STATE OF MICHIGAN

COURT OF APPEALS

BERRIEN COUNTY and
BERRIEN COUNTY SHERIFF,

Plaintiffs-Appellees,

v

POLICE OFFICERS LABOR COUNCIL,

Defendant-Appellant.

UNPUBLISHED
September 30, 2021

No. 355352
Berrien County Trial Court
LC No. 19-000261-CZ

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Defendant Police Officers Labor Council appeals as of right the final order of the trial court granting plaintiffs, Berrien County and Berrien County Sheriff, summary disposition under MCR 2.116(C)(10), in this declaratory judgment action. On appeal, defendant argues that the trial court erred in granting plaintiffs summary disposition because defendant was entitled to arbitration of the pertinent grievances. For the reasons stated herein, we affirm.

I. FACTUAL BACKGROUND

Plaintiffs[1] filed this declaratory judgment action seeking the trial court's legal interpretation of the arbitrability of two grievances filed under the collective bargaining agreements ("CBA") entered into between the parties. The CBAs allow for the use of compensatory time in lieu of overtime pay. Moreover, the CBAs reserve certain matters as management rights expressly vested in and reserved exclusively to plaintiffs, including, but not limited to, the right to schedule hours and shifts of work, including overtime.

On October 1, 2019, plaintiff Sheriff notified all Sheriff Department staff that limits would be placed on the amount of compensatory time approved for use to 80 hours per year. In its correspondence, plaintiff noted that limitations concerning the accrual of compensatory time

[1] Plaintiffs and defendant are parties to the Command Unit and Non-Command Unit Collective Bargaining Agreements. The following analysis applies to both agreements, as the language is practically identical.

would remain unencumbered, notwithstanding the restrictions on usage. Before implementation of the policy restricting usage to 80 hours annually, those represented by defendant could request compensatory time up to the maximum annual accrual amount.

In response to plaintiffs' new policy, defendant filed several grievances. Defendant filed Grievance #19-102 alleging that plaintiffs' new policy violated "compensatory time past practice," indicating that plaintiff's 80-hour annual compensatory time use cap and refusal for new requests of compensatory use violate the longstanding past practice under the CBAs.

At the same time, defendant filed Grievance #19-131, claiming violations of the CBAs provisions related to Vacation Scheduling, Hours of Work and Overtime, and Compensatory Time. This grievance claims that the CBAs permit the staff to accumulate more hours of compensatory time than permitted for use each year. This cap on usage negates defendant's members' ability to utilize compensatory time and replenish their compensatory time bank up to their maximum allowed amounts. Lastly, defendant filed Grievance #19-127, alleging violations of the "Compensatory Time Past Practice," and is practically identical to Grievance #19-102.[2]

Following the denial of the grievances by plaintiffs, defendant filed a Request of Arbitration Panel. In response, plaintiffs initiated this action for declaratory judgment and injunctive relief, claiming that the grievances were non-arbitrable.

II. PROCEDURAL HISTORY

On December 18, 2019, plaintiffs filed their complaint to enjoin arbitration and motion for preliminary injunction. On January 15, 2020 the parties entered a stipulated order for preliminary injunction through which defendant agreed not to pursue its pending demands for arbitration until further order of the trial court. The parties then agreed to the entry of a stipulated order granting plaintiffs leave to file its first amended complaint and extending preliminary injunction, which the court entered on April 23, 2020. This stipulated order granted plaintiffs leave to file a first amended complaint to add allegations with respect to Grievance 19-106.

On September 2, 2020, defendant filed its cross-motion for summary disposition, arguing that the alleged grievances are subject to arbitration. The trial court held a hearing on the parties' motions on September 28, 2020.

On October 15, 2020, the trial court entered an opinion and order denying defendant's cross-motion for summary disposition and granting plaintiffs' motion for summary disposition, concluding that the grievances were not subject to arbitration. Specifically, the court held that Grievance Nos. 19-131, 19-102, and 19-127 fell under the reserved management rights of Article

[2] In October of 2019, Deputy Jerad Phillips requested a payout of the remainder of his accrued compensatory time, but plaintiff refused to approve his request unless he gave written acknowledgment of the new policy. Phillips refused to sign the written agreement, leading to his filing of Grievance #19-126, which alleged a violation of Article 10 § 5 of the CBA and "the compensatory time past practice." The circumstances surrounding Grievance #19-126 are not at issue in this appeal.

4 of the CBAs and were not subject to arbitration pursuant to Article 5, Section 2. In its opinion and order, the court stated,

> Because Defendant cannot cite to a specific provision that would impose a limit or standard on Plaintiffs' right to schedule the use of compensatory time, Plaintiffs' management rights to schedule hours and shifts, including overtime, are not subject to arbitration.

However, the court did conclude that Grievance 19-126, which arose following a dispute over the accrual of compensatory time, was subject to arbitration. Nonetheless, plaintiffs did not appeal this order.

Defendant timely filed a claim of appeal of the trial courts order on November 4, 2020.

III. STANDARD OF REVIEW

"Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition may be granted under MCR 2.116(C)(7) "because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court may consider all documentary evidence submitted by the parties, accepting as true all the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Patterson v Kleiman*, 447 Mich 429, 433-435; 526 NW2d 879 (1994). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

IV. ARBITRABILITY

Defendant first argues that the trial court erred in concluding that the grievances are non-arbitrable based on its interpretation of the collective bargaining agreements.

"Arbitration is a matter of contract. A party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration." *Kaleva–Norman–Dickson Sch Dist No 6 v Kaleva–Norman–Dickson Sch Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975) (*KND Sch Dist*). We apply the same legal principles that govern contract interpretation when interpreting arbitration agreements. *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016). Our goal in interpreting a contract is to "ascertain the intent of the parties at the time they entered into the agreement." *Id*. The burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement. *Id*.

"The duty to arbitrate grievances arises from [the] contractual agreement between an employer and its employees. Absent such an agreement, neither party is obliged to submit to binding arbitration." *Ottawa Co v Jaklinski*, 423 Mich 1, 22; 377 NW2d 668 (1985). In deciding

the threshold question of whether a dispute is arbitrable, a reviewing court must avoid analyzing the substantive merits of the dispute. *KND Sch Dist*, 393 Mich at 594–595. If the dispute is arbitrable, "the merits of the dispute are for the arbitrator." *Id*. at 595.

Applying these principles, we must consider whether the language of the CBAs intended to cover the instant dispute between the parties. Plaintiffs and defendant are parties to several Collective Bargaining Agreements, including the Command Unit CBA and Non-Command Unit CBA. The language in the Command Unit CBA is practically identical to the language contained in the Non-Command Unit CBA. Therefore, the analysis that follows applies to both agreements. The Command Unit CBA provides in pertinent part:

> ARTICLE 4 MANAGEMENT RIGHTS Section 1. Rights. It is hereby agreed that the customary and usual rights, powers, functions and authority of management are vested in the Sheriff of Berrien County and the Berrien County Board of Commissioners. These rights include but are not limited to … to schedule hours and shifts of work, including overtime … The Employer agrees that it will not exercise these rights in violation of any specific provision of the Agreement.
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> * * *
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> ARTICLE 5 GRIEVANCE AND ARBITRATION PROCEDURE Section 2. Non-Grievable Matters. The following matters are not subject to the grievance procedure and may not be processed hereunder: … 4) all other actions which are exclusively reserved to management under Article 4.
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> * * *
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> ARTICLE 10 HOURS OF WORK AND OVERTIME Section 3. Compensatory Time. Compensatory time may be granted in lieu of overtime pay as mutually agreed upon between the employer and employee … A lieutenant may accumulate a maximum of 240 hours of compensatory time[3]… Time off using compensatory time will be granted using the same procedures as vacation time and must be scheduled in advance with their immediate supervisor.
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> * * *
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> ARTICLE 13 VACATION Section 3. Vacation Scheduling. Vacation time off will be scheduled by the Sheriff, or his designee, upon receiving a request in writing. The Sheriff shall determine the permissible number of employees who may be absent at any one time in the Department ….

Defendant argues that Article 4, the Management Rights Article, contains no words or phrases sufficient to give plaintiffs exclusive and unrestrained authority over compensatory time

[3] The Non-Command Unit Article 10 Section 5 similarly provides that compensatory time may be granted in lieu of overtime pay as mutual agreed upon between the Employer and Employee subject to a limit on the accrual of compensatory time that a Deputy or Sergeant may accumulate to 160 hours.

usage. Instead, defendant argues, language of limitation is woven into the management rights Article as it states that "the Employer agrees that it will not exercise these rights in violation of any specific provision of the Agreement." In other words, the management rights clause does not permit plaintiffs to act contrary to other CBA provisions.

Specifically, defendant contends that other provisions within the CBAs restrict the Sheriff's scheduling powers, the use of compensatory time is not exclusively vested in management and therefore does not fall under the umbrella of "non-grievable" matters. For example, Article 10 Section 5(c) provides that "A reasonable opportunity will be granted to use compensatory time," while Article 13 Section 3 provides that the Sheriff will schedule vacation time and the "Sheriff shall determine the permissible number of employees who may be absent at any one time in the department…"

Despite defendant's contentions, these provisions do not seize plaintiffs of their exclusive management rights carved out in Article 4, nor does it mean that all Article 4 powers are arbitrable. The plain language of Article 4 provides plaintiffs with the exclusive right to schedule hours and shifts of work, including overtime. This language undoubtedly includes the scheduled use of compensatory time, as the use of compensatory "time" affects scheduled hours and shifts of work. By specifically including hours and shifts of work, including overtime, in its management rights in Article 4, plaintiffs have expressly and explicitly excluded such matters from arbitration.

Defendant asserts that similar to the Court's ruling in *KND Sch Dist*, plaintiffs here have lost the exclusive right to schedule compensatory time because of language in another article limiting management powers. *KND Sch Dist*, 393 Mich at 586. In *KND Sch Dist*, a probationary teacher was informed in writing by the local board of education that her contract would not be renewed for the following year. The teacher filed a grievance asserting that non-renewal of her contract violated Article XI(C) of the collective bargaining agreement, which states that "[n]o teacher shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause." Moreover, pursuant to Article XIV(E), she is entitled to arbitration, which states that "[i]f the Board, the aggrieved employee, and the Association shall be unable to resolve any grievance through mediation, and it shall involve an alleged violation of a specific article and section of this agreement, it may, within ten school days, after mediation has been exhausted, be appealed to arbitration." *Id*. at 587-588. The Court held that there was no express reservation of such claims from arbitration in the contract or any evidence of a purpose to exclude such claims from arbitration. *Id*. at 593. The Court reasoned that "[a]n order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id*. at 592. The Court ultimately adopted the rule that the party who would exclude a matter from a general arbitration clause must do so expressly and explicitly. *Id* at 595.

Unlike the School District in *KND Sch Dist*, here, plaintiffs have expressly and explicitly reserved their management rights in Article 4 of the CBAs. Article 4 unambiguously states that the right to schedule hours and shifts of work, including overtime, is exclusively vested in plaintiffs. This right undoubtably includes the scheduled use of compensatory time. By expressly reserving these rights within Article 4, plaintiffs have specifically excluded the topic of scheduling shifts from arbitration. Moreover, Article 5 Section 2 excludes the actions exclusively reserved to management under Article 4 from the grievance procedure. Therefore, it can be said with positive assurance that the grievance procedure outlined in the CBAs is not susceptible to an interpretation encompassing non-grievable matters such as the usage of compensatory time.

V. THE FAIR LABOR STANDARDS ACT

Defendant argues that the Fair Labor Standards Act ("FLSA") is incorporated into the underlying agreements and thereby removes compensatory time usage as an action exclusively reserved to management. However, defendant cannot point to a provision of the FLSA that would obligate plaintiffs to submit an issue they otherwise did not agree to arbitrate to arbitration.

While it is true that contractual compensatory time provisions must abide by federal law, whether the specific provisions of the CBAs are enforceable under the FLSA is not implicated in this declaratory judgment action. In ruling from the bench, the trial court cited and discussed 29 USC §207, concluding that plaintiff is not stripped of the exclusive management rights expressly reserved in Article 4 of the CBAs simply because the FLSA addresses both the accrual and use of compensatory time.

Instead, the issue is one of contract interpretation, specifically concerning whether plaintiffs have agreed to arbitrate matters related to the usage of compensatory time. The CBAs unambiguously reserve certain matters as management rights, including, but not limited to, the right to schedule hours and shifts of work, including overtime. The grievances arising out of plaintiffs' actions regarding its management rights are non-grievable and are not subject to arbitration as outlined in the CBAs.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien