STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT and DETROIT POLICE DEPARTMENT,

Plaintiffs-Appellees,

v

DETROIT LIEUTENANTS' & SERGEANTS' ASSOCIATION and EDWARD FORMAN,

Defendants-Appellants.

UNPUBLISHED
February 17, 2005

No. 250424
Wayne Circuit Court
LC No. 02-225988-CK

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendants Detroit Lieutenants' & Sergeants' Association (the Association) and Sergeant Edward Forman appeal as of right from the order granting plaintiffs summary disposition under MCR 2.116(C)(10). The Association is the labor union representing Sergeant Forman. This case arose when Sergeant Forman was dismissed from the Detroit Police Department (DPD) after he was involved in an altercation during which he fired his department-issued firearm. We reverse and remand for entry of an order enforcing the arbitrator's award.

Defendants first argue that the trial court erred in vacating the award on the ground that the arbitrator exceeded his authority under the terms of a collective bargaining agreement (Master Agreement) executed between plaintiffs and the Association. We agree. We review de novo a trial court's ruling with regard to a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion should only be found if the result is so palpably and grossly violative of fact and logic that it "evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

The review of arbitration awards is "narrowly circumscribed." *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 117; 607 NW2d 742 (1999). To invite judicial action to vacate an arbitration award, the character or seriousness of a claimed error of law must have been so material or substantial that the award would have been substantially different if not for the error. *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982).

As an initial matter, we note that the court erred in rejecting evidence that was submitted regarding a later murder that was committed by the man who was allegedly involved in the altercation with Sergeant Forman. It is well established that a court may not review an arbitrator's factual findings. *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). An arbitrator's "'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce [an] award." *Major League Baseball Players Ass'n v Garvey*, 532 US 504, 509; 121 S Ct 1724; 149 L Ed 2d 740 (2001), quoting *United Paperworkers International Union v Misco, Inc*, 484 US 29, 39; 108 S Ct 364; 98 L Ed 2d 286 (1987). Here, the arbitrator found the murder relevant, and we conclude that the trial court was bound to honor that determination.

The court shall vacate an arbitration award if the arbitrator exceeded his powers. MCR 3.602(J)(1)(c). However, "[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." MCR 3.602(J)(1).

> The necessary inquiry for this Court's determination is whether the award was beyond the contractual authority of the arbitrator. Labor arbitration is a product of contract and an arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award "draws its essence" from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases. [*Lincoln Park*, *supra* at 4 (citations omitted).]

Here, the Master Agreement governed the arbitrator's authority. Defendants contend that the court erred in concluding that the arbitrator exceeded his authority under the Master Agreement when he made a visit to the Ninth Precinct where Sergeant Forman worked. Plaintiffs argue that the arbitrator did exceed his authority because he was not allowed to consider evidence that was not submitted during the arbitration hearings. In resolving this dispute, we note that there appears to be a conflict in the language of the Master Agreement pertaining to this issue. Section 10.B.7 states that every appeal, including arbitration hearings, "shall be a total review of guilt or innocence as well as severity of penalty and shall not be limited as to admission of evidence (de novo hearing)." However, § 9.A.3, which is the section that plaintiffs rely on, states that "[t]he Board of Arbitrators shall not consider any evidence submitted by either party which was not produced in the grievance procedure unless such evidence was not then known to the party submitting the same." Because § 10.B.7 applies specifically (by virtue of § 10.C.1) to disciplinary arbitration hearings rather than general arbitration hearings afforded under the Master Agreement, it is the more applicable provision defining the scope of the arbitrator's authority in this case. Thus, the arbitrator was not limited with respect to the evidence that he could admit.

The arbitrator was arguably applying the contract and acting within the scope of his authority to consider any evidence during the de novo arbitration hearing. See *Major League Baseball Players Ass'n*, *supra* at 509. Although plaintiffs argue that they did not agree to the arbitrator visiting the precinct, they also do not dispute that they were aware that the arbitrator

was invited. Although the invitation was extended in the presence of counsel for both parties, plaintiffs did not object at that point. If there had been any question about the arbitrator's authority to make the visit, the issue should have been raised at an earlier time. Plaintiffs' failure to object constituted acquiescence to the visit.

Accordingly, the trial court erred in vacating the arbitrator's award because the court improperly rejected the arbitrator's findings of fact, the arbitrator's award drew its essence from the Master Agreement, and the arbitrator did not exceed his authority under the agreement.

Defendants next argue that the trial court erred in vacating the arbitrator's award on the basis of a violation of public policy. We agree. Michigan has recognized a limited public policy exception to the general rule of judicial deference to arbitrator's awards. *Gogebic Medical Care Facility v AFSCME Local 992*, 209 Mich App 693, 697; 531 NW2d 728 (1995). The public policy exception is construed narrowly and authorizes vacating an arbitrator's award where it "would violate some explicit public policy that is well-defined and dominant, . . . ascertained by reference to the laws and legal precedent and not from general considerations of supposed public interest." *Lincoln Park*, *supra* at 6-7 (internal citations and quotations omitted). Included are awards that have the effect of mandating illegal conduct or awards that themselves violate a law. *Lansing Community College v Lansing Community Chapter of the Mich Ass'n for Higher Education*, 161 Mich App 321, 330-331; 409 NW2d 823 (1987), vacated 429 Mich 895, reaff'd on remand 171 Mich App 172 (1988).

Here, the trial court held that "to say [Sergeant Forman's] behavior cannot be seen as just cause for discharge of a sworn police officer is a proposition that violates any rational view of the public policy of the State of Michigan." Plaintiffs argue that Michigan public policy supports protecting citizens from the reckless discharge of a firearm, see MCL 752.863a and from the malicious destruction of property. See MCL 750.377a. Moreover, plaintiffs contend that public policy dictates that police officers meet a minimum standard of moral fitness. See MCL 28.609(1)(a).

These provisions do reflect valid, general public policy concerns and take into account considerations of supposed public interest. See *Lincoln Park*, *supra* at 6-7. However, they do not constitute a positive law prohibiting employment of a police officer who engages in the prohibited behavior. *Lansing Community College*, *supra* at 330-331. In other words, although the general public consensus might disfavor employing a police officer who is convicted of misdemeanor offenses, there is no well-defined and dominant public policy, as reflected by an express legal provision, against it. Further, the award in the instant case does not clearly undermine the public policy embodied in the legal provisions cited by plaintiffs. See *id*. at 333 (concluding that reinstatement of an associate professor who allegedly smoked marijuana with some of his students did not "violate[] the well-defined public policy against use of illegal

narcotics"). The trial court improperly concluded that the arbitration award could be vacated on the basis of public policy.[1]

The trial court further stated that it was improper for the arbitrator to look to the "the past deficiencies of the City's employment practices" when assessing Sergeant Forman's conduct. As long as his authority is not specifically limited by the terms of the collective bargaining agreement, an arbitrator may "'determine that, while the employee is guilty of some infraction, the infraction did not amount to just cause for discharge and impose some less severe penalty.'" *Police Officers Ass'n v Manistee Co*, 250 Mich App 339, 344; 645 NW2d 713 (2002), quoting *Monroe Co Sheriff v FOP Lodge #113*, 136 Mich App 709, 718; 357 NW2d 744 (1984). An arbitrator may consider mitigating circumstances in considering whether to lessen the severity of a sanction imposed on an employee. *Police Officers Ass'n*, *supra* at 346. Thus, the arbitrator was permitted to take into consideration Sergeant Forman's exemplary personal employment record as well as the general disciplinary practices of the DPD.

Defendants' last argument, that the court erred in ordering that the Police Trial Board's decision to discharge Sergeant Forman be upheld because the rules do not grant the court the authority to reinstate a prior decision, is moot in light of our conclusion that the court erred in vacating the arbitrator's award. However, we note that a reviewing court is without authority to fashion its own remedy. See *Service Employees International Union Local 466M v Saginaw*, 263 Mich App 656, 663-664; 689 NW2d 521 (2004). Rather, when an arbitrator exceeds his authority, the case must be remanded for further arbitration proceedings. *Michigan State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 585; 444 NW2d 207 (1989); see also MCR 3.602(J)(3). Again, however, we conclude that the arbitrator did not exceed his authority.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Donald S. Owens

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[1] Although an *arbitrator's* decision to order Sergeant Forman's termination of employment based on public policy reasons would be within his authority, the instant arbitrator's decision to order Sergeant Forman's continued employment simply does not constitute a violation of public policy that mandates our vacation of the arbitrator's award. It is not within the province of a court of law to substitute its judgment for that of an arbitrator who otherwise acts within his power. See, generally, *Lincoln Park, supra* at 4.

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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MURRAY, P.J. (*concurring)*.

I concur with the majority's conclusion that the arbitrator's remedy of reinstatement did not violate any well-defined public policy. Although Sgt. Forman's off-duty actions constituted illegal conduct, his reinstatement violates no positive public policy as reflected by our statutes or case law. Had Sgt. Forman been convicted of a felony, this would be an entirely different case. MCL 28.609b. I also agree with the majority's conclusion that the arbitrator's decision should not be vacated despite the fact that the arbitrator went, after the close of the hearings, on an evidence gathering venture to the Ninth Precinct. However, this conclusion is reached not because the arbitrator acted properly, but because the parties acquiesced to this particular procedure.

There can be no doubt that our review of the arbitrator's decision is exceedingly narrow. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 117; 607 NW2d 742 (1999). Nonetheless, and without disturbing the arbitrator's findings of fact, *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989), it seems clear that the arbitrator had no contractual authority to obtain ex parte facts which he in part relied upon in rendering his decision and award.

As the majority recognizes, the Master Agreement speaks to what evidence an arbitrator may consider. Section 10.B.7 states that arbitration hearings shall be de novo, with no limitation as to the admission of evidence. Section 9.A.3 then provides in clear terms that the arbitrator(s) "shall not consider any evidence submitted by either party which was not produced in the grievance process unless such evidence was not then known to the party submitting same." As the majority notes, these two provisions could be read to conflict, for Section 10.B.7 can be read

to indicate that arbitral review is not limited in the evidence that can be considered, while Section 9.A.3 can be read to limit the evidence to only that which was presented during the grievance process. Despite this potential conflict, there is absolutely no way to construe either of these provisions in a way that permits what the arbitrator did in this case.

Realistically, the only reasonable way to apply these sections is that the arbitrator reaches a decision de novo, i.e., with no deference to the Trial Board, while the conflict is whether the decision is based on a new record, or based on what was presented in the grievance process. But to go outside the record developed by the parties in both the grievance process and arbitration is to go beyond what the Master Agreement allows. There is quite simply no authority provided to the arbitrator to consider evidence not presented by the parties. Thus, the arbitrator exceeded his contractual authority in rendering his decision. And, when an arbitrator goes beyond the authority granted to him by the contract, he has disregarded, and therefore exceeded, his authority. *Police Officers Ass'n v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002).

Our Supreme Court has set aside an arbitration decision when the arbitrator has been subjected to ex parte communication. In *Hewitt v Reed City*, 124 Mich 6; 82 NW 616 (1900), the parties entered into an arbitration agreement. A hearing was held, and after the evidence was submitted, the hearing was closed. Thereafter, the defendant submitted ex parte to the arbitrator a memorandum of authorities. The circuit court vacated the award based upon the ex parte submission, and the Supreme Court affirmed. In doing so, the Court held that the communication violated the terms of the arbitration agreement, regardless of whether the ex parte communication influenced the arbitrator. *Id.* at 8-9. The Court adopted a "strict rule" that such communications were impermissible, without regard to the impact it had on the arbitrator. *Id.*

Hewitt, though more than a century old, has not been reversed or questioned by any Michigan court, although it has only been sparingly cited. See, e.g., *Campbell v Michigan Mut Hail Ins Co*, 240 Mich 167, 180; 215 NW 401 (1927). It does not, however, contain any discussion about the standard of review employed by the court, leaving the reader to wonder whether the review of an arbitration decision was as limited then as it is today.

However, courts from our sister states, employing the same standard of review as we are bound to employ, have cited *Hewitt* for the proposition that an arbitration award should be vacated when there has been "ex parte receipt of evidence as to a material fact, without notice to a party." *O&G/O'Connell Joint Venture v Chase Family Ltd Partnership No 3*, 203 Conn 133, 147; 523 A2d 1271 (1987). See, also, *Town of Wallingford v Wallingford Police Union*, 45 Conn App 432, 440; 696 A2d 1030 (1997); *Hooten Constr Co Inc v Borsberry Constr Co, Inc*, 108 NM 192, 194; 769 P2d 726 (1989).

In my view, *Hewitt* adds support to the conclusion that the arbitrator in this case exceeded his authority under the Master Agreement when he unilaterally gathered evidence without the presence of the parties. Although Hewitt involved ex parte submissions, while this case does not, the arbitrator, nonetheless, gathered information from one of the parties without either side actually being present. However, because the record reveals that both parties were aware that the arbitrator was proceeding to the Ninth Precinct, they had an opportunity to either object or attend, and plaintiff did neither. Plaintiff's failure to do so until after the adverse decision precludes the court from vacating the award. See, e.g., *Twin Lakes Reservoir & Canal Co v Platt*

Rogers, Inc, 112 Colo 155, 164-165; 147 P2d 828 (1944) ("the parties acquiesced in the plan and agreed on the scope of the survey. Thus, plaintiff may not now successfully maintain that, in *ordering* the survey, the board deviated from its authority.") (emphasis in original); *Graceman v Goldstein*, 93 Md App 658, 671-672; 613 A2d 1049 (1992). As the court held in *Lebow v Bogner-Seitel Realty, Inc*, 55 AD2d 695, 696; 389 NYS2d 51 (1976):

> The court properly determined that the arbitrator's independent inspection constituted misbehavior which is a valid ground for vacating an award[, *Stefano*] *Berizzi Co, Inc v Krausz*, 239 NY 315[; 146 NE 436 (1925)]; *Matter of 290 Park Ave,* [*Inc (Fergus Motors, Inc)*], 275 App Div 565[; 90 NYS2d 613 (1949)]. Petitioners, however, had ample opportunity to object to the arbitrator's behavior but failed to do so until after the adverse award was made. Consequently, it is this court's view that petitioners waived their right to object after the granting of the award . . . .

The arbitrator's decision to visit the Ninth Precinct was unwise and has led, in part, to these prolonged proceedings. I strongly caution this arbitrator from doing so again without the express, written agreement of both parties.

/s/ Christopher M. Murray