COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1506 **Cir. Ct. No. 00-CV-2142**

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

IN RE THE ARBITRATION OF A DISPUTE BETWEEN LOCAL 236 LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO AND CITY OF MADISON:

LOCAL 236 LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

PETITIONER-RESPONDENT,

V.

CITY OF MADISON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Reversed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 ROGGENSACK, J. Local 236 (the union) filed a grievance asserting that the City of Madison had assigned two employees the full duties and responsibilities of a higher job classification such that, under the terms of the collective bargaining agreement, the employees were entitled to increased pay for working at a level above their actual classification. An arbitrator determined that the employees were not performing the full duties and responsibilities of the higher classification and denied the grievance. The circuit court disagreed and vacated the arbitrator's decision; the City appealed. We conclude that the arbitrator did not exceed his authority in construing contract language that rationally could be considered ambiguous. Accordingly, we reverse the order of the circuit court and reinstate the arbitrator's decision.

BACKGROUND

¶2 The City of Madison's engineering division hired Steve Sonntag and Stewart Mael as engineering field aids in May of 1998 and April of 1998, respectively. At the time he was hired for the position, Sonntag had recently received a degree in civil engineering from the University of Wisconsin-Milwaukee. Mael had graduated from a technical college surveying program in 1991 and then worked with an engineering firm for seven years prior to accepting the job with the City. Sonntag and Mael are both members of Local 236.

¶3 The job progression for an engineering field aid includes two higher level classifications: Construction Inspector I (CI I) and Construction Inspector II (CI II). Under the terms of the collective bargaining agreement, the City has the authority to assign employees to work outside of their current classification. However, if the City elects to have an employee perform all of the work of a

higher classification, section 13.7 of the agreement provides for "classification pay" as follows:

> Whenever employees are assigned the full duties and responsibilities of a higher classification, an additional twenty (20) cents per hour for each range difference shall be applied to the employee's regular rate of pay.

¶4 In this case, Sonntag and Mael were assigned to perform construction inspection work on various projects during the 1998 and 1999 construction seasons. In particular, each of them had responsibility for inspection work on projects in a designated geographic area of the city for the duration of each season.[1] Only two other employees, Steve Wood and Lori Ziegler, were assigned inspection work on a geographic basis. Wood was classified as a CI II. Ziegler was classified as a CI I, but she received classification pay as a CI II. The City paid Sonntag and Mael classification pay at the CI I level.[2]

¶5 In May and June 1999, the union filed first-step and second-step grievances contending that during the 1998 and 1999 construction seasons, both Sonntag and Mael had been assigned the "full duties and responsibilities" of a

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[1] Don Fahrney, the City's Principal Civil Engineer, testified that Sonntag and Mael were each given responsibility for a part of what had been formerly treated as a single "area":

> What we did is we just assigned [Sonntag and Mael as inspectors] to the west area. And the reason we did that is they were both engineer aides, and they were kind of equivalent. And to give some more experience, we assigned them to give some projects in the west to one of them, and some projects in the west to the other one.

[2] According to the record, Sonntag and Mael received classification pay at the CI I level as part of a settlement of an earlier grievance. Although the two grievances appear to overlap in terms of the time periods they cover, the City has raised no issue of waiver or preclusion on this appeal.

Construction Inspector II. Accordingly, the union asserted, the employees were entitled to "classification pay" at the CI II rate for their work in 1998 and 1999.[3]

¶6 The City denied the grievances, asserting at each step that there was no violation of the contract. In particular, the City determined that:

> The job description of a Construction Inspector II requires three-years of experience as a Construction Inspector I or in an equivalent position. Stewart Mael was hired as an Engineering Field Aid on April 13, 1998 and Steve Sonntag was hired as an Engineering Field Aid on May 3, 1998. The Inspector II position requires independent initiative and [judgment] which comes with experience.

¶7 Pursuant to section 7.2 of the collective bargaining agreement, the dispute over classification pay proceeded to final and binding arbitration. After an evidentiary hearing, the arbitrator issued a written decision in favor of the City. The arbitrator determined that the phrase "full duties and responsibilities" was ambiguous as used in section 13.7 (*i.e.*, the "classification pay" provision) of the agreement. The arbitrator then construed the phrase in light of the written job descriptions for a CI I and CI II and concluded that:

> [t]he Class Description for Construction Inspector II emphasizes the experience and knowledge which must be acquired to qualify for that position as well as the geographical area of the City in which the variety of work is performed. Both experience and knowledge and responsibility for an area are necessary in order to discharge the full duties and responsibilities of an Inspector II. According to the Employer, in the construction seasons of 1998 and 1999 neither [Sonntag nor Mael] … as yet had the requisite experience or equivalent although they were

[3] Mael was promoted to CI I in June 1999, and then further promoted to CI II in December 1999. The union's grievance asserts that regardless of these promotions, Mael should have received classification pay at the CI II level throughout the 1998 and 1999 construction seasons. Sonntag was promoted to CI I in March 2000.

> assigned responsibility for a specific City area. Thus, they were not entitled to [Classification Pay] at the Inspector II level. Exercise of this judgment was in accordance to the provisions of Article 6 regarding Management Rights.
>
> ….
>
> A job or class description would be deficient if it omitted degree of supervision, requisite experience and knowledge for a skilled position, or for that matter to make no reference to required education, scope of work performance, and the like. The Class Descriptions in this case cover all these factors, none of which should be disregarded in defining "full duties and responsibilities." Accordingly, this Arbitrator is more persuaded by the employer's position than by the Union's.

¶8 The union sought judicial review of the arbitrator's decision. The circuit court vacated the arbitrator's award on the basis that it reflected a "perverse misconstruction" of the collective bargaining agreement. In particular, the circuit court concluded that the disputed contract language was not ambiguous and that the arbitrator erred by interpreting "duties and responsibilities" to include the "experience and knowledge" referred to in the applicable job descriptions.

¶9 On appeal, the City seeks reinstatement of the arbitrator's decision. The City contends that the arbitrator acted within his authority when he construed the collective bargaining agreement and that, even if the court would reach a different result upon independent review, the arbitrator's decision should be upheld to preserve the parties' bargained-for agreement to arbitrate the dispute.

DISCUSSION

Standard of Review.

¶10 When a party seeks to have an arbitrator's award set aside, we review the arbitrator's decision under the same common law and statutory

standards applied by the circuit court. ***Dane County v. Dane County Union Local 65***, 210 Wis. 2d 267, 274-75, 565 N.W.2d 540, 543 (Ct. App. 1997); *see also* WIS. STAT. §§ 788.10 and 788.11 (1999-2000).[4] An arbitrator's award will be set aside only when its invalidity is demonstrated by clear and convincing evidence. ***Dane County***, 210 Wis. 2d at 275, 565 N.W.2d at 543.

¶11 Wisconsin law favors agreements to resolve labor disputes through final and binding arbitration, and accordingly, the scope of our review of an arbitrator's decision is quite limited. ***Fortney v. School Dist. of West Salem***, 108 Wis. 2d 167, 178, 321 N.W.2d 225, 232 (1982). The primary purpose of our supervisory role is to ensure that the parties received the arbitration for which they bargained. ***Lukowski v. Dankert***, 184 Wis. 2d 142, 149, 515 N.W.2d 883, 886 (1994). As the Wisconsin Supreme Court has stated:

> A final and binding arbitration clause signifies that the parties to a labor contract desire to have certain contractual disputes determined on the merits by an impartial decision-maker ….
>
> The parties bargain for the judgment of the arbitrator—correct or incorrect—whether that judgment is one of fact or law.
>
> ….
>
> Enforcement of the award is enforcement of the parties' bargain. Having agreed to be bound by the arbitrator's determination, the arbitrator has the "authority" to err and a mistake of judgment is plainly not grounds for vacating an award ….

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

City of Oshkosh v. Oshkosh Pub. Library Clerical & Maint. Employees Union Local 796-A, 99 Wis. 2d 95, 103-04, 299 N.W.2d 210, 214-15 (1980).

¶12 In this case, the issue presented for arbitration involved exclusively a question of contract interpretation and application, and the contract itself expressly denied the arbitrator the power to alter or add to the parties' agreement. In such circumstances, the arbitrator's decision will be set aside when it is based on a perverse misconstruction of the labor contract, when 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. ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8, 11 (1988); ***Oshkosh***, 99 Wis. 2d at 106, 299 N.W.2d at 216.[5] In addition, courts will vacate an arbitration award where the arbitrator's interpretation of the labor contract has the effect of substituting the arbitrator's discretion for rights the agreement clearly reserves to one of the parties, or when it projects the arbitrator's own brand of justice rather than the terms of the collective bargaining agreement. *See, e.g.*, ***City of Milwaukee v. Milwaukee Police Ass'n***, 97 Wis. 2d 15, 26-27, 292 N.W.2d 841, 847 (1980) (vacating an arbitrator's award where the arbitrator's contract interpretation had the effect of adding limitations on police chief's authority to transfer employees; by contract and statute, the chief had unrestricted discretion over transfers); ***Dane County***, 210 Wis. 2d at 281, 565 N.W.2d at 546 (reversing in part an arbitrator's award because issue preclusion barred the arbitrator's "reinterpretation" of a previously construed contract provision).

[5] The common law standards for determining when an arbitrator's award exceeds the authority granted to the arbitrator by the labor contract are essentially the same as the statutory standards established in WIS. STAT. § 788.10. *See* ***Lukowski v. Dankert***, 184 Wis. 2d 142, 150-51, 515 N.W.2d 883, 886 (1994).

Perverse Misconstruction.

¶13 The union contends that the arbitrator's award should be vacated because the arbitrator perversely misconstrued the "classification pay" provision of the labor contract. In particular, the union contends that the arbitrator exceeded his authority by interpreting the phrase "full duties and responsibilities" to include the experience and knowledge that an employee brings to assigned tasks. According to the union, the phrase "full duties and responsibilities" is not ambiguous in this case, and, by construing the phrase differently from its plain meaning, the arbitrator improperly modified the parties' contract.

¶14 Previous cases have established that when parties agree to resolve their dispute through final and binding arbitration, arbitrators have a right to interpret a contract contrary to what a court may have done. Accordingly, an arbitrator's construction of a labor contract is not "perverse" or subject to reversal merely because the court disagrees with the arbitrator and would interpret the contract differently. ***United Steelworkers v. Enterprise Wheel & Car Corp.***, 363 U.S. 593, 598-99 (1960); ***Milwaukee Teacher's Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, 147 Wis. 2d 791, 795, 433 N.W.2d 669, 671 (Ct. App. 1988). In addition, the possible misapplication of the principles of contract construction does not render an arbitrator's construction perverse. ***Madison Metro. Sch. Dist. v. WERC***, 86 Wis. 2d 249, 260-61, 272 N.W.2d 314, 319 (Ct. App. 1978).

¶15 What the parties are entitled to expect from final and binding arbitration is that the arbitrator will exercise "a measure of rational judgment" in resolving the dispute. ***Oshkosh***, 99 Wis. 2d at 106, 299 N.W.2d at 216. Thus, an arbitrator has no authority to disregard or modify unambiguous contract language. ***Milwaukee Police Ass'n***, 97 Wis. 2d at 27, 292 N.W.2d at 847. However, so far

as an arbitrator's decision concerns construction of the collective bargaining agreement, we will conclude that the arbitrator has acted within his or her authority and with "a measure of rational judgment" when (1) the arbitrator construes language that rationally could be viewed as ambiguous, ***Oshkosh***, 99 Wis. 2d at 106 n.8, 299 N.W.2d at 216 n.8; and (2) the arbitrator's construction has a foundation in reason. ***Id.*** at 107, 299 N.W.2d at 216. In such circumstances, we cannot conclude that the arbitrator's construction of the contract is "perverse."

¶16 In this case, we conclude that the phrase "full duties and responsibilities" in section 13.7 of the collective bargaining agreement rationally could be viewed as ambiguous. As the union suggests, one potential construction of the phrase is that the word "duties" and the word "responsibilities" refer exclusively to the tasks to be performed on the job and that the words have nothing to do with the qualifications that an individual brings to the job or with the manner in which the individual is expected to perform the tasks. However, another potential construction of the phrase is that the word "duties" refers to the tasks to be performed, while the word "responsibilities" refers to the more subjective components of job performance, including the extent to which an individual is expected to perform a job independent from supervision given that individual's knowledge and experience. Such a construction is at least arguably appropriate where, as is true in this case, the job classifications at issue substantially overlap and involve increasing supervisory "responsibilities." Because the phrase "full duties and responsibilities" rationally could be viewed as ambiguous under the facts presented by the grievance, we conclude that the arbitrator acted within his authority when he construed the terms by referring to the job descriptions for the CI I and CI II positions.

¶17 According to the written job description for the CI I classification, the "General Responsibilities" of a CI I are as follows:

> This is paraprofessional construction inspection work, serving as the resident inspector on varied concurrent public works projects. The work is characterized by a sound knowledge of (and judgment in) the application of codes and engineering considerations related to the inspection of a wide variety of public works projects. The work is performed under the general supervision of a Civil Engineer, Engineering Technician, or a Construction Inspector II and is periodically checked for technical accuracy.[6]

(Footnote added.)

¶18 The "General Responsibilities" of a CI II are likewise described:

> This is responsible advanced level paraprofessional construction inspection work in an assigned area of the City and/or as the resident inspector for a large number of concurrent, varied, and complex public works projects. This work is characterized by responsibility for all projects and lower level inspectors in an area and/or independent initiative and judgment in the resolution of complex construction inspection problems. Work may require leading subordinate construction inspectors on individual projects or multi-inspector/large projects, or as members of a survey crew. The work is performed under the general supervision of a Civil Engineer or an Engineering Technician with only the most unusual or technical inspection problems requiring supervisor involvement.

¶19 The arbitrator noted two significant differences in the job descriptions for a CI I and a CI II. The first difference is that while a CI I may

[6] In the written job description for both the CI I and CI II positions, the first section is entitled "Class Description" and is comprised of two subsections: "General Responsibilities" and "Examples of Duties and Responsibilities." The second section, entitled "Qualifications," is comprised of three subsections: "Knowledge, Abilities and Skills," "Training and Experience" and "Special Qualifications."

serve as the inspector for "varied" and "concurrent" projects, a CI II may be assigned responsibility for all projects in a given area of the City. The union presented undisputed testimony that during 1998 and 1999, both Sonntag and Mael were assigned to inspect projects in particular geographic areas. It was also undisputed that some of the projects in their assigned areas were "complex" public works projects.

¶20 The second difference in the job descriptions noted by the arbitrator is that a CI II is expected to perform all duties with a greater degree of independent initiative and judgment than would be expected of a CI I. According to the arbitrator, CI II's are expected to exercise greater independent initiative and judgment because, as reflected in the qualifications listed for the CI II position, CI II's are expected to have greater knowledge and experience. Sonntag's and Mael's supervisors testified that, during the period relevant to the grievance, neither Sonntag nor Mael had the knowledge or experience necessary to perform at the level of independence that is required of a CI II. John Fahrney, a "Civil Engineer IV" for the City, testified that he spent more time on a daily basis on the projects assigned to Mael and Sonntag than he did on projects supervised by a CI II.

¶21 After considering the contract language, the CI I and CI II job descriptions and the other evidence presented by the parties, the arbitrator ruled in favor of the City. In the arbitrator's judgment, Sonntag and Mael had not been assigned the "full duties and responsibilities" of the CI II position because even though Sonntag and Mael had been assigned as area inspectors and performed inspection work on projects in a geographic area, the City had taken into account their knowledge and experience and had not assigned to them the responsibility of performing the inspection work with the degree of independence that normally is

expected of a CI II. We cannot conclude that this construction of the contract lacks a foundation in reason. It was within the arbitrator's authority to construe the arguably ambiguous contract language in light of the written job descriptions. The job descriptions provide some support for the conclusion that CI II's, because of their knowledge and experience, have the added "responsibility" of exercising a particular level of independent initiative and judgment that is not expected of a CI I. Finally, there is a measure of rationality in the conclusion that when the City assigns inspection duties to an employee, it also assigns varying levels of responsibility for performing the work independently, with such expectations being dependent on the employee's knowledge and experience. Accordingly, we conclude that the arbitrator's decision was not based on a perverse misconstruction of the labor contract.[7]

¶22 Accepting the arbitrator's construction of the contract language, as we conclude we must, we note that the evidence presented at the hearing would allow for the conclusion that, at the time that the City assigned Sonntag and Mael work as inspectors, the City expected, and found, that they would not perform the full duties and responsibilities of a CI II, including performing their work independently and generally free from supervision. Therefore, given the limits on our authority to review the merits of an arbitrator's decision, we see no basis for

[7] We do not agree with the union's contention that the arbitrator's award rendered section 13.7 of the agreement "meaningless." It is possible, for example, that the City would assign an employee, whom the City regards as possessing the required knowledge and experience, the full level of responsibility for independent work that differentiates a CI I from a CI II. Such an employee would then be eligible for "classification pay." The arbitrator's interpretation of section 13.7 is restrictive and it also allows the City considerable latitude in arguing for a denial of classification pay, but it does not render the provision meaningless.

setting aside the arbitrator's application of the "classification pay" provision to the circumstances presented by the grievance.

¶23 The union's legal argument in favor of setting aside the award rests on ***Milwaukee Police Association*** and the premise that the contract language at issue is unambiguous. In ***Milwaukee Police Association***, the Wisconsin Supreme Court concluded that the labor contract and state statutes clearly reserved to the chief of police the unrestricted discretionary authority to transfer employees within the department. ***Milwaukee Police Ass'n***, 97 Wis. 2d at 30, 292 N.W.2d at 849. The court further concluded that the arbitrator's award, which required transfer decisions to be fair and impartial, improperly added a limitation to the chief's unrestricted discretion over transfers and improperly substituted the arbitrator's discretion for rights expressly reserved to the chief of police. ***Id.*** at 31-32, 292 N.W.2d at 849-50. In this case, we have concluded that the relevant portion of the "classification pay" provision rationally could be viewed as ambiguous, and therefore, the contract language was subject to interpretation by the arbitrator. In addition, as the supreme court noted in ***Oshkosh***, the ***Milwaukee Police Association*** court "was concerned with the effect of the arbitration award in light of the statutory obligations or prerogatives of a municipal officer.… In such cases, the judgment of the arbitrator will not be given the deference which it might ordinarily be awarded in the absence of a relevant statute." ***Oshkosh***, 99 Wis. 2d at 108-09, 299 N.W.2d at 217. Here, there is no claim that the arbitration award conflicts with a statute.

¶24 The union provides many well-taken reasons why, based both on the contract language and the evidence produced at the hearing, the arbitrator could have awarded CI II classification pay to Sonntag and Mael. However, our power to review the merits of the arbitrator's decision is limited to the analysis above,

under which we have concluded that the arbitrator's decision was not based on a perverse misconstruction of the labor contract. Thus, although we understand the union's concerns, the union's remedy at this point is to seek an amendment of the contract language.

CONCLUSION

¶25 We conclude that the arbitrator did not exceed his authority in construing contract language that rationally could be considered ambiguous. Accordingly, we reverse the order of the circuit court and reinstate the arbitrator's decision.

By the Court.—Order reversed.

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