COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

NOTICE

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

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

No. 95-0133

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

OSHKOSH PARAPROFESSIONAL EDUCATION ASSOCIATION,

Plaintiff-Appellant,

v.

OSHKOSH AREA SCHOOL DISTRICT,

Defendant-Respondent.

APPEAL from an order of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Reversed and cause remanded with directions*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. The Oshkosh Paraprofessional Education Association (Association) appeals from the trial court's order vacating an arbitration award in its favor. Because we conclude that the trial court did not give due deference to the arbitrator's award, we reverse and remand for the entry of an order confirming the arbitrator's award.

This dispute arose after Pamela Henkel, a long-term employee and volunteer for the Oshkosh Area School District (District) and a collective bargaining unit member, was not selected for a full-time instructional aide position at Jefferson Elementary. The position went to Laura White, who was not a member of the bargaining unit. The bargaining unit operated under a collective bargaining agreement with the District.

Henkel's grievance protesting the District's failure to select her for the position was denied at each level of the grievance procedure. Thereafter, the Association and the District entered into arbitration of the dispute. The parties stipulated to the following issue before arbitrator Sherwood Malamud, who was mutually agreed to by the parties:

> Did the District violate Article V Posting Provision of the Collective Bargaining Agreement when it did not select the Grievant [Henkel] for the position of Instructional Aide at Jefferson Elementary School? If so, what is the appropriate remedy?

Article V, Assignments and Promotions, of the parties' collective bargaining agreement states:

> In filling vacancies, transfers and promotions, all employees shall be eligible for such vacancies, transfers and promotions, where practical, based on seniority, merit, work record, qualifications, and personal fitness. Where merit, work record, qualifications, and personal fitness are relatively equal, seniority shall prevail.

Central to the arbitration was the interpretation of "all employees shall be eligible for such vacancies." The Association argued that "all employees" meant bargaining unit members only; the District argued that "all employees" meant all employees, regardless of bargaining unit affiliation.

The Association argued that the arbitrator need not determine which candidate was more qualified for the open position because if a qualified bargaining unit candidate applied for the posted position, the position had to be offered to that individual first. The Association further argued that even if the arbitrator determined that bargaining unit and nonbargaining unit individuals were eligible for the position, Henkel was more qualified than White by virtue of her experience in the District.

The District argued that White was qualified for the position and that bargaining unit members never received preference over nonbargaining unit employees in filling vacancies. The District asserted that the Association unsuccessfully sought such a preference in its bargaining with the District and urged the arbitrator not to construe "all employees" to give the Association something it had not obtained in bargaining.

Because both parties' interpretations were supported by the language of the collective bargaining agreement, the arbitrator found the language ambiguous and turned to the District's evidence of past practice and bargaining history to clarify the meaning of the language and the parties' intent.[1]

The arbitrator reviewed language used in the Assignment and Promotions clauses of previous collective bargaining agreements and concluded that the bargaining history offered by the District did not support the District's interpretation of the language at issue. Under the 1982-85 agreement, qualified bargaining unit members were to receive first consideration for vacant positions. The 1985-87 agreement retained that provision.

The "all employees" language at issue in this case first appeared in the 1987-89 agreement. On its face, the language at issue departs from the "first consideration" language of the preceding contract (1985-87). The arbitrator examined the negotiations that preceded the 1987-89 contract and was unable to

[1] Because the Association did not deviate from its contention that the language was clear and unambiguous, it offered no bargaining history or past practice evidence. Therefore, the arbitrator resorted to the bargaining history and past practice evidence presented by the District.

conclude from the exchange of proposals relating to posting provisions that the parties intended the final language to apply to bargaining unit and nonbargaining unit members alike. The record did not offer any reasons for the selection of the language at issue.

The arbitrator then turned to evidence of past practice. The District argued that on two occasions it had filled vacant positions with nonbargaining unit employees. The arbitrator discounted the import of this conduct for the parties' intent because the Association was unaware that nonbargaining unit employees had been selected and, therefore, mutuality of intent was lacking.[2]

Having received no assistance from the District's past practice and bargaining history evidence, the arbitrator returned to the plain language in the contract. The arbitrator found that the language does not refer to nonbargaining unit employees of the District and assigned the following meaning to it:

> In the absence of any evidence to the contrary, the term employee refers to individuals working in positions covered by the terms and conditions of the collective bargaining agreement. If the parties intend to refer to individuals who ordinarily do not receive the wages, benefits, or whose terms of employment are not governed by the collective bargaining agreement, they would clearly indicate that intention through the use of such terms as, District employee or all employees of the Employer. No such language appears in Article V.

[2] The arbitrator found that there was no mechanism for alerting the Association which employees had applied for a vacant unit position and who was selected to fill that position. The arbitrator found that while the District had demonstrated its interpretation and conduct under the language, it had failed to establish that the Association knew or acquiesced in the conduct. Because mutuality was lacking, the arbitrator found that the District failed to prove the existence of the past practice.

Because the only eligible employees for the Jefferson instructional aide position were bargaining unit members, the arbitrator found that White was not eligible for the position and did not compare White's and Henkel's credentials. The arbitrator further found that in rejecting Henkel in favor of a nonbargaining unit employee, the District violated the collective bargaining agreement. He directed the District to place Henkel in the position for which she had applied or another position if both parties agreed.

The Association petitioned the trial court to affirm the arbitrator's award. The District counter-petitioned to vacate the award on the ground that the arbitrator exceeded his powers and authority when he construed "all employees" to mean only bargaining unit members. The trial court agreed with the District and vacated the arbitration award. The Association appeals.

We review the arbitrator's award without deference to the trial court's decision vacating that award. *See* ***City of Madison v. Local 311, Int'l Ass'n of Firefighters,*** 133 Wis.2d 186, 190, 394 N.W.2d 766, 768 (Ct. App. 1986). An arbitration award may be vacated or modified only upon the statutory grounds set forth in § 788.10(1), STATS. ***Milwaukee Police Ass'n v. City of Milwaukee,*** 92 Wis.2d 175, 182, 285 N.W.2d 133, 136-37 (1979) (§§ 298.10 and 298.11, STATS., renumbered to §§ 788.10 and 788.11, STATS.). An arbitration award within the scope of authority delegated to the arbitrator is "due great deference." ***Teachers' Ass'n v. Milwaukee Bd. of Sch. Directors,*** 147 Wis.2d 791, 795, 433 N.W.2d 669, 671 (Ct. App. 1988) (quoted source omitted). A court may not substitute its judgment for that of the arbitrator because the parties contracted to have an arbitrator settle their grievance. ***Id.*** (quoted source omitted). Therefore, "because arbitration is what the parties have contracted for, the parties get the arbitrator's award, whether that award is correct or incorrect as a matter of fact or law." ***Id.*** (quoted source omitted). Consequently, our review of an arbitrator's award is limited, and we will not interfere with the arbitrator's decision merely because of errors of law or fact or because we disagree with the result. *See* ***Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n,*** 118 Wis.2d 707, 712-13, 348 N.W.2d 175, 178 (1984).

The parties defined the issue for the arbitrator as whether the District violated Article V posting provisions when it did not select Henkel for the position of instructional aide at Jefferson Elementary. Resolution of this

issue required construing ambiguous language used in the collective bargaining agreement regarding Assignments and Promotions.

We agree with the arbitrator's conclusion that the "all employees" contract language was ambiguous. If a term may be rationally viewed as ambiguous, the arbitrator may consider extrinsic evidence to construe it. *See* ***City of Madison v. AFSCME, AFL-CIO, Local 60,*** 124 Wis.2d 298, 303, 369 N.W.2d 759, 762 (Ct. App. 1985). Here, the arbitrator properly considered the bargaining history and found it wanting. Additionally, the arbitrator's view that past practice evidence is most persuasive when there is evidence of mutual agreement is echoed in an arbitration treatise.

> If it is not proven that the [alleged past] practice is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed practice *accepted by both parties*, a binding past practice will usually not be found.

FRANK ELKOURI AND EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 121 (4th ed. 1985 & Supp. 1989) (emphasis added). The authors also write that "the degree of mutuality [when deciding the weight to be accorded past practice] is an important factor. Unilateral interpretations might not bind the other party." ***Id.*** at 452 (4th ed. 1985).

The arbitrator properly considered extrinsic evidence in construing the "all employees" language, but he found the extrinsic evidence lacking. By virtue of the ambiguity and the parties' agreement that this matter should be determined by an arbitrator, the arbitrator had authority to construe this language and the parties, by virtue of their agreement to arbitrate, were bound by the arbitrator's decision provided the arbitrator did not exceed his authority. *See* § 788.10(1)(d), STATS. The arbitrator's interpretation is rational and not a perverse misconstruction of the contract. *See* ***City of Madison***, 133 Wis.2d at 190-91, 394 N.W.2d at 769 (arbitration award can be vacated for manifest disregard for the law).

The trial court disagreed with the arbitrator's construction of the contract language. In so doing, the trial court substituted its judgment for that of the arbitrator. This was error. *See* ***Fortney v. School Dist. of West Salem,*** 108 Wis.2d 167, 178, 321 N.W.2d 225, 232 (1982). The arbitrator's decision must be upheld as long as it is within the bounds of the contract language, regardless of whether a court might have reached a different result. ***Id.*** at 179, 321 N.W.2d at 233.

Because "the arbitrator's alleged modification or alteration [of the contract] was in fact a mere construction and interpretation of the labor contract ... the award must be sustained." ***City of Oshkosh v. Union Local 796-A,*** 99 Wis.2d 95, 104, 299 N.W.2d 210, 215 (1980).

By the Court.—Order reversed and cause remanded with directions to reinstate the arbitrator's award.

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