MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION CASE LAW UPDATE

by

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I. INTRODUCTION

This article supplements "Recent Developments in Michigan Arbitration, Case Evaluation, and Mediation Law," *Labor and Employment Lawnotes* (Fall 2009), http://www.leehornberger.com/UserFiles/File/ADR%20Article,%20LEL%20Lawnotes,%20Fall%202009.pdf , with significant case law developments since April 2009.

II. ARBITRATION

A. Supreme Court Decisions

1. Supreme Court Upholds Labor Arbitration Award Concerning Take-Home Vehicle

City of Kentwood v Police Officers Labor Council, 483 Mich 1116 (2009). The Supreme Court denied the Plaintiff City's application for leave to appeal the October 28, 2008, Court of Appeals' judgment because the Supreme Court was not persuaded that the questions presented should be reviewed by the Court. This denial resulted in affirmation of the Court of Appeals' reversal of the Circuit Court's vacation of a labor arbitration decision.

The Arbitrator granted the grievance and held that the Grievant was to be assigned a take-home vehicle. The Arbitrator determined there was a past practice of assigning take-home vehicles and, therefore, the burden was on the employer to prove that it had repudiated this practice without objection by the Defendant labor organization. The Arbitrator stated that the "past practice became a distinct and binding working condition that could not be altered without the mutual consent of the parties where the collective bargaining agreement is silent on the assignment of take-home vehicles." The Arbitrator held that the policy manual provision was only valid "to the extent that it was consistent with the collective bargaining agreement, including established practices." The Arbitrator concluded that the Police Chief's decision not to assign a take-home vehicle was inconsistent with the past practice of assigning take-home vehicles.

Justice Markman dissented, with Justice Corrigan joining, indicating that he would reinstate the Circuit Court's order vacating the arbitration decision. The dissent indicated that

although the collective bargaining agreement does not refer to take-home vehicles in any way, and department policy accords the Police Chief discretion in assigning such vehicles.

The dissent said, in part:

> "I am cognizant of the broad authority vested in the arbitrator under the CBA when disputes arise, but I am also cognizant that such authority is not boundless. If the collective bargaining process, public or private, is going to work effectively, faithful regard must be given to contracts and agreements. The people of Kentwood, through their elected representatives, have chosen to cede a part of their administrative control over public employees from their elected city council to the arbitrator. Where, however, they have clearly not ceded such authority, as here, the regular processes of local self- government must be permitted to prevail."

B. Published Court of Appeals Decisions

1. Defendant's Motion To Vacate DRAA Arbitration Award Not Timely Filed

Vyletel-Rivard v Rivard, 286 Mich App 13 (2009). The Defendant challenged the trial court's order denying his motion to vacate the arbitration award concerning tort damages in a Domestic Relations Arbitration Act (DRAA), MCL 600.5070, *et seq*, case. The Court of Appeals affirmed the Circuit Court's denial because the Court concluded that the Defendant's motion to vacate was not timely filed.

On March 28, 2008, the Defendant, pursuant to MCL 600.509(2), filed a motion to vacate "the arbitration awards" of November 13, 2007, and December 7, 2007, as to tort damages. A party has twenty-one days to file motion to vacate in domestic relations case. MCR 3.602 (J)(2).

The lesson of this case is to think very carefully before filing a second round of reconsideration motions rather than filing a notice of appeal. See generally *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

2. Six-Year Limitation Period For Action to Vacate Labor Arbitration Award

City of Ann Arbor v AFSCME Local 369, 284 Mich App 126 (2009). In this public employer labor arbitration case, the Court of Appeals pointed out that there is no statute or court rule providing a limitations period specifically for actions seeking to vacate labor arbitration awards arising from collective bargaining agreements.

According to the Court of Appeals, actions to vacate arbitration awards are more akin to actions to enforce arbitration awards than to actions for unfair representation. An action to vacate a

labor arbitration award is subject to a six-year limitations period.

The Court of Appeals further pointed out that as long as the Arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority, a court may not overturn the decision even if convinced that the Arbitrator committed a serious error.

Previously *Rowry v University of Michigan*, 441 Mich 1(1992), had held that a plaintiff ordinarily has six years to seek enforcement of a labor arbitration award and recognized that in certain cases this time period may be substantially diminished if a plaintiff's arbitration award grants equitable relief and a delay in its enforcement is shown to prejudice the defendant in a way that evokes laches to bar the plaintiff's claim.

3. Domestic Relations Arbitration Award Upheld

Washington v Washington, 283 Mich App 667 (2009). In this Domestic Relations Arbitration case, the Court of Appeals stated that a reviewing court may not review the Arbitrator's findings of fact concerning division of marital property.

The Court stated: "as the United States Court of Appeals for the Sixth Circuit declared, "[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.'" See generally *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tenn Valley Auth v Tenn Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999)."

C. Unpublished Court of Appeals Decisions

1. DRAA Arbitrator May Consider Timely Reconsideration Motion

Considine v Considine, unpublished opinion of the Court of Appeals, issued December 15, 2009 (Docket No 283298). The Defendant filed a motion in Circuit Court to enforce the DRAA amended arbitration award. The Plaintiff filed a motion to vacate or modify the award. The Circuit Court granted the Defendant's motion to enforce and denied the Plaintiff's motion. On appeal, the Plaintiff argued that the Arbitrator exceeded the Arbitrator's authority and committed errors of law. The Court of Appeals affirmed the Circuit Court decision.

The Court of Appeals held that the Arbitrator had authority to consider a timely motion for reconsideration. MCL 600.5078(3). It was further held the reconsideration award was timely even though it was issued more than 21 days after the filing of the motion for reconsideration. *Id*.

2. Objections to Domestic Relations Arbitration Award Waived

Vulaj v Vulaj, unpublished opinion of the Court of Appeals, issued November 19, 2009 (Docket No 286334). The Court of Appeals held that the Plaintiff had waived the ability to argue

that the Arbitrator failed to comply with the Domestic Relations Arbitration Act, MCL 600.5070, *et seq*. In light of the Plaintiff's affirmative statement that he was not objecting to the entry of the judgment proposed by the Plaintiff, the Circuit Court, after receiving testimony from the parties, signed the judgment of divorce. The Plaintiff argued on appeal that the Arbitrator violated the DRAA which requires transcription of the hearing during which child support and parenting time are addressed. MCL 600.5077(2).

3. Labor Arbitration Retained Jurisdiction Supplemental Award Partially Vacated

Police Officers Ass'n of Mich v Leelanau County, unpublished opinion of the Court of Appeals, issued November 10, 2009 (Docket No 285132). In this case, the Court of Appeals partially vacated and partially confirmed a labor arbitration award.

The Arbitrator ruled that there was not just cause to terminate a Sheriff's Department Deputy. The Arbitrator required a psychological fitness for duty examination; and retained jurisdiction to resolve any issues concerning implementation of the award. The Circuit Court refused to vacate the reinstatement order, but the Circuit Court held the Arbitrator exceeded his authority by retaining jurisdiction providing for a fitness for duty examination. The Court of Appeals basically affirmed the Circuit Court decision.

Concerning arbitral retention of jurisdiction, Article 6(E)(1)(a) of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the: Federal Mediation and Conciliation Service, National Academy of Arbitrators [and] American Arbitration Association states:

> "Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise." See generally Elkouri and Elkouri, *How Arbitration Works,* 6th Ed, Ruben Editor (BNA 2003), at pp 333-337. See generally *CUNA Mut Ins Soc'y v Office & Prof'l Employees*, 443 F3d 556 (7th Cir 2006); and *Sterling China Co v Allied Workers*, 357 F3d 546 (6th Cir 2004).

In addition, concerning interest, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, Ruben Editor (BNA 2003), p 1219, indicates:

> "The modern view is that the award of interest is within the inherent power of an arbitrator, and in fashioning a 'make-whole' remedy it appears that a growing number of arbitrators are willing to exercise the discretion to award interest where appropriate." See generally *St Joseph County, Mich, Mental Health Facility*, 86 LA 683 (Girolamo, 1985); *City of Westland, Mich*, 86 LA 305 (Howlett, 1985).

It is interesting that the Court of Appeals did not discuss the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes or other authority concerning the Arbitrator retaining jurisdiction.

4. Refusal To Vacate FINRA Arbitration Award And Sanctions Granted

Healey v Spoelstra, unpublished opinion of the Court of Appeals, issued October 22, 2009 (Docket No's 281686 and 288223). In this case, the Court of Appeals refused to vacate a FINRA arbitration award. The arbitration awards were for $617,822 in damages and $75,766.67 for sanctions. The Circuit Court refused to vacate the awards because the Plaintiffs' complaint was untimely under MCR 3.602(J)(2) it that it was filed more than 21 days after the award was delivered to plaintiffs and that there were no legal grounds to vacate the award.

In addition, the Court of Appeals affirmed the Circuit Court's ruling that the Plaintiffs' grounds for moving to vacate the arbitration award were frivolous and in granting sanctions to Defendant under MCL 600.2591.

One lesson from this case includes filing jurisdictional documents such as notices of appeal by the earliest interpretation of when they might be due, rather than the latest interpretation. Another lesson from this case is that on occasion the appellate court sanctions the party appealing from a run of the mill arbitration award.

5. Labor Arbitration Award Involving Lay-Off Return Vacated

City of Frankfort v Police Officers Ass'n of Mich, unpublished opinion of the Court of Appeals, issued September 15, 2009 (Docket No 286523). This case arose out of the City hiring a new employee for a position rather than recalling an employee from prior layoff. The issue before the Arbitrator was whether or not the previously laid off employee had recall rights in light of new collective bargaining agreement language.

In a two (Meter and Murray) to one (Beckering) decision, the Court of Appeals vacated a labor arbitration award and remanded the matter to the Arbitrator. The dissent indicated that, if the arbitrator erred in his analysis, the Arbitrator, in making the analysis, was interpreting the provisions of the collective bargaining agreement.

The majority cited but distinguished *Michigan Family Resources, Inc v Serv Employees Int'l Union*, 475 F3d 752 (6th Cir 2007)(en banc). *Michigan Family Resources, Inc*, *id*, is the leading Sixth Circuit case on the standard for reviewing labor arbitration awards. In *Michigan Family Resources, Inc*, *id*, the Union appealed the District Court's decision vacating an arbitration award. The Sixth Circuit reversed and directed the District Court to enter an order enforcing the award because, according to the Sixth Circuit, the arbitrator was "acting within the scope of his authority," the company had not accused the arbitrator with fraud or dishonesty in making the award, the

arbitrator was "arguably construing ... the contract" when he awarded union employees a cost of-living increase, and the company had shown no more than that the arbitrator made an error, perhaps even a "serious error," in interpreting the collective bargaining agreement. *United Paperworkers Int'l Union, AFL-CIO v Misco*, 484 US 29, 38–39 (1987).

The Sixth Circuit in *Michigan Family Resources*, *id*, indicated that the following questions should be looked at in deciding whether to vacate a labor arbitration award. Did the arbitrator act:

> "outside [the arbitrator's] authority" by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing the award? And in resolving legal or factual disputes in the case, was the arbitrator "arguably construing or applying the contract"?

According to the Sixth Circuit, as long as the Arbitrator does not offend any of these requirements, the request for judicial intervention should be denied even though the Arbitrator made "serious," "improvident" or "silly" errors in resolving the merits of the dispute.

The Sixth Circuit in *Michigan Family Resources*, *id*, further indicated that an Arbitrator does not exceed the Arbitrator's authority every time the Arbitrator makes an interpretive error. The Arbitrator exceeds that authority only when the collective bargaining agreement does not commit the dispute to arbitration.

The lesson from the *City of Frankfort*, *id*, case is that on occasion a Michigan appellate court might not give the same deference to a labor arbitration award as a Federal court would under *Michigan Family Resources, Inc*, *id*.

6. Evaluation Notification Labor Arbitration Award Vacated

Northville Education Ass'n v Northville Public Schools, unpublished opinion of the Court of Appeals, issued August 20, 2009 (Docket No 287076). The Court of Appeals vacated a labor arbitration award and remanded the matter to the Arbitrator.

The collective bargaining agreement required that a teacher be given prior notification of eligibility to opt for goal based evaluation. Because the teacher was on maternity leave at the time such notification would have been given, the School District did not give the notification. The teacher was subsequently given a less favorable and less flexible evaluation method and ultimately an individual improvement plan. The teacher grieved arguing that she should have received notification of the more favorable goal based evaluation. Although the Arbitrator held that the grievance was timely, the Arbitrator denied the grievance. According to the Arbitrator, the teacher knew about the goal based evaluation option because of her prior participation in it, and by not requesting it again, she was "estoppel" from complaining about the technical non-notification.

The Circuit Court had found that the Arbitrator had added a term to the contract and therefore exceeded his authority, and furthermore estoppel was inapplicable because the terms of the

collective bargaining agreement did not permit such equitable considerations of "estoppel."

It is interesting that this is a case where the labor organization, not the employer, was the party brining the action to vacate the arbitration award.

III. CASE EVALUATION

A. Supreme Court Decisions

1. *Smith v Khouri* Attorney Fee Ruling Applies In FOIA Cases

Coblentz v City of Novi, 475 Mich 558 (2009). In this Freedom of Information Act, MCL 231, *et seq*, case, the Supreme Court held that the factors for determining attorney fees in a FOIA case are the same as those outlined in the case evaluation attorney fee case of *Smith v Khouri*, 481 Mich 519 (2008).

In *Smith*, *id*, a dental malpractice case, the Supreme Court in a four (Taylor, Young, Corrigan, and Markman) to three (Cavanaugh, Weaver, and Kelly) decision had reviewed a Circuit Court's award of "reasonable" attorney fees as part of case evaluation sanctions under MCR 2.403(O). The Supreme Court held that the Circuit Court should begin the process of calculating a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence.

2. Case Evaluation Attorney Fee Amount Determination

Juarez v Holbrook, 483 Mich 970 (2009). The majority denied the application for leave to appeal in this case evaluation attorney fee

The dissent of Justices Markman, Corrigan, and Young would have vacated that part of the Court of Appeals judgment that held that the Circuit Court properly determined the amount of attorney fees as case evaluation sanctions. Defendant was entitled to such sanctions because the jury verdict was well below the case evaluation award that all parties had rejected. One day later, the Supreme Court issued *Smith v Khouri*, 481 Mich 519 (2008), in which the Supreme Court clarified the process of calculating case evaluation attorney fees: According to the dissent, the Circuit Court should begin the process of calculating a reasonable attorney fee by determining factor 3 under MRPC 1.5(a) , i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services.

It is interesting that with the change of one seat on the Michigan Supreme Court, the new majority might apparently use *Smith*, *id*, as authority for remand when the lower court has granted low attorney fees, while the present three Justice minority would apparently use *Smith*, *id*, as authority for remand when the lower court has granted high attorney fees. *Juarez, id*. Before the one Justice switch, just the opposite had occurred. *Smith*, *id.*

3. Attorney Fee Amount Caused By Other Party's Litigation Conduct

Beach v Kelly Auto Group, Inc, 482 Mich 1101 (2008). Although the attorney fee award was disproportionate to "the amount involved and the results obtained," the Circuit Court properly attributed the extraordinary fees to the Defendant's conduct, which unnecessarily caused additional costs

B. Published Court of Appeal Decisions ---

C. Unpublished Court of Appeals Decisions

1. Timely Notice of Appeal After Case Evaluation Attorney Fees Order Required

King v American Axle & Manufacturing, Inc, unpublished opinion of the Court of Appeals, issued June 4, 2009 (Docket No 281928), involved a situation where the case evaluation sanction Plaintiff timely appealed on November 9, 2007, the October 23, 2007, "final order" granting defendant summary disposition. The Plaintiff did not file a new claim of appeal of the December 14, 2007, order granting case evaluation sanctions. The Court of Appeals held that it did not possess jurisdiction over the case evaluation issue because the Plaintiff did not file a timely notice of appeal covering such sanctions. A "final order" includes "a post-judgment order awarding ... attorney fees and costs under MCR 2.403." MCR 7.202(6)(a)(iv).

2. Interest of Justice Exception

Dormak v Zook, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 284665), held that the Circuit Court erred when it denied the Defendant's motion for actual costs by utilizing the MCR 2.403(O)(11) "interest of justice" exception. The Court of Appeals indicated that the Circuit Court's denial of sanctions pursuant to the interest of justice exception is reviewed for an abuse of discretion. For the interest of justice exception to be applicable, one of several "unusual circumstances" has to exist. Examples of these circumstances include legal issue of first impression or public interest, law is unsettled and substantial damages are at issue, a significant financial disparity between the parties, the effect on third persons may be significant, and where the prevailing party engages in misconduct.

3. Effect of No Attempt To Settle

In ***Moravcik v Trinity Health-Michigan***, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 281838), both parties rejected the evaluation. The Defendant made no attempt to settle. At trial, the jury returned a no cause of action verdict in favor of the Defendant. The Circuit Court denied the Defendant's motion for case evaluation sanctions because the Defendant had made no attempt to settle. The Court of Appeals reversed. According to the

Court of Appeals, the Circuit Court had impermissibly added a restriction that depended on the rejecting party's willingness to settle.

IV. MEDIATION

A. Supreme Court Decisions ---

B. Published Court of Appeals Decisions —

C. Unpublished Court of Appeals Decisions

1. Court Rejects Mediation Custody Agreement

Roguska v Roguska, unpublished opinion of the Court of Appeals, issued September 29, 2009.(Docket No 291352). In this domestic relations mediation, MCR 3.216, *et seq*, case involving custody, the Court of Appeals held that the Circuit Court did not err in rejecting the parties' mediated agreement concerning the custody of the children, finding that no custodial environment existed with respect to one of the parties' children, and applied the proper standard in evaluating the child custody factors.

The Defendant argued that the Circuit Court erred by rejecting the parties' mediated agreement regarding custody.

The parties negotiated a mediation settlement agreement that was signed by the mediator, both parties, and their attorneys. The Circuit Court held a divorce hearing and heard testimony that an agreement existed regarding custody, parenting time, property and child support. The parties stated that the consent judgment was consistent with the mediated agreement. However, during the divorce hearing, the Plaintiff testified that she thought the Defendant was "lying" during the mediation. The Circuit Court rejected the mediated agreement regarding custody, and the Court set a trial date to resolve the same.

The Court of Appeals held that the trial court is not bound by the parties' agreements regarding child custody. Regardless of the existence of a mediated agreement, the Child Custody Act (CCA), MCL 722.21 et seq, requires a trial court to determine independently the custodial placement that is in the best interests of the children, because the statutory best interest factors are paramount whenever a court enters an order affecting child custody.

According to the Court of Appeals, the Circuit Court did not act erroneously while exercising its discretion or applying the law to set aside the custody portion of the mediated agreement.

The Circuit Court's apparently hearing some testimony concerning statements made during the mediation might be considered I light of MCR 3.216(H)(8). MCR 3.216(H)(8) provides that:

"Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to

(a) the report of the mediator under subrule (H)(6),

(b) information reasonably required by court personnel to administer and evaluate the mediation program,

{c) in formation necessary for the court to resolve disputes regarding the mediator's fee, or

(d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2)." Emphasis added.

2. Public Body Mediation And Open Meetings Act

Hunt v Green Lake Twp, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 283524). In this case, the Defendant Township failed to have its entire Board of Trustees at the mediation. In addition, it failed to submit a pre-mediation written position submission as required by a Pre-Trial Scheduling Order. The Court of Appeals held that the Township made a good faith attempt to comply with the mediation attendance requirements by having some Board members present in light of the fact that full membership attendance would have created a public meeting under the Open Meetings Act. MCL 15.261, *et seq*. The Court of Appeals further held that the Township's failure to provide a written mediation submission did not materially harm the Plaintiff because the Township had adequately previously provided the Plaintiff with the rational for its position.

V. CONCLUSION

The Michigan appellate courts issued several exciting decisions concerning alternative dispute resolution in 2009. Many of these decisions impacted on areas of law in addition to ADR. These potentially far reaching decisions included:

1. ***Coblentz v City of Novi***, 475 Mich 13 (2009) (attorney fee calculation);

2. ***Vyletel-Rivard v Rivard***, 286 Mich App 13 (2009); and ***Healey v Spoelstra***, unpublished opinion of the Court of Appeals, issued October 22, 2009 (Docket No's 281686 and 288223) (timeliness of filing jurisdictional documents);

3. ***City of Ann Arbor v AFSCME Local 369***, 284 Mich App 126 (2009)(six

year limitations period for vacation of labor arbitration award); and

4. ***Roguska v Roguska***, unpublished opinion of the Court of Appeals, issued September 29, 2009.(Docket No 291352)(trial court's rejection of mediated custody agreement).

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