

STATE OF MICHIGAN
COURT OF APPEALS

JASON DERWOED,

Plaintiff-Appellant,

v

CITY OF WYANDOTTE,

Defendant-Appellee.

UNPUBLISHED

April 16, 2013

No. 308051

Wayne Circuit Court

LC No. 11-009372-AW

Before: JANSEN, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

In this action for a writ of mandamus, plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We affirm.

The police chief for the City of Wyandotte discharged plaintiff from his position as a city police officer after plaintiff arrived late for work and took a Breathalyzer test that registered a blood alcohol level of .085. Plaintiff's discharge was upheld by the city's mayor in a hearing under the veterans preference act (VPA), MCL 35.401 *et seq.*, and by an arbitrator through the grievance procedure established under a collective bargaining agreement (CBA). Plaintiff filed this action for a writ of mandamus, alleging that the police chief lacked the authority to unilaterally terminate his employment because the city charter granted that authority to the Police and Fire Commission.

The requirements for issuance of a writ of mandamus are as follows:

A writ of mandamus is an extraordinary remedy that will only be issued if (1) the party seeking the writ has a clear legal right to the performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act

¹ Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Although the trial court did not specify the subrule under which it granted the motion, its decision was based on evidence outside the pleadings. Therefore, review is appropriate under MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result. [*Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 366-367; 820 NW2d 208 (2012) (citations and internal quotations omitted).]

This Court reviews a trial court's decision to issue or deny a writ of mandamus for an abuse of discretion. *Coalition for a Safer Detroit*, 295 Mich App at 367. However, two of the requirements for issuance of a writ of mandamus, i.e., whether the defendant has a clear legal duty to perform and whether the plaintiff has a clear legal right to performance of the act requested, present questions of law that are reviewed de novo. *Id.* The court's ruling in this case was made in the context of defendant's motion for summary disposition. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Id.* A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." *Id.*

Although plaintiff's complaint for a writ of mandamus sought reinstatement of his employment, his arguments concern his purported right to a hearing before the Police and Fire Commission before being discharged.

The CBA does not establish a clear legal right or a clear legal duty for a hearing before the commission. The management rights clause of the CBA purports to vest the commission, the mayor, and the city council with the right to discipline and discharge officers. Consistent with the management rights clause, the commission formerly had authority to discipline and dismiss officers through its role in the grievance procedure. However, the third step of the appeal process was changed. The role of the Police and Fire Commission with respect to resolving third-step grievances was eliminated in favor of the Director of Administrative Services. The CBA refers to "a trial board" determining whether a member violated departmental rules. But defendant presented evidence, consisting of Police Chief Daniel Grant's testimony at the VPA hearing, that the process involving a trial board hearing before the Police and Fire Commission no longer existed. Although the management rights clause of the CBA leaves unanswered questions about the role of the Police and Fire Commission in the dismissal, those questions do not mean that the trial court erred in granting defendant's motion for summary disposition. The uncertainty with respect to the role of the commission under the CBA means that plaintiff failed to show a *clear* duty on the part of defendant to require a hearing, or a *clear* right by plaintiff to such a hearing. "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004). The CBA does not establish a clear duty or right to a hearing before the commission.

Plaintiff contends that regardless of the CBA, there is a clear legal duty and clear legal right to a hearing before the commission under the city charter. Plaintiff relies on chapter VII, section 26, paragraph i, of the city charter, which provides:

The powers and duties of the police and fire commission and the members of the police and fire departments, which shall be exercised and performed as

herein provided and in accordance with the laws of the state and the ordinances of the city, shall be as follows:

* * *

The commission may discipline, suspend temporarily and discharge permanently any member of the police or fire department for any cause which the commission, in the exercise of their discretion, deem sufficient, provided, however, that a statement in writing of the cause or causes of his suspension or removal be served upon him and that he be given a hearing before the commission. The decision of the commission shall be final.

Plaintiff contends that in the absence of a “true conflict” between the CBA and the charter, the charter still controls.

Plaintiff’s reliance on the charter to establish a clear legal duty and clear legal right is misplaced. Disciplinary procedures, grievances, and discharges are mandatory subjects of collective bargaining under the Public Employment Relations Act (PERA), MCL 423.215. *Local 1383, Int’l Ass’n of Fire Fighters, AFL-CIO v City of Warren*, 411 Mich 642, 661-662; 311 NW2d 702 (1981); *Pontiac Police Officers Ass’n v Pontiac (After Remand)*, 397 Mich 674, 681, 685; 246 NW2d 831 (1976). The duty to perform in accordance with the terms of a collective bargaining agreement prevails over conflicting charter provisions. *Local 1383, Int’l Ass’n of Fire Fighters*, 411 Mich at 662. By purporting to make the decision of the commission final, the charter provision conflicts with the CBA, which provides the grievance procedure, including arbitration. The CBA, although unclear in some respects, shows that discipline and dismissal are within the scope of the parties’ CBA. A determination of the parties’ duties and rights with respect to those matters is a contractual matter decided under the framework of the CBA. See *Monroe Co Sheriff v Fraternal Order of Police, Lodge 113*, 136 Mich App 709; 357 NW2d 744 (1984). The decision cited by plaintiff, *Caronis v City of Pontiac*, 71 Mich App 573; 248 NW2d 620 (1976), concerns the res judicata effect of a prior judgment and whether the “advent of PERA” resulted in a “true conflict” between the act and the issues previously litigated that would amount to a material change of circumstances to preclude application of res judicata. The discussion of the res judicata effect of a judgment has no bearing on whether a writ of mandamus may be founded on a charter provision when the matter is addressed, albeit unclearly, by the CBA. In short, plaintiff cannot show entitlement to a writ of mandamus that is premised on the city charter.

In addition, plaintiff has not established that there was no remedy other than a writ of mandamus that might achieve the same result. Plaintiff contends that the grievance and arbitration process did not provide an adequate remedy because the arbitrator “lacked the authority to decide the foundational question” whether the police chief had the authority to terminate plaintiff’s employment. Plaintiff argues that art XI, ¶ 11.6 of the CBA restricted the arbitrator from considering outside sources, such as the city charter. That CBA provision states:

11.6: The arbitrator may not add to, subtract from, change or amend any terms of this agreement; rather, he/she shall interpret and apply the same.

This provision is not as restrictive as plaintiff contends. The arbitrator is empowered to interpret and apply the CBA. Unless expressly agreed otherwise, “an arbitrator has great latitude in the sources he may rely upon in resolving disputes concerning the appropriate interpretation of specific contractual provisions[.]” *Port Huron Area School Dist v Port Huron Ed Ass’n*, 426 Mich 143, 160; 393 NW2d 811 (1986). The CBA provision does not restrict the arbitrator from considering evidence that is relevant to determining the meaning of the parties’ agreement. Thus, the arbitrator could consider, for example, the city charter and evaluate how the charter provisions and the parties’ past practices clarify the parties’ intentions where the CBA is silent or ambiguous. The arbitrator could not use the city charter to vary the terms of the CBA, but that limitation is consistent with the principle that the duty to perform in accordance with the terms of a collective bargaining agreement prevails over conflicting charter provisions. See *Local 1383, Int’l Ass’n of Fire Fighters, AFL-CIO*, 411 Mich at 661-662, discussing *Pontiac (After Remand)*, 397 Mich at 681, 685. That limitation does not mean that arbitration did not afford plaintiff an adequate alternative remedy to the writ of mandamus.

Because plaintiff did not establish the requirements for mandamus, the trial court did not err in granting defendant’s motion for summary disposition.

Plaintiff also argues that the trial court abused its discretion by denying his request to treat his complaint as an application for leave to appeal the arbitrator’s decision. Essentially, plaintiff sought leave to amend his complaint to assert an appeal of the arbitrator’s decision. This Court reviews for an abuse of discretion a trial court’s decision denying leave to amend pleadings. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A motion to amend ordinarily should be granted, and should be denied only for particularized reasons such as futility, undue delay, bad faith or dilatory motive, undue prejudice to the opposing party, and repeated failure to cure deficiencies by previous amendments. *Id.* at 658. In this matter, the trial court stated that it did not “see any merit” to the challenge that plaintiff sought to raise.

Judicial review of a labor arbitration award 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 award draws its essence from the contract.” *Police Officers Ass’n of Mich v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002) (citations and internal quotation marks omitted). If the arbitrator “did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases.” *Id.* “Thus, as 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.” *City of Ann Arbor v American Federation of State, Co, & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144-145; 771 NW2d 843 (2009) (citations and internal quotations omitted).

Plaintiff contends that the issue he would have raised in an appeal of the arbitration award is whether the award was beyond the contractual authority of the arbitrator. Specifically, he would have challenged “the arbitrator’s power to determine that the police chief had the authority to terminate [plaintiff], regardless of the chief’s reasoning.” Plaintiff argues that the CBA does not address the issue, and because the arbitrator’s authority is limited to the CBA, any ruling by the arbitrator on this issue would be beyond the terms of the CBA.

Plaintiff's contention that the arbitrator lacked the authority to determine whether the chief had the authority to terminate plaintiff's employment is comparable to an issue raised by the county sheriff and the county board of commissioners in *Monroe Co Sheriff*, 136 Mich App 709. That case involved the issue whether a deputy sheriff's grievance of the termination of his employment was arbitrable. The sheriff and county board of commissioners argued that MCL 51.70 gave the sheriff the statutory power to appoint deputies and to revoke those appointments at any time and that the parties' CBA retained that statutory power. Therefore, they argued that the arbitrator lacked jurisdiction and the deputy's grievance of his termination was not arbitrable. This Court recognized that the CBA was ambiguous because it purported to reserve the sheriff's powers under MCL 51.70, but also provided for discharge for just cause. *Id.* at 716-717. To accept the sheriff and board's position that the award should be vacated because the arbitrator lacked jurisdiction where the sheriff retained his statutory power, the Court would have had to first decide whether their interpretation of the CBA was correct. This Court refused to "engage in interpretation of the collective-bargaining agreement in order to reach the conclusion that the grievance was not arbitrable. The question of which of the parties' interpretation of the agreement is correct was a matter for the arbitrator and we are not at liberty to review on appeal the correctness of the arbitrator's interpretation of the agreement" *Id.* at 717 (citation omitted).

In the present case, the CBA addresses discharge and the process for challenging the dismissal. The grievance challenged whether the discharge violated the CBA. Questions about the role of the commission and the parties' practices in the administration of the CBA were matters for the arbitrator. Where plaintiff sought to challenge the award on the ground that the arbitrator lacked authority to decide these matters, the trial court did not abuse its discretion in denying plaintiff's request to amend the complaint.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Deborah A. Servitto