COURT OF APPEALS DECISION DATED AND FILED

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-0432

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

WISCONSIN PROFESSIONAL POLICE ASSOCIATION, LEER DIVISION,

PETITIONER-APPELLANT,

V.

ONEIDA COUNTY,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J, and Peterson, J.

¶1 PER CURIAM. The Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, appeals a judgment affirming an arbitration award selecting Oneida County's final proposed offer of a successor

collective bargaining agreement. The association argues: (1) The arbitrator exceeded his power when he chose the County's final offer; (2) the arbitrator improperly permitted the County to modify its certified final offer; (3) the arbitrator deprived employees of previously negotiated benefits; and (4) by selecting the County's final offer with the inclusion of a caveat, the arbitrator improperly modified the County's final offer. We affirm the judgment.

BACKGROUND

¶2 During collective bargaining over a successor to their 1995-97 collective bargaining agreement, the association and the County reached an impasse concerning Article VII – Wages, appendix "A." Following its statutorily mandated investigation, the Wisconsin Employment Relations Commission determined that the parties were at an impasse and ordered binding arbitration pursuant to WIS. STAT. §§ 111.70 and 111.77. The arbitrator issued its decision awarding the County its final offer.

¶3 The arbitrator summarized his reasons for selecting the County's final offer as follows:

> (1) because it is two years in duration and covers the current year, (2) because it moderates abnormally high starting wage rates in the Secretary and Correction Officer classifications to closer to average levels, (3) because it boosts the Dispatcher rates, and (4) because having market-based starting wage rates established in 1999 is critically important because of the significant expansion of positions at the jail effective June 1, 1999. As noted in the record, 14 new Correction Officers, 2 Dispatchers, and 1 Secretary will be hired.

The arbitrator also observed that there were five incumbent corrections officers employed at steps lower than the maximum, and noted "the Employer's proposal

does not involve any reduction in their present earnings. Due to their placements under the Employer's offer, they all experience an increase in their wage rates."

¶4 The association brought this action pursuant to WIS. STAT. §§ 788.10 and 788.11[1] to vacate or modify the award. The circuit court concluded that the award should not be vacated, modified or corrected because the arbitrator had not exceeded his authority in making the award, that his decision was reasoned and that there was no evidence of fraud or perversity of law and manifest injustice. The association then brought this appeal.

STANDARD OF REVIEW

¶5 "[O]ur review is of the arbitrator's award …." ***La Crosse Prof. Police Ass'n v. City of La Crosse***, 212 Wis. 2d 90, 568 N.W.2d 20 (Ct. App. 1997). The scope of our review is the same as the circuit court's and is without deference to the circuit court's decision. ***City of Madison v. Local 311, Int'l Ass'n of Firefighters***, 133 Wis. 2d 186, 190, 394 N.W.2d 766 (Ct. App. 1986). The grounds upon which we must vacate an award are found in WIS. STAT. § 788.10(1).[2]

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[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 788.10(1) reads:

> (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;

(continued)

¶6 Here, the association focuses its challenge on WIS. STAT. § 788.10(1)(d), which provides that we must vacate an award when "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." To determine our precise standard of review, "the inquiry must be whether the issue presented involves the scope of an arbitrator's statutory authority, as opposed to the arbitrator's discretionary weighing of the parties' offers in light of statutory factors." ***La Crosse Prof. Police***, 212 Wis. 2d at 100. The former issue presents a question of law. ***Id.*** Accordingly, we review de novo the question whether the arbitrator acted within his statutory authority. ***Id.***

DISCUSSION

¶7 The association argues that the arbitrator exceeded his powers when he selected the County's final offer. The association contends that the arbitrator was not authorized under WIS. STAT. § 111.77(6) to consider the proposed duration of the successor agreement.[3] We disagree. The association's final offer

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> (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;
> (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.

[3] WISCONSIN STAT. § 111.77, entitled "Settlement of disputes in collective bargaining," provides in part:

> (6) In reaching a decision the arbitrator shall give weight to the following factors:
> (a) The lawful authority of the employer.
> (b) Stipulations of the parties.
> (c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.

(continued)

proposed a one-year term, while the County's final offer proposed a two-year term. In WIS. STAT. § 111.77(6)(c), the arbitrator is directed to give weight to the interests and welfare of the public when choosing a final offer. The arbitrator determined that although comparability was a driving factor, the length of the contract was a "secondary factor."

¶8 The arbitrator noted the County's contention that multi-year agreements have been the pattern and that they reduce stress produced by more frequent bargaining and impasses. Also, in reaching his May 1999 decision, the arbitrator observed that the County's offer provided moderation in wages "now." He explained: "It no doubt would be more difficult to hire employees in 1999 if the Association's offer were accepted because 1999 rates would have to be bargained and the potential for delay in that process is high."

(d) Comparison of the wages, hours and conditions of employment of the employes involved in the arbitration proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally:

1. In public employment in comparable communities.

2. In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

¶9 The arbitrator considered the length of the successor agreement as an issue bearing on the public interest and welfare. Because the public interest and welfare is an appropriate factor under WIS. STAT. § 111.77(6)(c), the record establishes that the arbitrator did not exceed his statutory powers by considering the duration of the proposed contract.

¶10 Next, the association argues that the arbitrator exceeded his authority because he improperly allowed the County to modify its final offer by asserting that it would not reduce existing employee's wages, contrary to the plain meaning of its certified final offer.[4] The association contends that the arbitrator relied on the County's assertions in its brief that it would not reduce the existing wages, contrary to the plain meaning of the certified offer. It maintains that by doing so, the arbitrator also violated WIS. STAT. §§ 111.77(4)(b) and 788.10(1)(d), which require the arbitrator to issue an award that is final and definite without modification.

¶11 In this section of their arguments, the parties broadly discuss reductions and increases in hourly wages, without specific references or adequate

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[4] WISCONSIN STAT. § 111.77(4)(b) provides:

> (4) There shall be 2 alternative forms of arbitration:
> ….
> (b) Form 2. The commission shall appoint an investigator to determine the nature of the impasse. The commission's investigator shall advise the commission in writing, transmitting copies of such advice to the parties of each issue which is known to be in dispute. Such advice shall also set forth the final offer of each party as it is known to the investigator at the time that the investigation is closed. *Neither party may amend its final offer thereafter, except with the written agreement of the other party. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.* (Emphasis added.)

record cites. Neither party specifically identifies what the hourly rate was reduced to or increased by, and the trial court made no findings in this regard.[5] This issue is fact-intensive. In order to respond, we would first have to develop the argument factually. *See* ***Shannon v. Shannon***, 150 Wis. 2d 434, 446, 442 N.W.2d 25 (1989). Because the facts have not been adequately developed to allow us to make a reasoned determination, we conclude that the issue is inadequately briefed and therefore decline to address it. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995).

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[5] For example, the association claims: "The evidence in this case shows that despite the plain language and clear purpose of Section 111.77(4)(b), Stats., the Arbitrator allowed the County to modify materially the provisions of it[s] certified final offer." To support its argument, the association relies on the following sentence in the County's reply brief to the arbitrator: "The County's proposal does not harm incumbent employees, as there are no employees in the hire or first year steps …."

The association then points to the arbitrator's statements that "there are five incumbent Corrections Officers employed at steps less than the maximum. However, the Employer's proposal does not involve any reduction in their present earnings." The association argues that the arbitrator failed to require the County to "commit to its guarantee by having included that pledge in its final offer." It contends that these statements contradict the arbitrator's acknowledgment that he was awarding a pay provision that clearly differed from the plain wording of the County's certified final offer when, in his decision, he indicated that he was "attempting to 'moderate [] abnormally high starting wage rates in the Secretary and Correction Officer classification' which is in direct conflict with his 'strong equity concerns' for the wages of incumbent employees."

The association further contends that (1) "the County's offer with respect to the pay of these employees was not ambiguous: their wages plainly were to be reduced by the new wage scale included in the County's final certified offer," and supporting documents in the parties exhibits and (2) the arbitrator relied on as assertion made by the County that it would not reduce current employees salaries, even if its final offer were adopted.

The County responds: "The County carefully and painstakingly detailed in its final offer the hourly wage rates to be paid to each employee in the bargaining unit over the life of the proposed contract and attached its calculations and proposal as an appendix to its final offer." The County also argues that "[a] careful review of the salary schedules establishes that the pay loss only occurred because the County was forced to increase wages under the "dynamic status quo" doctrine and that there is no reduction in wages when comparing the 1997 and the 1998-99 salary schedules. The final offer of the County shows that all then-current employees would receive a wage increase over their 1997 wage rate."

