STATE OF MICHIGAN

COURT OF APPEALS

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION, Plaintiff-Appellant,	UNPUBLISHED October 16, 2008
v	No. 280360 Kent Circuit Court
CITY OF GRAND RAPIDS, Defendant/Counter-Plaintiff/Appellee.	LC No. 06-009904-CL

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Plaintiff, Grand Rapids Employees Independent Union (Union), appeals as of right a judgment granting summary disposition in favor of the defendant, City of Grand Rapids (City). We affirm.

I. Basic Facts and Proceedings

The Union and the City are parties to a collective bargaining agreement effective January 1, 2003 through December 31, 2006. Pursuant to the collective bargaining agreement, the Union is the exclusive bargaining representative for City employees.

This dispute arose out of the City's reorganization of its Neighborhood Improvement Department and the City's adoption of its Adopt-A-Park program, which authorized the Parks and Recreation Director to execute agreements with individuals or groups to provide maintenance services on City property.

Allegedly because of budget constraints, the City reorganized its Neighborhood Improvement Department. Essentially the City eliminated 20 positions for "Property Inspectors," "Housing inspectors I" and "Housing inspectors II," and created 17 positions for "Code Compliance Officers I," "Code Compliance Officers II" and "Code Compliance Officers." No City employee lost employment, but there were nonetheless three fewer employees in the Department.

In response, the Union filed Grievance 38-05 (Housing Department Grievance), alleging:

On June 3, 2005, the City unilaterally posted job openings for 3 new job classifications: Code Compliance Officer I, II, and III (17 positions in total). There are currently 20 inspector positions in the Housing Department (2 Property Inspectors, 12 Housing Inspectors I's and 6 Housing inspector II's). The City has advised that it is unilaterally eliminating these jobs by June 15, 2005. The employees in these bargaining unit positions have been informed by the City that not only will their jobs be eliminated, but also to remain in the department as Code Compliance Officers, employees will have to pass a Civil Service examination that will be open to all City Employees. The City has unilaterally changed the existing job classifications and job descriptions of the Property Inspectors, Housing Inspector I's and Housing Inspector II's by "eliminating" the positions and "creating" the new code Compliance Officer positions.

The City commission also created an Adopt-A-Park program, which authorized the Parks and Recreation Director to execute agreements with individuals or groups to provide maintenance services on City property. The City initially entered into the following three agreements under the Adopt-A-Park Program.

Belknap Park Maintenance and Use Agreement with Grand Rapids Community College. This Agreement is a license regarding the maintenance of the two ball fields at Belknap Park covering the period from August 28, 2005 through June 15, 2006. This Agreement provides that GRCC will mow, fertilize and weed control the grass within the baseball and softball diamonds as deemed necessary by GRCC; operate and irrigate all turf areas within the baseball and softball diamonds; perform field maintenance and pickup litter or trash caused by their use of the fields and their spectators. All costs for these services and all expenses associated with field light operation are the responsibility of GRCC. This agreement covers the two ball fields located at Belknap Park and the maintenance associated with the remainder of the 33 acre park continue to be the responsibility of the City.

Sullivan Park Maintenance and Use Agreement with Grand Rapids Community College. This Agreement is a license regarding the maintenance of one ball field at Sullivan Park covering the period from August 28, 2005 through October 30, 2005. This Agreement provides that GRCC will mow, fertilize and weed control the grass within the ball diamonds as deemed necessary by GRCC; perform field maintenance and pickup litter or trash caused by GRCC's use of the fields and their spectators. All costs for these services are the responsibility of GRCC. This agreement covers the one ball field located at Sullivan Park and the maintenance associated with the remainder of the 13 acre park continues to be the responsibility of the City.

Veteran's Park Adopt-A-Park Agreement with Second Story Properties. This Agreement is a license regarding the maintenance of Veteran's Park for the period from October 1, 2005 through November 15, 2006. This Agreement provides that Second Story Properties will mow the grass, remove any papers or debris prior to mowing, periodically edge the curbed or walk areas, and plant flowers. The

> remainder of the maintenance associated with Veteran's Park and its fountain remain the responsibility of the City.

The Union filed several grievances in regard to the above three agreements. Grievance 77-05 (Belknap Park Grievance), alleges,

> On July 29, 2005, the [Union] requested to meet with the City regarding Parks Department issues. No meeting has been scheduled to date. In addition the [Union] has made numerous requests for information regarding the "Adopt-A-Park" since July 29, 2005. The City has refused to provide any information to date. On November 1, 2005, at a meeting with Assistant Cit. Manager Victor Vasauez present, we again requested information regarding the parks that the City was contemplating using outside contractors for. Mr. Vasauez promised a speedy response to that request. To date we have received no response.
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> The [Union] recently learned that on August 28, 2005 an agreement was entered into between the City and GR Community College regarding general maintenance of Belknap Park (bargaining unit work.) The [Union] was not notified of this, nor did the City make mention of it when we asked for the requested information. The City's actions clearly undermine the [Union] agreement and violate the contract.

The Union also filed Grievance 80-05 (Adult Slow Pitch Softball Grievance), which contains identical language to that in Grievance 77-05, but also claims that:

> On December 16, the [Union] learned that the City Commission would be voting to enter into a contract with the Grand Rapids Area Amateur Softball Association (GRAASA) to administer, implement, and perform maintenance functions for the Adult Slow Pitch Softball programs (bargaining unit work). The [Union] was not notified of this, did not receive a request for proposal, nor did the City make mention of it when we asked for the requested information. The City's actions clearly undermine the [Union] agreement and violate the contract. The conduct of the City constitutes a repudiation of the contract of all its terms (for example, Article I -Dues: XI1 - Seniority) by its wholesale elimination of bargaining unit positions).

The Union also filed Grievance 26-06 (Veteran's Park Grievance), alleging:

> The City is permitting non-bargaining unit members, employed by a third entity, Second Story Properties, LLC, to maintain Veteran's Park by performing bargaining unit work, including mowing, edging, planting flowers, and other duties contained in the contract signed by the City and Second Story Properties. The City's actions clearly undermine the [Union] agreement and violate the contract. The conduct of the City constitutes a repudiation of the contract of all its terms.

Apparently after this litigation was commenced, the City entered into an agreement with DP Fox to maintain an outdoor ice rink. In response, the Union filed Grievance 64-06 (Ice Rink Grievance), which claimed:

> On or about October 3, 2006, the [Union] became aware that the City had entered into an agreement with DP Fox to have non-bargaining unit employees perform work at Rosa Park Ice Rink. This work has historically and exclusively been performed by bargaining unit employees.

The City denied the above grievances and the Union timely requested the matters be submitted to arbitration.

The Union also filed two Unfair Labor Practice Charges (ULP) with the Michigan Employment Relations Commission, MCL 423.231 *et seq*. The First Charge, Docket No. C05-G-151, alleged that:

> On or about July 15, 2005, in violation of the Act [PEW], Respondent [City] engaged in bad faith bargaining by eliminating approximately 20 inspector positions in the Housing Department, including two (2) Property Inspectors, twelve (12) Housing Inspector I's and six (6) Housing Inspector II's. [ULP, July 25, 2005.]

The second more expansive charge (Second Charge), Docket No. C05-K-283, alleged that:

> Since on or about September 2, 2005 and continuing to date, the City has refused to meet and negotiate the City's unilateral decision, made without bargaining, to "reorganize" the Housing Inspection and Building Inspection departments. Furthermore, the City has refused to negotiate the effects of such "reorganization." Since on or about September 13, 2005, and continuing to date, the City has refused to provide information requested by the Union as referenced in the City's letter to the [Union] of September 6, 2005. Said information is necessary to determine whether the terms of the collective bargaining agreement have been breached by the City. Since July 29, 2005 and continuing to date, the City has refused to meet and/or negotiate over the City's plan to permit nonbargaining unit third party employees to perform bargaining unit work. Since on or about November 1, 2005 and continuing to date, the City has refused to provide information requested regarding Belknap Park, Veteran's Park, Sullivan Park, and Rosa Parks Circle and the City's intended use of -- nonbargaining unit employees supplied by a third party to perform bargaining unit work. Furthermore, the City has refused requests made by the Union to negotiate over the use of third party employees performing bargaining unit work. Since on or about November 1, 2005, and continuing to date, the City has refused to sign the recently negotiated collective bargaining agreement without the addition of language that was not agreed to in bargaining. By this and other conduct, the City has engaged in bad faith bargaining. The [Union] respectfully requests this Commission enjoin the City from entering into any contracts with third parties and all necessary relief to remedy the City's unfair labor practices.

The City also presented evidence of a post-hearing brief the Union filed with MERC Housing in regard to the Housing Second charge that claims the Second Story Properties Agreement and the DP Fox Agreement violate PERA. (Public Employment Relations Act, MCL 423.201.) The Union does not dispute that they challenged the Second Story Properties Agreement and the DP Fox Agreement before the MERC.

On September 29, 2006, the Union filed the instant action seeking a declaratory judgment to compel the City to submit to arbitration in regard to the then-existing grievances; the Housing Department Grievance, the Belknap Park Grievance and the Adult Slow Pitch Softball Grievance. On October 20, 2006, the City answered the complaint raising the claim that under the contract the Union no longer had a right to arbitrate grievances because the Union filed the ULP charges on the same matters. The City also filed a counter-complaint alleging that the remaining grievances, the Veteran's Park Grievance and Ice Rink Grievance, are not subject to arbitration for the same reason.

The Union filed a motion for summary disposition arguing that the City violated the contract because it eliminated three positions in the Housing Department and because it contracted to allow non-represented workers perform work represented workers traditionally performed. The City filed a motion in response and sought summary disposition on the basis "that the arbitration agreement contained in the [contract] specifically excludes the five disputed grievances."

On June 1, 2007 the circuit court conducted a hearing on the motions for summary disposition. The circuit court initially determined that only the grievances in regard to the Union's complaint, the Housing Department Grievance, the Belknap Park Grievance and the Adult Slow Pitch Softball Grievance, were properly before the court. After hearing arguments, the trial court noted that:

> There is a provision found in the instant collective bargaining agreement as Grievance Procedure, Section 2.b., which has application to the facts of this case. That provision states as follows:
>
> "If proceedings involving any matter which is or might be alleged as a grievance are instituted in any administrative action before a government board or agency or in any court, then such administrative or judicial procedures shall be the sole remedy and grounds for a grievance under this agreement shall no longer exist."

The circuit court then recognized that:

> [s]ome 25 years ago the Michigan Supreme Court was presented with identical language in a case involving the City of Grand Rapids and another bargaining unit, namely the Fraternal Order of Police. The Union in this case argues that the factual basis in the case of *City of Grand Rapids v Grand Rapids Lodqe No*. 97, Fraternal Order of Police, 415 Mich 628[; 330 NW2d 52] (1982), provides a distinction with a difference. While we understand that the facts are not identical, the language contained in that collective bargaining act, as defined by our Michigan Supreme Court, is as mentioned unchanged, the language which is now presented to this Court.

From the Michigan Supreme Court's opinion, the following principles, I believe, are helpful.

First: "In the instant case, however, the collective bargaining agreement provides that if an action is commenced the grievance proceedings shall end." See *Grand Rapids v FOP* at page 637.

Second: "Grievance procedures arise solely from the labor agreement. In drafting the agreement, the Union and the employer are free to exclude matters from the grievance procedure, to choose who shall adjudicate disputes that arise under the agreement, to designate who may seek its enforcement, and to relinquish whatever interest the Union may have in grievance resolution. *Id*. at 638.

In my opinion, the law is clear and the answer is plain. Quote:

"In excluding topics from arbitration, this court has required either an express provision or the 'most forceful evidence' of exclusion. The provision at issue expressly excludes from arbitration 'any matter' taken before a court or administrative forum."

The motion of the Union for summary disposition to compel arbitration is respectfully denied, and summary disposition is granted to the defendant City of Grand Rapids pursuant to Michigan Court Rule 2.116(I).

The circuit court held a second hearing in regard to the City's counter-complaint; namely, the Ice Rink Grievance and the Veteran's Park Grievance. The circuit court likewise held that:

Accordingly, grievances alleging the violations of the collective bargaining agreement based on the same factual situation alleged is an unfair labor practice charge are not subject to arbitration under the collective bargaining agreement between the City and the plaintiff Union. Consequently, there is no factual dispute that the instant grievances, being 26-06 and 64-06 address the same factual situations that are presently being addressed in the unfair labor practice charge now pending before the Michigan Employment Relations Committee in their case number C05 K-283. For this reason, the defendant's motion for summary disposition is granted.

This appeal ensued.

II. Standard of Review

"[T]he question of arbitrability is for a court." *Kaleva-Norman-Dickson School Dist v Kaleva-Norman-Dickson Teacher's Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975). Appellate courts review de novo the interpretation of a contract. *PT Today, Inc v Commissioner of Office of Financial and Ins*, 270 Mich App 110, 126; 715 NW2d 398 (2006); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

III. Analysis

The Union argues that the circuit court erred in denying the request to compel the parties to arbitrate grievances.

"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 Teacher's Ass'n, supra* (citations omitted). The existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982).

> "To ascertain the arbitrability of an issue, [a] court must consider 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. The court should resolve all conflicts in favor of arbitration. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. [*Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007) (citations omitted).]

Here, the issue is whether the grievances are expressly exempt from arbitration under the contract. Under Article IX, entitled, "Grievance Procedure," Section (2), entitled "Grievance Time Limits and Exclusive Remedy," subsection (b) provides that:

> If proceedings involving any matter which is or might be alleged as a grievance are instituted in any administrative action before a government board or agency, or in any court, then such administrative or judicial proceedings shall be the sole remedy; and grounds for a grievance under this agreement shall no longer exist.

"In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Id*. However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties. *Id*.

The Union claims that the circuit court improperly added the phrase, "based on the same factual situation," to Section (2)(b). However, review of the circuit court's statement, "based on the same factual situation," in context, indicates that the circuit court merely summarized the actual language of the phrase, "any matter which is or might be alleged as a grievance." Indeed, "matter" is defined as "[s]ubstantial facts forming the basis of claim or defense; facts material to issue; substance distinguished from form," etc. Black's Law Dictionary, 6th ed. Thus, the question remains whether the Union initiated a proceeding with the MERC in regard to "matters" that "[are] or might be alleged as a grievance."

We conclude that the Union's ULP charges clearly comprise matters that not only "might" have been alleged as a grievance, but actually "were" alleged as grievances.

Specifically, the First Charge alleges that the City "engaged in bad faith bargaining by eliminating approximately 20 inspector positions in the Housing Department, including two (2) Property Inspectors, twelve (12) Housing Inspector I's and six (6) Housing Inspector II's. (ULP, July 25, 2005). The Housing Department Grievance alleges that "[t]here are currently 20 inspector positions in the Housing Department (2 Property Inspectors, 12 Housing Inspectors I's and 6 Housing inspector II's)," and "[t]he City has advised that it is unilaterally eliminating these jobs by June 15, 2005." The above First Charge comprises the same matter as that alleged in the Housing Department Grievance.

The Second Charge alleges that "the City has refused to provide information requested regarding Belknap Park, Veteran's Park, Sullivan Park, and Rosa Parks Circle and the City's intended use of -- nonbargaining unit employees supplied by a third party to perform bargaining unit work." The Belknap Park Grievance states that, "[i]n addition the [Union] has made numerous requests for information regarding the "Adopt-A-Park" since July 29, 2005[,] [t]he City has refused to provide any information to date." Further, the Union filed separate grievances challenging the City's "intended use of -- nonbargaining unit employees" at each park, except perhaps Sheldon Park, which though is likely encompassed under the Adult Slow Pitch Softball Grievance as Sheldon Park has a baseball diamond. Moreover, section (2)(b) states that filing a ULP claim forfeits the Union's right to aggrieve "any matter which is or *might* be alleged as a grievance." (Emphasis added). Thus, the Union, in filing the ULP claims, essentially forfeited the right to arbitrate grievances on all matters alleged within those claims.

The Union also argues that the grievances are not the same "matters" because the ULP claims are statutory and can only be filed with the MERC. However, as mentioned, "matter" is broadly defined as "[s]ubstantial facts forming the basis of claim or defense; facts material to issue; substance distinguished from form . . . ." Black's Law Dictionary, 6th ed. Further, even if the ULP were a distinct matter, the law is clear that,

> [g]rievance procedures arise solely from the labor agreement. The union and the employer are free to exclude matters from the grievance procedure, to choose who shall adjudicate disputes that arise under the agreement, to designate who may seek its enforcement, and to relinquish whatever interest the union may have in grievance resolution. *City of Grand Rapids, supra* at 638.

Thus, the Union cannot maintain a right to compel arbitration of grievances where the contract plainly excludes arbitration of grievances when an administrative action is filed on the same matter.

The Union further argues the circuit court failed to recognize that, "[a]rbitration is the favored means of resolving labor disputes and courts will compel arbitration of grievances when the grievance, on its face, is governed by the contract." However, "[a]rbitration is a matter of contract." *Kaleva-Norman-Dickson Teacher's Ass'n, supra* (citations omitted). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *In re Smith Trust, supra*. "The preference for arbitration in Michigan and federal labor law is triggered only if the parties agree to arbitrate. That preference does not operate to override the intent of the parties." *City of Grand Rapids, supra* at 635. Thus, regardless of any recognized preference to arbitrate disputes, the plain language of the contract must control. Section (2)(b) of the contract

plainly states that upon institution of an action with an administrative agency alleging facts that are or might be a grievance, the sole remedy becomes that administrative action. Further, it also provides that "grounds for a grievance under this agreement shall no longer exist." Thus, upon the Union filing its ULP claims, no grievance existed under the contract to arbitrate.

The union last argues that, "[t]he City's claim that Article IX, Section 2(b) of the grievance procedure precludes the grievances from being arbitrated is a matter that should be interpreted by the arbitrator, not the court." As earlier mentioned, the existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). Here, the union requested that the circuit court compel the parties to arbitrate grievances that the city claimed, "no longer exist[ed]" under the contract. This is clearly a matter of arbitrability to be decided by the court. Further, the circuit court properly limited its focus to whether the grievances were subject to arbitration, not whether the union's grievances had merit. Thus, the circuit court properly considered the contract to determine whether grievances were subject to arbitration.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra