

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 11, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP1584**

**Cir. Ct. No. 2016CV718**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**LOCAL 67, AFSCME, AFL-CIO,**

**PETITIONER-APPELLANT,**

**V.**

**CITY OF RACINE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Racine County:  
EMILY S. MUELLER, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Local 67, AFSCME, AFL-CIO (hereafter the Union) appeals from a circuit court order denying its motion to vacate an arbitration award. The arbitrator dismissed a Union member's grievance after denying the Union representative's request to adjourn the scheduled arbitration. We agree with the circuit court that the arbitrator properly exercised his discretion when he denied the adjournment request. We affirm the circuit court order denying the Union's motion to vacate the arbitration award.

¶2 The following facts are undisputed. The arbitration involved the adjudication of a Union member's grievance against the City of Racine. Mark DeLorme was the Union representative assigned to the grievance case. The arbitration hearing was scheduled for October 26, 2015, at 11 a.m. Late in the afternoon of October 25, DeLorme emailed the arbitrator to tell him that he had injured his back in a fall off a ladder and needed to seek medical attention the next day, October 26. DeLorme stated that he would request "a note" to document the need for medical care. Citing the history of the case, including prior delays and adjournments, the City objected to the adjournment request. The arbitrator denied the Union's adjournment request at 7:55 a.m. on October 26.

¶3 At 11 a.m. on October 26, the arbitrator, the City and the grievant appeared for the arbitration.<sup>1</sup> DeLorme did not appear. The grievant asked for a postponement, the City objected, and the arbitrator urged the grievant to represent herself, which she stated she was unable to do. The arbitrator then granted the City's motion to dismiss the grievance.

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<sup>1</sup> The arbitration award issued on November 27, 2015, recited what occurred at the hearing.

¶4 On November 27, the arbitrator issued the arbitration award. The arbitrator confirmed his decision to dismiss and placed that decision in the context of the history of the entire arbitration.

¶5 On December 18, DeLorme asked the arbitrator to reopen the record so that he could introduce evidence supporting his October 25 request to adjourn the October 26 arbitration. The arbitrator declined to reopen the record citing a lack of jurisdiction to consider the request.

¶6 In January 2016, the Union moved the circuit court to vacate the arbitration award. The circuit court found that the arbitration record established that the Union did not show sufficient cause for an adjournment. The arbitration award was issued one month after the October 26 date at which DeLorme did not appear. DeLorme did not provide any documentation of his injury and need for medical treatment until three weeks after the arbitrator issued the arbitration award. The circuit court concluded that the arbitrator properly exercised his discretion when he denied a postponement and did not commit misconduct. The Union appeals.

¶7 On appeal, the Union argues that the arbitrator engaged in misconduct when he declined to adjourn the hearing after the Union established sufficient cause to do so. While the Union concedes that numerous delays occurred in the arbitration arising from its previous adjournment requests, the Union places great weight on the fact the arbitrator did not cite this history of delay or offer any reason at all on October 26 when he denied DeLorme's adjournment request.

¶8 We consider whether in declining to postpone the arbitration the arbitrator engaged in "positive misconduct" or "manifestly disregard[ed] the law."

***Racine Cty. v. International Ass’n of Machinists & Aerospace Workers Dist. 10***, 2008 WI 70, ¶11, 310 Wis. 2d 508, 751 N.W.2d 312 (citations omitted). The decision whether to grant an adjournment was within the arbitrator’s discretion. ***Kemp v. Fisher***, 89 Wis. 2d 94, 101, 277 N.W.2d 859 (1979). “[R]efusal to postpone a hearing which effectively forecloses a party from presenting evidence may constitute an abuse of discretion amounting to misconduct.” ***Id.***

¶9 We agree with the circuit court that the record supports the arbitrator’s discretionary decision to deny the Union’s requested postponement.<sup>2</sup> The arbitration award describes the circumstances surrounding the arbitrator’s decision to deny the Union’s request for a postponement. On October 23, the previous arbitrator recused himself at the Union’s request, identified the successor arbitrator and stated that the file had been turned over to the successor arbitrator. When the successor arbitrator received the Union’s October 25 request to postpone the October 26 arbitration, he had before him a file setting out the Union’s previous postponement requests, the City’s objections to those requests, and the City’s recitation of the history of the arbitration which included numerous delays arising from requests or actions of the Union.

¶10 DeLorme created the expectation that he would document his need for a postponement due to injury.<sup>3</sup> See ***id.*** at 102. The circuit court found

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<sup>2</sup> In its reply brief, the Union argues that the City has raised for the first time issues having to do with the Union’s delay in prosecuting the arbitration. We disagree. The record indicates that this issue was raised in the circuit court and discussed by the circuit court in its decision. And, even if the issue were not raised, a respondent may allege additional grounds for affirming the circuit court. ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute*, WIS. STAT. § 940.225(7).

<sup>3</sup> The Union does not squarely address DeLorme’s failure to submit documentation of his need for medical treatment on October 26.

significant, as do we, that DeLorme did not attempt to document his injury to the arbitrator until three weeks after the arbitrator issued the November 27 award dismissing the grievance, which was one month after the October 26 arbitration at which DeLorme did not appear. The arbitrator's award was based upon the record which included that the grievant did not present her case on October 26. We conclude that the arbitrator did not commit positive misconduct or manifestly disregard the law. ***Racine Cty.***, 310 Wis. 2d 508, ¶11.

*By the Court.*—Order affirmed.

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

