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### SCHOOL COMMITTEE OF LEXINGTON V. ZAGAESKI, 469 Mass. 104 (2014)

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#### I. INTRODUCTION

In a case presenting a question about the scope of an arbitrator's authority in teacher dismissal cases, the Supreme Judicial Court held in *School Committee of Lexington v. Zagaeski* that the arbitrator exceeded the scope of his authority by reinstating a teacher the school district had dismissed, when the school district met its burden of proving the teacher, Mark Zagaeski, had engaged in conduct unbecoming a teacher.

At the heart of this case is an issue left unresolved in Justice Cordy's plurality opinion in *School District of Beverly v. Geller*. 435 Mass. 223 (2001). The plurality concluded in *Geller* that an arbitrator may not substitute his disciplinary judgment for that of the superintendent when the school district proves the facts giving rise to the discipline. *Id.* at 232. Footnote 7 of the case causes some uncertainty, however, in the case where the alleged misconduct was "minor."<sup>1</sup> According to footnote 7 in *Geller*, an arbitrator likely acts within the scope of his authority if he finds that the minor misconduct, which may "nominally fit within a category on which dismissal could be based" does not rise to the level of misconduct contemplated by G.L. c. 71, § 42 for dismissal. In *Zagaeski*, the SJC clarified that footnote 7 is aimed at preventing school districts from using the label of "conduct unbecoming a teacher" as a pretext or from dismissing a teacher whose conduct does not rise to the level of seriousness necessary for dismissal. If, however, the

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<sup>1</sup> That footnote states, in relevant part:

This is not the case of an arbitrator finding a teacher to have engaged in minor misconduct that, however, nominally fit within a category on which dismissal could be based. In such circumstances, an arbitrator's finding that the conduct did not rise to the level of misconduct contemplated by the statute as a ground for dismissal is one that would likely lie within the scope of his authority.

school district carries its burden of proving facts sufficient to show that the alleged conduct arises to “conduct unbecoming a teacher,” then the general rule applies that an arbitrator may not substitute his disciplinary judgment for that of the superintendent.

The Court also addressed the language in G.L. c. 71, § 42 authorizing an arbitrator reviewing a teacher dismissal to consider the “best interest of the pupils in the district and the need for elevation of performance standards.” In interpreting those provisions, the Court limited the consideration an arbitrator may give to a teacher’s past performance and divided the bases for a teacher dismissal into two categories: (1) performance and (2) conduct that jeopardizes the wellbeing of students or proper functioning of the school district. The categories determine whether the arbitrator should consider the dismissal primarily in light of the need to elevate performance standards or in light of pupils’ interest in a safe and secure educational environment.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The Court accepted the facts as found by the arbitrator, as it is bound to do. According to those factual findings, Zagaeski had been employed as a physics teacher in Lexington from 2000 until the spring of 2011. Zagaeski taught an integrated math and physics class for students who struggled with those subjects. Many of his students also had behavioral and/or learning challenges. Consequently, Zagaeski’s teaching style was more relaxed and flexible. Prior to the spring of 2011, his evaluations had been uniformly positive and he had never been disciplined by the district.

In April 2011, a 17 year old female student in Zagaeski’s class who was disappointed with her grade asked if she could “pay for a better grade.” A male student in the class suggested she pay with sexual favors. Rather than correcting that improper comment, Zagaeski played along, stating “yes, that is the only thing that would be accepted.” The students laughed and Zagaeski later said “don’t be ridiculous” and that the only way to raise her grade would be through hard work.

Two days after that incident, the student sought Zagaeski’s help after school. Another female student was in the classroom. Again, the first student asked if she could pay for a better grade. Again, Zagaeski responded that he would only accept sexual favors. The student made a complaint to her guidance counselor, which the arbitrator determined was a result of the student being troubled by the comments.

The principal initiated an investigation, which the central office took over. Zagaeski was put on notice of the investigation and placed on administrative leave. The investigation included interviews of witnesses and Zagaeski. Following his interview, Zagaeski wrote a letter expressing remorse for his bad judgment. The superintendent reviewed Zagaeski’s file and the results of the investigation, and after providing Zagaeski due process, dismissed him. The dismissal was based on six separate instances of conduct unbecoming a teacher, any one of which, the superintendent’s letter stated, would have been sufficient to justify dismissal.

Zagaeski sought arbitral review pursuant to his statutory rights. The arbitrator found that the school district carried its burden of proving conduct unbecoming a teacher on only one of the

six bases, which was Zagaeski's response that he would only accept sexual favors as payment for a better grade. The arbitrator found that the conduct was intended as a joke but rose to the level of sexual harassment under Lexington's sexual harassment policy. The arbitrator also found that the comments were objectively inappropriate for a teacher to make to a student and that they had the subjective effect of offending the student, thereby creating a hostile or offensive educational environment for the student. The arbitrator, nonetheless, found the two separate comments to be "one isolated instance" of sexual harassment, that was "relatively less egregious"; therefore, according to the arbitrator, the conduct only "nominally" constituted conduct unbecoming a teacher. He also found that, in light of Zagaeski's strong performance for over 10 years in the District, it was in the best interest of the pupils for him to be retained as a teacher. Accordingly, the arbitrator reinstated Zagaeski, with back pay, for all but two days of unpaid suspension, which the arbitrator ruled was the most severe discipline for which the district had just cause.

Lexington appealed to the Superior Court, seeking to vacate the award on the basis that the arbitrator exceeded his authority in modifying the discipline imposed by the superintendent and on public policy grounds. The Superior Court noted some uncertainty in case law concerning the proper scope of an arbitrator's authority in teacher dismissal cases. Although the judge generally agreed with the plurality opinion in *Geller*'s holding that arbitrators should not substitute their judgment for a superintendent's, footnote 7 in *Geller* gave the judge pause. Because the arbitrator's opinion finding that Zagaeski's conduct only "nominally" constituted conduct unbecoming a teacher mirrored the language of footnote 7, the Superior Court upheld the arbitrator's award.

Lexington appealed directly to the Supreme Judicial Court.

### **III. DISCUSSION**

The Supreme Judicial Court reversed the ruling of the Superior Court and remanded the case to the Superior Court to enter an order vacating the arbitration award. Justice Lenk dissented.

#### **A. Standard of Review**

Generally, courts are bound by an arbitrator's rulings, even if they are in error. The *Zagaeski* court reiterated that in teacher dismissal cases, however, the level of deference to arbitrator awards is lower than in cases adjudicated under collective bargaining agreements, where the parties agreed to arbitrate disputes. Since an arbitrator's authority to review teacher dismissal statutes is grounded in a statute and since "courts are as well, if not better, positioned to interpret the 'law of the land' in the form of the statutes of the Commonwealth . . . judicial review of the arbitrator's interpretation of the authorizing statute, particularly regarding the scope of the arbitrator's authority under the statute, is 'broader and less deferential' than in cases of judicial review of an arbitrator's decision arising from the interpretation of a private agreement."

## **B. Positions of the Parties on Appeal**

In support of its appeal, Lexington argued that the arbitrator's description of Zagaeski's comments as inappropriate and sufficient to create a hostile educational environment established that Zagaeski's comments amount to conduct unbecoming a teacher, even though the arbitrator concluded that the conduct only "nominally" rose to that level. Lexington also argued that once the arbitrator concluded that a school district proved one of the grounds for a dismissal, he was not authorized to impose a lesser punishment. The District read footnote 7 to apply only to cases where the conduct was so minor that it does not constitute conduct unbecoming a teacher.

Zagaeski argued that G.L. c. 71, § 42 permits arbitrators to adjust discipline even after finding that the conduct rose to the level of one of the statutory grounds for teacher dismissal. Zagaeski relied on the following language in support of his position: "Upon a finding that the dismissal was improper under the standards set forth in this section, an arbitrator may award back pay, benefits, reinstatement, and any other appropriate non-financial relief or any combination thereof." G.L. c. 71, § 42, par. 6. Zagaeski argued that an arbitrator may find a dismissal "improper" if the school district cannot carry its burden or if the discipline was excessive. Zagaeski further argued that the arbitrator correctly considered the best interests of the pupils in light of the plain language in the statute authorizing him to do so.

## **C. Scope of the Arbitrator's Authority**

The Supreme Court reiterated the limited scope of an arbitrator's authority to adjust the discipline chosen by a school district.

In reaching that conclusion, the Court first noted that the purpose of the Education Reform Act ("ERA") was to increase the accountability of teachers and improve the quality of education; it was not to enhance the employment rights of teachers. Although the ERA preserved certain protections for teachers with professional status, it balances the need to attract and retain strong teachers with the need to ensure administrators can swiftly implement personnel decisions. Citing pre-ERA case law, the Court stated that one of the protections the ERA offered to teachers was against dismissals where the district's stated grounds are mere pretext for hostility or animosity toward the teacher. The Court further explained that, while the ERA's decision to shift decision making to principals and superintendents, rather than the school committee, combined with the Governor's goal of "depoliticizing" the dismissal process indicate that the Legislature intended to ensure that teachers are dismissed for only valid reasons, the Legislature did not necessarily intend to grant arbitrators broad discretion to adjust discipline when a school district carries its burden of establishing misconduct.

Against that backdrop, the Court explained that footnote 7 in *Geller* permits an arbitrator to override a school district's dismissal only in cases in which the dismissal is a mere pretext or where the alleged conduct was so minor that it does not rise to the level of one of the enumerated bases for dismissal. Where, as in *Zagaeski*, a school district meets its burden of establishing the misconduct rises to the level of one of the statutory reasons for dismissal, the general rule that arbitrators may not substitute their disciplinary judgment for that of the school district applies.

Turning to the facts of the case, the Court held that the superintendent acted within his statutory authority in dismissing Zagaeski for conduct unbecoming a teacher. The Court recited long-standing case law concerning the “position of special public trust” that teachers hold, as well as the importance of teacher dismissal decisions in the effective management of schools. According to the Court, Zagaeski’s sexually harassing behavior in front of students “undercuts our constitutional value of freedom from gender discrimination”; therefore, the superintendent acted within his authority and “was not unwarranted” in concluding that Zagaeski engaged in conduct unbecoming a teacher.

**D. Best Interest of the Pupils and Need to Elevate Performance Standards**

The Court next discussed an arbitrator’s review of the best interest of the pupils and the need to elevate performance standards. The Court recognized, as it must, that G.L. c. 71, § 42 expressly authorizes arbitrators to consider those factors in reviewing dismissal decisions. The Court went on to state, however: “we disagree that this statutory language authorizes an arbitrator to draw on a teacher’s past performance to override a dismissal decision based on a teacher’s conduct having threatened the safety and welfare of his or her students.” According to the Court, using a teacher’s past performance to reinstate a teacher impermissibly conflates the “need for elevation of performance standards” and the “best interests of the pupils.”

The Court then divided the statutory grounds for dismissing a teacher with professional status into two separate categories: (1) teacher performance and (2) well-being of students and proper functioning of the school community. “Inefficiency,” “incompetency” and failure to satisfy performance standards are performance-based reasons for discharge. “Conduct unbecoming a teacher,” “insubordination,” and “incapacity” fit within the second category, affecting students’ well-being. When the dismissal rests on performance-based grounds, the arbitrator “should consider the school district’s decision primarily in light of the need to raise performance standards.” “However, when the conduct in issue has jeopardized the safety or self-esteem of students in the classroom setting, the arbitrator should consider the best interests of the pupils primarily in light of the pupils’ interest in a safe learning environment.”

In the case at issue, the Court found that the arbitrator exceeded his authority when he reinstated Zagaeski based on past performance. The arbitrator improperly equated the “best interests of the students” and the “need to elevate performance standards,” thereby rendering meaningless one of the stated purposes of the ERA, namely safeguarding students’ “sense of security or self-esteem.” The Court concluded that the Legislature could not have intended a teacher’s past academic performance to justify reinstatement where the teacher’s conduct created a hostile educational environment.

**E. Dissent**

Justice Lenk dissented. She characterized the arbitrator’s decision as concluding that Lexington did not carry its burden of proving that Zagaeski’s behavior rose to the level of conduct unbecoming a teacher under G.L. c. 71, § 42 because, while it nominally fit into that category, it was minor in nature. Such a decision, she concluded, was within the arbitrator’s authority. Justice Lenk stated that under her reading of G.L. c. 71, § 42, “it is within the scope of an arbitrator’s authority to determine both whether the conduct alleged by the school district in

fact occurred, and, if it did, to decide whether such conduct ‘r[ose] to the level of [serious] misconduct contemplated by the statute as a ground for dismissal.’ (quoting *Geller* n.7).

She nonetheless concluded that the arbitrator exceeded his authority by imposing a two-day suspension in lieu of a dismissal. Quoting from the portion of the sixth paragraph of G.L. c. 71, § 42 discussing the actions permitted by an arbitrator, which Justice Lenk classified as “remedial in nature,” Justice Lenk concluded that an arbitration hearing may have only one of two possible outcomes: either the arbitrator will find that the district carried its burden and will uphold the discipline or the arbitrator will find that the district did not carry its burden and awarding some relief. If the dismissal decision is reversed, Justice Lenk posits that “it remains solely within the purview of the district to determine whether other discipline should then be imposed.”

With respect to the arbitrator’s finding that Zagaeski committed “nominal” misconduct, Justice Lenk takes the majority to task for “shar[ing] the school committee’s conviction that Zagaeski’s very utterance of the words to the student itself suffices to establish serious misconduct.” Instead, she would hold that when an arbitrator concludes that conduct is “nominal,” and therefore did not rise to the serious misconduct necessary for dismissal of teachers with professional status under G.L. c. 71, § 42, the arbitrator acts within the bounds of his authority when concluding that the school district has not met its burden.

Finally, Justice Lenk disagreed with the Court’s separation and categorization of the enumerated bases for the dismissal of teachers with professional status. She correctly points out that the statute does not contain any such distinctions and that, in practice, “performance-based” misconduct may not be readily distinguishable from misconduct that jeopardizes the safety or self-esteem of students. She went on to state that the arbitrator’s review of the teacher’s past performance considered both the pupils’ best interest and need to elevate standards as interconnected criteria, rather than placing the performance standards above the interest of the pupils, as the majority had concluded.

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