STATE OF MICHIGAN

COURT OF APPEALS

CAPITOL CITY LODGE 141 FRATERNAL ORDER OF POLICE, LABOR PROGRAM, INC., EATON COUNTY SHERIFF COMMAND DIVISION, AND JOHN ROJESKI, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED June 17, 2004
v	No. 246570 Eaton Circuit Court LC No. 02-000634-CL
EATON COUNTY BOARD OF COMMISSIONERS and EATON COUNTY SHERIFF, Defendants/Counter-Plaintiffs-Appellees.	

Before: Fitzgerald, P.J. and Bandstra and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants summary disposition on plaintiffs' claim that an arbitration award exceeded the arbitrator's authority and on defendants' claim that a grievance filed by plaintiffs was barred by collateral estoppel. We affirm the former and reverse the latter.

I. FACTS

The case arose out of a dispute regarding accumulation of vacation hours by certain police officers whose maximum accumulation was not explicitly determined by the terms of the parties' collective bargaining agreement. Defendants imposed a "cap" on the maximum accumulations of these officers. Plaintiff filed two grievances, which went to arbitration, where the arbitrator found that the parties had agreed to the caps and upheld them. Plaintiffs filed a third grievance and filed a complaint with the circuit court alleging that the arbitrator exceeded his authority under the terms of the collective bargaining agreement. Defendants claimed that the arbitrator's award was dispositive of the third grievance and it should be barred. Both parties moved for summary disposition on both claims, and the trial court granted both to defendants.

II. STANDARD OF REVIEW

A trial court's grant of summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817, reh den 461 Mich 1205 (1999). Under MCR 2.116(C)(8), a court examines the pleadings only to determine if the allegations in the complaint could never be sufficiently developed to justify recovery. *Id*. at 119-120. Under MCR 2.116(C)(10), a court examines all submitted evidence to determine if it establishes a genuine issue of material fact. *Id*. at 120. Under MCR 2.116(C)(7), the court examines whether the claim is barred. *Id*. at 118. All evidence is viewed in the light most favorable to the non-moving party. *Id*. at 118-120. The determination of whether an issue is arbitrable is a question of law also reviewed de novo. *Madison Dist Public Schools v Myers*, 247 Mich App 583, 594; 637 NW2d 526 (2001). However, review of an arbitration award is "narrowly circumscribed" and limited to determining whether the arbitration award exceeded the arbitrator's contractual authority. *Sheriff of Lenawee Co v Police Officers Labor Council*, 239 Mich App 111, 117-118; 607 NW2d 742 (1999).

In reviewing an arbitration award, judicial review ends if the arbitrator acted within the scope of his authority set forth in the parties' contract. *Sheriff of Lenawee Co*, *supra* at 118. The arbitrator is allowed to interpret and apply the agreement. *Id*. at 119. It is irrelevant whether the arbitrator's interpretation is wrong. *Michigan State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 583-584; 444 NW2d 207 (1989). Moreover, reviewing courts must be careful to avoid reviewing the merits of the underlying claim. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 MW2d 704 (1991). Absent express language to the contrary, an arbitration award will be presumed to be within the scope of the arbitrator's authority. *Id*.

III. ANALYSIS

The agreement specifies maximum vacation accumulations for officers, with an exception for officers who had already accumulated more than the limit. It does not specify a new limit for those excluded officers. However, this does not, as plaintiffs argue, equate to a specification that there was to be *no* limit for those officers. The law provides no rule to be applied in the absence of a contractual term governing vacation accumulation, so silence constitutes ambiguity. *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993). An arbitrator may use past practices of parties to a collective bargaining agreement to interpret ambiguous language or even to show that clear language was modified by mutual agreement as demonstrated by inference from the circumstances. *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 328; 550 NW2d 228 (1996). Furthermore, in the face of ambiguity or silence in the contract, only a "tacit agreement that the practice should continue" is needed. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455; 473 NW2d 249 (1991).

Therefore, the arbitrator did not exceed his authority when he considered transactions by the parties outside of the four corners of the collective bargaining agreement to interpret the ambiguity regarding vacation accumulation by the relevant officers because the arbitrator was merely interpreting the meaning of an ambiguous term and not rewriting a clear contract term. Consequently, the trial court appropriately granted defendants' motion for summary disposition.

Again, when a court inquires into arbitrability, the court must be careful to avoid making any determination regarding the merits of the underlying dispute. *Ottawa Co v Jaklinski*, 423 Mich 1, 25; 377 NW2d 668 (1985). Collateral estoppel may apply to subsequent civil proceedings where the prior proceeding was an arbitration. *Porter v Royal Oak*, 214 Mich App

478, 485; 542 NW2d 905 (1995). Furthermore, collateral estoppel may apply to an arbitration proceeding where the issue was previously decided in an adjudicatory administrative proceeding. *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 123-129; 592 NW2d 408 (1998). However, no cases in Michigan have determined whether collateral estoppel may apply where the previous and subsequent proceedings are both arbitrations.

Prevailing federal case law is that collateral estoppel will not apply. The Fifth Circuit noted that arbitrators will generally, but not necessarily, follow prior awards on the same facts and the same contract, but this conclusion leaves that determination to the arbitrator. *W R Grace and Co v Local Union No 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 652 F 2d 1248, 1252-1253 (1981). The Eighth Circuit noted that an arbitrator's findings will bind a *court* under collateral estoppel. *Vacca v Viacom Broadcasting of Missouri, Inc*, 875 F 2d 1337, 1340-1341 (CA 8, 1989). The Federal Circuit applied collateral estoppel where the subsequent proceeding was not another arbitration but an adjudicative administrative hearing. *Kroeger v United States Postal Service*, 865 F 2d 235, 236-238 (CA Fed 1988). However, the Sixth Circuit, citing decisions from the First, Third, Seventh, and D.C. Circuits, determined that "the preclusive effect of an earlier arbitration award is to be determined by the arbitrator." *International Union v Dana Corp*, 278 F 3d 548, 554-557 (CA 6, 2002).

Federal case law is not binding on this Court, but this Court may adopt a federal court's decision as persuasive. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997). A court should avoid considering the merits of a dispute, *Ottawa Co, supra* at 25, and should resolve all doubts regarding arbitrability in favor of arbitration. *Madison Dist Public Schools, supra* at 595. Furthermore, arbitrability of a dispute does not turn on facts, but rather on "whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." *Watts v Polaczyk*, 242 Mich App 600, 608; 619 NW2d 714 (2000). Because the determination of the facts and the merits of the dispute are best left to the arbitrator, we agree with the Sixth Circuit's conclusion that the arbitrator should also determine the preclusive effect of a previous arbitration. Therefore, the trial court should not have granted summary disposition on the ground that the third grievance was barred by collateral estoppel, but instead should have remanded the matter to the arbitrator for a determination of this issue.

We affirm the trial court's grant of summary disposition regarding the arbitration award because the arbitration award did not exceed the arbitrator's authority, but we reverse the trial court's grant of summary disposition regarding the third grievance and remand the matter to the arbitrator for a determination of the preclusive effect of the prior arbitration award. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette