STATE OF MICHIGAN

COURT OF APPEALS

JAMES VOLLMAR, Plaintiff-Appellant,	UNPUBLISHED August 27, 2009
v	Nos. 282125; 285606 Wayne Circuit Court
GIBRALTAR SCHOOL DISTRICT, Defendant-Appellee.	LC No. 07-705786-CZ

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

These consolidated cases arise from a dispute regarding the scope of an arbitration agreement. In Docket No. 282125, plaintiff James Vollmar appeals as of right a circuit court order granting defendant Gibraltar School District (the District) summary disposition of plaintiff's complaint seeking to set aside the arbitrator's opinion and award. In Docket No. 285606, plaintiff appeals as of right the circuit court's order granting the District's motion for costs. We reverse both orders and remand for further proceedings.

I. Facts and Proceedings

Plaintiff served as the District's superintendent from 1997 until the District terminated his employment in 2004. In October 2003, the District placed plaintiff on a nondisciplinary paid leave of absence and initiated an independent investigation concerning allegations of improprieties and misconduct. In April 2004, the Gibraltar School Board (the Board) notified plaintiff that the independent investigation had identified 10 grounds for termination of his employment pursuant to the following provision in plaintiff's contract of employment:

> … [T]he Board retains its right to terminate this Contract at any time for insubordination, moral turpitude, misconduct or gross incompetence, or if the Superintendent violates any of the substantive terms or covenants of this Contract. In the event the Board determines to bring charges against the superintendent, prior written notice of the charges shall be given to the Superintendent ("the noticed charges"), and the Superintendent, at his option, may request an open or closed hearing before the Board for the purpose of defending said charges.

Plaintiff requested a hearing before the Board, which took place over the course of four days and generated a 280-page transcript. Gary Collins, an attorney and a member of the defense

counsel's law firm, served as the hearing officer, while William Blaha, another law firm member, presented the charges and assumed the role of prosecutor. In August 2004, the Board voted to terminate plaintiff's contract.

Plaintiff then invoked the employment contract's arbitration clause, which sets forth in relevant part the following:

> In the event the Superintendent elects to contest the Board of Education's disposition in regard to such termination following such hearing, he shall have the right, exclusive of any other rights or remedies available to him at common law or by statute, to request arbitration, the award arising out of which shall be binding on the School district and the Superintendent and enforceable in any court of competent jurisdiction in this State. *The scope of the arbitrator's review pursuant to this submission agreement shall be limited to determining whether the Board of Education acted without reasonable and just cause in its determination to terminate the superintendent's employment.* [Emphasis added.]

The parties selected Mario Chiesa as their arbitrator. Chiesa conducted a hearing that spanned 12 days and included the testimony of 17 witnesses. A court reporter prepared a 2,616-page transcript of the proceedings.

On February 7, 2007, Chiesa issued an 88-page opinion and award that addressed in detail each of the 10 charges levied by the Board. Chiesa found that six charges did not warrant any disciplinary action. With respect to the remaining four charges, Chiesa determined that plaintiff had violated his employment contract and that just cause supported his dismissal. Chiesa's opinion did not address whether the employment contract required that defendant give plaintiff severance pay, despite that the parties had submitted this issue for Chiesa's consideration.

Plaintiff filed a lawsuit in the Wayne Circuit Court seeking to vacate the arbitration award. A second amended complaint filed by plaintiff advanced various legal theories in support of his request for vacation of the award, including that (1) Chiesa "exceeded his jurisdiction under the arbitration agreement's scope of submission clause," (2) Collins's participation as "judge" at the disciplinary hearing violated plaintiff's right to due process, (3) Chiesa's de novo review of the evidence was "erroneous as a matter of law," and (4) Chiesa's opinion contained errors reflecting his bias and partiality. The complaint also sought enforcement of the severance pay provision in plaintiff's employment contract.

The District moved for summary disposition under MCR 2.116(C)(7), (8) and (10), contending that none of plaintiff's challenges to the arbitration award possessed legal merit. The circuit court granted the District summary disposition and dismissed the case. Later, the District sought costs. The circuit court ordered plaintiff to pay a share of the arbitration-related court reporter fees in the amount of $13,734.83.

II. Issues Presented and Analysis

Plaintiff challenges the propriety of the circuit court's grant of summary disposition and imposition of costs. We review de novo a circuit court's summary disposition ruling. *Walsh v*

Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004).[1] We also review de novo a circuit court's decision to enforce, vacate, or modify a statutory arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).[2] Although we generally review a court's award of costs or fees for an abuse of discretion, we consider de novo any involved questions of law. *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477, 486; 682 NW2d 519 (2004), vac'd in part on other grounds 477 Mich 920 (2006).

A. Whether Chiesa Exceeded his Powers

Plaintiff initially asserts that Chiesa exceeded the limits of his contractual authority by conducting a de novo hearing at which he considered evidence not presented to the Board. The District responds, in the alternative, that plaintiff failed to preserve this issue for appeal, waived any error in this regard by requesting a de novo hearing, and that the scope of Chiesa's inquiry comported with the contract's arbitration language.

Our review of the circuit court record convinces us that plaintiff preserved his claim that Chiesa exceeded his powers by conducting a de novo hearing. The second amended complaint alleges that "the Arbitrator's decisions should be vacated, because … (i) he exceeded his jurisdiction under the arbitration agreement's scope of submission clause[.]" At the summary disposition hearing, both counsel addressed plaintiff's contention that Chiesa exceeded his powers, and the circuit court announced, "And I'm ruling that he had authority. That's my decision." Because plaintiff's complaint presented this issue, the parties addressed its merits at the summary disposition hearing, and the circuit court ruled on it, the issue qualifies as preserved. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Moreover, we may overlook preservation requirements when, as here, an issue involves a question of law and the facts necessary for its resolution appear in the record. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

We also find no support in the record for the District's suggestion that plaintiff waived any objection to the scope of Chiesa's review. A lone statement from Chiesa's opinion supplies the only evidence available regarding this issue: "The grievant's position is that the submission agreement controls the arbitration and defines my authority. The grievant submits that to ignore the mutually agreed upon standard of review would dictate that I act without authority and, thus,

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[1] The circuit court neglected to invoke any specific grounds under which it found summary disposition appropriate. However, because the court rejected the propriety of summary disposition on the basis of a period of limitation or res judicata, MCR 2.116(C)(7), and because the parties and the court plainly referenced documentation beyond the pleadings, we deem the court's summary disposition ruling as premised on subrule (C)(10). *Walsh*, *supra* at 621. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.*

[2] The parties do not dispute that their arbitration was statutory and governed by the Michigan arbitration act (MAA), MCL 600.5001 *et seq.*

the award would be invalid." We simply find nothing in the record suggesting that plaintiff advocated for an extra-contractual extension of the scope of Chiesa's review. Further, although a party who agrees to submit a grievance to arbitration may be precluded from later challenging the grievance's arbitrability, "it does not follow . . . that by voluntarily submitting to arbitrate a specific grievance a party waives his rights completely to later challenge the arbitral award on the ground that the arbitrator exceeded his authority." *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 161; 393 NW2d 811 (1986). Accordingly, we reject that plaintiff waived his challenge to the scope of Chiesa's review.

We now consider whether Chiesa exceeded the powers granted him in the employment contract. "[A] reviewing court's ability to review an [arbitration] award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Detroit Automobile Inter-Ins Exch v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982). In general, when determining whether to enforce an arbitration award, this Court examines "whether the award was beyond the contractual authority of the arbitrator." *City of Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). In conducting its limited review, this Court may not review the merits of the arbitrator's decision or his factual findings. *Id*. "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*. "Furthermore, an award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Chiesa's 88-page opinion commences with a lengthy discussion of the scope of his arbitral authority, and a determination that the employment contract permitted him to conduct a de novo review of the evidence. Chiesa explained,

> It must be recognized that the parties engaged me to be the arbitrator of this dispute. The parties have agreed to be bound by my interpretation of the language in the employment contract, my evaluation of the record, the conclusions I reach, and the award arising out of this arbitration. …
>
> I view the language defining the scope of my review as requiring that I determine whether the Board of Education acted without reasonable and just cause.
>
> Absent a specific definition of the term "just cause," and I have found none in this agreement, nor have the parties directed me to any, I find that the term means that when judged in light of all the circumstances, the Board of Education's actions must be reasonable. . . .
>
> . . . In relation to the scope of the evidence which I may consider, I do not agree with the Employer's suggestion that the only evidence I can consider is the evidence placed in the record at the grievant's Board of Education hearings. *There is nothing in the submission agreement which confines me to that record. While my charge is to determine whether the Board of Education acted without reasonable and just cause, that doesn't mean I am confined to considering only*

> *the evidence it considered. There is no such restriction in the arbitration language contained in the employment agreement in question.*
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> * * *
>
> In summary, I conclude that the standard to be used for the review is just what is stated in the agreement and, that is, reasonable and just cause. *I am not confined to the evidence which was presented to the district at the Board of Education meeting regarding the grievant's termination.* Obviously there was much more that was relevant to this dispute as evidenced by the fact that the arbitration hearing lasted three times longer and created approximately ten times more transcript. . . . [Emphasis added.]

Chiesa's authority to determine the scope of his inquiry "is circumscribed by a requirement of adherence to the principles of law which govern the issues in dispute." *DAIIE*, *supra* at 432. Our Supreme Court has explained that those governing principles derive directly from "the contract which most immediately defines the rights and duties of the parties and confers upon the arbitrator the authority to act." *Id*. In this context, the parties' contract forms the law of the case. *Gordon Sel-Way*, *supra* at 496. "Thus, in discharging their duty, arbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority[.]" *DAIIE*, *supra* at 434. In determining whether an arbitrator has exceeded his authority, we must maintain a reluctance to vacate or modify an award "when the arbitration agreement does not expressly limit the arbitrators' power in some way." *Gordon Sel-Way*, *supra* at 497. Our interpretation of the contract's arbitration provision is further guided by the fundamental rule that "unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original).

Plaintiff's employment contract defines the extent of an arbitrator's powers as follows: "The scope of the arbitrator's review pursuant to this submission agreement shall be limited to determining whether the Board of Education acted without reasonable and just cause in its determination to terminate the superintendent's employment." This statement clearly and unambiguously limits the arbitrator's authority. By its plain terms, the arbitration language contemplates that an arbitrator may consider only whether the Board acted without reasonable cause "*in its determination* to terminate the superintendent's employment." (Emphasis added). This clear and unambiguous contractual limitation of Chiesa's power did not authorize him to consider facts and allegations supplanting the evidence that informed the Board's decision. By its plain language, the arbitration clause only empowered the arbitrator to decide whether the Board possessed reasonable and just cause when it decided to terminate plaintiff's contract. Because the face of the Chiesa's opinion and award demonstrates that he exceeded his powers, we conclude that the circuit court erred by granting the District summary disposition under MCR 2.116(C)(10).

B. Severance Pay

Plaintiff next contends that the circuit court improperly granted summary disposition with respect to his severance pay claim. The District responds that by submitting the issue to Chiesa, plaintiff waived his right to a circuit court determination of this issue. The District also contends

that because plaintiff committed the initial breach of his employment contract, he may not maintain an action for severance pay.

A review of the record reveals that the arbitration did not resolve plaintiff's claim for severance pay. Chiesa's opinion does not mention the severance pay dispute. Moreover, the contractual arbitration clause does not permit an arbitrator to interpret the severance pay language, or to make a finding with respect to the propriety of severance pay. The arbitration clause clearly limits the arbitrator's authority to determining whether just cause existed for plaintiff's termination.

The employment contract includes only one sentence concerning plaintiff's entitlement to severance pay: "The Board agrees to provide the Superintendent a One Hundred percent (100%) tax free severance plan of the Superintendent's annual gross salary in the final year of service to the District." The District insists that despite the clear and unambiguous nature of this sentence, general contract law principles establish that a contracting party's material breach of a contract excuses the nonbreaching party from further performance. In support of this proposition, the District relies primarily on *Prozinski v Northeast Real Estate Services, LLC*, 797 NE2d 415 (Mass App, 2003). In that case, the Massachusetts Court of Appeals held that a question of fact existed with respect to whether the employee's breach of a fiduciary duty to his employer amounted to a material breach of his contract of employment, which excused the employer from its contractual obligation to pay severance. *Id*. at 424.

The plain, unambiguous, and unconditional language of the severance pay language in this case refutes the District's claim that it could withhold severance pay on the basis of its determination that plaintiff breached his employment contract. The employment agreement simply does not purport to condition severance payment on plaintiff's adherence to the contract's terms. Nothing in the severance pay clause or elsewhere in the employment contract tends to support that the District could avoid its obligation to pay if plaintiff breached a contractual provision. Where no ambiguity exists, we enforce the language of a contract as written. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). Given the absolute clarity of the contractual language, we decline the District's invitation to engraft on this contract an interpretation dictated by extraneous interpretive principles. Irrespective whether plaintiff breached the employment contract by committing acts that subjected him to termination, the unambiguous terms of the contract obligate the District give him severance pay.[3]

C. Costs

Plaintiff additionally submits that the circuit court erred in granting the District's motion for costs because no statute explicitly contemplates that a court may tax as costs the reporting services utilized during an arbitration hearing. The District asserts that it is entitled to costs under MCR 3.602(M), which states, "The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the

[3] The District could have conditioned plaintiff's entitlement to severance pay on termination without just cause. *City of Hazel Park v Potter*, 169 Mich App 714, 716; 426 NW2d 789 (1988).

award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action."

The power to tax costs is wholly statutory. *Herrera v Levine*, 176 Mich App 350, 357; 439 NWd 378 (1989). Taxation of costs in civil actions is governed by MCL 600.2401 *et seq*. Costs may be awarded only if supported by identifiable statutory authority. *JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996), and *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 621-622; 550 NW2d 580 (1996). The District has failed to identify any statutory authority permitting the circuit court to assess as costs the fees charged by court reporters. Although MCL 600.2543(2) envisions that a prevailing party may recover as a taxable cost the amount of a court reporter's fee, this subsection applies "[o]nly if the transcript is desired for the purpose of moving for a new trial or preparing a record for appeal." Here, neither party submitted arbitration transcripts to this court or to the circuit court. Consequently, the circuit court improperly awarded the District costs for the court reporter fees.

D. Remaining Issues

Plaintiff raises numerous additional challenges to the circuit court's summary disposition ruling. Given our resolution of this case, we need address only one of them, plaintiff's contention that the Board violated his constitutional due process rights by selecting Collins as the "judge" at the Board hearing. Plaintiff maintains that a conflict of interest barred Collins's participation because his law firm was financially involved in the outcome of the proceedings and had drafted the charges presented against plaintiff. Plaintiff cites only *Crampton v Dep't of State*, 395 Mich 347; 235 NW2d 352 (1975), in support of his argument that a presumption of bias should have prohibited Collins's involvement. In *Crampton*, our Supreme Court held that "it is impermissible for officials who are entrusted with responsibility for arrest and prosecution of law violators to sit as adjudicators in a law enforcement dispute between a citizen and a police officer." *Id*. at 356. *Crampton* does not apply here, and no evidence tends to establish that Collins cast a vote on plaintiff's termination or issued any rulings during the hearing. Under the circumstances presented, we find no due process violation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher