Neutral Notes

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WEINGARTEN RIGHTS IN THE PUBLIC SECTOR

A recent decision by the Maryland Court of Appeals, in Prince George's County Police Civilian Employees Association v. Prince George's County, Maryland on Behalf of Prince George's County Police Department, discussed the inclusion of Weingarten rights regarding civilian police employees. In Prince George's County, employee Marlon Ford, a member of the Civilian Employees Association, was terminated after a criminal investigation during which Ford was questioned regarding alleged crimes and an internal affairs investigation.

Following Ford's termination, the Association filed a grievance and the parties participated in arbitration. The arbitrator vacated the County's termination of employment, imposed a thirty-day suspension instead, and granted Ford back pay. The arbitrator based the award, in part, on the determination that the County had violated a collective bargaining agreement between the County and the Association because officers of the Criminal Investigations Division failed to advise Ford of the right to have a representative present from the Association during the criminal investigative interview that yielded information that later formed part of the basis for his termination.

The Court held that, under the County's Code, the County lacked the authority to enter into a collective bargaining agreement that required the implication of Weingarten rights "before a criminal investigative interview of one of the County's police civilian employees." Based upon that analysis and ruling, the Court found that the arbitrator exceeded his authority by basing the arbitration award on the determination that the County violated its collective bargaining agreement.

The collective bargaining agreement between the County and the Association stated in pertinent part:

> When an employee … is to be the subject of an investigatory interview or other meeting [that] may result in discipline, he/she shall be informed in writing at least five (5) working days prior to the start of the interview … of his/her right to have present, upon request, a[n Association] representative…. [I]f an immediate interview is required[,] and the designated [Association] representative is unavailable, the employee may select another [Association] representative who can be present during the investigatory interview. Article 8.C.
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> The [County] will not initiate disciplinary action against an employee later than ninety (90) calendar days after the occurrence (or after the [County] was aware of the occurrence) of the alleged infraction or violation of Departmental rules or regulations or of the Personnel Law…. These time limits shall apply to alleged infractions or violations [that] affect only the [County]-employee relationship. They shall not apply to alleged violations or infractions [that] are also criminal violations nor to non-criminal violations [that] are related to an active criminal investigation. Article 8.I.

Ford was the subject of two investigations – a criminal investigation of allegations of theft of a handgun, impersonation of a law enforcement officer, and use of law enforcement vehicles, as well as an internal affairs investigation of his conduct as an employee. During an initial interview he was advised of his Miranda rights but not his Weingarten rights. The interview lasted fourteen hours.

The facts of the case are interesting. However, the significant legal finding was that the

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The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

SPLIT RULING ON MOTION TO COMPEL ARBITRATION OF STATE LAW AND FLSA CLAIMS

In Collado, et al. v. J. & G. Transport, Inc., et al., the Eleventh Circuit looked at a collective action lawsuit under the Fair Labor Standards Act (FLSA) basically alleging that J. & G. Transport (J&G) failed to pay its truck drivers for overtime work. J&G waived its contractual right to compel arbitration by participating in the litigation but when Collado amended his complaint to add state law claims for breach of contract and quantum meruit, J&G moved to compel arbitration regarding those new claims. The District Court denied the motion and the matter reached the Court of Appeals based upon an interlocutory appeal.

The facts have now become routine, particularly in trucking and similar industries. Collado complained that he had worked for J&G as a truck driver doing hauling and worked about eighty-five (85) hours per week. However, the drivers were required to sign an independent contractor agreement "in a scheme to evade the FLSA's overtime wage requirements."

After the close of discovery, but before trial was to begin, Collado moved to file a second amended complaint seeking to add state law claims for breach of contract and quantum meruit, arguing that an addendum to the agreement provided for an adjustment of his compensation based upon adjusted gross revenue received by J&G for loads and he only learned of some of this information on the last day of discovery.

The District Court granted Collado's motion to file a second amended complaint, finding that he could not have discovered the potential breach of contract claim until he learned how much money J&G earned per haul. J&G conceded it had waived arbitration of the FLSA claim but argued the second amendment revived its right to elect arbitration of the state law claims because those new claims "unexpectedly broadened the scope of the case."

The Court ruled that J&G did not waive its right to arbitrate the state law claims raised in the second amended complaint because those claims "were not in the case when it waived by litigation the right to arbitrate the FLSA claim." The Court ruled, despite Collado's argument that J&G should have known there was a state law claim "lurking in the case," that

> knowing that a potential claim may lurk in the shadows of a case is not the same as litigating against a claim that has been brought out into the open in a pleading. A defendant is not required to litigate against potential but unasserted claims. By the same token, a defendant will not be held to have waived the right to insist that previously unasserted claims be arbitrated once they are asserted. A defendant who was willing to litigate the claim pleaded against it would need to identify all of the possible claims that could have been but weren't pleaded against it and file a motion insisting that those unpleaded claims be arbitrated. Otherwise, under Collado's position, the defendant would waive the right to arbitrate those claims if they ever were pleaded.

The Eleventh Circuit remanded the case for further proceedings but vacated the District Court's order denying J&G's motion to compel arbitration of the state law claims.

PRACTICE NOTE: As of this writing it is not clear how the case will proceed since the state law claims are to be arbitrated and the FLSA claims, apparently, are proceeding in federal court. The split decision will no doubt make coordination more complicated.

INTERNATIONAL BREACH OF CONTRACT LITIGATION COMPELLED TO ARBITRATE

In Terra Holding GMBH, et al. v. Unitrans International, Inc., a Federal District Court in Alexandria, Virginia ruled that the parties should submit to an Arbitrator first whether the dispute is subject to arbitration under the agreement and, if so, the question of arbitrability. In the interim, the Court stayed the proceedings.

The case involved Terra Holding and Terra Handles-und Speditiionsgesellschaft (Terra Spedition), German companies with principal places of business in Germany. Unitrans was a Virginia company with a principal place of business in Virginia.

Terra Holdings and Unitrans each owned 45% of UAB GaTe Logistics (Gate), a Lithuanian company engaged in the business of providing transportation services in places including the Baltic and Afghanistan. Terra Spedition is a creditor of Gate.

Soon after Gate was established, Terra Holding, Unitrans, and Gate entered into a Shareholders Agreement dated March 29, 2013. The Shareholders Agreement provided that it was governed by the laws of Lithuania and included the following provision:

> All disputes, claims or controversies arising from or in connection with this Agreement as well as disputes as to the validity, interpretation or breach of this Agreement, shall be settled amicably. In case of failure by the Parties to solve any such dispute, claim or controversy by way of negotiations, or if negotiations do not being, the said disputes, claims or controversies shall be resolved by arbitration in accordance with the Arbitration Rules of the Vilnius Court of Commercial Arbitration [hereafter "Vilnius Court"]. The respective dispute, claim or contro-

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County lacked the authority to enter into a collective bargaining agreement that contained Weingarten rights before a criminal investigative interview. The Court looked to cases in Illinois and New York for guidance.

The Court found that the County lacked the authority to enter into a collective bargaining agreement that required the invocation of Weingarten rights "before a criminal investigative interview of one of the County's police civilian employees." Therefore, the arbitrator exceeded his authority by basing the arbitration award, in part, on the determination that the County violated the collective bargaining agreement for failure to provide Weingarten rights in addition to Miranda warnings. The Court reasoned that to conclude otherwise "would encroach upon the Prince George's County Police Department's statutorily mandated duty" to enforce the law. The Court noted that no provision of the Prince George's County Code gave the County the authority to enter into a collective bargaining agreement requiring Weingarten advisements before a criminal investigative interview of one of the County's police civilian employees.

The Court concluded that the characterization of the interview was of no moment. It stated that "[i]t is immaterial whether an investigation is 'purely' criminal. Where an investigation is criminal – purely so or not – the County lacks the authority to bind itself to making Weingarten advisements."

The Maryland Court concluded that the County lacked the authority to grant contractual rights to police civilian employees in criminal investigations that the Police Department was required by statute to conduct. The Court also stated that it "decline[d] to conclude that, because the State entered into a collective bargaining agreement extending the Weingarten right to criminal investigations, the County was therefore empowered to do the same."

Based upon its analysis of the law, the Court of Appeals concluded that the arbitration award may be vacated because the arbitrator exceeded his authority by issuing an award where one of the parties lacked authority to enter into the underlying contract. Despite a lengthy analysis and review of the law, the Court held that the case was remanded for review by the same arbitrator based on the existing grounds supporting the award, "absent the alleged Weingarten violation."

PRACTICE NOTES: Prince George's County Police is an interesting and significant decision looking to the full scope of arbitral authority as well as the ability of parties to enter into collective bargaining agreements containing basic provisions in labor relations. Essentially, the Court ruled that absent such an enactment, the County lacked the authority to enter into the agreement and even though the agreement had language providing for Weingarten rights, it could not be enforced. Therefore, the arbitrator needed to reassess his opinion based upon that ruling. The Court noted that "[s]pecifically, on remand, the arbitrator shall determine whether the three grounds for the award that were independent of the alleged Weingarten violation – lack of intent, progressive discipline, and mitigating factors – are or are not sufficient to support an award for back pay and reinstatement

International Breach of Contract Litigation Compelled To Arbitrate (*Cont'd from pg. 2)*

> versy shall be examined by 3 (three) arbitrators appointed in accordance with the said Arbitration Rules. The venue of arbitration shall be Vilnius. The arbitration proceeding shall be conducted in the Lithuanian language.

This provision subjected disputes to arbitration in accordance with the Arbitration Rules of the Vilnius Court of Commercial Arbitration.

Subsequently, the parties developed financial difficulties and an inability to resolve these issues. Terra Holding filed this action in Virginia on December 13, 2014. The next day they filed suit in the Klaipeda Regional Court in Lithuania. The Lithuanian Court ruled it did not have jurisdiction and dismissed the action.

Defendant moved to dismiss based on *forum non conveniens* and included a motion to compel arbitration pursuant to the Shareholders Agreement.

The U.S. District Court stated that the initial analysis begins with "resolving the question whether the court or the arbitrators should decide the issue of arbitrability…." The Court stated that the question of arbitrability is generally an issue for judicial determination and that courts have looked to a "clear and unmistakable" standard, which means that the arbitrator shall determine what disputes the parties agreed to arbitrate. The Court ruled that the clear and unmistakable standard was met because "the arbitration clause both includes expansive language and incorporates a specific set of rules. The Shareholders Agreement provides that 'disputes arising from or in connection with' the Agreement 'shall be resolved by arbitration in accordance with the Arbitration Rules of the Vilnius Court of Commercial Arbitration.'"

Having decided the initial question, the Federal Court stated that analysis of the motion to compel next looked to the question of "whether there is authority in this forum to compel arbitration." The Court stated that the Federal Arbitration Act (FAA) "mandates the enforcement of valid arbitration agreements." The Court declared that the FAA and its underlying policy favoring arbitration apply "to foreign commercial contracts."

The Federal Court stated that under the New York Convention there are four main factors that the Fourth Circuit has looked to in determining whether to enforce a foreign arbitration clause. The four jurisdictional requirements are as follows:

> (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for

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arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Because some of the parties in this dispute are foreign, any order to arbitrate must be based upon the Convention. The Court ruled that the four jurisdictional requirements "are met." The Shareholders Agreement contained a valid written agreement to arbitrate. The territory in which the arbitration clause pointed – Lithuania – is a signatory to the Convention. The parties are involved in a commercial relationship and some of the parties are not American citizens.

In sum, the Court declared that the arbitrability question should be handled by Vilnius Court arbitrators. Based upon that finding and analysis, the Court entered a stay and declined to resolve the question of whether district courts retain jurisdiction

ARBITRATION PROVISIONS IN EMPLOYEE HANDBOOKS

The Supreme Court of Texas, in Cardwell v. Whataburger Restaurants, granted review basically on the question of unconscionability of an arbitration agreement contained in the employee handbook. The courts below had rejected such a finding but the High Court of Texas simply concluded that all of the arguments raised by Cardwell had not been reached. Cardwell specifically objected to Whataburger's motion to compel arbitration based upon its employee handbook. Cardwell had argued that such a provision was, among other things, unconscionable. The High Court noted that the Court of Appeals (below) did not address every issue raised which was necessary for final disposition of the appeal. Without doing so, the Supreme Court ruled that it could not order arbitration either.

PRACTICE COMMENT: Stay tuned regarding reflexive use of arbitration provisions in employee handbooks. This subject is evolving and emerging.

SUPREME COURT FOCUS ON PATERSON, NJ

In Heffernan v. City of Paterson, New Jersey, et al., the U.S. Supreme Court addressed and expanded the notion of protected political activity where, in this case, the public official "incorrectly believed" the employee had supported a particular candidate for mayor. There was also a spirited dissent written by Justice Thomas who noted, among other things, that "[d]emoting a dutiful son who aids his elderly, bedridden mother may be callous, but it is not unconstitutional."

PRACTICE NOTE: Heffernan is a must read since it involves interesting and sometimes local political issues. The Court's ruling is important in terms of the potential expansion of protected conduct and for the specific facts I suggest you read the opinion in its entirety.

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