

STATE OF MICHIGAN
COURT OF APPEALS

TAYLOR BOARD OF EDUCATION,

Plaintiff/Counterdefendant-
Appellant,

v

SEIU LOCAL, 26M,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED
February 14, 2003

No. 241872
Wayne Circuit Court
LC No. 01-108243-CL

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Plaintiff Taylor Board of Education appeals as of right the order upholding the arbitration award reinstating Joseph Cieslak, a janitor for the Taylor School District. We affirm.

The pertinent facts of this case are the following. Following an exploratory investigation, plaintiff discharged Cieslak from his employment for (1) inappropriate and threatening communications to students, (2) dishonesty in falsifying his employment application, (3) insubordination, and/or (4) possession of used tampons. After being discharged from his employment, Cieslak pursued a grievance under the terms of the collective bargaining agreement (CBA). Once the grievance procedures were exhausted, defendant SEIU, Local 26M sought Cieslak's reinstatement pursuant to the arbitration process provided in the CBA. Subsequently, the arbitrator found no just cause for Cieslak's dismissal, awarding him back salary and benefits but conditioning his reinstatement on a psychological evaluation.

Thereafter, plaintiff filed suit, seeking to vacate the arbitration award. In the meantime, Cieslak was deemed psychologically fit to return to work pursuant to a final determination prepared by an independent medical examiner jointly selected by the parties. Following a hearing on the parties' cross-motions for summary disposition, the trial court denied plaintiff's motion for summary disposition but granted defendant's motion for summary disposition, affirming the arbitration award on the grounds that the arbitrator properly exercised the authority granted under the CBA, that the award did not violate public policy and that Cieslak was properly reinstated to his former employment as a school custodian.

On appeal, plaintiff claims that the arbitration award should be vacated because it did not draw its essence from the CBA and because the award violated public policy. Specifically,

plaintiff argues that the arbitrator did not take into consideration the statutory and public interest duties of a school district to ensure the safety of its student body and did not determine whether the proffered reasons for Cieslak's discharge were "misconduct" that warranted discharge, imposing duties upon the school district that are not contained in the CBA.

While we review a trial court's grant or denial of a motion for summary disposition *de novo*, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), judicial review of an arbitration award is "extremely limited." See *Port Huron Area School District v Port Huron Education Association*, 426 Mich 143, 150; 393 NW2d 811 (1986). As this Court pointed out in *POAM v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002):

The necessary inquiry for this Court's determination is whether the award was beyond the contractual authority of the arbitrator. Labor arbitration is a product of contract and an arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award "draws its essence" from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases. [250 Mich App at 343, quoting *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989) (citation omitted)].

Whether an arbitrator exceeded his contractual authority is an issue for judicial determination. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999). An arbitrator may not act on his own sense of personal justice, but is confined to interpretation and application of the agreement. *Id.* at 19. An arbitration award should be upheld so long as the arbitrator does not disregard or modify plain and unambiguous provisions of the agreement. *POAM, supra*, 250 Mich App at 344.

At the outset, we note that the trial court properly concluded that the agreement did not define what acts constituted just cause for discharge, and that the parties have left the decision to the arbitrator. See *id.* at 346, citing *Bloomington v Local 2828 of the American Federation of State, Co & Municipal Employees*, 290 NW2d 598, 602 (Minn, 1980) ("By failing to specifically define what acts constitute just cause for discharge, . . . the parties left the decision to the arbitrator.")

Pursuant to Article 3(I) the CBA, school district has the right as an employer to "discipline and discharge employees for just cause." Article 18, which provides for exploratory interviews to determine disciplinary actions, provides that "[d]isciplinary action may only be taken for reasonable and just cause." Article 19 of the agreement, which provides for the procedure to be followed for discharge and demotion, provides that employees "may be disciplined, demoted, or discharged for reasonable and just cause." Article 19(5) provides that an employee "aggrieved by the actions of the employer" may appeal the action pursuant to the contractual grievance procedure. Article 20, which outlines the grievance procedure, defines a "grievance" as to mean "a complaint by an employee in the bargaining unit, (1) that there has

been a violation, misinterpretation, or inequitable application of any provisions of this Agreement” Further, Article 20(5)(a) provides that, if the union was dissatisfied with the decision of the school district, the union may submit the grievance to binding arbitration. Article 20(5)(b) provides that the arbitrator “shall have no power to add to, subtract from, or modify the collective bargaining agreement.”

Thus, in light of the above contractual provisions, the arbitrator was charged by the agreement to determine whether the school district violated those provisions that allow it to discharge an employee “for reasonable and just cause.” Contrary to plaintiff’s claim that the arbitrator was required to determine whether Cieslak’s behavior constituted “misconduct,” the agreement required the arbitrator to determine whether the proffered reasons amounted to “reasonable and just cause” for the discharge.

The principal thrust of plaintiff’s argument on appeal rests upon the claim that the arbitrator defied public interest considerations and the Revised School Code statutory duties of a school district to ensure the safety of its student body, and reinstated a dangerous employee who made a bomb threat and who collected used tampons for “ghoulish fetishism.” This misstates the record. First, although Cieslak was initially charged with making a bomb threat, the Board of Education, following an exploratory meeting to investigate Cieslak’s case, opted not to discharge Cieslak for that reason. Second, there is nothing in the record to indicate any sexual connection with the collection of used tampons. Rather, plaintiff’s own psychiatric experts who examined Cieslak noted that his medical records were replete with his behavior of excessive and uncontrollable hoarding of useless materials. Further, the neutral psychiatric expert, who examined Cieslak twice, did not find any evidence pertaining to a sexual connection related to the collection of the tampons. Moreover, the record indicates that Cieslak explained that he collected the tampons for about one month to prove to his supervisor that the tampons were being found throughout the school premises.

Further, plaintiff does not assert, and the record does not show, that the arbitrator was presented with the public interest and statutory arguments that plaintiff now raises on appeal. Specifically, there is nothing in the record to indicate that the Board of Education had adopted a zero-tolerance policy with respect to school bomb threats, that it presented the arbitrator with any of the Board of Education’s safety policies that it may have adopted pursuant to the Revised School Code, or that plaintiff enumerated to the arbitrator the statutory provisions of the Revised School Code which plaintiff raises for the first time on this appeal. An arbitrator lacks the power to resolve an issue not presented for arbitration. *Hopkins v Midland*, 158 Mich App 361, 370; 404 NW2d 744 (1987).

Here, plaintiff has failed to show that the arbitration award did not draw its essence from the CBA. With respect to the first proffered reason for discharge, plaintiff argues that the arbitrator exceeded his contractual powers when he determined the issue of Cieslak’s intent in making the threatening communication to a female student, and that the arbitrator’s decision limited the school district to discipline employees only for communications that carry an actual intent to inflict harm. In this instance, the arbitrator properly exercised his contractual authority in determining Cieslak’s intent with respect to the “threatening communications” for which he was discharged. As for plaintiff’s claim that the arbitrator failed to determine whether certain language in Cieslak’s communications with the female student was “inappropriate,” the trial court properly found that the award should not be vacated on this basis because the

arbitrator specifically addressed this issue, even though he did not detail all his findings. See *DAIE v Ayvazian*, 62 Mich App 94; 233 NW2d 200 (1975) (noting that “the findings specific enough to show how the arbitrators arrived at an award and what award they decided”).

With respect to the second proffered reason for discharge – dishonesty in falsifying the employment application – plaintiff argues that the arbitration award improperly limited the school district’s ability to discipline an employee who falsifies his employment application. The arbitrator determined that, given the facts in this case, it was reasonable that an employer would immediately inquire into the absence of such application information unless the information was irrelevant for the position sought. The arbitrator found that plaintiff failed to inquire into the noticeable fourteen-year gap in Cieslak’s listed work experience, the noticeable absence of a check mark in the box inquiring into whether the applicant had been dismissed from a previous job, and the noticeable short military service of eight months. In effect, plaintiff requests this Court to review the arbitrator’s factual findings or decision on the merits with respect to whether the school district had reasonable and just cause to discharge Cieslak for the lack of information in his work application, which this Court is not allowed to do. *POAM, supra*, 250 Mich App at 343 (“A court may not review an arbitrator’s factual findings or decision on the merits.”)

Plaintiff also argues that the arbitrator failed to consider whether Cieslak’s collection of used tampons was misconduct, but instead impermissibly imposed a duty not found within the contract by requiring a psychological examination for Cieslak’s fitness for duty. As previously discussed, the issue before the arbitrator was to determine whether plaintiff had reasonable and just cause to discharge Cieslak. When a CBA does not define what acts constitute just cause for discharge, the parties leave the decision to the arbitrator, and the arbitrator is empowered to fashion the appropriate remedy or level of discipline for the violations found. *POAM, supra*, 250 Mich App at 346. When fashioning a remedy, an arbitrator has the authority to consider all circumstances that may be probative of a party’s intent and the likelihood that the wrongful behavior would be repeated. *Id.* In this case, we find that the arbitrator properly exercised his contractual powers in determining that the proffered discharge reasons did not amount to reasonable and just cause for the discharge. Accordingly, plaintiff has failed to show that the trial court erred in holding that the arbitration award drew its essence from the CBA.

Plaintiff also argues that the trial court erred in not setting aside the arbitrator’s award on the ground that it violated public policy. We disagree.

This Court may refuse to enforce an arbitration award that is contrary to public policy. *Porter v City of Royal Oak*, 214 Mich App 478, n 6, 488; 542 NW2d 905 (1995), citing *Lincoln Park, supra*, 176 Mich App at 6-7. This exception is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedent and not from general considerations of supposed public interest. *POAM, supra*, 250 Mich App at 347 (citations and quotations omitted).

Contrary to plaintiff’s argument, and as the trial court correctly noted, Cieslak was never found to have endangered student safety or to have engaged in conduct that would legally preclude the school district from reinstating him. Plaintiff has therefore not demonstrated a well-defined and dominant public policy to discharge Cieslak. Accordingly, the trial court did not err in finding no violation of public policy.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage