**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 26, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP50** **Cir. Ct. No. 2004CV1391**

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

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**BROWN COUNTY,**

**PETITIONER-APPELLANT,**

**V.**

**AFSCME LOCAL 1901-F, BROWN COUNTY SHELTER CARE EMPLOYEES AND AFL-CIO,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brown County appeals an order denying its untimely motion to vacate an arbitrator's award that reinstated Ed Zenko after he

was fired for sleeping on the job. The County argues the time limit set out in WIS. STAT. § 788.13[1] should be equitably tolled because the arbitrator's decision was based on perjury, and the County's motion was filed in response to the Union's complaint to the Wisconsin Employment Relations Commission (WERC), after Zenko was again fired. We need not determine whether the time can be tolled because we agree with the trial court that the County's delay in filing the motion was unreasonable. The Union requests a finding that this appeal is frivolous. Although we reject the County's arguments, we conclude the appeal is not frivolous.

¶2 The arbitrator's decision reinstating Zenko was issued August 18, 2003. On February 9, 2004, one of Zenko's witnesses, a coworker, gave a sworn statement that contradicted testimony she gave at Zenko's arbitration hearing. The County then fired Zenko again as well as the witness. The Union filed a prohibited practice complaint with the WERC alleging retaliatory discharge. On July 30, 2004, eleven months after the arbitration decision and more than six months after learning of the perjury, the County served its motion to vacate the arbitration award.

¶3 A motion to vacate an arbitration award must be served within three months of the decision. *See* WIS. STAT. § 788.13. However, if a party applies to the circuit court for an order confirming the award within one year, the time limit for challenging the award is not applicable. *See* ***Milwaukee Police Ass'n v. Milwaukee***, 92 Wis. 2d 145, 164-65, 285 N.W.2d 119 (1979).

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 The trial court properly concluded the County's delay in serving the motion to vacate was unreasonable. The discovery of the perjury more than three months after the decision adequately explains the County's failure to comply with WIS. STAT. § 788.13. However, the County offers no reasonable explanation for its failure to serve the motion for more than six months after it learned of the perjury. The Union's WERC complaint about Zenko's second firing does not affect the reasonableness of the delay in challenging the arbitrator's decision. The WERC complaint is not comparable to commencing a court action to confirm the arbitration award. It relates to the second firing and is not a court action.

¶5 Although we reject the County's appeal, we cannot conclude the County's arguments lack a good-faith basis for extending or modifying the law. *See* WIS. STAT. § 809.25(3)(c)2.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.