NEBRASKA LAW REVIEW BULLETIN
Issue 1 lawreview.unl.edu

WHITE ROBES AND BLACK ROBES: THE NEBRASKA SUPREME COURT'S VACATUR IN STATE V. HENDERSON

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Oftentimes in the law, the outcome in a case is determined by what has previously happened procedurally. Sometimes, the simple, common sense result is precluded because of the procedural posture of a dispute. But this bizarre result stands because the procedural requirements are part of the rule of law upon which our society is based. The Nebraska Supreme Court's review of an arbitration award in *State v. Henderson*[1] presented just such a case in which the procedural background should have foreclosed the common sense outcome. However, the court, by vastly expanding a narrow exception, was able to achieve the necessary outcome.

Henderson involved an arbitration agreement ordering reinstatement of a Nebraska State Trooper who had been fired for posting comments on a website affiliated with the Ku Klux Klan (KKK). On one hand, common sense would seemingly require the termination to be upheld. If the Nebraska State Patrol employs KKK members, Nebraskans would question whether the law applies equally to all. But on the other hand, under our rule of law, judicial review of arbitration award is "severely circumscribed;"[2] courts are not free to overturn an arbitration award simply because they do not like the result. The situations in which courts can overturn such an award are few and narrow.[3] One of these situations, established in a trilogy of United States Supreme Court cases,[4] is when the award would be contrary to public policy. In a matter of first impression, the Nebraska Supreme Court relied on this narrow exception to overturn Henderson's reinstatement.

This commentary argues that the Nebraska Supreme Court erred in applying the narrow public policy exception to the enforcement of arbitration awards. In doing so, the court relied on a crafty conceptualization and organization of supposed public policy. It was only by this judicial sleight of hand that the court could have argued that it was staying true to the Supreme

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[1] 277 Neb. 240, 762 N.W.2d 1 (2009), *cert. denied*, 129 S. Ct. 2841 (2009).

[2] Jones v. Summit Ltd. P'ship Five, 262 Neb. 793, 798, 635 N.W.2d 267, 271 (2001) (citing Apex Plumbing Supply v. U.S. Supply Co., 142 F.3d 188, 193 (4th Cir. 1998)).

[3] *See* E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000) ("[C]ourts will set aside the arbitrator's interpretation of what [the] agreement means only in rare instances.").

[4] *Id.*; United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757 (1983).

Court's case law on the exception. Unfortunately, this sleight of hand transforms what is supposedly a narrow exception into one that is potentially vast. This commentary argues that the solution to this problem can be found in Justice Scalia's concurring opinion in *Eastern Associated Coal Corp. v. United Mine Workers, District 17*[5] and argues that courts should adopt his theory for determining when an arbitration award is contrary to public policy. That is, courts should only find an arbitration agreement contrary to public policy when it violates positive law.[6] By hewing closely to this standard, the public policy exception will remain the narrow exception that it should be.

This commentary contains three sections. The first explains the facts of *State v. Henderson* as well as the court's decision and the dissenting opinion. The second summarizes the case law establishing the public policy exception. The third argues that the Nebraska Supreme Court misapplied the public policy exception and that courts should hold that only awards that violate positive law are contrary to established public policy.

State v. Henderson[7]

In 2003, Robert Henderson was an officer in the Nebraska State Patrol. He had been serving in law enforcement for about twenty-one years. About that time, his marriage fell apart when his wife left him for a man of Hispanic descent. Shortly thereafter, Henderson paid a $35 membership fee for access to the "members only" section of a website run by the Knights Party, an affiliate of the KKK.[8] Once on the site, Henderson posted a series of comments. Some of the

[5] 531 U.S. 57, 67 (2000) (Scalia, J. concurring).

[6] Positive law is "[a] system of law promulgated and implemented within a particular community by political superiors, as distinct from moral law or law existing in an ideal community or in some non-political community." It "typically consists of enacted law" such as "codes, statutes, and regulations." BLACK'S LAW DICTIONARY 1280 (9th ed. 2009).

[7] 277 Neb. 240, 762 N.W.2d 1 (2009), *cert. denied*, 129 S. Ct. 2841 (2009).

[8] The Ku Klux Klan formed in the aftermath of the Civil War. In the years after the war, members of the Klan targeted African-Americans in an effort to thwart them in the exercise of their new rights and freedom. The Klan also targeted whites that sought to assist the African-Americans. Their terrorizing tactics included beatings, rape, arson, and murder. In response to the Klan, Congress passed what became known as the "Ku Klux Klan Act." *See* An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985, and 1986 (2006)). In addition to the act, the federal government also utilized the military in putting down the Klan. Their efforts were successful and the Klan was largely dissolved.

The Klan enjoyed a resurgence in the first quarter of the 20th century. This increase in membership even led to electoral success for the Klan as several elected officials claimed allegiance to the Klan. This revival did not last long and membership began to decline until the Klan ultimately disbanded again in 1944. The Klan would never again enjoy the popularity it had during the post-Civil War period and in the early 20th century. The Klan today exists as a number of splintered groups. Church of the American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 200 n.2 (2d Cir. 2004); *see also* Virginia v. Black, 538 U.S. 343, 352–57 (2003) (recounting the history of the Klan and cross-burning); Anti-Defamation League, Ku Klux Klan – History, http://www.adl.org/learn/ext_us/kkk/history.asp (last visited Sept. 28, 2009) (noting that fragmentation and decentralization are the dominant themes in the recent history of the Klan).

comments were requests to be put in touch with like-minded people in Nebraska, while another comment reflected Henderson's frustration with what he saw as favorable treatment to minorities by law enforcement officials and society as a whole.[9]

A short time after these postings, an agent from the Kansas Bureau of Investigation alerted the Nebraska State Patrol that a Nebraska law enforcement officer might be a member of the KKK. After an investigation by the state patrol, it was determined that the person posting on the site was indeed Robert Henderson. Although Henderson soon renounced his membership in the Knights Party, he was still terminated from the patrol.[10]

After Henderson was terminated, the State Law Enforcement Bargaining Council (SLEBC) filed a grievance on his behalf, pursuant to the collective bargaining agreement to which Henderson was a party. The grievance was not resolved satisfactorily and the matter was submitted to arbitration.[11] The arbitrator found that the firing of Henderson violated his First Amendment rights and that the patrol did not have "just cause" for the firing.[12] The arbitrator crafted an award that required the state patrol to reinstate Henderson, but allowed the patrol to reassign him to another position in order to "maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware of [Henderson]'s association with the Knight's Party."[13]

The state patrol moved to vacate the award. The district court granted the motion, relying on a public policy exception that had never been previously recognized in Nebraska.[14] Henderson and the SLEBC then appealed.

The Nebraska Supreme Court, in a 4-2 decision,[15] upheld the vacatur. After first explaining the Supreme Court decisions establishing the public policy exception,[16] the court

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[9] The post related to an incident for which Henderson was investigated. Henderson's new fiancé was working for a television station in Omaha along with an African-American man who was allegedly making unwelcome advances on her. Henderson pulled over the man because the man did not have the proper plates on his car. Henderson issued the man a warning. The man subsequently issued a complaint with the State Patrol against Henderson. The Patrol conducted an investigation and found that Henderson had not engaged in any misconduct and further, that the man was in fact in violation of the law. *See* Arbitration Opinion and Award at 14 & 28, State v. Henderson, 277 Neb. 240, 762 N.W.2d 1 (2009) (No. S-07-010).

[10] *Henderson*, 277 Neb. at 254, 762 N.W.2d at 11.

[11] *Id.* at 242, 762 N.W.2d at 3.

[12] *Id.* The arbitrator found that Henderson's personal beliefs did not interfere with his impartial enforcement of the law. He found "no evidence or credible testimony that [Henderson]'s affiliation with the Knight's Party/KKK impaired the operation or efficiency of the State Patrol or the employee" or that his reinstatement would do so. Arbitration Opinion and Award, *supra* note 9, at 45.

[13] Arbitration Opinion and Award, *supra* note 9, at 47.

[14] *See Henderson*, 277 Neb. at 245, 762 N.W.2d at 6 ("We have not previously addressed whether an arbitration award, under the Uniform Arbitration Act, can be vacated by a court on public policy grounds.").

turned its attention to determining whether or not Nebraska had a public policy that would be violated by reinstating Henderson to the state patrol. Such a public policy had to be "explicit, well defined, and dominant."[17] It also had to be ascertainable "by reference to laws and legal precedents, not from general considerations of supposed public interests."[18] But the award itself did not have to violate positive law to be unenforceable as against public policy.[19]

The court found that Nebraska has a fundamental public policy "that the laws of Nebraska should be enforced without racial or religious discrimination."[20] The court further noted that this policy "incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination."[21] The court went on to hold that:

> Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race.[22]

The court found that Henderson's voluntary association with the KKK would undermine the public's confidence in law enforcement and thus was contrary to public policy.[23]

The dissent took issue with several aspects of the court's decision. Most significantly, it accused the court of "redecid[ing] the merits of [the] case under the guise of public policy."[24] According to the dissent, in order to find that the award violated public policy, the majority had

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[15] Chief Justice Heavican did not participate in the case but was replaced by Judge Sievers of the Nebraska Court of Appeals. Justice Wright did not participate in the decision. Justices Stephan and Connolly dissented from the decision of the court.

[16] These decisions are discussed in a later section of this commentary. In the interest of avoiding redundancy, they will not be discussed in-depth at this point.

[17] *Henderson*, 277 Neb. at 250, 762 N.W.2d at 9.

[18] *Id.*

[19] *Henderson*, 277 Neb. at 250, 762 N.W.2d at 9.

[20] *Id.* at 263, 762 N.W.2d at 16–17. To establish this, the court first noted that Nebraska's admission as a state was conditioned on its promise not deny suffrage on the basis of race or color. It also cited portions of the state constitution as well as part of the state's seal. Finally, the court pointed to a number of statutes that barred discrimination in areas such as public accommodations, housing, and employment, among others. *See id.* at 259-60, 762 N.W.2d at 14–15.

[21] *Id.* at 263, 762 N.W.2d at 17.

[22] *Id.*

[23] *Id.* at 264–65, 762 N.W.2d at 17–18.

[24] *Id.* at 272, 762 N.W.2d at 22 (Stephan, J., dissenting).

to make factual findings at odds with those of the arbitrator and/or rest on speculation as to future events, neither of which is permitted under the public policy exception. Thus, the dissent concluded, the award was not contrary to public policy and should have been enforced.

The Public Policy Exception

Arbitration "is purely a matter of contract."[25] Arbitration in Nebraska is governed by the Uniform Arbitration Act (UAA).[26] Since many of the provisions were modeled on the Federal Arbitration Act (FAA),[27] Nebraska courts often look to federal law for guidance when interpreting the UAA.[28] In recognizing a public policy exception, the Nebraska Supreme Court relied on a trilogy of United States Supreme Court cases.

The first of these cases is *W.R. Grace & Company v. Local Union 759, International Union of the United Rubber Workers*.[29] In *W.R. Grace*, a company had laid off workers pursuant to a conciliation agreement entered by a court. However, the lay-offs violated a collective bargaining agreement that had previously been signed by the company and the union. The lay-offs were submitted to arbitration and the arbitrator decided that good faith adherence to the conciliation agreement did not excuse the company from its violations of the CBA.[30] The company then argued that enforcement of the arbitration award would violate public policy as the company had to choose between following a court order or the CBA. Forcing the company to comply with the CBA could undermine respect for judicial orders, which, the company argued, would be contrary to public policy.

The Court based the public policy exception on the notion that, "[a]s with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy."[31] Public policy is to be determined by courts, and "must be well defined and dominant"

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[25] *Id.* at 243, 762 N.W.2d at 4.

[26] NEB. REV. STAT. §§ 25-2601 to -2622 (Reissue 2008).

[27] 9 U.S.C. §§ 1–16 (2006). Arbitration in Nebraska can be governed by the FAA if it arises from a contract involving interstate commerce. However, that was not the case in *Henderson*, and the Nebraska Supreme Court relied instead on the UAA.

[28] *See Henderson*, 277 Neb. at 243, 762 N.W.2d at 4. ("[B]ecause the applicable provisions of the Uniform Arbitration Act and the Federal Arbitration Act are similar, we look to federal case law explaining the scope of judicial review of arbitration awards.").

[29] 461 U.S. 757 (1983).

[30] *Id.* at 763–64.

[31] *Id.* at 766; *see also* United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 42 (1987) ("A court's refusal to enforce an arbitrator's award . . . because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.").

and ascertainable "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[32]

The Court found that, while compliance with judicial orders is an important public policy, nothing in the arbitrator's award required the violation of that policy.[33] The Court further noted that the company had voluntarily entered both agreements and stated that to hold the company to both was not so unfair as to violate public policy. The Court also found that the public policy of voluntary compliance with Title VII was not violated either.[34]

The next case applying the public policy exception was *United Paperworkers International Union v. Misco, Inc.*[35] *Misco* involved the termination of an employee who was found in the back seat of a car on company property with a lit marijuana cigarette in the front ash tray and smoke in the air. The employee worked with a dangerous machine that had previously caused several injuries. After the arbitrator ordered the employee reinstated,[36] the company moved to have the award vacated as contrary to public policy. Both the district court and appellate court upheld the vacatur, finding the reinstatement to be contrary to a public policy against operating dangerous machinery while under the influence of drugs or alcohol.[37] The case then went to the Supreme Court.

In deciding that the award did not violate public policy, the *Misco* Court cautioned that *W.R. Grace* does not "sanction a broad judicial power to set aside arbitration awards as against public policy."[38] The Court overruled the vacatur on two grounds. First, the Court pointed out that the court of appeals had not looked to law and legal precedents in determining public policy and instead had rested on common sense notions of supposed public policy. The Court then highlighted the fact that *W.R. Grace* explicitly prohibited such a practice.[39] Second, the Court admonished the court of appeals for making inferences about the facts. The fact-finding by the court exceeded its authority and in any case, "[a] refusal to enforce an award must rest on more than speculation or assumption."[40]

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[32] *W.R. Grace*, 461 U.S. at 766 (internal quotations and citations omitted).

[33] *Id.* at 766–70.

[34] *Id.* at 770–72.

[35] 484 U.S. 29 (1987).

[36] *Misco*, like *Henderson*, involved some very questionable fact-finding by the arbitrator. Finding the employee in the back of a smoke-filled car with a marijuana cigarette in the front ashtray was deemed to be "insufficient proof that [the employee] was using or possessed marijuana on company property." *Id.* at 34. However, the Court stated that "improvident, even silly, factfinding" is not "a sufficient basis" for overturning the decision of the arbitrator. *Id.* at 39.

[37] *See id.* at 31–35.

[38] *Id.* at 43.

[39] *Id.* at 44.

[40] *Id*.

The final case in the trilogy is *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*.[41] This case involved the reinstatement of a truck driver who had tested positive for marijuana. The Court emphasized that it is the award to be considered in light of public policy, not the underlying conduct. It framed the question as "does a contractual agreement to reinstate [the employee] . . . run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?"[42] The Court stated that while courts must look to positive law in ascertaining public policy, it is not necessary that the award itself violate positive law.[43] But the Court then went on to order enforcement after determining that "[t]he award violate[d] no specific provision of any law or regulation."[44] In other words, the award was enforceable because it did not violate any positive law.

Justice Scalia wrote a concurring opinion in *United Mine Workers*. His concurrence argued that courts should only vacate awards on public policy grounds when the awards violate positive law. Justice Scalia points out that, since *Erie Railroad*,[45] the Court had not invalidated an agreement on public policy grounds that did not violate positive law. Justice Scalia cautions against giving judges too much discretion because it is impossible to know whether "the apparent gaps in the law are intentional or inadvertent."[46] He further argues that the benefits stemming from a clear-cut rule outweigh the benefits of leaving courts with the flexibility needed to deal with, what he sees as, the rare case in which an award contravenes public policy but not positive law.[47]

The Problem and the Remedy

The Nebraska Supreme Court's treatment of the public policy exception in *Henderson* is troubling because by allowing for an expansive interpretation of public policy the court has

[41] 531 U.S. 57 (2000).

[42] *Id.* at 63.

[43] *Id.* The Court reiterated that the exception is narrow and went on to say that "where two political branches have created a detailed regulatory regime in a specific field, courts should approach with particular caution pleas to divine further public policy in that area." *Id.*

[44] *Id.* at 66. This statement by the Court is somewhat perplexing given that the Court had said that the award does not have to violate positive law to be unenforceable. Perhaps this seeming contradiction can be explained by the fact that Congress and the Secretary of Transportation had heavily regulated this area, so much to the point that the Court assumed that the regulations embodied all the policies the two wished to enact. Thus, a plausible reading of this case may suggest that when the area is heavily regulated, a violation of positive law will be necessary. But when the area is more devoid of regulation, courts will have a freer hand in determining when an award will contravene public policy.

[45] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[46] *Id.* at 68 (Scalia, J., concurring).

[47] *Id.*

undermined the reasons for submitting disputes to arbitration. Granting too much discretion to a court weakens the parties' belief that their arbitration award is truly binding.

The opinion in *Henderson* illustrates the problem that a creative court can always craft public policy in such a way to get the result the court desires. In *Henderson*, there were two public policy considerations at play: equal application of the law and public perception of law enforcement. The court ruled that the former incorporated the latter. However, upon examination, it is only by this formulation that the case could have come out as it did.

If the court treated the two policies as two separate policies, which they at least arguably are, then the award would have had to be enforced. While equal application of the law surely meets the requirements of explicitness and narrowness necessary to be an appropriate public policy for this analysis, finding that the agreement contravened this public policy would have required the court to ignore the factual findings of the arbitrator, something that is impermissible under the principles governing review of arbitration agreements.[48] The second policy, that the public should perceive the law as being applied fairly, likely does not meet the requirements to be an appropriate public policy.[49] It appears to be more of a common sense, generalized notion of public policy as opposed to explicitly defined in statutes and legal precedents. This is not adequate, as the previously cited U.S. Supreme Court cases illustrate.[50] But by deciding that one incorporates the other, the court was able to have the best of both worlds.

Giving courts too much of a free hand in reviewing arbitration agreements and awards is problematic in that it undermines the reasons for having arbitration in the first place. Parties agree to submit matters to arbitration because it provides a quicker and less expensive alternative to litigation. An expansive view of the situations in which an arbitration award can be vacated simply encourages a losing employer to take the matter to court; it tells the parties that if they do not really want the binding arbitration to be binding, they can take a second bite at the apple in court.

The answer to this problem is simple. In *United Mine Workers*, Justice Scalia argued that only awards that violate positive law should be unenforceable as against public policy.[51] He claimed that the situations in which an award violates a public policy that meets the relevant requirements—that it be definite, well defined, and ascertainable by reference to laws and legal precedents—without violating positive law would be few and far between. Further, he stated

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[48] "[I]t is the arbitrator's view of the facts . . . that [the parties] have agreed to accept. Courts thus do not sit to hear claims of factual . . . error . . . ." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38–39 (1987).

[49] This is assuming that the arbitrator had found factually that the reinstatement would harm public perception of the patrol. He did not find so and in any case crafted an award where the patrol could transfer Henderson to a less sensitive position. *See* Arbitration Opinion and Award, *supra* note 9, at 45–47. In any case, it seems that the court is doing little more than speculating as to *future* public reaction if the award is upheld and the "refusal to enforce an ward must rest on more than speculation or assumption." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 44 (1987).

[50] *See supra* notes 25–47 and accompanying text.

[51] *United Mine Workers*, 531 U.S. at 67–69 (Scalia, J., concurring).

that courts' ability to deal with these rare cases is far outweighed by the certainty inherent in requiring awards to conflict with positive law to be unenforceable.[52]

Henderson is the type of case that Justice Scalia predicted would be rare. The award was found to be contrary to public policy but would not have violated any positive law. There was no statute or legal precedent in Nebraska that bars a KKK member from serving as a law enforcement officer.[53] But the court crafted a broad public policy that incorporated public perception to invalidate the award. This was unnecessary. As the *Henderson* court pointed out, Nebraska has several laws against the overt display of racism by law enforcement. However, the state lacked any laws that barred members of any groups from employment in law enforcement. This could have, at least in theory, represented a compromise between a person's First Amendment rights and the public's interest in effective law enforcement; we will let you think what you want, just do not act on it. If this was in fact a deliberate balance made by the legislature, the court upset it. Further, even if the court stayed its hand, the legislature may be able to still act and pass a law later implementing that public policy.[54] In short, the court erred on the wrong side; the determination of public policy could still have been left to the public's representatives.

While most would not argue with the result—keeping a KKK member off of the state patrol—one must recognize that if we are going to present arbitration as a serious alternative to litigation, we must adopt rules of judicial review that are narrow and will instill faith in the parties that their binding decisions are truly binding.

Preferred Citation Format: Daniel J. Hassing, *White Robes and Black Robes: The Nebraska Supreme Court's Vacatur in* State v. Henderson, 1 NEB. L. REV. BULL. 45 (2009), http://lawreview.unl.edu/?p=610.

[52] *Id.*

[53] However, if Henderson were a judge, a reinstatement award would violate positive law as the Nebraska Code of Judicial Conduct prohibits a judge from being a member in an organization that practices invidious discrimination. *See* NEB. CODE OF JUDICIAL CONDUCT § 5-202(C) (recodified 2008).

[54] As Justice Scalia pointed out, supervening law could make performance of the employment contract impracticable. *See United Mine Workers*, 531 U.S. at 69; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 264 (1979) (stating that intervening governmental action may discharge a duty of performance). *United States v. Winstar Corp.*, 518 U.S. 839, 897-98 (1996) (Souter, J. with two Justices concurring) lays out the rule for when a federal law may be used to assert an impracticability defense on the part of the federal government. For the defense to be available, the law must be a "public and general act" and must have less than a substantial effect on the government contracts. The greater the government's self-interest in passing the law, the less likely the defense will be available. In other words, the law cannot be passed merely to invalidate a contract the government no longer views as a good deal.