

AMEDEO GRECO
Arbitrator
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February 17, 2009

Mr. Mike Cook
c/o Illinois Education Association/NEA
1012 Plummer Drive, Suite 400
Edwardsville, IL 62024

VIA FAX and MAIL

Ms. Christi L. Flaherty
Doster, Guin, James, Ullom, Benson
& Mundorf, LLC
Attorneys at Law
310 Regency Center
Collinsville, IL 62234

Re: AAA No. 51 390 00406 08
Tri-County Special Education Association, IEA,
NEA and Tri-County Special Ed.

Dear Mr. Cook and Ms. Flaherty:

I am in receipt of Mr. Cook's February 6, 2009, letter asking that I extend and exercise my remedial jurisdiction and that I arrange for a joint conference call between the parties to address recent events and to help determine whether a further evidentiary hearing is warranted.

I have not received a reply from Ms. Flaherty to my February 6, 2009, letter stating that she was to provide me by February 13, 2009, with "whatever legal and/or arbitral authority she is relying upon in support of her claim that I cannot retain remedial jurisdiction . . ."

Hence, Ms. Flaherty has not provided any arbitral or legal authority in support of the prior claims in her February 2, 2009, letter to Ms. Alicia McCullough of the American Arbitration Association ("AAA") which asserted that "the Arbitrator no longer has jurisdiction over this case"; that "Neither the Collective Bargaining Agreement nor the Rules of the American Arbitration Association provide for his continued jurisdiction and involvement in this matter"; and that "If Arbitrator Greco attempts to exercise improper jurisdiction over this matter, please advise the undersigned on the procedures for filing a formal complaint with [sic] AAA against Arbitrator Greco."

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As Mr. Cook correctly points out in his February 6, 2009, letter, Ms. Flaherty never claimed at the July 3 and 21, 2008, hearing conducted in this matter that it would be improper for me to retain remedial jurisdiction as requested by the Union on July 3, 2008. She, instead, only claimed at the hearing that there was no need for me to do so.

In addition, Ms. Flaherty never claimed in the Employer's post-hearing brief that it would be improper for me to retain remedial jurisdiction even though she had the opportunity to brief that issue after Mr. Cook raised it at the hearing. Mr. Cook, by contrast, addressed that issue in his brief by reiterating the Union's request that I retain remedial jurisdiction.

Ms. Flaherty by letter dated November 13, 2008, subsequently requested that I clarify my Award and I subsequently did so by letter dated December 1, 2008. Ms. Flaherty at that time never claimed that I lacked the authority to clarify the Award and she at that time never raised any objection to my continued retention of remedial jurisdiction.

It was only after I refused to clarify the Award along the lines she requested and only after I stated in my December 1, 2008, letter to the parties that the Employer had until the close of business on December 3, 2008, to take the remedial steps ordered in the Award, that she first claimed in her February 2, 2009, letter to Ms. McCullough that I lack the authority to retain remedial jurisdiction.¹

There in fact is authority upholding an arbitrator's authority to retain remedial jurisdiction dating back to Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, (1960), where the United States Supreme Court remanded a remedial back-pay question back to the arbitrator.

Since then, arbitrators in a long line of cases have retained remedial jurisdiction over issues involving the application or interpretation of a remedy. See, for example, Weyerhaeuser Co. Forrest Products, 108 LA 26 ((Levak, 1997); Dresser Indus., 103 LA 696 (Redel, 1994); Young's Commercial Transfer, 101 LA 993 (McCurdy, 1993); Hexcel Corp., 101 LA 700 (Silver, 1993); Air Line Pilots v. Aviation Associates, 955 F.2d. 90 (1st Cir. 1992); Synergy Gas Co. v. Sasso, 853 F.2d 59 (2nd Cir., 1998); Hughes Aircraft Co. v. Electronic & Space Technicians Local 1553, 822 F.2d. 823 (9th Cir., 1987); Pathmark Stores v. Service Employees Local 1199, 160 LRRM 2346, 2349 (S.D. N.Y., 1999); Paperworkers v. Gaylord Container Corp., 755 F. Supp. 158, (E.D. La 1991); Dries & Krump Mfg. Co. v. Machinists Dist. 8, 1985 WL 3752 (N.D. Ill. Nov 8, 1985), aff'd 802 F.2d. 247 (7th Cir., 1986); Fred Meyer v. Teamsters Local 206, 463 F. Supp. 2d 1186 (D. Or. 2006).

¹ The difference between clarifying an award and addressing remedial questions was spelled out in Sears Logistics Services, 97 LA 421 (Garrett, 1991).

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See also Dunsford, Should Arbitrators Retain Jurisdiction Over Awards?: On Retaining Jurisdiction in Arbitration, 1998: The Changing World of Dispute Resolution, Proceedings Of The 51st Annual Meeting of The National Academy of Arbitrators (BNA Books, 1999), p. 102.

Indeed, this principle is so well established that the United States Court of Appeals for the Seventh Circuit ruled in CUNA Mutual Insurance Society v. Office and Professional Employees International Union Local 39, 443 F.3d. 556, 564-565, (2006), that sanctions should be imposed against a party claiming otherwise. There, the employer claimed that the arbitrator under a collective bargaining agreement lacked the authority to retain remedial jurisdiction to resolve any questions which might arise over application of the remedy.

In imposing Rule 11 sanctions, the court stated:

...

However, the present case falls within the "clarification-completion" exception to the *functus officio* doctrine, which allows arbitrators to clarify an award already made. In *Glass, Molders, Pottery, Plastics & Allied Workers Int'l. Union, Local 1828 v. Excelsior Foundry Co.*, 56 F.3d. 844 (7th Cir. 1995) this court rejected a company's argument that clarification of an award was forbidden by the *functus officio* doctrine after the arbitrator had issued his opinion and award. Additionally, there is an abundance of case law in both this circuit and other circuits that recognizes the propriety of an arbitrator retaining jurisdiction over the remedy portion of an award. See, e.g., *Dreis & Krump Mfg. v. Int'l. Ass'n of Machinists & Aerospace Workers, Dist. No. 8*, 802 F.2d 247, 250 (7th Cir. 1986); *Dep't of the Navy v. Federal Labor Relations Auth.*, 815 F.2d 797, 802 (1st Cir. 1987); *Engis Corp. v. Engis Ltd.*, 800 F.Supp. 627 (N.D. Ill. 1992).

The case law on this issue is clear, and CUNA's counsel "should have known that [its] position is groundless." *Nat'l Wrecking Co. v. Int'l. Bhd. of Teamsters, Local 731*, 990 F.2d 957, 963 (7th Cir. 1998) (quoting *CNPA v. Chicago Web Printing Pressman's Union No. 7*, 821 F.2d 390, 397 (7th Cir. 1987) (citations omitted)). (Emphasis added).

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The Court's 2006 decision in CUNA predated the 2007 amendment to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, ("Code"), which expressly provides for retaining remedial jurisdiction.

The AAA, along with the Federal Mediation and Conciliation Service and the National Academy of Arbitrators, is a co-signatory to the Code and they all agreed in 2007 to add the following new language as Part 6, Section E, of the Code:

- E. Retaining Remedial Jurisdiction
1. An arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy. (Emphasis added).
 - a. Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise.
 2. The retention of remedial jurisdiction is limited to the question of remedy and does not extend to any other parts of the award. An arbitrator who retains remedial jurisdiction is still bound by Paragraph D above, entitled "Clarification or Interpretation of Awards," which prohibits the clarification or interpretation of any other parts of an award unless both parties consent.²

The Code thus now expressly authorizes arbitrators to retain remedial jurisdiction to resolve any remedial issues arising over the application or interpretation of a remedy when requested to do so by a party and when there is no contract language expressly providing otherwise, which is the very situation here.

Ms. Flaherty therefore erred in claiming in her February 2, 2009, letter to Ms. McCullough that I cannot retain remedial jurisdiction because the agreement does not "provide" for it. The test under the Code is not whether the agreement provides for it, but rather, whether the agreement expressly prohibits it. Here, no such prohibition exists.

² See Elkouri and Elkouri, How Arbitration Works, 2008 Supplement (ABA-BNA Books, 6th Ed.), pp. 139-140.

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Ms. Flaherty's February 2, 2009, letter also erred in claiming that the AAA's rules do not provide for my continued jurisdiction. The AAA requires all arbitrators on its labor-management panel to adhere to the Code which, as related above, expressly provides for the retention of remedial jurisdiction upon a single party's request.

Since pertinent case law and the Code so clearly support my continued retention of remedial jurisdiction, Ms. Flaherty's contrary claim is groundless.

I therefore will continue to retain remedial jurisdiction indefinitely until all remedial issues are resolved.

Ms. Flaherty also stated in her February 2, 2009, letter to Ms. McCullough that the Employer "will not submit to, or pay for, his continued involvement in this case," and that the Union's remedy "is through the Illinois Educational Labor Relations Act."

In this connection, Section 10.3 of the agreement provides:

Expenses of the arbitrator, including the cost of the arbitrator's transcript, if one is requested, shall be borne equally by the Board and the Association. Each party to the arbitration proceeding shall be responsible for compensating its own representatives and witnesses.

This language therefore does not state that a party is required to pay the arbitrator's expenses only if it agrees with his/her decision and/or his/her course of action. That is why the Employer here is required under the agreement to pay for the arbitrator's expenses regardless of whether it agrees with what is being done.

The Employer's refusal to pay the arbitrator's fees and expenses incurred in resolving any remedial issues also runs counter to Rule 44 of the AAA's Labor Arbitration Rules which states:

The expenses of witnesses for either side shall be paid by the party producing such witness. Expenses of the arbitration, other than the cost of the stenographic record, including required traveling and other expenses of the arbitrator and of AAA representatives and the expenses of any witness or the cost of any proof produced at the direct request of the arbitrator, shall be born equally by the parties, unless they agree otherwise, or unless the arbitrator, in the award, assesses such expenses or any part thereof against any specified party or parties. (Emphasis added).

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The Employer's refusal to abide by Section 10.3 and Rule 44 means that the proceeding cannot go forward since I will not take any further action in this matter unless, and until, the Employer affirmatively states in writing that it will pay my fees and expenses.

The Employer's refusal to recognize my continued retention of remedial jurisdiction and the need to resolve all remedial questions in this proceeding also is at odds with that part of my November 10, 2008, Award stating that I would retain remedial jurisdiction "to resolve any remedial questions which may arise over the interpretation or application of the remedy ordered..." The Employer's refusal to have remedial questions resolved in this proceeding therefore constitutes a refusal to abide by this portion of the Award.

But since an arbitrator under the agreement lacks the power to enforce his/her award, I am powerless to force the Employer to proceed in this matter.

The Union's remedy therefore must lie elsewhere, which is why I am unable to now proceed along the lines requested by Mr. Cook. As related above, however, I will honor his request that I extend my retention of remedial jurisdiction indefinitely until all remedial issues have been resolved.

I recognize that this will delay a final resolution in this matter which is highly unfortunate, particularly given the fact that the Employer's position is groundless.

Very truly yours,


Amedeo Greco

AG/gk

cc: Ms. Alicia McCullough, Case Manager, c/o American Arbitration Association, American Center Building, Suite 1150, 27777 Franklin Road, Southfield, MI 48034-8208

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