STATE OF MICHIGAN

COURT OF APPEALS

LAKE COUNTY and LAKE COUNTY SHERIFF, Respondents-Appellants,	UNPUBLISHED February 8, 2011
V	No. 293044 Michigan Employment Relations Commission
POLICE OFFICERS ASSOCIATION OF MICHIGAN, Charging party-Appellee.	LC No. 07-000011

Before: MARKEY, P.J., AND WILDER AND STEPHENS, JJ.

PER CURIAM.

This case arises from an unfair labor practice (ULP) charge filed by the union against the county defendants when the latter refused to submit to arbitration over a grievance. Respondents appeal as of right from the administrative tribunal's decision compelling them to arbitrate. We affirm.

The facts as stated below are taken from pages 2-3 of the decision and order of the Michigan Employment Relations Commission (MERC) in this case, dated June 25, 2009. Where respondents' version varies from this is noted in its argument below.

> Charging Party and Respondents were parties to a 2003-2005 collective bargaining agreement that provided a grievance procedure concluding in binding arbitration, as well as a provision stipulating that Respondents must demonstrate just cause for terminating an employee. As of the contract's expiration on December 31, 2005, no agreement had been reached to extend the term or provisions of the contract.
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> The parties began negotiating a new collective bargaining agreement during August 2005 and reached a tentative agreement in May 2006. The tentative agreement was drafted in the form of a list of changes to the parties' 2003-2005 contract. The parties agreed that, except for the enumerated changes listed in the tentative agreement, all language from the previous contract would become part of the new agreement. The tentative agreement did not state when the contract would take effect. However, the agreement provided that a change in

the seniority provisions accepted by the parties would not be retroactive, nor would the new language apply to any pending grievances.

On July 19, 2006, Charging Party ratified the tentative agreement. Respondents did not immediately submit the tentative agreement to the County's board of commissioners for ratification. Counsel for Respondents, John McGlinchey, prepared a draft contract that was sent to Charging Party on August 10, 2006. The draft provided the contract was effective January 1, 2006 and would be in full force and effect until December 31, 2008. On September 19, 2006, after McGlinchey and Charging Party's business representative, Patrick Spidell, agreed to a few clerical changes to the draft and to modify the retiree health insurance provisions with a letter of understanding, Spidell signed the contract.

On September 15, 2006, several days before the contract was signed by Spidell, Respondents terminated Deputy Joseph Luce. Charging Party filed a grievance on September 20, 2006. Respondents denied the grievance, stating that the discharge was subsequent to the expiration of the old contract and prior to the Employers' execution of the new contract. In support of its position, Respondents contended that, based on *Ottawa Co v Jaklinski*, 423 Mich 1; 377 NW2d 668 (1985), the right to be discharged for just cause does not survive the expiration of a labor contract and, therefore, employers have no obligation to arbitrate a post-contract discharge based on an alleged violation of the just cause discharge standard contained in an expired labor contract. The Union informed Respondents it disagreed with the Employers' interpretation of the *Jaklinski* case, claiming that there is nothing in the case that would prevent a just cause standard from applying to the discharge of Luce.

On October 12, 2006, Charging Party's local union president, Ron Brown, notified Respondents' board of commissioners that Charging Party was appealing Luce's grievance to the third step of the grievance procedure and would ultimately seek arbitration if the grievance procedure did not resolve the issue. On October 17, 2006, McGlinchey sent a letter to Spidell stating that the agreement ratified and executed by POAM would be presented to the board of commissioners for ratification/execution. The letter also stated that the Employer did not consent to arbitrate grievances filed after the expiration of the old contract, particularly the one involving the Luce discharge. As late as October 26, 2006, the parties were communicating with each other about the grievance issue, with Respondents taking the position they would not arbitrate the issue. On October 26, the contract was signed by both Respondents, even though the parties continued to negotiate over retiree health insurance issues. Shortly thereafter, the parties agreed to substitute retiree health insurance language proposed by Charging Party for the language in the ratified agreement. Brown signed the contract on November 8, 2006. The retiree health insurance changes then became effective, and employees received wage increases that were made retroactive to January 1, 2006.

The charging party filed a ULP against respondents on January 24, 2007, alleging that respondents were required to arbitrate the Luce grievance under the terms of the 2006-2008 agreement. Respondents countered that because the discharge occurred after the old agreement expired and before the 2006-2008 agreement was ratified, they were not required to arbitrate the grievance.

The case proceeded through MERC as described in its decision:

> The ALJ held that the grievance is arguably arbitrable and that Respondents violated their duty to bargain in good faith by refusing to submit the Luce grievance to an arbitrator for a decision on the issue of arbitrability. The ALJ recommended we order Respondents to cease and desist from repudiating their obligation to arbitrate grievances under their 2006-2008 collective bargaining agreement with POAM. The ALJ also recommended we order that, upon demand, Respondents participate in the process of arbitrating the grievance filed by POAM regarding Luce's termination.

Respondents filed exceptions mirroring their arguments in this Court. MERC adopted the order recommended by the hearing referee (ALJ), finding that the Luce grievance was arguably arbitrable under the 2006-2008 contract, and stating, "For us to agree with Respondent's contention, we would have to find that the grievance is clearly not arbitrable under both the 2003-2005 contract and the 2006-2008 contract. The record does not support such a finding." The decision explained:

> We make no finding on the question of whether the arbitration provision in the 2006-2008 contract is retroactive to January 1, 2006 or whether the Luce grievance is arbitrable. That is not the issue before us. Inasmuch as we have found that the issue is arguably arbitrable, the question of actual arbitrability is left to the arbitrator or the courts. *City of Detroit (Police Dep't)*, 1989 MERC Lab Op 699, 700; 2 MPER 20124 (1989).

Respondents argue that MERC erroneously found they committed a ULP by refusing to arbitrate a grievance that was arguably not arbitrable. We disagree. Factual findings by the MERC are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. Const 1963, art 6, § 28; MCL 423.216(e). However, this Court may review the law regardless of the factual findings of the commission. *U of M Regents v Employment Relations Comm*, 389 Mich 96, 102; 204 NW2d 218 (1973). Judicial review includes the determination of whether a decision of the MERC is "authorized by law," Const 1963, art 6, § 28, and such a decision may be set aside on appeal if based on a "substantial and material error of law," MCL 24.306(1)(f).

In *AT&T Technologies, Inc v Communications Workers of America*, 475 US 643, 649; 106 S Ct 1415; 89 L Ed 2d 648 (1986), the United States Supreme Court stated:

> [T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably

> provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator . . . . "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." [Quoting *John Wiley & Sons, Inc v Livingston*, 376 US 543, 547; 84 S Ct 909; 11 L Ed 2d 898 (1964).]
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> However, this Court has explained:
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> > In *John Wiley & Sons, Inc*, the Supreme Court held that "once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." Since that decision, an overwhelming majority of federal appellate circuits (including the Sixth Circuit Court of Appeals) considering the issue have determined that timeliness of a claim is a procedural matter and, therefore, within the arbitrator's jurisdiction. Michigan, which has developed its own strong policy favoring arbitration on the basis of federal precedent, is in accord. Michigan law also provides that arbitrators, rather than courts, should decide the application of such potential defenses to arbitration as contractual limitation periods, statutes of limitation, and the doctrine of laches. [*Amtower v William C Roney & Co*, 232 Mich App 226, 232-233; 590 NW2d 580 (1998).]

In this case, there can be no question that the subject of the Luce grievance, his discharge without just cause, is a matter for arbitration under the agreement. The question is whether the timing of the grievance, after the old agreement expired and before the new agreement was ratified, requires it to be arbitrated. This is a procedural, rather than a substantive, question.

Moreover, "[p]arties may agree to arbitrate the contractual issue of arbitrability." *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 162 n 21; 393 NW2d 811 (1986). In this case, both the expired and the successor contracts provide, "If the issue of arbitrability is raised, the arbitrator shall decide the merits of the grievance only if arbitrability is affirmatively decided." There is no question the parties have agreed to arbitrate contractual disputes. While the language quoted above does not explicitly provide where the issue of arbitrability is to be raised, the clause is in the middle of the description of the arbitrator's powers and grievance procedures. In harmony with this and with *Amtower*, MERC did not err in concluding that the employer committed a ULP by refusing to arbitrate.

Respondents also argue that the Luce grievance was not arbitrable as a matter of law. We note that MERC expressly did not decide that the grievance was arbitrable, only that it was arguably arbitrable, leaving the ultimate decision on this matter to the arbitrator. We find this was not erroneous.

Respondents' argument that they never impliedly or explicitly agreed to retroactive application of these provisions fails because they expressly ratified and executed the contract retroactively, except for provisions expressly exempted from retroactivity. The contract, as MERC found, unambiguously states that the agreement is "effective January 1, 2006, unless

otherwise provided." Respondents' claim that they did "provide otherwise" by vociferously refusing to participate in arbitration and point to their counsel's opinion that they were not required to arbitrate the Luce grievance. Respondents' counsel testified at the hearing that letters and conversations, in which it was made clear the employer felt it had no duty to arbitrate, constituted an exception under the "unless otherwise provided" language of the contract. However, the contract's language provides that its terms are retroactive "unless otherwise provided *by and between*" the parties. The contract also states that it "contains the entire terms and conditions of employment agreed upon" by the parties. Nothing in *Jaklinski* requires matters in controversy to be specifically noted in a subsequently adopted collective bargaining agreement. In point of fact, the parties did specifically exclude health care benefits from retroactivity, which underscores their understanding of the term "except as otherwise provided." No such language appeared in relation to arbitrability. The language in the agreement is on its face unambiguous; thus, there is no reason to resort to parol evidence for assistance in construing the contract's terms.

MERC's decision is incorrect only if respondents can conclusively demonstrate that the Luce grievance was absolutely not arbitrable. None of respondents' arguments have so demonstrated. In contrast, charging party's arguments show that at the very least, the grievance was arguably arbitrable based on the retroactivity clause in the 2006-2008 contract.

Finally, respondents assert that the hearing referee incorrectly exceeded the scope of the ULP charge by considering language of the successor agreement and that the only question before the referee was whether the expired agreement's terms were extended. Contrary to respondents' argument, however, the ULP was not limited to examining the 2003-2005 contract. The charge alleged that the parties entered into an agreement January 1, 2003 "that was effective until December 31, 2005." It then alleged, "Upon expiration of the collective bargaining agreement, all terms and conditions of employment remained in effect while bargaining proceeded on the new collective bargaining agreement." No authority for this position is indicated. However, the charge continues, giving the procedural dates and noting, "The approved and signed collective bargaining agreement effective dates are from January 1, 2006 to December 31, 2008." The charge then states, "The collective bargaining agreement contains a grievance procedure and right to arbitration," and "The employer's repudiation of the clear and unambiguous terms and renunciation of the ratified and signed contract that was negotiated between the parties" constitute a ULP. Although the charge does not specify which agreement it references, use of the present tense, "contains," as well as the context imply that the charge is referring to the 2006-2008 agreement. Thus, the hearing referee's attention was drawn to the successor agreement from the beginning, and that this was not a "new claim" as asserted by respondents. The importance of the 2006-2008 agreement was placed at issue in the ULP charge filed by the charging party.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens