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Tripartite Boards - In the Matter of the Arbitration
between the Astoria Medical Group and Health
Insurance Plan of Greater New York, 11 N.Y.2d 128,
182 N.E.2d 85 (1962)

DePaul College of Law

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Recommended Citation

DePaul College of Law, *Arbitration - Qualifications of Arbitrators on Tripartite Boards - In the Matter of the Arbitration between the Astoria Medical Group and Health Insurance Plan of Greater New York*, 11 N.Y.2d 128, 182 N.E.2d 85 (1962), 12 DePaul L. Rev. 125 (1962)
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CASE NOTES

ARBITRATION—QUALIFICATIONS OF ARBITRATORS ON TRIPARTITE BOARDS

Health Insurance Plan of Greater New York (HIP) is a nonprofit corporation engaged in writing medical care insurance policies. To assure such care to its policyholders, HIP entered into contracts with groups of physicians. In identical contracts made by HIP with those Medical Groups which are petitioners in this action, it was agreed that each of them would be paid a fixed sum, or "capitation," for each insured person receiving the services of the particular Medical Group. In addition to such "capitation," HIP agreed to pay each Medical Group an additional sum, termed "supplemental capitation," in an amount depending upon criteria and standards which were to be established in the future. If the parties were unable to agree upon such criteria by a specified date, the unresolved issues were to go to arbitration. The arbitration clause of the contract provided, in part, that one arbitrator was to be appointed by HIP, another appointed by the Medical Group, and the third to be selected by the arbitrators appointed by the parties.¹ When the parties failed to agree upon the criteria, HIP designated Dr. George Baehr as their arbitrator. Dr. Baehr was one of the incorporators of HIP, its president from 1950-1957, and currently both a member of HIP's Board of Directors and one of its paid consultants. The Medical Groups moved for an order disqualifying Dr. Baehr on the ground of personal interest, bias and partiality. The Justice of the Special Term granted the motion and the Appellate Division affirmed by a divided court. The Court of Appeals, in a 5-4 decision, reversed the decision of the lower court, and permitted Dr. Baehr to serve as an arbitrator in this dispute. *In the Matter of the Arbitration between the Astoria Medical Group, et al., and Health Insurance Plan of Greater New York*, 11 N.Y.2d 128, 182 N.E.2d 85 (1962).

At the time of the trial Section 1462 of the New York Civil Practice Act expressed the requirement of impartiality on the part of the arbitrator:

In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated: . . .

2. Where there was evident partiality or corruption in the arbitrators or either of them. . . .

¹ For an historical approach to the development of the arbitration process see Gitelman, *The Evolution of Labor Arbitration*, 9 DE PAUL L. REV. 181 (1960).

A similar requirement is enforced in all those states which permit agreements to arbitrate future disputes.² Here, however, the court took cognizance of a trend toward liberality in the application of this standard in the tripartite type of arbitration.³

In early decisions the courts considered the arbitrators to be acting in a judicial,⁴ or at least a quasi-judicial,⁵ capacity, and, therefore, they were considered bound by the same rules as govern such officers. Arbitrators were disqualified, and awards vacated, because the arbitrator had created a doubt as to his impartiality.⁶ These acts ranged from formulating an opinion on the issue to be decided prior to the hearing⁷ to having a personal interest in the outcome of the dispute,⁸ or at least bearing a close business relationship to one of the parties to the dispute.⁹

The courts frequently noted, however, that in arbitration proceedings such as herein, where special skill and experience are valuable, it is no disqualification that the arbitrators have had business dealings with either party to the arbitration.¹⁰ Moreover, the court has stated that where the agreement gave each party the right to appoint an arbitrator, it is natural that they would appoint someone in whom they had confidence.¹¹

² N.J. STAT. ANN. § 2A; 24-8 (1961); MASS. ANN. LAWS C. 251, § 15 (1956); CAL. CODE CIV. PROC. § 1283 (Deering 1953); PURDON PENN. STAT. ANN. ch. 4, § 161 (1930); OHIO REV. CODE ANN. § 2711.10 (Baldwin 1953); LA. REV. STAT. § 9-4210 (1950); FLA. STAT. ANN. § 57.07 (1959); MICH. COMP. LAWS ANN. § 645-9 (1948); WISC. STAT. § 298-10 (1958). MINN. STAT. ANN. § 572.01 (1957).

³ Gold and Furth, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARVARD L. REV. 293 (1954).

⁴ *E.g.* Matter of Friedman, 215 App. Div. 130, 135, 213 N.Y. Supp. 369, 374 (1st Dep't 1926).

⁵ *E.g.* Empire Plexiglass Corp. v. Levitt Corp., 192 Misc. 251, 77 N.Y.S.2d 85 (Munic. Ct. 1948).

⁶ *E.g.* Matter of Friedman, 215 App. Div. 130, 213 N.Y. Supp. 369 (1st Dep't 1926). For a thorough discussion of the many relationships which caused awards to be vacated, see *Arbitration Awards Vacated for Disqualification of an Arbitrator*, 9 SYRACUSE L. REV. 56 (1957), or *When May an Arbitrator's Award Be Vacated?*, 7 DE PAUL L. REV. 236 (1958).

⁷ Flannery v. Sahagian, 134 N.Y. 85, 31 N.E. 319 (1892).

⁸ *In re* Miller, 260 App. Div. 444, 23 N.Y.S. 2d 120 (1940).

⁹ *E.g.* Ilios Shipping and Trading Corp. v. American Anthracite and Bitumenous Coal Corp., 148 F. Supp. 698 (1957).

¹⁰ *Mater* of Atlantic Rayon Corp. (Goldsmith), 277 App. Div. 554, 555 (1st Dep't 1950), motion for leave to appeal dismissed, 302 N.Y. 842 (1951). See also *Matter* of Meining Co. v. Katakura Co., 241 App. Div. 406 (1st Dep't 1934), *aff'd*, 266 N.Y. 418 (1934).

¹¹ *Matter* of Linwood (Sherry), 14 Misc. 2d 495, 496 (Sp. Ct. Nassau Co. 1958) *aff'd*, 7 App. Div. 2d 757 (2d Dep't 1958), *aff'd*, 266 N.Y. 418 (1959). See also *Matter* of Perlman, Inc. (Raycrest Mills), 280 App. Div. 744, 747-48 (1st Dep't 1952), *aff'd* 305 N.Y. 803 (1953).

The court was influenced both by these decisions and by a great volume of articles written on the current practices in the field of arbitration.¹² These articles contend that the parties to a tripartite arbitration tend to appoint arbitrators "not individually expected to be neutral."¹³

The trend to relaxing the requirements pertaining to the party-designated arbitrators has been felt in other jurisdictions. An Iowa case recited that while choosing arbitrators wholly disinterested is an admirable standard to aspire to, its strict enforcement would enable few awards to stand. Further, the fact that the arbitrator had previously acted in a like or similar capacity for the nominator does not disqualify him. "On the contrary, it speaks for his competency to act in such capacity."¹⁴ A Federal court has held that "designation by the parties themselves of arbitrators who may not be completely disinterested is generally accepted practice and is not ground for objection at onset or in course of proceedings."¹⁵

Turning to the case before us, the court said that there can be no doubt that, when HIP and the Medical Groups agreed to the use of a tripartite tribunal, they must be taken to have contracted with reference to established practice and usage in the field of arbitration.¹⁶ In light of accepted practice, which sanctions and contemplates two non-neutral arbitrators on a tripartite board, the parties must be deemed to have intended that each was free to appoint any arbitrator desired, however closes his relationship to the dispute.¹⁷ The parties were free to enter into a contract which would provide for neutral arbitrators, the court contended, and by their failure to limit the identity, status or qualifications of the arbitrators, the parties permitted the appointment of "interested" arbitrators. Also, although Dr. Baehr was an interested party, he would derive no personal benefit since HIP is a non-profit corporation. All that Dr. Baehr could do is bring to the arbitration proceeding the wealth of experience he gathered in his long career in public health administration. This would be a great aid in the determination of the supplemental capitiation.

¹² See *Bell Aircraft Corp.*, 13 L.A. 813, 820§21. Lesser, *Tripartite Board or Single Arbitrators in Voluntary Labor Arbitration?*, 5 ARB. J. (N.S.) 276; Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 YALE L. J. 31, 47 (1934); Pirsig, *The New Uniform Arbitration Act*, 11 BUSINESS LAWYER 44, 47 (April 1956); ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* (Rev. Ed. 1960), p. 48; see also Taylor, *The Arbitration of Labor Disputes*, 1 ARB. J. (N.S.) 409, 413.

¹³ Pirsig, *The New Uniform Arbitration Act*, 11 BUSINESS LAWYER, 44, 48 (April 1956); Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 YALE L. J. 31, 47 (1934).

¹⁴ *First Nat. Bank of Cedar Falls v. Clay*, 231 Iowa 703, 716, 2 N.W.2d 85, 92 (1942).

¹⁵ *Petition of Dover Steamship Co.*, 143 F. Supp. 738, 741-42 (S.D.N.Y. 1956).

¹⁶ See *Bolles v. Scheer*, 225 N.Y. 118, 121, 121 N.E. 771, 772 (1919); see also CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, pp. 62-64.

¹⁷ *Matter of Lipschultz (Gutwirth)*, 304 N.Y. 58, 61-62, 106 N.E. 2d 8, 9, 10 (1952).

Another point raised by the respondent was that the motion to disqualify was prematurely brought since the Civil Practice Act¹⁸ only made provision to *vacate* an award on grounds of partiality or bias on the part of the arbitrators. The court dismissed this contention by claiming inherent power to control all litigation before it, and, in the absence of express prohibition, disqualify an arbitrator before an award is made.¹⁹

In conclusion, the court here recognized that the tripartite type of arbitration has evolved to the point where it is the accepted practice for the arbitrators appointed by the parties to bear some relation to the appointing party, with the third arbitrator remaining neutral.²⁰

Because of the complexity of the disputes which are arbitrated, special skill, experience and knowledge on the part of the arbitrators is invaluable in reaching a just and speedy settlement. A person who lacked this background would require extensive instruction in the technicalities of the subject matter of the dispute to have that degree of comprehension which an experienced party would already possess. Undoubtedly these practical considerations also prompted the New York Legislature, which changed Section 1462 of the C.P.A. to conform to the common practice and usage shortly after the HIP Medical Groups decision was reached.²¹

¹⁸ NEW YORK CIVIL PRACTICE ACT, § 1462, subd. 2. This provision has been modified. Cf. note 21, ff.

¹⁹ Cf. *Western Union Telegraph Co. v. Selly*, 295 N.Y. 395, 68 N.E.2d 183 (1946); *Gaer Bros. v. Mott*, 144 Conn. 303, 130 A.2d 804, 65 A.L.R. 2d 749 (1957).

²⁰ This view is accepted as morally and socially correct. See AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS AND PROCEDURAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION, I, 8 (1951).

²¹ CPLR § 7511, subd. (b), par. 1, cl. (ii) signed into law on April 4, 1962: L. 1962, ch. 308, eff. Sept. 1, 1963. This new law permits a vacatur of an award only where the partiality is that "of an arbitrator appointed as a neutral."

CONSTITUTIONAL LAW—THE *ENGEL* CASE IN LIGHT OF PRECEDENT

The State Board of Regents of New York *officially proposed* the following prayer which they recommended and published as part of their *Statement on Moral and Spiritual Training in the Schools*:

Almighty God, we acknowledge our dependence on thee, and we beg thy blessings upon us, our parents, our teachers, and our country.¹

The respondent, the board of education of the Union Free School District, No. 9, New Hyde Park, New York, directed the school district's

¹ *Engel v. Vitale*, 370 U.S. 421, 422 (1962).