STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES COUNCIL 25, LOCAL 2724, and MICHAEL KANGAS,

Plaintiffs-Appellants,

v

MARQUETTE COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
December 21, 2004

No. 247524
Marquette Circuit Court
LC No. 02-040118-CZ

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's decision vacating an arbitration award reinstating Michael Kangas to his employment with defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Kangas was an employee subject to the labor agreement executed between plaintiff labor union and defendant road commission. Although a graduated system of discipline was provided for in the contract, some conduct, including violations of the substance abuse policy, was subject to discharge. The type of disciplinary action imposed was contingent upon the offense classification into one of three categories: major offenses, serious offenses, or lesser offenses. The consumption of or being under the influence of alcoholic beverages during work periods was classified as a major offense. A major offense violation normally resulted in immediate discharge. Despite the graduated punishment scheme, the employer was the sole arbiter of the punishment where just cause termination occurred. The contractual agreement executed between plaintiff labor union and defendant employer expressly provided:

> (c) An employee shall be subject to discipline in accordance with the provisions of the Discipline Policy Appendix. Should it be determined by the arbitrator that an employee has been disciplined for just cause, the arbitrator shall not have jurisdiction to modify the degree of discipline imposed by the Employer.

Kangas, a heavy equipment operator for defendant, was discharged after a blood test revealed that he reported to work with a blood alcohol content (BAC) of .11%. Defendant's drug and alcohol policy prohibited a driver from reporting for work with a BAC of .04% or greater.

Again, the prohibited use of alcohol constituted a ground for immediate disciplinary action, up to and including immediate suspension or discharge, and this was a major offense for which immediate discharge was appropriate unless mitigating circumstances were presented. Defendant employer discharged plaintiff employee after he reported to work in violation of the alcohol policy.

The parties' collective bargaining agreement (CBA) provided for a grievance procedure, the final step of which was arbitration. The CBA provided that an arbitrator had the authority and jurisdiction to "interpret and apply" the agreement in order to determine the merits of the grievance, but had no authority "to add to or detract from or alter in any way the provisions" of the CBA. The CBA expressly provided that if an arbitrator determined that an employee was disciplined for just cause, the arbitrator would have no authority to modify the degree of discipline imposed.

Plaintiffs' grievance regarding Kangas's termination was denied, and the matter proceeded to arbitration. At the arbitration hearing, Kangas testified that he had requested February 27, 2002, off to attend a dentist appointment. The evening before his day off, he celebrated his girlfriend's birthday by drinking beer. Although he had requested the next day off, he knew that a snowstorm was imminent and reported for work, where he would have been assigned to operate a snowplow. On the contrary, his supervisor testified that Kangas had not requested the day off. When Kangas reported for work, he looked "rough," his eyes were bloodshot, and there was a strong odor of alcohol on his breath. Plaintiff admitted that he had consumed a couple of beers.

Based on his appearance, it was necessary to determine if he was in violation of the alcohol limitations. Kangas was driven to the local hospital, which was located thirty miles away. Despite the thirty to forty-five minute drive, Kangas' BAC was .11, nearly three times over the permissible limit.

The arbitrator ruled in favor of Kangas and ordered him reinstated to his employment. Although the arbitrator acknowledged that Kangas violated defendant's drug and alcohol policy, he determined whether discharge was the appropriate penalty. The arbitrator found that Kangas's clear disciplinary record, his length of service, and the fact that he did not operate machinery while under the influence of alcohol constituted mitigating factors, and concluded that discharge was inappropriate under the terms of the CBA and the principles of just cause.

Defendant refused to reinstate Kangas, and plaintiffs moved in circuit court to implement the arbitration award. The court granted defendant's motion for summary disposition and vacated the arbitrator's award. The court found that the arbitrator's finding, that Kangas violated defendant's drug and alcohol, was tantamount to a finding that Kangas was disciplined for just cause, and concluded that once the arbitrator made an implied finding that Kangas was disciplined for just cause, he lacked authority to modify the discipline imposed by defendant.

