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

KENNETH A. COSTELLA, Plaintiff-Appellant,	UNPUBLISHED August 27, 2013
v TAYLOR POLICE & FIRE RETIREMENT SYSTEM and CITY OF TAYLOR, Defendants-Appellees.	No. 310276 Wayne Circuit Court LC No. 11-015152-AS

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the order of the circuit court granting defendants' motion for summary disposition and upholding defendants' calculation of plaintiff's retirement benefits. We reverse and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

Plaintiff, Kenneth A. Costella, was employed as a firefighter for the City of Taylor ("City") for 19 years. He served as the City's fire chief during the last six years of his employment. The terms and conditions of Costella's employment as fire chief were defined by the Personal Services Contract ("Contract"). The Contract was entered into in August 2002, and continued until Costella's removal from his position as fire chief and later retirement in November 2005.

Costella negotiated his Contract with James Riddle, then City chief of staff and human resources director. Costella agreed to waive his rights under the Fire Fighters and Police Officers Civil Service System Act, MCL 38.501 *et seq*. ("Act 78"). In return, Costella was given the option to receive either (1) a lump-sum payment of 26 weeks of his base salary (i.e., $48,168.12) to be paid at the time of his removal, or (2) "retreat rights."

The negotiation included discussions between Costella and Riddle regarding the inclusion of the "26 weeks of base salary" in the calculation of Costella's Final Average Compensation ("FAC"). The method for calculating Costella's FAC was to be determined according to the terms of the Collective Bargaining Agreement ("CBA") between the City and the Taylor Fire Fighter's Association. The CBA specifically provided that "[b]ase [w]age, including any deferred compensation," was to be included in the calculation of FAC. Riddle contacted Gustaf

Andreasen, the city attorney, to confirm that the $48,168.12 would be included in the calculation of Costella's FAC. After Riddle was assured that the sum would be included, he proposed the Contract to the city council. Subsequently, the city council approved the Contract.

On November 12, 2005, the City's mayor removed Costella from his position as fire chief without cause. Two days later, Costella retired from the City, which entitled him to disbursement of pension benefits by defendant Taylor Police & Fire Retirement System ("Board").

Initially, the City refused to pay Costella the $48,168.12. However, after arbitration by agreement of the parties, the circuit court entered an order adopting the arbitrator's decision that the City had no lawful basis for refusing to pay Costella.

The Board then undertook its obligation to calculate Costella's pension benefit with the advice of its legal counsel, Jack Timmony. Timmony concluded that the Board was required to include the $48,168.12 in the calculation of Costella's FAC because the city council's approval of the Contract constituted a "postretirement adjustment increasing retirement benefits" under § 6d of the Fire Fighters and Police Officers Retirement Act, MCL 38.556. Pursuant to this advice, the Board unanimously resolved to include the $48,168.12.

At the Board meeting of March 10, 2010, City finance director, Dean Philo, objected to the Board's decision. To address Philo's concerns, the Board requested clarification of the prior arbitration award. Subsequently, the arbitrator issued a Clarification of Decision and Award, which stated that the Contract "is clear and unambiguous . . . [and] that the intent of the parties was that the 26 weeks' severance pay to former Chief Costella was not to be included in the [FAC] for determining his pension." After reviewing the Contract, the arbitrator noted that it does not contain language stating that severance pay would be included in Costella's FAC. Further, the arbitrator noted that other contracts between the City and other high-ranking City officials provided for the inclusion of severance payments in the calculation of FAC. The arbitrator determined that the absence of such language in Costella's contract shows that the drafters did not intend to include his severance payment in the calculation of his FAC. Upon receipt of this Clarification of Decision and Award, the Board reversed its previous decision and determined that the Contract did not specifically provide that the 26 weeks' of base wages should be included.

Thereafter, Costella brought an action in the circuit court requesting that the arbitrator's Clarification of Decision and Award be vacated. The circuit court ultimately vacated the arbitrator's decision. After Costella was notified, he appealed to the Board. However, the Board reaffirmed its earlier position.

On December 8, 2011, Costella filed a complaint for superintending control in the circuit court. The Board filed a motion for summary disposition. In an opinion and order granting the Board's motion, entered March 26, 2012, the court stated that if the parties had wanted the lump-sum to be included, they should have specifically contracted for it, as was previously done in other employees' contracts with the City. The circuit court noted that "a rational interpretation of the 26 weeks paragraph as contemplated by the parties allows for it to be considered severance pay," and concluded that it should not be included in the calculation of Costella's FAC. The

court dismissed the complaint for superintending control, and determined that the decision of the Board was not contrary to law, arbitrary, capricious, or a clear abuse of discretion. In addition, the court noted that the "determination is supported by competent, material and substantial evidence on the whole record."

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo the circuit court's grant or denial of a motion for summary disposition. *Thurman v Pontiac*, 295 Mich App 381, 384; 819 NW2d 90 (2012). Further, the construction and interpretation of a contract is a question of law that we review de novo. *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

An appellate court reviews the decision of an administrative agency to determine if the decision was affected by a substantial and material error of law, was arbitrary and capricious, or was not supported by competent, material and substantial evidence on the whole record. MCL 24.306; *VanZandt v State Employees' Ret System*, 266 Mich App 579, 583; 701 NW2d 214 (2005). We examine the lower court's review of the administrative agency's decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review. *Id.* at 585; see also *Dignan v Mich Pub Sch Employees Ret Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002). A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made. *Dignan*, 253 Mich App at 576. In reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record. *Great Lakes Sales Inc v State Tax Comm*, 194 Mich App 271, 280; 486 NW2d 367 (1992). "Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).

B. DISCUSSION

In this case, the calculation of Costella's FAC was to be performed in accordance with the terms of the CBA. There are two ways that the $48,168.12 could have been included in the calculation of Costella's FAC. First, the sum could have been includable pursuant to Article XII, Section 3, Clause C of the CBA, which enumerates the types of payment and compensation that are includable in the calculation of an employee's FAC.[1] Second, the Contract, itself, could have provided that the sum should be included.

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[1] The language of Article XII, Section 3, Clause C of the CBA is set forth later in this opinion.

We conclude that the sum of $48,168.12 does not fit within any of the specific categories enumerated in Article XII, Section 3, Clause C of the CBA. We also conclude that the Contract, itself, is silent regarding whether the sum of $48,168.12 was to be included in the calculation of Costella's FAC. Accordingly, because the CBA does not govern our analysis in this regard, and in light of the fact that the Contract does not provide sufficient clarity, we examine the intent of the drafters.

1. CLASSIFICATION OF THE LUMP-SUM

Michigan courts have consistently defined "compensation" in accordance with Black's Law Dictionary, which defines the term as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." Black's Law Dictionary (9th ed); see also *Gentile v Detroit*, 139 Mich App 608, 617; 362 NW2d 848 (1984); *Hay v Highland Park*, 134 Mich App 624, 628; 351 NW2d 622 (1984); *Stover v St Clair Shores Fire & Police Ret Bd*, 78 Mich App 409, 415; 260 NW2d 112 (1977). Further, "deferred compensation" is defined in relevant part as "[p]ayment for work performed, to be paid in the future or when some future event occurs." Black's Law Dictionary (9th ed). "Severance pay," however, is defined as "[m]oney (apart from back wages or salary) paid by an employer to a dismissed employee." *Id.*

The language of Costella's Contract states:

> The Taylor Fire Chief shall not be eligible for, nor shall he seek or request, severance pay in any form upon leaving office, except as provided for below.
>
> * * *
>
> The City agrees that, if the Mayor removes the Taylor Fire Chief from his position, without just cause, the Taylor Fire Chief will automatically be accorded 26 weeks of his base salary or "retreat rights" to I.A.F.F. Local 1252 to the rank at which he left without any loss of seniority. Nothing in the paragraph in any way abrogates the City's right to terminate the Taylor Fire Chief for just cause.

According to the Contract, the method for calculating Costella's FAC is determined by the terms and conditions of the CBA:

> The Taylor Fire Chief's pension payable from the Retirement System shall be determined using the multiplier specified in the [CBA] for all years of the Taylor Fire Chief's service, including all his years of service in excess of twenty-five (25) years. In no case shall the Taylor Fire Chief's pension be greater than the [CBA] multiplier times all the Taylor Fire Chief's years of service.

The CBA, in Article XII, titled "PENSION", defines FAC and includes a formula for determining the pension benefits payable to a retired City firefighter as follows:

> A. The ranks of Battalion Chief, Captain, Fire Marshall, Lieutenant, Fire Inspector, and Sergeant-Driver shall have their "final average compensation" provided for under the terms of Act 345 which shall mean the average of their highest annual compensation received by a member during the three (3) years of

his highest annual compensation received during the ten (10) years of service immediately preceding his retirement or leaving service.

* * *

C. "Final Average Compensation" as referred to above includes:

a. Base Wage, including any deferred compensation;

b. Cost of living allowance;

c. Overtime pay;

d. Vacation bank and current year entitlement which is unused or not paid out prior to retirement date and sick and/or bonus days not to exceed capped bank, plus current, if any;

e. Longevity pay;

f. Equivalency pay;

g. School or degree bonus pay.

As noted previously, we conclude that the sum of $48,168.12 does not fit within any of these specific categories enumerated in Article XII, Section 3, Clause C of the CBA. The only category that is arguably at issue here is "Base Wage, including any deferred compensation[.]" However, the sum of $48,168.12 did not constitute "[b]ase [w]age" or "deferred compensation." We acknowledge that the Contract referred to the sum of $48,168.12 as "26 weeks of . . . *base salary*." (Emphasis added). However, the term "base salary" in the Contract was *not* used to define the *type* of compensation. Rather, the phrase "26 weeks of . . . base salary" was merely a descriptor of the amount that would be due to Costella. In fact, because the sum was to be awarded after Costella's term of employment had concluded, it cannot be considered "base wage" because it was not paid for work performed or services rendered.

Instead, we conclude that the $48,168.12 was in the nature of a severance payment, and cannot be included in the calculation of Costella's FAC under the terms of the CBA alone. Therefore, it is necessary to examine the Contract to determine whether the sum must be included in the calculation.

2. LANGUAGE OF THE CONTRACT

There is no explicit provision of the Contract providing for the inclusion of the lump-sum payment in Costella's FAC. However, after review of the record before us, we conclude that the drafters intended to include the sum of $48,168.12 in the calculation of Costella's FAC.

There is no authority in Michigan stating that mere silence is the equivalent of an ambiguity. However, another state has ruled on a similar issue. In *Kuehn v Safeco Ins Co of America*, 140 Wis 2d 620, 626; 412 NW2d 126 (1987), the Wisconsin Court of Appeals affirmed

the lower court's use of extrinsic evidence to determine the intent of the parties where the contract was silent as to a specific definition of a term. Although the *Kuehn* Court found no ambiguity in the contract, it noted that the contract should be construed to give effect to the parties' true intent. *Id*.

Likewise, in Michigan, the fundamental purpose of contractual interpretation is to ascertain and give effect to the intent of the parties. *Grosse Pointe Park v Michigan Municipal Liability & Prop Pool*, 473 Mich 188, 218; 702 NW2d 106 (2005).

Given the affidavits submitted by Costella and Riddle, the drafters of the Contract, it is clear that both parties intended to include the $48,168.12 in the calculation of Costella's FAC. During the drafting process, Riddle requested the opinion of city attorney Andreasen concerning whether the lump-sum would be included under the language of the Contract and the CBA. When he was told by Andreasen that the amount would be included, Riddle relayed that opinion to Costella, further assuring Costella of the terms of the Contract. Additionally, Riddle informed the city council that the $48,168.12 would be included in the calculation of Costella's FAC before the city council ever approved the Contract.[2]

The Board argued that Costella's severance pay should not be included in the calculation of his FAC in light of other employment contracts with high-ranking City officials. These other contracts had expressly provided for the inclusion of lump-sum severance payments in the calculation of FAC, whereas Costella's contract did not. However, notwithstanding the silence of Costella's contract, past practice may be used to clarify the drafters' intent. See *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 345; 551 NW2d 349 (1996). These other contracts with high-ranking City officials tended to establish that it was the parties' intent to include the lump-sum payment in Costella's FAC. After all, these contracts plainly demonstrated that the City had routinely included severance payments in the calculation of FAC for other former officials.[3]

III. CONCLUSION

Costella justifiably relied on the representations of various officials that the sum of $48,168.12 would be included in his final FAC calculation. Moreover, the city council was assured that the sum of $48,168.12 would be included in the calculation of Costella's FAC. Finally, as already discussed, it is clear that the parties plainly intended to include the sum in the

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[2] In waiving his Act 78 rights and entering into the Contract, Costella justifiably relied on these representations that the sum of $48,168.12 would be included in the calculation of his FAC. We conclude that these representations were sufficiently definite to justify Costella's reliance thereon. See *McMath v Ford Motor Co*, 77 Mich App 721, 726; 259 NW2d 140 (1977). This provides further support for our conclusion that the sum of $48,168.12 must be included in the calculation of Costella's FAC.

[3] In addition, we note that the city council was within its authority to include the lump-sum severance payment in the calculation of Costella's FAC under MCL 38.556d.

calculation of Costella's FAC. As such, we conclude that the Board was required to include the sum of $48,168.12 in Costella's FAC calculation.

The Board erred in its application of the law, as it failed to give appropriate consideration to the intent of the drafting parties. Moreover, in upholding the Board's decision, the circuit court misapplied the substantial evidence test and did not apply correct legal principles.

Reversed and remanded for entry of an order directing defendant Taylor Police & Fire Retirement System to include the sum of $48,168.12 in the calculation of Costella's FAC. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax his costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Michael J. Kelly

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

KENNETH A. COSTELLA, Plaintiff-Appellant,	UNPUBLISHED August 27, 2013
v	No. 310276 Wayne Circuit Court
TAYLOR POLICE & FIRE RETIREMENT SYSTEM and CITY OF TAYLOR, Defendants-Appellees.	LC No. 11-015152-AS

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

BORRELLO, J. (*dissenting*.)

I would affirm the trial court's decision in this matter for the reasons set forth in its opinion of March 26, 2012. I therefore respectfully dissent from the holding of the majority for the reasons set forth more fully below.

I concur with the statement of the facts as set forth by my colleagues in the majority. I would only add to their recitation of the facts that relevant to my decision in this matter, the employment contract at issue in this case has clauses entitled "TERM OF CONTRACT " and "COMPENSATION." It is under the heading "TERM OF CONTRACT" that the severance pay at issue here is discussed. Under the heading "COMPENSATION" there is no discussion of severance pay. However, I point this out merely for purposes of clarification as I agree with the finding of the majority that the severance pay received by plaintiff does not qualify as compensation.

I. PROPER STANDARD OF REVIEW.

As stated by the majority, this action began as a complaint for superintending control. Thus, as correctly stated by the trial court in its March 26, 2012 opinion, "[T]he review power of this Court when addressing an appeal such as this is not conterminous without the power of the circuit court were this matter to come before it filed under the original jurisdiction of the circuit court." Thus, the proper standard of review in this case is to determine, de novo, if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Thus, the trial court held, under *VanZandt v State Employees' Ret System*, 266 Mich App 579; 701 NW2d 214 (2005), its review was limited to a determination as to whether the decision by defendant retirement system was "not contrary to law, capricious, or a clear abuse of discretion, and is supported

by competent, material and substantial evidence on the whole record." *VanZandt*, 266 Mich App at 583. In *VanZandt*, this Court also stated that when reviewing an agency decision, "[i]f there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result," quoting, *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992). As properly stated by the trial court, "[t]he review power of this Court when addressing an appeal such as this is not coterminous without the power of the circuit court were this matter to come before it filed under the original jurisdiction of the circuit court." I concur with this statement of the trial court and find, for the reasons set forth more fully below, that the majority exceeded its proper scope of review by essentially substituting its judgment for that of defendant retirement system.

II. ANALYSIS.

As stated by the majority, the employment contract at issue does not state that plaintiff's severance pay should be used to calculate his final average compensation (FAC). Indeed the majority opines, and I concur, that the severance payment does not constitute compensation as that term is defined by any relevant Michigan statue or by defendant's retirement system. The majority correctly asserts that defendant retirement system clearly states that only compensation can be included in calculating an employee's FAC. Despite this finding, the majority holds that the trial court erred by not considering the intent of the parties prior to reaching its conclusion that defendant retirement system's ruling was not contrary to law, arbitrary, capricious, or constituted a clear abuse of discretion. The majority so asserts, despite its previous findings, that the employment contract is (a) not ambiguous relative to the issue of whether plaintiff was entitled to severance being included in his FAC; and (b) severance pay is not construed as compensation under any cited Michigan statute or defendant's retirement system.

To support its conclusion that the trial court erred as a matter of law by not considering the intent of the parties when reaching its decision, the majority relies on *Kuehn v Safeco Ins Co of America*, 140 Wis 2d 620, 626; 412 NW2d 126 (1987), for the legal conclusion that even when a contract is silent as to a specific definition of a term, the contract " . . . should be construed to give effect to the parties' true intent." I read the majority's reliance on *Kuehn* to hold that silence can be used to create an ambiguity, thereby allowing a reviewing court to look outside the four corners of the document and construe that parties' intent by use of extrinsic evidence. I respectfully disagree with the majority's interpretation of *Kuehn* as well as what I regard as their disregard for well established principles of contract law.

In *Kuehn*, the Court held that because there was no endorsement or explanation of underinsurance coverage attached to a motor vehicle insurance policy, the trial court was empowered to interpret that provision of the insurance contract. *Id.* at 623. The Court held that due to " . . . the absence of an endorsement defining 'underinsurance,' the policy is silent as to this feature." However, a critical prerequisite to the Court's finding that parol evidence was necessary to construe the intent of the parties was their finding that: "If a writing is only a partial integration of the parties' agreement, it is proper to consider parol evidence which establishes the full agreement as long as the parol evidence does not conflict with the part that has been integrated in writing." *Id.* at 624. There is nothing in the case before us that could lead me to conclude that we are faced with only a partial integration of the parties' agreement. There being

no issue presented relative to partial integration in this case, *Kuehn* is wholly inapplicable. Additionally, based on its misguided reliance on *Kuehn*, the majority erred in its consideration of extrinsic evidence to determine the intent of the parties to a contract which (a) by its own terms constituted the parties' entire agreement, and (b) contained no ambiguity as to whether severance pay should be factored into plaintiff's FAC calculation.

I also dissent because it is my opinion that the majority errs by conflating this Court's duty to "honor the intent of the parties", *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999), with this Court's long-standing duty to give words in a contract their plain and ordinary meaning and if the contract is unambiguous, enforce the contract as written. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). By failing to follow long prescribed legal principles, the majority's decision is tantamount to a re-write of the employment agreement. Simply put, the majority opinion inserts a contractual benefit where none existed. As stated throughout this dissent, based on past practices of the parties to this employment contract, including the alleged drafter of the employment contract, Riddle, had the parties intended to include severance pay in the calculation of plaintiff's FAC, they would or most assuredly could have specifically so stated. I disagree, in part, with the majority's opinion because their readiness to insert a contractual provision where none existed can only be accomplished through ignoring long standing legal principles which this Court is legally bound to follow.

III. CONCLUSIONS.

The issue presented by this appeal is simple: whether the trial court committed legal error by not properly applying the correct legal principles of review as stated by this Court in *VanZandt*. The trial court properly applied the correct legal standard of review, and did not, as alleged by the majority, commit any legal error. To the contrary, I find the trial court's ruling predicated on clear, concise findings of applicable legal principles, and would affirm its decision for the reasons set forth in its opinion. Hence, for the reasons stated herein, I respectfully dissent.

/s/ Stephen L. Borrello