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City of Waterbury v. Connecticut Alliance of City Police -- A New Standard of Impartiality for Arbitrators in Interest Arbitrations?

Education Law Notes

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By Zachary Schurin

The Superior Court's decision in **City of Waterbury v. Connecticut Alliance of City Police**, could mark the emergence of a new standard of impartiality for party-selected arbitrators in Municipal Employee Relations Act ["MERA"] interest arbitrations. In the decision, Superior Court Judge Brazzel-Massaro disqualified a union attorney from sitting on a MERA interest arbitration panel after the City claimed that the attorney should be disqualified because:

1) he represented [the Union] and participated in prior negotiations relative to the subject collective bargaining agreement; 2) his representation of [the Union] in prior negotiations for this very same contract permitted him to be part of "off the record" discussions that may impact his appointment as an arbitrator; 3) he is presently the counsel for [the Union] and continues to represent [the Union] in matters involving grievances and workers' compensation issues for which he is compensated; and 4) his representation is a violation of the Rules of Professional Conduct.

The case is up on appeal (you can check the appeal's status **here**) so there will be more to say once an appellate court decision is handed down, but if the decision is affirmed the case could mark a major change in the way arbitrators are selected for interest arbitrations held pursuant to the MERA and the Teacher Negotiation Act ["TNA"].

By way of background, in Connecticut, impasses in the negotiation of public-sector collective bargaining agreements under the TNA or the MERA are resolved through a so-called "last best offer" interest arbitration process. After unsuccessfully attempting to negotiate a new or successor collective bargaining agreement, the union and the public-sector employer enter into an arbitration process in which each side presents a last best offer on each issue in dispute. The arbitrator, or arbitrators then have to pick either the union or management offer on each identified issue based upon statutory factors. The arbitration panel, or single arbitrator, can't split the difference between the last best offers; they have to pick one or the other final offer on each issue in dispute.

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Under the TNA and the MERA the union and management each pick one party arbitrator who will sit on a three-member arbitration panel. (Technically, under the TNA the parties can proceed to arbitration with a single arbitrator, but that rarely happens.) Under the TNA the parties select a neutral arbitrator, or if one can't be agreed upon, the State Department of Education "goes to the hat" and a neutral is randomly selected from a state-designated panel of approved arbitrators. Under the MERA, once the two party arbitrators have been chosen, they are required to confer and select a neutral arbitrator from another state-approved panel of neutral arbitrators.

Union and management advocates generally expect their selected arbitrator to advocate on behalf of their side during the arbitration process. In this sense, there are really two-levels of advocacy in the interest arbitration process. The parties put on evidence and argue their positions at the arbitration hearing, but then when the arbitration panel later reconvenes in its executive session to decide each issue in dispute, the party arbitrators continue to advocate to the neutral on behalf of the party that selected them. Since the management and union-selected arbitrators will invariably vote for the management or union last best offer on each issue, the neutral really decides the interest arbitration because he or she casts the deciding vote on every issue.

There's one other aspect to the interest arbitration process to be aware of. The party selected arbitrators are paid their per-diem fees by the party that selects them. The neutral-arbitrator's fees are split between the union and management.

In reaching her decision in City of Waterbury, Judge Brazzel-Massaro heavily relied upon the Connecticut Appellate Court's decision in **Metropolitan District Commission v. Connecticut Resources Recovery Authority, 130 Conn. App. 132 (2011)** in determining the standard for the disqualification of a party appointed arbitrator. In that case, which arose in the context of a contract dispute rather than an interest arbitration, the Appellate Court broadly stated that:

a trial court may intervene in an arbitration proceeding pursuant to its equitable powers and disqualify an arbitrator when the arbitrator cannot observe his or her ethical duties or cannot participate in the arbitration proceeding in a fair, honest and good faith manner. . . To conclude that an arbitrator, who cannot observe his or her ethical duties or who cannot participate in a fair, honest and good-faith manner, may nevertheless serve as an arbitrator would "undermine society's confidence in the legitimacy of the arbitration process

Relying on Metropolitan District Commission, Judge Brazzel-Massaro found that the Union-selected arbitrator's ongoing representation of the Union would create an untenable "dual responsibility" to both his Union client and the arbitration panel itself. As the Court found:

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This dual responsibility provides at the very least a public perception of conflict and unfairness. The result of the dual responsibility is that [the Union appointed arbitrator] cannot be fair and act in good faith when it may have an impact on his client's needs for his services. Any decision by the arbitration panel will be seen by the public as a done deal with no opportunity for a fair, balanced approach that considers the taxpayers who will fund any arbitration finding.

The Court also reasoned that this point was underscored by the fact that while Rule 1.12(d) of Connecticut's Rules of Professional Conduct for attorneys states that a party-selected arbitrator "in a multi-member arbitration panel is not prohibited from *subsequently* representing that party" (emphasis added), there is no corresponding provision in the Rules of Professional Conduct that affirmatively allows an attorney who has previously or is currently representing a party to serve as an arbitrator in an arbitration involving the party. On this basis, the Court found that the Union-selected arbitrator's position:

as the sole counsel and negotiator with ongoing and future legal representation of [the Union] creates a conflict which is further exacerbated by the public perception of unfairness or lack of good faith that will inevitably surface as the taxpayers are impacted by any decision.

While the Court's decision in City of Waterbury is somewhat limited by its unique set of facts, the case raises a number of interesting questions. For starters, where should the line be drawn when it comes to a party-selected arbitrator's "partiality"? Both the Superior Court in City of Waterbury and the Appellate Court in Metropolitan District Commission readily acknowledged that party-selected arbitrators are customarily expected to advocate on behalf of the party that selects them. But even if this is the case, how does an arbitrator's partiality square up with his or her apparent ethical duty – as noted in Metropolitan District Commission -- to serve on an arbitration panel "in a fair, honest and good faith manner"? Can a person really be fair and partial at the same time? What if a party-selected arbitrator in an interest arbitration knows that an argument advanced by their side is particularly weak or even frivolous? Would that arbitrator owe a duty to the arbitration panel, and the public at-large, to vote against the side that picked them on that issue at the executive session?

In a related vein, what actually counts as fairness in the eyes of the public? If, as found in City of Waterbury, representation of a client while concurrently serving as that party's appointed arbitrator at interest arbitration offends public notions of fairness and undermines the stature of an interest arbitration panel, then what about the fact that party-selected arbitrators are paid by the parties themselves? If the process is supposed to be sacrosanct in the eyes of the public, is that expectation compatible with an interest arbitration system that requires the parties to pay their selected arbitrators? Could there be anything that undermines the public's perception of the interest arbitration process more than the direct payment of arbitrators by the parties that appoint them?

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We can probably expect an appellate court's answer to questions such as these later in the year, so stay tuned.

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