COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3234 **Cir. Ct. No. 01CV7319**

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

GREENDALE EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

GREENDALE SCHOOL DISTRICT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Greendale Education Association (Union), on behalf of James R. Wittlieff, appeals the vacatur of an arbitrator's award which reinstated Wittlieff as a Greendale physical education teacher with a year's suspension without pay after Wittlieff was fired by the Greendale School District (District). The Union argues that the trial court erred when it vacated the

arbitration award and found that: (1) the arbitrator exceeded his authority in making the findings and conclusions that he did, as well as by "substituting his own judgment for that of the District's with regard to discipline"; and (2) the award violated a public policy against sexual harassment of students. Because the arbitrator had the authority under the law to hold a *de novo* hearing and make factual findings and determine the proper discipline, the arbitrator was entitled to substitute his judgment for that of the District. Consequently, the arbitrator did not exceed his authority. Additionally, the arbitrator found that Wittlieff's actions were not sexually motivated. Since the arbitrator found that Wittlieff's actions did not constitute sexual harassment, the award did not violate a public policy against sexual harassment of students. Thus, we reverse and remand and order the circuit court to affirm the arbitrator's award.

I. BACKGROUND.

¶2 Wittlieff began his employment with the Greendale School District as a physical education teacher during the 1974-75 school year. Unfortunately, Wittlieff's tenure with the District has not been problem-free. In 1978, when it appeared that he was not going to be rehired, Wittlieff agreed to the renewal of his probationary status in order to maintain his employment. In 1993, he spent a year teaching at a different school because of conflicts with the high school principal.

¶3 In 1993, Greendale adopted an anti-harassment policy prohibiting sexual harassment of students. Then in 1994, several complaints were registered against Wittlieff by female students. These allegations centered around Wittlieff's practice of making inappropriate comments to female students, the manner in which he took posture photos of females, his occasional practice of picking up female students and throwing them over his shoulders, and his requirement that

girls do stretches and exercises in their swimsuits, rather than sweat suits, before swimming. After an investigation, Wittlieff was counseled about his behavior and given an oral warning.

¶4 In 1997, additional complaints were filed against Wittlieff by several female students. These complaints concerned Wittlieff's practice of requiring male and female students to do push-ups over his outstretched arm, his habit of referring to female students as "honey," "dear," "sweetheart," and his refusal to permit girls to wear additional clothing in the pool during the swim unit of his class. After the District investigated these complaints, it decided to suspend Wittlieff's employment with pay. Ultimately, it was the recommendation of the principal to the Board of Education that Wittlieff's employment be terminated. Wittlieff was terminated on November 10, 1997. In deciding that Wittlieff should be terminated, the Board determined that "just cause" existed for Wittlieff's termination, as was required by the collective bargaining agreement. Following notification of the termination, the Union filed a grievance. Pursuant to the collective bargaining agreement's provisions, the matter was directed to binding arbitration.

¶5 The arbitrator selected by the parties held hearings which took ten days. He heard the testimony of twenty-nine District witnesses, thirty-two Union witnesses, and reviewed numerous exhibits. The issue before the arbitrator was whether there was "just cause" to terminate Wittlieff. The arbitrator found that the District did not have "just cause" to terminate Wittlieff. In a forty-four page decision, the arbitrator found that although Wittlieff's conduct was inappropriate, it did not rise to the level of sexual harassment. Inasmuch as no sexual harassment was found, the arbitrator opted for a lesser penalty, a one-year suspension.

¶6 The Union then brought a motion to confirm the arbitration award after the District refused to reinstate Wittlieff and filed a motion seeking to vacate the arbitration award. After ordering briefs and hearing oral arguments, the circuit court ruled that the arbitrator exceeded his authority in rendering the award. Specifically, the trial court found that the arbitrator substituted his judgment for that of the District with regard to discipline, and that the conclusion reached by the arbitrator was so contrary to public policy concerning sexual harassment of students that it could not stand. Consequently, the trial court vacated the award and reinstated the underlying decision of the District to terminate Wittlieff. It is that determination which brings this matter before this court.

II. ANALYSIS.

¶7 Arbitration, as a dispute resolution alternative, is favored in Wisconsin. Underlying this policy is the belief that arbitration prevents individual problems from blossoming into labor disputes, which cause strikes and walkouts, and which require collective bargaining to restore peace and tranquility. *See* ***Layton Sch. of Art & Design v. WERC***, 82 Wis. 2d 324, 346, 262 N.W.2d 218 (1978). Many public sector collective bargaining agreements provide for grievance and binding arbitration of disputes as a method of establishing labor peace. *See* ***Fortney v. School Dist. of West Salem***, 108 Wis. 2d 167, 178, 321 N.W.2d 225 (1982). Recognizing the importance of this policy to the stability of labor regulations in the public sector, the Municipal Employment Relations Act, found in Chapter 111, WIS. STAT. § 111.70(3)(a)5 (1999-2000),[1] prohibits the

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

refusal to arbitrate questions when a collective bargaining agreement requires arbitration, and prohibits the refusal to accept the terms of such arbitration award. This policy is echoed in ***Joint Sch. Dist. No. 10, City of Jefferson v. Jefferson Edu. Ass'n***, 78 Wis. 2d 94, 112, 253 N.W.2d 536 (1977), where the supreme court concluded there is a strong legislative policy favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes.

¶8 Chapter 788 of the Wisconsin Statutes codifies the use of arbitration as a dispute resolution alternative. Case law has established that in a review of an arbitrator's decisions, an arbitrator's award is presumptively valid and it will be disturbed only when invalidity is demonstrated by clear and convincing evidence. *See* ***Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Educ. Ass'n***, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980). Besides being presumptively valid, a review of an arbitrator's award is quite limited in scope. In the seminal case of ***Dehnart v. Waukesha Brewing Co.***, 17 Wis. 2d 44, 51-52, 115 N.W.2d 490 (1962), our supreme court adopted the federal law as promulgated in the ***Steel Workers Trilogy***. Under federal law, "A federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be a better one." ***W. R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.***, 461 U.S. 757, 764 (1983); ***United Steelworkers v. Enterprise Wheel & Car Corp.***, 363 U.S. 593, 596 (1960). "Unless the arbitral decision does not 'dra[w] its essence from the collective bargaining agreement,' a court is bound to enforce the award and is not entitled to review the merits of the contract dispute." ***W. R. Grace & Co.***, 461 U.S. at 764 (citation omitted) (alteration in original). "This remains so even when

the basis for the arbitrator's decision may be ambiguous." ***Id.*** The Supreme Court has also noted:

> [A]s long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn the decision.

Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000) (citation omitted). Thus, arbitration awards enjoy great deference and are rarely overturned.

¶9 While judicial review of arbitration awards is very limited, and courts are reluctant to interfere with an arbitrator's award, the possibility exists to both vacate and modify an award under limited circumstances. WISCONSIN STAT. § 788.10 provides for the vacation of an arbitration award under certain extraordinary circumstances, and WIS. STAT. § 788.11 establishes certain conditions which allow for the modification of such an award. As is pertinent to this dispute, WIS. STAT. § 788.10(1)(d) permits vacatur where arbitrators "exceed[] their powers, or so imperfectly execute[] them that a mutual, final and definite award upon the subject matter submitted was not made." An arbitrator's award also runs afoul of § 788.10(1)(d) if: (1) there is a perverse misconstruction; (2) if there is positive misconduct plainly established; (3) if there is a manifest disregard of the law; or (4) if the award itself is illegal or violates strong public policy. *See* ***Joint Sch. Dist. No. 10, City of Jefferson***, 78 Wis. 2d at 117-18.

¶10 Here, the trial court claimed that the arbitrator exceeded his authority both in his factual findings and conclusions, and in selecting a remedy other than that imposed by the District: "[T]he conclusions reached are without basis, do not comport with the evidence or the arbitrator's own findings." Further, the trial

court found that the arbitrator's determination that there was not "just cause," as found by the District, was also improper: "[T]he award merely represents the arbitrator's substitution of his own judgment for that of the District's with regard to discipline." The trial court's decision goes on to state that the decision refusing to find "just cause" for termination was "so contrary to the public policy concerning sexual harassment of students that it cannot stand." We disagree with the trial court in all respects.

¶11 An arbitrator's power is derived solely from the contract, and that authority is limited by the terms of the contract. *See* ***Milwaukee v. Milwaukee Police Ass'n***, 97 Wis. 2d 15, 25, 292 N.W.2d 841 (1980). Here, the collective bargaining agreement between the District and the Union permitted the arbitrator to conduct a hearing and craft a remedy. The collective bargaining agreement's provisions authorizing binding grievance arbitration gave the arbitrator the authority to make findings and determine discipline.

> It shall be the *function of the arbitrator*, and *s/he shall be empowered* except as his/her powers are limited below, *after due investigation*, *to make a decision in cases of alleged violation of the specific articles and sections of this Agreement*….
>
> *The parties agree that the award of the arbitrator* insofar as it is in conformity with the scope of his/her authority as set forth above *is final and binding on the GEA, its members, the employee(s) involved and the Board. Appeals of an arbitrator's ruling are limited to the grounds set forth in Wisconsin Statutes*.

(Emphasis added.) Thus, under the collective bargaining agreement in operation between the Union and the District, the arbitrator was free to conduct a *de novo* hearing and to make factual findings as well as to determine the proper remedy. The arbitrator could also take evidence and make findings as to whether the factual allegations against the employee have been proven. *See* ***Fortney***, 108

Wis. 2d at 169. Here, the arbitrator rendered a lengthy decision setting forth his findings and conclusions, and explaining the remedy he selected.

¶12 Moreover, an arbitrator's findings are not reviewable unless the findings and conclusions constitute grounds for vacation of the award pursuant to WIS. STAT. § 788.10. Because an arbitrator's award is presumptively valid, the trial court could not overturn the award unless there was clear and convincing evidence that the arbitrator's actions violated one of the limited grounds found in WIS. STAT. § 788.10. *See* ***City of Madison v. AFSCME***, 124 Wis. 2d 298, 302, 369 N.W.2d 759 (Ct. App. 1985). Although the trial court was critical of the arbitrator's findings and conclusions, it did not rule that the arbitrator's findings and conclusions formed the underpinnings for a vacatur ground listed in WIS. STAT. § 788.10, except to claim the arbitrator "exceeded his authority" and violated public policy pursuant to WIS. STAT. § 788.10(1)(d).[2] Because these

[2] WISCONSIN STAT. § 788.10 provides:

> **Vacation of award, rehearing by arbitrators.**
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> **(1)** In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
>
> (a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(continued)

grounds did not challenge the arbitrator's actual findings and conclusions, great deference should have been given to the arbitrator's findings of fact by the trial court. Indeed, so great is the deference given to an arbitrator's decision that an arbitrator's award will not be disturbed merely because it is wrong or because the arbitrator made an error of law or fact. *See* ***Joint Sch. Dist. No. 10, City of Jefferson***, 78 Wis. 2d at 117.

¶13 Next, we address the trial court's ruling that the arbitration award must be vacated because the arbitrator's finding that no "just cause" existed was contrary to that of the District's. The trial court wrote that this no "just cause" determination "merely represents the arbitrator's substitution of his own judgment for that of the District's with regard to discipline." However, the trial court failed to appreciate that the arbitrator was not obligated to give any deference to the District's determination that "just cause" existed. An arbitrator may independently determine whether the charges that are proven provide good cause for discharge. *See* ***Fortney***, 108 Wis. 2d at 180. While reasonable people could differ as to the seriousness of Wittlieff's conduct and the discipline to be imposed, the arbitrator's interpretation must be given deference. Consequently, we find nothing in the evidentiary facts to support the trial court's conclusion that the arbitrator's finding of no "just cause" was flawed. Thus, the trial court erred when

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> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.
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> **(2)** Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

it held that the arbitrator had exceeded his authority by making findings contrary to those found by the District.

¶14 Finally, we address the trial court's determination that reinstating Wittlieff with a year's suspension violated a public policy against sexual harassment. The arbitrator found Wittlieff's conduct to consist of only controversial pedagogical techniques and poor judgment. The Union asserts that the trial court's characterization of Wittlieff's actions as sexual harassment was error. The District asks us to ignore the findings made by the arbitrator, and instead, adopt the finding of the trial court that the award violates strong public policy. We decline the District's invitation.

¶15 There can be no doubt that the arbitrator summarily rejected the District's conclusion that Wittlieff sexually harassed his students. The arbitrator found that he "does not believe that Wittlieff's remarks are sexual or demeaning to the extent that they fall within the ambit of sexual harassment." The arbitrator determined that Wittlieff's conduct, while offensive, was not "sexual in nature." The arbitrator concluded that: "Although the arbitrator believes that Wittlieff has been guilty of insensitivity, stubbornness, rudeness, rigidity and intrusiveness, the arbitrator finds that Wittlieff's conduct does not rise to the level of sexual harassment."

¶16 In explaining his decision, the arbitrator noted the testimony of an investigating Greendale police officer (who declined to press criminal charges against Wittlieff arising out of the identical complaints), who opined that Wittlieff simply "didn't get it" – meaning Wittlieff failed to recognize the changing social norms regarding teenage girls, and he failed to appreciate that his large stature was intimidating. The arbitrator agreed with this assessment and noted that although

the touching of a student's muscles used to be routine, this practice is now thought to be an invasion of a student's privacy.

¶17 Wittlieff also provided ample proof that he "didn't get it." He testified that he called some girls "foxy" and boys "studly" because he considered these terms to be appropriate compliments to students. The arbitrator also found it persuasive that Wittlieff's complained-of conduct was not done in private or accompanied by any comments that suggested he was looking for sexual gratification.

¶18 Additionally, other evidence supported the arbitrator's position. Although several female students testified against Wittlieff, numerous other female students testified that Wittlieff was a strict teacher and a man of fine character. These witnesses also stated that he had never touched them, they never heard any allegations about his touching other students, and, based upon their knowledge of Wittlieff, they would be surprised to hear such complaints. Thus, the opinion of the arbitrator that Wittlieff's conduct lacked sexual intent is supported by evidence in the record, and, for the reasons previously stated, we must accept it. Consequently, Wittlieff did not violate the District's sexual harassment policy or a public policy against sexual harassment of students.[3]

¶19 In sum, giving great deference to the arbitrator's award, we must reverse the trial court's decision and remand the matter to the trial court with directions to affirm the arbitration award.

[3] The District's sexual harassment policy states: "Sexual harassment consists of unwelcomed sexual advances, requests for sexual favors, and other inappropriate verbal or physical conduct of a sexual nature."

By the Court.—Order reversed and cause remanded with directions.

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