Order

Michigan Supreme Court
Lansing, Michigan

May 25, 2016

147511 & (58)

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES,
Plaintiff-Appellee,

v

SC: 147511
COA: 304920
Ct of Claims: 10-000037-MK

STATE OF MICHIGAN and OFFICE OF THE STATE EMPLOYER,
Defendants-Appellants.

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On May 4, 2016, the Court heard oral argument on the application for leave to appeal the June 20, 2013 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and we REMAND this case to the Court of Claims for issuance of an order granting summary disposition in favor of the defendants on Count I of the Complaint. The Civil Service Commission has "plenary and absolute" authority to set rates of compensation and to determine the procedures by which it makes those compensation decisions. See *UAW v Green*, 498 Mich 282, 288 (2015). The consensus agreement purports to bind the parties to jointly recommend certain wage increases for civil service employees, and was part of the process by which the Civil Service Commission fixed rates of compensation. The plaintiff's breach of contract claim arises out of the exclusive constitutional authority of the Civil Service Commission to "fix rates of compensation" for the classified service. Const 1963, art 11, § 5. Judicial incursion into that process is "unavailing." *Council No 11, AFSCME v Civil Service Comm*, 408 Mich 385, 408 (1980). The motion to supplement the record is considered, and it is DENIED. Evidence regarding the amount of damages is irrelevant because the controversy fell exclusively within the purview of the Civil Service Commission.

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN ASSOCIATION OF GOVERNMENTAL EMPLOYEES, Plaintiff-Appellee,	UNPUBLISHED June 20, 2013
V STATE OF MICHIGAN and OFFICE OF THE STATE EMPLOYER, Defendants-Appellants.	No. 304920 Court of Claims LC No. 10-000037-MK

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Defendants appeal by leave granted[1] from the Court of Claims order granting, in part, plaintiff's motion for summary disposition.[2] We affirm.

Plaintiff is a limited-recognition organization (LRO) under the Michigan MCSC Rules.[3] Plaintiff represents classified Civil Service employees who are ineligible for full collective

[1] This Court denied defendants' application for leave to appeal. *Michigan Ass'n of Governmental Employees v Michigan*, unpublished order of the Court of Appeals, entered February 15, 2012 (Docket No. 304920). However, our Supreme Court remanded the case to this Court for consideration as on leave granted. *Michigan Ass'n of Governmental Employees v Michigan*, 493 Mich 860; 820 NW2d 905 (2012).

[2] The Court of Claims granted summary disposition in favor of defendants with regard to plaintiff's claims of unjust enrichment and equal protection, but granted summary disposition, in part, in favor of plaintiff with regard to the breach of contract claim. Plaintiff did not appeal the ruling regarding the unjust enrichment and equal protection claims.

[3] "***Limited-recognition organization*** means a labor organization recognized by the state personnel director to represent employees in nonexclusively represented positions." CSC Rule 9-1 (emphasis in original).

bargaining, known as nonexclusively represented employees (NEREs).[4] CSC Rule 6-8.3. Civil Service Rules require that the Office of State Employer (defendant OSE) meet and confer with LROs, such as plaintiff, on the matter of compensation for the employees represented by the LRO. The CSC Rules also permit the parties to enter into a consensus agreement to jointly recommend to the Coordinated Compensation Panel the compensation that NEREs are to receive. See CSC Regulation 6.06. The panel then makes a recommendation to the Michigan Civil Service Commission (MCSC), which has plenary authority to set the terms and conditions of employment for state employees. CSC Rule 5-1.2-5.13; Const 1963, art 11, § 5.

In October 2007, plaintiff and defendant OSE reached a consensus agreement with regard to compensation for fiscal years 2009-2011. The parties agreed that they would recommend to the Coordinated Compensation Panel a zero percent general wage increase for fiscal year 2009, a one percent increase for 2010, and a three percent increase for 2011. The parties complied with the consensus agreement for fiscal years 2009 and 2010, but in fiscal year 2011, defendant OSE recommended to the Coordinated Compensation Panel that there be a zero percent compensation increase for NEREs. The panel rejected defendant OSE's position and proposed that the MCSC grant the three percent general wage increase as originally agreed to by the parties. The matter then went before the MCSC, which adopted defendant OSE's recommendation.

Following the MCSC's decision, plaintiff filed an unfair labor practices grievance against defendant OSE, pursuant to MCSC administrative procedures. The civil service hearing officer issued a decision in favor of plaintiff, finding that defendant OSE violated civil service rules prohibiting coercion, interference with employee rights, and discrimination. The hearing officer issued a cease and desist order, ordered defendant OSE to post notices concerning the findings and conclusions of his decision, and awarded attorney fees to plaintiff.[5] The hearing officer declined to award damages for breach of contract concluding that he "has no authority to adjudicate breach of contract disputes of the nature presented in this hearing."

In the present action, plaintiff also filed a complaint against defendants in the Court of Claims alleging breach of contract, unjust enrichment, and violation of equal protection. Both parties filed cross-motions for summary disposition, and the Court of Claims granted summary disposition to defendants on the unjust enrichment and equal protection portions of plaintiff's complaint, while granting partial summary disposition to plaintiff on the issue of breach of contract. The Court of Claims reserved the matter of damages for trial. This appeal followed.

"A challenge to the jurisdiction of the Court of Claims presents a statutory question that is reviewed de novo as a question of law." *AFSCME Council 25 v State Employees Retirement Sys*, 294 Mich App 1, 6; 818 NW2d 337 (2011). A trial court's ruling on a motion for summary disposition also presents a question of law subject to review de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012).

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[4] ***Nonexclusively represented position*** means (1) an excluded position or (2) an eligible position in a unit that has not elected an exclusive representative. CSC Rule 9-1 (emphasis in original).

[5] Defendant OSE later appealed the award of attorney fees, which was reversed by the MCSC.

Defendants raise three arguments alleging that the Court of Claims lacked jurisdiction to hear plaintiff's breach of contract claim. First, defendants assert that the doctrine of primary jurisdiction placed sole jurisdiction in the hands of the MCSC. Under this doctrine, a court's jurisdiction is limited where an administrative agency possesses "superior knowledge and expertise in addressing recurring issues within the scope of their authority." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 200; 631 NW2d 733 (2001). In the instant case, however, the breach of contract involves an area of law for which the MCSC possesses no superior knowledge or expertise. In fact, it is the Court of Claims which has been granted, by statute, jurisdiction to "hear and determine all claims and demands, liquidated and unliquidated, *ex contractu and ex delicto*, against the state and any of its departments, commissions, boards, institutions, arms or agencies." MCL 600.6419(1)(a) (emphasis added). Given the expertise of the Court of Claims in breach of contract matters, as well as the statutory grant of jurisdiction, the court's exercise of jurisdiction in this case was proper.

Second, defendants argue that the Court of Claims lacked jurisdiction because plaintiff failed to exhaust all administrative remedies prior to filing its breach of contract claim. When a claim "is cognizable in the first instance by an administrative agency alone[,] judicial interference is withheld until the administrative process has run its course." *Travelers*, 465 Mich at 197 (further citation and quotation omitted). Here, plaintiff filed its breach of contract claim prior to the resolution of its unfair labor practices grievance against defendant OSE. Accordingly, the exercise of jurisdiction by the Court of Claims took place prior to the exhaustion of all administrative remedies. However, the doctrine of exhaustion only applies when a claim "is cognizable in the first instance by an administrative agency alone." *Id*. In the instant case, the Court of Claims had concurrent jurisdiction and, as such, plaintiff's breach of contract claim was not cognizable in the first instance by the MCSC alone. Therefore, exhaustion is inapplicable to the facts of this case.

Third, defendants argue that the Court of Claims lacked jurisdiction because plaintiff's claim was moot. Defendant bases this assertion on the fact that the Coordinated Compensation Panel recommended the three percent compensation increase for fiscal year 2011, and because plaintiff was ultimately successful in its unfair labor practices grievance against defendant OSE. While the panel did indeed recommend the three percent compensation increase for fiscal year 2011, the MCSC rejected the recommendation. Also, although it is true that plaintiff won its unfair labor practices grievance against defendant OSE, plaintiff received no remedy for defendant OSE's breach of the consensus agreement because the hearing officer explicitly found that he had no jurisdiction over breach of contract matters. Accordingly, while plaintiff received remedies for some portions of defendant OSE's improper conduct through the grievance process, plaintiff has yet to receive any remedy for defendant OSE's breach of contract.

We also reject defendants' argument that no enforceable contract existed between the plaintiff and defendant OSE. To begin, defendants argue that plaintiff is not competent to contract, citing civil service rules that prohibit LROs such as plaintiff from engaging in collective bargaining. See CSC Rule 6-2.1(e). An enforceable contract requires parties competent to contract. *Calhoun Co v Blue Cross & Blue Shield*, 297 Mich App 1, 13; 824 NW2d 202 (2012). However, nothing in the rules prohibits LROs from entering into contracts, and indeed the regulations allow LROs to enter into consensus agreements such as the one at issue in this case.

Defendants also argue that plaintiff did not provide any valuable consideration to defendants. An enforceable contract requires legal consideration be given by each party. *Id*. Here, plaintiff promised to recommend the indicated compensation increases to the coordinated compensation panel for fiscal years 2009, 2010, and 2011. By agreeing to recommend those amounts, plaintiff surrendered the opportunity to lobby for larger compensation increases for its members. Furthermore, defendants do not dispute plaintiff's assertion that it agreed to fringe benefit concessions. This constitutes valuable consideration. While defendants argue on appeal that promises to recommend certain amounts to the coordinated compensation panel are "illusory," defendant OSE's own conduct belies this assertion, as it found breaching the consensus agreement and recommending a zero percent compensation increase in fiscal year 2011 to be a valuable course of action.

In the alternative, defendants argue that if the consensus agreement did represent an enforceable contract, any breach of that contract was excused by the doctrine of impossibility. Strict performance of a contractual promise is excused "in the event that unanticipated circumstances beyond the contemplation of the contracting minds and beyond their immediate control make strict performance impossible." *Bissell v L W Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). Here, defendants assert that recommending the agreed-to three percent compensation increase was impossible due to Michigan's budget situation at the time. However, defendant OSE's only duty under the consensus agreement was to recommend the agreed-to compensation increase. The state's budgetary situation would not serve as an impediment to making a recommendation, which can be rejected.

Finally, defendants argue that plaintiff failed to establish that it suffered any damages as a result of defendants' breach of the consensus agreement. In order to make a claim for breach of contract, a plaintiff must show both breach and damages. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Here, plaintiff alleges that its members suffered damages in the form of being denied a three percent compensation increase in fiscal year 2011, as well as in the form of potentially reduced compensation increases in fiscal years 2009 and 2010. Questions of whether plaintiff could have successfully lobbied for compensation increases greater than those awarded in fiscal years 2009 and 2010 and whether plaintiff's members would have been awarded the three percent increase in fiscal year 2011 had defendant OSE complied with consensus agreement are damage questions of fact that the Court of Claims properly reserved for trial. While defendants argue on appeal that the Court of Claims lacks the power to award compensation increases to state employees, the Court of Claims does not lack the authority to award damages for breach of contract.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell