

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

UIW, SIU, AFL-CIO and MILTON CHARLES,	)	
	)	CIVIL NO. 330/1997
Petitioners,	)	
	)	
vs.	)	ACTION TO SET ASIDE
	)	ARBITRATOR'S AWARD
VIRGIN ISLANDS CEMENT, INC., PAUL	)	
ARNOLD and ARBITRATOR AUBREY LEE,	)	
	)	
Respondents.	)	
		<u>NOT FOR PUBLICATION</u>

APPEARANCES:

ESZART A. WYNTER, SR., Esq.
Law Office of Eszart A. Wynter, Sr., P.C.
#27 Estate Whim
P.O. Box 1847
Fredericksted, VI 00841
(Attorney for Petitioners)

GRUNERT STOUT & BRUCH
P.O. Box 1030
St. Thomas, VI 00804
(Attorney for V.I. Cement & Building Products, Inc.)

DENNIS W. HEILMAN, Esq.
Professional Building, Suite 7
1039 Fortets Strade, St. Thomas
U.S. Virgin Islands 00802
(Attorney for Aubrey Lee)

MEMORANDUM OPINION
(February 24, 1998)

THIS MATTER comes before the Court on petitioners' motion for reconsideration and additional time to respond. Petitioners' move this Court to reconsider its Order dated August 15, 1997 on the grounds that the order erroneously treats petitioners' petition to review arbitrator's award as a petition for a writ of review. No opposition has been filed by any of the respondents.

STATEMENT OF FACTS

On or about October 16, 1996, the parties allegedly attended an arbitration hearing at Villa Morales. The arbitration was conducted pursuant to a private contract between Virgin Islands Cement and Grievant Milton Charles. Paul Arnold was the representative of V.I. Cement and Aubrey Lee served as the arbitrator. The matter that was allegedly subject to the arbitration was an issue of just cause for termination.

Petitioners allege that during the arbitration, Arbitrator Lee denied petitioners the opportunity to demonstrate the inaccuracy of the Seniority List of Respondent V.I. Cement. Petitioners allege that this decision was erroneous and prejudicial as well as arbitrary and capricious. Furthermore, petitioners allege that Arbitrator Lee failed to disclose his close and political relationship with Paul Arnold. Petitioners finally allege that had they known about this relationship, they would not have agreed to Aubrey Lee acting as arbitrator for the matter involving the parties.

On May 29, 1997, petitioners filed a petition to review Arbitrator Lee's award and to set aside the award. The petition was supported by affidavits from Milton Charles, Amos Peters (Regional Vice-President for the UIW, SIU, AFL-CIO) and Eszart A. Wynter, Esq. Petitioners relied solely on 24 V.I.C. §§ 376 and 379 as the only basis for subject matter jurisdiction. They further alleged that the conduct of Arbitrator Lee violated the code of ethics that governs arbitration as well as 9 U.S.C. § 10. On July 30, 1997, the Court entered an order denying petitioners' petition on the ground that petitioners had failed to comply with several procedural requirements for the granting of a writ of review.

On August 7, 1997, petitioners filed a motion to amend the verified complaint filed on or

about July 25, 1997. Petitioners proposed amended verified complaint relied solely on 4 V.I.C. § 76 and 9 U.S.C. §10 as the basis for jurisdiction. The proposed amended complaint also alleges that the conduct of Arbitrator Lee violated the code of ethics that govern arbitration. Because a review of the casefile revealed no verified complaint dated July 25, 1997, the Court once again treated petitioners' motion as a petition for writ of review and denied said petition by Order dated August 15, 1997 for failure to comply with several procedural requirements. The Court additionally ruled that petitioners were precluded from bringing this action pursuant to Title 24 V.I.C. § 376 and 379 as well as 9 U.S.C. § 10. As a result of this Order, the Court proceeded to separately deny as moot respondents V.I. Cement and Aubrey Lee's motions to dismiss for lack of subject matter jurisdiction.

On September 2, 1997¹, petitioners moved this Court to reconsider its Order that was entered on August 18, 1997 and for additional time to respond. Petitioners allege that "a writ of review lies when a substantial right is alleged to have been violated by a *governmental determination*² (emphasis added)." Petitioners further allege that because this case involves a private arbitration agreement, review of an arbitrator's decision under 5 V.I.C. § 1421 is inapplicable since no governmental entity, agency, tribunal, or officer is involved. Finally, petitioners allege that this is an action to set aside the arbitrator's award because of the respondents' failure to disclose their relationship and not an action to review the facts of this case.

¹ Petitioner filed its motion for reconsideration within the ten day time period as required by Federal Rule Civil Procedure 59(e).

² *Schuster v. Thraen*, 18 V.I. 287, 300 (D. Virgin Islands 1981).

DISCUSSION

The sole issue for this Court to determine is whether the petitioners have alleged a basis for subject matter jurisdiction in this matter. A review of petitioners' petition to review arbitrator's award (dated May 29, 1997) and petitioners' proposed amended verified complaint (dated August 8, 1997) shows that the petitioners have identified the following bases for subject matter jurisdiction:

- (1) Title 24 V.I.C. § 376, et seq. and 379;³
- (2) Title 9 U.S.C. § 10;⁴
- (3) Title 4 V.I.C. § 76, et seq.;⁵ and
- (4) Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, Ch.2, (B) (3)(a), (4), and (5).⁶

A. Title 24 V.I.C. § 376, et seq.

As stated in this Court's July 30, 1997 Order, the petitioners are precluded from bringing this action pursuant to Title 24 V.I.C. §376 and 379. Title 24 specifically deals with public employers and their employees. See Title 24 V.I.C. § 362 (1993). Since the instant matter allegedly concerns a private employment dispute, sections 376 and 379 are inapplicable in the above-captioned matter.

B. The Federal Arbitration Act

The Federal Arbitration Act ("FAA"), Title 9 U.S.C.A § 1, et. seq. (1976) was enacted for

³ See May 29 , 1997 Petition to Review Arbitrator's Award;

⁴ See August 8, 1997 proposed "Amended Verified Complaint";

⁵ Id.

⁶ See Motion for Reconsideration and Additional Time to Respond (dated September 2, 1997) and Petition to Review Arbitrator's Award, paragraph 17.

the purpose of "establishing a uniform federal law over contracts which fall within its scope." *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 118 (1984). The FAA applies to proceedings in state courts as well as federal courts. *Id.*; *See also Virgin Islands Housing Authority v. Coastal Gen. Const.*, 27 F.3d 911 (3d Cir. 1994)(The Third Circuit held that "the federal and state courts have concurrent jurisdiction to enforce the provisions of the Arbitration Act") and *Government v. United Indus. Workers*, Civil No. 1992-022 (Appellate Division of the District Court Dec.1, 1997)(The District Court held that the "procedural, as well as the substantive, provisions of the [FAA] are available to parties to seek recourse in the Territorial Court of the Virgin Islands to validate, enforce, modify, or vacate agreements to arbitrate").

In order for a dispute to fall within the scope of the FAA, there must be a showing of federal subject matter jurisdiction, i.e. diversity jurisdiction, and evidence of either a maritime transaction or a transaction involving interstate or foreign commerce. See 9 U.S.C. § 2; *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117 (2nd Cir. 1991)(cited by Judge Meyers in *Government of the Virgin Islands, DPNR v. United Industrial Workers, et.al.*, (Terr.Ct. Civil No. 420/1994); *Gavlick Constr.Co. v. H.F. Campbell Co.*, 526 F.2d 777, 784 (3d Cir. 1975)⁷; *Merritt-Chapman & Scott Corp. v. Pa. Turnpike Com'n*, 387 F.2d 768, 772 (3d Cir. 1967); and *Ferreri v. First Options of Chicago, Inc.*, 623 F.Supp. 427, 432 (E.D. Pa. 1985). Furthermore, it has been held that "section 10 of the Arbitration Act does not confer subject matter jurisdiction on a district court." *Riccio v.*

⁷ The Third Circuit held that "section 2 of the Arbitration Act provides that the Act applies only to maritime transactions or contracts 'evidencing a transaction involving commerce'." (citing *Bernhardt v. Polygraphic Company of America*, 76 S.Ct. 273, 350 U.S. 198 (1956)).

Gray, 852 F.Supp. 5, 6 (S.D.N.Y. 1993)(citing *Harry Hoffman Printing v. Graphic Com., Local 261*, 912 F.2d 608, 611 (2nd Cir. 1990)); See also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S.1, 103 S.Ct. 927, 74 L.E2d 765 (1983). There must be an independent basis for jurisdiction before a district court may entertain petitions under the Act. *Harry Hoffman*, 912 F.2d at 611. Since the instant matter allegedly deals with a private employment dispute and there is no evidence of a maritime or interstate commercial transaction, the FAA is also inapplicable in the above-captioned matter.

C. Title 5 V.I.C. §1421, et seq. ~ Writ of Review

The Appellate Division of the District Court has recently held that "Title 5 V.I.C. § 1421, writ of review statute, does not give jurisdiction to the Territorial Court to review an arbitration award." *Government v. United Indus. Workers*, Civil No. 1992-022 (Appellate Division of the District Court Dec.1, 1997). Accordingly, this Court erroneously treated petitioners' petition as a petition for a writ of review in its orders dated July 30, 1997 and August 18, 1997.

D. Common Law Principles

Petitioners can seek vacation of Arbitrator Lee's award under common-law principles, *Bouton v. Government*, 792 F.Supp. 420, 27 V.I. 200, 209 (D.VI 1992), aff'd 987 F.2d 162 (3d Cir. 1993), and the substantive law of the Virgin Islands as embodied in the Restatement (Second) of Contracts § 345(f)⁸. Where common-law principles are applicable, it is broadly held that the courts

will permit an award to be impeached only where it is clearly illegal, or where there has been fraud, misconduct, corruption, palpable or gross mistake or error or some other irregularity on the part of the arbitrators which caused the rendition of an unjust, inequitable or unconscionable award. *See Hain v. Keystone Ins. Co.*, 326 A.2d 526 (Pa. Super. 1974); *International Brotherhood of Firemen and Oilers, AFL-CIO Local 1201 v. School District of Philadelphia*, 350 A.2d 804 (Pa. Super. 1976).

An arbitrator must possess the qualifications of fairness, disinterestedness, and impartiality and must avoid the slightest appearance of bias. *See Abramovich v. Pennsylvania Liquor Control Board*, 416 A.2d 474 (Pa. Super. 1980); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 117 (6th Cir. 1953)⁹. Accordingly, an arbitrator is required to disclose, any information which may serve to disqualify him, or any dealings that might create an impression of bias.¹⁰ However, mere personal friendship with one of the parties does not automatically disqualify an arbitrator.¹¹ *See Kentucky*

The judicial remedies available for the protection of the interests stated in section 344 include a judgment or order

(f) enforcing an arbitration award

⁹ "Arbitrators are selected to act in quasi-judicial capacity in place of court and must be fair and impartial so as to render faithful, honest, and disinterested opinion in carrying out their obligation to do justice to parties through their award."

¹⁰ See Chapter 2, section B of the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" issued by the National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service.

¹¹ See Chapter 2, section B (3)(a) of the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" which provides

River Mills, 206 F.2d at 117. Instead, evidence of such a relationship may be examined in connection with other circumstances on the question of fraud or misconduct and in determining as a matter of fact whether he is a disinterested or impartial arbitrator. *See Astoria Medical Group v. Health Ins. Plan of Greater New York* (N.Y.Ct.App. 1962).

If arbitrators conduct themselves with bias or partiality, this amounts in law to misconduct which will warrant the setting aside of the award. *See Strohman Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1446 (3d Cir. 1991), cert. denied, 61 U.S.L.W.3337 (U.S. Dec.7, 1992); *High Concrete Structures, Inc. of N.J. v. United Elec., Radio & Mach. Workers of America, Local 166*, 879 F.2d 1215, 1218 (3d Cir. 1989); *Wilson v. Dan McCabe's Creative Carpentry, Inc.*, 417 N.E.2d 49 (Mass.App.Ct. 1981); *Barcon Associates v. Tri-County Asphalt*, 390 A.2d 684 (N.J. Super. 1978). However, in order to warrant setting aside of the award, the bias or partiality must be direct, definite and capable of demonstration, rather than remote, uncertain or speculative. *See House Grain Co. v. Obst*, 659 S.W.2d 903 (Tex.Ct.App. 1983); *R.E. Bean Const. v. Middlebury, Etc.*, 428 A.2d 306 (Vt. 1981); and *Freeport Const.Co. v. Star Forge, Inc.*, 378 N.E.2d 558 (Ill.App.Ct. 1978).

Petitioners have alleged in their petition to review arbitrator's award and proposed amended verified complaint the following:

Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

15. Upon information and belief, Paul Arnold and Arbitrator Lee have had a close friendship and a close political relationship.

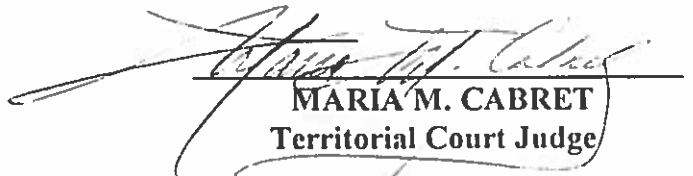
16. Arbitrator Lee failed to disclose his close personal relationship that covers over twenty (20) years and his close political relationship with Paul Arnold.

17. The conduct of Arbitrator Lee violated the code of ethics that governs Arbitration.

The petitioners have alleged sufficient facts which, if proven true, could support a common law action to vacate an arbitrator's award on the ground that Arbitrator Lee acted with bias or partiality. Thus, this Court has subject matter jurisdiction over the above-captioned matter. Accordingly, this court will grant petitioners' motion for reconsideration and allow the parties in this action to properly brief the merits of this case for the purpose of determining whether Arbitrator Lee's award should be vacated.

CONCLUSION

The Petitioners have alleged a proper basis for subject matter jurisdiction in the above-captioned matter. Although petitioners are precluded from proceeding in this action pursuant to Title 24 V.I.C. §§ 376 and 379, Title 9 U.S.C. § 10, and Title 5 V.I.C. § 1421, et seq., petitioners can still seek vacation of Arbitrator Lee's award under both common-law principles and the Restatement. Accordingly, this Court will grant petitioners' motion for reconsideration and return the above-captioned matter to the court's calendar.


MARIA M. CABRET
Territorial Court Judge