STATE OF MICHIGAN

COURT OF APPEALS

WAYNE-WESTLAND COMMUNITY SCHOOLS,

Plaintiff-Appellant,

v

WAYNE-WESTLAND EDUCATION ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
December 6, 2012

No. 304486
Wayne Circuit Court
LC No. 10-007522-CL

WAYNE-WESTLAND COMMUNITY SCHOOLS, MEA/NEA, and JOHN WARRA,

Plaintiffs-Appellees,

v

WAYNE-WESTLAND COMMUNITY SCHOOLS and WAYNE-WESTLAND COMMUNITY SCHOOLS BOARD OF EDUCATION,

Defendants-Appellants.

No. 305296
Wayne Circuit Court
LC No. 10-007448-CK

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 304486, plaintiff, Wayne-Westland Community Schools (the District), appeals as of right an order denying the District's motion for summary disposition and granting summary disposition in favor of defendant, Wayne-Westland Education Association (the Association). In Docket No. 305296, defendants, the District and Wayne-Westland Community Schools Board of Education (the Board of Education), appeal as of right an order granting

plaintiffs', the Association, MEA/NEA, and John Warra (Warra), motion for summary disposition.[1]

I. STANDARD OF REVIEW

"We . . . review de novo a trial court's decision to enforce, vacate, or modify an arbitration award." *36th Dist Court v Mich AFSCME Local 917*, 295 Mich App 502, 508; 815 NW2d 494 (2012), rev'd in part on other grounds ___ Mich ___; 821 NW2d 786 (2012). "We review de novo a trial court's ruling on a motion for summary disposition." *Id.* The trial court did not specify whether it granted the motion for summary disposition under MCR 2.116(C)(8) or (10). However, "review is appropriate under MCR 2.116(C)(10) because the parties relied on evidence outside the pleadings." *36th Dist Court*, 295 Mich App at 508. "A motion under MCR 2.116(C)(10) should be granted only if the submitted evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

II. PUBLIC POLICY

The District contends that the arbitration award violated public policy established by Michigan law which required the District to hire certified teachers, prohibited the District from hiring noncertified teachers when a certified teacher is available, and placed responsibility for acquiring and maintaining teaching credentials on the teacher. We disagree.

This Court has stated:

> A court may not review an arbitrator's factual findings, but may review whether the arbitrator acted within the scope of his or her contractual authority. A court may also review an arbitrator's award for an error of law that clearly appears on the face of the award or in the reasons stated by the arbitrator for the decision. The error must be "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." "[A]rbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." [*36th Dist Court*, 295 Mich App at 508-509 (citations omitted).]

Further, this Court has stated:

> 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

[1] We refer to plaintiff in Docket No. 304486 and defendants in Docket No. 305296, collectively, as "the District." We refer to defendant in Docket No. 304486 and plaintiffs in Docket No. 305296, collectively, as "the Association."

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. [*City of Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989) (citations omitted).]

However, this Court has also stated:

There is an exception to the substantial judicial deference given to arbitration awards. As we stated in *Gogebic Med Care Facility v AFSCME Local 992,* 209 Mich App 693, 697; 531 NW2d 728 (1995), "[a]s an exception to the general rule of judicial deference, we have recognized that a court may refuse to enforce an arbitrator's decision when it is contrary to public policy." [*36th Dist Court*, 295 Mich App at 509 n 1.]

"[T]his exception is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedent and not from general considerations of supposed public interest." *Gogebic Med Care Facility*, 209 Mich App at 697 (citations and internal quotation marks omitted).

In arguing that the arbitration award violated public policy requiring the District to hire certified teachers and prohibiting the District from hiring noncertified teachers when a certified teacher is available, the District relies on MCL 380.1233(1) and MCL 380.1233b(4). MCL 380.1233(1) provides: "Except as otherwise provided by law, the board of a school district or intermediate school board of an intermediate school district shall not permit a teacher who does not hold a valid teaching certificate to teach in a grade or department of the school." MCL 380.1233b(4) provides: "Except as provided in subsection (5), the board of a local or intermediate school district shall not engage a full-time or part-time noncertificated, nonendorsed teacher to teach a course described in subsection (1) if the district is able to engage a certificated, endorsed teacher." Thus, this public policy is ascertained from Michigan law. See *Gogebic Med Care Facility*, 209 Mich App at 697.

Assuming this public policy is also well defined and dominant, see *Gogebic*, 209 Mich App at 697, there are, nonetheless, exceptions to this public policy. The Michigan Department of Education (MDE) promulgated a rule allowing districts to apply for annual vocational authorization, Rule 390.1165 (Rule 65),[2] which provides:

[2] The following is the version attached as part of Exhibit 1 to Gibson's deposition and quoted by the arbitrator and trial court.

(1) If a candidate does not meet the standards described for obtaining the interim occupational certificate, an evaluation of recent and relevant work experience can be used to issue an annual occupational authorization for 1 year to an employing school district. The annual occupational authorization is restricted to grade 9 to 12 assignments.

(2) The annual authorization is valid for teaching those courses in approved programs in which instruction is limited to the occupation specified on the authorization.

(3) A school district shall certify that an occupational education certificated teacher is not available. A school district shall document that an occupational education certificated teaching opening was advertised, but a teacher was not available, before applying for the annual occupational authorization. The advertising requirement does not apply if the noncertificated teacher for whom the annual occupational authorization is sought is annually and continually enrolled and completing credit in an approved occupational teacher preparation program leading to occupational certification. The exemption from the advertising requirement shall not be granted for more than 8 consecutive school years subject to guidelines for program completion determined by the department of education.

Further, districts may apply for credit track authorization. Based on the credit track authorization application form, credit track is available "for individuals working towards vocational certification and have held an Annual Vocational Authorization previously." Credit track is available even when certified teachers are available in some situations, as Jo Anne Gibson, of MDE, testified that if a certified teacher applied for a position who the District did not feel was qualified, had poor references, or did not have a good work ethic, she would advise the District to document why the individual was not hired before placing someone else on credit track.

Accordingly, a district may hire a noncertified teacher when one of the above exceptions applies.[3] The arbitrator found that "in view of the substantive and substantial uncertainties concerning eligibility for credit track placement, it cannot be said that Warra would not have been eligible for credit track placement." The arbitrator's factual finding that it was unclear whether Warra was eligible for credit track placement is not subject to review. *36th Dist Court*, 295 Mich App at 508. If Warra was eligible, then hiring him would not have violated public policy. Therefore, the arbitrator's award, requiring the District to pay Warra for the 2009-2010 school year and requiring the District and the Association to meet and determine Warra's eligibility, did not violate public policy.

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[3] The District cites *Greater Johnstown Sch Dist v Greater Johnstown Ed Ass'n*, 167 Pa Commw 50; 647 A2d 611 (1994). However, in that case, the arbitrator found that the District was required to recall teachers to positions for which they were not certified, even though certified substitutes were available, and there did not appear to be any exceptions. *Id.* at 56.

Nonetheless, the District argues that it had no obligation to apply for credit track authorization for Warra. This is supported by the internal document used by Gibson, which provides that credit track authorization is for the convenience of the school district and that districts are not required to employ someone on credit track. However, the arbitrator's award was based on its finding that the District did not provide proper notice regarding credit track placement and treated Warra differently from another teacher, Anthony Paquette. She also found that there were "substantive and substantial uncertainties concerning eligibility for credit track placement." These factual findings are not subject to review. *36th Dist Court*, 295 Mich App at 508. The arbitrator's award requiring the District pay Warra for the 2009-2010 school year and to determine his eligibility for employment does not violate public policy in light of the exceptions to the hiring of certified teachers and the arbitrator's factual findings.

The District also argues that the arbitration award violated public policy placing responsibility for acquiring and maintaining teaching credentials on the teacher, and relies on Collins and Blaha, *The Michigan Teacher and Tenure* (2002 ed). The portion of this document cited by the District provides that the responsibility for acquiring and maintaining certification is on the individual teacher and a school board is not required to notify a teacher that his certificate has expired. See Collins and Blaha, *The Michigan Teacher and Tenure* (2002 ed) pp 15, 17.

Even assuming this public policy is dominant, well defined, and ascertained from Michigan law, see *Gogebic*, 209 Mich App at 697, the arbitrator found that Article 7.1 of the collective bargaining agreement (CBA) required the District to inform Warra of how he could continue to maintain certification and preserve his job and the District failed to do so. The merits of the decision are not subject to review. *City of Lincoln Park*, 176 Mich App at 4.

Nonetheless, Article 7.1, while affirming this general policy, shifts some responsibility to the Board of Education. Article 7.1 of the CBA provides:

> The Board's goal is to hire teachers who hold certificates, permits, or vocational authorizations valid for the positions to which they are assigned; who meet the standards of being highly qualified under the No Child Left Behind (NCLB) Act of 2001 for the positions to which they are assigned; and who meet North Central Accreditation (NCA) requirements for the positions to which they are assigned.
>
> The responsibility for being properly certified to teach in the school district rests solely with the individual teacher. The Board will continue its present practice of informing the teachers of this prime responsibility and the manner in which it may be fulfilled. The Association shall be notified of any such action.
>
> The Board agrees that teachers employed by the Board, who hold annual authorizations, shall, as a condition of employment make every attempt to obtain permanent status through recognized work and/or study programs as per MCL 380.1233 and/or MCL 380.1233 (b).

Thus, the Board of Education agreed to inform teachers of how to fulfill certification requirements. Although the second paragraph refers only to certification, the first paragraph mentions vocational authorizations. Moreover, as shown by the application for credit track, it is

the district that must apply for credit track authorization. Gibson also testified that for an individual to be placed on credit track authorization, the District must make the request. The District and the teacher must come up with "[a] plan of study leading to vocational certification." Given that the Board of Education agreed to inform teachers of how to maintain certification and that obtaining credit track authorization requires the District to apply, the arbitration award did not violate public policy by requiring the District and the Association to meet and determine Warra's eligibility for employment.

The District further contends that the trial court did not address its public policy argument and that the trial court's rationale was not legally or factually correct. The District makes several arguments, which do not affect the conclusion that the arbitration award did not violate public policy.

The District argues that the trial court stated that its public policy argument was irrelevant because the arbitrator found that the District erred in failing to give Warra notice and treating Warra differently and that it was unclear whether Warra was qualified for credit track authorization. The District submits that statutes, regulations, and precedent do not require the District to notify anyone of how to receive credit track authorization or prohibit it from treating Paquette and Warra differently. It also argues that the CBA does not require such notification. However, the merits of the arbitrator's decision, finding that Article 7.1 did require such notification and that the District acted improperly in failing to treat Warra and Paquette equally, are not subject to review. *City of Lincoln Park*, 176 Mich App at 4.

The District asserts that the Association failed to allege the District violated Article 7.1. However, as the trial court found, the Association did cite Article 7.1 in its post-hearing brief. The District further submits that Virginia Kowalski did notify Warra of his obligations. However, the arbitrator found that the District failed to inform Warra of how he could fulfill his responsibility of being certified. The arbitrator's factual findings are not subject to review. *36th Dist Court*, 295 Mich App at 508. The District contends that it did not treat Warra and Paquette differently because (1) it was MDE that treated them differently, (2) Paquette and Warra were not similarly situated, and (3) the teacher who replaced Warra was qualified. Again, the arbitrator's factual finding that Warra may have been eligible for credit track authorization is not subject to review. *Id.*

Finally, the District alleges that the trial court's statement that the District relied on depositions taken after the arbitrator reached her conclusion was misplaced because (1) the District's public policy argument did not turn on the testimony, but on statutes, (2) Kowalski testified at the arbitration hearing that Gibson told her that Warra was ineligible for credit track authorization, and (3) the depositions were taken because the arbitration award required the District and the Association to meet, Gibson attended, and her statements created the need for her deposition. However, the trial court's point was that it could not review the factual findings of the arbitrator regardless of any contrary testimony. The District ignores the arbitrator's finding that it was unclear whether Warra was eligible for credit track authorization, despite Kowalski's testimony, and that given this finding, the arbitration award did not violate public policy.

III. COLLECTIVE BARGAINING AGREEMENT

Next, the District contends that the arbitration award should be vacated because it was not based on the CBA. We disagree.

Again, our review is limited:

> A court may not review an arbitrator's factual findings, but may review whether the arbitrator acted within the scope of his or her contractual authority. A court may also review an arbitrator's award for an error of law that clearly appears on the face of the award or in the reasons stated by the arbitrator for the decision. The error must be "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." "[A]rbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." [*36th Dist Court*, 295 Mich App at 508-509 (citations omitted).]
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> 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. [*City of Lincoln Park*, 176 Mich App at 4 (citations omitted).]

The District argues that the arbitrator exceeded her authority by relying on a provision of the CBA, Article 7.1, which the Association did not allege the District violated. As noted above, the Association did cite Article 7.1 in its post-hearing brief. Even if the Association did not allege the provision was violated, the arbitrator was not prohibited from relying on Article 7.1. In the case cited by the District, *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 156; 393 NW2d 811 (1986), the Michigan Supreme Court found that the arbitrator interpreted a portion of the collective bargaining agreement which neither party had implicated and which was "expressly withheld from arbitral jurisdiction." In this case, even if the parties failed to cite the provision, it was not expressly withheld from arbitration. Further, a CBA is a contract. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 327; 550 NW2d 228 (1996). Contracts are to be read as a whole. *White v Taylor Distrib Co, Inc*, 289 Mich App 731, 734; 798 NW2d 354 (2010).

The District also argues that Article 7.1 is inapplicable and supports its position. However, the merits of the arbitrator's decision are not subject to review. *City of Lincoln Park*, 176 Mich App at 4. Nonetheless, Article 7.1 did apply to annual authorizations and required notification, as discussed above.

The District also lists six other ways that the arbitrator disregarded the CBA and the law, including by: (1) granting the grievance even though Warra was not a member of the Association when it was filed, (2) ignoring Michigan law requiring the District to hire a certified teacher, (3) ignoring the District's discretion to apply for annual authorizations, (4) ignoring Kowalski's undisputed testimony regarding her conversation with Gibson about the District's discretion to not hire Veronyca Cornish, (5) assuming Warra and Paquette were similarly situated despite undisputed testimony to the contrary, and (6) basing its award on a vague concept of due process, rather than the CBA. The first claim is addressed in Issue IV, *infra*. The second and third claims were addressed in Issue II, *supra*. With regard to the fourth and fifth claims, the arbitrator's factual findings are not subject to review. *36th Dist Court*, 295 Mich App at 508. Finally, the District's sixth claim fails because the arbitrator's award was properly based on Article 7.1. Therefore, the arbitration award drew its essence from the CBA. See *City of Lincoln Park*, 176 Mich App at 4.

In its reply brief, the District claims that the arbitrator's authority was limited to determining whether the District expressly violated the CBA, which it failed to do. Article 3.1 of the CBA provides that "[t]he Board retains the sole right and shall have the right to manage and conduct its obligation in accordance with the laws of the State of Michigan subject only to the condition that it shall not do so in any manner which constitutes an express violation of this Agreement." However, a review of the arbitration award reveals that the arbitrator did find that the District violated Article 7.1.

IV. JURISDICTION/ARBITRABILITY

Finally, the District contends that the arbitration award should be vacated because the arbitrator did not have jurisdiction over the grievance as Warra was not a member of the bargaining unit. We disagree.

The Association claims that the arbitrator's finding that the grievance was properly filed is a factual finding not subject to review. However, a court may review the arbitrability of an issue. This Court has stated:

> "To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." The court should resolve all conflicts in favor of arbitration. [*Fromm v Meemic Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004) (citations omitted).]

The District argues that because Warra's vocational authorization expired on June 30, 2009, and the grievance was filed on August 29, 2009, he was not a member of the bargaining unit when the grievance was filed. Article 1.1 of the CBA defines "Bargaining Unit" as "[a]ll certified probationary/tenure teachers and teachers with professional and occupational certificates, temporary vocational authorizations, or full vocational authorizations." Assuming Warra's vocational authorization had expired when the grievance was filed, other provisions of the CBA suggest that discharged teachers are part of the bargaining unit. Article 22.10, for example, provides that "[i]f any teacher in the bargaining unit (including the probationary

teachers) for whom a grievance is sustained shall be found to have been unjustly discharged, s/he shall be reinstated with full reimbursement of all professional compensation lost from the date of discharge." This provision suggests that discharged teachers are part of the bargaining unit and may be involved in the grievance process, including arbitration. See Article 22. As the trial court found, precluding grievances of discharged instructors would render provisions such as Article 22.10 meaningless. "[C]ontract interpretation that would render any part of the contract surplusage or nugatory must be avoided." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012).

The District argues that the arbitrator may not "rule on a grievance filed on behalf of a former Association member, like Mr. Warra, who does not have the credentials necessary for Association membership regardless of the arbitrator's award." However, Warra could not renew his vocational authorization or obtain credit track authorization on his own. Moreover, the arbitrator found that, while vocational authorizations are annual, the District had already sent Warra a letter "advising him of his 'tentative assignment for the 2009-2010 school year.'" Therefore, it was not Warra's fault alone that his authorization expired and the District was required to take action to renew his authorization.

Moreover, there is no provision expressly precluding discharged teachers whose vocational authorizations expired from filing grievances. See *Fromm*, 264 Mich App at 306. The arbitrator's decision should be affirmed because "[a]bsent an express provision excluding a particular grievance from arbitration, or the most forceful evidence of a purpose to exclude the claim, the matter should go to arbitration." *Kentwood Pub Sch v Kent County Ed Ass'n*, 206 Mich App 161, 164-165; 520 NW2d 682 (1994).

Finally, the Association argues that it had standing to file the grievance. Under Article 22.1 of the CBA, the Association had the right to file a grievance.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro