COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2069

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MILWAUKEE DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO,

PETITIONER-APPELLANT,

V.

CITY OF MILWAUKEE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Reversed and cause remanded*.

Before Eich, Roggensack and Deininger, JJ.

¶1 DEININGER, J. Milwaukee District Council 48, American Federation of State, County & Municipal Employees, AFL-CIO (the union) appeals an order vacating a grievance arbitration award. The circuit court vacated

the award after concluding that the arbitrator "exceeded the scope of the authority granted him" under the applicable collective bargaining agreement, rendering the award voidable under WIS. STAT. § 788.10(1)(d) (1997-98).[1] The union contends that the arbitrator did not exceed his authority in making the award, and that it should thus be reinstated and confirmed. We agree, and accordingly, we reverse the order of the circuit court and remand for the entry of an order confirming the arbitration award.

BACKGROUND

¶2 The City of Milwaukee and the union were parties to a collective bargaining agreement for 1995-96. Prior to 1995, the City utilized members of the union to assist with its fall leaf collection and winter salting operations. In 1995, however, the City modified its procedures for collecting leaves and assigning salting routes, and these changes adversely affected members of the union.[2] The union contended that these modifications violated the collective bargaining agreement, and it initiated a grievance against the City. The City denied the union's grievance, and the union requested arbitration.

[1] WISCONSIN STAT. § 788.10(1)(d) (1997-98) is quoted and discussed in the Analysis section of this opinion. All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Prior to 1995, the City's leaf collection program utilized both a driver from the union and a loader from a different bargaining unit, Local 61. In 1995, the City merged the two jobs and created a single "driver/loader" position. The driver/loader positions were then filled exclusively by members of Local 61. The City's winter salting duties were historically offered first to members of the union, and only after the union's employee list was exhausted would the City call out members of other bargaining units. In 1995, the City changed the order in which it called out its employees for salting operations, and members of the union were no longer necessarily summoned ahead of personnel from other units. As a result of both these changes, members of the union lost opportunities for work.

¶3 During arbitration proceedings, the parties were asked to frame the issue being arbitrated. Each framed the issue somewhat differently. The City initially phrased the issue as follows: "[D]oes the City have a management right to organize the delivery of services and assign work?" The City later rephrased it as:

> 1. Did the City of Milwaukee violate Section 6.6 and 7.1 or Article 45 of the 1995-96 Collective Bargaining Agreement between the parties when it assigned Drivers/Loaders:
>
> A. to drive leaf packers during the fall of 1995 as part of the City's Leaf Collection Program; or
>
> B. to drive some of the salt routes in the 1995-96 winter season?
>
> 2. If so, what should the remedy be?

The union's original characterization of the issue before the arbitrator was: "[D]id the City violate the Collective Bargaining Agreement, specifically Sections 7.1, 6.6, and Article 45, by assigning work historically performed by District Council 48 members to workers outside of the bargaining unit?" The union subsequently framed the issue as follows:

> Did the City of Milwaukee violate §§ 6.6 and 7.1 or Article 45 of the 1995-96 Collective Bargaining Agreement:
>
> 1. when, in reducing the size of leaf collection crews from three-man crews to two-man crews in 1995, it began utilizing members of Local 61 as drivers, or
>
> 2. when it changed the order in which members of DC 48 and Local 61 are called out to participate in

> salting operations beginning in the 1995-96 winter season?
>
> If so, what is the remedy?

Because the parties disagreed as to how the issue should be framed, the arbitrator asked the parties to stipulate that they would "make arguments and proofs to the Arbitrator regarding their respective issues" and that "the Arbitrator will then decide which issue is most appropriate." The parties agreed to this stipulation.

¶4 In August 1998, the arbitrator issued his written decision. First, he explained that the parties had "vested in [him] the authority to frame the issue," and that he had determined the issue was best stated as follows:

> Did the City of Milwaukee violate the 1995-96 Collective Bargaining Agreement when it:
>
> (1) Began utilizing members of Local 61 as drivers/loaders to drive leaf packers during the fall of 1995 as part of the city's leaf collection program during the fall of 1995, and/or
>
> (2) When it utilized Local 61 driver/loaders to drive some of the salt routes during the 1995-96 winter season?
>
> If so, what shall be the remedy?

The arbitrator then determined that the City had made "extensive numbers of operational changes" regarding leaf collection and salting operations, which it had a right to do; the City alone may determine which department and which individuals will supervise its programs; and the "contract does not confer upon

District 48 the exclusive right to the work described." Next, however, he concluded that:

> this matter involves a true sub-contract. Even though the City has given this work to another local union, the effect on District 48 members is exactly the same as if the City had given this matter to an outside third party.

¶5 The arbitrator went on to discuss several tests he deemed applicable in "sub-contracting cases." He determined that "there is nothing in the contract" that would "interfere with the Employer's contracting out this type of work," but that there existed a "past practice" of the City's "utilizing District 48 members to a much greater extent than is currently the case with respect to leaf collection, snow removal and salting operations." Because of this, the arbitrator concluded that the City could only change the status quo if it could demonstrate "persuasive reasons or a quid pro quo," and that the "matter cannot be resolved until good faith bargaining has taken place." The arbitrator therefore ordered the parties to enter into "good faith negotiations," reserving jurisdiction "for the sole purpose of resolving any disputes that come out of the ordered negotiations…."

¶6 The union filed a petition in the Milwaukee County circuit court requesting an order confirming the arbitration award. The City opposed the petition and moved the court to modify or vacate the award on the grounds that the arbitrator: (1) "issued an award on a matter not submitted to him," and (2) "impermissibly exceeded his authority." The circuit court concluded that the arbitrator exceeded the scope of his authority by examining the issues of a sub-contract and past-practice, neither of which had been addressed by the parties. The court entered an order vacating the arbitration award, which the union appeals.

ANALYSIS

¶7 Under WIS. STAT. § 788.10(1)(d), a court must vacate an arbitration award if it concludes that arbitrators have "exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." On an appeal of an order vacating an arbitration award, our scope of review is the same as the circuit court's, and "[w]e review the arbitrator's award without deference to the trial court's decision." ***City of Madison v. Local 311, Int'l Ass'n of Firefighters***, 133 Wis. 2d 186, 190, 394 N.W.2d 766 (Ct. App. 1986). In determining "whether the award of the arbitrator was outside the scope of [the arbitrator's] authority and contrary to law," we begin with a presumption that the award is valid, and we will set it aside only if "its invalidity is demonstrated by clear and convincing evidence." ***Whitewater Educ. Ass'n v. Whitewater Unified Sch. Dist.***, 113 Wis. 2d 151, 157, 335 N.W.2d 408 (Ct. App. 1983).

¶8 The supreme court has explained that, when reviewing an arbitrator's decision to determine whether the arbitrator exceeded his or her authority, a court should not concern itself with the correctness of the arbitrator's decision on the merits of the dispute being arbitrated. *See* ***Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n***, 118 Wis. 2d 707, 719, 348 N.W.2d 175 (1984). Rather, we are to "'uphold the arbitrator's decision as long as it is within the bounds of the contract language, regardless of whether we might have reached a different result under that language, and does not violate the law.'" ***Id***. at 713 (citation omitted). This is so because the parties have agreed to have certain disputes arising from the contract between them determined by a neutral decision maker, and they have further agreed to accept the arbitration award as final and binding, even if it is "incorrect" on the facts or the law. *See* ***id***. We may only vacate the award if the

arbitrator exceeded the authority granted him under the terms of the parties' contract, by effectively amending it, or by dispensing "his own brand of justice." ***Id***.

¶9 The scope of an arbitrator's authority is determined by considering the way in which the parties framed the issue to be arbitrated, the conduct of the parties, and the original contract to arbitrate. *See* ***Employers Ins. of Wausau v. Lloyd's London***, 202 Wis. 2d 673, 680, 552 N.W.2d 420 (Ct. App. 1996). An issue falls within the "scope" of the "issues presented to the arbitrator" if we can determine with reasonable certainty that there was a "common intent" to submit that particular issue to arbitration. ***Id.*** at 681. In reviewing an arbitrator's interpretation of the scope of the issues presented, we apply the same standard we use to review an arbitrator's interpretation of a contract. *See* ***id.*** at 682. That is, the arbitrator's contract interpretation will be upheld if we can conclude that the interpretation "drew its essence from the contract" and was not a "manifest disregard of the parties' agreement." ***Id.*** (citing ***United Steelworkers v. Enterprise Wheel & Car Corp.***, 363 U.S. 593, 599 (1960)).

¶10 With these principles in mind, we now consider the City's challenge to the validity of the award before us. The City contends that the arbitrator exceeded the authority granted to him under section 17.12 of the collective bargaining agreement. That section provides that in arbitrating a grievance, "[t]he arbitrator shall expressly be confined to the precise issue submitted for arbitration and shall not submit declarations of opinion which are not essential in reaching the determination of the question submitted…." Although the City acknowledges that the parties were unable to agree on the wording of the issue before the arbitrator, and that each party submitted a differently-worded version of the issue, the City notes that each implied that the arbitrator's review should be confined to three

specific provisions of the collective bargaining agreement.[3] The City therefore argues that the arbitrator exceeded his authority when he failed to base his decision on one of the three mutually-cited provisions, and instead resolved the dispute on the basis of his interpretation of how the City's "sub-contracting" of work previously assigned to unit members under a "past practice" should be handled under the agreement taken in its entirety.

¶11 We conclude, first, that it was not improper for the arbitrator to consider the entire collective bargaining agreement when formulating his decision. The ultimate issue submitted to the arbitrator asked him to determine whether the City violated the contractual rights of union members when it modified its procedures in 1995 and reassigned tasks formerly performed by union members to personnel from other bargaining units. Although the parties' formal submissions implied that this issue could be resolved by considering three specific contract provisions, we are not convinced that the arbitrator was obligated to confine his review to these sections, or to ignore other parts of the collective bargaining agreement he deemed relevant to the dispute.

¶12 Article 17 of the agreement establishes an "arbitration procedure" and states that the arbitrator is confined to the "precise issue" submitted, not that he or she may look at only those provisions of the agreement the parties believe are dispositive of the submitted issue. Other arbitration provisions require that an arbitrator not "add to, detract from, [or] modify the language of the Agreement in arriving at a determination of any issue presented," and that arbitrators "shall hear

[3] The final "drafts" of the issue submitted by both the City and the union asked, "Did the City of Milwaukee violate Sections 6.6 and 7.1 or Article 45 of the 1995-96 Collective Bargaining Agreement…."

evidence that in their judgment is appropriate for the disposition of the dispute." In short, the language of the arbitration article appears to vest in the arbitrator the authority to consider the entire collective bargaining agreement in resolving a submitted dispute, and the discretion to determine what provisions are relevant. Although the arbitrator's analysis went beyond the specific sections of the agreement which the parties highlighted, we conclude that the arbitrator's interpretation "drew its essence from the contract" and thus did not constitute a "manifest disregard of the parties' agreement." *See* ***Employers Ins. of Wausau***, 202 Wis. 2d at 682.

¶13 We conclude next that the arbitrator did not exceed his powers when he chose to analyze the City's 1995 personnel reassignments as if the City had "sub-contracted" tasks that union members had previously performed under a "past practice." The City asserts that this issue was not raised by either of the parties, and that the arbitrator therefore acted improperly by characterizing the City's actions in this fashion. We disagree.

¶14 The City itself noted in its arbitration brief that the union "will likely argue" that the City's utilization of union members in the leaf collection and salting operations established a "past practice." The City went on to refute the notion of a "past practice" by arguing that its right to unilaterally reassign personnel was reserved to it under the management rights article of the collective bargaining agreement. The arbitrator concluded, however, that the management rights provision in the parties' agreement was "in the nature of a general provision," and that the "established practice [of assigning union members to the duties in question] does modify and control that general provision." It may be, as the City argues, that this analysis is flawed, and that the result reached by the arbitrator is factually or legally suspect. But, as we have noted, the issue before us

is not the correctness of the award or the quality of the arbitrator's reasoning. We conclude that the arbitrator's determination that the issue before him could best be resolved by considering principles that govern sub-contracting and past practices "was not a manifest disregard of the parties' agreement." *See* ***id.*** at 682. Thus, in considering these principles, the arbitrator did not exceed the scope of his authority.

¶15 Finally, the City contends that the arbitrator's remedy was inappropriate because he ignored section 6.8 of the collective bargaining agreement, which provides, in relevant part, as follows:

> 6.8 The City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the City. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union or to discriminate against any of its members. The City agrees to a timely notification and discussion in advance of the implementation of any proposed contracting or subcontracting. The City agrees it will not lay off any employees who have completed their probationary period and who have regular civil service status at the time of the execution of this agreement because of the exercise of this contracting or subcontracting right except in the even of an emergency, strike or work stoppage, or essential public need where it is uneconomical for City employees to perform this work….

The City maintains that it "was not required to negotiate anything under the Contract when subcontracting is an issue," but only had to "notify and discuss" with the union any proposed subcontracting in advance of its implementation. We conclude, however, that even if there were merit in the City's argument on this point, the arbitrator's alleged error in selecting negotiation as a remedy would not constitute grounds to invalidate the arbitration award.

¶16 The union points out that ordering negotiations is not a drastic or unusual remedy in grievance arbitration awards. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 395 (5th ed. 1997) ("In some cases the arbitrator finds a violation of the agreement but returns the case to the parties for negotiations as to the remedy.") The City does not develop its argument as to how or why its acknowledged obligation under the agreement to provide the union "timely notification and discussion in advance" of proposed subcontracting would preclude the arbitrator from ordering the parties to attempt "good faith negotiations" regarding changes deemed to alter a past practice. We are thus unable to conclude that the award constitutes a "manifest disregard" of the parties' agreement, or a "perverse misconstruction" of it. *See* ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988) (explaining that a court will only set aside an arbitrator's award when "'perverse misconstruction or positive misconduct [is] plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy'") (citation omitted).

¶17 We close by emphasizing again that our direction that an order be entered confirming the award is not based on any conclusion of this court as to the soundness of the result the arbitrator reached. In this regard, we note that the union itself was at best lukewarm in its defense of the arbitrator's reasoning, acknowledging that "if the matter was to be relitigated, and new briefs were submitted to the arbitrator, that a different decision might be reached." Rather, our disposition is driven by the extremely deferential standard of review the courts of this state have traditionally taken when the question of the validity of an arbitration award is presented. *See* ***id.*** (noting that a reviewing court "will not overturn the arbitrator's decision for mere errors of law or fact").

¶18 Our conclusion is simply that the City has not presented "clear and convincing evidence" that this award falls outside of the authority granted to the arbitrator under the parties' collective bargaining agreement to resolve disputes between them that arise under it. *See* ***Whitewater Educ. Ass'n,*** 113 Wis. 2d at 157. The arbitrator ordered no remedy specifically precluded by law or by the contract, and he addressed no issues beyond the disputed change in the City's personnel assignment policies regarding the two operations cited.

CONCLUSION

¶19 For the reasons discussed above, we reverse the order of the circuit court and remand for the entry of an order reinstating the arbitration award.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.