# STATE OF MICHIGAN

# COURT OF APPEALS

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LAURA J. SINKLER,

Plaintiff-Appellant,

v

NORTH OAKLAND MEDICAL CENTER, PONTIAC GENERAL HOSPITAL, AFSCME COUNCIL 25 and AFSCME LOCAL 100,

Defendants-Appellees.

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UNPUBLISHED
October 29, 1996

No. 179915
LC No. 93-451315

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendants in this breach of contract action. We affirm.

Plaintiff began working at North Oakland Medical Center (NOMC) in January, 1985. At that time, plaintiff was living in the City of Pontiac and was advised that NOMC required its employees to remain citizens of Pontiac as a condition of employment. After plaintiff began working at NOMC, she became aware of the fact that some employees had been given waivers or exemptions from the residency policy. On September 30, 1988, plaintiff and her husband moved from Pontiac to Orion Township. Plaintiff notified NOMC of her change in address on October 4, 1988, but did not request a waiver before moving. On April 24, 1989, plaintiff requested a waiver of the residency requirement on the ground that her husband was disabled and was unable to do maintenance on a house and that the outdoor services and exterior maintenance on their Orion Township condominium was done by the condominium association. Plaintiff's request was denied and she resigned upon threat of termination.

AFSCME Local 100 filed a grievance, which was denied by NOMC. AFSCME Council 25 agreed to prosecute the grievance to arbitration and attorney Michael A. Flack was retained by Council 25 to challenge plaintiff's discharge from employment at NOMC. Following an evidentiary hearing, the

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* Circuit judge, sitting on the Court of Appeals by assignment.

parties submitted briefs arguing their positions. An arbitrator found that just cause for discharge had been demonstrated by NOMC and that the evidence was insufficient to establish that the denial of plaintiff's waiver request was either arbitrary or based on bias. Plaintiff filed a lawsuit in circuit court on March 16, 1993, alleging unfair representation on the part of defendant AFSCME and breach of contract on the part of defendant NOMC. Defendants were granted summary disposition pursuant to MCR 2.116(C)(10).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when there is no genuine issue of material fact, except as to damages, and the moving party is entitled to judgment as a matter of law. *Id.* When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Id.*

Judicial review of an arbitrator's decision is very limited. *Dahlman v Oakland University*, 172 Mich App 502, 505; 432 NW2d 304 (1988). A trial court may not review an arbitrator's factual findings or decision on the merits. *Port Huron Area School District v PHEA*, 426 Mich 143, 150; 393 NW2d 811 (1986); *MSEA v Dep't of Mental Health*, 178 Mich App 581, 583; 444 NW2d 207 (1989). However, decisions resulting from arbitration are not immune from limited review. *Renny v Port Huron Hosp*, 427 Mich 415, 432; 398 NW2d 327 (1986). An arbitration award may be vacated where the arbitrator exceeded his or her powers. MCR 3.602(J); *Renny*, *supra* at 434. In addition, an employee may challenge the determination of the grievance process on procedural grounds and a court may review the process for elementary fairness. The essential elements of fairness are (1) adequate notice, (2) the right to present and rebut evidence and arguments, (3) formulation of the issues of law and fact, (4) a rule specifying the point at which the final decision is reached, and (5) other procedures necessary to determine the matter in question. *Id.* at 436-437.

Plaintiff first argues that the trial court erred in granting summary disposition to NOMC because the arbitrator in this case exceeded his powers by strictly applying policy A-38, which governed waivers of the residency requirement, despite the fact that he had previously found that it had been waived. However, the arbitrator did not find that policy A-38 had been waived. The arbitrator found that policy A-38 had been broadened to allow a waiver to be granted in cases of economic hardship. This finding is supported by the fact that the witnesses who testified that they had received waivers had cited economic considerations as the reason for their waiver requests. It is apparent that the arbitrator considered plaintiff's waiver request under both policy A-38 and under the broadened policy and found that plaintiff had not presented sufficient evidence that the personnel committee acted either arbitrarily or unfairly in denying the waiver request. These were factual findings that the arbitrator had been charged to render. Consequently, the trial court did not err in upholding the arbitration award and granting summary disposition in favor of defendant NOMC. *City of Pontiac v Pontiac Police Supervisors Ass'n*, 181 Mich App 632; 450 NW2d 20 (1989); *Gantz v Detroit*, 392 Mich 348, 356; 224 NW2d 278 (1974).

Plaintiff next argues that she was not represented during the arbitration proceedings and that, had she been aware that the union attorney did not represent her, she would have retained her own attorney. However, plaintiff testified in her deposition that she retained attorney L. Brooks Patterson at the time of her discharge, but that she later retained Paul Valentino, who had more experience dealing with wrongful discharge cases. Plaintiff also stated that Valentino consulted with Flack on more than one occasion. Plaintiff decided not to have Valentino attend the arbitration hearing on Valentino's recommendation, although Flack had no objections to Valentino being present. Further, Flack called witnesses on behalf of plaintiff and insured that plaintiff's right to present and rebut evidence and arguments was protected. Given this situation, the trial court was correct in concluding that there was no genuine issue of material fact that the arbitration proceedings in this case were not procedurally deficient, nor were they were lacking in elementary fairness. *Renny*, *supra* at 436-437.

Plaintiff further argues that the trial court erred in finding that there was no genuine issue of material fact that defendant AFSCME failed to fairly and properly represent her in the arbitration proceedings. A union does not breach its duty of fair representation unless its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit*, 419 Mich 651, 661-665; 358 NW2d 856 (1984); *Silbert v Lakeview Education Ass'n, Inc.*, 187 Mich App 21, 25; 466 NW2d 333 (1991). A plaintiff need not prove bad faith or fraud to make out a claim for breach of the duty of fair representation. *Walk v P*I*E Nationwide, Inc.*, 958 F2d 1323, 1326 (CA 6, 1992). However, a union's mere negligence does not constitute a breach of its duty of fair representation. *Goolsby*, *supra* at 680. The conduct prohibited by the duty of fair representation includes "(a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence." *Id.* at 682.

Plaintiff complains that AFSCME failed to provide her any representation during the arbitration proceedings. We disagree. Although attorney Flack's client was AFSCME, arbitration was instituted by the union on behalf of plaintiff. Therefore, Flack represented the interests of both the plaintiff and the union at the arbitration hearing.

Plaintiff also complains that attorney Flack failed to properly investigate the grievance by interviewing pertinent witnesses, as well as reviewing and introducing waiver requests and decisions on those requests by defendant NOMC. If a union fails to present favorable evidence during the grievance or arbitration process, this failure may constitute a breach of its duty of fair representation only if the evidence might have brought about a different decision and if the union official's decision exhibited arbitrary or discriminatory conduct, or if actions were taken in bad faith. *Walk*, *supra* at 1326-1327. The actions at issue here do not rise to that standard.

With regard to plaintiff's claim that Flack failed to interview pertinent witnesses, Flack indicated in an affidavit that he did not call plaintiff or her husband as witnesses because, on the basis of his discussions with them, he concluded, the disadvantages of having them testify outweighed the advantages. He felt their testimony would highlight the fact that plaintiff had not made any substantial effort to find suitable housing in Pontiac, as well as the fact that plaintiff's husband had been disabled

since 1981, but that plaintiff and her husband did not move until 1988. In addition, Flack concluded that plaintiff and her husband had no evidence of bias in NOMC's decision-making process. Further, he attested that they did not call plaintiff's husband's doctor as a witness because NOMC did not contest his medical condition and another witness testified that she was aware of the disability. Next, Flack asserted that he did not call hospital board members to testify at the arbitration hearing on the issue of bias because they were likely to be hostile witnesses who would testify in a manner adverse to plaintiff's position.

Finally, plaintiff claims that Flack failed to review and introduce waiver requests, witnesses, and decisions on waiver requests that would have shown that waivers were granted to numerous employees without requiring a showing of economic hardship. This may have been arguably negligent in light of the finding by the arbitrator that waivers had only been broadened enough to allow for waiver of the residency requirement due to economic hardship. These decisions, however, cannot reasonably be characterized as irrational, arbitrary, discriminatory, or grossly negligent. *Goolsby*, *supra* at 419. Thus, there was no genuine issue of material fact as to this issue and the granting of summary disposition was appropriate.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka