

STATE OF MICHIGAN  
COURT OF APPEALS

---

POLICE OFFICERS LABOR COUNCIL,

Plaintiff/Counterdefendant-  
Appellant,

v

CITY OF WYOMING,

Defendant/Counterplaintiff-  
Appellee.

---

UNPUBLISHED

July 18, 2006

No. 258843

Kent Circuit Court

LC No. 03-011121-CZ

Before: Meter, P.J., and Hoekstra and Markey, JJ.

HOEKSTRA, J., (*dissenting*).

I respectfully dissent from the majority's decision to affirm the trial court's order vacating the arbitration award at issue in this case. Although I find the facts of this case to be quite disturbing, I nonetheless conclude that adherence to the limited standard for review of an arbitrator's decision does not permit holding that the arbitrator exceeded his authority. Further, unlike the majority, I conclude that the award of reinstatement does not violate public policy because, without engaging in impermissible fact-finding, as the majority unhesitatingly does, no public policy violation is established in the record before us. Consequently, I would reverse the trial court's order vacating the arbitrator's award.

A. The Arbitrator's Authority and Factual Findings

The principle issue on appeal, one the majority ignores, is whether the trial court erred in vacating the arbitration award on the ground that the arbitrator exceeded his authority under the parties' collective bargaining agreement by disregarding the plain language of applicable rules and regulations regarding ethical and appropriate law enforcement officer conduct. As recognized by the majority, although judicial review of an arbitration award is *de novo*, *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003), that review, whether conducted here or in the trial court, is narrowly circumscribed, *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986).

In reviewing the award of an arbitrator, a court may only inquire into "whether the award was beyond the contractual authority of the arbitrator." *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). The reason for this limited review stems from the nature of arbitration as a contractual substitute for litigation. Thus, as recognized

by Justice Souris in his dissenting opinion in *Frazier v Ford Motor Co*, 364 Mich 648, 656; 112 NW2d 80 (1961):

“the fact that the arbitrator made erroneous rulings during the hearing, or reached erroneous findings of fact from the evidence is no ground for setting aside the award, because the parties have agreed that he should be the judge of the facts. Even his erroneous view of the law would be binding, for the parties have agreed to accept his view of the law. Were it otherwise in either of these cases, arbitration would fail of its chief purpose; instead of being a substitute for litigation it would merely be the beginning of litigation. Error of law renders the award void only when it would require the parties to commit a crime or otherwise violate a positive mandate of law.” [quoting *Updegraff & McCoy, Arbitration of Labor Disputes* (1946), p 126.]

A court may not, therefore, review an arbitrator’s factual findings or decision on the merits. *Lincoln Park, supra*. “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.” *Id.* (citation omitted).

An arbitrator exceeds the scope of his authority when he ignores the plain language of the collective bargaining agreement, or the rules and regulations established or otherwise applicable under the terms of that agreement. *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 119-124; 607 NW2d 742 (1999); see also *Pontiac v Pontiac Police Supervisors Ass’n*, 181 Mich App 632, 635; 450 NW2d 20 (1989). Here, the arbitrator was employed by the parties to determine whether the conduct for which the officer was discharged constituted the “just cause” necessary under the parties’ collective bargaining agreement to terminate the officer’s employment. The collective bargaining agreement does not define “just cause,” and neither it nor the rules and regulations governing the conduct of a City of Wyoming police officer alleged by defendant to have been violated by the officer contain any language mandating the dismissal of an officer if it is found that he or she has violated such rules or regulations. Cf. *Lenawee Co Sheriff, supra* at 120. Moreover, the Law Enforcement Code of Ethics (LECE), which has been incorporated into the parties’ collective bargaining agreement, fails to define the requirements necessary to live the “unsullied” life the officer has pledged to live. The unbecoming conduct rule, which has also been incorporated into the parties’ labor contract and requires that City of Wyoming police officers “conduct themselves at all times . . . in such a manner as to reflect most favorably on the department,” similarly provides only general guidance regarding conduct violative of the rule, e.g., that “which brings the department into disrepute or reflects discredit upon the officer . . . .”

When a collective bargaining agreement fails to define just cause for discharge, an arbitrator has the authority to define what acts constitute just cause. *Police Officers Ass’n of Michigan v Manistee Co*, 250 Mich App 339, 346; 645 NW2d 713 (2002). By extension, when the rules and regulations established or otherwise applicable under a collective bargaining fail to define terms, the arbitrator similarly has the authority to define what acts constitute a violation of those rules. *Id.*; see also *United Steelworkers of America v Enterprise Wheel and Car Corp*, 363 US 593, 599; 80 S Ct 1358; 4 L Ed 2d 1424 (1960) (“[i]t is the arbitrator’s construction which was bargained for; . . .”). As noted above, the collective bargaining agreement and associated

rules at issue here fail to clearly define conduct constituting just cause for discharge. Accordingly, the arbitrator was both required and empowered to determine if the officer violated the LECE or any other rule or applicable regulation, and if so, whether the violation amounted to just cause to terminate the officer's employment.

In making this determination, the arbitrator specifically found that while the officer "exercised poor judgment" and "could have acted in a more responsible and reasonable fashion," his actions did not rise to the level of violating the LECE, the unbecoming conduct rule, or any other rule or regulation applicable to his employment. The trial court apparently disagreed with the arbitrator's conclusion in this regard. However, because conduct violative of these rules of employment is not clearly defined, it was within the scope of the arbitrator's contractual authority to determine whether the officer's conduct violated those rules. *Lincoln Park, supra*. Thus, regardless whether the arbitrator was correct in his assessment of the evidence, the standard of review applicable in both this Court and the trial court does not permit disturbing the arbitrator's finding that the officer's conduct was not violative of any rule or regulation applicable to his employment. *Id.*; see also *Frazier, supra*. Consequently, the trial court in erred in vacating the arbitration award on the ground that the arbitrator exceeded the scope of his authority.

#### B. Public Policy

Despite the limits on judicial review of arbitration awards, a court may vacate an arbitration award if the award is contrary to public policy. *Gogebic Medical Care Facility v AFSCME Local 992, AFL-CIO*, 209 Mich App 693, 697; 531 NW2d 728 (1995). However, a court may not vacate an arbitration award merely because it finds the conduct at issue distasteful. *Lincoln Park, supra* at 7. To violate public policy, an arbitration award must mandate illegal or unlawful conduct. *Id.*

In its brief on appeal and also below in the trial court, defendant claimed that the arbitrator's award could be vacated on the alternative ground that the award violates public policy.<sup>1</sup> For reasons that differ in some respects from those advanced by defendant, the majority finds that the reinstatement award contravenes public policy on two grounds—first, that the officer's conduct violates the proscription against encouraging the delinquency of a minor found in MCL 750.145a, and second, that this violation, in combination with the general manner in which the officer dealt with the boy, demonstrates that he lacks the good moral character required of law enforcement officers by the Michigan Commission on Law Enforcement Standards (MCOLES). I must admit to a temptation to join with the majority because of the disturbing facts in this case. However, unlike the majority, I do not conclude that "[i]t is of no import that the officer has not been convicted of a crime or that the MCOLES has not instituted proceedings against the officer." *Ante* at 4. Rather, I find that the absence of these factual bases precludes us from vacating the arbitrator's award on the ground of public policy. In concluding

---

<sup>1</sup> Although raised below, the trial court did not address defendant's public policy argument. This Court may nonetheless consider the question whether the arbitration award violates public policy because it is one of law for which all the facts necessary for resolution have been presented. See, e.g., *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005); see also *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 723; 697 NW2d 539 (2005).

otherwise, I believe the majority makes a fundamental error by engaging in fact-finding to reach their result. *Frazier, supra; Lincoln Park, supra*. Although doing so in this case achieves what may be perceived as a more desirable outcome, it arguably sets a precedent that is contrary to the established standard of appellate review.

Pursuant to the Commission on Law Enforcement Standards Act (CLESA), MCL 28.601 *et seq.*, the MCOLES has been granted the authority to bestow the certification necessary to be employed as a police officer in this state, and to promulgate the rules for acquiring and maintaining such certification. See MCL 28.609 and MCL 28.609a. The majority is correct that one such rule established by the commission requires that each individual certified to be a law enforcement officer possess good moral character, and that all violations of the law will be considered by the commission to indicate a lack of such character. See 1999 AC, R 28.4102(e).<sup>2</sup> However, while the CLESA requires revocation of an officer's certification upon conviction of a felony "by a judge or jury," "by a plea of guilty," or "by a plea of no contest," it is not disputed that no such independent finding or admission of criminal responsibility is present in the record before us.<sup>3</sup> MCL 28.609b. Moreover, while I do not dispute that a violation of the law short of felony conviction is a permissible consideration for purposes of determining whether an individual possesses the good moral character required by 1999 AC 28.4102(e), the CLESA and its associated rules make clear that the determination whether an officer does or does not possess such character, and therefore is ineligible for employment as a law enforcement officer, has been committed to the MCOLES. Again, however, the record offers no evidence that any such determination has been made by the commission.

Thus, on the record before us, neither the arbitrator, who was contractually permitted to making findings regarding the effect of the officer's conduct, nor the MCOLES, which is statutorily authorized to assess an individual's moral fitness for employment as a law enforcement officer, has made any finding that, as a result of the conduct for which he was discharged, the officer lacks good moral character or is otherwise ineligible for continued certification and employment as a law enforcement officer. Nonetheless, and despite their assurance that they "are not disputing the arbitrator's factual findings," *ante* at 3 n 3, the majority concludes that the circumstances of this case "indicate, at a minimum, that the officer encouraged a child to engage in acts of delinquency" in violation of MCL 750.145a, and that this violation, as well as "the general manner in which [the officer] dealt with the boy in this case," establishes that the officer did not adhere to the high moral standards applicable to law enforcement officers under 1999 AC, R 28.1402(e), *ante* at 3-4. As indicated, however, whether the officer is guilty of a criminal offense or otherwise lacks the moral character required for certification as a law enforcement officer are matters outside the scope of review to which this Court is bound. Indeed, like conduct "unbecoming" an officer, "good moral character," as used in 1999 AC, R 28.4102(e), is an undefined and ambiguous term, and however earnestly this panel believes that the officer lacks such character, we are not permitted by the standard of

---

<sup>2</sup> 1999 AC R 28.4102 was rescinded by the MCOLES shortly after submission of this case for our decision. The substance of the rule was, however, immediately restated by the commission. See 2006 MR 11, R 28.14203(e). Thus, the requirement of good moral character remains a regulatory standard for certification as a law enforcement officer in this state.

<sup>3</sup> To the contrary, the record indicates that misdemeanor criminal charges were filed against the officer, but were later dismissed.

review applicable here to make that determination. See *Fraternal Order of Police, Ionia Co Lodge No 157 v Bensinger*, 122 Mich App 437, 448; 333 NW2d 73 (1983) (it is the arbitrator's award, rather than his factual findings and conclusions of law, that must be contrary to public policy). To the contrary, in the absence of a violation of law, rule, or regulation factually established independent of the arbitrator's findings, either by conviction in a court of competent jurisdiction or through the administrative processes of the MCOLES, we are bound by the arbitrator's determination that the officer has not violated any law, rule, or regulation regarding appropriate conduct by a police officer. *Frazier, supra*; *Lincoln Park, supra*. As such, requiring defendant to reinstate the officer simply does not violate public policy because, so long as the officer remains certified for employment as a law enforcement officer, to do so does not violate any positive mandate of law. See *Lincoln Park, supra* at 7-8 (enforcing the arbitrator's award because there was no legal proscription against reinstating the officer under the circumstances); cf. *Gogebic, supra* at 697-698 (vacating the arbitrator's award of reinstatement because the defendant's continued employment was in direct conflict with federal regulation).

Consequently, because the arbitrator did not exceed his authority, and reinstatement of the officer does not violate public policy, I would reverse the trial court's order vacating the arbitration award.

/s/ Joel P. Hoekstra