COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2156 **Cir. Ct. No. 2016CV138**

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

LOCAL 643 TRANSIT, AFSCME, AFL-CIO,

PETITIONER-APPELLANT,

V.

CITY OF BELOIT,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Rock County: MICHAEL R. FITZPATRICK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 DUGAN, J. Local 643 Transit, AFSCME, AFL-CIO (the "Union") appeals the circuit court orders denying in part its request for modification of an arbitration award and denying the Union's subsequent motion for reconsideration.

¶2 In the underlying arbitration proceeding, the arbitrator found that City of Beloit employee, Russell Ahrens, had not violated the work rule identified by the City, there was no just cause for the termination of Ahrens' employment on November 4, 2014, and awarded a remedy. The remedy provided that Ahrens "shall be returned to work but without back pay and without the restoration of seniority or other benefits." The remedy also included other conditions discussed below.

¶3 The City did not contest the arbitrator's findings that the work rule was not violated, that it did not have just cause to terminate Ahrens' employment, and that Ahrens should be returned to work with the conditions set forth by the arbitrator. However, the Union filed a circuit court action for modification of the remedy, contending that the arbitrator exceeded his authority under the collective bargaining agreement (the "CBA").

¶4 The circuit court agreed with the Union in part and to that extent modified the remedy awarded by vacating (1) the conditions that the arbitrator had imposed on Ahrens before he could return to work, and (2) the last-chance provision in the terms of Ahrens' return to work. In addition, the circuit court ordered that Ahrens' seniority be returned as of the date of the arbitrator's decision. However, the circuit court upheld the arbitrator's denial of back pay, seniority and other benefits prior to the date of the arbitrator's decision.

¶5 On appeal, the Union contends that the arbitration award exceeded the scope of the arbitrator's authority and, therefore, Ahrens was entitled to back pay, restoration of his seniority, and all of his benefits from the date of termination. Alternatively, it maintains that, at a minimum, the arbitrator should have awarded seniority and back pay with all benefits for the period from

November 10, 2015 through December 29, 2015, when Ahrens was prevented from returning to work due to conditions imposed by the arbitrator.

¶6 Given the arbitrator's factual determinations and legal conclusions that Ahrens had not violated the work rule identified by the City and that there was no just cause for the employment termination, this court cannot determine whether the arbitrator's award exceeded the scope of his authority. We cannot determine whether the remedy awarded has some reasonable foundation in the CBA. Therefore, we reverse the circuit court's orders affirming in part and modifying in part the arbitration decision regarding back pay, seniority, other benefits, and the conditions for returning to work including the last-chance provision, and remand to the trial court with instructions to remand the matter to the arbitrator for clarification of the issue whether the remedy awarded has some reasonable foundation in the CBA. However, because neither the City nor the Union challenge those parts of the arbitration decision finding that: (1) the work rule was not violated; and (2) that the City did not have just cause to terminate Ahrens' employment, we affirm that part of the circuit court's order affirming that portion of the arbitrator's decision finding that the work rule was not violated and that the City did not have just cause to terminate Ahrens' employment.

¶7 To be clear, we are not making any rulings on the substance of any issue on appeal. We merely remand the matter to the arbitrator to clarify his decision so that the circuit court, upon any subsequent review, can determine whether the remedy has some reasonable foundation in the CBA.

¶8 The following background facts provide helpful context. We also refer to additional facts in the discussion section.

BACKGROUND

¶9 Ahrens, a Union member, was employed as a part-time bus driver for the City until November 3, 2014, when he received a letter from the City terminating his employment based on allegations that his behavior was threatening and intimidating. The termination was based on an October 1, 2014 incident between Ahrens and a coworker. The Union filed a timely grievance on Ahrens' behalf and, after the parties were unable to settle, brought it to arbitration. The arbitrator conducted an evidentiary hearing in August 2015.

¶10 In a November 10, 2015 decision, the arbitrator addressed the following two issues presented by the parties: "[d]id the City have just cause to terminate the employment of … [Ahrens]? If not, what is the remedy?" In answering the question involving just cause for termination, the arbitrator described and quoted "applicable parts" of the CBA and the City's work rules. He also summarized the parties' positions, noting that the City asserted it had just cause to terminate Ahrens' employment for violating Major Work Rule #9 ("Rule 9") of the City's Employee Conduct Policy and Work Rules, which prohibits "[v]erbally harassing, threatening, intimidating, coercing, or interfering with other employees or customers …." The Union asserted that the City did not have just cause and that it failed to provide Ahrens with basic due process.

The Arbitrator's Just Cause Decision

¶11 The arbitrator evaluated the evidence and determined that Ahrens had not violated Rule 9 and the City had failed to establish just cause for terminating Ahrens' employment because it had not provided notice to him that his behavior violated Rule 9.

¶12 The arbitrator examined the conduct underlying the discipline and concluded that

> [w]hile [Ahrens'] behavior in these instances may be inappropriate, boorish, intense, etc., none of it rises to the level of what could reasonably be considered threatening, intimidating, or harassing. [Ahrens] uses no words which suggest *an intent to harm someone or do something unpleasant or unwanted.* Nor do the words suggest [Ahrens] wanted to make someone afraid or to compel or deter by threats. Clearly [Ahrens] was angry, but anger is not part of Rule 9.
>
> ….
>
> What appears to me is that [Ahrens] was, loud, angry, probably not socially skilled, and certainly an intense person in his interactions with others when he perceived some action, policy, etc., was going to happen with which he disagreed. *I also think* [*Ahrens*] *was and has been essentially unaware of how others perceived his interactions*. When I asked him at the hearing whether he thought he was a loud intense person, he said he did not.
>
> ….
>
> It is clear from the testimony that [Ahrens] at times could be loud; he could be forceful in his attempt to convince people that his thoughts about an issue were correct. He may have been boorish; he may have been "in-your-face." That conduct, however, especially without some notice, is not sufficient to rise to giving the City just cause to discharge him.

The arbitrator held: "I just do not find that [Ahrens'] behavior, either singly or taken as a whole, rises to the level that a reasonable person would find violates Rule 9."

¶13 The arbitrator also made factual findings to support the determination that the City had not established just cause for terminating Ahrens' employment, stating that he relied on the fact that "*every arbitrator requires an employee to have notice that his actions violated some work rule.*" The arbitrator

stated that "Rule 9 includes behavior which in part relies on the perception of the other person. If the behavior is going to result in discharge, the City should have discussed [Ahrens'] behavior *with him* at least once before discharging him." (Underline omitted.) The arbitrator stated:

> The City's argument has one defining problem, however. The City never informed [Ahrens] that his conduct violated Rule #9. Both the testimony taken at the hearing and the City's post-hearing briefs stress that [Ahrens] violated Rule 9. While that may be, there is no testimony or other evidence of any time when the City took [Ahrens] aside and informed him that some aspect of his behavior, even if not intentionally threatening, harassing, or intimidating, was so considered by one or more of his co-workers.

(Footnote omitted.) The arbitrator explained that "[a] fundamental part of just cause is that the employee knows what behavior the employer's work rules prohibit. In this case, everyone talked among themselves *about* [Ahrens'] behavior, but no one *talked to* [*Ahrens*]."

The Arbitrator's Remedy Award

¶14 After answering the just cause for termination question in the negative, the arbitrator addressed the second issue presented by the parties: the question whether, if the City lacked just cause "to terminate the employment of … [Ahrens], what is the remedy?" The arbitrator stated:

> The [g]rievance is sustained and [Ahrens] shall be returned to work but *without back pay and without the restoration of seniority or other benefits*. His return to work is conditioned upon the following:
>
> (a) Since [Ahrens] clearly exhibits anger management issues and sometimes uses what other employees consider abusive language, prior to returning to work he shall begin an Anger Management program and complete at least half of it. … In addition, prior to returning to work, [Ahrens] will meet with a representative of the City … and with any

> or all of the employees that testified they felt threatened or intimidated during which time there shall be a discussion …. If no other employees wish to attend, then it will just be a counseling session.
>
> (b) This shall be considered a "last chance" with regard *only* to the types of matters covered in this instant case[.]

(Emphasis added in first sentence.)

¶15 Thereafter, the Union filed the circuit court action pursuant to WIS. STAT. Ch. 788 (2015-16)[1] seeking modification of the arbitration award. The Union's supporting brief requested that the circuit court modify the award to "restore Ahrens' seniority and all attendant benefits arising therefrom" and that the court "award him back pay in an amount to be determined on remand" to the arbitrator.

The Circuit Court's Rulings

¶16 After the issues were briefed, the circuit court issued an oral decision modifying the arbitrator's decision by directing that the conditions that the arbitrator placed on Ahrens' return to work would not be enforced. However, the circuit court upheld the arbitrator's decision not to order back pay and not to restore seniority or other benefits. Subsequently, the circuit court issued a written order modifying the arbitration award.

¶17 The Union filed a motion for reconsideration. At a hearing, the circuit court denied the Union's motion. However, on its own motion at the hearing, the circuit court ordered that Ahrens was entitled to have his seniority

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

date returned as of the November 10, 2015 date of the arbitrator's decision, rather than the December 29, 2015 date Ahrens had actually returned to work. Thereafter, the circuit court issued a written order memorializing those rulings. That order also states that the City "shall not credit … Ahrens with the accrual of any seniority for the time he was off of work from November 4, 2014 through November 9, 2015."

¶18 The Union filed this appeal. The City did not file a cross-appeal.

DISCUSSION

¶19 The Union argues that, after determining that Ahrens was not terminated for just cause, the arbitrator exceeded the scope of his authority under the CBA by refusing to grant back pay and seniority for the time period between the termination of Ahrens' employment until the date Ahrens was allowed to return to work. Alternatively, the Union contends that, at minimum, Ahrens must be awarded back pay and benefits for the time that he was prevented from returning to work because of the conditions the arbitrator had placed upon his return to work. The City counters that the arbitrator had complete authority to issue a remedy that did not include back pay or seniority based on the CBA, the agreed upon issue submitted to the arbitrator, and Ahrens' misconduct. The City does not contest any part of the arbitrator's decision.

¶20 Because we are remanding this case to the arbitrator to clarify his decision so that the circuit court, upon any subsequent proceeding, can determine whether the remedy awarded has some reasonable foundation in the CBA, we are not addressing any issues raised by the parties.

The Standard of Review and the Applicable Law

¶21 Our review is governed by the following principles:

> The standard for our review of the arbitrator's decision is the same as that for the circuit court, and we review the arbitrator's decision without deference to the decision of the circuit court. The scope of the court's review is limited. We presume the arbitrator's decision is valid, and we disturb it only where invalidity is shown by clear and convincing evidence. Essentially the court's role is supervisory in nature—to insure that the parties receive what they bargained for when they agreed to resolve certain disputes through final and binding arbitration.

See ***Madison Teachers Inc. v. Madison Metro. Sch. Dist.***, 2004 WI App 54, ¶9, 271 Wis. 2d 697, 678 N.W.2d 311 (citations omitted). We give deference to the arbitrator's factual and legal conclusions. *See* ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988).

¶22 "Courts are guided by the statutory standards in WIS. STAT. §§ 788.10 … and 788.11 and by the standards developed at common law." ***Baldwin-Woodville Area Sch. Dist. v. West Cent. Educ. Ass'n-Baldwin Woodville Unit***, 2009 WI 51, ¶20, 317 Wis. 2d 691, 766 N.W.2d 591 (citations and footnotes omitted; ellipsis added). If the common law and statutory standards are not violated, we should affirm the arbitrator's award. *See* ***Lukowski v. Dankert***, 184 Wis. 2d 142, 150-51, 515 N.W.2d 883 (1994). "Though limited, a court's role is not a mere formality; a court must overturn an arbitrator's award when the [arbitrator] exceeds [his or her] powers." ***Sands v. Menard, Inc.***, 2010 WI 96, ¶48, 328 Wis. 2d 647, 787 N.W.2d 384 (brackets added). An arbitrator exceeds his or her powers by engaging in "perverse misconstruction or positive misconduct," by "manifestly disregard[ing] the law," or "where the award itself is illegal or violates strong public policy." *See* ***id.*** (brackets added). "Whether the

arbitrator's decision meets any of these standards is a question of law we review *de novo*." *See* ***id.***

¶23 Generally, an arbitrator obtains his or her authority from the CBA, and the arbitrator is confined to construing that agreement. ***Milwaukee Prof'l Firefighters Local 215 v. City of Milwaukee***, 78 Wis. 2d 1, 21, 253 N.W.2d 481 (1977). The arbitrator "'may of course look for guidance from many sources, yet [the] award is legitimate only so long as [the arbitrator] draws its essence from the [CBA].'" ***Madison Teachers Inc.***, 271 Wis. 2d 697, ¶15 (quoting ***United Steelworkers of Am. v. Enter. Wheel & Car Corp.***, 363 U.S. 593, 597 (1960)) (third set of brackets added).

¶24 "The arbitrator is free to give his own construction to ambiguous language in the [CBA] but he is without authority to disregard or modify plain and unambiguous provisions." ***City of Milwaukee v. Milwaukee Police Ass'n***, 97 Wis. 2d 15, 27, 292 N.W.2d 841 (1980) (brackets added). The award will be upheld if there is some reasonable foundation in the contract language for the award. *See* ***Lukowski***, 184 Wis. 2d at 153.

The Circumstances Presented Require that the Arbitrator Clarify that the Remedy Has Some Reasonable Foundation in the CBA

¶25 Here, in his forty-five page decision with in-depth analysis of the evidence and the parties' arguments regarding just cause for termination, the arbitrator found that although Ahrens' "behavior was loud, perhaps abrasive, probably forceful and insistent, and generally unpleasant," it did not rise to the level that would violate Rule 9. Moreover, the arbitrator found the City had violated due process because it had not given Ahrens notice regarding his conduct.

¶26 In contrast, when the arbitrator proceeded to the second question presented by the parties: "[w]hat was the remedy?" the arbitrator merely described the remedy in a paragraph. He did not reference any section of the CBA that authorized the remedy ordered. Although the arbitrator ordered that Ahrens was to return to work, he expressly ordered that the return was without back pay and without the restoration of seniority or other benefits. Additionally, due to the additional conditions imposed by the arbitrator (later vacated by the circuit court as having no basis in the CBA), Ahrens was prevented from returning to work immediately and did not receive any back pay or benefits during that time.

¶27 The arbitrator's remedy of the return to work without back pay and without the restoration of seniority or other benefits appears inconsistent with his factual findings, as well as his conclusions that Ahrens had not violated Rule 9, and that the City did not have just cause for terminating Ahrens' employment. The arbitrator supported those determinations with extensive findings and discussion. Consistent with those determinations, the arbitrator directed that the City allow Ahrens to return to work. However, the arbitrator did not award Ahrens any back pay or benefits and did not reinstate his seniority. Under these circumstances we are unable to determine whether the exclusion of back pay and benefits and reinstatement of seniority has "some reasonable foundation" in the CBA, ***Lukowski***, 184 Wis. 2d at 153, or whether, as contended by the Union, the arbitrator exceeded his powers.

¶28 Thus, we are not able to resolve the issues on appeal, and we must reverse the circuit court orders as noted above with directions to remand to the arbitrator so that he can clarify some reasonable foundation in the CBA for the remedy he awarded. *See* ***Diversified Mgmt. Servs., Inc. v. Slotten***, 119 Wis. 2d 441, 449-50, 351 N.W.2d 176 (Ct. App. 1984) (remanding with directions under

WIS. STAT. § 788.10(1)(d) for completion of the missing dollar amount for a part of an award, relying on ***Enterprise Wheel & Car Corp. v. United Steelworkers***, 269 F.2d 327, 332 (4th Cir. 1959), *aff'd in part, rev'd in part on other grounds*, 363 U.S. 593 (1960)).[2] *See also*, ***Fillnow v. City of Madison***, 148 Wis. 2d 414, 417, 435 N.W.2d 296 (Ct. App. 1988).

¶29 Federal case law also recognizes the authority of courts to remand arbitration awards to the arbitrator for clarification. In ***Raymond James Financial Services, Inc. v. Bishop***, the court stated:

> We conclude first that the district court did not abuse its discretion in remanding the award to the arbitration panel for clarification of the bases of the award from the arbitration panel. Like the district court, we believe the original award is sufficiently inscrutable that it was reasonable to seek clarification of the basis for the award from the arbitration panel.

Id., 596 F.3d 183, 191 (4th Cir. 2010). The court recognized the potential danger in such a remand, explaining that, "courts must approach remand to the arbitrator with care lest the arbitrator believe that a 'remand' is equivalent to 'retrial' with an expectation of an opposite result the second time around." ***Id.*** (citation and one set of quotation marks omitted). The court went on to state, "[a]t the same time, however, as one court has noted, '[r]emand to an arbitrator for clarification and interpretation is not unusual in judicial enforcement proceedings.'" ***Id.*** (citation omitted).

[2] Because the Federal Arbitration Act, 9 U.S.C. § 10, and WIS. STAT. § 788.10 are nearly identical, federal decisions interpreting the Act are persuasive authority for our interpretation of § 788.10. *See* ***Diversified Mgmt. Servs., Inc. v. Slotten***, 119 Wis. 2d 441, 446, 351 N.W.2d 176 (Ct. App. 1984).

¶30 Also in ***Rich v. Spartis***, the court remanded the arbitration award explaining, "[b]ecause the lack of clarity in the arbitration panel's award does not permit us at this time to determine whether the [a]ward was issued in manifest disregard of the law, or exceeded the powers of the arbitrators, we will remand this case to the [d]istrict [c]ourt with instructions to remand to the … arbitration panel for clarification of the [a]ward." ***Id.***, 516 F.3d 75, 83-84 (2d Cir. 2008) (brackets and ellipses added.)

¶31 We suggest that the arbitrator's clarification include, but need not be limited to the following: what provisions of the CBA authorized the remedy such that the remedy has some reasonable foundation in the CBA.

CONCLUSION

¶32 Because we cannot determine whether the remedy was authorized by the CBA and/or that the remedy has some reasonable foundation in the CBA, we cannot determine whether the arbitrator's remedy exceeded the scope of his authority or whether, at a minimum, the arbitrator should have awarded back pay, seniority and other benefits for the time period that Ahrens could not return to work due to conditions imposed by the arbitrator. We are reversing the circuit court orders in part and remanding this cause to the circuit court with directions to remand the matter to the arbitrator to clarify his decision by showing there is some reasonable foundation in the CBA for the remedy awarded.

¶33 However, because neither the City nor the Union challenge those parts of the arbitration decision finding that: (1) the work rule was not violated; and (2) that the City did not have just cause to terminate Ahrens' employment, we affirm that part of the circuit court's orders affirming that portion of the arbitration decision.

¶34 This court's decision is not intended to express any opinion about what the arbitrator's determination should be or about the merits of the parties' contentions on appeal.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.