STATE OF MICHIGAN

COURT OF APPEALS

BOARD OF EDUCATION OF THE WALLED LAKE CONSOLIDATED SCHOOL DISTRICT,

Plaintiff/Counterdefendant-Appellee,

v

MICHIGAN EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, WALLED LAKE ESP #1, and MEA/NEA,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
January 30, 2001

No. 210787
Oakland Circuit Court
LC No. 97-546820-CL

Before: Holbrook, Jr. P.J., and Kelly and Collins, JJ.

PER CURIAM.

Defendants, organizations representing the interests of a school bus driver who was dismissed after failing a random drug test, appeal as of right from a circuit court order setting aside an arbitration award that reduced the driver's penalty from dismissal to suspension. We affirm.

The school bus driver, a thirteen-year employee of plaintiff with no previous disciplinary problems, tested positive for marijuana following a bus run. Plaintiff suspended the driver and referred her to a drug-abuse counselor, who concluded that the driver was not a serious drug abuser and did not need continuing substance-abuse treatment. However, after subsequent testing confirmed the impermissible level of marijuana, plaintiff dismissed the driver.

Defendants challenged plaintiff's decision, and the parties submitted the case to an arbitrator under the terms of their collective bargaining agreement. The arbitrator concluded that the evidence supported plaintiff's decision to remove the driver from her position as an operator of a school bus, but further concluded that, in light of the "just cause" standard for dismissal and applicable contractual language emphasizing rehabilitation in cases of first-time positive drug tests, the driver was "entitled to a second chance to salvage her job and prove her worth." The arbitrator stated that the substance abuse counselor's conclusion that the driver was not an abuser of drugs "would seem to permit a reasonably optimistic outcome for her being able to abstain

totally." The arbitrator ruled that the driver's dismissal would be modified to a suspension without pay, her reinstatement being conditioned on her satisfying the recommendations of a substance abuse professional.

On appeal to the circuit court, plaintiff sought to have the arbitrator's award set aside on the grounds that the arbitrator exceeded her authority under the collective bargaining agreement and that the arbitrator's award was contrary to public policy. On cross motions for summary disposition, the circuit court ruled that the collective bargaining agreement afforded the arbitrator the authority to change a dismissal for a positive drug test to a suspension, but accepted plaintiff's second argument, stating, "the Court finds that a strong public policy exists against allowing someone under the influence of illegal drugs or alcohol to be responsible for the safe passage of children to and from school." The circuit court accordingly set aside the arbitration award and reinstated plaintiff's dismissal of the bus driver.

Defendants argue on appeal to this Court that the circuit court erred in setting aside the arbitrator's award on the basis of public policy. We need not reach that issue, however, because we affirm on the alternative ground argued by plaintiff, i.e., that the arbitrator exceeded her authority in changing the driver's termination to a suspension in the first instance.[1]

Judicial review of an arbitrator's decision is narrowly circumscribed. A court may not review an arbitrator's factual findings or decision on the merits, and may normally set aside an award only if the arbitrator's decision reaches beyond the arbitrator's contractual authority. *Gogebic Medical Care Facility v AFSCME Local 992*, 209 Mich App 693, 696-697; 531 NW2d 728 (1995). "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." *Id.* at 697, quoting *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989).

"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." *Lincoln Park Police Officers Ass'n*, *supra* at 4. Where a collective bargaining agreement provides that an employee may be terminated only for "just cause," but does not specifically authorize an arbitrator to modify the penalty in such cases, and where the arbitrator finds that just cause for termination exists, the arbitrator lacks authority to modify the employer's decision to terminate an errant employee. *Board of Control of Ferris State College v Michigan AFSCME, Council 25, Local 1609*, 138 Mich App 170, 178-179; 361 NW2d 342 (1984).[2] However, where an arbitrator does not find that just cause for dismissal exists, "[i]n the absence of clear and unambiguous language to the contrary in the collective bargaining agreement, an arbitrator may determine that, while the employee is guilty of some infraction, the infraction does not amount to just cause for discharge and impose a less severe penalty." *Lincoln Park Police Officers Ass'n, supra* at 5.

The collective bargaining agreement in this case states, "No member of the Association who has completed his/her probationary period shall be disciplined without just cause." Within the agreement, plaintiff expressly reserved certain rights, including the right to adopt reasonable rules and regulations, and the right to exercise judgment pursuant to those rules and regulations

and to discharge employees, except as expressly limited by the agreement. Pursuant to its reserved rights, plaintiff promulgated specific regulations concerning drugs and alcohol. The "Zero Tolerance Provision" of plaintiff's "Administrative Procedures Governing Drug and Alcohol Use and Abuse," states the practical concern that plaintiff could be held responsible if a safety-sensitive employee tested positive for a controlled substance but plaintiff failed to take appropriate action. Also, pursuant to federal mandates,[3] the regulations set forth a detailed policy of random drug testing. According to the regulations, "any employees testing positive for any of the substances identified . . . whose record does not warrant assistance, who refuses treatment, or refuse[s] to submit to a test will be terminated from employment." The regulations otherwise provide for unpaid suspension pending rehabilitation of the offender, at plaintiff's "sole discretion," if the employee testing positive "is not terminated." Finally, Article XI of the regulations provides as follows:

> TERMINATION: Any regulated employee who is found to have confirmed positive illegal drug . . . result will be suspended immediately. Successful completion of a voluntary, supervised substance abuse treatment or rehabilitation program may reduce the level of disciplinary action for first time offenders. Lacking compelling reasons for contrary results, the employee may be terminated following a review of the facts by the district and within the context of our agreement with the association and proper and documented justification.

In concluding that "the arbitrator did have contractual authority to amend a dismissal for a positive drug test to a suspension," the circuit court relied on the following provision of the collective bargaining agreement:

> It shall be the function of the arbitrator, and he/she shall be empowered except as his/her powers are limited below, after due investigation to make a decision in cases of alleged violation, misinterpretation or misapplication of any provision of this Agreement or any other rule, order or regulation of the Board relating to wages, hours, terms or conditions of employment.

The circuit court stated that, because this case concerned a dispute over "a 'rule, order, or regulation,'" and because plaintiff "considered the procedures on drug and alcohol use to be regulations," the arbitrator had the authority to interpret the termination provision of the regulations as calling for suspension rather than dismissal. Although we agree that the arbitrator was authorized to interpret that provision and decide whether the bus driver was discharged in violation of the Agreement, we nonetheless conclude that, in light of her findings, the arbitrator was not authorized under the collective bargaining agreement to alter the penalty imposed on the bus driver in this case.

The collective bargaining agreement specifically provides that the arbitrator "shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of the Agreement." The agreement left the promulgation of regulations to the discretion of plaintiff and left disciplinary decisions to plaintiff's exclusive discretion subject only to the just-cause limitation. The regulations clearly envision suspension or termination for drug-related misconduct at plaintiff's discretion. The arbitrator was thus contractually authorized to decide whether just

cause for termination existed, not to decide among possible penalties in the face of just cause, or whether the facts constituted "compelling reasons" to constrain plaintiff's option to terminate for just cause.

Not disputed on appeal, and not subject to review by the courts, *Gogebic*, *supra* at 697, are the following findings of the arbitrator: That the bus driver occupied a safety-sensitive position; that the driver had an "impermissible level of a controlled substance in her system" while on the job, this constituting misconduct; that the driver's defense that the positive drug test was the result of passive inhalation was without scientific basis; and that by using marijuana, the driver "displayed unacceptable bad judgment, irresponsible indifference to her job responsibilities, and lack of self-discipline."

Significantly, however, the arbitrator made no explicit finding that just cause for termination did not exist. Rather, the arbitrator made findings of fact, and then concluded that the driver was "entitled to a second chance." Thus, while the arbitrator impliedly found no just cause for termination, what the arbitrator appears to have done in fact was to avoid making a finding with regard to just cause in order to exercise discretion that was contractually reserved to plaintiff. Indeed, the arbitrator did not state that the driver was discharged in violation of the collective bargaining agreement. Moreover, the arbitrator's findings that the driver engaged in misconduct in her safety-sensitive job, displaying "unacceptable bad judgment, irresponsible indifference to her job responsibilities, and lack of self-discipline," can hardly be construed as anything but a finding of just cause for termination, at plaintiff's discretion, under the terms of the collective bargaining agreement and applicable regulations.

Because the arbitrator exceeded the scope of her authority in altering the penalty imposed on the bus driver, *Ferris State College*, *supra* at 178-179, we conclude that the circuit court reached the correct result in setting aside the arbitrator's award and reinstating the dismissal of the bus driver.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey G. Collins

[1] This Court will not reverse when the trial court reaches the correct result regardless of the reasoning employed. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). See also *Porter v Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995) (upholding a correct ruling originally reached for the wrong reason).

[2] "'Most arbitrators agree that, where there is no clear showing that the Company acted arbitrarily, discriminatorily, prejudicially or with bias, management's position should be sustained in matters of discipline.'" *Hardesty v Essex Group, Inc*, 550 F Supp 752, 764 (ND Ind, 1982), quoting *Libby, McNeil & Libby*, 53 LA 188, 190 (Larkin, 1969).

[3] See the Omnibus Transportation Employee Testing Act of 1991 (Pub L 102-143, Title V, October 28, 1991, 105 Stat 952. See also 49 USC 5331(b)(1)(A); 49 CFR Parts 40 and 382.