

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

CITY OF DETROIT and DETROIT POLICE  
DEPARTMENT,

UNPUBLISHED  
February 17, 2005

Plaintiffs-Appellees,

v

DETROIT LIEUTENANTS' & SERGEANTS'  
ASSOCIATION and EDWARD FORMAN,

No. 250424  
Wayne Circuit Court  
LC No. 02-225988-CK

Defendants-Appellants.

---

Before: Murray, P.J., and Meter and Owens, JJ.

MURRAY, P.J. (*concurring*).

I concur with the majority's conclusion that the arbitrator's remedy of reinstatement did not violate any well-defined public policy. Although Sgt. Forman's off-duty actions constituted illegal conduct, his reinstatement violates no positive public policy as reflected by our statutes or case law. Had Sgt. Forman been convicted of a felony, this would be an entirely different case. MCL 28.609b. I also agree with the majority's conclusion that the arbitrator's decision should not be vacated despite the fact that the arbitrator went, after the close of the hearings, on an evidence gathering venture to the Ninth Precinct. However, this conclusion is reached not because the arbitrator acted properly, but because the parties acquiesced to this particular procedure.

There can be no doubt that our review of the arbitrator's decision is exceedingly narrow. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 117; 607 NW2d 742 (1999). Nonetheless, and without disturbing the arbitrator's findings of fact, *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989), it seems clear that the arbitrator had no contractual authority to obtain ex parte facts which he in part relied upon in rendering his decision and award.

As the majority recognizes, the Master Agreement speaks to what evidence an arbitrator may consider. Section 10.B.7 states that arbitration hearings shall be de novo, with no limitation as to the admission of evidence. Section 9.A.3 then provides in clear terms that the arbitrator(s) "shall not consider any evidence submitted by either party which was not produced in the grievance process unless such evidence was not then known to the party submitting same." As the majority notes, these two provisions could be read to conflict, for Section 10.B.7 can be read

to indicate that arbitral review is not limited in the evidence that can be considered, while Section 9.A.3 can be read to limit the evidence to only that which was presented during the grievance process. Despite this potential conflict, there is absolutely no way to construe either of these provisions in a way that permits what the arbitrator did in this case.

Realistically, the only reasonable way to apply these sections is that the arbitrator reaches a decision de novo, i.e., with no deference to the Trial Board, while the conflict is whether the decision is based on a new record, or based on what was presented in the grievance process. But to go outside the record developed by the parties in both the grievance process and arbitration is to go beyond what the Master Agreement allows. There is quite simply no authority provided to the arbitrator to consider evidence not presented by the parties. Thus, the arbitrator exceeded his contractual authority in rendering his decision. And, when an arbitrator goes beyond the authority granted to him by the contract, he has disregarded, and therefore exceeded, his authority. *Police Officers Ass'n v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002).

Our Supreme Court has set aside an arbitration decision when the arbitrator has been subjected to ex parte communication. In *Hewitt v Reed City*, 124 Mich 6; 82 NW 616 (1900), the parties entered into an arbitration agreement. A hearing was held, and after the evidence was submitted, the hearing was closed. Thereafter, the defendant submitted ex parte to the arbitrator a memorandum of authorities. The circuit court vacated the award based upon the ex parte submission, and the Supreme Court affirmed. In doing so, the Court held that the communication violated the terms of the arbitration agreement, regardless of whether the ex parte communication influenced the arbitrator. *Id.* at 8-9. The Court adopted a “strict rule” that such communications were impermissible, without regard to the impact it had on the arbitrator. *Id.*

*Hewitt*, though more than a century old, has not been reversed or questioned by any Michigan court, although it has only been sparingly cited. See, e.g., *Campbell v Michigan Mut Hail Ins Co*, 240 Mich 167, 180; 215 NW 401 (1927). It does not, however, contain any discussion about the standard of review employed by the court, leaving the reader to wonder whether the review of an arbitration decision was as limited then as it is today.

However, courts from our sister states, employing the same standard of review as we are bound to employ, have cited *Hewitt* for the proposition that an arbitration award should be vacated when there has been “ex parte receipt of evidence as to a material fact, without notice to a party.” *O&G/O’Connell Joint Venture v Chase Family Ltd Partnership No 3*, 203 Conn 133, 147; 523 A2d 1271 (1987). See, also, *Town of Wallingford v Wallingford Police Union*, 45 Conn App 432, 440; 696 A2d 1030 (1997); *Hooten Constr Co Inc v Borsberry Constr Co, Inc*, 108 NM 192, 194; 769 P2d 726 (1989).

In my view, *Hewitt* adds support to the conclusion that the arbitrator in this case exceeded his authority under the Master Agreement when he unilaterally gathered evidence without the presence of the parties. Although *Hewitt* involved ex parte submissions, while this case does not, the arbitrator, nonetheless, gathered information from one of the parties without either side actually being present. However, because the record reveals that both parties were aware that the arbitrator was proceeding to the Ninth Precinct, they had an opportunity to either object or attend, and plaintiff did neither. Plaintiff’s failure to do so until after the adverse decision precludes the court from vacating the award. See, e.g., *Twin Lakes Reservoir & Canal Co v Platt*

*Rogers, Inc*, 112 Colo 155, 164-165; 147 P2d 828 (1944) (“the parties acquiesced in the plan and agreed on the scope of the survey. Thus, plaintiff may not now successfully maintain that, in ordering the survey, the board deviated from its authority.”) (emphasis in original); *Graceman v Goldstein*, 93 Md App 658, 671-672; 613 A2d 1049 (1992). As the court held in *Lebow v Bogner-Seitel Realty, Inc*, 55 AD2d 695, 696; 389 NYS2d 51 (1976):

The court properly determined that the arbitrator’s independent inspection constituted misbehavior which is a valid ground for vacating an award[, *Stefano Berizzi Co, Inc v Krausz*, 239 NY 315[; 146 NE 436 (1925)]; *Matter of 290 Park Ave, [Inc (Fergus Motors, Inc)]*, 275 App Div 565[; 90 NYS2d 613 (1949)]. Petitioners, however, had ample opportunity to object to the arbitrator’s behavior but failed to do so until after the adverse award was made. Consequently, it is this court’s view that petitioners waived their right to object after the granting of the award . . . .

The arbitrator’s decision to visit the Ninth Precinct was unwise and has led, in part, to these prolonged proceedings. I strongly caution this arbitrator from doing so again without the express, written agreement of both parties.

/s/ Christopher M. Murray