STATE OF MICHIGAN

COURT OF APPEALS

YPSILANTI SCHOOL DISTRICT and YPSILANTI BOARD OF EDUCATION,

Plaintiffs/Counter-Defendants/Appellants,

v

YPSILANTI SUPPORT STAFF ASSOCIATION, MEA/NEA,

Defendant/Counter-Plaintiff/ Appellee.

UNPUBLISHED
May 14, 1999

No. 203660
Washtenaw Circuit Court
LC No. 96 7792 CL

Before: White, P.J., and Markman and Young, JJ.

PER CURIAM.

Plaintiffs appeal of right the circuit court's order granting defendant's motion for summary disposition and denying plaintiffs' motion for summary disposition in this action seeking to vacate an arbitration award, and a supplemental award, on the grounds that the arbitrator exceeded his contractual authority. We affirm.

Plaintiffs and defendant are parties to a collective bargaining agreement (CBA) under §15 of the public employment relations act, MCL 423.215; MSA 17.455(15). After plaintiffs discharged an employee (grievant), grievant contested the discharge, went through the grievance process, and the matter was submitted to binding arbitration. The arbitration award denied the grievance in part and granted it in part, ordering reinstatement of the grievant without backpay and other benefits, conditioned on grievant's paying $7,264 for certain equipment and shipping charges, or returning the equipment unused. The arbitrator stated in the award that he retained jurisdiction for ninety days. Within the ninety-day period, the arbitrator issued a supplemental award permitting the execution of a promissory note and security agreement as fulfillment of the restitutionary payment requirement. Plaintiffs declined to accept payment in this manner and filed suit to vacate the arbitration award. On cross-motions for summary disposition, the circuit court held that the arbitrator did not exceed his authority in either the initial or the supplemental award. This appeal ensued.

I

Plaintiffs employed grievant as a groundskeeper from February 1987 until his discharge on October 28, 1994. Grievant voluntarily used equipment from his private landscaping business to perform his job and stored this equipment in plaintiffs' storage facility during the winter. When the storage facility was burglarized in February 1994, grievant's equipment was among the items stolen. At his supervisor's direction, grievant prepared a list of missing items for plaintiffs' insurer; however, he did not tell his supervisor that some were his personal property. Upon authorization from plaintiffs' insurer, the stolen items were replaced. Plaintiffs thereafter issued a memorandum that directed all employees to remove personal equipment at the end of each day. Grievant's supervisor told him to take home "any replacement item belonging to him as it comes in." Grievant retrieved a lawn mower, tiller, and generator, three items that had been replaced by plaintiffs' insurer at a cost of $7,264.

In May 1994, while grievant was on medical leave, a new supervisor received an invoice for the equipment replaced by plaintiffs' insurer and could not locate some of the invoiced equipment. Plaintiffs then discovered that grievant had picked up some of these items from the vendor, and requested a meeting with him. Grievant attended the meeting, along with his attorney and defendant. When it appeared that criminal charges might be involved, grievant's attorney instructed him not to answer further questions.

Plaintiffs continued their investigation over the next five months, with the assistance of law enforcement officials. Grievant returned to work from medical leave in September 1994 and, at about the same time, law enforcement officials notified plaintiffs that grievant would not be prosecuted because they were "unable to prove what, if anything, suspect took." However, plaintiffs did not advise grievant or his attorney that the police investigation had concluded. At a meeting on October 28, 1994, plaintiffs asked grievant to identify the equipment in his possession. According to plaintiffs' representative, grievant refused to answer on the advice of his attorney. Grievant was discharged on that date for insubordination for failure to answer plaintiffs' questions. Plaintiffs later enlarged the reasons for discharge to include "dishonesty by the fraudulent submission of a school district property loss to the District's insurance carrier for reimbursement of the loss of certain school District property" and "dishonesty by misrepresenting himself as the school District's Director of Security to a law enforcement officer."

The issues submitted for arbitration, defined by defendant and accepted by plaintiffs, were: Did the District violate the Agreement by the October 28, 1994 discharge of the Grievant? If so, what is the appropriate remedy?

II

Plaintiffs first argue that the arbitrator's initial award exceeded his contractual authority by reducing grievant's discharge to a conditional reinstatement because the CBA expressly reserves to plaintiffs the right to discipline and discharge for just cause. We disagree.

Arbitration is a favored means of resolving labor disputes and courts refrain from reviewing the merits of an arbitration award when considering its enforcement. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986). Courts may not review an arbitrator's

factual findings or decision on the merits; a court may only decide whether the award draws its essence from the contract. *Id.; Gogebic Medical Facility v AFSCME Local 992*, 209 Mich App 693, 697; 531 NW2d 728 (1995). Although the judicial policy favoring labor arbitration warrants a strong presumption in favor of enforcing arbitral awards, an award is properly vacated when it is dependent on an arbitrator's interpretation of provisions expressly withheld from arbitral jurisdiction, or upon an arbitrator's disregard and contravention of the provisions expressly limiting arbitral authority. *Port Huron, supra* at 152.

The cases plaintiffs cite, not all of which are discussed here, are distinguishable from the instant case. Plaintiffs correctly observe that arbitrators were found to have exceeded their authority where the CBA allowed the employer to discharge for just cause and the arbitrator found that just cause for dismissal existed, but nevertheless ordered reinstatement without back pay, *Board of Control of Ferris State College v Michigan AFSCME, Council 25*, 138 Mich App 170; 361 NW2d 342 (1984), where the award was dependent on the arbitrator's interpretation of provisions expressly withheld from arbitral jurisdiction, *Port Huron, supra* at 159, and where the arbitrator found a specific violation that the CBA expressly stated constituted cause for discharge, but awarded reinstatement, *Int'l Brotherhood of Fireman & Oilers v Nestle Co, Inc*, 630 F2d 474 (CA 6, 1980). However, none of these situations is present here.

The CBA in the instant case does not vest in plaintiffs the unreviewable discretion to discharge for insubordination. Rather, the CBA reserves to plaintiffs the "right to discipline and discharge for just cause." Contrary to plaintiffs' argument, the CBA does not provide that insubordination is grounds for discharge; rather, it states that the employer "shall have the right to invoke disciplinary action" for violation of a rule, including insubordination. The arbitrator found that just cause for dismissal did not exist.

If not specifically limited by the terms of the collective bargaining agreement, an arbitrator is free to fashion a remedy which considers the relative fault of the parties. The question is whether the remedy fashioned is rationally explainable as a logical means of furthering the aims of the contract. *Michigan Ass'n of Police v Pontiac*, 177 Mich App 752, 759; 442 NW2d 773 (1989). In *Michigan Ass'n of Police*, this Court upheld an arbitrator's decision to reinstate a discharged employee without back pay and subject to an arbitrator-imposed additional probationary period of six months. *Id*. at 760-761. The arbitrator stated that he was fashioning a remedy that would discipline both parties. *Id*. at 755. In upholding the arbitrator's remedy, this Court explained:

> To hold otherwise would be to require the arbitrator to choose between the extremes of discharge or total exoneration, a course which would remove the flexibility in fashioning remedies which is one of the arbitrator's chief advantages for the amicable settlement of labor disputes. [*Id*. at 761.]

Further, absent clear and unambiguous language to the contrary, an arbitrator may lessen the severity of a sanction imposed on an employee. *Monroe Co Sheriff v FOP, Lodge 113*, 136 Mich App 709, 718-720; 357 NW2d 744 (1984) (upholding an arbitrator's authority to reduce a deputy sheriff's discharge to, "in effect, a suspension without back pay" where the CBA was deemed

ambiguous in that it apparently reserved the sheriff's statutory power to discharge deputy sheriffs at will, while also providing for "discharge for just cause.") Unless the CBA language is explicit in limiting arbitration, this Court has consistently upheld arbitrators' authority and interpretation of contracts in fashioning a remedy. *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1; 438 NW2d 875 (1989) (rules provided that discharge was optional, stating employer "may" discharge, and arbitrator determined that grievant's actions did not justify dismissal); *Lansing Community College v Lansing Community College Chapter of the Michigan Ass'n for Higher Ed (On Remand)*, 171 Mich App 172; 429 NW2d 619 (1988) (arbitrator reduced grievant's discharge to suspension without pay where the CBA reserved employer authority and discretion to terminate for just cause).

In the present case, the CBA does not expressly limit arbitral jurisdiction to the question whether the employee violated a work rule. Plaintiffs do not have discretion under the CBA to discharge for insubordination without just cause. We thus conclude that the arbitrator did not exceed his authority in determining that there was no just cause for dismissal and in reducing the discharge to what was, in effect, a suspension without pay. With regard to the initial arbitration award, we conclude that plaintiffs' motion for summary disposition was properly denied and defendants' motion properly granted.[1]

III

Plaintiffs next argue that the arbitrator's supplemental award[2] exceeded his authority, in violation of the doctrine of *functus officio*.

Defendant argues that the doctrine of *functus officio* does not apply because the supplemental award was rendered within the ninety-day period of extended jurisdiction and involved an issue over which jurisdiction had been specifically reserved. Defendant further argues that the fact that the arbitrator was called upon by the parties to resolve a dispute over implementation of the award "confirms his office had not been discharged, his function fulfilled, or his purpose accomplished" when he rendered the initial award.

Michigan recognizes the common law doctrine of *functus officio*, *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996),[3] which means "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority." Black's Law dictionary 606 (5th ed 1979).[4] We have found no Michigan cases applying the doctrine in circumstances similar to those presented here, and thus look to federal decisions for guidance.

In *Glass, Molders, Potter, Plastics and Allied Workers Int'l Union v Excelsior Foundry Co*, 56 F3d 844 (CA 7, 1995), an arbitrator ordered the defendant to reinstate an employee without backpay or fringe benefits if the employee completed an employer-approved rehabilitation program within sixty days of the rendition of the award. The award did not say who would pay for the program, which cost $3,000. After unsuccessfully negotiating with the employer, the union asked the arbitrator to clarify the award. The arbitrator responded that he had not intended that the employer pay, and that the employee would have to pay.

> After working out an installment plan for paying for the program, Jackson finally enrolled. But by now the July 5 deadline was looming, and it was not until July 27 that he completed the program. This was more than 60 days after the arbitrator's award had been rendered. But shortly before Jackson completed the program his union representative had called the arbitrator to ask when the 60-day period for the completion of the program had started to run. On July 30 the arbitrator wrote the parties that it had started to run on June 2, the date of his letter clarifying the award . . . which meant that Jackson had completed the program within the deadline after all. Excelsior nevertheless refused to reinstate Jackson, so the union brought this suit to enforce the arbitrator's award and thus compel reinstatement.
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> The district judge granted summary judgment for the employer on the ground that the arbitrator's action in extending the period for completion of the drug-rehabilitation program was forbidden by the doctrine of functus officio.

In reversing the district court, Chief Judge Posner wrote for the court:

> . . . . Arbitrators are no more infallible than judges. They make mistakes and overlook contingencies and leave much to implication and assumption—as the present case illustrates. The arbitration award says that Jackson has 60 days to complete a rehabilitation program. Period. But many drug-rehabilitation programs have long waiting lists. What if Jackson had applied to the company-approved program the day after the award was rendered, had been put on a waiting list, and as a result could not have completed the program within 60 days of the date of the order? What if through no fault of his own he had broken his leg in the middle of the program and had had to withdraw?
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> These questions, as well as the dramatic question whether the uncertainty about who would pay for Jackson's rehabilitation justified an extension of the deadline fixed in the original award, can fairly be characterized as "interpretive," allowing the union and Jackson to crawl through the loophole in the doctrine of functus officio for clarification or completion, as distinct form alteration, of the arbitral award. See, e.g., *Industrial Mutual Association, Inc. v. Amalgamated Workers, supra,* 725 F.2d [406,] 412 n. 3 [(CA 6, 1984)]; *Courier-Citizen Co. v. Boston Electrotypers Union No. 11, supra,* 702 F.2d [273,] 279-80 [(CA 1 1983)]*; LaVale Plaza, Inc. v R.S. Noonan, Inc., supra,* 378 F.2d [569,] 573 [(CA 3, 1967)]. An award that fails to address a contingency that has arisen after the award was made is incomplete; alternatively, it is unclear; either way, it is within an exception to the doctrine.
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> The present case is within the clarification-completion exception (or exceptions) to functus officio. Presumably, however, like the inherent power of courts and other public tribunals to reconsider their decisions, the power of arbitrators to clarify an award

> already made must be exercised within a reasonable period of time, unless there is a fixed deadline, as there is for judges in Fed.R.Civ.P. 60(b)(1)-(3) . . . In this case the award itself contemplated a period of up to 60 days before it would take full effect. And the informal motion to extend the period was "filed" with the arbitrator, and by him granted, within 30 days after the end of that period, before Jackson had completed the rehabilitation program that the arbitrator's initial award had invited him to enroll in. It could be argued that Jackson's termination as an employee of Excelsior "vested" on the sixty-first day after the award was rendered. But against this suggestion we point out that the union's first request for clarification (clarification as to who was to pay for the rehabilitation program) came within the 60 days. All things considered, we cannot say that July 30, which was 85 days after he rendition of the initial award, was too late for the arbitrator to be entitled to clarify the award.[5]

In *Red Star Express Lines v Int'l Brotherhood of Teamsters, Local 170,* 809 F2d 103 (CA 1, 1987), the court noted:

> . . . . the application of functus officio to labor disputes is considerably less absolute than the Union suggests. Strong authority in this circuit (and in other jurisdictions) holds that a labor arbitrator may, for example, "interpret or amplify" his award, functus officio notwithstanding. *Courier-Citizen* [*supra* at 278-280] (arbitrator may reopen proceeding in which he had ordered back pay award to "senior journeyman" in order to identify journeyman and specify amount of back pay); *Locals 2222, 2320-2327, International Brotherhood of Electrical Workers v. New England Telephone and Telegraph Co.*, 628 F.2d 644, 647-49 (1st Cir. 1980) (court can order parties to resubmit dispute over extent of "lost earnings" ordered paid) . . .

A

Defendant argues that the "clarification" exception to functus officio applies here.

The CBA in the instant case has no express contractual provision regarding supplemental arbitration awards. Plaintiffs do not challenge the arbitrator's power to retain jurisdiction, but argue that the arbitrator refashioned the remedy.

The arbitrator's supplemental award did not revisit the merits of the initial award. However, the supplemental award altered the initial award's deadline for grievant's payment of restitution and also affected the manner of payment that would trigger plaintiffs' obligation to reinstate grievant. In the initial award, plaintiffs were obligated to reinstate grievant upon receipt of notice that grievant wishes to return to work and payment of $7624, plus shipping charges, within thirty days. Under the supplemental award, plaintiffs were obligated to reinstate grievant upon receipt of grievant's executed promissory note and security agreement. Nonetheless, the arbitrator noted, and the plaintiffs do not dispute, that they have suffered no financial loss, nor do they dispute that they will, at most, serve as a conduit for the transmittal of payments to the District's insurance carrier. Mindful of the arbitrator's observations that implementation of the initial award must necessarily take into consideration the grievant's present

financial condition, and that the award was not meant to be punitive, we agree with the arbitrator that "[t]he nature of this case permits a finding that the term 'pay' encompasses discharging the obligation in the form of the Promissory Note and Security Agreement." The arbitrator did not change his reasoning about the decision, did not redirect the distribution of the award, and did not change plaintiffs' expectations about their rights and liabilities contained in the award. *Teamsters Local 312 v Maltlack, Inc*, 118 F3d 985, 992 (CA 3, 1997). Under *Excelsior Foundry, supra*, the arbitrator's supplemental award falls within the "clarification-completion" exception and constitutes addressing a contingency that arose after the initial award.

Because of the policy favoring arbitration, and given that any doubts should be resolved in favor of arbitrability, we conclude that the arbitrator's supplemental award did not revisit the merits of the initial award, and did not exceed his contractual authority.

IV

Plaintiffs last argue that the supplemental award violates the Michigan Constitution, Article 9, § 18, which provides that "[t]he credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution." Plaintiffs assert that this provision "prohibits the use of government funds to assist private persons in their financial affairs" and that they cannot accept a promissory note from grievant. Plaintiffs argue that the supplemental award violates the CBA provision stating "The arbitrator shall not render any decision which would require or permit an action in violation of Michigan school laws."

Article 9, § 18 is violated only when the state creates an obligation legally enforceable against it for the benefit of another. *Petrus v Dickinson Co Commr's*, 184 Mich App 282, 297; 457 NW2d 359 (1990). Here, there was no evidence that plaintiffs reimbursed their insurer nor that plaintiffs' credit would be a guarantee for grievant's restitution

We conclude that the supplemental award does not violate Article 9, § 18 of the Michigan Constitution and that the circuit court properly granted defendant's motion for summary disposition and properly denied plaintiffs' motion.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman

Judge Robert P. Young, Jr. not participating.

[1] Plaintiffs assert that the circuit court "failed to consider and recognize the impact of the express wording of Article X, Section G, which expresses [plaintiffs'] reservation of the right to invoke discipline

or discharge for the serious breaches of conduct indicated." Based on the precedent cited herein, Section G is not determinative in light of the CBA's "just cause" provision. Plaintiffs also argue that the arbitrator found that grievant's conduct involved falsification of records and the arbitrator was, therefore, duty bound to defer to plaintiffs' discretion to discharge. We do not agree that the arbitrator made such a finding, or that such a finding would be dispositive.

[2] The supplemental award stated:

> . . . . It is correct that in resolving disputes over implementation, I am foreclosed from revising the Award. Implementation must necessarily take into consideration the Grievant's present financial condition. I am satisfied that he does not currently have the ability to make a lump sum payment to the Board.
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> Financial instruments are an accepted method of payment. The nature of this case permits a finding that the term "pay" encompasses discharging the obligation in the form of the Promissory Note and Security Agreement of July 17, 1996. I do not believe this ruling violates the principle of *functus officio*, the Agreement or external law. On the contrary, it is in harmony with the Award. No interest is provided as the record does not show that the District has suffered any financial loss. Indeed, at most, it will serve as a conduit and transmit payments to its insurance carrier. Upon receipt of the executed Promissory Note and Security Agreement, the Board shall comply with the part of the award concerning reinstatement.

[3] The *Beattie* Court held that the circuit court erred in permitting the arbitration panel to reconsider the merits of its original decision, and vacated a second arbitration award. Noting that the case involved common-law arbitration, that the arbitrator's authority was governed solely by the arbitration agreement, and that the arbitration agreement had no express contractual provision regarding reconsideration, the *Beattie* Court stated that it would thus look to the common law for guidance.

> ". . . [a] fundamental common law principle [is] that once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration. The policy which lies behind this is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion.…
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> "'[W]hen an arbitrator has made and delivered his award, the special power conferred upon him ends. But an award must be final, complete, and coextensive with the terms of the submission.'" [*Id.* at 578-579, quoting *La Vale Plaza, Inc v RS Noonan, Inc*, 378 F2d 569, 572-573 (CA 3, 1967). (Emphasis added).]

[4] The doctrine of *functus officio* originated when the courts looked with disfavor upon arbitration proceedings. *Courier-Citizen, supra*, 702 F2d 279; *Teamsters Local 312 v Matlack, Inc*, 118 F3d 985, 991 (CA 3, 1997).

[5] The *Excelsior Foundry* court stated that the doctrine of functus officio "is hanging on by its fingernails and whether it can even be said to exist in labor arbitration is uncertain." 56 F.3d at 846. See also *Red Star Express Lines v Int'l Brotherhood of Teamsters, Local 170*, 809 F2d 103, 108 (CA 1, 1987). Although expressing "profound skepticism" regarding the doctrine, the *Excelsior Foundry* court declined to abrogate it. 56 F.3d at 847-848.