We review a circuit court's decision on a motion for summary disposition de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). Judicial review of an arbitration award is circumscribed. An arbitrator's authority to resolve a dispute arising out of the interpretation of a CBA is derived exclusively from the contract. A court may not review factual findings or the merits of the decision, and may only decide whether the arbitrator's decision

draws its essence from the contract. If the arbitrator did not disregard the scope of his authority as expressed in the contract, judicial review ceases. *Lenawee County Sheriff v Police Officers Labor Council*, 239 Mich App 111, 118-119; 607 NW2d 742 (1999), quoting *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989).

In *Lenawee County Sheriff, supra*, the plaintiffs sought to reinstate an employee charged with various violations of the employer's rules and regulations. While married, but separated from his wife, the employee went to Las Vegas and married another woman. The employee then provided false information on his health insurance membership regarded the date of the second marriage. The employer's rules and regulations prohibited the violation of any law, and termination would occur for any knowingly false statement made on any official document. *Id*. at 115-116. The arbitrator did not conclude that the employee had made a false statement on an official document, but rather concluded that he had made "untruths" that did not warrant termination under the circumstances. While acknowledging that the employee had violated the law by committing polygamy, the arbitrator concluded that it was a "milder form." However, the plain language of the employer's rules and regulations did not allow the arbitrator to interpret the agreement in that manner. Rather, once "the arbitrator found a violation of law, his inquiry should have ended at that point." *Id*. at 122. The arbitrator may not result to his own form of industrial justice to avoid what he perceives to be an unjust result. *Id*. at 119.

Similarly, in the present case, the arbitrator avoided interpreting the plain language of the CBA by failing to reach the issue of just cause in order to address mitigating circumstances to reinstate Kangas. It is clear that Kangas violated defendant's drug and alcohol policy by reporting for work with a BAC of .11%.[1] Defendant's drug and alcohol policy allowed an employee to report for work with alcohol in his system, provided that the BAC level did not exceed .04%. That policy is particularly generous in light of the fact that defendant's employees were responsible for road maintenance and required their employees to operate machinery, including snowplows. However, the CBA also provided that a violation of this policy was a major offense for which just cause termination was appropriate. When a CBA provides that an employee may be terminated only for just cause, but does not specifically authorize an arbitrator to modify a penalty imposed in such a case, and where the arbitrator finds that just cause for termination existed, the arbitrator lacks the authority to modify the employer's decision to terminate the employee. *Bd of Control of Ferris State College v Michigan AFSCME, Council 25, Local 1609*, 138 Mich App 170, 178-179; 361 NW2d 342 (1984).

---

[1] Specifically, the arbitrator did not reach the issue of the categorization and nature of the violation and punishment. The arbitrator merely concluded that: "It is agreed that Grievant violated the Road Commission's alcohol policy when he reported to work with a .111 level of alcohol, which is far in excess of the permitted level. The only issue is whether discharge is the appropriate penalty under the contract." On the contrary, without reaching the nature of the offense and the penalty under the contract, the arbitrator was not entitled to proceed to mitigating circumstances under the plain language of the CBA.

In the present case, the arbitrator's finding, that Kangas violated defendant's drug and alcohol policy, constituted an implied conclusion that just cause existed for imposing discipline.[2] Once the arbitrator determined that just cause existed, he had no authority to modify the discipline imposed by defendant. The circuit court correctly determined that the arbitrator exceeded the authority granted to him by the CBA. *Lenawee County Sheriff, supra*, 118-119.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

[2] In addition to failing to reach a conclusion regarding just cause, the arbitrator also failed to make factual findings in favor of Kangas. The arbitrator did not conclude that the testimony of Kangas was credible with regard to his absence. That is, the arbitrator did not conclude that Kangas had indeed been given the day off and came into work when he learned of the impending snowstorm.