

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF HOLLAND,
Plaintiff-Appellee,

UNPUBLISHED
June 18, 2013

v

JENIFER L. FRENCH,
Defendant-Appellant.

No. 309367
Ottawa Circuit Court
LC No. 10-001684-CZ

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent, on two grounds. First, I disagree with the majority's description of the core issues in these arbitrations. Second, I disagree with the majority's conclusion that the first arbitrator's award comported with the Michigan Tax Tribunal's decision. Instead, I conclude that the first arbitrator exceeded his powers when he disregarded the preclusive effect of the Tax Tribunal's findings. I further conclude that the first arbitrator exceeded his powers by overlooking all but one of the City's reasons for discharging French. I would affirm the circuit court's decision to vacate the first arbitration award and its decision to confirm the second arbitration award.

I. STANDARD AND SCOPE OF REVIEW

This Court reviews de novo the circuit court's decisions regarding the arbitration awards. *Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 226; 792 NW2d 59 (2010). Accordingly, the first task in this appeal is to determine whether the circuit court properly vacated the first arbitration award. As the majority recognizes, a circuit court must vacate an arbitration award upon a proper motion if the arbitrator has exceeded his or her powers. MCR 3.602(J)(2)(c).

In this case, the arbitrator's powers were defined by the City Employee Handbook and by the controlling law. This Court has long recognized that an arbitrator's power is limited by the contract from which he draws his authority. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554-555; 682 NW2d 542 (2004); see generally *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 432-434; 331 NW2d 418 (1982). In addition, the Court has recognized that an arbitrator's authority is limited by controlling law. As we explained in *Saveski*, 261 Mich App at 555:

Arbitrators exceed their power when they “act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.” *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). “[W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.” *Id.* at 443; 331 NW2d 418, quoting *Howe v Patrons’ Mut Fire Ins Co of Michigan*, 216 Mich 560, 570; 185 NW 864 (1921).

II. ARBITRATION ISSUE

According to the majority, the core issues in the arbitration were (1) whether French actually lived in the Holland house, and (2) whether she deceitfully claimed the Holland house as her principal residence. I disagree. The actual issue for arbitration was defined in the controlling contract, which, as both arbitrators recognized, was the City Employee Handbook. The Handbook expressly identified the arbitration issue and the scope of the arbitrator’s power to decide the issue:

The arbitrator will decide, in writing, whether the employee was discharged for just cause. The arbitrator will also rule on any tort or civil rights claims made by the employee. If the arbitrator decides that the discharge was not for just cause, or otherwise violated the employee’s rights, the arbitrator may decide upon an appropriate remedy, which may include reinstatement and/or back pay and/or benefits. The arbitrator may not add or delete anything in this procedure. In deciding whether or not the discharge was for just cause or was otherwise improper, the definition of “just cause” and the other rules and policies set forth in the Employee Handbook, and all other relevant policies and procedures, will be observed. In additional, [sic] the arbitrator shall be guided by prior decisions of other arbitrators and the meaning of “just cause” in such prior decisions. [Emphasis added.]

As defined in the Handbook, the issue for arbitration in this case was whether the City had just cause to discharge French. The Handbook further mandated that the arbitrator observe the Handbook’s rules and policies in making the arbitration decision. Those rules and policies included the Handbook’s provision that the City could discharge an employee for “conduct detrimental to the image of the employer.”

Rather than giving proper consideration to the broad issue of just cause, the first arbitrator mistakenly limited his consideration to the narrow issue of French’s dishonesty. Of the four grounds the City identified for French’s discharge, only the first ground involved dishonesty, i.e., French’s falsification of city records and documents. The other three grounds addressed other, separate instances of French’s misconduct: her improper voter registration; her improper property tax registration; and her conduct detrimental to the image of the City. The City informed French that any one of these grounds standing alone would justify her discharge. As the City’s Human Resources Director testified at the first arbitration hearing, “We terminated

her for dishonesty *and* improperly *and* falsely filling out documents. The legal definition of fraud had nothing to do with that.” (Emphasis added).

The first arbitrator concluded that absent proof of dishonesty, French had not committed a dischargeable offense. The arbitrator wrote: “In the absence of an intent to deceive, the element of trust is not destroyed and it is not unreasonable to continue the employment relationship. If the element of dishonest intent is lacking because of a failure of proof, no actionable offense has been committed.” The first arbitrator also found, apparently as an aside, “[t]he City never developed any information that creates a nexus between her performance as City Clerk and the decision to terminate her employment.”

When the City appealed the first arbitrator’s award to the circuit court, the court correctly indicated that the arbitrator had exceeded his powers by reinstating French without considering all of the City’s grounds for termination. Specifically, the court noted that the arbitrator “did not decide whether, even if [French’s] actions were not ‘dishonest’ they were detrimental to the image of the Employer and just cause for discharge. Likewise, although [the arbitrator] mentioned the voter registration issue, he did not discuss it, and most importantly, he did not decide whether it was just cause for discharge.”

By focusing on the dishonesty issue, the first arbitrator disregarded the Handbook’s mandate that he consider all rules and policies set forth in the Handbook. An arbitrator’s disregard for a contract provision in a labor arbitration is an abuse of the arbitrator’s authority, which requires an appellate court to overturn the arbitration award. *Sheriff of Lenawee Co v Police Officers Labor Council*, 239 Mich App 111, 120; 607 NW2d 742 (1999). In *Lenawee*, this Court affirmed a circuit court’s decision to vacate an arbitration award on the ground that the arbitrator exceeded the authority granted him under a collective bargaining agreement. *Id.* at 124. Specifically, the *Lenawee* Court determined that the arbitrator had erred by “adding requirements to the contract that did not exist.” *Id.* at 119.

Like the arbitrator in *Lenawee*, the first arbitrator in this case added a requirement to the Handbook by replacing the Handbook’s several grounds for discharge with a single requirement that the City establish dishonesty as the sole ground for discharge. In vacating the first arbitrator’s award, the circuit court recognized that, as the City Clerk, French was not simply another city employee, but was “responsible for maintaining the integrity of the City’s voting process.”

I agree with the circuit court’s apt conclusion regarding the first arbitrator’s error:

That [French] submitted a voter registration when, as a matter of law, she did not “reside” at the South Shore Drive address *indicates either an intent to deceive or a lack of knowledge of one of the core functions of her position. Either may be just cause to terminate her employment as City Clerk.* If the arbitrator believed otherwise, it was his duty to address the voter registration issue, make findings of fact, and demonstrate a rationale to reject [the City’s] assertions.

Similarly, a finding that [French] did not have the intent to deceive necessary for falsely filing a principal residence exemption affidavit does not

necessitate a finding that her conduct is not detrimental to the image of the employer. In addition, her filing of an improper voter registration could also be seen as conduct detrimental to the image of the employer. In sum, the arbitrator should have determined whether each of the grounds [the City] set forth was just cause for terminating [French's] employment. Because he did not, he exceeded his powers and the court must vacate the award. [Emphasis added.]

I acknowledge that if the arbitration in this case had required any interpretation of the Handbook, this Court would defer to the arbitrator's interpretation. See *Ann Arbor v AFSMCE Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). In this case, however, no interpretation was required. The Handbook charged the arbitrator with deciding whether French was discharged for just cause and required the arbitrator to observe the Handbook's references to just cause. The first arbitrator disregarded the Handbook's authority and thereby exceeded his powers.¹

III. PRECLUSIVE EFFECT OF TAX TRIBUNAL DECISION

In addition to acting outside the scope of his contractual authority, the first arbitrator exceeded his powers by disregarding the preclusive effect of the Michigan Tax Tribunal (MTT) judgment. The MTT's administrative law judge found that the evidence affirmatively proved that the Holland house was not French's true, fixed, and permanent residence. The parties stipulated that they would be bound by the MTT's factual conclusions. Nonetheless, the first arbitrator decided that French had lived in the Holland home "at least for significant periods of time." This decision was directly contrary to the MTT's finding and, therefore, was an improper exercise of authority by the arbitrator.

French had the opportunity to fully litigate the residency issue before the MTT. The MTT ruled against her, finding that the Holland house was not her residence. The doctrine of collateral estoppel, as well as the parties' stipulation, required the first arbitrator to base his analysis of just cause on the established fact that French did not reside in the Holland house. Because the first arbitrator failed to give proper effect to that established fact, the circuit court properly vacated the first arbitrator's award.

IV. CONFIRMATION OF SECOND ARBITRATION AWARD

¹ My dissent rests mainly with the first arbitrator's failure to comply with the terms and conditions of the Employment Handbook. I would be remiss, though, if I did not address the majority's allegation of "beady-eyed scrutiny." If beady eyes present a clear view of the first arbitrator's errors, then I accept the allegation. If, however, the majority is asserting that this Court should wear rose-colored glasses and take a myopic view of the arbitrator's errors, then I reject the allegation. It is not the facts or findings of the first arbitrator that is undergoing "beady-eyed scrutiny" in this case, it is his compliance with the terms and conditions of his contractual obligations.

Given that the first arbitrator's award was invalid, the circuit court correctly ordered the parties to pursue a second arbitration. Acting within the scope of his powers, the second arbitrator gave due regard to the Handbook and found: "French submitted a false voter registration to the City and a False PRE to avoid paying \$8,000 in taxes. This and her subsequent representations to the Respondent during the investigation was detrimental to the image of the City and are just cause for her discharge." The circuit court confirmed the second arbitration award.

On appeal, French argues that the second arbitrator erred by excluding the first arbitration award from consideration by giving conclusive effect to the MTT's ruling that French did not reside in the Holland house and by substituting his judgment for that of the first arbitrator.

French's arguments are mistaken. The original arbitration award was not material where the circuit court had vacated that award and ordered the matter to be reheard in a new arbitration proceeding. When an award is vacated, it is annulled, cancelled, and rendered void. See Black's Law Dictionary (6th ed), p 1548. It would have been improper for the second arbitrator to consider an award that had been voided by the circuit court. For the same reason, the second arbitrator was not required to follow the first arbitrator's reasoning.²

Moreover, the circuit court correctly ruled that the MTT judgment had preclusive effect in the arbitration proceeding. Consequently, the second arbitrator was required to accept as true the fact that French did not reside in the Holland house. French's challenges to the second arbitration award are without merit.

V. CONCLUSION

Because the first arbitrator exceeded his powers, the circuit court properly vacated the first arbitration award. Similarly, because the second arbitrator acted within his powers, the circuit court properly confirmed the second arbitration award. I would affirm both of the circuit court's decisions.

/s/ Peter D. O'Connell

² At least one additional fact is necessary to understand what occurred in this case: when French's husband failed to obtain the \$8,000 principal residence exemption, his corporation transferred the property to French.