STATE OF MICHIGAN

COURT OF APPEALS

OTTAWA COUNTY,

Plaintiff/Counter-Defendant-Appellee,

v

POLICE OFFICERS ASSOCIATION OF MICHIGAN,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
June 30, 2009

No. 285131
Ottawa Circuit Court
LC No. 06-056547-CL

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant/counter-plaintiff Police Officers Association of Michigan (POAM) appeals as of right the trial court's order denying its motion for summary disposition and granting in part plaintiff/counter-defendant Ottawa County's motion for summary disposition. We affirm.

I

Ottawa County and the POAM are parties to a collective bargaining agreement (CBA) that was in effect from August 24, 2004 to December 31, 2005. After the CBA expired, the parties signed a new CBA that was in effect from March 1, 2006 to December 31, 2008. The CBAs include an identical provision permitting "any employee having a grievance in connection with the terms of" the CBA "or the rules and regulations" of the Ottawa County Sheriff's Department or the county to appeal the matter, along with the POAM, to binding arbitration. This case arises out of the discharge of Ottawa County corrections officer Catherine Whiting. Corrections officers employed by the county are part of a collective bargaining unit represented by the POAM. The events leading up to Officer Whiting's discharge, and the discharge itself, occurred during the interim period between the effective dates of the CBAs.

On February 15, 2006, while Officer Whiting was off duty, she learned that her husband had engaged in an extra-marital affair with a female acquaintance, Holly Gerbers. Upon learning of the affair, Officer Whiting telephoned Holly and threatened to kill her. The following day, Officer Whiting was suspended from her duties pending an internal investigation. At her disciplinary hearing on February 24, Officer Whiting admitted violating department policy and procedure, but declined to resign. At the conclusion of the hearing, Sheriff Gary Rosema

informed Officer Whiting that her employment was terminated. On March 1, the POAM filed a grievance on Officer Whiting's behalf challenging the validity of her discharge. On March 27, the officer was given the opportunity to explain her grievance at a "Step III Hearing." Following the hearing, Sheriff Rosema sent Officer Whiting a "Step III Answer" affirming his decision to terminate her employment and addressing the arbitrability of her grievance:

> SPECIAL NOTE: As part of my formal response, [Richard] Schurkamp [the Human Resources Director for Ottawa County] has shared the following information on the part of Ottawa County regarding this process. That the county's position with regard to arbitrability is as follows. Due to the fact that the issue giving rise to this grievance (February 24, 2006 termination) arose after the expiration of the [CBA] and prior to ratification of a new [CBA] (March 1, 2006), it is the employer's position (in keeping with Ja[kl]inski vs. Ottawa County), that the union does not have access to binding arbitration in this case.

On April 17, the POAM filed a petition with the Michigan Employment Relations Commission (MERC) requesting the appointment of an arbitrator pursuant to the expired CBA. On April 25, the MERC sent a list of five potential arbitrators to the POAM and the county. James DeVries, a POAM business agent, and Sheriff Rosema discussed the list and agreed on arbitrator Ruth Kahn. On June 14, Kahn sent a letter to DeVries and Ottawa County counsel John Gretzinger indicating that the arbitration hearing would be held on October 6. On September 18, Gretzinger sent POAM counsel Douglas Gutscher a letter outlining the county's position on the arbitrability of Officer Whiting's grievance. Gretzinger explained that because "Officer Whiting's discharge arose, was investigated and her discharge authorized and implemented entirely within the hiatus period between [CBAs]," she "has no right to arbitrate the merits of her discharge . . . ." Gretzinger also sent Kahn a letter indicating that the county would not participate in the scheduled arbitration hearing. Thereafter, Gutscher sent Kahn a letter stating the POAM's position on the arbitrability of the grievance. On October 2, Kahn advised the parties that the issue of arbitrability would be addressed at the hearing on October 6.

Ottawa County filed a complaint for declaratory and injunctive relief on October 5, asserting that the county had no obligation to submit to arbitration. Later that day, the trial court issued a temporary restraining order adjourning the scheduled arbitration hearing. On November 21, the POAM filed a counterclaim asserting that the county: 1) breached the parties' CBAs by refusing to submit to arbitration; 2) entered into an agreement to arbitrate through its actions; and 3) terminated Officer Whiting's employment without just cause. On February 1, 2008, the POAM filed a motion for summary disposition under MCR 2.116(C)(8) as to the county's complaint and Count I of the counterclaim, and under MCR 2.116(C)(7) and (10) as to Count II of the counterclaim. On the same day, Ottawa County filed a motion for summary disposition under MCR 2.116(C)(8) and (10) as to Count III of the counterclaim. On February 11, the county filed a response to the POAM's motion asserting that the county was entitled to summary disposition under MCR 2.116(C)(8), (C)(10), and (I)(2) as to its complaint and Counts I and II of the counterclaim.

Following a hearing on the parties' motions, the trial court ruled in favor of Ottawa County as to all points relevant on appeal. The court found that: 1) the county was under no obligation to submit Officer Whiting's grievance to arbitration because her discharge occurred during the interim period between the effective dates of the CBAs; 2) the county's actions after

her discharge amounted, at most, to a common law agreement to arbitrate, which was expressly revoked by the county; and 3) the county had just cause to terminate Officer Whiting's employment. The POAM now appeals as of right.

II

On appeal, the POAM argues that the trial court erred in concluding that Ottawa County has no obligation to submit Officer Whiting's grievance to arbitration under the terms of the expired CBA. According to the POAM, the county is obligated to arbitrate the grievance because the arbitration provisions of an expired CBA remain in effect until the parties reach an impasse in negotiating a new CBA, and the parties in this case never reached an impasse. The POAM additionally argues that the county is obligated to arbitrate Officer Whiting's grievance under the terms of the new CBA. We disagree.

The trial court granted the county summary disposition on this issue pursuant to MCR 2.116(C)(8) and (I)(2), finding that the POAM failed to state a claim upon which relief may be granted.

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Summary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if the opposing party, rather than the moving party, is entitled to judgment.

The public employment relations act (PERA), MCL 423.201 *et seq*., governs public labor relations in Michigan. *Detroit Fire Fighters Ass'n IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008). The PERA requires employers and unions to collectively bargain on matters comprising "mandatory subjects of bargaining." *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one that imposes a significant or material impact on "wages, hours and other terms and conditions of employment." MCL 423.215(1); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177; 445 NW2d 98 (1989). "Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under § 10(1)(e) of the PERA." *Southfield Police Officers Ass'n*, *supra* at 178, citing MCL 423.210(1)(e). When a CBA expires, the employer has a continuing duty to bargain in good faith to obtain a new CBA with regard to mandatory subjects. *Local 1467, Int'l Ass'n of Firefighters v Portage*, 134 Mich App 466, 472; 352 NW2d 284 (1984). Neither party to the expired CBA may take unilateral action on a mandatory subject unless an impasse has been reached in contract negotiations, and if the employer takes such action before impasse, an unfair labor practice has been committed. *Ottawa County v Jaklinski*, 423 Mich 1, 13; 377 NW2d 668 (1985); *Local 1467, Int'l Ass'n of Firefighters v Portage*, *supra* at 473; MCL 423.210(1)(e).

"Among the mandatory subjects of bargaining is grievance resolution, including arbitration." *Gibraltar School Dist v Gibraltar MESPA-Transportation*, 443 Mich 326, 337; 505 NW2d 214 (1993). While most mandatory subjects of an expired CBA may not be unilaterally changed before an impasse has been reached in negotiations, there are several exceptions to this rule, including in regard to grievance arbitration. *Id*. at 337, 345-346. The exceptions regarding grievance arbitration are premised on the consensual, rather than compulsory, nature of arbitration. *Id*. at 337-341, 345-346; *Jaklinski*, *supra* at 22-23.

In *Jaklinski*, *supra*, our Supreme Court addressed for the first time "whether the right to grievance arbitration of an unjust discharge claim survives the expiration of the [CBA] by which it is created." *Jaklinski*, *supra* at 7. In that case, a deputy sheriff, Diedre Jaklinski, lost her position after expiration of a CBA and after negotiations for a new CBA had reached an impasse. *Id*. at 8, 10. The POAM filed a request for grievance arbitration on Jaklinski's behalf, asserting that her employer's failure to reappoint her was not for just cause in violation of the expired CBA. *Id*. at 11. Jaklinski posed three possible sources for an obligation to arbitrate after expiration. *Id*. at 12. The first was that her employer had a duty not to unilaterally alter mandatory subjects of bargaining, including arbitration, during negotiations until impasse. *Id*. The Court held that Jaklinski could not "rightly claim that her right [to arbitrate] survived the agreement's expiration because it was a mandatory subject of bargaining which the employer could not alter prior to impasse" because "her grievance arose and was denied after impasse was reached and after the employer's duty had terminated" and "such an 'unfair labor practice' claim is within the exclusive jurisdiction of [the] MERC." *Id*. at 7-8, 13-14.

In addressing the third prong of Jaklinski's argument–that a presumption of arbitrability arises when a CBA fails to expressly state that the duty to arbitrate terminates with the agreement–the Court considered the United States Supreme Court's decision in *Nolde Bros v Bakery & Confectionery Workers Union*, 430 US 243; 97 S Ct 1067; 51 L Ed 2d 300 (1977). The *Nolde Bros* Court held that under the parties' CBA, severance pay disputes were arbitrable following the expiration of the CBA. *Nolde Bros*, *supra* at 255. The *Jaklinski* Court stated that there are four distinct approaches to the holding in *Nolde Bros*. *Jaklinski*, *supra* at 17. The Court adopted the fourth approach–"that *Nolde* is factually limited to grievances regarding contract rights which can vest or accrue while a [CBA] is in effect, but which may not ripen until after its expiration." *Id*. at 7, 19-22. The Court held that Jaklinski's "right to be reappointed except for just cause was not the kind of right which could accrue over time or which could vest upon a particular contingency" and, therefore, that the right "did not survive the expiration of the [CBA]." *Id*. at 7, 26, 29.

Following *Jaklinski*, the United States Supreme Court issued its decision in *Litton Financial Printing Div v NLRB*, 501 US 190; 111 S Ct 2215; 115 L Ed 2d 177 (1991). Our Supreme Court summarized the facts and procedural history in *Litton* as follows:

> In *Litton*, the expired [CBA] contained a two-step grievance procedure with arbitration as the final step. During the hiatus between contracts, and without consulting the union, the employer eliminated a portion of its operations and laid off workers. The union demanded grievance procedures and arbitration concerning the layoffs pursuant to the terms of its prior contract with the employer. The employer refused to process or arbitrate the grievances. The [National Labor Relations Board (NLRB)] upheld the union's charge of an unfair

labor practice and ordered grievance procedures and arbitration. The Supreme Court granted the employer's petition limited to the issue of the right to arbitration postcontract. Justice Kennedy's opinion for the Court differentiates two sources for imposing an obligation on an employer to arbitrate a dispute arising after the expiration date of one [CBA] but before the effective date of any successor agreement. These sources might be called the statutory obligation and the contract obligation. [*Gibraltar*, *supra* at 335-336 (footnotes omitted).]

