

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRENDA MERKEL and LINCOLN  
EDUCATION ASSOCIATES ORGANIZATION,  
MEA/NEA,

UNPUBLISHED  
October 19, 2010

Plaintiffs/Cross-Defendants-  
Appellants,

v

LINCOLN CONSOLIDATED SCHOOLS and  
LINCOLN CONSOLIDATED SCHOOLS  
BOARD OF EDUCATION,

No. 292795  
Washtenaw Circuit Court  
LC No. 09-000183-CL

Defendants/Cross-Plaintiffs-  
Appellees.

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Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Plaintiffs/Counter-Defendants Brenda Merkel and Lincoln Education Associates Organization, MEA/NEA, appeal as of right the order denying their motion for summary disposition, dismissing with prejudice their “Complaint to Vacate Arbitration Award,” granting defendants’ motion for summary disposition, and enforcing the arbitration award in favor of defendants. This action stems from the trial court's review of an arbitrator's order in a grievance brought pursuant to the parties' collective bargaining agreement. (CBA). We affirm.

Defendant Lincoln Consolidated School District and plaintiff Lincoln Education Associates Organization (LEAO) were parties to a collective bargaining agreement. Plaintiff Brenda Merkel was an employee of the district, and LEAO was her bargaining agent.

On October 5, 2007, plaintiffs filed a grievance with the school district pursuant to Article VII of the agreement, asserting that Merkel was entitled to additional health benefits under the agreement. The grievance procedure in Article VII (B) contains 5 steps. Step 5 states:

If the LEAO is not satisfied with the disposition of the grievance at Step 4, or if no disposition has been made within the period provided here, the grievance shall be submitted to arbitration within fifteen (15) working days.

The district's disposition of the matter at Step 4 resulted in a denial of Merkel's grievance on October 9, 2007. Plaintiffs filed their demand for arbitration pursuant to Step 5 on November 2, 2007 – 18 working days after the disposition of the grievance at Step 4.

Article VII (C) of the agreement states that “powers of the arbitrator are subject to the following limitation”:

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2. If either party disputes the arbitrability of any grievance under the terms of this Agreement, the arbitrator shall first render a decision as to the arbitrability thereof. Should the grievance be determined nonarbitrable, it shall be returned to the parties with no opinion on its merits.

Article VII (E) of the agreement states that “the time limits provided in this Article shall be strictly observed but may be extended by written agreement of the parties.”

An arbitration hearing was held on October 13, 2008.<sup>1</sup> Following the hearing, the parties filed post-hearing arbitration briefs. In a decision dated December 15, 2008, the arbitrator concluded, “after a thorough review of the evidence submitted by the parties, together with their helpful post-hearing briefs,” that he did not have jurisdiction to resolve the dispute because plaintiffs failed to submit the grievance to arbitration within fifteen days of the disposition of the grievance at Step 4.

In February 2009, plaintiffs filed the present action in circuit court to vacate the arbitration award. Plaintiffs alleged that defendants failed to raise the issue of the arbitrability of the grievance during the arbitration hearing, but instead raised the issue for the first time in its post-hearing brief. Plaintiffs contended that the arbitrator exceeded his authority by considering evidence not presented at the hearing. In response, on April 3, 2009, defendants filed a counterclaim for enforcement of the arbitration award in which it asserted that the arbitrator correctly determined that it did not have authority to decide the grievance and that defendants were entitled to have the arbitration award confirmed into a judgment.

On May 8, 2009, defendants filed a motion for summary disposition of plaintiffs' complaint to vacate the arbitration award on the ground that the motion was untimely under MCL 3.602(J). Plaintiffs thereafter filed a motion for summary disposition on May 20, 2009. In response, defendants requested an order denying plaintiffs' motion for summary disposition and confirming the arbitration award.

At a June 10, 2009, hearing with respect to both parties' motions for summary disposition, the trial court denied plaintiffs' motion for summary disposition and dismissed plaintiffs' complaint to vacate the arbitration award. The trial court opined in part:

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<sup>1</sup> This Court does not have a transcript of the arbitration hearing.

Plaintiff clearly got her day in -- in arbitration. The arbitrator properly resolved the issue of arbitrability of the grievance before reaching the merits of the agreements as the CBA instructs. Plaintiff even points out in her brief that the CBA requires that “if the grievance is not arbitrable the arbitrator shall render no decision on the merits.” That is exactly what the arbitrator did here.

The arbitrator obviously had to hear proofs about the filing of the grievance in order to come to his conclusion concerning arbitrability. The arbitrator found “after a thorough review of the evidence” that the late filing of the grievance was a “fatal flaw,” and that “given that finding” he was required to determine that the grievance is non-arbitrable.

Plaintiffs contend that the trial court erred by granting summary disposition in favor of defendants. A trial court's decision to enforce, vacate or modify an arbitration award is reviewed de novo on appeal. *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). Questions of law, including the proper interpretation of a contract, are also reviewed de novo. *Wold Architects & Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

MCL 423.9d governs arbitration of labor disputes. *Serv Employees Internat'l Union Local 466M v Saginaw*, 263 Mich App 656, 660; 689 NW2d 521 (2004). *Lenawee County v Police Officers' Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999), citing *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4, 438 NW2d 875 (1989), set forth the limited review of labor arbitration decisions that this Court must employ:

The necessary inquiry for this Court's determination is whether the award was beyond the contractual authority of the arbitrator. Labor arbitration is a product of contract and an arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award ‘draws its essence’ from the contract. 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. [ (Citations omitted.) ]

An action to enforce or vacate an arbitration award is subject to a six-year limitations period. *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 143; 771 NW2d 843 (2009).

Plaintiffs initially contend that defendants failed to meet their burden of proof “with respect to their own motion for summary disposition under MCR 3.602(J).” Defendants first moved for summary disposition of plaintiffs’ complaint to vacate the arbitration award on the

basis of MCR 3.602(J)<sup>2</sup>. Plaintiffs thereafter filed a motion for summary disposition. Defendants filed a reply to plaintiffs' motion for summary disposition and sought summary disposition pursuant to MCR 2.116(I)(2) on the ground that plaintiffs failed to comply with Step 5 of the grievance procedure by failing to submit the grievance to arbitration within 15 working days after the disposition of the grievance at Step 4 – which is the same argument that was raised by defendants in their counterclaim for enforcement of the arbitration award. The trial court denied plaintiffs' motion for summary disposition and granted defendants' motion for summary disposition on the ground that the grievance was not arbitrable because plaintiffs failed to submit the grievance to arbitration within 15 working days after the disposition of the grievance at Step 4 as required by the CBA. A review of the record clearly reveals that summary disposition in favor of defendants was not granted on the basis of MCR 3.602(J). Thus, plaintiffs' argument in this regard is misplaced.

The gist of plaintiffs' argument is that the arbitrator exceeded the scope of his authority by considering evidence presented for the first time in defendants' post-hearing brief. Defendants contend that both the arbitrator's decision and the plaintiffs' own post-hearing brief illustrate that the issue of arbitrability was raised, and that the CBA expressly provides that "if either party disputes the arbitrability of any grievance under the terms of this Agreement, the arbitrator **shall** first render a decision as to the arbitrability thereof" [Emphasis added].

Procedural matters arising out of an arbitrable dispute are for the arbitrator, and not the court, to determine. *Bennett v Shearson Lehman-American Express, Inc*, 168 Mich App 80, 83; 423 NW2d 911 (1987). As such, the timeliness of bringing an arbitration proceeding is a procedural issue to be determined by the arbitrator rather than the courts. *Id.*; see also *Nielsen v Barnett*, 440 Mich 1, 10, 485 NW2d 666 (1992).

The parties' CBA in this case provides that (1) the grievance shall be submitted to arbitration within fifteen (15) working days, (2) if either party disputes the arbitrability of any grievance under the terms of the agreement, the arbitrator shall first render a decision as to the arbitrability thereof, and (3) that "the time limits provided in this Article shall be strictly observed but may be extended by written agreement of the parties." In his decision, the arbitrator stated as follows:

*After a thorough review of the evidence submitted by the parties, together with their helpful post-hearing briefs, I find that one of the procedural issues raised by the District is controlling. . . . The parties' CBA [collective bargaining agreement] says that time limits must be strictly adhered to and there is no question that the appeal to arbitration came beyond the fifteen (15) day time limit. Therefore, I find that I have no jurisdiction to resolve this dispute. (Emphasis added.)*

Plaintiffs' post-hearing brief acknowledges that arbitrability was raised:

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<sup>2</sup> MCR 3.602 is not applicable to arbitration involving labor disputes.

The Employer through cross-examination of the grievant tried to raise an arbitrability issue. The employer did ask questions as it related to where the grievance was initiated. Arbitrator Jason asked the Employer whether he was raising the issue of arbitrability. The Employer never responded to the question. The Association contends [sic] arbitrability is not an issue. Again, the Employer never responded to Arbitrator Jason's question which leaves the Association with the opinion that it really is not an issue.

Although plaintiffs contend that they did not believe that arbitrability was an issue, the arbitrator's written decision reveals otherwise. As noted by the trial court, "the arbitrator obviously had to hear proofs about the filing of the grievance in order to come to his conclusion concerning arbitrability." The trial court correctly ruled that "The Arbitrator properly resolved the issue of arbitrability of the grievance before reaching the merits of the agreement as the CBA instructs," correctly dismissed plaintiffs' complaint with prejudice, and properly enforced the arbitration award.

Affirmed.

/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad