

STATE OF MICHIGAN
COURT OF APPEALS

SUPERVISORY EMPLOYEES' ASSOCIATION,
LIVONIA SCHOOLS / MEA,

UNPUBLISHED
August 20, 2002

Plaintiff-Appellee,

v

LIVONIA PUBLIC SCHOOLS AND LIVONIA
PUBLIC SCHOOLS BOARD OF EDUCATION,

No. 232402
Wayne Circuit Court
LC No. 00-022573-CZ

Defendants-Appellants.

Before: White, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right the circuit court's grant of summary disposition, which set aside an arbitrator's determination that a grievance was not arbitrable. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

On February 8, 1999, David Kozakiewicz, a 22-year employee of the Livonia Public School District ("District") working as a custodian, was confronted by his supervisor for taking discarded, empty pop cans from a school facility and placing them in his vehicle. Kozakiewicz was a member of the Supervisory Employees Association, Livonia Schools ("SEALS"). Kozakiewicz's immediate supervisor notified him by letter on February 9, 1999 that he was suspended. On February 15, 1999, Kozakiewicz filed a Step 2 grievance, contesting his suspension. On March 1, 1999, the District's personnel office notified Kozakiewicz by letter that he was terminated for theft, insubordination, and using the property and resources of the District for personal gain. On March 2, 1999, Kozakiewicz filed a Step 3 grievance, challenging his termination on just cause grounds. He never filed a Step 2 grievance on his termination.

The grievance process at issue is set out in the collective bargaining agreement ("CBA") between the District and SEALS. Article IX, Section A of the CBA states: "Demotion or discharge of any SEALS member is subject to the grievance procedure beginning at Step Two." The District held a Step 3 grievance hearing on March 9, 1999, denied the Step 3 grievance on March 11, 1999, and agreed to consolidate the termination and suspension grievances.

At an arbitration hearing on November 22, 1999, the District challenged the arbitrability of the termination grievance on the grounds that Kozakiewicz had failed to file it as a Step 2 grievance, as required by the CBA. The CBA recognizes the District's right to challenge whether a grievance is arbitrable. SEALS offered evidence that the District had not always followed the CBA process for addressing grievances.

The arbitrator found for the District:

The discharge grievance is not arbitrable because it was filed at Step Three of the grievance arbitration procedure. Article XVIII, Section B establishes a four step grievance arbitration procedure. Article IX, Section A permits the filing of discharge grievances at Step Two. Observing each step of this procedure, as modified by Article IX, Section A, is a condition precedent to the arbitrator's assumption of jurisdiction. The Employer did not waive its challenge [of arbitrability] by failing to raise it at Step Three. The evidence of past practice is not sufficient to prove that the parties, by their conduct, have modified the requirements of Article XVIII, Section B or Article IX, Section A.

SEALS then filed the instant complaint in circuit court seeking to vacate the arbitrator's award. The parties filed cross-motions for summary disposition, and the circuit court granted SEALS' summary disposition motion "for public policy reasons," noting:

This kind of reminds me a little bit of default judgments, and really you don't want to not reach the merits of the cases unless you just have to, and I think this was kind of like a technicality thing.

II

Defendants argue that the circuit court erred in setting aside the arbitrator's award on the ground that it violated public policy. This Court reviews a trial court's decision on a summary disposition motion de novo. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 15; 643 NW2d 212 (2002).

Michigan's "legislature and . . . courts have strongly endorsed arbitration as an inexpensive and expeditious alternative to litigation." *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 133; 596 NW2d 208 (1999). Courts show strong deference toward an arbitrator's award. *Port Huron Area School Dist v Port Huron Educ Ass'n*, 426 Mich 143, 152; 393 NW2d 811 (1986). "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." *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989). A court, however, can refuse to enforce an arbitrator's award where the award is contrary to public policy. As this Court noted in *Lincoln Park, supra*:

In *United Paperworkers [Int'l Union v Misco, Inc*, 484 US 29, 43; 108 S Ct 364; 98 L Ed 2d 286 (1987)], the Supreme Court, relying upon its earlier decision in *W R Grace & Co v Rubber Workers*, 461 US 757; 103 S Ct 2177; 76 L Ed 2d 298 (1983), held:

In *W R Grace*, we recognized that “a court may not enforce a collective-bargaining agreement that is contrary to public policy,” and stated that “the question of public policy is ultimately one for resolution by the courts.” We cautioned, however, that a court's refusal to enforce an arbitrator's interpretation of such contracts 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 precedents and not from general considerations of supposed public interest.’” [*Lincoln Park, supra* at 6.]

In the instant case, the arbitrator concluded that because the grievance process was not followed, the grievance was not arbitrable. The circuit court set aside the arbitrator’s award based on public policy, likening the situation to a default judgment.

Public policy favors disposition of cases on the merits rather than through a default judgment. *Levitt v Kacy Mfg Co*, 142 Mich App 603, 607; 370 NW2d 4 (1985). However, setting aside an arbitrator’s award on public policy grounds can be done only if it is based on “some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interest.’”” *Lincoln Park, supra* at 6.

In *Saginaw v Michigan Law Enforcement Union, Teamsters Local 129*, 136 Mich App 542; 358 NW2d 356 (1984), this Court enforced an arbitrator’s award enjoining the city from requiring unionized police officers to forfeit one paid work day per month, rejecting the city’s claim that the award violated public policy by forcing the financially-strapped city to lay off police officers. In *Lansing Community College v Lansing Community College Chapter of Michigan Ass’n for Higher Educ*, 171 Mich App 172; 429 NW2d 619 (1988), this Court, hearing the case on remand in light of the United States Supreme Court’s decision in *United Paperworkers, supra*, upheld its earlier decision concluding that an arbitrator’s award allowing a professor to continue teaching after smoking marijuana with his students did not contravene public policy. In *Lincoln Park, supra*, this Court held that an arbitrator’s award reinstating a police officer who had engaged in consensual sex while on duty did not contravene public policy. “Although we do not condone [the police officer’s] actions, . . . [t]he award did not otherwise have the effect of mandating any illegal conduct or cause the employer to act unlawfully.” *Id.* at 7. In contrast, in *Gogebic Medical Care Facility v AFSCME Local 992, AFL-CIO*, 209 Mich App 693; 531 NW2d 728 (1995), this Court refused to enforce an arbitrator’s award allowing a nurse’s aide at a long-term care facility to return to work despite a Michigan Department of Public Health’s (“MDPH”) determination that the aide had abused residents.

The arbitration award, if enforced, would cause plaintiff to act unlawfully.^[1] We believe that this regulation reflects a "well defined" and "dominant" public policy

¹ “[T]he arbitration award would violate 42 CFR 483.13(c)(1)(ii).” *Gogebic, supra*, at 697. §483.139(c)(1)(ii) states: “(1) The facility must-- (ii) Not employ individuals who have been-- (A) Found guilty of abusing, neglecting, or mistreating residents by a court of law; or (B) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment (continued...)”

in favor of protecting residents of long-term care facilities from abusive treatment by nurse's aides. In light of our decision upholding the MDPH's determination that [the aide] had committed abuse, we conclude that the arbitrator's award reinstating [the aide] was properly set aside. [*Id.* at 698.]

Citing § 11 of the PERA, plaintiff argues that the arbitrator's award contravened the well-defined public policy that permits public employees to have their grievances heard on the merits. Section 11 states:

Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment. [MCL 423.211.]

The statute recognizes that public employees have the same right to exclusive representation as enjoyed by employees in the private sector. The statute's proviso speaks to the rights of individual public employees covered under a collective bargaining agreement. *Mellon v Board of Ed of Fitzgerald Public Schools*, 22 Mich App 218, 221; 177 NW2d 187 (1970). Nothing in the statute addresses the right of individual public employees in general to have their grievances heard on the merits. Rather, the statute speaks to the rights of public employees covered by a collective bargaining agreement to present grievances directly to the employer without a union representative present. That is not at issue in the instant case. Therefore, plaintiff's claim to the contrary is without merit.

Plaintiff also points to §203(d) of the Labor Management Relations Act, which provides in pertinent part: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 USC §173(d). The Act explicitly points to the "method agreed upon by the parties." In the instant case, the method agreed upon by the parties required that termination grievances begin at Step 2, and contemplated that an arbitrator would determine the arbitrability of the grievance.

Plaintiff further argues that failing to hear grievances because of procedurally insignificant errors offends public policy. However, public policy promotes resolving grievances in accord with the procedures set out in a collective bargaining agreement.

(...continued)

of residents or misappropriation of their property." [42 CFR 483.13(c)(1)(ii).]

Where a collective-bargaining agreement provides a method by which disputes are to be resolved, there is a strong policy in favor of deference to that method of resolution. [Citation omitted.] This policy can only be effectuated “if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.” *United Steelworkers of America v American Mfg Co*, 363 US 564, 566; 80 S Ct 1343; 4 L Ed 2d 1403 (1960). [*Fulghum v United Parcel Service, Inc*, 424 Mich 89, 92; 378 NW2d 472 (1985).]

Plaintiff also notes that, under the Federal Rules of Civil Procedure, mere technicalities do not block pursuing the just determination of a complaint. This comparison is inapposite. In the instant case, the parties agreed to the grievance procedures in the CBA and gave no indication that any provision was a mere technicality. Moreover, the grievance procedures are not simply the initiation of a process that involves other elaborate procedures, as is the case with the Federal Rules of Civil Procedure. The grievance procedures are the sole process for resolving the matter at hand.

We conclude that the asserted public policy disfavoring default judgments lacks the “well-defined and dominant” characteristics exemplified in *Gogebic, supra*. In refusing to enforce the arbitrator’s award, the circuit court cited no law in support and we have found none compelling that result. Enforcing the award will “not . . . have the effect of mandating any illegal conduct or cause the employer to act unlawfully.” *Lincoln Park, supra* at 7.

Reversed and remanded for entry of judgment enforcing arbitrator’s award. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell