

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN STATE EMPLOYEES
ASSOCIATION, AFSCME LOCAL 5,

UNPUBLISHED
September 13, 2012

Plaintiff-Appellee/Cross-Appellant,

v

No. 305398
Ingham Circuit Court
LC No. 07-000770-CZ

DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellant/Cross-
Appellee.

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant-appellant/cross-appellee Department of Natural Resources (DNR) appeals as of right from the trial court's July 12, 2011, order denying the DNR's motion for reconsideration. Specifically, the DNR challenges the court's June 1, 2011, order awarding Brian Fish retirement service credits for the period from March 18, 2005 to October 5, 2009. On cross-appeal, petitioner Michigan State Employees Association (the union) challenges the court's June 21, 2011, order denying the union's motion for summary disposition on the ground that the court did not have the power to impose back pay as a sanction. We reverse the court's award of retirement service credits and affirm the court's denial of sanctions.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Michigan State Employees Association (the union) is a collective bargaining representative of civil service employees employed by the State of Michigan, including conservation officers employed by the DNR. Following the termination of Brian Fish's employment as a conservation officer, the union pursued to arbitration a grievance that Fish's March 8, 2005, discharge was not for just cause and was therefore in violation of the Collective Bargaining Agreement between the union and the State of Michigan.

The arbitrator found that Fish had engaged in misconduct, but that discharge was not the appropriate penalty. In an order dated July 10, 2006, the arbitrator ordered as follows:

I believe that the Grievant could be returned to work on a last chance basis, only after a proper psychological evaluation, and a determination by the psychologist that the Grievant will comply with Departmental rules whether or

not he has grievances against the Department which he feels are being ignored. However, the Grievant must understand that unless he expresses those grievances, they cannot be dealt with.

The Grievant is to be returned to work on a last chance basis, subject to and following a complete psychological evaluation which will determine whether or not he is capable of complying with the Departmental rules and regulations. The Grievant is not to be rewarded for taking matters into his own hands in terms of resolving his grievances with the Department; he is to retain his seniority, but to receive no back pay or benefits for the period he has been off work until the time that he may return to work. His last chance agreement shall be for a period of eighteen (18) months.

On February 12, 2007, the DNR sent a letter to Fish notifying him to appear “for an independent psychological evaluation to determine your fitness to return to duty in accordance with Arbitrator Jacobs’ award.” Following the evaluation, the DNR sent a letter to the union dated April 24, 2007, stating that the psychologist’s professional opinion was “that Mr. Fish is not capable in a consistent manner over time, of complying with Departmental rules that he disagrees with.” The letter advised that “the Department cannot reinstate Mr. Fish and he will remain discharged from State service in accordance with the arbitration award.”

On June 18, 2007, the union then filed a “Petition to Enforce Arbitration Award” that commenced the present dispute. The union asserted that Fish had submitted the psychologist’s report to another psychologist who issued a report that was critical of the original report. The union requested the hiring of an independent psychologist “to examine all of the test data, complete an interview, and draw conclusions about Mr. Fish’s personality functioning.”

On October 8, 2008, the trial granted the union’s motion for appointment of an independent psychologist. The court further ordered that:

[T]he parties, via their respective expert witnesses, shall mutually select an independent psychologist to perform “a complete psychological evaluation which will determine whether or not [Brian Fish] is capable of complying with the Departmental rules and regulations.”

When the parties could not agree on an independent psychologist, the trial court granted the union’s motion for appointment of Jeffrey Andert, Ph.D. The court ordered Dr. Andert to “conduct a complete psychological evaluation to determine whether or not Brian Fish is capable of complying with departmental rules and regulations as required by the arbitration award.” Dr. Andert was ordered to conduct the requisite examination within thirty days of June 4, 2009, and to prepare a complete report of his findings within sixty days of June 4, 2009.

Dr. Andert conducted the psychological examination on Brian Fish and concluded his detailed report as follows:

Based on the current evaluation results, Mr. Fish does not meet the diagnostic criteria of a psychiatric condition which would significantly impair his

functioning, including his ability to adhere to rules and regulations in the work setting.

The union again moved for summary disposition on September 8, 2009. Following a hearing held on September 23, 2009, the trial court issued an amended opinion and order dated September 24, 2009. The court found that “Based upon the psychological evaluation of Dr. Andert, this Court finds Mr. Fish has fulfilled the requirements to return to work as set forth by the Arbitrator.” Thus, the court granted the union’s motion for summary disposition and ordered the DNR to return Fish to his position as a conservation officer. The court denied the DNR’s motion for summary disposition that was brought pursuant to MCR 2.116(4) and (7).

Fish was reinstated to work on October 5, 2009. On January 10, 2011, the union filed a post-judgment motion to enforce the judgment and underlying arbitration award. The union alleged that Fish had encountered a variety of “seniority-related problems” that the DNR had not resolved. Some of the problems noted had been resolved before the union filed the motion. With regard to unresolved matters, the union specifically alleged that “his [Fish’s] seniority on the DCDS System” had not been restored on the “DCDS¹ counter.” The union also argued that, even though the arbitrator ordered no back pay, that the trial court should order partial back pay “for the period of time during which [the DNR] flouted the arbitration award.”

In response, the DNR asserted that it had complied with the arbitrator’s decision relating to Fish’s seniority. With regard to the unresolved issue of “continuous service hours” on DCDS, the union asserted that a review of DCDS records confirmed that Fish’s continuous hours of service had been restored and that “no hours of service were lost due to his termination.”² The DNR noted that

What the petitioner is actually seeking in this case is that he be awarded additional hours of continued service for the period of time he was not working. Making such a credit would, arguably, contradict the Arbitrator’s Award as the Arbitrator expressly stated that Mr. Fish was “not to be rewarded for taking matters into his own hands” in terms of resolving his grievances with the Department; instead, “he [was] to retain his seniority, *but to receive no back pay or benefits* for the period that he has been off work until the time he may return to work. Presumably, crediting the Respondent with additional hours of continuous service for which he did not work would be awarding him benefits in contravention of the Arbitrator’s decision.

¹ “DCDS” is the state’s computerized payroll system and stands for Data Collection and Distribution System.

² The DNR presented an uncontested affidavit indicating that Fish had been credited with all of his continuous hours of service on the DCDS.

The DNR further asserted that, even if Fish had been denied the restoration of his seniority, an award of back pay would be inappropriate and would be an improper exercise of the court's authority.

A hearing was held on the motion on May 4, 2011. With regard to the issue of continuous hours of service, the court stated:

In regard to the seniority issue, it clearly says – Arbitrator Paul Jacobs says he is to retain his seniority but to receive no back pay or benefits from the period that he has been off work until the time that he may return to work. His last-chance agreement shall be for a period of 18 months.

Now when I look at the issue of he is to retain his seniority, what first comes to my mind, and I suppose that's because I served for 20 years in the military and did so much work with the Soldiers and Sailors Civil Relief Act,³ which has now been renamed, but, nonetheless, when soldiers are deployed they do not lost those kinds of benefits. Because we do not want them to serve and have a break in their retirement. They come back as if they had been at work.

And the language in the act, as I recall, is much like this. He is to retain his seniority. They are to retain the benefit. So I agree with the interpretation of petitioner. I think that to do otherwise is to give him a break in his retirement and put him behind where he is supposed to be. . . . So there will be no break in his retirement. That needs to be counted as if he was continuously there.

In an order dated June 1, 2011, the trial court ordered the DNR to “forthwith restore to Brian Fish his earned service credits for retirement purposes from March 18, 2005, to October 5, 2009.” The court also ordered the union to submit a brief regarding “whether this matter should be returned to the arbitrator to clarify his ruling with regard to back pay, and whether the Court has authority to order back pay as a sanction against [the DNR].”

In an opinion and order dated June 21, 2011, the trial court concluded, after noting that the union “has made no allegations that the award should be modified or vacated according to the rules set forth in the Michigan Court Rules,” as follows:

Plaintiff argues that because he was not reinstated as a Conservation Officer until March 26, 2010, Defendant failed to follow the arbitration agreement. However,

³ The Soldiers' and Sailors' Civil Relief Act of 1940 was replaced by the Servicemembers' Civil Relief Act of 2004, 50 USC 501 *et seq.* “The provisions of the Federal statute were obviously designed to protect those in military service. It does not appear that in the enactment of the measure Congress sought to protect others.” *Haller v Walczak*, 347 Mich 292, 296; 79 NW2d 622 (1956). The trial court erred by analogizing the federal act, which is not applicable in cases not involving military service. Further, the federal act obligates employers to protect the jobs of military reservists called to active duty, which is not a situation presented in this case.

reinstating Plaintiff as a Conservation Officer before that time would have meant violating the requirements of the Michigan Commission on Law Enforcement Standards (MCOLES). MCOLES requires the recertification of employees after two years. The arbitration agreement could not be read to violate the law and Plaintiff was reinstated as a Conservation Officer as soon as he completed his recertification. The previous delay of approximately 3 years was due to the mutual disagreement over the psychological examination of Plaintiff. Defendant should not suffer sanctions for this delay since both parties were responsible for this delay. Furthermore, the parties complying with the condition in the arbitration agreement that Mr. Fish be found psychologically fit to follow and obey the rules and regulations, caused the delay.

Thus, the court denied the union's request for back pay as a sanction against the DNR.

The DNR filed a motion for reconsideration on June 22, 2011, asking the court to reconsider its order granting Fish earned service credit for retirement purposes for the period from March 18, 2005, to October 5, 2009. The DNR asserted that

Under the State of Michigan's defined benefit retirement plan, Defendant is without authority to give service credits for retirement purposes. The State of Michigan defined benefit retirement system is governed by the State Employees Retirement Act, MCLA 38.1, et seq. Under the Act, the State of Michigan Retirement Board is solely vested with the authority to control the retirement system. MCLA 38.2. Accordingly, Defendant has no authority to award retirement service credits. Thus, reconsideration is warranted because Defendant has no legal authority to award the relief granted.

The trial court denied the motion for reconsideration in an opinion and order dated July 12, 2011. The court held in relevant part:

[T]his Court believes Defendant does have the authority to direct the State of Michigan Retirement Board, who is solely vested with the authority to control the retirement system, to award Plaintiff with retirement service credits. Defendant and the Retirement Board are all departments of the State of Michigan. Therefore, palpable error was not committed when this Court ordered Defendant to provide Plaintiff with retirement service credits.

The court ordered that "Defendant direct the State of Michigan Retirement Board to award Plaintiff with retirement service credits for the period from March 18, 2005 to October 5, 2009, as stated in the June 1, 2011, order."

II. RETIREMENT SERVICE CREDITS

The DNR argues that the trial court exceeded its authority in ordering that Fish be awarded retirement service credits. A court's power to modify, correct, or vacate an arbitration award is limited. MCR 3.602 provides a circuit court with only three options when an arbitration award is challenged: it may (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent

on the face of the award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); MCR 3.602(I), (J), and (K). This Court reviews de novo a circuit court's decision whether to confirm, vacate, or modify an arbitration award. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

Neither party challenges the arbitration award itself. Rather, the issue is the meaning of the phrase "retain his seniority" in the arbitrator's award. A trial court has the authority and obligation to enforce an arbitration award, including the authority to determine the meaning of an award. *Staniszewski v Grand Rapids Packaging Corp*, 125 Mich App 97, 99; 336 NW2d 10 (1983). In that regard, a court may interpret the award and fully effectuate it. *Id.*

At issue is the following language in the arbitrator's decision:

[H]e is to retain his seniority, but to receive no back pay or benefits for the period he has been off work until the time that he may return to work.

The trial court concluded that the phrase "retain his seniority" as used in the arbitrator's decision meant that Fish should be awarded his retirement service credits from the date of his termination until the date of his reinstatement.

The arbitrator's decision provided that Fish would be allowed to retain his seniority. In determining the arbitrator's intended meaning of the term "retain," this Court must accord the term its plain and ordinary meaning as it does when interpreting a statute, court rule, or contract. This Court may consult dictionary definitions because the arbitrator's decision does not define the term. The word "retain" commonly means "to keep possession of; to continue to use, practice, etc.; to continue to hold or have; to hold in place or position." *Random House Webster's College Dictionary* (1992). The term "seniority" commonly means "precedence or status as the result of a person's length of service, as in a profession." *Id.* When the words are considered together, and in the context of the arbitrator's clear admonishment that Fish receive "no back pay or benefits for the period he has been off work until the time that he may return to work," the plain meaning of the phrase "retain his seniority" is that Fish keep in place the seniority that he had at the time of his termination rather than requiring him to "start from scratch." In other words, he did not lose the seniority that he had accrued *before* his termination.

Further, nothing in the language of the arbitrator's decision expresses the intent that Fish be awarded retirement service credits from the date of his termination until the date he returned to work. The decision does not mention "retirement service credits" at all. Indeed, awarding such service credits for the period that Fish was off work would bestow a benefit upon him in contradiction of the arbitrator's decision that Fish receive "no back pay or benefits for the period he has been off work until the time that he may return to work." Additionally, contrary to the union's argument, the arbitrator's decision does not contemplate a specific date by which Fish

“*may* be returned to work.”⁴ The trial court erred by ordering that Fish be awarded retirement service credits from the date of his termination until the date he returned to his employment.

III. SANCTIONS

On cross-appeal, the union argues that the trial court erred by refusing to order back pay as a sanction for the DNR’s delay in returning Fish to work. Although acknowledging that the trial court found that the DNR has not violated the arbitration award by failing to reinstate Fish until a consensus was reached on the psychological evaluation, the union relies on foreign precedent in arguing that “other courts have found that back pay is an appropriate sanction under analogous situations.” Specifically, the union asserts that a “misrepresentation by the psychologist unilaterally picked by the DNR caused the delays in obtaining a final psychological evaluation.” The union asserts that back pay should be awarded “from the date that pursuant to the arbitration award, the employee should have been reinstated.” However, as noted above, the circuit court found the parties mutually responsible for the delay in obtaining a psychological evaluation and, in addition, the arbitration award did not specify a date by which Fish would be returned to work. The trial court properly declined to award back pay as a sanction.

IV. CONCLUSION

We reverse the order awarding Fish retirement service credits for the period from March 18, 2005, to October 5, 2009. We affirm the order denying sanctions.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

⁴ Further, the circuit court rejected the union’s argument that the delay in returning to work was due to any tactics on the part of the DNR.