STATE OF MICHIGAN

COURT OF APPEALS

AFSCME COUNCIL 25 LOCAL 1690,

Plaintiff-Appellant,

v

WAYNE COUNTY AIRPORT AUTHORITY,

Defendant-Appellee.

UNPUBLISHED
March 11, 2021

No. 352500
Wayne Circuit Court
LC No. 19-007875-CL

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

An arbitrator granted an award in favor of defendant, and plaintiff filed a complaint asking the trial court to vacate the award and remand for further arbitration. Plaintiff now appeals as of right the trial court's order granting defendant's motion for summary disposition and denying plaintiff's cross-motion for summary disposition. Plaintiff contends that the trial court erred by concluding defendant was entitled to judgment as a matter of law and by denying plaintiff's cross-motion for summary disposition. We agree, although for different reasons than proffered by plaintiff.

Plaintiff is a union that represents certain employees of defendant. One class of employees that plaintiff represents are those classified as Department Manager IV (DMIV) employees. A collective bargaining agreement (CBA) governs the relationship between plaintiff and defendant. Whenever a dispute arises over the interpretation, application, or enforcement of the CBA and the parties cannot resolve the dispute on their own, the CBA requires that the dispute be submitted to an arbitrator to resolve.

In this case, two provisions of the CBA are at issue. One provision addresses the general authority of the arbitrator. Specifically, Article 10.04, Step 4(E) states:

> The arbitrator shall have no authority to amend, alter or modify this Agreement. Further, the arbitrator shall limit the decision strictly to the interpretation, application, or enforcement of this Agreement and shall be without authority to make any decision contrary to, or inconsistent with, or modifying or

> varying, in any way, the terms of this Agreement; or granting any wage increases or decreases.

The other provision states that a wage increase must be provided under certain conditions. Article 34.07 states:

> Should a newly-hired employee be placed in the pay grade at a higher rate than other bargaining unit members in the same classification, the pay rate of those bargaining unit member(s) will be increased to that of the newly-hired employee.

The dispute over these provisions arose after defendant hired Samuel Kaufman as a DMIV-Technology Services System Engineer. Defendant hired Kaufman at a salary of $85,000 per year—a pay rate higher than that of any other DMIV employee. Although Kaufman was technically classified as a DMIV employee, defendant believed that Kaufman's job duties were distinct enough from other DMIV employees that he could be paid as if he was in a different classification. Hence, defendant believed that Article 34.07 of the CBA would not require defendant to increase the pay rate of other DMIV employees to the same rate as Kaufman.

Shortly after defendant hired Kaufman, plaintiff filed a grievance, alleging that Article 34.07 required defendant to raise the pay rates of the other DMIV employees so that they all received $85,000 per year. Eight weeks after hiring Kaufman, defendant reconsidered its position, and conceded that Article 34.07 required it to pay all other DMIV employees the same rate as Kaufman. In an effort to placate the union, defendant lowered Kaufman's salary so that it was the same as other DMIV employees.

Despite defendant's concession, plaintiff went forward with its grievance and the case proceeded to arbitration. Plaintiff demanded that defendant raise the annual wage of all DMIV employees to $85,000 and provide back pay for the eight weeks that Kaufman was paid at a higher rate. The arbitrator denied plaintiff's request and granted an award in favor of defendant.[1] Although plaintiff's and defendant's arguments concerned only the interpretation of Article 34.07, the arbitrator considered only Article 10.04, Step 4(E) of the CBA, which, he reasoned, prohibited him from granting a wage increase as a remedy:

> Here the nature of the grievance filed is requesting an increase in wages for certain employees in the bargaining unit. Article 10.04, Step 4(E) clearly and unmistakably shows us that a grievance remedy that grants any wage increase is a remedy inconsistent with the article. The Arbitrator must consider and apply Art. 10.04, Step 4(E) as governing his authority to decide this case.
>
> Since there is no other request for remedy other than the increase in wages for certain bargaining unit members, there is nothing within my jurisdiction to operate on. This case must be closed with that result, and without an award.

[1] The arbitrator stated that "[t]his case must be closed . . . without an award." However, "[a] final decision by an arbitrator" is an "arbitration award." *Black's Law Dictionary* (11th ed).

Notably, the arbitrator did not discuss whether Article 10.04, Step 4(E)'s prohibition of granting wage increases could be reconciled with Article 34.07's mandate of providing pay rate increases.

After the arbitrator's award in favor of defendant, plaintiff filed a complaint with the trial court seeking to vacate the arbitration award and remand to another arbitrator. Plaintiff argued the arbitration award was invalid because the arbitrator acted outside the scope of his authority. Plaintiff asserted that the arbitrator's application of Article 10.04, Step 4(E) essentially nullified Article 34.07. And because the CBA prohibits an arbitrator from "amend[ing], alter[ing] or modifying" the terms the CBA, plaintiff reasoned that the arbitrator exceeded his contractual power.

In lieu of filing an answer, defendant filed a motion for summary disposition under MCR 2.116(C)(10). Defendant argued that because the arbitrator applied a valid provision of the CBA in deciding to dismiss the grievance, the arbitrator acted within the scope of his authority. Further, because the arbitrator acted within the scope of his contractual authority, the trial court could not vacate the award. Plaintiff then filed a cross-motion for summary disposition under MCR 2.116(C)(10) for the same reasons detailed in its complaint.

After considering the parties' respective positions, the trial court granted defendant's motion for summary disposition and denied plaintiff's cross-motion for summary disposition. The trial court conceded that plaintiff had a good argument, but noted that it could not disturb the arbitrator's ruling if the arbitrator had a rational basis for his decision. Finding that the arbitrator had a rational basis for his decision, the trial court granted defendant's motion. Plaintiff appeals that decision, arguing that the trial court erred by finding that the arbitrator did not exceed his authority.

We review de novo a trial court's decision to grant summary disposition. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac*, 309 Mich App 611, 617; 873 NW2d 783 (2015). "A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013) (quotation marks and citation omitted). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "This Court [also] reviews de novo a circuit court's decision whether to vacate an arbitration award." *TSP Servs, Inc v National-Standard, LLC*, 329 Mich App 615, 619-620; 944 NW2d 148 (2019).

"Judicial review of an arbitrator's decision is narrowly circumscribed." *Ann Arbor v American Federation of State, Co, & Muni Employees Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). "A court may not review an arbitrator's factual findings or decision on the merits. Likewise, a reviewing court cannot engage in contract interpretation, which is an issue for the arbitrator to determine. Nor may a court substitute its judgment for that of the arbitrator." *Id.* (citations omitted). But, a court may review whether an arbitrator acted within the scope of his authority. *36th Dist Court v Mich American Federation of State, Co & Muni Employees Council 25, Local 917*, 295 Mich App 502, 508-509; 815 NW2d 494 (2012), rev'd in part on other grounds 493 Mich 879 (2012). " [A]s long as the arbitrator is even arguably construing or applying the

contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed a serious error." *Ann Arbor*, 284 Mich App at 144. (quotation marks and citations omitted). Simply put, a court must vacate an arbitration award and remand for further arbitration proceedings when the arbitrator exceeded his or her authority. *Mich State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 585; 444 NW2d 207 (1989).

An arbitrator's authority extends no further than interpreting and applying the terms of a CBA. *Sheriff of Lenawee Co v Police Officers Labor Council*, 239 Mich App 111, 119; 607 NW2d 742 (1999). An arbitrator's "award is legitimate only so long as it draws its essence from the [CBA]. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id*. (quotation marks and citation omitted).

This Court has previously held that an arbitrator abuses his authority by disregarding an express provision of a CBA. In *Sheriff of Lenawee Co*, a deputy sheriff corrections officer was discharged from his employment with the plaintiff for polygamy (the deputy remarried before his first divorce was finalized) and making related false statements in official documents. *Id*. at 112-114. The defendant labor council sought reinstatement of the deputy pursuant to the terms of the CBA between the plaintiff and the defendant. *Id*. at 112. At the arbitration hearing, the arbitrator considered the terms of the plaintiff's rules and regulations and the CBA. *Id*. at 114-117. "Despite finding that [the deputy] committed polygamy and provided false statements on official documents," the arbitrator determined that the deputy's discharge was untimely and without just cause, and reinstated the deputy. *Id*. at 117. The trial court vacated the arbitration award because the arbitrator exceeded the authority under the CBA. *Id*. at 112-113. This Court found that "[t]he arbitrator's most egregious abuse of authority occurred when he disregarded an express provision of the collective bargaining agreement that mandates discharge when an employee knowingly makes a false statement on an official document." *Id*. at 120. Accordingly, the trial court's order vacating the arbitration award was affirmed. *Id*. at 124.

Federal courts have similarly held that an arbitrator's disregard of a dispositive contract term suggests that the arbitrator has exceeded his authority. See, e.g., *George A Hormel & Co v United Food & Commercial Workers, Local 9*, 879 F2d 347, 351 (CA 8, 1989) ("We believe that where an arbitrator fails to discuss a probative contract term, and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract."); *Coca-Cola Bottling Co of St. Louis v Teamsters Local Union No 688*, 959 F2d 1438, 1442 (CA 8, 1992) (reversing the arbitrator's award because the arbitrator disregarded a portion of the last chance agreement); *Boise Cascade Corp v Paper Allied-Indus, Chem & Energy Workers, Local 7-0159*, 309 F3d 1075, 1084 (CA 8, 2002) (applying the holding from *George A Hormel & Co*). While this Court is not bound by the decisions of intermediate-level federal courts, see *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), these decisions can be considered for their persuasive authority, *Hill v City of Warren*, 276 Mich App 299, 314; 740 NW2d 706 (2007). After all, if in granting an award, an arbitrator has disregarded a contract provision that is plainly applicable to the facts of a dispute, then the arbitrator has not drawn his award from the essence of the agreement.

By disregarding Article 34.07, the arbitrator here failed to draw his award from the essence of the contract, and so exceeded his authority. *Sheriff of Lenawee Co*, 239 Mich App at 121. The plain language of Article 34.07 indicates a clear intention of the parties for the provision to apply

to situations similar to this case. Indeed, before the arbitrator's decision, it was the only provision of the CBA in dispute. Yet, the arbitrator disregarded Article 34.07, consulting only Article 10.04, Step 4(E). Had the arbitrator at least acknowledged Article 34.07's existence and made some effort to interpret it, then perhaps his award would be beyond judicial scrutiny. See *Ann Arbor*, 284 Mich App at 144. But the arbitrator never mentioned Article 34.07 in his opinion—not even to say that it was trumped by Article 10.04, Step 4(E). By disregarding this crucial component of the parties' agreement, the arbitrator failed to tether his award to his interpretation and application of the CBA. And by failing to tether his award to his interpretation and application of the CBA, there arises a high risk that the arbitrator based his decision on equitable considerations rather the essence of the contract. *Sheriff of Lenawee Co*, 239 Mich App at 119 ("[A]n arbitrator may not act on his own sense of personal justice, but is confined to interpretation and application of the agreement."). For this reason, we must reverse the trial court's order granting summary disposition in favor of defendant and remand for entry of an order granting plaintiff's motion for summary disposition, thereby vacating the arbitration award and remanding for further arbitration. *Mich State Employees Ass'n*, 178 Mich App at 585.

Finally, remand before a different arbitrator is not necessary. Plaintiff asserts that this Court has authority to remand to a different arbitrator, yet cites no binding authority to support this assertion. Instead, plaintiff cites *Muskegon Central Dispatch 911 v Tiburon, Inc*, 462 Fed Appx 517 (CA 6, 2012), an unpublished Sixth Circuit opinion, with no context and without explaining its relevance. Consequently, we need not address this issue. See *Conlin v Scio Twp*, 262 Mich App 379, 384; 686 NW2d 16 (2004) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the party's claim."). Moreover, *Muskegon Central Dispatch 911* does not stand for the proposition that an arbitrator's "thinking that went into [the] error," justifies remand to a different arbitrator, as plaintiff contends. Instead, the relevant discussion concentrated on the principle of functus officio,[2] and that remanding the case would require a review into the merits of the case. *Muskegon Central Dispatch 911*, 462 Fed Appx at 527-528.

In any event, plaintiff's argument lacks merit. Although this Court has suggested that once an arbitrator has made and published a final award, the arbitrator's authority is exhausted when the arbitrator has issued an award that is "final, complete, and coextensive with the terms of the submission." *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 57-5798; 552 NW2d 181 (1996) (citation omitted). Here, because the arbitrator never considered Article 34.07 of the CBA, his

[2] "The Latin term 'functus officio' means that 'having performed his or her office,' an official is 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.' " *Muskegon Central Dispatch 911*, 462 Fed Appx at 527, quoting *Black's Law Dictionary* (9th ed).

award was not final or complete, nor was the award rendered on the merits of the case. Accordingly, remand to the same arbitrator is appropriate.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood