

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

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CITY OF FRANKFORT,

Plaintiff-Appellant,

v

POLICE OFFICERS ASSOCIATION OF  
MICHIGAN, INC.,

Defendant-Appellee.

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UNPUBLISHED  
October 18, 2011

No. 298307  
Benzie Circuit Court  
LC No. 07-008083-CK

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff City of Frankfort appeals as of right the trial court's order denying the City's motion for summary disposition under MCR 2.116(C)(9), granting defendant Police Officers Association of Michigan, Inc. (the Union) summary disposition under MCR 2.116(I)(2), and confirming an arbitration decision after remand. This case arises out of a dispute over interpretation and application of the terms of a collective bargaining agreement between the City and the Union. We emphasize, as a prior panel of this Court ruled, that the language of the collective bargaining agreement is clear and unambiguous. But that is not the question that is before us. The question before us consists of two related parts: whether the arbitrator on remand acted within the authority that this Court's order granted him and within the scope of his authority under the collective bargaining agreement. Because we conclude that he did, we affirm.

**I. FACTS**

This case comes to us after this Court's remand to the arbitrator and the trial court's confirmation of the arbitrator's decision on remand. In this Court's prior opinion ordering the remand,<sup>1</sup> the panel laid out the facts as follows:

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<sup>1</sup> *City of Frankfort v Police Officers Ass'n of Mich*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2009 (Docket No. 286523), at 2.

The arbitration in this case involved a grievance filed on behalf of the lead senior officer in [the City's] police department, who was laid off in April 2003 under the terms of the 2001-2004 collective bargaining agreement between the parties. Under that contract, an individual's layoff status was entitled to recall rights no matter how long he had been on layoff. However, the collective bargaining agreement agreed upon for the 2004-2007 time frame contained a new provision, Article 8.8, which provided that an employee's recall rights were extinguished after 12 months on layoff. The grievance arose because during the term of the 2004-2007 contract, the grievant sought to be recalled to a part-time police officer position, but the [City] denied his request because he had been on layoff for more than 12 months.

The parties presented testimony at the arbitration hearing from some of the individuals involved in the negotiations leading up to the 2004-2007 contract. In general, the witnesses for [the Union] testified that [the City] had proposed the new Article 8.8, but that [the Union] had indicated approval of that provision so long as it did not apply to the grievant. The witnesses presented by [the City] indicated that there either was no response to the union's proposal, or none could be recalled. There was also testimony as to the purpose of the provision.

After reviewing all of the witness testimony, summarized above, the arbitrator issued his written opinion. In this Court's prior opinion,<sup>2</sup> it outlined that written decision as follows:

The arbitrator's decision was broken down into numerous sections. Sections 1-3 involved a summary of the testimony from all the witnesses regarding pre-contract negotiations. At the conclusion of Section 3, the arbitrator specifically found that "[h]owever credible, *the case for or against the grievant cannot be made on the basis of witness testimony*. On the face of this standoff, one must look elsewhere." The arbitrator then set forth four other sections, wherein the next two sections (Sections 4 and 5) the arbitrator set forth general principles of Michigan and arbitration law regarding seniority rights. In Sections 6 and 7 of the opinion and award, the arbitrator discussed the intent and purpose behind Article 8.8, surmising that by not following its own stated objective and purpose in proposing Article 8.8, the [City] was effectively discharging the grievant without just cause:

If [the City] had accepted the Union's counter proposal on [Article] 8.8 (providing that Grievant would have been exempt from its impact), its stated objective could have been immediately and almost totally obtained. By recalling Grievant to the job vacancy, as he requested, instead of filling it with a new hire, the objective would have been completely obtained. As it turned out, the certain, direct and immediate result of this [City] proposal was

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<sup>2</sup> *Id.* at 2 (emphasis in original).

the termination of Grievant's employment—tantamount to his discharge without just cause.

The arbitrator then recognized that “the words of the Contract are clear and unambiguous,” but following the Restatement Second of Contracts, he concluded that the “situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usage of trade, and the course of dealing between the parties taken together, outweigh the plain meaning of the words in Article 8.8.” As a result of that, the arbitrator granted the grievance.

After the arbitrator rendered his original decision, the City moved in the trial court to vacate the arbitration award. The City argued that the arbitrator exceeded his authority by refusing to enforce the admittedly clear and unambiguous language of Article 8.8 of the collective bargaining agreement. The City also contended that the arbitrator's opinion was in contravention of controlling principles of law. The Union and the City then filed competing motions for summary disposition. After taking the matter under advisement, the trial court issued its opinion and order, denying the City's motion, granting the Union's motion for summary disposition, and confirming the arbitration award. In doing so, the trial court concluded that the arbitrator did not exceed his contractual authority because his decision took its essence from the contract. The City appealed.

On appeal, this Court vacated the arbitration award.<sup>3</sup> This Court first acknowledged the strong deference that courts should generally give to an arbitrator's decision.<sup>4</sup> But this Court explained that it could not ignore the fact that, despite the arbitrator's admission that the language of the contract was undisputedly clear and unambiguous, he nevertheless chose to disregard that language and instead “impose[] his own brand of industrial justice[.]”<sup>5</sup> As this Court explained,

[T]he parties presented testimony addressing [the Union's] position that the parties agreed during negotiations that Article 8.8 would not apply to grievant. *Acceptance of [the Union's] witnesses' testimony, i.e., concluding that there was an agreement reached to exempt grievant from Article 8.8, would have been perfectly permissible and resulted in an unassailable opinion.* However, rather than accepting one version of the events over the other, the arbitrator specifically declined to decide the matter based on the parties witnesses, and instead decided to “look elsewhere” . . . .<sup>[6]</sup>

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<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 4 (emphasis added).

As, as the emphasized language shows, this Court found it significant that the arbitrator “expressly refused to make factual findings,”<sup>7</sup> thereby “foreclosing a *factual* finding that Article 8.8 did not apply to the grievance.”<sup>8</sup> In the absence of that necessary factual finding, this Court concluded that it was undisputed that under the plain language of Article 8.8 the grievant would not be entitled to recall rights because he had been laid off for more than 12 months at the time it became effective.<sup>9</sup> This Court therefore held that “[b]ecause it is undisputed that Article 8.8’s language is clear and unambiguous, and because it is undisputed that application of that clear and unambiguous language would preclude any relief to the grievant, the arbitrator’s decision and award was in disregard of the plain contract language.”<sup>10</sup> According to this Court, the arbitrator erred by refusing to apply the clear and unambiguous bargained for language of the contract, instead determining that other sources (like the Restatement Second of Contracts) outweighed the plain contract language.<sup>11</sup> Accordingly, this Court reversed the trial court’s order upholding the arbitration decision, vacated the arbitration award, and remanded this case to the arbitrator for further proceedings.<sup>12</sup>

On remand, the arbitrator issued its decision after reviewing the records of the original hearing. The arbitrator first confirmed that if the undisputedly plain and unambiguous language of Article 8.8 applied to the grievant, then the grievant would have no right to recall because he had been laid off for more than 12 months. However, the arbitrator then stated that based on his review of the record, his finding now was that “there exists a real question of whether the parties agreed to exempt Grievant from the application of Article 8.8.” The arbitrator noted that, according to the Union witnesses, the Union took the City’s silence to its counterproposal as acceptance of the condition that the grievant would be exempt from Article 8.8. The City’s witnesses could not recall responding to the Union’s counterproposal.

Upon reconsidering the testimony, the arbitrator opined that “[t]he Union could have understood, not without reason, that [the City], by its silence, was subscribing to its counterproposal. [The City], on the other hand, denied that it had agreed, either expressly or tacitly, that it had accepted the counterproposal.” The arbitrator continued,

The Union witnesses’ testimony was not contradicted in any particular respect. [The City] did not respond to the Union counterproposal, neither during the bilateral negotiations, when it was submitted, nor during the mediation process. In fact, the Union did not learn of [the City’s] rejection thereof until after the conclusion of negotiations, when employer refused to recall Grievant to a

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<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 4 (emphasis in original).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 5.

vacancy. Instead, it was filled by the hiring of a new employee. The Union was thus deprived of the opportunity to consider other options for seeking to resolve the issue, including further consideration of Article 8.8 as proposed; other variants; or by seeking to submit the dispute to binding mandatory arbitration . . .

\* \* \*

I find that [the City's] actions amounted to acceptance of the Union's counterproposal, and that Grievant was exempt from the provisions of Article 8.8.

The arbitrator therefore granted the grievance and ordered the City to reinstate the grievant and make him whole for his losses.

The City then moved for summary disposition in the trial court under MCR 2.116(C)(9), arguing that the arbitrator did not have the authority on remand to reconsider the witnesses' testimony regarding the parties' intent when implementing Article 8.8. According to the City,

[b]ecause the Court of Appeals held that the arbitrator's finding that "the case for or against the grievant cannot be made on the basis of witness testimony" foreclosed a factual finding that Article 8.8 did not apply to the grievant, the only action on remand authorized by the arbitration agreement . . . and the appellate opinion was for the arbitrator to enter an award in favor of the City, denying the grievance.

The City contended that this Court's instructions remanded the case to the arbitrator "for further consideration consistent with its opinion," not for the arbitrator to reconsider the testimony or merits of the arguments. The City added that the doctrine of *functus officio* ("having performed his office") prohibited the arbitrator from reconsidering the merits of his original, final award.

The Union responded and moved for summary disposition under MCR 2.116(I)(2), arguing that the scope of this Court's opinion did not limit the arbitrator's ability to reconsider the merits of the case. The Union argued that if this Court chose to so limit disposition of the case on remand, it would have specifically ordered, for example, that on remand an award be entered in the City's favor. Instead, the Union contended, this Court simply stated that the case was remanded for further proceedings and consideration consistent with its opinion, leaving open the possibility for the arbitrator to reconsider his previous analysis of the record. And, according to the Union, the arbitrator's review of the record was entirely consistent with this Court's opinion. The Union also argued that the doctrine of *functus officio* was not factually applicable, and, even if it were, it would actually work against the City. The Union explained,

Essentially the [City] is arguing that the Arbitrator cannot change the analysis he used in his original Award, but that he can change his actual conclusions. . . . However, [the City] cannot have it both ways, either the original Award must stand must be final [sic] under the doctrine of *functus officio* or none of it should.

The Union added that, regardless, an arbitrator's award that has been vacated and remanded by an appellate court is not actually a "final" decision precluded from further consideration.

The trial court denied the City's motion for summary disposition, granted the Union summary disposition, and confirmed the arbitration decision. In its reasoning on the record, the trial court noted that this Court had many options on appeal:

The Court of Appeals could have reversed and ordered this court to enter judgment. The Court of Appeals could have entered judgment on its own, it has that authority, although more typically, the Court of Appeals could have entered judgment for the city without any kind of remand. Although typically the Court of Appeals doesn't. It remands to the trial court with instructions to enter the judgment.

The Court of Appeals in this case didn't do that. It reversed and remanded to the arbitrator for further proceedings consistent with this opinion.

Notably, the Court of Appeals did not retain further jurisdiction, nor did it remand to this court.

None of the cases cited by the City on the doctrine of *functus officio* were cases on remand. None of them were cases on remand. So what the court has to decide is: Did the arbitrator act within the authority of the remand and within the authority of the contract? And the court's answer to both those questions is in the affirmative.

The trial court added that the arbitrator's award, including making factual findings on remand, was not inconsistent with this Court's opinion, "which criticized the arbitrator for not make a factual finding."

The City now appeals.

## II. THE ARBITRATOR'S DECISION ON REMAND

### A. STANDARD OF REVIEW

This Court reviews *de novo* a circuit court's decision to enforce an arbitration award<sup>13</sup> and ruling on motions for summary disposition.<sup>14</sup> However, judicial review of arbitration decisions is limited to determining "[w]hether an arbitrator exceeded his contractual authority."<sup>15</sup> It is not for a court to determine whether the arbitrator correctly interpreted the contract.<sup>16</sup> "Judicial review is limited to whether the award 'draws its essence' from the contract, whether

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<sup>13</sup> *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

<sup>14</sup> *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

<sup>15</sup> *Sheriff of Lenawee Co v Police Officers Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999).

<sup>16</sup> *Ferndale Ed Ass'n v Ferndale School Dist*, 67 Mich App 637, 643; 242 NW2d 478 (1976).

the award was within the authority conferred upon the arbitrator by the collective bargaining agreement.”<sup>17</sup> It is from the contract that the arbitrator derives his authority, “and the agreement is the law of the case.”<sup>18</sup> “The fact that an arbitrator’s interpretation of a contract is wrong is irrelevant.”<sup>19</sup>

## B. ANALYSIS

We note at the outset that at no time in the proceedings leading up to this opinion have either of the parties, the arbitrator, or the prior panel of this Court ever disputed that Article 8.8’s language is clear and unambiguous. Indeed, the arbitrator’s disregard of that clear and unambiguous language was part of the basis of this Court’s decision to vacate the arbitrator’s original award:

[W]hen the arbitrator expressly refuses to make factual findings based on the only witnesses presented, and admits that the contract language is clear and unambiguous, yet still issues an award that is contrary to those clear and unambiguous words, we feel that we have been presented with the “rare case” where vacating is required.<sup>[20]</sup>

And in our decision today, we continue, as we must, to adhere to the tenet that the clear and unambiguous language of the collective bargaining agreement controls.<sup>21</sup> The question that we address in this opinion is, as the trial court stated, whether the arbitrator acted within the authority granted by this Court’s order on remand and within the scope of his authority under the collective bargaining agreement? Like the trial court, we conclude that he did.

The City argues essentially that the arbitrator exceeded his authority on remand because this Court’s prior decision constrained him to render a decision in the City’s favor. In so arguing, the City focuses on the language in this Court’s prior decision, stating that this Court remanded the case for “further proceedings consistent with” that decision. The City argues that the arbitrator could not reconsider his underlying analysis of the witness testimony and his only choice was to apply the plain and unambiguous language of Article 8.8 in the City’s favor. While we agree that the arbitrator had to act within the scope of his authority under the collective bargaining agreement, we disagree that our prior decision prohibited the arbitrator from reconsidering his factual findings.

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<sup>17</sup> *Id.*

<sup>18</sup> *Chippewa Valley Schs v Hill*, 62 Mich App 116, 119; 233 NW2d 208 (1975).

<sup>19</sup> *Ferndale Ed Ass’n*, 67 Mich App at 643.

<sup>20</sup> *City of Frankfort*, unpub op at 5.

<sup>21</sup> *Rory v Continental Ins Co*, 473 Mich 457, 488-489; 703 NW2d 23 (2005); *Kingsley v American Central Life Ins Co*, 259 Mich 53, 54-55; 242 NW 836 (1932); *Police Officers Ass’n of Michigan v Manistee Co*, 250 Mich App 339, 343; 645 NW2d 713 (2002).

When an arbitrator exceeds his authority, the court must remand the case for further arbitration proceedings.<sup>22</sup> Indeed, as the City recognizes in its brief on appeal,

[A]s a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.<sup>[23]</sup>

The City argues that vacating the award leaves open the possibility of further proceedings *only if they are permitted under the terms of the agreement*.<sup>24</sup> And the City argues that, here, the collective bargaining agreement permitted no such proceedings. We do not agree that this Court's prior decision so limited the arbitrator's authority on remand. Rather, there are two different scenarios: (1) a reviewing court may simply vacate an award, leaving it to the arbitrator and parties to choose whether to engage in further proceedings, as permitted by the agreement; or (2) the reviewing court may exercise its authority to order further proceedings on remand if that step seems appropriate under the circumstances. We conclude that this Court clearly had the authority in its prior opinion to order further proceedings on remand even though such proceedings were not available under the collective bargaining agreement.

The City also relies on *Beattie v Autostyle Plastics, Inc*<sup>25</sup> and the doctrine of *functus officio* to argue that the arbitrator had no authority to reconsider the merits of his original decision once it was final. However, in *Beattie* the arbitration panel reconsidered its final decision based on the plaintiff's motion for reconsideration, but there was no allowance in the arbitration agreement for that procedural mechanism.<sup>26</sup> In this case, the parties and the courts followed the allowable remedy of judicial review and, as we stated above, this Court acted within its authority in vacating the arbitrator's award and remanding the matter for further proceedings.

Further, the doctrine of *functus officio* is inapplicable because the arbitrator's decision was not final and complete when this Court ordered the award vacated and remanded for further proceedings. To hold otherwise would functionally negate the purpose of appellate review.

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<sup>22</sup> *Mich State Employees Ass'n v Dep't of Mental Health*, 178 Mich App 581, 585; 444 NW2d 207 (1989).

<sup>23</sup> *United Paperworkers Int'l Union v Misco, Inc*, 484 US 29, 40 n 10; 108 S Ct 364; 98 L Ed 2d 286 (1987).

<sup>24</sup> *Id.*

<sup>25</sup> *Beattie v Autostyle Plastics*, 217 Mich App 572; 552 NW2d 181 (1996).

<sup>26</sup> *Id.* at 576.

Moreover, as the Union points out, application of the doctrine is incongruous with the City's requested outcome. While arguing that the doctrine prohibited the arbitrator from reassessing the rationale for its decision, the City nevertheless suggests that the doctrine would not prevent the arbitrator from rendering a decision completely *opposite* to his original award. We cannot, and do not, accept such an interpretation.

The City further contends that this Court's prior statement—that the arbitrator's original refusal to rely on the witnesses' testimony "foreclos[ed] a factual finding that Article 8.8 did not apply to the grievance"<sup>27</sup>—is binding under the law of the case doctrine. This argument is without merit. In making that statement, this Court was merely explaining the end result of the arbitrator's finding, or the lack of such a finding. That is, this Court did not render a binding legal determination regarding the effect of the arbitrator's decision. Indeed, this Court was without authority to render such a determination,<sup>28</sup> which is precisely why it instead vacated and remanded the matter for the arbitrator's further consideration. Therefore, although the arbitrator's original refusal to rely on the witnesses' testimony foreclosed a factual finding that Article 8.8 did not apply to the grievance *at that time*, we conclude that the arbitrator was acting within the scope of his authority on remand when he reconsidered the facts and determined that the City's silence amounted to acceptance of the Union's counterproposal and rendered the grievant exempt from the provisions of Article 8.8. The arbitrator's acceptance of the Union's witnesses' testimony was perfectly permissible and resulted in an unassailable opinion in favor of the Union.<sup>29</sup>

In sum, the arbitrator acted within the authority granted by this Court's order on remand and within the scope of his authority under the collective bargaining agreement.

Accordingly, we affirm.

/s/ Michael J. Kelly  
/s/ E. Thomas Fitzgerald  
/s/ William C. Whitbeck

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<sup>27</sup> *City of Frankfort*, unpub op at 4.

<sup>28</sup> *United Paperworkers Int'l Union*, 484 US at 40 n 10 (“[A]s a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator’s decision that the parties bargained for in the collective-bargaining agreement.”).

<sup>29</sup> *City of Frankfort*, unpub op at 4.