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BARRY BRIDGES

The case pitted the police union against the town of North Providence over the delayed filling of a vacant detective's position.

Justices: arbitrator's read of CBA nets 'irrational' result

Dispute centers on delayed promotion

By Barry Bridges
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A majority of the Rhode Island Supreme Court has concluded that an arbitrator's decision favoring a police union in its dispute with the town of North Providence over the delayed filling of a vacant position had no basis in the parties' collective bargaining agreement and delivered a "completely irrational" result.

The defendant union, the Fraternal Order of Police, Lodge 13, complained that the town did not honor the CBA when it took months to appoint Officer Matthew Phelan to an open detective position when it became available.

Central to the grievance was a section in the parties' CBA stating that the town would fill detective vacancies within 45 days from the date that vacancy was "recognized" by the town.

The union equated "recognized" with the vacancy being "created," in this case through a detective's retirement. But the

Continued on page 12

Plea agreement's appeal waiver ruled enforceable

Defendant claimed 'ineffective counsel'

By Eric T. Berkman
Lawyers Weekly Correspondent

The 1st U.S. Circuit Court of Appeals has ruled that a waiver of appeal in a criminal defendant's plea agreement precluded his attempt to appeal the case based on ineffective assistance of counsel at the pleading and sentencing stage.

Defendant David Staveley pleaded guilty to charges of conspiracy to commit bank fraud and failure to appear in court after fraudulently seeking hundreds of thousands of dollars in pandemic relief loans for small businesses and then, while released to home confinement, attempting to flee, leading authorities on a multi-state pursuit.

Appealing his 56-month sentence, Staveley argued for the first time that his guilty plea was unknowing and involuntary due to his then-counsel's failure to properly advise him about the waiver or to develop evidence he believed would mitigate his sentence.

But the 1st Circuit panel disagreed, affirming his conviction under the court's 1993 decision in *United States v. Mala*, which states that a defendant cannot make a "fact-specific" assertion

of ineffective assistance of counsel for the first time on appeal where the record is insufficiently developed to allow reasoned consideration of the claim.

"Simply put, the connective tissue necessary to make out the defendant's ineffective assistance of counsel claim concerning his plea lies well outside the record on appeal," Judge Bruce M. Selya wrote. "That means, of course, that we cannot proceed to find the waiver of appeal unenforceable on this ground."

The panel similarly rejected the defendant's assertion that enforcement of the waiver would constitute a miscarriage of justice, again finding the record insufficiently developed to make such a determination.

Still, the 1st Circuit dismissed Staveley's appeal without prejudice, inviting him to bring his ineffective assistance claims at the District Court level in a collateral proceeding.

The 23-page decision is *United States v. Staveley*, Lawyers Weekly No. 01-163-22. The full text of the ruling can be found at rilawyersweekly.com.

Staveley's appellate counsel, Kara Hoopis Manosh of Providence, declined to comment. The U.S. Attorney's Office, which handled the prosecution, did not respond to a request for an interview.

Continued on page 13

Lawyer confident in progress from 'civics education' effort

By Barry Bridges
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Although not securing the desired courtroom victory, the lead attorney for the Rhode Island student plaintiffs who sought to establish a federal constitutional right to a civics education says the settlement that brought an end to the litigation will translate into better civics instruction in the state's schools.

The students asked the court in their putative class action to declare that they have a constitutional right to an education that will "prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social and political systems sufficiently to make informed choices, and to participate effectively in civic activities."

But while applauding the plaintiffs' initiative at a time when "American democracy is in peril," U.S. District Court Judge William E. Smith felt constrained to dismiss *Cook v. McKee* as the U.S. Supreme Court declared 50 years ago that education is not a fundamental right under the federal Constitution. The 1st U.S. Circuit Court of Appeals affirmed earlier this year.

The lead counsel for the plaintiffs, Michael Rebell, executive director of the Center for Educational Equity at Columbia University's Teachers College, then set about preparing a petition for writ of certiorari to the U.S. Supreme Court.

But in June, Rebell and the Rhode Island Department of Education announced a resolution of the suit through an agreement establishing a

"civic readiness task force" to advise the state on how best to prepare its students for engaged citizenship. Its members will study issues such as media literacy; how to support students in having "respectful conversations on controversial issues with individuals having views different from their own"; and how best to implement a civics diploma seal for high school graduates.

As the task force prepares to launch its work next month, Rebell chatted with Lawyers Weekly on the trajectory of the lawsuit and on the settlement that he views as a win for students and a possible model for how other states can prioritize civics education.

Q. What was the impetus behind filing the lawsuit?



MICHAEL REBELL

A. After researching the question on sabbatical several years ago, I concluded that there has been a decline in the last 50 or 60 years in teaching kids in this country

Continued on page 14

IMPORTANT OPINIONS OF THE WEEK

Corporate | Demand futility

A plaintiff's stockholder derivative complaint should be dismissed in light of the plaintiff's failure to demonstrate, through particularized factual allegations, demand futility as required by Rule 23.1 of the Superior Court Rules of Civil Procedure, a Superior Court judge decides. **page 5**

Criminal | Sentence

A defendant's sentence for racketeering should be vacated because the sentencing court procedurally erred by basing the sentence on several unadjudicated administrative complaints filed against the defendant during his career as a police officer, the 1st U.S. Circuit Court of Appeals holds. **page 6**

Labor | Duty to bargain

The Department of Corrections had no duty to bargain with a union before unilaterally changing its absenteeism policy, as the changes to the policy did not amount to "substantial or material changes" that required the DOC to negotiate with the union, a Superior Court judge determines. **page 16**

Arbitrator's read of CBA found to net 'irrational' result

Continued from page 1

town maintained that since it had done nothing to "recognize" the opening, it was not bound by the 45-day parameter.

An arbitrator sided with the union and awarded Phelan back pay and benefits, concluding that the town ran against the CBA by delaying the appointment for several months while pondering the need for the position during budget deliberations.

A Superior Court judge upheld the arbitrator's interpretation, finding his reading to be a plausible one.

But the Supreme Court disagreed.

"[T]his provision plainly requires some affirmative action by the town to recognize the vacancy for purposes of filling the vacancy pursuant to that provision. Mere notice of the creation of a vacancy by the retirement of a detective was not enough under the terms of the CBA," Justice Melissa A. Long wrote for the court's majority in vacating the lower judgment.

The court also observed that the parties' agreement gave the town the authority to set its staffing levels and to decide whether a vacancy would be "recognized."



"The arbitrator didn't merely misconstrue the CBA, but he also undermined the

town's discretion, ignored clear-cut language, and assigned to the word 'recognize' a meaning other than that which was plainly expressed."

— Vincent F. Ragosta Jr., Providence

Thus, the arbitrator also "contravened the essence of the CBA by 'manifest[ly] disregard[ing] relevant provisions ... relating to the town's managerial prerogatives," Long added.

Justice William P. Robinson III "vehemently dissent[ed]," emphasizing the court's "exceptionally deferential" standard of review in labor arbitration matters.

The 21-page decision is *Town of North Providence v. Fraternal Order of Police, Lodge 13*, Lawyers Weekly No. 60-062-22. The full text of the ruling can be found at rilawyersweekly.com.

'Defied common sense'

Vincent F. Ragosta Jr., who represented the town in the litigation, used the adage "words matter" to summarize the appeal.

"To most of us, different words mean different things," Ragosta said. "But according to the arbitrator whose award underlay this case, the different words

Town of North Providence v. Fraternal Order of Police, Lodge 13

THE ISSUE Considering that a collective bargaining agreement required a town to fill an open detective position within 45 days from the date the vacancy was "recognized," did an arbitrator lack a basis to award retroactive pay and benefits to a police officer who was not elevated within 45 days of the vacancy's "creation"?

DECISION Yes, the arbitrator's ruling contravened the plain language of the CBA and further deprived the town of its reserved managerial discretion over staffing decisions (Rhode Island Supreme Court)

LAWYERS Vincent F. Ragosta Jr. of Providence (plaintiff)
Edward C. Roy Jr. of North Kingstown (defense)

'created' and 'recognized' meant the same thing, which is a conclusion that exceeded his powers, defied common sense, and produced a completely irrational result that the Supreme Court reversed."

Although the CBA did not provide the town control over when a vacancy is created, Ragosta pointed out that it did provide it with discretion to decide when and whether to recognize a vacancy, thereby triggering its obligation to fill it.

"The arbitrator didn't merely misconstrue the CBA, but he also undermined the town's discretion, ignored clear-cut language, and assigned to the word 'recognize' a meaning other than that which was plainly expressed," Ragosta said.

Ragosta said the Supreme Court's analysis offers a few pointers for public sector labor attorneys, who should "value the court's recognition of inherent, indispensable managerial rights of a public employer to design and structure its units of government and to control general staffing decisions."

The Providence attorney said the ruling is also instructive both for public employers and unions by "upholding the axiomatic non-delegable prerogative of an employer to determine where and when to fill vacancies."

The union's attorney, Edward C. Roy Jr. of North Kingstown, characterized the decision as a narrow one, calling the disputed language an "outlier" among police CBAs in Rhode Island.

"No other CBA gives a municipality the ability to control promotions in the manner that North Providence advocates for," Roy said. "In any police department, promotions are critically important because the process incentivizes members to improve themselves. Allowing management such strict control acts as a disincentive to seeking a promotion." Nevertheless, he said, the Supreme Court has the final word on the subject.

Delayed appointment

When Detective Scott Godin retired from the North Providence Police Department in February 2017, Phelan was

next in line for the position. But Phelan's appointment was delayed until December while the town considered eliminating a detective position during budget talks.

Relying on the collective bargaining agreement's specification that a detective vacancy is to be filled within 45 days from the date that vacancy is "recognized," the police union filed a grievance to the effect that Phelan should have been elevated to the position on March 21, 2017, 45 days after Godin's retirement created the vacancy. The union sought retroactive compensation and time-in-grade for Phelan.

The town countered that the 45-day clock did not begin running until it acted to "recognize" the vacancy, further asserting that the town enjoyed the prerogative under the CBA's management rights provision to determine the size and structure of its police force.

The arbitrator found in favor of the union, consulting dictionary definitions to conclude that the town "recognized" the vacancy when it received notice of its creation. Further, he viewed the 45-day provision as one that "limited, abridged or relinquished" the town's managerial rights. In his estimation, the town therefore violated the CBA by failing to appoint the grievant to his new position by March 21.

A Superior Court judge confirmed the award, and the town appealed to the Supreme Court, arguing that the arbitrator exceeded his authority in ignoring the agreement's plain language.

'Manifest disregard' of CBA

Although giving a nod to the strong public policy favoring the finality of arbitration awards, the majority could not abide the decision below.

According to the court, the arbitrator's interpretation of the 45-day provision relied on "decades-old definitions of the word 'recognize' to nullify the distinction between 'creation' and 'recognition' of a vacancy."

Furthermore, Long explained that

such an interpretation gave short shrift to the managerial discretion afforded the town under the parties' agreement.

"The arbitrator's decision upends the presumption of managerial prerogative contained in the management-rights provision of the CBA, in favor of a presumption that the town must fill a vacancy within forty-five days of its creation, regardless of the town's ability to control how and when a vacancy is created," Long wrote. "The arbitrator's 'manifest disregard' of these relevant provisions of the CBA produced an interpretation of the CBA that contravenes its essence, which places a presumption in favor of the managerial prerogative of the town to direct its employees in their capacities as public safety officers."

Viewed in his entirety, Long continued, the CBA established that the town retained the authority to make day-to-day staffing decisions and to otherwise "direct employees in the performance of official duties," "maintain the efficiency of the operations entrusted to it," and "exercise any and all rights and authority granted to the town as an employer by statute, ordinance and applicable regulations."

The arbitrator's "manifest disregard" of those management provisions — in addition to his reading of the 45-day provision in a way that brought "completely irrational results" — prompted the court to vacate the award and remand for further proceedings.



"No other CBA gives a municipality the ability to control promotions in the

manner that North Providence advocates for. Allowing management such strict control acts as a disincentive to seeking a promotion."

— Edward C. Roy Jr., North Kingstown

In his dissent, Robinson countered that "while [the arbitrator] may not have reached the same conclusions about the meaning of the term 'recognize' and its relationship with other sections of the contract (particularly those which the majority characterizes as relating to 'the town's managerial prerogatives') as the majority would have reached, his conclusion was, to my mind, at the very least 'passably plausible' and drew its essence from the contract itself." **RILW**

