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Evidentiary Portions Of Teacher Interest Arbitration Hearings Must Be Open To The Public

In a recent decision, the Freedom of Information Commission (the "Commission") concluded that the evidentiary portion of a teacher interest arbitration hearing conducted under the Teacher Negotiations Act ("TNA") is a "hearing or other proceeding" and is therefore a "meeting," within the meaning of the Freedom of Information Act ("FOIA"). The Commission ruled that the evidentiary portion of the hearing did not constitute collective bargaining strategy or negotiations, and thus, it should have been open to the public. *Jim Moore and the Waterbury Republican American v. State of Connecticut, Department of Education*, *Contract Arbitration Panel, et al.*, Docket #FIC 2010-132 (February 25, 2011).

In *Moore*, the arbitration panel convened to hear testimony and receive last best offers from the Torrington Board of Education ("Board") and the Torrington Education Association ("Association"), following the rejection by the Torrington City Council of a negotiated agreement between the Board and the Association. A reporter's request to attend the hearing was denied by the Chair of an arbitration panel, because he concluded that the arbitration panel was not a public agency and that the hearing was not a "meeting" under the FOIA.

The Commission first found that the arbitration panel was a "committee" of the State Department of Education, and thus came within the definition of "public agency" in Conn. Gen. Stat. § 1-200(l). In doing so, the Commission relied on Conn. Gen. Stat. § 10-153f, which states that there shall be an arbitration panel "in the Department of Education" and on the fact that the statute required the Department to adopt regulations concerning selection of arbitrators for the panel.

In analyzing the definition of "meeting" and the scope of the statutory exclusion for "strategy or negotiations with respect to collective bargaining," the Commission relied heavily on the Connecticut Supreme Court's decision in *Glastonbury Education Assn. v. FOIC*, 234 Conn. 704, 711-13 (1995), even though, in that decision, the Supreme Court found that there was no violation of FOIA based on the exemption from the statutory definition of "meeting" for "strategy or negotiations with respect to collective bargaining." In the *Glastonbury* case, the Court focused on the fact that

Questions?

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there was discussion and exchange of last best offers as part of the arbitration process and thus decided that arbitration under the TNA resembled negotiations, despite the fact that the proceeding was called arbitration. In *Glastonbury*, the Court ruled as it did, at least in part, because the FOIC ordered that the entire arbitration process be open to the public. The Court found that the FOIC's unconditional order was improper as a matter of law.

In its decision in the *Moore* case, the Commission quoted from passages in the *Glastonbury* decision concerning the long-standing legislative policy of the FOIA favoring "the open conduct of government and free public access to government records." Moreover, the Commission noted that the *Glastonbury* decision provided guidance in distinguishing between evidence presented and discussion and argument about "last best offers" at interest arbitration hearings. In so doing, the Commission noted that the *Glastonbury* decision found that only the presentations of last best offers by the parties sufficiently resembled negotiations to be excluded from the "meeting" requirements of the FOIA. Second, the Commission found that the TNA provides an opportunity for parties to create an evidentiary record, including evidence of financial data, on which the arbitrators can rely in making their final determination on any unresolved issues. Finally, the Commission pointed out that the *Glastonbury* Court "postpone[d] to another day questions concerning the validity of a more narrowly tailored FOIC order that requires open hearings only with respect to evidentiary presentations and permits executive sessions for discussion and argument about the contents of the parties' last best offers." *Id*. at 718.

Guided by the Supreme Court's distinction in the *Glastonbury* case between the presentation of evidence and discussion and argument about "last best offers," the Commission determined that the arbitration panel violated Conn. Gen. Stat. §1-225(a) by conducting the evidentiary portion of the hearing in private. The Commission determined that the evidence presented in support of the parties' last best offers should have been open to the public while the actual presentation of the last best offers were properly held in executive session. More specifically, the evidentiary portion of the proceedings that were stenographically recorded was not "strategy or negotiations with respect to collective bargaining," and therefore, was a "meeting" under the FOIA that was required to be open to the public.

Based on the Commission's decision, that portion of an interest arbitration hearing which should be open to the public likely includes presentation of evidence on the statutory factors that arbitrators are required to consider under the TNA, with the probable exception of evidence on "the history of the negotiations between the parties prior to arbitration, including the offers and the range of discussion of the issues." Conversely, the Commission concluded that the negotiation portions of the hearing, conducted off the record and

away from the panel, are excluded from the definition of "meeting" and may be held in private. Moreover, the Commission advised that parties to interest arbitration proceedings should not construe its decision to mean that they must convene in executive session to conduct off the record negotiation sessions.

Based on the Commission's decision, the evidentiary portions of interest arbitrations are "meetings" that are open to the public. Unfortunately, this decision ignores the fact that the evidence presented at an arbitration hearing is often intertwined with "collective bargaining strategy and negotiations."

Questions that remain open in light of this decision include the following:

- Who is responsible to post the notice of and agenda for the "meeting" of an arbitration panel under the FOIA, and where must it be noticed? The Commission decided that the arbitration panel is a committee of the State Department of Education. Should the panel be responsible for the posting, or should the public agency, the State Department of Education? It seems clear that the board of education would not have this responsibility.
- How will arbitrators navigate the muddy waters between what portion of a hearing is purely evidentiary and what portion is or would disclose "collective bargaining strategy and negotiations?"
- Will this decision be deemed applicable to interest arbitrations under the Municipal Employee Relations Act ("MERA") and/or the State Employee Relations Act ("SERA")?

On the last question, it is probable that the Commission would apply similar reasoning to arbitrations under MERA and SERA and find that the evidentiary portions of interest arbitration hearings should be open to the public. However, there are different arguments concerning the status of an arbitration panel or single arbitrator under those statutes. Therefore, those involved in any interest arbitration proceedings under MERA or SERA should consult with counsel prior to an interest arbitration hearing on these issues.

Questions or Assistance?

If you have any additional questions, please contact Saranne Murray at smurray@goodwin.com or 860-251-5702 or Jessica Ritter at jritter@goodwin.com or 860-251-5034.

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