# STATE OF MICHIGAN

# COURT OF APPEALS

CITY OF PONTIAC,

Plaintiff-Appellee,

v

MICHIGAN ASSOCIATION OF POLICE and PONTIAC POLICE OFFICERS ASSOCIATION,

Defendants-Appellants.

UNPUBLISHED
February 19, 2009

No. 280919
Oakland Circuit Court
LC No. 2007-079892-CL

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendants Michigan Association of Police and the Pontiac Police Officers Association (collectively the "union") appeal as of right from a circuit court order vacating an arbitration award that required plaintiff, city of Pontiac (the "city"), to reinstate Martice Berry to his employment as a Pontiac Police Officer. Because we conclude that the arbitrator did not exceed the scope of his authority and that enforcement of the arbitrator's decision does not violate public policy, we reverse the circuit court's decision and reinstate the arbitration award.

Initially, we note that the Michigan Arbitration Act, MCL 600.5001 *et seq*., does not apply to arbitration proceedings conducted pursuant to a collective-bargaining agreement. MCL 600.5001(3). Thus, MCR 3.602, which "governs statutory arbitration," does not apply to this case.

Labor arbitration awards involving Michigan public employees have traditionally been reviewed under a very deferential standard adopted from United States Supreme Court decisions in federal labor arbitration cases. See *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986). "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.'" *Id*. Thus, an arbitrator has "no general jurisdiction to resolve matters independent of the arbitration contract." *Id*. at 150-151.

"A court may not review an arbitrator's factual findings or decision on the merits." *Id*. at 150. Rather, "[t]he only issue is whether the arbitrator, in granting the award, disregarded the terms of his employment and the scope of his authority as expressly circumscribed in the arbitration contract." *Id*. at 151. Accordingly, "an award is properly vacated when that award is dependent upon an arbitrator's interpretation of provisions expressly withheld from arbitral

jurisdiction, or upon an arbitrator's disregard and contravention of provisions expressly limiting arbitral authority." *Id*. at 152.

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [*Id*. at 152, quoting *United Steelworkers v Enterprise Wheel & Car Corp*, 363 US 593, 597; 80 S Ct 1358; 4 L Ed 2d 1424 (1960).]

A court may "not substitute its opinion on the merits of the grievance for that of the arbitrator." *Id*. at 160; see, also, *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 118-119; 607 NW2d 742 (1999). The same is true of "questions of contract interpretation." *Roseville Community School Dist v Roseville Federation of Teachers*, 137 Mich App 118, 124; 357 NW2d 829 (1984). Further, "[w]here it is contemplated [that] the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that regard." *City of Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 6; 438 NW2d 875 (1989), quoting *United Paperworkers Int'l Union v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987).

"Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement." *Major League Baseball Players Ass'n v Garvey*, 532 US 504, 509; 121 S Ct 1724; 149 L Ed 2d 740 (2001). "The fact that an arbitrator's interpretation of the contract is wrong is irrelevant." *Roseville Community School Dist*, *supra* at 123. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union*, *supra* at 38. "The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Id*. at 37. By itself, "improvident, even silly, factfinding," is insufficient to justify overturning an arbitration award. *Id*. at 39; see, also, *Major League Baseball Players Ass'n*, *supra* at 509.

In this case, the arbitrator found that Berry ran numerous LEIN inquiries on his ex-girlfriend and her new boyfriend. He found that this activity supported the charge of harassment "to some degree," but did not merit termination. The arbitrator found that the evidence did not sufficiently support the complainants' claims that Berry repeatedly drove by their parents' homes. The arbitrator found that Berry's telephone calls and lawsuit against his ex-girlfriend were acts of harassment, but were not committed in Berry's official capacity as a police officer. The arbitrator questioned Berry's motives for effectuating a traffic stop of his ex-girlfriend's new boyfriend, but explained that if the city had presented a proper arbitration case with witnesses and cross-examination, he would have been able to determine the degree of harassment that was in fact occurring. Nonetheless, he concluded that there was little question that Berry had harassed the boyfriend.

The arbitrator also found, however, that the city failed to provide Berry with proper notice of the charges, in violation of the collective-bargaining agreement. At the arbitration hearing, the city failed to present any witnesses who participated in the investigation. The arbitrator found that the evidence presented by the city was less than convincing and not subject to cross-examination, that the city had conducted a less-than-thorough investigation, and that the city recorded Berry's interview in violation of the collective-bargaining agreement.

The arbitrator stated that he could not and would not overlook the city's violation of Berry's fundamental rights under the collective-bargaining agreement. He questioned whether the city was biased against Berry. He concluded that "[i]n consideration of the charge being that of a personal matter with the complainants with a minimum of official Police authority involved, the aborting of the employee rights of the Collective Bargaining Agreement due the Grievant, . . . the Employer has not met its burden of proving just-cause to justify the Grievant's termination."

Applying the applicable standard of review, we note that the city does not claim that the arbitrator applied any contract provisions expressly withheld from arbitration, or that he disregarded any provisions expressly limiting his authority. The record discloses that the arbitrator considered the charges against Berry, and the city's violations of the collective-bargaining agreement and, consistent with his authority, devised remedies for the contract violations he found. Courts cannot disagree with an arbitrator's honest judgment in that regard. *City of Lincoln Park*, *supra* at 6. Contrary to the city's argument, courts have "no business" determining that the arbitrator struck an improper balance between Berry's misconduct and the city's violation of the collective-bargaining agreement. See *United Paperworkers Int'l Union*, *supra* at 37. Whether the arbitrator found, and properly considered, whether any prejudice resulted from the city's contract violations goes to the merits of his decision, which is outside the applicable scope of judicial review.

In sum, we conclude that the arbitrator interpreted and applied the parties' collective-bargaining agreement, and did not dispense his own brand of industrial justice. Right or wrong, his award draws its *essence* from the collective-bargaining agreement and, therefore, should be enforced.

We disagree with the circuit court's determination that enforcing the arbitration award would violate public policy.

The Supreme Court has stated that "[a] court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Id*. at 42. "That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Id*.

In *United Paperworkers Int'l Union*, *id*. at 43, the Court noted that in *W R Grace & Co v Local Union 179, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 US 757; 103 S Ct 2177; 76 L Ed 2d 298 (1983), the Supreme Court held that a reviewing court "may not enforce a collective-bargaining agreement that is contrary to public policy, and stated that the

question of public policy is ultimately one for resolution by the courts." The Court "cautioned, however, that a court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where *the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests*." *Id*. (emphasis added; internal quotations and citations omitted). The Court noted that in *W R Grace*, it had "identified two important public policies that were potentially jeopardized by the arbitrator's interpretation of the contract: obedience to judicial orders and voluntary compliance with Title VII of the Civil Rights Act of 1964," but that the Court had gone "on to hold that enforcement of the arbitration award in that case did not compromise either." *Id*. The Court further stated:

> Two points follow from our decision in *W R Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other laws and legal precedents rather than an assessment of general considerations of supposed public interests. At the very least, an alleged public policy must be properly framed under the approach set out in *W R Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced. [*Id*. (internal quotations and citation omitted).]

Applying these principles to the case before it, the *United Paperworkers Int'l Union* Court found:

> The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W R Grace* that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement. [*Id*. at 44.]

The Court added that, even if the Court of Appeals' formulation of public policy were accepted, a court would need to draw an inference from evidence of marijuana found in the grievant's car that the grievant had been using marijuana at work. *Id*. However, drawing inferences from the evidence was exclusively within the arbitrator's purview and, therefore, was outside the Court's permissible scope of review. *Id*. at 44-45.

Michigan courts have adopted the standards set out in *United Paperworkers Int'l Union* and *W R Grace*. See *City of Lincoln Park, supra* at 6-8 (no public policy violation found where arbitration award ordered reinstatement of a police officer who engaged in a consensual, although improper, sexual relationship while on duty with a woman who had called for assistance); compare *Gogebic Medical Care Facility v AFSCME Local 992, AFL-CIO*, 209 Mich App 693, 697; 531 NW2d 728 (1995) (because the arbitrator found that the grievant had abused

a patient, requiring her to be listed on a particular register, and applicable state regulations explicitly forbade a medical facility from employing a listed individual, enforcement of the arbitration award ordering reinstatement would violate public policy by forcing the employer to break the law).

In the present case, the city argues that enforcing an arbitration award requiring it to reinstate Berry would violate public policy prohibiting misuse of the LEIN system, and would violate standards adopted by the Michigan Commission on Law Enforcement Standards ("MCOLES"). The city adds that Berry's harassment of the complainants amounted to stalking, that Berry's activities were in potential violation of 42 USC 1983, and that Berry's reinstatement is inconsistent with one of the stated purposes of the collective-bargaining agreement, to benefit the citizens of Pontiac.

The city cites 2008 AACS R 28.14607, which provides, consistently with MCL 28.609b(2), that an officer who *discloses* information obtained from the LEIN system shall be "suspended." However, the rule does not mention *termination*, nor does it address improper LEIN *usage*, even for personal reasons. Here, the arbitrator specifically found that the state police had concluded that there was insufficient evidence that Berry had *disclosed* LEIN information. The arbitrator did not find that Berry's LEIN usage violated R 28.14607 or MCL 28.609b(2). In concluding otherwise, the circuit court exceeded the permissible scope of its review. Thus, the city has failed to establish a dominant and well-established public policy that would be violated by enforcing the arbitration award.

The city argues that the circuit court properly found that enforcing the arbitration award would require the city to violate MCOLES standards requiring good moral character. We disagree.

MCOLES is a state agency charged with promulgating rules establishing minimum law enforcement officer standards, including minimum standards for "moral fitness." See MCL 28.609(1)(a). In pertinent part, 2008 AC R 28.14203(e) provides that "[a] person selected to become a law enforcement officer" shall

> [p]ossess *good moral character* as determined by a favorable comprehensive background investigation covering school and employment records, home environment, and personal traits and integrity. Consideration shall be given to a history of, and the circumstances pertaining to, having been a respondent to a restraining or personal protection order. Consideration shall also be given to all law violations, including traffic and conservation law convictions, as indicating a lack of good moral character.

However, R 28.14203 is contained in Part 2, which addresses selection and employment standards. By contrast, Part 6, entitled Investigations and Revocations, R 28.14601 *et seq.*, does not mention moral fitness. Instead, R 28.14604 and R 28.14605 provide, consistently with MCL 28.609b, that an officer's certification may be revoked upon conviction of a felony, and for making materially false or fraudulent statements during the application process.

Thus, the "good moral character" language on which the city relies applies to new recruits. There is no similar language allowing an officer such as Berry to be decertified based

on lack of moral fitness. Thus, the city has failed to show that there is an explicit, well-defined, and dominant public policy against the *continued* employment of a certified law enforcement officer based on a perceived lack of moral fitness.

In any event, even if there was such public policy, the arbitrator did not address the issue whether Berry possessed good moral character. Nonetheless, the circuit court found that in harassing the complainant and misusing the LEIN system, Berry violated the MCOLES requirement that he possess good moral character. In doing so, however, the circuit court must necessarily have drawn inferences from the evidence presented to the arbitrator, thereby exceeding the permissible scope of its review. This is not a situation akin to *Gogebic*, *supra*, where, for example, an arbitration award required an employer to reinstate an officer who had been convicted of a felony, which would clearly violate MCL 28.609b(1). Thus, the circuit court erred in refusing to enforce the arbitration award based on public policy concerns related to the MCOLES standards.

The city argues that Berry's conduct was akin to stalking, as defined in MCL 750.411h(1)(d), and was an arguable violation of the complainants' civil rights under color of state law, contrary to 42 USC 1983. We disagree.

The circuit court did not reach these issues. More importantly, the arbitrator did not find that Berry had engaged in conduct that met the statutory definition of stalking, or that he violated the complainants' civil rights. To conclude otherwise, as the city urges, this Court would need to go outside its proper scope of review and draw inferences from the evidence presented to the arbitrator. We decline to do so.

Lastly, the city argues that the arbitration award violates one of the goals of the collective-bargaining agreement, i.e., to benefit the citizens of Pontiac. We again disagree.

The collective-bargaining agreement is not a law or legal precedent. Thus, it does not qualify as an explicit, well-defined, and dominant public policy under the standards set out in *W R Grace* and *United Paperworkers Int'l Union*. Instead, the goal of promoting orderly and peaceful labor relations, for the benefit of the citizens of Pontiac, is a general consideration of the public interest, and does not provide a basis to refuse to enforce the arbitration award.

For these reasons, we reverse the circuit court's order and reinstate the arbitrator's decision.

Reversed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray