STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN STATE POLICE TROOPERS ASSOCIATION,

Plaintiff-Appellant,

v

STATE OF MICHIGAN and DEPARTMENT OF STATE POLICE,

Defendants-Appellees.

UNPUBLISHED
September 2, 2004

No. 242907
Ingham Circuit Court
LC No. 02-000502-CL

MICHIGAN STATE POLICE TROOPERS ASSOCIATION,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and DEPARTMENT OF STATE POLICE,

Defendants-Appellants.

No. 243948
Ingham Circuit Court
LC No. 02-000756-CL

MICHIGAN STATE POLICE TROOPERS ASSOCIATION,

Plaintiff-Appellant,

v

STATE OF MICHIGAN and DEPARTMENT OF STATE POLICE,

Defendants-Appellees.

No. 245567
Ingham Circuit Court
LC No. 02-001409-CL

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

In Docket No. 242907, plaintiff Michigan State Police Troopers Association (MSPTA) appeals as of right the Court of Claims' grant of summary disposition to defendants State of Michigan and Department of State Police. In Docket No. 243948, defendants State of Michigan and Department of State Police appeal by leave granted the Court of Claims' denial of their motion summary disposition. In Docket No. 245567, plaintiff MSPTA appeals as of right the Court of Claims' grant of summary disposition and sanctions to the same defendants. This Court consolidated the appeals. We reverse and remand in 242907, reverse in part in 245567, and affirm in 243948.

I

The MSPTA and Michigan State Police (MSP) are parties to a collective bargaining agreement (CBA). Two of the three consolidated appeals (docket nos. 242907 & 245567) began as a grievance the MSPTA brought on behalf of probationary State Police Trooper Jason Mercier, after the MSP notified Mercier of its intent to terminate him. The termination resulted from a complaint lodged by a female recruit against Mercier regarding an incident on February 2, 2001, at which time Mercier was also a recruit, at the State Police Training Academy. The MSP's UD-93 "Complaint Against Member" form, case number IA-026-01, stated:

II

> The allegation is that Recruit Jason D. Mercier made an inappropriate, offensive comment to a female recruit, Kimberly Noble, in violation of department policy, state and federal law. The alleged statement is "We could use a cup of coffee – bitch."

Noble lodged the complaint on February 9, 2001, the same day Mercier graduated from the MSP Recruiting School. In March 2001 (more than 30 days after Mercier graduated from recruit school) an investigation took place, and the MSP recommended Mercier be terminated under the "Termination of Probationary Employee" provisions of Article 11, Part B, § 3 of the CBA.

The MSPTA and Mercier filed a grievance on April 23, 2001.[1] The grievance proceeded to arbitration. The MSP asserted Mercier's termination was not grievable pursuant to the

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[1] The grievance stated:

> Tpr Mercier was interviewed on March 15, 2001 pursuant to IA-026-01, about alleged misconduct. March 27, 2001, Capt Darling wrote a memo to Tpr Mercier stating " . . my intention to separate you. ." from the Dept. Tpr Mercier appeared before Capt Sturdivant on Apr 12, 2001, with MSPTA Counsel, who advised that IA-026-11 should be conducted as a "misconduct," not "probationary" procedure. Capt Sturdivant wrote to Tpr Mercier on Apr 19, 2001, "it is my recommendation to uphold the termination." Tpr Mercier is entitled to MSPTA representation

(continued…)

Probationary Employee provisions of the CBA (Article 11, Part B) and thus was non-arbitrable. Following a December 19, 2001 hearing at which one witness testified for each side, the arbitrator bifurcated the proceedings, requesting post-trial briefing on the question whether Mercier's termination was appealable through the grievance and arbitration procedure before considering the substance of the grievance. The parties filed briefs, and the arbitrator concluded that the MSPTA's grievance was non-arbitrable, and that she had no authority to address the mertits of the grievance.

In April 2002, the MSPTA filed a verified complaint to vacate the arbitration award and remand for additional arbitration. The MSP moved for summary disposition, and the court granted the motion under MCR 2.116(C)(8), concluding that the arbitrator's award drew its essence from the CBA. The court denied the MSPTA's motion for reconsideration. The MSPTA's appeal of this dismissal is Docket No. 242907.

In September 2002, the MSPTA filed a second complaint to vacate the arbitration award and remand for additional arbitration, alleging that the award was obtained by fraud, which came to light through newly discovered evidence. The court dismissed this second complaint with prejudice under MCR 2.116(C)(7) and (C)(8), and assessed attorney fees, costs and sanctions totaling $6,000 against the MSPTA's counsel under MCR 2.114 and MCL 600.2591. The MSPTA's appeal of this dismissal is Docket No. 245567.

The issue in Docket No. 243948 is whether the arbitrator's decision in the Mercier matter collaterally estops arbitration of two subsequent grievances of MSP Troopers Steven League and Randy Wilkins. The MSPTA filed a complaint in May 2002 requesting that the circuit court order the MSP to proceed to arbitration on the League and Wilkins grievances. In July 2002, the MSP moved for summary disposition on a number of grounds, under MCR 2.116(C)(4), (7), (8) and (10), including collateral estoppel. The circuit court denied MSP's motion and granted the MSPTA's cross-motion, concluding that the MSPTA's appeal of the Mercier matter before this Court (docket no. 242907), stayed the preclusive and binding effect of the arbitration decision in the Mercier matter,[2] and ordering the parties to promptly proceed to arbitration in the League and Wilkins matters, under CBA Article 9.

(…continued)

> under Articles 8 & 9, as well as other Articles associated with misconduct & affirmative action. The allegation is false, and does not violate the Code of Conduct; and/or comes within the definition of affirmative assistance.
>
> * * *
>
> The proposed discipline should be set aside or significantly reduced. The investigation, memoranda, & all references to the matter, & the grievance should be destroyed. The grievant should be Made Whole Otherwise for all losses.

[2] The circuit court also concluded that the question whether the Mercier arbitration decision binds and precludes subsequent arbitration proceedings between the same parties regarding the (continued…)

II

A – **The Collective Bargaining Agreement**

Management Rights are set forth at Article 4 of the CBA, including:

> It is agreed that (except as limited by terms of this Agreement), the Employer retains the right to manage the affairs of the Department and to direct the working forces. Such functions of Management include (but are not limited to) the right to:
>
> * * *
>
> c. Direct the work of the employees covered by this Agreement, including the right to hire, to discharge . . . to establish job duties, to determine the amount of work needed . . . , subject to the provisions expressly set forth in this Agreement.
>
> * * *
>
> h. Determine the basis for selection, retention and promotion of employees for classifications within or not within the bargaining unit, as established in this Agreement, and as governed by any applicable Civil Service Regulation.

Defendants maintain they had the discretion to terminate, and did terminate, Mercier pursuant to Article 11, Part B, § 3, governing probationary employees:

> **[ARTICLE 11] PART B. PROBATIONARY EMPLOYEES**
>
> Section 1. Probationary Period.
>
> For the purposes of exercising rights under this contract all employees undergoing the required initial probationary period for the purposes of evaluation and training, including the time spent in "recruit school", shall be deemed probationary employees. . . .
>
> Section 2. Rights of Probationary Employees.
>
> a. A probationary employee, while assigned to the Michigan State Police Academy, and prior to being "sworn" as a Michigan State Police Trooper, shall only be entitled to the basic wage and fringe benefit provisions of this contract.

(…continued)

same issues is a matter to be resolved by an arbitrator before seeking review by a trial court.

b. Upon graduation from recruit school and taking the sworn oath of office as a Michigan State Police Trooper, a probationary employee shall have all the rights afforded to any other employee covered by this Agreement, except the following:

(1) The employee shall not be entitled to the protections of the discipline provisions of this Agreement until thirty (30) days after graduation from recruit school;

* * *

(6) The probationary employee shall not be entitled to the benefits or protections of the affirmative assistance provisions of this contract.

Section 3. Termination of Probationary Employee.

a. Written evaluations **shall** be prepared by the post commander or other assigned personnel summarizing job performance **of all probationary employees** at three (3), six (6), nine (9) and eleven (11) month intervals, which report shall be reviewed with the probationary employee. These evaluations shall extend, but are not limited to, such subjects as work performance, attendance, personality, temperament, ability to deal with the public (if the probationary employee is assigned such work) and other related areas of police work. These evaluations may be considered by the Employer in determining to retain the employee or to terminate his/her employment with the Department.

b. If, during the portion of the initial probationary period **subsequent to recruit school**, the Department has reason to believe based upon the evaluations of supervisory personnel that a probationary employee's employment should be terminated, the Employer shall advise the employee and the Association in writing at least thirty (30) calendar days before the termination of the probationary period. The employee, if he/she desires to contest such determination, shall, within five (5) calendar days, of receipt of notice request a conference with the immediate superior of the person making the determination to terminate his/her employment. After such conference, the officer reviewing same shall make his/her determination within five (5) calendar days and either rescind the order of termination or affirm the same, immediately providing written notice to the employee affected.

If the employee desires to contest this determination, he/she shall, within five (5) calendar days of receipt of notice, file a request for a hearing with the Director. A hearing will be conducted within five (5) calendar days by the Director or his/her designee, and within five (5) calendar days of the conclusion of said hearing, the Director may either rescind such termination or affirm the same, notifying the employee affected. No employee who has requested a review or a hearing shall

be terminated from employment until after completion of the conference and hearing procedures, and until receipt of the Director's final determination. The Director's determination shall not be appealable through the grievance procedure of this agreement.

Plaintiff MSPTA maintains that pursuant to Article 11, Part B, § 2(b)(1), quoted *supra*, which provides that 30 days after graduation from recruit school probationary employees are entitled to the protections of the CBA's discipline provisions (Art 8), Mercier should have been disciplined under Articles 8 and 9, which provide in part:

ARTICLE 8

DISCIPLINE AND AFFIRMATIVE ASSISTANCE

PART A. DISCIPLINE MISCONDUCT

Section 1. Scope

The Employer will utilize disciplinary action only for just cause toward employees who engage in violations of the Code of Conduct. It is the intention of the Employer to utilize discipline by progression, when feasible.

Section 2. Definitions.

a. Disciplinary Action. For the purposes of review thereof, disciplinary action shall mean a written warning, written reprimand, suspension without pay, and discharge. For the purposes of this Part, counseling, retraining, conditional service ratings and demotions are not disciplinary action. Nothing in this Part is intended to preclude a supervisor from verbally discussing isolated instances of minor misconduct with an employee in lieu of administering disciplinary action.

b. Investigatory Leave. Upon verbal notification followed within twenty-four (24) hours by written delineation of the reasons, an employee may be placed upon investigatory leave with pay for up to fifteen (15) calendar days as a result of the Employer's reasonable belief that the employee participated in an event of significant consequence to the Department, the employee, or the public. Such investigatory leave with pay shall be for the purpose of investigating the event. . . . Investigatory leave with pay shall create no negative inferences with reference to the affected employee, shall not be considered discipline, and is not subject to appeal.

* * *

Section 3. Application.

The various disciplinary actions are described as follows:

a. Written Warning. A written warning delineates minor violation(s) of the Code of Conduct not involving a violation of law and advises the employee that official notice has been taken thereof and that further misconduct of a similar nature will subject the employee to further disciplinary action. . . .

b. Written Reprimand. A written reprimand includes the personal discussion accompanied by a written notice that delineates violation(s) of the Code of Conduct. Its purpose is to advise the employee that further misconduct may result in additional disciplinary action including discharge. . . .

c. Suspension or Discharge After Investigation. If an investigation establishes just cause for disciplinary action, a suspension without pay not to exceed thirty (30) calendar days or a discharge may be issued after a hearing by the Discipline Appeal Board. . . .

d. Immediate Suspension Without Pay. When the Director or Acting Director forms a reasonable belief that an employee has committed a felony, as defined by the Michigan Penal Code, or in the event of a misdemeanor for which a warrant has been issued, he/she may suspend the employee without pay for such period as is required to reach a final determination through the procedures of this Agreement. . . .

Section 4. Association Participation.

Whenever the Employer and the employee mutually request or the employee requests assistance from the Association in helping work with an employee who may have engaged in conduct for which the employee may be, or has been disciplined, the Association shall cooperate in rendering necessary assistance.

Section 5. Grievances, Appeals, Hearings and Arbitration.

a. Written Warning or Written Reprimand. If an employee believes that any written warning or written reprimand is unfair, unjust or inaccurate, the employee may appeal within fifteen (15) calendar days after notification in writing to their District or Division Commander, who shall promptly schedule a Discipline Panel pursuant to Section 6. The decision of the Discipline Panel shall be final.

b. Suspension or Discharge. Upon receipt of written notice of the reasons for a . . . discharge, an employee may file a grievance pursuant to Article 9 of this Agreement commencing at Step 3. Upon receipt of a written Step 3 answer, the Association, on behalf of the employee, may within fourteen (14) calendar days, give written notice of the grievant's desire to convene a Discipline Appeal Board.

c. Except as provided in Section 3(d) of this Article, no suspension or discharge shall be invoked against any employee who has not accepted the discipline until a determination is reached by the Discipline Appeal Board.

d. Within fourteen (14) calendar days following the determination of the Discipline Appeal Board, the Association may give the Employer written notice of the Association's intent to convene a new hearing pursuant to the Step 4 arbitration procedures set forth in Article 9 of this Agreement. * * *[3]

ARTICLE 9

GRIEVANCE PROCEDURE

Section 1. Grievance Defined.

A grievance shall mean a complaint of violation, misapplication, or misinterpretation of this Agreement, a claim of unreasonable and arbitrary work order, or a claim that rules and regulations are not reasonable or involve discrimination in application, or a claim of discipline without just cause.

Section 2. Filing A Grievance.

Whenever an employee or the Association acting on behalf of any employee, or on behalf of all members of the Association, believes a cause for a grievance exists, the grievance procedure provided in this Article shall be followed. . . . .

* * *

Section 6. Presenting a Grievance.

In processing any grievance, the following steps shall be observed . . .

[description of Steps 1 through 3]

Step 4: Arbitration. In the event any employee, Association or group grievance is not resolved at Step 3, such grievance(s) may be referred to arbitration by the Association. . . .

[3] Article 8, Part B addresses Affirmative Assistance (counseling, retraining, demotion, etc.).

* * *

> The arbitrator shall have no authority except to pass upon alleged violations of the expressed written provisions of this Agreement, the unreasonableness or misapplication of a rule and regulation . . . or a claim of suspension, discharge or demotion without just cause.
>
> The arbitrator shall have no power or authority to add to, subtract from, ignore or modify any of the terms of this Agreement and shall not substitute his/her judgment for that of the Employer where the Employer is given discretion by the terms of this Agreement.
>
> The arbitrator shall construe this Agreement in a manner which does not interfere with the exercise of either the Employer's or the employees' and the Association's rights and responsibilities, except to the extent that such rights and responsibilities may be expressly limited by the terms of this Agreement.
>
> * * *
>
> The arbitrator may take steps necessary to correct any abuse or to provide a fair resolution to the grievance or issues presented; however, the arbitrator is without authority to change or rewrite any provisions of the Agreement or insert his/her wisdom for that of the Employer or Association. . . .
>
> There shall be no appeal of the decision of the arbitrator if made in accordance with the jurisdiction and authority conferred upon the arbitrator by this Agreement. However, any decision of the arbitrator, which a party fails to comply with, shall be enforceable by law.
>
> * * *
>
> Section 11. Scope of Review.
>
> Wherever review is provided elsewhere in this Agreement (e.g., certain limited forms of disciplinary action, hardship and employee conduct transfers, probationary employees**,** and unfair labor practice charges), such review shall be exclusive and not appealable under any circumstances under this Article.

B - **Arbitrability**

Defendants raised an arbitrability challenge. The arbitrator bifurcated the arbitrability issue from the substance of the grievance following the arbitration hearing, at which two witnesses testified, Capt. Richard Darling for the MSP, and Sgt. Michael Herendeen, President of the MSPTA, for the MSPTA. The parties were asked to brief the issue:

"Whether the Association has the right to challenge the Department's decision regarding how to terminate a probationary employee under Article 11, Part B?"

The arbitrator's Opinion and Award answered the question in the negative:

> A. After careful analysis of the evidence and the arguments of the parties, I find that the Association does not have the right to challenge, in the grievance arbitration procedure of Article 9, the Department's decision regarding how to terminate a probationary employee under Article 11, Part B.
>
> My finding is based on the following reasoning:
>
> > 1. As arbitrator, my primary obligation to the parties is to respect their bargain by enforcing the clear and unambiguous terms of the Agreement. Article 11, Part B, Section 3(b) clearly and unambiguously states that the "Director's determination shall not be appealable through the grievance procedure."
> >
> > 2. This provision coordinates with the clear and unambiguous language in Article 9, Section 11, which states, "Wherever review is provided elsewhere in this Agreement (e.g., probationary employees . . .), such review shall be exclusive and not appealable under any circumstances under this Article."
> >
> > 3. Under Article 9, Section 6, Step 4 of the Agreement I have no authority to ignore the terms of the Agreement. Granting the Association the right to grieve a Director's determination would ignore and violate Article 11, Part B, Section 3(b) and Article 9, Section 11.
> >
> > 4. No contractual provision grants the Association the right to challenge, via the grievance arbitration procedure, the Department's decision regarding how to terminate a probationary employee.
> >
> > 5. Under Article 9, Section 6, Step 4 of the Agreement, I have no authority to add such a provision or to modify the terms of the Agreement, which bar grieving the Director's determination.
> >
> > 6. Management has the inherent right to initiate employment actions. In the management rights clause of Article 4, sections c and h, the parties recognize that management retains the specific rights to discharge and to the [sic] determine the basis for retention of employees. Included within these rights is the right to determine how to terminate a probationary employee.

7. Under Article 9, Section 6, Step 4, the arbitrator is prohibited from substituting his or her judgment for that of the Department where the Department is given discretion by the terms of the Agreement.

8. Although the parties recognize management's right or discretion to initiate disciplinary action, they also recognize the Association's right to challenge management's determinations regarding discipline. For example, Article 9, Section 1 defines what constitutes a grievance and what matters may be grieved. In Article 8, Part A, Section 5 and Part B, Sections 6 and 7, the parties carefully delineated what adverse employment actions may be grieved and what actions may not be grieved. These examples show that, whenever the parties intended the Association to have a right to challenge a management disciplinary determination, they made that right clear and express and detailed the appropriate procedure. The absence of a provision granting the Association the right to challenge how the Department terminates a probationary employee strongly indicates the parties' intention that the Association does not possess such a right.

9. As the Association points out in its Brief, it has "achieved major inroads into the representation of probationary Troopers." Absent these inroads, probationary employees would have few rights and could be terminated without any appeal, either internal or external. Each of these "inroads" has been negotiated and is expressed in a contract provision. None of these "inroads" is based on implication or inference. Granting the Association the right to challenge how probationary employees are terminated, in the absence of an express provision, would depend entirely on implication and inference. Article 9, Section 6, Step 4 limits the arbitrator's authority to passing "upon alleged violations of the expressed written provisions" of the Agreement.

10. Bargaining history shows that the Association understood it could not challenge the Director's determination under Section 3(b) in the grievance arbitration procedure. The notes of the June 30, 1983 session indicate that the Association opposed adding the last sentence to Section 3(b) because there would be no right to appeal a Director's determination. In spite of the Association's initial opposition, the parties ultimately agreed to include the Department's proposal without change.

11. Granting the Association the right to grieve the Director's determination would have the effect of nullifying Article 9, Section 11 and the last sentence of Article 11, Part B, Section 3(b).

12. Article 11, Part B, Section 2(b)(1) does not grant probationary employees a right to be disciplined or the right to be terminated for disciplinary reasons. It simply provides certain rights and protections once management has determined that misconduct is the basis for termination.

13. The evidence on this record is not sufficient to establish that Section 2(b)(1) has been, or will be, eviscerated, unless the Association has the right to challenge how probationary employees are terminated. The evidence shows that no grievances have been filed since 1984 challenging how probationary employees are terminated until this grievance and another one were filed in 2001. This indicates that the Department has not sought to circumvent Section 2(b)(1) by handling all probationary terminations under Section 3(b). If, in the future, the Association's fears materialize and it perceives a developing trend of terminations under Section 3(b), which it believes should have been handled under Section 2(b), the remedy would be to negotiate an appeal procedure at the bargaining table. As detailed above, clear contract language in Article 9 and 11 ties the hands of any arbitrator to resolve the dilemma in favor of the Association's position.

14. There is a second reason why Section 2(b)(1) is not eviscerated. The Association has the right to challenge how the Department terminates a probationary employee in the context of the internal appeal process detailed in Section 3(b). The Association has the right to represent probationary employees during this process and raise the issue of whether the termination should have been handled under Section 2(b)(1).

B. For the following reasons, I further find that the Mercier's grievance is not arbitrable:

1. The evidence establishes that Mercier was terminated pursuant to [Art 11] Section 3 (b). He was never served with a statement of charges, the document used to initiate disciplinary action. Instead he was served with notice that the Department intended to separate him from employment pursuant to Section 3.

2. The basis for discharging Mercier under [Art 11] Section 3(b) was that his personality and temperament were not suitable for police work, as evidenced by an alleged statement. Section 3(a) authorizes management to consider "personality" and "temperament" when determining whether to retain or terminate probationary employees.

3. Because Mercier's termination was not disciplinary in nature, the protections of Article 8 are not available by operation of Article 11, Part B, Section 2(b)(1).

4. Because Mercier's termination was non-disciplinary in nature, Section 3(b) bars challenging the Director's determination in the grievance arbitration procedure.

5. Management's failure to issue Mercier written evaluations according to the terms of [Art 11] Section 3(a) does not spoil its determination to terminate him under Section 3(b). The last sentence of Section 3(a)

> features permissive, not mandatory language. It states that these evaluations "may be considered" by management in determining to retain or terminate employment. This language does not require management to consider evaluations.
>
> 6. Although the Association makes excellent arguments regarding single acts constituting misconduct and not being sufficient to establish personality and temperament, I have no authority to pass on the merits of these arguments because that would constitute testing the Director's determination in violation of Section 3(b).

The MSPTA filed an action to vacate the arbitration award and remand for arbitration. The State defendants moved for summary disposition under MCR 2.116(C)(8), and the court granted the motion, concluding the arbitrator's decision derived its essence from the CBA.

III

This Court reviews de novo the circuit court's grant of summary disposition. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 701; 597 NW2d 506 (1999). A motion for summary disposition under MCR 2.116(C)(8) examines the legal basis of the complaint and is tested by the pleadings alone. *Horace v Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

Judicial review of labor arbitration awards is limited; a court may not review an arbitrator's factual findings or decision on the merits. *Port Huron Area Sch Dist v PHEA*, 426 Mich 143, 150; 393 NW2d 811 (1986). Further,

> The legal basis underlying this policy of judicial deference is grounded in contract: the contractual agreement to arbitrate and to accept the arbitral decision as "final and binding." . . . . An arbitrator's jurisdiction and authority to resolve a particular dispute concerning the appropriate interpretation of a collective bargaining agreement derives exclusively from the contractual agreement of the parties; an arbitrator possesses no general jurisdiction to resolve such matters independent of the arbitration contract.
>
> * * *
>
> Whether an arbitrator exceeded his contractual authority is an issue for judicial determination. [*Id.* at 151-152.]

The CBA provides two methods to discharge probationary employees. The express language of Article 11, Section 3(b), states that a termination under that section is based upon mandatory evaluations of the probationary employees.[4] The arbitrator's decision addressed the MSP's right to choose whether to proceed under article 8 or article 11. However, this does not address the argument that the MSP did not, in fact, proceed under article 11, because the decision to terminate was not based on the supervisory evaluations as contemplated by the CBA, or that if it did proceed under article 11, it did so in violation of the CBA because it failed to conduct evaluations as required by article 11. The arbitrator's only statement in this regard was that the failure to issue evaluations was not fatal because the last sentence of Section 3(a) stating that evaluations may be considered is permissive, not mandatory. However, this ignores that subsection 3(a) states that the evaluations **shall** be performed, and subsection 3(b), which defendants claim to have been pursuing, speaks of a decision to terminate that is based upon the evaluations of supervisory personnel.

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[4] The MSPTA's post-hearing brief argued in pertinent part:

> Article 11, Part B, contains two distinct ways that a probationary employee may be separated from the Department during that period of his career:
>
> --by way of misconduct charges, which fall under Part B, Section 2(b)(1); and,
>
> --by way of inadequate performance, as expressed and documented by the command that the Department *shall* prepare written evaluations of the job performance of each probationary employee [Part B, Section 3(a)].
>
> As became apparent at the hearing on this matter, the Department, for its own reasons, chose some time ago to abandon large chunks of Part B, Section 3. It no longer conducts evaluations on the stated schedule, claiming that its unilateral change of the probation time frame (via Civil Service) no longer required its performance of said evaluations.
>
> Yet, we are faced with a disingenuous argument contained within that same contract paragraph: the Department claims the right to discharge without impartial review, claiming bits and pieces of the paragraph which is [sic it] wishes to obey and enforce at its leisure.
>
> All contracts, be they labor or general in nature, include an exchange of promises and performances. Put another way, with *rights* come necessary *obligations*. If the Department claims the right to discharge outside the grievance procedure via Part B, Section 3 [of Article 11], it *must* do so upon its obligation to fairly and objectively perform evaluations upon the probationary employees.

Thus, the arbitrator's award in this regard did not draw its essence from the CBA, and the matter must be resubmitted to arbitration. In No. 242907, we reverse the circuit court's grant of summary disposition to defendant.

IV

Our disposition of No. 242907 makes it unnecessary to address the fraud claim in No. 245567. Because the matter will be resubmitted, the MSPTA will have an opportunity to present the dealings between the MSPTA and the MSP regarding the Richardson grievance and arbitration, discussed *infra*. We must address, however, the court's assessment of costs against the MSPTA in No. 245567.

This Court reviews the circuit court's finding that plaintiff violated MCR 2.114(D) for clear error. *In re Attorney Fees and Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). MCR 2.114(D) provides:

> Effect of Signature. The signature of an attorney . . . constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal or existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> * * *
>
> (3) Definitions. As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit.

There was no indication that the complaint was initiated to harass, embarrass or injure the MSP. Nor was there any indication that the MSPTA lacked a reasonable basis to believe that the asserted facts were untrue. The basis of the complaint was that after the arbitration, the MSPTA, in the course of going through records regarding an unrelated matter, discovered phone logs and e-mails disclosing that when MSP witness Capt. Darling had served as the head of the MSPTA, he had dealings with the MSP in which he had asserted, and the MSP had accepted, that a probationary trooper who had been terminated (Richardson) should be able to grieve the termination under article 8, although the MSP had initially taken the position that the termination was under article 11. The MSPTA claimed that Darling had led the arbitrator and the MSPTA to believe that there had never been any understandings or grievances regarding the propriety of using one article or the other, although he knew of information to the contrary. While the MSP challenged the relevance of the Richardson arbitration, the MSPTA's diligence in failing to bring it forward itself, and the effect that the arbitration would have had on the arbitrator in the instant case, the underlying factual assertions were not shown to be false.

Further, there was no basis to conclude that the complaint was not warranted by existing law or a good faith argument for an extension of existing law, or that it was devoid of arguable legal merit. The MSPTA claimed and supported that the nature of labor relations law is such that the prior resolution of the issue would be of great relevance and significance. The MSPTA also cited cases where arbitrations were set aside based on fraud. We conclude that the court abused its discretion in granting sanctions because none of the factors of MCR 2.114(D) or MCL 600.2591 were present.

VI

Lastly, in Docket No. 243948, we need not address the propriety of the court's denial of MSP's motion for summary disposition regarding the two unrelated grievances in light of our disposition in Docket No. 242907. We further observe that the MSP cites no authority for the proposition that a party to a CBA can avoid the dispute resolution mechanisms of the CBA by asserting collateral estopel before a court, rather than the arbitrator.

We affirm in Docket No. 243948. We reverse and remand in No. 242907. We reverse the grant of sanctions in No. 245567. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Helene N. White