The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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COLLATERAL ESTOPPEL AND "EXCEEDED POWERS"

AMERICAN POSTAL WORKERS UNION, ALF-CIO v. UNITED STATES POSTAL SERVICE 2014 WL 2535249 (2nd Cir. June 6, 2014)

"Exceeded powers" is the most frequently asserted and the most frequently successful vacatur ground authorized by the Federal Arbitration Act.[2] In *American Postal Workers Union, AFL-CIO v. United States Postal Service ("American Postal Workers")* the Second Circuit applied its existing "exceeded powers" vacatur test to an arbitrator's application of collateral estoppel or issue preclusion to bar recovery to a union member claimant in a collective bargaining agreement ("CBA") arbitration.[3]

The postal worker filed a federal worker's compensation claim in 1986, was reassigned to limited-duty in 2007, and in 2008 was placed on "leave-without-pay/injured-on-duty status."[4] The postal worker then filed a grievance pursuant to the applicable CBA that resulted in an arbitration of the employment action. Approximately three months later she filed an appeal to the Merit Systems Protection Board ("MSPB") arising out of the employment action and its relation to her worker's compensation claim.[5] The Administrative Law Judge in the MSPB proceeding acted first and determined that the worker had been properly terminated dismissing her claim. Her grievance proceeding was then heard and the arbitrator decided that the worker's claim was barred by the collateral estoppel effect of the MSPB ALJ's decision. The district court vacated the arbitrator's

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] 9 U.S.C. §10(a)(4); *see* Mills, Bader, Brewer, and Williams, "Vacating Arbitration Awards," *Dispute Resolution Journal* (Summer 2005); *see* Thomas J. Brewer et al., *When Arbitrators "Exceed Their Powers" – A New Study of Vacated Arbitration Awards*, DISPUTE RESOL. J., Vol. 64, no. 1, February-April 2009.

[3] 2014 WL 2535249, *1 ("We hold that the arbitrator's decision to apply collateral estoppel—which was based on his interpretation of particular provisions of the arbitration agreement, and is within an arbitrator's authority to decide under a broad arbitration agreement—did not exceed his powers under the arbitration agreement as would be required to justify vacating the award.").

[4] *Id.*

[5] Postal workers are permitted to pursue both a collective bargaining agreement arbitration related to an employment action and a "MSPB" appeal of a worker's compensation alleged violation. 2014 WL 2535249, *1.

award explaining that the arbitrator "exceeded his powers" because the CBA's arbitration clause did not give the arbitrator the right to apply the doctrine of collateral estoppel.[6]

The Second Circuit reversed the district court and remanded with instructions to confirm the arbitral award.[7] The Court explained that whether the arbitrator had the authority under the CBA to apply collateral estoppel to bar the worker's claim was "a legal one, reviewed *de novo* on appeal."[8] And the Second Circuit's test for whether an arbitrator had exceeded his or her powers is a question of "whether the arbitrator's award draws its essence from the collective bargaining agreement."[9] Citing *Oxford Health Plans v. Sutter*,[10] the Second Circuit explained that "draws its essence" describes what the arbitrator does with the parties' agreement, as the source of the arbitrator's "delegated authority."[11] Did the arbitrator "even arguably" construe the parties' agreement? If so, then the award has drawn its essence from the parties' agreement and "an error—or even a serious error" by the arbitrator in the interpretation or construction of the parties' agreement is not enough to warrant vacatur based on 9 U.S.C. §10(a)(4).

In this case the arbitrator construed the CBA's express reference to *res judicata* in circumstances where a grievance and an appeal, as in this case, were pending at the same time, to mean that the arbitrator had the power to recognize and apply collateral estoppel.[12] The fact that the parties' agreement expressly precluded the application of *res judicata* to similar situations for workers who were veterans - the worker in this case was not a veteran – suggested to the arbitrator that the parties knew about *res judicata* at the time of the CBA formation but only prohibited its application for veterans who were postal workers. The *res judicata* doctrine was recognized by the parties in the CBA and, therefore, the arbitrator decided that its application was permitted in this case.[13]

Quoting *Stolt-Nielson S.A. v. AnimalFeeds International Corp.*, the Second Circuit said the issue whether the arbitrator in this case had exceeded his powers was decided by the arbitrator having interpreted the parties' agreement (with a contractual basis stated) rather than the arbitrator having provided no explanation of the contractual basis for the arbitrator's decision.[14]

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[6] 2014 WL 2535249, *3 ("The District Court concluded that Arbitrator Kelly improperly "relied on the free-floating principle of collateral estoppel to use the MSPB decision to preclude LaGreca from recovering in her grievance under the [CBA] ... without any contractual basis.").

[7] 2014 WL 2535249, *4.

[8] 2014 WL 2535249, *3.

[9] 20 14 WL 2535249, *3 (citing *St. Mary Home, Inc. v. Serv. Emps. Int'l Union, Dist. 1199,* 116 F.3d 41, 44 (2d Cir.1997) (internal quotation marks and citations omitted).

[10] --U.S.--, 133 S.Ct. 2064, 2068, 186 L.Ed.2d 113 (2013).

[11] 2014 WL 2535249, *3.

[12] 2014 WL 2535249, *1 fn1 (Citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) for an explanation of "the doctrine of collateral estoppel, also known as issue preclusion.").

[13] 2014 WL 2535249, *2.

[14] 2014 WL 2535249, *3 (Explaining the difference between *Oxford Health Plan* and *Stolt-Nielson* as the arbitrator in the former interpreted the parties' agreement –whether right or wrong in the eyes of the court–and the arbitrator in the latter could not because the parties stipulated they had no agreement about class arbitration.).

OBSERVATIONS

1. The Fifth Circuit also has permitted the application of *res judicata* and collateral estoppel in arbitrations.[15]

2. The parties' arbitration agreement should be carefully reviewed for any direction to the arbitrator about the applicability of *res judicata* in the arbitration in question.

3. Arbitrators have to become and stay informed about the parties' arbitration agreement so as to act within the powers granted the arbitrator by the parties.

4. A written confirmation or record should be made when parties choose, as often happens during an arbitration, to modify their existing arbitration agreement.

5. Unrealistic time deadlines are often written into pre-dispute arbitration agreements that should be carefully considered and discussed with the parties early in the arbitration process.

6. Arbitrators should observe fully the deadlines stated in the parties' arbitration agreement and the deadlines created by the parties' adoption of arbitration rules that contain deadlines.

7. One of the most often ignored deadlines by arbitrators is any time limit created by the parties' agreement or applicable rules for the issuance of the final award.

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[15] *See Local 1351Intern. Longshoremens Ass'n v. Sea-Land Serv. Inc., Carriers' Container Council,* 214 F.3d 566, 572 (5th Cir.2000); *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1135 (5th Cir.1992); *Miller Brewing Co. v. Fort Worth Distributing Co., Inc.*, 781 F.2d 494, 498 (5th Cir.1986).