STATE OF MICHIGAN

COURT OF APPEALS

CITY OF FRANKFORT, Plaintiff-Appellant, v POLICE OFFICERS ASSOCIATION OF MICHIGAN, Defendant-Appellee.	UNPUBLISHED September 15, 2009 No. 286523 Benzie Circuit Court LC No. 07-008083-CK

Before: Meter, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Plaintiff City of Frankfort, appeals as of right from the trial court's order granting defendant Police Officers Association of Michigan's motion for summary disposition. The trial court's order upheld the arbitration decision that granted a grievance pursued by defendant. For the reasons that follow, we reverse and remand for further proceedings before the arbitrator.

I. Introduction

The arbitration in this case involved a grievance filed on behalf of the lead senior officer in plaintiff's police department, who was laid off in April 2003 under the terms of the 2001-2004 collective bargaining agreement between the parties. Under that contract, an individual's layoff status was entitled to recall rights no matter how long he had been on layoff. However, the collective bargaining agreement agreed upon for the 2004-2007 time frame contained a new provision, Article 8.8, which provided that an employee's recall rights were extinguished after 12 months on layoff. The grievance arose because during the term of the 2004-2007 contract, the grievant sought to be recalled to a part-time police officer position, but the employer denied his request because he had been on layoff for more than 12 months.

The parties presented testimony at the arbitration hearing from some of the individuals involved in the negotiations leading up to the 2004-2007 contract. In general, the witnesses for defendant testified that plaintiff had proposed the new Article 8.8, but that defendant had indicated approval of that provision so long as it did not apply to the grievant. The witnesses presented by plaintiff indicated that there either was no response to the union's proposal, or none could be recalled. There was also testimony as to the purpose of the provision.

The arbitrator's decision was broken down into numerous sections. Sections 1-3 involved a summary of the testimony from all the witnesses regarding pre-contract negotiations. At the conclusion of Section 3, the arbitrator specifically found that "[h]owever credible, *the case for or against the grievant cannot be made on the basis of witness testimony*. On the face of this standoff, one must look elsewhere." The arbitrator then set forth four other sections, wherein the next two sections (Sections 4 and 5) the arbitrator set forth general principles of Michigan and arbitration law regarding seniority rights. In Sections 6 and 7 of the opinion and award, the arbitrator discussed the intent and purpose behind Article 8.8, surmising that by not following its own stated objective and purpose in proposing Article 8.8, the employer was effectively discharging the grievant without just cause:

> If Employer had accepted the Union's counter proposal on [Article] 8.8 (providing that Grievant would have been exempt from its impact), its stated objective could have been immediately and almost totally obtained. By recalling Grievant to the job vacancy, as he requested, instead of filling it with a new hire, the objective would have been completely obtained. As it turned out, the certain, direct and immediate result of this Employer proposal was the termination of Grievant's employment – tantamount to his discharge without just cause.

The arbitrator then recognized that "the words of the Contract are clear and unambiguous," but following the Restatement Second of Contracts, he concluded that the "situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usage of trade, and the course of dealing between the parties taken together, outweigh the plain meaning of the words in Article 8.8." As a result of that, the arbitrator granted the grievance.

II. Analysis

Appeals involving judicial review of an arbitration decision are not normally difficult, and usually result in upholding the arbitrator's decision. This generality holds true because of the well recognized and long standing principle of judicial deference given to labor arbitration decisions. See, e.g., *United Steel Workers of America v Enterprise Wheel and Car Corp*, 363 US 593, 599; 80 S Ct 1358; 4 L Ed 2d 1424 (1960) and *Port Huron Area School Dist v Port Huron Education Ass'n*, 426 Mich 143, 150; 393 NW2d 11 (1986). What makes this case difficult, and therefore what takes it outside the general line of cases, is plaintiff's persuasive argument that the arbitrator's decision falls within the narrow exception to the general rule of judicial deference. In our view, and with all due respect to our esteemed dissenting colleague, the arbitrator exceeded his authority under the contract and imposed his own brand of industrial justice by disregarding the admitted and undisputed clear and unambiguous language of the contract. Accordingly, we reverse the trial court's order affirming the arbitrator's decision and award.

