STATE OF MICHIGAN

COURT OF APPEALS

CITY OF CENTER LINE,

Plaintiff/Cross-Defendant-Appellant,

v

POLICE OFFICERS ASSOCIATION OF MICHIGAN, INC and ANGELA POST,

Defendants/Cross-Plaintiffs-Appellees.

UNPUBLISHED
February 9, 2010

No. 289248
Macomb Circuit Court
LC No. 2008-001037-CL

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff ("the City") appeals as of right from the trial court's order granting defendants' motion for summary disposition and affirming the parties' arbitration award. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant Angela Post was a public safety officer employed by the City. The terms of her employment were governed by a collective bargaining agreement ("the CBA") between the City and defendant Police Officers Association of Michigan ("POAM"). In July 2006, Post experienced pain in both knees and sought treatment from Dr. Garver. Dr. Garver concluded Post was unable to work for an indefinite period, and Post took sick leave. In early November 2006, Dr. Garver wrote that Post's right knee had "recovered pretty well" but that her left knee required further surgery. Post sought a second opinion from Dr. Perry, whose December 11, 2006 report, made no mention of Post's right knee and stated that her left knee did not need surgery. Dr. Perry further stated that Post was cleared to return to unrestricted duty in January.

In late December 2006, Post went to the stationhouse with Dr. Perry's note, asking to be assigned work. However, the City declined to assign her to work, finding a conflict between Dr. Garver's November note and Dr. Perry's December note, and requiring a third evaluation by its independent doctor, Dr. Tofaute. Dr. Tofaute examined Post on January 10, 2007, and found that her left knee was fine but that her *right* knee was not, and concluded that she was unable to return to work for at least three to four months. However, Post's sick leave would be exhausted on January 27, 2007. Under the CBA, when an employee's sick leave is exhausted, his or her status changes to "inactive." If the employee's physician and the City's physician agree on a

"date certain for return to full duty status," the inactive employee can return to active status on that agreed-upon date, either taking unpaid sick leave or long-term disability in the interim. But if there is no "date certain" for return to active duty, the employee is considered terminated after six months of unpaid sick leave.

Relying on Dr. Tofaute's report, the City refused to let Post return to active duty in January and began to take steps to place her on either unpaid sick leave or long-term disability. The City mailed Post the form for long-term disability. Post saw Dr. Garver on January 29, 2007, to have him complete the form; however, when he returned the form to her, he had stated on it that her activities were not restricted and she was able to return to unrestricted duty at work. Concluding that this meant she was not disabled and would not be eligible for benefits, Post did not file the form. Instead, she filed a grievance, arguing that the City wrongfully prevented her from returning to active duty in January 2007, which proceeded to arbitration.

The arbitrator concluded that the City acted properly in trying to resolve the conflict between Dr. Garver and Dr. Perry, but that the opinion of Dr. Tofaute failed to resolve the dispute. He further held that Dr. Tofaute's opinion did "not appear to have been fairly reached" because it did not address the conflict regarding Post's left knee, nor did it indicate agreement with Dr. Perry's conclusion that surgery was not indicated. Dr. Tofaute's opinion also found new, right-knee symptoms that Dr. Garver and Dr. Perry agreed were *not* problematic. Yet Dr. Tofaute did not provide any explanation why his findings were contrary to the earlier two opinions. Thus, Dr. Tofaute's examination did not resolve the issue of whether Post was fit to return to active duty. The arbitrator therefore concluded that the City acted unreasonably in putting Post on inactive status without adequate, objective evidence that she was unable to return to work. Finally, because the medical evidence was still at issue, the arbitrator concluded that he could not fashion a remedy without yet another medical opinion. He ordered the City to obtain an opinion specifically addressing Post's current fitness for duty and her probable fitness for duty back in January 2007. The amount of back pay owed, if any, could not be determined until this information was available.

When the evaluation was complete, the arbitrator asked the parties to brief whether Post should have been put on inactive status on January 27, 2007, or whether at some point she was entitled to be placed on active duty and, if the latter was so, whether she was entitled to back pay and back benefits for some or all of the period. In a supplemental opinion and award issued on December 14, 2007, the arbitrator specifically found that the City violated the CBA by placing Post on inactive status without an adequate medical justification. The arbitrator then found that Post failed to mitigate her damages arising from the City's breach because she should have requested unpaid sick leave to avoid termination. Finally, the arbitrator found that the medical evidence provided by the fourth evaluation showed that Post could have returned to active duty at least by March 15, 2007. Accordingly, he concluded that Post was on inactive status between January 27, 2007, and March 15, 2007, and that she was entitled to back pay beginning from March 15, 2007. Post was to be reinstated to active status as soon as possible.

The City filed a complaint in the trial court to vacate the award. Both parties moved for summary disposition under MCR 2.116(C)(10), and the trial court affirmed the award, granting defendants' motion.

We review de novo a trial court's decision to enforce, vacate or modify an arbitration award. *Greater Bethesda Healing Springs Ministry v Evangel Bldrs & Constr Mgrs, LLC*, 282 Mich App 410, 415; 766 NW2d 874 (2009); *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). A court may not review an arbitrator's factual findings or decision on the merits or substitute its judgment for that of the arbitrator; a court may only decide whether the award draws its essence from the contract. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986); *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009); *Police Officers Ass'n v Manistee County*, 250 Mich App 339, 343; 645 NW2d 713, lv den 467 Mich 891 (2002). If an arbitrator, in granting an award, did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the arbitration agreement, judicial review effectively ceases. *Ann Arbor*, 284 Mich App at 144. The fact that an arbitrator's interpretation of the party's contract is wrong is irrelevant. *Mich State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 584; 444 NW2d 207 (1989).

The arbitrator's choice of remedy is also generally broad. The question is whether the remedy fashioned is rationally explainable as a logical means of furthering the aims of the contract. *Mich Ass'n of Police v City of Pontiac*, 177 Mich App 752, 759; 442 NW2d 773 (1989). If not specifically limited by the terms of the collective bargaining agreement, an arbitrator is free to fashion a remedy that considers the relative fault of the parties. *Police Officers Ass'n*, 250 Mich App at 344; *Mich Ass'n of Police*, 177 Mich App at 759.

Under this standard of extreme deference, it cannot be said that the arbitrator exceeded his authority in this case. The CBA does not limit the arbitrator's ability to order a particular remedy. When the arbitrator unambiguously found that the City should not have put Post on inactive status without more and better evidence, he was properly performing his functions as an arbitrator. He could have ordered the City to pay back wages to January 2007, but instead proceeded as if Post had requested unpaid sick leave and established a date certain for her return to active duty. This outcome is well within the "essence" of the CBA.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello