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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002175-MR

HARLAN COUNTY BOARD OF EDUCATION APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RONALD JOHNSON, JUDGE
ACTION NO. 02-CI-00241

INTERNATIONAL UNION, UNITED
MINE WORKERS OF AMERICA APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: The Harlan County Board of Education has appealed from the September 2, 2004, summary judgment by the Harlan Circuit Court in favor of the International Union of the United Mine Workers of America (UMWA)[1]. Having concluded there

[1] The UMWA is an unincorporated association and labor organization which represents employee members, including members in Harlan County, and is authorized to contract and contract with, to sue and be sued, and to bring this action on behalf of union employees in Harlan County, Kentucky.

is no genuine issue as to any material fact and that the UMWA is entitled to judgment as a matter of law, we affirm.

The UMWA and the school board were parties to a collective bargaining agreement dated August 1, 1999. Article VII of the agreement stated, in part, as follows:

> Change in Job – All jobs shall be posted as required by law, listing the job classification, qualifications, and requirements. Vacancies shall first be filled by existing employees who apply and are qualified. . . .

The remainder of this paragraph says nothing more about the initial selection of the employees bidding on the job.

In July 2000 the school board gave notice to the UMWA of its intention to create four new positions.[2] Previously, there were two letters of understanding signed by the parties, both dated July 18, 2000. The first letter dealt with a search for employees through commercial bids from the general public[3] and stated as follows:

> The United Mine Workers of America Local President, Royce Wynn, and the Harlan

[2] The duties of the new positions included the hauling of ashes, mowing the lawns, and in general, outdoor upkeep.

[3] The arbitrator refers to this first letter of understanding as follows:

> On the one hand, they asked for and received special permission from the Union to advertise for outside workers to be supplied on contract. That they say was their purpose for the language . . . . The Board's reaction to the commercial bids they received on this request for contract maintenance duties was that they were either too high or too low and the system did not seem to resolve itself.

> County Board of Education Superintendent, Tim Saylor, mutually agree on a non-precedent setting basis that the Harlan County Board of Education will be able to bid landscaping duties which would include but would not be limited to hauling off ashes, mowing lawns, and general outdoors upkeep. This was mutually agreed upon after the parties [met] and agreed this does not affect any classified personnel's hours of pay.[4]

This first letter of understanding is not in dispute. A second letter of understanding was agreed to on the same date, referring to the posting of "new jobs" and stated as follows:

> The United Mine Workers of America Local President, Royce Wynn and the Harlan County Board of Education Superintendent, Tim Saylor, mutually agree on a non-precedent setting basis that the Harlan County Board of Education on new job postings, <u>after giving due regard for seniority, with all qualifications being equally reasonable, the Superintendent will have the final decision in filling vacancies</u>. Upon making a final decision the Superintendent and Union official will meet within sixty days in order to create a clear policy for seniority [emphasis added].

After the two letters of understanding were entered into between the UMWA and the school board, the school board posted the jobs and allowed persons to bid. Among those who bid on the jobs were three existing employees of the Harlan County School System, namely, Richard Stewart, Charles Brigmon, and

[4] We note that this letter of understanding is not contained in the record on appeal. However, it is quoted in the arbitrator's opinion and we quote from that opinion.

Judy Stanton (now Johnson).[5] The Superintendent did not move any of these three current employees into these positions. Instead, the Superintendent filled these positions with applicants who were not existing employees of the Harlan County School System. Stewart, Brigmon, and Johnson filed grievances alleging that the Superintendent's failure to hire them constituted violations of the collective bargaining agreement.[6]

Article 11 of the collective bargaining agreement established a four-step grievance process. The first three steps included mediation. The fourth step of the grievance procedure was stated as follows:

> Grievances not settled at STEP (3) may be referred by the Union to Mediation. The Mediator shall be a person jointly selected by the Parties. After conducting a hearing on the matter the Mediator will issue an opinion as soon as possible, but not to exceed thirty (30) days. The opinion of the Mediator shall be in writing setting forth findings of fact and conclusions. The Opinion shall be binding on the parties.[7]

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[5] In his opinion the arbitrator stated as follows: "The basic arrangement is that School Board employees can look at posted jobs and ask for a transfer, hoping to improve their positions. These people have a variety of skills and experience. They are good, hardworking people and can do most of the tasks called for, which apparently were relatively manual and menial."

[6] Two other employees initially filed grievances with the school board for the same reasons, but resolved their disputes with the school board prior to arbitration.

[7] Because of its binding effect, step four of the grievance procedure, while not specifically called such, was actually a method of arbitration, not mediation. Neither party denies that it was such and both refer to step four as arbitration in their briefs, as the arbitrator refers to himself in his award entered on April 17, 2001.

Because the grievances could not be resolved by any other means as set forth in the collective bargaining agreement, the grievances were submitted to arbitration and a hearing was held on March 20, 2001. The arbitrator[8] issued his opinion and award on April 17, 2001, sustaining the grievances and awarding the jobs in question to Stewart, Brigmon, and Johnson. The arbitrator stated that, while the first letter of understanding in fact gave the school board the right to contract out certain work, the second letter of understanding applied to filling vacancies and that was the portion of the agreement that was violated by the school board. In reviewing the second letter of understanding, the arbitrator determined that the Superintendent had, by agreeing to this letter, committed to give due regard to seniority and upon doing so gave up his right to choose between those equally qualified, if one had more seniority. The arbitrator found no evidence that such considerations were even given to the current employee applicants before the Superintendent made his decision and, thus, found that the Superintendent arbitrarily violated the collective bargaining agreement and the second letter of understanding.

The school board filed a request for reconsideration on May 4, 2001, upon which the arbitrator reviewed his decision and considered again the second letter of understanding and

[8] The parties selected Bernard H. Cantor to arbitrate the dispute.

ultimately denied the school board's request on May 10, 2001. In support thereof, the arbitrator stated as follows:

> The letter will be treated as effective as written. The School Board considered that paper to give the Superintendent some last word. On rereading these documents, it is clear that the Superintendent was not given a free ticket to be the last word. The letter of July 18, 2000 very clearly says, and again repeating the language that in filling new job postings, which they were, the Superintendent had to "give due regard for seniority" on the one hand and that "all qualifications being equally reasonable," that is amongst those applying for the particular job. Then, in that case if there was a tie on all these qualities, the Superintendent would have the final decision, not otherwise.
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> . . .
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> The Arbitrator finds that these qualifications of the applicants had not been reviewed nor compared with any other bidders. As a matter of fact, the grievants were rejected and we find that new people who were not regular members of the workforce and had not bid on the postings were put in the jobs. Thereby, the Superintendent became arbitrary as to who took the job without regard to any relationships to the other applicants or bidding on the jobs posted. Neither the contract nor the letter were recognized.

The arbitrator supplemented his previous award by stating that Stewart, Brigmon, and Johnson should receive the pay and benefits for 240 days of work on the basis of the jobs for which they had bid.

After the school board refused to comply with the arbitrator's decision, the UMWA filed a complaint in the Harlan Circuit Court on March 26, 2002, to enforce the arbitrator's decision.[9] The UMWA filed its motion for summary judgment on April 14, 2004, and the school board filed a cross-motion for summary judgment on August 4, 2004. The circuit court granted the UMWA's motion for summary judgment on September 2, 2004. This appeal followed.

In United Paperworkers International Union, AFL-CIO v. Misco, Inc.,[10] the United States Supreme Court addressed general principles of law concerning the judicial review of an arbitrator's decision. The Court stated:

> The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower

[9] At this point, Stewart and Brigmon had released their claims against the school board because the Superintendent had voluntarily placed them in the position of employment for which they had filed grievances, leaving only an award to be paid to Johnson. Johnson had been paid a portion of the award, but according to the UMWA she was still owed $9,912.36 under the award.

[10] 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

> courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them.

Noting that "the courts play only a limited role when asked to review the decision of an arbitrator[,]" the Supreme Court also stated that "[t]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."[11] Further, the Court noted that courts in general "have no business weighing the merits of the grievance, considering whether there is equity in a particular claim."[12]

Resolving disputes through arbitration is favored in this Commonwealth,[13] and Kentucky courts have similarly analyzed this issue. In Smith v. Hillerich & Bradsby Co.,[14] the former Court of Appeals stated the general approach to this issue as follows:

> The law favors and encourages the settlement of controversies by arbitration, and arbitrators are not expected or required to follow the strict rules of law, it being sufficient that they have due regard for natural justice. If the parties wanted exact justice administered according to the

[11] United Paperworkers, 484 U.S. at 36.

[12] Id. at 37 (citing Steelworkers v. American Manufacturing Co., 363 U.S. 564, 567-68, 80 S.Ct. 1343, 1346, 4 L.Ed.2d 1403 (1960)).

[13] First Baptist Church v. Hall, 246 S.W.2d 464, 465 (Ky. 1952).

[14] 253 S.W.2d 629 (Ky. 1952).

> forms of law they should not have agreed to substitute a private forum for a court of law [citations omitted].[15]

Further, the Court stated that an arbitrator's award may not be set aside "for mere errors of law or of fact. . . . There must be a gross mistake of law or of fact constituting evidence of misconduct amounting to fraud or undue partiality in order to impeach an award, and before a court can set aside an award, the evidence supporting the grounds of impeachment must be clear and strong" [citations omitted].[16]

In Taylor v. Fitz Coal Co., Inc.,[17] our Supreme Court described the limited scope of review by a court of an arbitrator's award as follows:

> "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation [citations omitted]."[18]

In the case before us, the school board argues that the circuit court erred in granting summary judgment to the UMWA

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[15] Id. at 630.

[16] Smith, 253 S.W.2d at 630.

[17] 618 S.W.2d 432 (Ky. 1981) (quoting Burchell v. March, 58 U.S. 344, 349, 15 L.Ed. 96 (1855)).

[18] Taylor, 618 S.W.2d at 433.

because it ignored the applicable law and the terms of the collective bargaining agreement, which did not give the arbitrator the power to rule on the Superintendent's decisions regarding filling vacancies. In support of this argument, the school board states that the second letter of understanding gave the Superintendent the final decision on filling a vacancy for a new position, which is in accordance with both Kentucky statutory law,[19] and case law.[20] Regardless, the school board argues, the statutory authority granting Superintendents discretion would supersede any contrary language of the collective bargaining agreement and that the Superintendent would be statutorily barred from having any authority less than sole discretion in selecting the candidates for these new positions. In connection with this argument, the school board asserts that the arbitrator made gross mistakes of fact in finding that the Superintendent was not the ultimate decision maker in whether to hire the current employees for the newly-created jobs. We disagree.

"When one accepts employment under the collective agreement, he thereby ratifies and accepts its terms, and his rights and his employer's rights are to be measured and adjudged

[19] Kentucky Revised Statutes (KRS) 160.380(2)(a).

[20] Reed v. Greene, 243 S.W.2d 892, 893 (Ky. 1951).

by that contract."[21] Thus, our Supreme Court has recognized that a collective bargaining agreement controls the rights of all parties to the agreement. Further, contrary to the school board's arguments, the collective bargaining agreement and the second letter of understanding do not usurp any of the school board's rights given under KRS 160.380(2)(a). The agreements do not take away the Superintendent's discretion in recommending employees to fill vacancies, but rather states that he has voluntarily put conditions on these rights by giving due regard to seniority of current employees when filling the vacancies. We know of no law prohibiting such conditions.

Finally, the school board argues that it was the sole responsibility of the arbitrator to determine that the school board had acted arbitrarily or maliciously before taking any action, and because it did not, the arbitrator exceeded the scope of his duty under the collective bargaining agreement. Further, it argues that there is no proof that the three current employees were not considered and all were ultimately offered jobs "commensurable" with the new job postings. The school board's reliance on International Brotherhood of Firemen and Oilers, Local 320 v. Board of Education of Jefferson County,[22] in support of this argument is misplaced. In International

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[21] Bridge v. F. H. McGraw & Co., 302 S.W.2d 109, 112 (Ky. 1957).

[22] 393 S.W.2d 793 (Ky. 1965).

Brotherhood, the school board had established a grievance procedure and the court held that there was no agreed-to provision allowing employees to be represented by third persons during grievance meetings, and therefore the employees had no such rights.[23] The case before us is distinguishable because the act of the arbitrator which the school board disputes is his making the Superintendent honor the portion of the second letter of understanding which was agreed to by both parties.

The arbitrator did not fail to give due consideration to the second letter of understanding dated July 18, 2000. Rather, the arbitrator found that that letter of understanding specifically provided the Superintendent must give due regard to seniority in filling the new positions. The arbitrator further concluded that the qualifications of Stewart, Brigmon, and Johnson had not been reviewed nor had they been compared with the qualifications of any other applicants. In fact, the Superintendent chose to hire for the newly-created positions individuals who were not members of the current work force and who did not bid on the jobs. The arbitrator concluded that the Superintendent's decision to hire persons "off the street" was arbitrary and therefore the school board had ignored the collective bargaining agreement as well as the letters of understanding.

[23] International Brotherhood, 393 S.W.2d at 795.

We agree with the trial court that the arbitrator did not err in these factual determinations, and even if he did, no gross mistake of law or fact was committed by the arbitrator that would constitute evidence of misconduct. Our Supreme Court in Carrs Fork Corp. v. Kodak Mining Co.,[24] referred to the common dictionary definition of "gross" as "immediately obvious or glaringly noticeable." No such error occurred in this case. As noted previously, "an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them."[25] Further, because there is no proof of fraud or mistake, we shall construe the "applicable law liberally" to uphold the arbitrator's award herein.[26] The circuit court properly awarded summary judgment to the UMWA.

Accordingly, the judgment of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnnie L. Turner
Susan Turner Landis
Harlan, Kentucky

BRIEF FOR APPELLEE:

James R. Hampton
Hazard, Kentucky

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[24] 809 S.W.2d 699, 701 (Ky. 1991).

[25] United Paperworkers, 484 U.S. at 38.

[26] General Exchange Ins. Corp. v. Harmon, 288 Ky. 624, 157 S.W.2d 126, 127 (1941).