In regard to the statutory obligation to arbitrate, the *Litton* Court stated, in part:

> Sections 8(a)(5) and 8(d) of the [National Labor Relations Act (NLRA)], require an employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." . . . The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. See [*NLRB v Katz*, 369 US 736; 8 L Ed 2d 230; 82 S Ct 1107 (1962)]. . . . The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed. . . .
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> The Board has ruled that most mandatory subjects of bargaining are within the *Katz* prohibition on unilateral changes. The Board has identified some terms and conditions of employment, however, which do not survive expiration of an agreement for purposes of this statutory policy. . . .
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> In [*Hilton-Davis Chem Co*, 185 NLRB 241, 242 (1970)], the Board determined that arbitration clauses are excluded from the prohibition on unilateral changes, reasoning that the commitment to arbitrate is a "voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties. . . . Arbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." The Board further relied upon our statements acknowledging the basic federal labor policy that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." . . . Since *Hilton-Davis*, the Board has adhered to the view that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz*, continue in effect after expiration of a [CBA].
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> We think the Board's decision in *Hilton-Davis* . . . is both rational and consistent with the Act. The rule is grounded in the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration. The rule conforms with our statement that "no obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." We reaffirm today that under the NLRA arbitration is a matter of consent,

and that it will not be imposed upon parties beyond the scope of their agreement. [*Litton*, *supra* at 198-201 (citations omitted).]

The *Litton* Court then addressed the contractual obligation to arbitrate and interpreted the Court's earlier decision in *Nolde Bros*, *supra*, stating, in part:

> The duty not to effect unilateral changes in most terms and conditions of employment, derived from the statutory command to bargain in good faith, is not the sole source of possible constraints upon the employer after the expiration date of a [CBA]. A similar duty may arise as well from the express or implied terms of the expired agreement itself. This, not the provisions of the NLRA, was the source of the obligation which controlled our decision in *Nolde Brothers* . . . .
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> [W]e come to the crux of our inquiry. We agree with the approach of the Board and those courts which have interpreted *Nolde Brothers* to apply only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it. *Nolde Brothers* does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. A rule of that sweep in fact would contradict the rationale of *Nolde Brothers*. The *Nolde Brothers* presumption is limited to disputes arising under the contract. A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.
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> Any other reading of *Nolde Brothers* seems to assume that postexpiration terms and conditions of employment which coincide with the contractual terms can be said to arise under an expired contract, merely because the contract would have applied to those matters had it not expired. But that interpretation fails to recognize that an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. . . . [*Litton*, *supra* at 203, 205-206.]

In *Gibraltar*, *supra*, our Supreme Court again addressed whether the arbitration clause of a CBA survives the expiration of the CBA that created it. *Gibraltar*, *supra* at 328. The Court adopted the *Litton* Court's rationale with regard to both the statutory and contractual obligation to arbitrate. The *Gibraltar* Court stated that although federal precedent developed under the NLRA is not controlling, courts of this state look to it for guidance in interpreting the PERA. *Id*. at 335. The Court noted that a "unanimous court in *Litton* agreed that there is no statutory right to arbitration under the NLRA and refused the invitation to reject the NLRB's decision, relying almost totally on the consensual nature of arbitration." *Id*. at 338 (footnote omitted). The Court then noted several additional sources of guidance and addressed its previous decision in *Jaklinski*, *supra*:

> We have the benefit of the decision of the MERC in this case, which was decided before the Supreme Court issued its opinion in *Litton*.[12] The MERC was forced to use the principles announced in *Nolde Bros* . . . , the lead case on contract obligation post [CBA], as well as NLRB authority implementing *Nolde Bros*, and our decision in [*Jaklinski*, *supra*], which also drew on *Nolde Bros*. However, the MERC, as a matter of interpreting the PERA, reached a conclusion that matches *Litton's* interpretation of the NLRA. . . . [T]he MERC stated, "[A]n employer's obligation to arbitrate post-contract extends only to those hiatus grievances which involve 'vested or accrued rights,'" that is, rights under the contract obligation.
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> [12] In [*Jaklinski*, *supra*], this Court addressed the issue of postexpiration arbitration. . . . The facts led to three possible sources for an obligation to arbitrate after expiration. The first was that an employer had to maintain mandatory subjects of bargaining, including arbitration, during negotiations until impasse. We stated that "this line of reasoning . . . logically follows" but rejected the argument because the parties had bargained to impasse. *Id*. at 13. This statement about the logic of the argument was not an acceptance of the doctrine into Michigan law. . . . The third possible source of the obligation discussed in *Jaklinski* is the *Nolde Bros* . . . contract obligation. [*Gibraltar*, *supra* at 339-340 and n 12.]

The *Gibraltar* Court concluded that on the basis of legislative intent, a weighing of the policy considerations regarding the consensual nature of arbitration, and federal and state precedent, "the Court in *Litton*, and the MERC in this case, reached the correct conclusion that there is no statutory duty to arbitrate after expiration of a [CBA]." *Id*. at 345-346.

In regard to the contractual obligation to arbitrate, the *Gibraltar* Court noted that "in *Jaklinski*, a majority of this Court decided that the proper application of *Nolde Bros* to the PERA was that 'the right to grievance arbitration survives the expiration of the [CBA] when the dispute concerns the kinds of rights which could accrue or vest during the term of the contract.' In *Litton*, the Court ended at least the initial round of the debate on the scope of *Nolde Bros* in a fashion identical to our decision in *Jaklinski*." *Id*. at 348 (citation omitted). The *Gibraltar* Court held that because "the PERA does not create a statutory duty to arbitrate grievances arising after the expiration of a [CBA]" and "the grievances filed in [that] case were not the type that accrued or vested under the previous [CBA]," the employer had no obligation to submit the grievances to arbitration. *Id*. at 350.

In this case, the POAM argues that Ottawa County was obligated to arbitrate Officer Whiting's grievance because the arbitration provisions in the parties' CBA survived the expiration of the CBA. The POAM attempts to distinguish this case from *Jaklinski* and *Gibraltar* by pointing out that at the time of Officer Whiting's discharge, the parties had not reached an impasse in negotiating the new CBA (unlike the facts in *Jaklinski*) and there was never any question that the parties would execute a new CBA containing the same arbitration provisions as the expired CBA (unlike the facts in *Gibraltar*). But, considering our Supreme Court's holding in *Gibraltar*, these factual distinctions are immaterial. Courts of this state have recognized the general rule that an employer may not take unilateral action on a mandatory subject of bargaining following the expiration of a CBA unless an impasse has been reached in

contract negotiations; otherwise, the employer is guilty of an unfair labor practice under the PERA. *Jaklinski*, *supra* at 13; *Local 1467, Int'l Ass'n of Firefighters v Portage*, *supra* at 473; MCL 423.210(1)(e). But this general rule prohibiting unilateral changes before impasse does not apply to grievance arbitration. There is no statutory duty to arbitrate after the expiration of a CBA. *Gibraltar*, *supra* at 345-346. The right to grievance arbitration only survives the expiration of a CBA when the grievance concerns the kinds of rights that could accrue or vest during the term of the CBA, unless the CBA specifically provides otherwise. *Id*. at 348; *Jaklinski*, *supra* at 21-22. Because the right not to be discharged except for just cause is not the kind of right that accrues over time or vests upon a particular contingency, *Jaklinski*, *supra* at 7, 26, Ottawa County has no obligation to submit Officer Whiting's grievance to arbitration under the terms of the expired CBA.

The POAM argues in the alternative that the county is obligated to arbitrate Officer Whiting's grievance because the grievance was filed after the new CBA became effective. Although the POAM filed the grievance during the term of the new CBA, the subject matter of the grievance occurred when no CBA was in effect. There is no basis on which to find that the county is contractually bound under the new CBA to arbitrate the grievance, and the POAM has cited no authority supporting its position. See *Int'l Brotherhood of Teamsters, Local Union 1199 v Pepsi-Cola Gen Bottlers, Inc*, 958 F2d 1331, 1337-1339 (CA 6, 1992).

Because Ottawa County has no statutory or contractual obligation to submit Officer Whiting's grievance to arbitration, the trial court properly granted summary disposition to the county on this issue.

III

The POAM next argues that Ottawa County, by virtue of its conduct after Officer Whiting's discharge, agreed to arbitrate her grievance in accordance with the terms of the parties' CBAs and that the trial court erred in concluding otherwise. We affirm the decision of the trial court.

The trial court granted the county summary disposition on this issue pursuant to MCR 2.116(C)(8), (C)(10), and (I)(2). As indicated, a "motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden*, *supra* at 119.

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 119-120 (citations omitted).]

Summary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if the opposing party, rather than the moving party, is entitled to judgment.

After Officer Whiting's discharge, the POAM filed a grievance on her behalf. The county then followed the "Step III grievance procedure" outlined in the parties' CBAs. The

county conducted a "Step III Hearing," providing Officer Whiting the opportunity to explain her grievance. Sheriff Rosema then sent the officer a "Step III Answer" affirming his decision to terminate her employment. In the "Step III Answer," the sheriff also explained that because the issue giving rise to the grievance occurred between the effective dates of the CBAs, the POAM did not have access to binding arbitration. Thereafter, the POAM filed a petition with the MERC requesting the appointment of an arbitrator. The MERC sent a list of five potential arbitrators to the POAM and Sheriff Rosema. Under the "Step IV grievance procedure" outlined in the CBAs, the parties were required to select an arbitrator from the list provided by the MERC. POAM business agent DeVries contacted Sheriff Rosema to discuss the list of arbitrators. Initially, the sheriff indicated that he needed to confer with his human resources department regarding the selection of an arbitrator. He later telephoned DeVries and the two agreed on arbitrator Kahn. After being appointed as arbitrator, Kahn sent a letter to DeVries and Ottawa County counsel Gretzinger indicating that the arbitration hearing had been scheduled. Gretzinger then sent letters to POAM counsel Gutscher and Kahn reiterating the county's position that Officer Whiting's grievance was not arbitrable.

In essence, the POAM argues that after Officer Whiting's discharge, the parties formed an implied contract to arbitrate. "Courts recognize implied contracts where parties assume obligations by their conduct." *Williams v Litton Sys, Inc*, 433 Mich 755, 758; 449 NW2d 669 (1989). The elements necessary to establish an implied contract include: (1) parties competent to contract; (2) a proper subject matter; (3) consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In particular, an implied contract must satisfy the element of mutual assent. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). Mutual assent means that there has been a "meeting of the minds." *Kamalnath v Mercy Mem Hosp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). A meeting of the minds must occur on all the material facts. *Id*. at 548 (citations omitted). To determine whether mutual assent has occurred, an objective test is used to examine "the express words of the parties and their visible acts," and the question should be asked whether a reasonable person could have interpreted the conduct or words in the alleged manner. *Id*. (citations omitted).

The POAM has failed to establish that an implied contract existed in this case. Initially, we note that although Sheriff Rosema participated in selecting an arbitrator after conferring with the county's human resources department, neither the sheriff nor the human resources staff was authorized to bind the county to an arbitration agreement. Alan Vanderberg, the county administrator, averred that the human resources director has the authority to select arbitrators and schedule arbitration hearings, but only the Ottawa County Board of Commissioners is authorized to modify a CBA or enter into an agreement to arbitrate on behalf of the county. Sheriff Rosema admitted in an affidavit that he lacked the authority to enter into an agreement to arbitrate on behalf of the county and that only the board of commissioners possessed that authority. The sheriff further averred that he never advised DeVries that he or the county was willing to arbitrate Officer Whiting's grievance and that his telephone conversations with DeVries were limited to selecting an arbitrator as requested by the MERC.

Moreover, the POAM cannot establish that there was a "meeting of the minds" in regard to an agreement to arbitrate Officer Whiting's grievance. A reasonable person could not have interpreted the parties' conduct and words to mean that an implied contract existed. *Kamalnath*,

supra at 548. The county expressly stated in its March 2006, "Step III Answer" and September 2006, letters to Gutscher and Kahn that the POAM did not have access to binding arbitration because the subject matter of the grievance arose between the effective dates of the CBAs. The fact that the county followed the grievance procedure outlined in the parties' CBAs, up to the arbitration step, in processing Officer Whiting's grievance is insufficient to find that the county agreed to arbitrate the grievance. If the county had unilaterally abandoned the grievance procedures of the expired CBA, then the county may have been guilty of an unfair labor practice under the PERA. *Southfield Police Officers Ass'n*, *supra* at 178; *Jaklinski*, *supra* at 13; *Local 1467, Int'l Ass'n of Firefighters v Portage*, *supra* at 473; MCL 423.210(1)(e). Several federal court cases are instructive on this point. See, e.g., *Int'l Brotherhood of Teamsters*, *supra* at 1335-1336 (CA 6, 1992) (holding that the fact that the employer continued to process an employee's grievance up to the arbitration step as provided by the expired CBA supports the inference that the employer wished to avoid violating the NLRA, not that the employer impliedly contracted to arbitrate); *Coast Hotels & Casinos, Inc v Culinary Workers Union Local 226*, 35 F Supp 2d 765, 771 (D Nev, 1999) (holding that a claim of implied contract had no merit where the employer's processing of a grievance up to, and through, arbitration was the only way the employer could protect itself from an unfair labor practice charge and there was no explicitly manifested intention to arbitrate). Accordingly, we find that the parties did not enter into an implied agreement to arbitrate.

Additionally, the trial court found and Ottawa County now asserts that even if the parties formed an agreement to arbitrate, it was only a revocable common law agreement, which was expressly revoked by the county. In *Wold Architects & Engineers v Strat*, 474 Mich 223, 238; 713 NW2d 750 (2006), our Supreme Court held that "common-law arbitration continues to exist in Michigan jurisprudence" and that "common-law arbitration agreements continue to be unilaterally revocable before an arbitration award is made." Thus, if a common law agreement to arbitrate did, in fact, exist in this case, the agreement was clearly revoked by the county in its September 2006, letters to Gutscher and Kahn stating that it would not submit Officer Whiting's grievance to arbitration.

IV

Finally, the POAM argues that the trial court erred in concluding that there was no material question of fact that Ottawa County discharged Officer Whiting for just cause. We disagree.

The trial court granted the county summary disposition on this issue pursuant to MCR 2.116(C)(10). As indicated, a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and should only be granted where the proffered evidence, viewed in the light most favorable to the nonmoving party, fails to establish a genuine issue regarding any material fact. *Maiden*, *supra* at 119-120.

Assuming without deciding that Officer Whiting was entitled not to be discharged without just cause under the terms of the expired CBA,[1] we review the reasons for the officer's discharge under the principles set forth in *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980):

> [W]here an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work. . . .
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> The role of the jury will differ with each case. Where the employer claims that the employee was discharged for specific misconduct—intoxication, dishonesty, insubordination—and the employee claims that he did not commit the misconduct alleged, the question is one of fact for the jury: did the employee do what the employer said he did?
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> Where an employee is discharged for stated reasons which he contends are not "good cause" for discharge, the role of the jury is more difficult to resolve. If the jury is permitted to decide whether there was good cause for discharge, there is the danger that it will substitute its judgment for the employer's. . . .
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> While the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include a right to be discharged only with the concurrence of the communal judgment of the jury. . . .
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> In addition to deciding questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reason for discharge amounts to good cause: Is it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job?

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[1] In its motion for summary disposition as to Count III of the POAM's counterclaim, Ottawa County argued that Officer Whiting had no contractual right not to be discharged without just cause. According to the county, the "just cause provision" relied on by the POAM did not survive the expiration of the CBA, and at the time of her discharge, Officer Whiting was an at-will employee. The county argued that the "POAM's Count III is nothing other than an attempted disguised unfair labor practice claim. It expressly tries to bootstrap the PERA's 'duty to bargain-unilateral change prohibition' rights, which are to be enforced within the MERC's exclusive jurisdiction." The trial court determined that the "just cause provision" of the parties' CBA survived the expiration of the CBA and, therefore, that the POAM's "just cause claim" did not fall under the exclusive jurisdiction of the MERC. The county has not specifically challenged the trial court's determination; therefore, we will not address it.

* * *

> An employer who agrees to discharge only for cause need not lower its standard of performance. It has promised employment only so long as the employee does the job required by the employment contract. The employer's standard of job performance can be made part of the contract. Breach of the employer's uniformly applied rules is a breach of the contract and cause for discharge. In such a case, the question for the jury is whether the employer actually had a rule or policy and whether the employee was discharged for violating it.
>
> An employer who only selectively enforces rules or policies may not rely on the principle that a breach of a rule is a breach of the contract, there being in practice no real rule. An employee discharged for violating a selectively enforced rule or policy would be permitted to have the jury assess whether his violation of the rule or policy amounted to good cause. Rules and policies uniformly applied are, however, as much a part of the "common law of the job" and a part of the employment contract as a promise to discharge only for cause. [*Toussaint*, *supra* at 621-624 (footnotes omitted).]

Officer Whiting was discharged as a result of her conduct on February 15, 2006, particularly the threatening statements she made to Holly over the telephone. Both parties concede that there is some dispute regarding the content of the officer's telephone conversation with Holly. On the night of the incident, Holly informed the police that Officer Whiting had threatened to slit the throats of her and her son Ty Gerbers. She testified to the same at her deposition. The day after the incident, Holly told the police that Officer Whiting had also threatened to slit the throat of her husband Cory Gerbers. Cory informed the police and later testified at his deposition that, according to Holly, Officer Whiting had threatened to slit the throats of him, Holly, and Ty. Officer Whiting initially told the police that she had threatened to slit Holly's throat, but had not threatened Cory or Ty. At her February 24, disciplinary hearing and subsequent deposition, however, the officer stated that she had only threatened to kill Holly, not to slit her throat. She admitted that threatening to kill someone is a violation of law and that her threat violated County Policy 36.000-Rule 15 and the Law Enforcement Code of Ethics Private Life section in regard to off-duty conduct. While Officer Whiting disputes the exact content of the telephone conversation, she has consistently admitted that she threatened to kill Holly and that her conduct violated county rules and policies. Her employment was terminated as a result of her violation of those rules and policies. Therefore, any factual dispute regarding the content of the conversation is immaterial. The trial court properly concluded that Officer Whiting's undisputed conduct, i.e., her threat to kill Holly, amounted to just cause to terminate her employment. See *Toussaint*, *supra* at 623-624.

On appeal, the POAM does not dispute that Officer Whiting's conduct violated county rules and polices. Rather, the POAM asserts that the officer was treated differently than other officers in similar circumstances. The only example provided by the POAM is an incident that occurred in 2003 involving three county deputies, wherein Deputy Dale Randall assaulted Deputy Jack Adams after learning that Deputy Adams had an affair with his wife, another deputy. The POAM contends that although Deputy Randall committed an offense similar to Officer Whiting's in this case, Deputy Randall was never disciplined and, therefore, the county

treated Officer Whiting unfairly. It is undisputed, however, that Deputy Randall was not discharged as a result of his conduct because he chose to resign. Sheriff Rosema gave Officer Whiting the opportunity to resign and she declined to do so. The trial court concluded and we agree that the evidence proffered by the POAM regarding Deputy Randall is insufficient to find that Ottawa County has selectively enforced its rules and policies. See *Toussaint, supra* at 624. The POAM has provided only one example of alleged selective enforcement, which occurred three years before Officer Whiting's discharge. Moreover, it is clear that Deputy Randall would have been discharged, but for his decision to resign. Therefore, we find that the county properly terminated Officer Whiting's employment and that the trial court did not err in granting summary disposition to the county on this issue.

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis