from enforcing it. Such public policy, however, must be well defined and dominant and is to be "ascertained by reference to laws and legal precedents and not from general consideration of supposed public interest" [19, at 766].

However, the same year, when deciding *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food*, the Fifth Circuit vacated an arbitrator's award that reinstated an employee who had been terminated after being cited for drinking and speeding when his eighteen-wheeler overturned, stating that there is no positive law required to establish that reinstatement of a driver caught drinking violates public policy [21].

United Paper Workers International Union v. Misco, Inc.

Misco is considered to be one of the most important public policy exception cases [18]. In this case, the employee (Employee A) was found in the back seat of a co-worker's car in Misco's parking lot. There was a marijuana cigarette in the ash tray in the front seat of the car. Two other employees had been observed leaving the car prior to Employee A being found in the car. Misco terminated Employee A based on his violation of state laws against the possession and use of illegal substances and employer rules against bringing or using illegal substances on

company property and while operating machinery. The union brought a grievance on behalf of the terminated employee [18].

Five days prior to the arbitration hearing, Misco received notice that the terminated employee had been under police surveillance for drug possession and that marijuana had been found in Employee A's car [18].

Although Misco brought this information to the attention of the arbitrator at the hearing as support for its termination decision, the arbitrator found that the police findings could not be used to support the employer's action because they had not been available when the employer made the decision to discharge. Having heard the admissible evidence, the arbitrator reinstated the employee, finding that the employer had insufficient evidence for discharge [18].

Misco appealed the arbitrator's decision at the district court level on the grounds that the employee's reinstatement violated the public policy against operating dangerous machinery while under the influence of mind-altering substances. The district court vacated the arbitrator's award, and its decision was upheld by the Fifth Circuit [18].

On appeal, the Supreme Court overturned the decision of the Fifth Circuit based on the Court's conclusions a) that the lower courts had not identified an explicit public policy based in law or legal precedent but rather had made their determinations on common sense—criteria expressly forbidden by *Grace* [19] and b) that the district court had overturned the factual findings of the arbitrator when it found that the employer's termination action was proper under the collective bargaining agreement—a behavior the courts were expressly forbidden to do by the *Trilogy* [3, 4, 6, 18].

Commentary

During the consideration of *Misco* by the Supreme Court, most legal analysts hoped that the Court would affirmatively define the criteria for the public policy exception. When, however, the Court did not specifically address that issue, the presumption of these analysts was that the decision articulated the narrowest application of the public policy exception—which is to defer to the arbitrator's award unless the award itself requires the employer to violate a positive law [4, 6, 14]. However, Blackmun, in a concurring opinion (joined by Justice Brennan), explicitly stated that the decision

> . . . does not reach the issue upon which certiorari was granted: whether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement on public policy grounds only when an award itself violates positive law or requires unlawful conduct by the employer. The opinion takes no position on this issue. Nor do I understand the Court to decide, more generally, in what way, if any, a court's authority to set aside an arbitration award on public policy grounds differs from its authority, outside

> the collective bargaining context, to refuse to enforce a contract on public policy grounds. Those issues are left to another day [18, at 46].

Post-*Misco* decisions made by the courts indicate that the narrow interpretation was not as clear (to the courts) as the legal analysts presumed—as indicated by the following cases in the areas of the use of drugs and/or intoxicants, sexual harassment, and public safety. The lower courts appear to be acting on premise that the Supreme Court—by never identifying the specifics under which the public policy exception provides grounds for vacating or overturning an arbitration award—is not discouraging the lower courts from exercising their judgment; and the circuit courts have arrived at different conclusions when hearing public policy exception cases.

DRUG AND ALCOHOL USE

Northwest Airlines Inc. v. Airline Pilots Association International

The narrow interpretation of the scope of the public policy exception was used by the D.C. Circuit to uphold an arbitration award reinstating a Northwest Airlines employee who had been discharged for violating airline safety rules that prohibited the use of alcoholic beverages [22]. The employee, a recovering alcoholic, was terminated for being "under the influence." He was reinstated by the arbitrator contingent upon being re-certified by the FAA. When he was re-certified, Northwest appealed the award, and the district court upheld the denial of the reinstatement. The D.C. Circuit Court reversed the lower court on the basis that the award had drawn its essence from the collective bargaining agreement negotiated by the parties. The Supreme Court denied certiorari in 1988 [22].

Delta Airlines v. Airline Pilots Association

The Supreme Court also denied certiorari to the Delta Airlines appeal of the Eleventh Circuit decision, which upheld vacatur of an arbitrator's award reinstating a pilot who had been discharged for being intoxicated while flying [23]. In this case, the pilot had consumed alcohol and apparently boarded and flew a jet plane while intoxicated. The pilot was detained upon landing, tested above the level of legal drunkenness, and was terminated for being intoxicated on the job. The FAA suspended his license on the basis that medical documentation existed which demonstrated that he was neither fit nor qualified to fly at the time of the incident. The arbitrator conditionally reinstated the pilot on the basis that he be re-certified by the FAA. The FAA re-certified him after he had completed an alcoholic rehabilitation program [23].

When Delta appealed, the reinstatement award was vacated by the district court, and the lower court's decision was upheld by the Eleventh Circuit. The appellate

court concluded that it had not encountered any statute, ordinance, or court precedent that flying under the influence is consistent with public policy. In this case, the Eleventh Circuit framed the issue as, "Does an established public policy condemn the performance of the employment activities in the manner engaged in by the employee?" rather than "Is there a statute which prohibits reinstatement?" In addition, the Eleventh Circuit found that the arbitrator does not have the authority to consider the potential for successful rehabilitation when modifying the remedy [23].

Interstate Brands Corporation v. Chauffeurs, Teamsters, Warehousemen & Helpers Local No. 135

In this case, a bakery truck driver was suspended when Interstate (the employer) learned of his arrest for drug possession and drug use while driving off-duty [24]. The award reinstating the employee was vacated by the district court on the grounds that the arbitrator had exceeded his authority and because the award violated the public policy that prohibits operating a motor vehicle while using drugs. However, the Sixth Circuit overturned the lower court decision on the basis that although driving under the influence (DUI) is a violation of public policy, reinstating an employee who had violated the DUI laws is not a violation of public policy [24].

Exxon Shipping Company v. Exxon Seamen's Union

Exxon terminated a tanker employee for being intoxicated on duty—conduct that violates the employer's policy against the use of alcohol and drugs under the Drug Free Workplace Act [25]. The arbitrator found that there was just cause for some discipline, ordered a ninety-day suspension, and reinstated the employee on the basis of a long and clean record. Exxon appealed to the district court, which vacated the arbitration award on the grounds that the award violated a public policy against the operation of commercial vessels while intoxicated. The Third Circuit upheld the vacatur based on the existence of such a public policy—identified through the Air Pollution Act, the Clean Water Act, and the U.S. Coast Guard regulations, which permit marine employers to require drug and alcohol testing [25, 26].

Exxon Corporation v. Esso Workers' Union

Exxon had a drug-free workplace program that included random testing, and the collective bargaining agreement negotiated by the parties permitted termination of an individual in possession of or under the influence of mind-altering substances [27]. In 1990, an employee in a safety sensitive position, who had signed a statement acknowledging that he knew he was subject to random testing, tested positive for cocaine. (Note: The results of tests revealed only the existence of

metabolites. They did not identify when the cocaine was used or whether the employee was legally under the influence of cocaine at the time of testing.) The employee was terminated [27].

The arbitration award reduced the discipline to a two-month suspension and ordered reinstatement if the employee passed a drug test. When Exxon appealed the award to the district court, the award was upheld. Exxon then appealed the lower court decision to the First Circuit [27].

The First Circuit considered whether enforcing the award would violate public policy and reversed the lower court decision based on the following logic. Referring to three Third Circuit cases involving Exxon, the First Circuit concluded that society has achieved a broad national consensus that no person should be permitted to put other persons at risk by being under the influence of drugs. This consensus has resulted in laws and regulations that prohibit individuals under the influence of narcotics or intoxicants from operating various types of machinery and vehicles. The First Circuit found that the totality of these laws and regulations form a solid basis of evidence that there is a well-defined and dominant public policy against the performance of safety sensitive tasks while under the influence [27].

In addition to its decision to overturn the arbitration award, the First Circuit's decision also included a discussion of how the public policy exception should be analyzed. First, the court should ascertain whether there is a well-defined and dominant public policy that prohibits the behavior engaged in by the worker. Second, if the court decides that such a policy exists, at that point the court should then consider whether the arbitrator's award violates the policy [15, 27].

SEXUAL HARASSMENT

Communications Workers of America v. Southeastern Electric Cooperative

Southeastern Electric terminated an employee for sexual harassment [28]. The employee was reinstated by the arbitrator on the grounds that there was only one instance of harassment, the employee seemed penitent and apologetic, and the discipline should be mitigated by the employee's past work record. The Tenth Circuit upheld the award, noting that the arbitrator had taken the public policy against sexual harassment into consideration when making his decision [28, 29].

Newsday, Inc. v. Long Island Typographical Union, Number 915

In this case, *Newsday, Inc.* terminated an employee for sexual harassment incidents [30]. The employee was discharged for the first time in 1983, but he was later voluntarily rehired by *Newsday, Inc*. He was terminated for the second time—again for sexual harassment incidents—in 1988. The termination was

grieved by the union. The arbitrator reinstated the terminated employee, finding that the employer had not followed the negotiated contract provisions of building a record for termination through progressive discipline [30].

Newsday, Inc. appealed the award to the district court, which overturned it. The Second Circuit upheld the lower court decision stating, 1) that there was an explicit, well-defined, and dominant public policy against sexual harassment in the workplace and 2) that the arbitrator's award violated this public policy by returning a known harasser to the workplace, perpetuated a hostile and offensive working environment, and inhibited the employer from performing its duty to prevent sexual harassment. In 1991, the Supreme Court denied certiorari [30].

Stroehman Bakeries v. Local 776

The Supreme Court also denied certiorari to this case after the Third Circuit had affirmed the vacatur of an arbitrator's award reinstating an employee who had been discharged for sexual harassment and remanded the case to a new arbitration hearing [31]. In this case, one of Stroehman's customers reported a Stroehman employee for sexually harassing one of the customer's employees. Stroehman investigated the allegation, concluded that sexual harassment had occurred, and terminated the employee on the basis that he had violated Stroehman rules prohibiting immoral conduct [31].

The arbitrator reinstated the Stroehman employee based on the fact that Stroehman had conducted an insufficient investigation by not giving its employee the opportunity to explain and/or refute the accusations. The arbitrator affirmatively determined not to rule on the issue of whether harassment had occurred; and in an aside stated that if he had ruled on this issue, the record would not support the allegation of harassment [31].

The district court vacated the award, and the vacatur was upheld by the Third Circuit on the grounds that it is a violation of public policy to reinstate a worker accused of sexual harassment without a factual finding based on the merits of the case. Further, the court stated that by not making a decision on the merits, the arbitrator had interpreted the contract in a manner 1) that permitted a person who may have committed sexual harassment to continue to remain in the workplace and 2) that conflicted with the well-defined and dominant public policy concerning the obligation of the employer to prevent sexual harassment in the workplace [29, 31, 32].

PUBLIC SAFETY

Iowa Electric Light and Power Company v. Electrical Workers Local 204

Iowa Electric terminated an employee who violated Nuclear Regulatory Commission safety regulations by deliberately ordering the disconnection of a security and pressurizing system leading to a nuclear reactor building [33]. The

employee was reinstated by the arbitrator, who found that although the act was deliberate, thoughtless, and foolish, it did not warrant termination. Iowa Electric appealed to the district court, which vacated the reinstatement award before the Supreme Court had handed down the *Misco* decision. The union appealed the decision of the district court to the Eighth Circuit Court. Two weeks after the *Misco* decision, the Eighth Circuit affirmed the vacatur, stating that there was an unmistakable public policy favoring strict observation of federal safety regulations [33].

Stead Motors v. Automotive Machinists Lodge 1173

In this case, the employee was terminated for the failure to tighten the lug nuts on automobiles being repaired [34]. He was reinstated by the arbitrator on the basis that there was no just cause for discharge. The district court vacated the award on the basis that the public safety was being compromised and California driving laws were being violated. The Ninth Circuit reversed the lower court, observing that the critical point is not whether the employee's act violates public policy but whether reinstatement of the employee is barred by public policy [14, 34].

Eastern Associated Coal Corporation v. United Mine Workers of America, District 17

The final case to be discussed is the most recent Supreme Court decision brought under the public policy exception.

Eastern first terminated the employee—an operator of heavy mobile equipment—in March 1996, when he tested positive for marijuana use in a random drug test [17]. The union grieved the termination. The arbitrator reduced the discipline to thirty days without pay and reinstated the employee under the conditions that he participate in a substance abuse program and be subject to random drug testing for five years. The arbitrator's rationale was that the employee's drug use was an isolated occurrence. Eastern did not appeal this award [17].

In the next fifteen months, the employee was randomly tested four times. The first three tests were negative; but in June 1997, the employee tested positive; and he was terminated for the second time. The union also grieved this termination. The arbitrator reinstated the employee for the second time, again stating that the drug use was an isolated occurrence as a result of family problems. The arbitrator reduced the discipline to a two-month suspension; ordered the employee to reimburse Eastern and the union for the arbitration costs; required that the employee submit to further random testing and substance abuse counseling; and mandated that the employee provide Eastern with a signed resignation letter to become effective immediately if he tested positive for drug use any time in the next five years [17].

Eastern appealed the second award to the district court on the grounds that public policy prohibits performing safety sensitive work under the influence of

drugs and/or alcohol. The district court upheld the award, stating that there was no public policy which prohibited reinstatement of an employee who had tested positive for drug use in the past. When Eastern appealed the district court decision, enforcement of the award was upheld by the Fourth Circuit [17].

The Supreme Court agreed to hear the case and in a unanimous decision agreed that the arbitrator's award should be upheld. In making its decision, the Court considered the requirements of all the laws and regulations presented by the employer and decided that many of these laws and regulations do not require *termination* but rather require *rehabilitation* of the employee. In this case, the arbitrator set rehabilitation prerequisites for reinstatement and also required ongoing monitoring of the employee. The Court decided that as long as these prerequisites and monitoring requirements were met, reinstatement of a worker who was a chronic drug user would be prevented. In addition, the Court took note of the fact that the laws cited by the employer required license suspension only when the operator is found to have operated the vehicle under the influence (a fact which was not in evidence) [17].

However, in addition to deciding that the award should be upheld, the Court also made the following observations. First, the Court noted that in a unionized environment the parties should determine the resolution of disciplinary questions. Second, the Court also explicitly stated that the courts do have the authority to invoke the public policy exception and that the public policy exception—although narrow—is not only limited to instances in which the arbitrator's reinstatement award violates positive law [17, 35].

Commentary

The resolution of the *Eastern Associated Coal* case appears to have the following results. First, the principles identified and codified in the *Trilogy*—that an arbitration award should be upheld unless it violates public policy—appear to be secure and intact. Second, the existence of a public policy exception that is not limited to situations in which the reinstatement itself violates an explicit and positive law appears to be recognized and affirmed.

Unfortunately, the Court again left the critical question of how to demonstrate a public policy exception unanswered; thereby leaving the district and circuit courts with the freedom to exercise their judgment in specific cases brought before them. In addition, the Court left unsettled some of the issues identified by the circuit court decisions. For example, the question of the importance of public safety issues in considering the public policy exception as identified by *Kane Gas Works* [20], *Iowa Electric* [33], *Delta* [23], and *Stead* [34]; or the importance of the degree of seriousness of the violation as identified in *Northwest* [22], *Delta* [23], *Southeastern Electric* [28], *Interstate Brands* [24], and *Newsday, Inc.* [30]; or how the issue of where the work is being performed (e.g., in a private workplace or on a

public thoroughfare) should be included in the analysis as identified in *Grace* [19], *Great Western Food* [21], and *Exxon v. Seamen's Union* [25].

PREPARING FOR A PUBLIC POLICY EXCEPTION CASE

As a result of the recognition of the public policy exception in *Eastern Associated Coal* [17], employers will continue to appeal arbitration awards on the grounds of public policy, and unions must continue to be prepared to defend the principle of arbitral finality. This final section identifies some strategies the parties may use in preparing for these cases, covering: 1) the bargaining stage; 2) the grievance procedure and arbitration stage; 3) between the arbitration hearing and the court hearings; and 4) the judicial proceedings stage. The decision to present the employer strategies first and the union strategies second was made on the basis of alphabetical order. The strategies are not presented in order of importance or perceived effectiveness. That issue is left, in the words of Judge Blackmun, "to another day" [18].

EMPLOYER STRATEGIES

Bargaining Stage

When negotiating the collective bargaining agreement, employers can seek provisions that would explicitly include the consideration of public policy issues in the disciplinary procedure.

1. The employer can negotiate that the disciplinary action taken for certain offenses or behaviors can bypass the usual progressive discipline process. For example, any incident of unwanted touching earns an immediate suspension; or any action that would merit discharge by a governmental oversight agency warrants an immediate discharge [6].
2. The employer can negotiate that any employee who tests positive for drug and/or alcohol use will be automatically subject to increased random testing for a specific period of time or will be required to complete a clean probationary period in order to be retained [6, 7].
3. The employer can negotiate provisions under which arbitral discretion is limited [36]. For example, negotiating that after-discovered evidence must be considered by the arbitrator in cases of legal intoxication, or negotiating that prior work records cannot mitigate termination in cases of endangering public safety.
4. The employer can negotiate for a grievance procedure in which the arbitrator is restricted to making a finding of fact and not to modifying the remedy [6, 15].

5. The employer can negotiate for provisions that make the collective bargaining agreement congruent and consistent with the language, factfinding procedures, and disciplinary actions of the substantive law regulating public policy [1, 6].
6. The employer can negotiate for provisions that require the arbitrator to hear and consider issues of public policy when rendering an award [1, 6].

Grievance Procedure and Arbitration Stage

During the grievance procedure, the employer also has a variety of strategies available to ensure that issues of public policy are included and considered. First, the employer can introduce the concept of a public policy violation as early as possible in the proceedings by introducing all statutes and legal precedents that prohibit or regulate the behavior for which the employee was terminated [10]. Second, at the arbitration hearing, the employer must submit as much evidence as possible, to enable the arbitrator to find that there is clear public policy which clearly prohibits the employee's behavior [2, 37]. Third, the employer must give evidence of the full degree of public risk associated with the employee's behavior [6] (e.g., *Great Western Food* [21]). Fourth, the employer should indicate that the employee has shown a propensity to continue the behavior [6]. Fifth, the employer should present the arbitrator with information enumerating the costs of continuing to employ the worker, including insurance claims, workers' compensation, potential damage awards, etc.

For example, if the employer wants to sustain the termination of an employee for operating a large commercial truck on public highways while under the influence of intoxicants, the employer should include the following information in its presentation. First, present all the laws and legal precedents that prohibit the operation of vehicles while under the influence. Second, report the penalties for drivers who operate vehicles under the influence and then present evidence that the employee was, in fact, operating under the influence. (The employer should not be satisfied with presenting evidence that the employee simply possessed or was using intoxicants.) Third, include material that describes the risks to public safety posed by drunken drivers. Fourth, the employer should attempt to demonstrate that the employee, unless terminated, will continue to drink and drive. Fifth, the employer should introduce a chart that includes all the costs of continuing to employ this individual.

Finally, recognizing that arbitrators are required to draw their decisions from the essence of the contract and generally use the just-cause standard to analyze termination cases, the employer should present its case from the perspective of a just-cause termination rather than presenting from the perspective of a public policy violation. The employer should make sure that its disciplinary position is reasonable in the specific case being considered; that the investigation was timely and fair; that the employee was given notice that the behavior could warrant

termination; that the facts and processes used match the published and negotiated process; that the discipline in this case is consistent with discipline imposed in similar cases, and that the infraction is of sufficient importance to justify termination [10].

Judicial Proceedings Stage

If the employer decides to appeal the reinstatement award, the employer must prepare carefully. The critical elements that the employer must demonstrate are 1) that there is a well-defined and dominant public policy which is identified and articulated using law and legal precedent rather than some generalized notion of public interest and 2) that the arbitrator's award requires the employer to violate this public policy [36] (e.g., *Newsday, Inc.* [30]). Therefore, the employer must present as many laws and legal precedents that describe the spectrum of prohibited behaviors and then clearly categorize the employee's conduct on that spectrum [2, 37] (e.g., *Exxon Shipping* [25]; *Exxon Corp* [27]). Since federal law prevails over state laws, the greater the number of federal laws and legal precedents that can be cited the better [2]. However, in the case of the absence or paucity of federal law, state laws and legal precedents should be presented.

In responding to the principle of arbitral finality as affirmed in the *Trilogy*, employers should point out to the court that it cannot abdicate its responsibility and obligation as the protector of the public interest; and therefore, the court cannot uphold an arbitration award that endangers the welfare of groups not party to the contract on which that award is based [1]. Some legal analysts believe that threats to public safety appear to have the best chance for a broad interpretation at the court level; and therefore, the employer should focus on this arena [6] and clearly connect the employee's behavior to increased levels of risk to public safety (e.g., *Great Western Food* [21]; *Iowa Electric* [33]).

Finally, in responding to the principle of the *Trilogy* that restricts the arbitrator to drawing the award from the essence of the contract, the employer can assert that the arbitrator has no authority to consider the potential for rehabilitation in modifying the remedy imposed by management [2] (e.g., *Delta* [23]) and can search for cases in which the court upheld awards not necessarily drawn from the essence of the contract, such as *Ottley v. Sheepshead Nursing Home* [38]. In *Ottley*, the Second Circuit held that the arbitrator did not exceed his authority by basing his award on the National Labor Relations Act rather than on the collective bargaining agreement, opining that if the arbitrator is confined only to interpreting the contract in a mechanical way, his/her ability to achieve industrial peace and industrial self-government is hindered. In addition, the Second Circuit took note of the fact that all collective bargaining agreements are drafted against a background of government regulation and to require that the arbitrator ignore that background puts the arbitrator in the position of rendering an award that may be in conflict with these government mandates—in other words, an award that may be a violation of public policy.

UNION STRATEGIES

Bargaining Stage

When negotiating the collective bargaining agreement, unions can bargain for provisions which explicitly state that arbitration awards will not be appealed. Second, the union can bargain for provisions that strengthen the grounds on which disciplines will be mitigated. Remembering that one of the purposes of the arbitration process is to encourage labor peace by having the union give up its right to strike in return for the acceptance of the arbitrator's award by the employer [1], perhaps the union could consider agreeing to provisions that the arbitrator hear and consider specific public policy issues in return for a provision that the employer agrees to accept the arbitrator's award in these cases.

Another strategy of the union would be to oppose or to accept any of the provisions proposed by the employer. The position of the union vis-à-vis each proposal would be to accept any specific provision only if it provided benefits for the members and to oppose any specific provision detrimental to the individual members or to the ability of the union to represent its members.

Grievance Procedure and Arbitration Stage

One strategy the union can use is to attempt to negotiate a settlement of the case at every stage of the grievance procedure before the issuance of a final and binding award.

A second strategy is based on the requirement of the arbitrators to draw their decisions from the essence of the contract and to use the negotiated just-cause standard to analyze termination cases. Therefore, the union should make its presentation either from the perspective that the actions of the employer are not drawn from the essence of the contract but, rather, from external law; or that the actions of the employer do not meet the requirements of a just-cause termination. For example, the union can demonstrate that the disciplinary position is unreasonable in the specific case being considered; that the investigation was nonexistent, untimely, and/or unfair; that the employee was not given notice that his/her behavior could warrant termination; that the employer did not follow the published and negotiated progressive discipline process; that the evidence does not support the discipline imposed; that the discipline in this case is not consistent with the disciplines imposed in similar cases, and that the infraction is not severe enough to merit termination [10].

In addition, the union can introduce evidence that the employee is sorry for his/her action(s) and is amenable to correcting her/his behavior through discipline [2] (e.g., *Southeastern Electric* [28], *Eastern Associated Coal* [17]). The union can introduce evidence that details the costs of hiring a new employee as compared to the costs of providing the current employee with support and direction to improve. For purposes of mitigating the discipline, the union must ensure that

the arbitrator has a full background history of the worker's performance. Finally, if the union believes that reinstatement is not a realistically attainable award (e.g., in *Misco* [18]), the union can ask for a monetary award of back pay, front pay, and severance.

If the public policy exception is a concern in a specific case, the union can negotiate to have an arbitrator who is qualified in the public policy arena being discussed by the employer, since the courts perceive that arbitrators are not experts in public policy arenas [6] (e.g., *Southeastern Electric* [28]).

Finally, the union must be prepared to respond to whatever public policy arguments are raised by the employer, using the approach that these arguments are not as clear as the employer maintains.

Between the Arbitration Hearing and the Court Hearing

The union can offer to negotiate from a win-win perspective. The union wants to protect its members, and the employer does not want the employee to return to the workplace. Normally, neither party wants expensive and prolonged court proceedings. The union could ask for a monetary settlement or ask that the employee be placed in a nonsensitive position. Although the costs of challenging an arbitration award and responding to such a challenge are considered by the parties when making such decisions, the authors are not aware of any information that reports these costs.

Judicial Proceedings Stage

The union has two very strong positions to take at the court proceedings. First, the union can demonstrate that the public policy the employer is advocating is not clear, well-defined, and dominant by identifying the inconsistencies in the laws and legal precedents being cited by the employer. Second, the union must take the position that if the court should uphold or overturn an arbitrator's award based on the existence of an explicit, well-defined, and dominant public policy based on the decisions in *Muschany* [13], *Grace* [19], *Misco* [18] and *Eastern Associated Coal* [17], then dominance of arbitral finality as a public policy is clearly indicated by the longevity of government practices and statutory enactments as indicated by the *Trilogy* [3].

The union can also ensure that the court understands that the arbitrator is the surrogate of the parties, and therefore, the decision of the arbitrator equals the resolution of the parties. Using this approach, the union specifically states that under collective bargaining policy, practice, and precedent, the arbitrator's award represents what the parties agreed to. There is no conflict between the parties once the decision has been rendered [6, 14]. In addition, the union can present evidence that the arbitrator was selected on the basis of her/his knowledge of the work and the workplace and based his/her decision on this knowledge [6, 29].

Finally, the union can introduce the information that the laws and legal precedents cited by the employer do not always require termination. Often, what

the law requires is that the employer takes appropriate action either to correct the employee's behavior or to prevent the reoccurrence of the prohibited behavior in the future (e.g., *Eastern Associated Coal* [17]). Using the award, the union can reiterate that the arbitrator recognized that the employee is sorry for and indicates a strong amenability to correcting his/her misconduct through participation in appropriate self-help or employee-assistance programs [6, 7, 15, 29], since this element was considered important by the courts in *Delta* [23] and *Chrysler Motor Corporation v. Local 793, International Union Association of Allied Industrial Workers of America* [39].

In *Chrysler*, an employee discharged for sexual harassment was reinstated by the arbitrator based on the fact that there was not just cause for termination. The arbitrator reduced the discipline to a suspension. Chrysler appealed the award to the Seventh Circuit, which upheld the award based on the fact that there was no evidence that the employee could not be rehabilitated and that a suspension was adequate to deter him from further incidents [39].

CONCLUSION

The Supreme Court's positive recognition, in *Eastern Associated Coal* [17], of the existence of a public policy exception that is not limited to cases in which the arbitrator's award does not violate a positive law created a situation in which the definition and interpretation of the exception are needed. This article explains the current court interpretation of the public policy exception, presents and analyzes some of the cases decided using the exception, and generates strategies for both unions and employers to use when preparing to rely upon or to defend against the application of the exception.

This article contributes to our current knowledge in two ways. First, by identifying areas that need further study; and second, by providing practitioners with guidance as they prepare to present cases utilizing the public policy exception. We argue that, as a result of this recent Supreme Court decision, more research focused on the public policy exception will be needed to identify the scope of the exception; the criteria to distinguish when a public policy violation has risen to the level at which an arbitration award will be overturned or vacated; and the elements considered necessary when presenting a public policy case. From a practitioner standpoint, research investigating the effectiveness of the various strategies identified in the final section is also needed.

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Direct reprint requests to:

Professor Kathleen Pereles
Management/MIS Department
College of Business
Rowan University
201 Mullica Hill Road
Glassboro, NJ 08028
e-mail: pereles@rowan.edu