The well-settled judicial policy of providing broad judicial deference to arbitration decisions is contained in both *United Steelworkers of America*, *supra*, and *Port Huron Education Ass'n*, *supra*, as well as our opinion in *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002). There is no need to repeat that standard here, but what needs to be emphasized is that those same cases provide that "'while the powers of an arbitrator are not unlimited, his awards should be upheld *so long as he does not disregard or modify plain and unambiguous provisions* of a collective bargaining agreement.'" *Manistee Co*,

supra, quoting *General Telephone Co of Ohio v Communications Worker of America, AFL-CIO*, 648 F2d 452, 457 (CA 6, 1981) (emphasis added). Consequently, under both Michigan and federal law, an arbitrator's decision that ignores or disregards the plain language of a collective bargaining agreement must be overturned. See *United Paper Workers Int'l Union v Misco*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987) ("The arbitrator may not ignore the plain language of the contract . . . ."); *Sheriff of Lenawee Co v Police Officers Labor Council*, 239 Mich App 111, 119-120; 607 NW2d 742 (1999) (Vacating arbitration decision because it violated "the plain meaning of the rules and regulations and sections of the collective bargaining agreement . . . ."); *City of Pontiac v Pontiac Police Supervisor's Ass'n*, 181 Mich App 632, 635; 450 NW2d 20 (1989). And, neither the parties nor the arbitrator dispute the separate but related principle under Michigan law that courts must enforce the plain and unambiguous language of a contract. See *Rory v Continental Ins Co*, 473 Mich 457, 488-489; 703 NW2d 23 (2005) and *Kingsley v American Central Life Ins Co*, 259 Mich 53, 54-55; 242 NW 836 (1932).

We also recognize, of course, that courts are not permitted to vacate an arbitration decision that contains a serious error of law, or that represents "'improvident, or silly' decision making." *Michigan Family Resources, Inc v Serv Employees Int'l Union*, 475 F3d 746, 752 (CA 6, 2007), quoting *Misco, supra* at 39. In this case, however, the arbitrator specifically found that "the words of the Contract are clear and unambiguous," and both plaintiff and defendant agree that Article 8.8 is clear and unambiguous. It is also undisputed that under Article 8.8 the grievant would not be entitled to recall rights because he had been on layoff for more than 12 months. Despite all this undisputed law and fact, the arbitrator refused to apply that plain, clear and bargained for language of the contract, instead determining that other sources "outweighed" the plain language of the contract.

The route the arbitrator took to this conclusion reveals that this was not simply inadvertent or silly decision making, or an error, which arises solely from an error of law.[1] We are also not driven by a mere disagreement with the arbitrator's decision. Rather, as explained below, the rationale articulated by the arbitrator makes it clear that he simply disregarded the plain language of the contract to invoke his own brand of justice. Our explanation for this holding is as follows.

The bargained for contract language within Article 8.8 states, again in admittedly clear and unambiguous language, that effective July 1, 2004, "an employee's right to recall ends . . . twelve (12) months after the employee has been laid off." If one were to apply this language to the facts of this case, the grievance would have to be denied because the grievant was laid off

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[1] Although the arbitrator recognized that the "plain meaning rule" – and by that he was referring to the plain language rule enunciated in contract cases such as *Rory* – was a dominant principle amongst the courts, he nonetheless opined that the rule had been uniformly criticized in academic literature and by some jurists in recent court decisions, as well as by a growing number of arbitrators. The authority for that position was the famed arbitration treatise, *How Arbitration Works*, 6th Edition, by Elkouri and Elkouri. Failing to recognize and adopt controlling Michigan law as reflected in *Rory* was an error of law, but is not a basis for our decision to vacate the opinion and award. *Dohanyos v Detrex Corp*, 217 Mich App 171,176; 550 NW2d 603 (1996).

more than 12 months before the instant recall. In light of this, to uphold the grievance the arbitrator must have deemed Article 8.8 inapplicable to the grievant for some non-textual reason, as there is no ambiguity or exception contained within the Article. The arbitrator's opinion specifically disavows that he did so.

As noted in section I of this opinion, the parties presented testimony addressing defendant's position that the parties agreed during negotiations that Article 8.8 would not apply to grievant. Acceptance of defendant's witnesses' testimony, i.e., concluding that there was an agreement reached to exempt grievant from Article 8.8, would have been perfectly permissible and resulted in an unassailable opinion. However, rather than accepting one version of the events over the other, the arbitrator specifically declined to decide the matter based on the parties witnesses, and instead decided to "look elsewhere":

> However credible, the case for or against the grievance cannot be made on the basis of witness testimony. In the face of this standoff, one must look elsewhere.

This statement is critical for two reasons. First, the only evidence of a separate agreement exempting grievant from application of Article 8.8 was the witness testimony. By refusing to decide the case based on that testimony, the arbitrator was foreclosing a *factual* finding that Article 8.8 did not apply to the grievance. Second, after making this statement, the arbitrator remained true to his word and never returned to any factual finding as to who was more credible, or what evidence as to pre-contract discussions or agreement was more objective and acceptable. Instead, after discussing the perceived lack of judicial/arbitral adherence to the "plain meaning" rule under Michigan contract law, and quoting from the Restatment of Contracts about interpreting contract language, the arbitrator concluded without further explanation that "'the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties . . . .' taken together, outweigh the plain meaning of the words in Article 8.8."

The foregoing makes several matters clear to us. For one, even if the arbitrator felt compelled to disregard the "plain language" theory of contract law (see footnote 1, *supra*), we are not free to ignore binding United States and Michigan Supreme Court decisions that unequivocally hold that when an arbitrator ignores or disregards the plain language of a collective bargaining agreement, it has exceeded its authority and the decision and award must be vacated. *Misco*, *supra*; *County of Manistee*, *supra; Sheriff of Lenawee*, *supra*. Those decisions remain binding on the circuit court and our Court as much today as five decades ago. Because it is undisputed that Article 8.8's language is clear and unambiguous, and because it is undisputed that application of that clear and unambiguous language would preclude any relief to the grievant, the arbitrator's decision and award was in disregard of the plain contract language.

Additionally, the union argues that the issue was not whether the grievant can succeed under the new article 8.8, but instead was "whether the provision should be applied to [the grievant] given that he had been laid off years in advance of the provision's addition to the contract and given the negotiations surrounding the addition of Section 8.8." In other words, the union argues that the real issue before the arbitrator was not the result coming from application of Article 8.8 to the grievant, but whether Article 8.8 even applied to the grievant. If that was the issue actually decided by the arbitrator, we would agree that the arbitration decision and award should be upheld. However, as noted above, the arbitrator did not decide that issue, and did not

make a finding that the parties intended to implement Article 8.8 into the contract only if grievant was excluded from the provision. Indeed, he specifically refused to make a finding relative to that issue, and instead disregarded controlling law and clear and unambiguous language to reach the award.

We also disagree with defendant and our dissenting colleague's position that by citing to the Restatement (Second) of Contracts, we must presume the arbitrator found that there was a separate agreement. Otherwise, the argument goes, why would he have cited to that authority? In rejecting this contention, we recognize that some courts have required that "if there is doubt we will presume that the arbitrator" was engaged in interpretation. *Michigan Family Resources, supra* at 753. But when the arbitrator expressly refuses to make factual findings based on the only witnesses presented, and admits that the contract language in clear and unambiguous, yet still issues an award that is contrary to those clear and unambiguous words, we feel that we have been presented with the "rare case" where vacating is required.

In light of our conclusion, the proper remedy is to vacate and remand for further consideration by the arbitrator. See, *Michigan Family Resources, Inc, supra* at 760 (Martin, J., dissenting), citing *Misco, supra* at 40 n 10, and other cases cited therein.

No costs, a public question involved.

Reversed and remanded to the arbitrator for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray