STATE OF MICHIGAN

COURT OF APPEALS

INGHAM COUNTY BOARD OF COMMISSIONERS and INGHAM COUNTY SHERIFF,

Plaintiffs-Appellants,

v

CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE,

Defendant-Appellee.

UNPUBLISHED
March 27, 1998

No. 201332
Ingham Circuit Court
LC No. 96-084992 CZ

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) but granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Following an employee grievance that arose out of a sex discrimination claim by an Ingham County Sheriff detective, an arbitrator found that the detective's assignment as warrant officer showed that she was the recipient of disparate treatment. The arbitrator ordered that she be relieved of the assignment immediately. Plaintiffs argue that the arbitrator exceeded his authority, maintaining that his decision did not draw its essence from the collective bargaining agreement.

On appeal, a trial court's grant of summary disposition will be reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition under 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). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Judicial review of an arbitrator's decision is

narrowly circumscribed. *City of Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989).

According to the United States Supreme Court, because the authority of the arbitrator is a subject of collective bargaining, just as any other contractual provision, the scope of an arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator. *W R Grace & Co v Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 US 757, 765; 103 S Ct 2177; 76 L Ed 2d 298 (1983).

Although the scope of judicial review of an arbitration award is extremely limited, an arbitrator is confined to the interpretation and application of the collective bargaining agreement and "may not sit to dispense his own brand of 'industrial justice.'" *City of Pontiac v Pontiac Police Supervisors Ass'n*, 181 Mich App 632, 634; 450 NW2d 20 (1989). Similarly, this Court has held that an arbitrator's jurisdiction and authority to resolve a particular dispute concerning the appropriate interpretation of the collective bargaining agreement derives exclusively from the contractual agreement of the parties. *Byron Center Public Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29; 463 NW2d 112 (1990).

We believe the instant arbitration award "draws its essence" from the contract. The preface of the collective bargaining agreement at issue provided:

> The County, the Sheriff, and the Division recognize the moral principles involved in the area of civil rights and have reaffirmed in the Collective Bargaining Agreement their commitment not to discriminate because of race, religion, creed, color, national origin, age, sex or handicap except for a BFOQ (bona fide occupational qualification).

This collective bargaining agreement also provided for a grievance procedure to settle disputes between the union and the employer regarding the interpretation and application of the agreement and required binding arbitration for unsettled grievances. In terms of the collective bargaining agreement, the arbitrator's scope of authority did not extend to adding, subtracting or modifying the terms of the agreement. However, acting pursuant to the antidiscrimination provision in the preface of the agreement, the arbitrator was free to determine that the detective's assignment as warrant officer constituted discrimination.

Moreover, in the absence of clear and unambiguous language to the contrary, the arbitrator properly determined that a suitable remedy for the violation was to relieve the detective from the warrant officer assignment. In *United Paper Workers International Union, AFL-CIO v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987), the United States Supreme Court stated:

> [W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.

At the basis of plaintiffs' claim is the finding of the arbitrator that "although strong inferences [could] be drawn from the circumstances surrounding [the] assignment [of the detective], a case of sex

discrimination [had] not been made out in the[] proceedings." Plaintiffs suggest that although the arbitrator did not find a case of sex discrimination, he implied a job assignment by seniority standard into the agreement and thereby ignored the express language of the agreement and imposed his own personal sense of fairness and justice on the parties. If the arbitrator had indeed found that there was no case of sex discrimination, as one sentence of his opinion might suggest, he would have exceeded his contractual authority by ordering that the detective be relieved from her warrant officer duties. In *Bd of Control of Ferris State College v Michigan AFSCME Council 25, Local 1609*, 138 Mich App 170; 361 NW2d 342 (1984), this Court held that an arbitrator exceeded his contractual authority by reinstating a grievant after expressly finding that just cause existed for dismissal. However, an arbitrator's ambiguous opinion, even if it permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. *United Steelworkers of America v Enterprise Wheel & Car Corp*, 363 US 593, 598; 80 S Ct 1358; 4 L Ed 2d 1424 (1960).

We conclude that the controversial sentence in the arbitrator's opinion, when read in context, was meant to convey his finding that there was a lack of *direct* evidence to prove discrimination. Notwithstanding his finding that there was no direct evidence of discrimination, the arbitrator found that, considering the unusual elements involved in the warrant officer assignment, the detective "was at least the recipient of disparate treatment" and ordered that the detective "be forthwith relieved from this duty." What the arbitrator did in his opinion was to consider the two recognized alternate legal methods to prove intentional discrimination. *Harrison v Olde Financial*, 225 Mich App 601, 606; ___ NW2d ___ (1997). Intentional discrimination can be established either by circumstantial evidence, *Harrison*, *supra* at 606, citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), or by direct evidence of discrimination, *Harrison*, *supra* at 611, citing *Price Waterhouse v Hopkins*, 490 US 228; 109 S Ct 1775; 104 L Ed 2d 268 (1989). Although the arbitrator did not find direct evidence of discrimination, he made a finding of disparate treatment on the basis of circumstantial evidence. This finding was within the scope of his authority, as the parties had incorporated in the preface to their agreement a statement of their commitment not to discriminate, and the arbitrator had the authority to interpret this provision of the contract to make sure that the parties abided by their stated commitment.

We find no error in the trial court's finding that the arbitrator's decision was within the scope of his authority under the collective bargaining agreement, or in its enforcement of the arbitrator's decision and order.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer