

STATE OF MICHIGAN
COURT OF APPEALS

DETROIT POLICE OFFICERS ASSOCIATION,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

February 4, 1997

No. 191553

Wayne Circuit Court

LC No. 91120993 CL

ON REMAND

Before: Marilyn Kelly, P.J., and Markey and Markman, JJ.

PER CURIAM.

Plaintiff, Detroit Police Officers Association (DPOA), appealed from a dismissal of its action for breach of contract and mandamus relief against the defendant, City of Detroit. It alleged that defendant was compelled to spend funds specifically appropriated by the city council for the rehiring of fifty-four laid off police officers. Initially on appeal, we held that the trial judge properly dismissed the count for breach of contract for failure to prosecute. The majority held, also, that the trial judge properly denied plaintiff's request for mandamus, because the DPOA lacked standing to force the city to spend money appropriated by the council. *Detroit Police Officers Association v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued 4/21/95 (Docket No. 167538).

This matter is now before us on remand from the Michigan Supreme Court. We have been ordered to reconsider our previous decision in light of *Detroit Firefighters Ass'n v City of Detroit*, 449 Mich 629; 537 NW2d 436 (1995). We affirm in part and remand.

I

Due to a lack of funds, defendant laid off three hundred police officers in March, 1991. In an amendment to the 1991-1992 budget, the city council appropriated sufficient funds so that fifty-four of the officers could be rehired. The mayor vetoed the amendment, and the council overrode the veto. Nonetheless, defendant did not recall the fifty-four officers.

After defendant rejected plaintiff's offer to arbitrate the dispute, plaintiff filed the instant lawsuit. Count I alleged that the failure to recall the fifty-four officers was a breach of the collective bargaining agreement. Count II sought mandamus relief, because the mayor's actions violated the city charter.

On August 27, 1991, the trial court ruled that plaintiff was not entitled to a writ of mandamus, because the DPOA lacked standing to enforce the city code. The trial court refused to dismiss the breach of contract count. The parties agreed to submit it to arbitration and the trial judge ordered the case stayed. However, arbitration was never conducted. On July 28, 1993, the trial court lifted the stay and dismissed the action without prejudice.

II

Plaintiff argues that the judge erred in dismissing the breach of contract count for failure to prosecute. Where, as here, a union seeks to arbitrate a grievance and an employer claims that the grievance is not arbitrable, it is up to the court to decide "whether the party seeking arbitration is making a claim which on its face is governed by the contract." *Kentwood Public Schools v Kent County Education Association*, 206 Mich App 161, 164; 520 NW2d 682 (1994). Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. *Id.* Because defendant stipulated to submit the grievance to arbitration, it waived the argument that the grievance was not arbitrable. *Port Huron Area School District v Port Huron Education Ass'n*, 426 Mich 143, 161; 393 NW2d 811 (1986).

Regardless, the trial court was not required to keep the case on its docket indefinitely. Almost two years after the court ordered a stay, the parties still had not arbitrated the grievance. Although the trial court failed to give notice of the proposed dismissal as required by the court rules, its order states that the court communicated with the parties by phone. See MCR 2.502(A)(1). The record contains no explanation for the delay, no showing of due diligence or lack of fault, and no motion to reinstate the case. See MCR 2.502(B)(1) and (C). On this record, we cannot conclude that the judge abused her discretion in dismissing the action without prejudice for failure to prosecute. See *Bolster v Monroe County Board of Road Commissioners*, 192 Mich App 394, 398; 482 NW2d 184 (1991).

III

With respect to plaintiff's count for mandamus relief, we find that the trial judge erred in failing to grant it on the ground that the DPOA lacked standing. The Michigan Supreme Court recently addressed a similar issue in *Detroit Fire Fighters Ass'n, supra*. There, the plaintiff asserted it had standing to challenge the mayor's refusal to spend money appropriated for a new fire department squad. *Id.*, at 632. Although the Court disagreed on the proper analysis, four Justices found that the plaintiff had standing. Similarly, in the instant case, the DPOA has standing to advocate its members' interests.

IV

With respect to the substantive issue, we agree with plaintiff that defendant was required to spend the money appropriated for the salaries of the 54 officers. In *Detroit Firefighters*, the Supreme Court held that the mayor has only the authority conferred by charter or by the council acting within the scope of the charter. The charter does not give the mayor the authority to refuse to spend money appropriated by the city council for a specific purpose. The Court noted that the charter provides two methods by which to amend the budget after its adoption. However, either requires the joint action of the mayor and the city council. *Id.* at 640.

Likewise, in the instant case, the mayor refused to spend money which the city council appropriated for the specific purpose of rehiring fifty-four police officers. The city charter does not allow the mayor to make that decision independently, even if the purpose is to balance the budget.

V

Finally, we must determine whether plaintiff is entitled to a writ compelling the mayor to spend the money appropriated for the recall of 54 officers. A writ of mandamus is an extraordinary remedy which compels a body or an officer to perform. *Teasel v Dep't of Mental Health*, 419 Mich 390, 409-410; 355 NW2d 75 (1984). To obtain the mandamus, (1) a plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled; (2) the defendant must have a clear legal duty to perform it; (3) the act must be ministerial; and (4) the plaintiff must be without other adequate legal or equitable remedy. *Tuscola Co Abstract Co v Tuscola Co Register of Deeds*, 206 Mich App 508, 510-511; 522 NW2d 686 (1994).

Generally, where a mayor refuses to spend funds appropriated by a city council, trial judges should be able to grant mandamus, because all of the requirements for the writ to be issued have been satisfied. See *Detroit Firefighters*, *supra* p 661 (Cavanagh, J.). However, in this case, we are unable to grant mandamus as requested by plaintiff. As Justice Cavanagh noted in his opinion in *Detroit Firefighters*, from a purely practical viewpoint, we cannot order defendants to spend the appropriated funds so many years after the fiscal year in which this dispute arose. *Id.*

Therefore, we remand this matter to the trial court to determine if the mayor is continuing to refuse to spend the money for the additional police officers as authorized by the city council. In reaching a determination, the trial court may take into consideration whether the executive branch substantially accomplished the “stated purpose” for which the spending was appropriated by alternative means. *Id.* at 659. If the mayor has substantially accomplished the stated purpose, then he has legally operated within his discretionary authority. *Id.* However, if the effect of not spending the money has frustrated or thwarted the stated purpose, then the mayor has exceeded his authority. *Id.*

In determining whether the mayor is spending the money as authorized by the council, the court may take into consideration whether the executive branch substantially accomplished the “stated purpose” for which the spending was appropriate by alternative means. *Detroit Firefighters*, *supra* at 659. If the mayor has substantially accomplished the stated purpose, then it has legally operated within

its discretionary authority. *Id.* However, if the effect of not spending the money has frustrated or thwarted the stated purpose, then the mayor has exceeded his authority. *Id.*

If the court concludes that the mayor is not spending the money as authorized by the council, the court should issue a writ of mandamus to the mayor to do one of two things: rehire the officers or seek a formal amendment of the budget through joint action with the council.

Affirmed in part and remanded.

/s/ Marilyn Kelly

/s/ Jane E. Markey

/s/ Stephen J. Markman