

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PERCY SCOTT, DONNIE BENION, KENNETH  
CORR, ARLON MAXWELL, RAHEEM  
MUHAMMAD, TIM RADFORD, SPENCER  
GARFIELD, and WILBERT THORNTON,

Plaintiffs-Appellees,

v

ROAD COMMISSION FOR COUNTY OF  
OAKLAND, a/k/a OAKLAND COUNTY ROAD  
COMMISSION,

Defendant-Appellant.

UNPUBLISHED

June 3, 2003

No. 233992

Oakland Circuit Court

LC No. 98-006784-CL

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ROAD COMMISSION FOR OAKLAND  
COUNTY, a/k/a OAKLAND COUNTY ROAD  
COMMISSION,

Plaintiff-Counterdefendant-  
Appellant,

v

PERCY SCOTT, DONNIE BENION, KENNETH  
CORR, ARLON MAXWELL, RAHEEM  
MUHAMMAD, TIM RADFORD, GARFIELD  
SPENCER, and WILBERT THORNTON,

Defendants-Counterplaintiffs-  
Appellees.

No. 233995

Oakland Circuit Court

LC No. 01-029380-CZ

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Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff/counterdefendant Road Commission for Oakland County (hereinafter RCOC) appeals as of right from a final order entering judgment on an arbitration award in favor of defendants/counterplaintiffs. We affirm.

In 1998 defendants/counterplaintiffs (hereinafter employees), were the plaintiffs in a discrimination suit alleging violations of the Civil Rights Act, MCL 37.2101, *et seq.*, against their employer, the RCOC. In April 2000, that case was placed into arbitration by stipulated order and was dismissed with prejudice. After the arbitrators unanimously found in favor of employees, RCOC filed a complaint in the lower court challenging the arbitration award and award of attorney fees and costs. A judgment was entered on the arbitration award, and it is from that judgment that RCOC appeals.

In the underlying discrimination case, each party selected its own arbitrator, and both parties agreed to select a neutral arbitrator, Valdemar Washington.

Employees' co-counsel in this suit, Michael Pitt and Jeanne Mirer, were also working together as class counsel in an ongoing matter entitled *Gilford, et al v The Detroit Edison Co* (hereinafter *Edison*). In 1998, a consent judgment was entered in *Edison* creating a monitoring program and appointing Washington as the special master of the program to mediate and facilitate Detroit Edison human resources issues between 1998 and 2003. As class counsel in the matter, Pitt and Mirer agreed to the selection of Washington as the special master.

This relationship between employees' co-counsel and the neutral arbitrator was not disclosed to RCOC before the selection of Washington as the neutral arbitrator in the underlying discrimination case. However, on the sixth day of the seven-day arbitration, counsel for RCOC became aware of the relationship and discussed the matter with Washington, Pitt, and Mirer. Although no record was made of this discussion, all parties agree that the consent judgment and Washington's role as special master were mentioned and Pitt and Washington reassured RCOC's counsel that Washington was neutral. After this discussion, the subject was not raised again. The arbitration proceedings concluded on October 26, 2000, and a unanimous arbitration panel issued awards in favor of the employees on December 20, 2000.

RCOC argues that neutral arbitrator Washington's failure to disclose a relationship that might reasonably lead to the impression or appearance of bias is "evident partiality" under MCR 3.602(J)(1)(b), and sufficient grounds to set aside the arbitration award. We disagree.

This Court reviews the trial court's refusal to vacate an arbitration award for clear error. *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982); *Emerson v Arnold*, 92 Mich App 345, 353-354; 285 NW2d 45 (1979). Arbitration awards are given great deference and should not be lightly set aside. *Bell v Seabury*, 243 Mich App 413, 422; 622 NW2d 347 (2000). An arbitration award may be confirmed, modified, corrected, or vacated. The court's power to modify, correct, or vacate an arbitration award is limited by court rule. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 174; 550 NW2d 608 (1996). MCR 3.602(J)(1)(b) states that an award may be vacated if "there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights."

If partiality or bias is alleged to justify overturning an award, it must be "certain and direct, not remote, uncertain or speculative." *Belen v Allstate Ins Co*, 173 Mich App 641, 645;

434 NW2d 203 (1988). The party attacking the impartiality of the arbitrator has the burden of proof on that issue. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992).

RCOC relies heavily on the Supreme Court's ruling in *Commonwealth Coatings Corp v Continental Casualty Co*, 393 US 145; 89 S Ct 337; 21 L Ed 2d 301 (1968). In *Commonwealth*, the neutral arbitrator of a tripartite panel failed to inform the plaintiff that the defendant, the prime contractor in the suit, was a sporadic customer of the arbitrator's engineering consulting business in Puerto Rico. This relationship existed over four or five years, and involved fees of approximately \$12,000. After the arbitration panel made a unanimous decision in favor of the defendant, the plaintiff learned of the business relationship between the neutral arbitrator and the defendant and sought to set aside the award. The Court found that it is not only actual bias, but the appearance of bias that must be excluded from judicial and arbitral forums and the award was vacated. *Id.* at 150.

However, *Commonwealth* factually differs from the present case in two important ways. First, in the present case there is no business relationship between neutral arbitrator Washington and employees' co-counsel, and thus no impression or appearance of possible bias exists. Second, RCOC waived its right to object to the relationship because it was on notice of the relationship and failed to act before the conclusion of the proceedings.

There is no evidence demonstrating that employees' co-counsel were involved in any business capacity with Washington, aside from being class counsel in the *Edison* class action. Pitt and Mirer do not alone have any power over special master Washington in the *Edison* case. *Edison* counsel and class counsel together selected Washington to be the special master, and the court entered an order approving him. Moreover, the consent judgment provides that the special master may only be removed by joint written request of both parties or by order of the court on a motion by either party for good cause shown. Payments to the special master are made out of a special master escrow fund set up by Detroit Edison. The court, not class counsel, controls the special master's budget for the monitoring program. The special master sets forth the budget needed for his work, and while either party may object to it, the court must approve of it. Class counsel reviews all budgeting requests from the position of an officer of the court, and the court is the ultimate decision-maker on any budget dispute.

We conclude that it is more accurate to characterize the relationship between special master Washington and the *Edison* class counsel as that between lawyers and a judicial officer. The special master's duties include acting as a judge and final arbitrator of many issues arising under the consent judgment, including making final and binding decisions regarding disputes and hearing motions on behalf of either party. Washington was appointed to this position to make neutral and fair decisions. Pitt and Mirer have met with him on no more than two or three occasions since 1998 for short meetings to review the status of the human resources program or to meet with the *Edison* counsel to resolve minor disputes. Otherwise, special master Washington works exclusively with the Detroit Edison Company and a monitoring committee comprised of Detroit Edison employees. Therefore, there is no business relationship between neutral arbitrator Washington and employees' co-counsel that would create the impression or appearance of bias.

Next, the present case differs from *Commonwealth* because it is undisputed that RCOC had notice of Washington's appointment as special master in the *Edison* class action before the close of arbitration. In *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 120-121; 440 NW2d 907 (1989), rev'd in part on other grounds 438 Mich 488; 475 NW2d 704 (1991), this Court stated that "a party's failure to raise the disqualification issue in the arbitral proceeding may constitute a waiver." A waiver occurs when there is the existence of knowledge, actual or constructive, in the complaining party of the tainted relationship or interest of the arbitrator. *Id.* at 120.

In the present case, RCOC argues that full disclosure was never made, and the specific details of the relationship were only learned after the proceedings had ended. However, it is undisputed that RCOC had knowledge that Washington had been appointed special master in the *Edison* case, that Pitt and Mirer were class counsel, and there was a consent judgment issued in the matter. RCOC's counsel was told on the sixth day of the seven-day arbitration that the matter was public record, and he could look into it further if he so desired. He appeared satisfied with the disclosure made and did not raise the subject again until the award had been issued. He did not move to disqualify neutral arbitrator Washington, question him any further, or move for a mistrial. In *Gordon Sel-Way, Inc, supra*, the defendant had no actual knowledge of any prior relationship, yet this Court found that he was placed on notice because knowledge was imputed to him via his agents. *Id.* at 123-124. Thus it follows that having actual notice of the existence of a relationship, even without knowledge of the specific details surrounding it, also constitutes sufficient notice. Therefore, RCOC was on notice of the relationship between neutral arbitrator Washington and employees' co-counsel prior to the conclusion of the proceedings and failed to object to it until after the award had been issued, waiving its right to object.

RCOC next argues that the issue of partiality was fairly raised, and thus, the lower court erred in refusing to allow limited discovery into the details surrounding the relationship between neutral arbitrator Washington and employees' co-counsel. In support of this, RCOC cites *Kauffman, supra* at 819-820. This Court reviews for error the trial court's refusal to vacate an arbitration award and its failure to permit discovery where partiality is fairly raised. *Id.* at 819-820.

In *Kauffman*, this Court indicated that to be "fairly raised" the issue "requires a strong and definite showing of evident partiality." *Id.* at 819. In the present case, the issue of partiality was not fairly raised. First, as stated above, there is no business relationship between the parties, as the relationship is more akin to a lawyer-judicial officer relationship. Thus, it is not a relationship that would spark the impression or appearance of bias. Second, RCOC learned about the relationship before the conclusion of the proceeding and did not act, thereby waiving its right to object to it; therefore, the issue of partiality was not fairly raised. Furthermore, we note there are no unanswered questions about the nature of the relationship that cannot be answered simply by reading the *Edison* consent judgment.

RCOC's final argument is that the arbitration award must be vacated pursuant to MCR 3.602(J)(1)(c) because the arbitrator exceeded his powers. RCOC maintains that despite the fact no evidence or testimony was offered by employees regarding attorney fees or costs, the arbitration award contained both; consequently, the award exceeded the authority given to the arbitrator under the arbitration agreement. The appropriate standard of review for determining whether arbitrators have exceeded the scope of their authority is whether an error of law appears

from the terms of the arbitration agreement; i.e., arbitrators have exceeded their powers whenever they act beyond the material terms of the arbitration agreement. *Dohanyos, supra* at 176-177.

In the present case, the arbitration agreement authorizes the arbitrators to award attorney fees and costs. Specifically, paragraph eight of the arbitration agreement states: “The panel will also separately award costs and attorney fees, if any.” The panel unanimously concluded that it had authority and sufficient evidence to arrive at the fees and costs contained in the award. Therefore, the arbitrators did not exceed their authority by awarding attorney fees and costs.

Affirmed.

/s/ William C. Whitbeck  
/s/ Richard Allen Griffin  
/s/ Donald S. Owens