IN THE SUPREME COURT OF THE STATE OF NEVADA

NYE COUNTY AND NYE COUNTY SHERIFF'S DEPARTMENT,
Appellants,
vs.
DEAN PENNOCK,
Respondent.

No. 41017

FILED

MAY 04 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order vacating an arbitration award. The appellants, Nye County and Nye County Sheriff's Department, disciplined respondent Dean Pennock on two separate occasions. Pennock received and served an eighty-hour suspension for the first incident, but the appellants determined that the second incident warranted Pennock's termination. Pennock filed two separate petitions for judicial review in district court. The district court deferred decisions on the petitions and remanded them for arbitration. Pennock did not seek our review of this decision. The parties agreed that the arbitrator had de novo authority to review the County's disciplinary decision for the first incident. The arbitrator determined that the second incident did not justify Pennock's termination, but the first one did, and affirmed the County's termination decision. The district court concluded that notwithstanding the parties' agreement for a de novo review, the arbitrator exceeded his authority in increasing the punishment for the first incident. The district court then vacated the arbitration award.

On appeal, Nye County and Nye County Sheriff's Department contend that the district court erred in vacating the arbitrator's determination. Without cross-appealing, Pennock raises the issue that the

de novo review agreement was invalid because the person who signed the stipulation on Pennock's behalf had no authority to bind him.

FACTS

Pennock worked as a deputy sheriff at the Nye County Sheriff's Department. Nye County and the Nye County Law Enforcement Association (the Association) had signed two collective bargaining agreements dated July 1, 1994--June 30, 1998 (the 1994 Agreement) and July 1, 1998--June 30, 1999 (the 1998 Agreement). Both agreements contained grievance procedures for challenging disciplinary actions imposed upon employees who were Association members.

On July 9, 1998, Sheriff Wade A. Lieseke, Jr., the final decision maker under the 1994 Agreement, disciplined Pennock for disobeying a superior's order. The grounds for discipline arose when a citizen asked Pennock to escort him to a residence in violation of a temporary protective order (the TPO). Pennock sought the opinion of several senior officers on the matter and they advised him against accompanying the citizen. Despite his superiors' advice, Pennock escorted the citizen to the said premises and observed the citizen remove personal property. As a result, Pennock received an eighty-hour suspension without pay. Pennock disputed the eighty-hour penalty according to the 1994 Agreement procedures and lost his appeal. Dissatisfied, Pennock filed a petition for judicial review in the district court.

The second disciplinary action stemmed from an incident which occurred in November 1998 (the electioneering). Pennock appeared at a polling place with his wife and daughter so his wife could vote. Pennock's daughter was wearing a campaign T-shirt promoting the election of the Sheriff's election opponent. Because signs around the

polling place advised voters that electioneering within 100 feet of a polling place was unlawful, the polling officials asked Pennock to cover his daughter's shirt or leave the area. Pennock allegedly responded curtly and demonstratively left after making a number of political comments about removing the present Sheriff. On June 2, 1999, Pennock received notification of termination by the final decision maker under the 1998 Agreement. Pennock contested the termination, but did not request an arbitration pursuant to the 1998 Agreement. Instead, on July 1, 1999, Pennock filed another petition for judicial review in the district court challenging the County's disciplinary action.

On June 30, 2000, the district court sent both disputes to arbitration. The parties selected R. Paul Sorenson to act as a neutral arbitrator and submitted the following issues: (1) did the County have just cause to terminate Pennock in the electioneering matter; and if not, what is the appropriate remedy; and (2) did the County have just cause to suspend Pennock for sixteen hours for failure to "call out" in the TPO matter?[1]

In an affidavit, Peter L. Knight, Deputy District Attorney for Nye County, stated that John J. Graves, Pennock's counsel, and he discussed the arbitrator's standard of review prior to arbitration. Graves allegedly indicated to Knight that he believed the arbitration was a "'de novo' review of the matter which meant that the arbitrator had the right

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[1]The failure to "call out" refers to Pennock's failure to announce his arrival at the residence where he escorted the citizen in the TPO incident. The sixteen-hour penalty was a part of the original eighty-hour suspension that Pennock received. It appears that is the only part of the discipline Pennock challenged during arbitration.

to review all evidence and reach his own conclusions." Knight's affidavit further explained that "[i]n reviewing the collective bargaining agreement, [Knight] saw nothing which suggested otherwise and it appeared a reasonable interpretation to [him]."

The two-day arbitration occurred on June 6-7, 2001. Prior to arbitration, the parties allegedly informed the arbitrator of their de novo review agreement. Because almost a year passed between the arbitration proceeding and the arbitrator's final decision, the arbitrator wanted to confirm the scope of his review before announcing the decision. On April 26, 2002, he wrote a letter to the parties, indicating that he was uncertain about his scope of authority regarding the TPO incident. The arbitrator asked the parties to "address within ten days whether or not the suspension meted out for that breach is considered the final punishment for that act. If not, please address the authority you believe I possess to enter a de novo punishment for that action."

Between May 2, 2002, and May 14, 2002, Graves declared that he had a conflict of interest and withdrew from Pennock's representation. On May 14, 2002, Sergeant Edwin Howard, purportedly acting on behalf of the Association and Pennock, entered into a stipulation with Knight. The stipulation provided that "[a]rbitrator Paul Sorenson had complete authority to give consideration to the finalization of his decision in this matter on a de novo basis pursuant to the employee's handbook and the status of the file herein."

On May 16, 2002, the arbitrator issued his decision. The arbitrator opined that he had authority to rule on the matter de novo and therefore had complete power to consider the matter without deferring to prior decisions or findings. The arbitrator determined that Pennock did

not violate the election law or a law enforcement officer's duty in the electioneering matter. However, the arbitrator concluded that Pennock's conduct in the TPO matter "rose to the highest level of misconduct that a law enforcement officer can engage in without violating criminal law." The arbitrator then affirmed Pennock's termination because the TPO incident demonstrated that Pennock lacked the necessary criteria to maintain a law enforcement position.

On August 14, 2002, Pennock filed a complaint in district court seeking to set aside the arbitrator's determination. Concluding that the arbitrator exceeded his authority, the district court vacated the arbitration award and remanded the disciplinary actions to a new arbitrator. The district court reasoned as follows:

> [N]otwithstanding the parties agreed prior to the arbitration hearing that the arbitrator's standard of review would be de novo, . . . the arbitrator did not have the authority to increase the discipline imposed by the final decision maker under the relevant collective bargaining agreements between the Nye County Law Enforcement Association and Nye County.

This appeal followed.

DISCUSSION

Howard's authority

Without cross-appealing, Pennock argues that the district court properly vacated the arbitrator's award because neither Howard nor the Association had authority to bind Pennock. We conclude that Pennock's argument lacks merit, but nevertheless address this issue because it bears on the validity of the stipulation for de novo review.

Apparent authority pertains to circumstances where a principal holds his agent out as possessing authority to represent the

principal.[2] "A party claiming apparent authority of an agent . . . must prove (1) that he subjectively believed that the agent had authority to act for the principal and (2) that his subjective belief in the agent's authority was objectively reasonable."[3]

Pennock contends that Howard had no authority to bind him because at the time Howard signed the stipulation, Howard was not an officer of the Association and had no power to act on the Association's behalf. In a declaration, Howard confirmed Pennock's contentions. Howard also stated that he understood the phrase "de novo" to mean that the arbitrator would only have the authority to review the entire case, but it did not give the arbitrator the right to increase the punishment the County imposed.

Pennock further maintains that even if Howard represented the Association, the Association had no authority to act on Pennock's behalf because Pennock was not a member of the Association at the time of stipulation. Allegedly, John Graves represented Pennock as Pennock's personal attorney. During his Association affiliation, Pennock paid monthly dues to the Fraternal Order of Police (FOP) in order to obtain "legal insurance" wherein FOP paid for private counsel for him and other FOP members. Pennock declared that his attorney, John Graves, received

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[2]Topaz Mutual Co. v. Marsh, 108 Nev. 845, 864, 839 P.2d 606, 619 (1992).

[3]Great American Ins. v. General Builders, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997).

compensation from FOP, not from the Association, and therefore Graves acted as Pennock's private attorney and not on the Association's behalf.

We find Pennock's arguments unpersuasive. To begin, the parties already litigated the authority issue before the district court and the court examined evidence on the matter. As set forth above, Peter L. Knight, Deputy District Attorney for Nye County, stated in an affidavit that he and Graves discussed the arbitrator's standard of review before Graves withdrew from Pennock's representation. Graves had indicated to Knight that he believed the arbitration was a "'de novo' review of the matter which meant that the arbitrator had the right to review all evidence and reach his own conclusions." Knight's affidavit further explained that "[i]n reviewing the collective bargaining agreement, [Knight] saw nothing which suggested otherwise and it appeared a reasonable interpretation to [him]." In light of Knight's affidavit, Howard's lack of authority to bind Pennock is irrelevant. Pennock does not allege that Graves had no authority to bind him in the arbitration dispute. On the contrary, Pennock maintains that Graves was his personal attorney. Absent a showing that Graves lacked authority to act on Pennock's behalf, Graves' actions sufficiently support the district court's determination that the parties agreed to a de novo review.

Even if Graves did not agree to a de novo review, there is ample evidence to justify the district court's finding on apparent authority grounds. In December 1999, Howard signed a sworn affidavit stating that he was the Association's President and that

> under the Contract language of Article 28(E), Mr. Graves' request for Arbitration for Dean [Pennock] is the same as if it were the Association asking for Arbitration for Dean [Pennock], inasmuch as Mr.

> Graves works for individual members of the Association, through the Association.

After Graves' withdrawal, the arbitrator informed Knight that Graves no longer represented Pennock, but it was the arbitrator's belief that "the union had assumed representation of Mr. Pennock." At the arbitrator's request, Knight set up a telephone conference with Howard's participation to clarify the arbitrator's scope of review. Allegedly, Howard was happy to participate in the conference and at no point informed Knight that he lacked authority to sign on behalf of the Association. Howard also never indicated that Knight should contact Pennock directly or identified other legal counsel as Pennock's representative. On the contrary, Howard allegedly indicated that he appeared on Pennock's behalf. Shortly after the conference, the arbitrator asked Knight to prepare the stipulation, which Howard signed.

In another affidavit, Thomas Beko, appellants' trial and appellate counsel, stated that Graves advised him of the de novo review agreement between Knight and Graves. Beko also explained that he did not question Howard's representation of Pennock because Howard had previously acted on behalf of other union members. We conclude that Howard's behavior led the appellants to subjectively and reasonably believe that Howard had authority to act on Pennock's behalf. There is no evidence that the appellants knew or had any reason to know that Howard was no longer the Association's President. Based on Howard's 1999 affidavit and the dealings between the parties, the appellants properly assumed that Howard had authority to represent the Association and Pennock. If Pennock was representing himself, he should have clarified that to the appellants. Absent such clarification, Pennock may not allege

that the stipulation Howard signed is invalid, but should seek recourse against Howard.

Pennock's reliance on NRS 288.140(2) and Cone v. Nevada Service Employees Union[4] is inapposite. NRS 288.140(2) provides as follows:

> The recognition of an employee organization for negotiation, pursuant to this chapter, does not preclude any local government employee who is not a member of that employee organization from acting for himself with respect to any condition of his employment, but any action taken on a request or in adjustment of a grievance shall be consistent with the terms of an applicable negotiated agreement, if any.

In pertinent part, Cone stands for the proposition that non-union members who choose to pursue their own grievances must pay for their representation, "even if such payment is made to the union."[5] However, neither NRS 288.140(2) nor Cone have any bearing on our prior analysis. Pennock's right to non-union representation, and his obligation to pay for it, have no impact on the fact that Graves consented to a de novo review on Pennock's behalf. Neither do such a right and obligation preclude an apparent authority finding because apparent authority principles focus on the appellants' state of mind. We conclude that the district court properly found that the parties agreed to a de novo review.

Arbitration award

Appellants argue that the district court erroneously concluded that the arbitrator exceeded his power in issuing the award. We agree.

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[4]116 Nev. 473, 998 P.2d 1178 (2000).

[5]Id. at 478, 998 P.2d at 1181-82.

An appellate court reviews the legal grounds for a district court's decision to affirm or vacate an arbitration award de novo.[6] The district court's power to review an arbitration award rests on the statutory provisions of the Uniform Arbitration Act.[7] Under the Act, a court shall vacate an arbitration award if the arbitrator exceeded his powers.[8] An arbitrator must base his award on the collective bargaining agreement.[9]

Consequently, we will first examine the collective bargaining agreements. The 1994 Agreement does not mention arbitration. The agreement states only that "[i]n those grievances where the Under Sheriff or Sheriff is the final decision-maker, the decision of the Under Sheriff or Sheriff shall be final and binding on the parties, except for judicial review." Although the 1998 Agreement contains several references to arbitration, none of them provides guidance on the issue at bar. Under the 1998 Agreement, "[i]n those actions where the Under Sheriff or Sheriff is the final decision-maker, the decision of the Under Sheriff or Sheriff may be appealed to arbitration." The Agreement further states that

> [t]he arbitrator's decision shall be final and binding upon both parties. The arbitrator's authority shall be limited to the application and

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[6]Coutee v. Barington Capital Group, L.P., 336 F.3d 1128, 1132 (9th Cir. 2003).

[7]New Shy Clown v. Baldwin, 103 Nev. 269, 271, 737 P.2d 524, 525 (1987).

[8]NRS 38.241(1)(d).

[9]Int'l Assoc. Firefighters v. City of Las Vegas, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991).

> interpretation of the provisions of this Agreement and any related rules, regulations, and policies of the County. No arbitrator shall have the power to modify, amend or alter any terms or conditions of this Agreement.

Notably, neither collective bargaining agreement has progressive discipline provisions. Thus, nothing in the agreements precluded the arbitrator from determining that Pennock's conduct in the TPO matter warranted termination. The district court even acknowledged that the parties agreed to a de novo arbitration review. Nevertheless, the district court vacated the award because "the arbitrator did not have the authority to increase the discipline imposed by" the County.

Absent a pertinent provision in the collective bargaining agreements, the issue becomes what was the arbitrator's scope of authority and whether the parties' de novo review stipulation permitted the arbitrator to deviate from the preliminary issues the parties submitted.

An "arbitrator's decision 'is bound only by the scope of the submission.'"[10] Nevada law does not provide much guidance on the issue at bar. Although several Nevada cases discuss an arbitrator's scope of authority,[11] these cases are distinguishable. Having found no Nevada precedent on point, we turn to the ordinary meaning of a "de novo" review.

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[10]IBEW Local 396 v. Central Tel. Co., 94 Nev. 491, 493, 581 P.2d 865, 867 (1978) (quoting Northwestern Sec. Ins. Co. v. Clark, 84 Nev. 716, 720, 448 P.2d 39, 41 (1968)).

[11]Wichinsky v. Mosa, 109 Nev. 84, 847 P.2d 727 (1993); City of Las Vegas v. Int'l Assoc. Firefighters, 108 Nev. 64, 824 P.2d 285 (1992); Int'l Assoc. Firefighters, 107 Nev. 906, 823 P.2d 877; IBEW Local 396, 94 Nev. 491, 581 P.2d 865.

"[T]he term 'de novo' means anew."[12] Where we review a matter de novo, we examine the district court's record anew and without deference to the district court's findings.[13] While this statement pertains to appellate review, its meaning does not change in the arbitration context.

Appellants maintain that once the district court found that the parties had agreed to a de novo arbitration review, the arbitrator had the power to decide every issue relating to the disciplinary matter. He did not have to confine his determination to the issues the parties previously submitted. Because the parties allegedly chose not to define the term "de novo" and no pertinent contract provision existed, the arbitrator properly gave the term its ordinary meaning. The arbitrator then merely affirmed the County's decision, albeit on different grounds. Finally, appellants claim that the district court erred in vacating the award because the policy behind arbitration, i.e., quick and inexpensive dispute resolution, dictates a very limited judicial review of arbitration awards. We conclude that the appellants' arguments have merit.

The arbitrator's letter to the parties expressly indicated that he was uncertain about his scope of authority regarding the TPO incident. The arbitrator then explicitly asked the parties to "address within ten days whether or not the suspension meted out for that breach is considered the final punishment for that act. If not, please address the

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[12]Nevada Indus. Comm'n v. Strange, 84 Nev. 153, 156, 437 P.2d 873, 875 (1968).

[13]Estate of Delmue v. Allstate Ins. Co., 113 Nev. 414, 416, 936 P.2d 326, 328 (1997).

authority you believe I possess to enter a de novo punishment for that action." (Emphasis added.) Responding to the arbitrator's concern, the parties signed a stipulation that "[a]rbitrator Paul Sorenson had complete authority to give consideration to the finalization of his decision in this matter on a de novo basis pursuant to the employee's handbook and the status of the file herein."[14] While the stipulation did not expressly mention that the arbitrator had de novo authority over the TPO matter punishment, the context of the parties' communication provides sufficient clarification. The parties signed the stipulation after the arbitrator inquired about his authority to enter punishment. Because the stipulation was a response to the said inquiry, the terms "complete authority" and "de novo basis" must have referred to the arbitrator's power to reevaluate the appropriate discipline. The de novo review stipulation opened up the punishment issue. Although the issues the parties submit limit the arbitrator's scope of review,[15] in the instant case the parties agreed to broaden the arbitrator's authority. Pennock cannot rely on the preliminary issues the parties submitted because of the subsequent de novo review agreement. We, therefore, conclude that the district court erred in vacating the arbitrator's award.[16]

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[14]The employee handbook is not a part of the record the parties submitted on appeal.

[15]IBEW Local 396, 94 Nev. at 493, 581 P.2d at 867.

[16]The parties cite to numerous federal cases interpreting the Federal Arbitration Act, which is similar to the Nevada Arbitration Act. See 9 U.S.C. § 10(a)(4); NRS 38.241(1)(d). We find none of the cases cited by the parties to be persuasive.

Accordingly, we

ORDER the judgment of the district court REVERSED. The case is remanded to district court with instructions to confirm the arbitrator's award.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Erickson Thorpe & Swainston, Ltd.
Dennis A. Kist & Associates
Nye County Clerk