¶12 Next, the association argues that the arbitrator erroneously relied on the speculative effect of the County's staffing of its new jail when evaluating the parties' final proposals. It argues that speculation about prospective economic impacts cannot be characterized as definite because they are inherently susceptible to change. We are unpersuaded. It is undisputed that the County created fourteen new corrections officer positions, two dispatcher positions and one secretary position, effective June 1, 1999. With respect to the significance of the factor of proposed agreement's duration, the arbitrator stated:

> It is also important that the moderation be in place now because of the hirings for the new jail. If the Union's proposal for starting rates for 1998 was accepted, the new employees would have to be hired at those rates pending negotiations for 1999, and it would be nearly impossible to roll back starting and first-year rates once employees were in place at the higher rates. Strong equity concerns are established when a rate reduction is imposed. The time to do it is now before employees are hired, not after.

¶13 It is appropriate for the arbitrator to consider the financial impact of an award on the employer and employee. WIS. STAT. § 111.77(6)(h). We conclude that the arbitrator's reference to the newly created positions did not render the award fatally indefinite or nonfinal so that it must be vacated under WIS. STAT. § 788.10(1)(d).

¶14 Next, the association argues that the arbitrator exceeded his powers and made no final or definite award because he deprived certain employees of their previously negotiated benefit and concluded that the existing wages for some wage classifications were abnormally high, despite evidence to the contrary. The association also argues that the previous wage rates were the result of previous voluntary agreements. In support of this argument, the association cites to its circuit court brief referring as an example to corrections officer Steven LaBrasca.

¶15 LaBrasca began employment with the County in 1997 during the term of the parties' 1995-97 predecessor agreement. Under that agreement, his starting salary was $11.952 per hour. In 1998 and 1999, pursuant to the predecessor agreement, LaBrasca received "step-up" increases to $12.525 and $12.799 per hour. Under the County's accepted proposal, LaBrasca received $12.56 per hour effective January 1, 1999. The association argues:

> Not only did this decision reduce LaBrasca's overall wage rate to below the rate he had received when he started his employment with the County, he also was required to pay back $0.23 per hour for each hour of pay earned from January 1, 1999 through June 25, 1999, when the County began paying him the lower rate per the arbitration decision.

He owed a total of $650.40.

¶16 The association's claim that the arbitrator's decision reduced LaBrasca's wage rate to below the rate he had received when he started his employment with the County is unpersuasive. The association itself maintains that LaBrasca's starting wage in 1997 was $11.952 and that under the County's 1998-99 proposal, he was paid $12.56 effective January 1999. The association fails to show that the repayment was solely a result of the County's proposal. Accordingly, the record does not support the association's claim.

¶17 The association makes a similar argument with respect to employee Terri Steinmetz. We are equally unpersuaded. We reject the association's claim that the arbitrator denied either LaBrasca or Steinmetz a previously negotiated benefit. It is undisputed that the 1995-97 predecessor agreement had expired and, therefore, their wages in 1998 and the first six months of 1999 were paid without

the benefit of a contract. Consequently, we reject the association's assertion that the 1998-99 wages paid before the arbitration decision were a negotiated benefit.

¶18 The association further claims that the arbitrator's "rationale that County employees' wages were 'abnormally inflated' ignores, disregards, and trivializes many years of joint negotiations and bilateral agreement on the value of employees' services." This argument is fatally flawed. First, it attacks the factual basis of the arbitrator's determination, a challenge the association concedes is not within our scope of review. *See* WIS. STAT. § 788.10(1). Second, the argument simply disagrees with the arbitrator's discretionary weighing of the two offers and fails to state grounds for vacating the decision. Last, the association's argument stands without accompanying legal citation. *See* WIS. STAT. § 809.19(1)(e); ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Consequently, we do not accept its unsupported premise that a successor agreement cannot as a matter of law lower wage rates.

¶19 Finally, the association argues that "By Selecting The Final Offer Of The County Only With The Inclusion Of A Caveat, The Arbitrator Improperly Modified the County's Final Offer." It argues "[a]s has been shown, the arbitrator did not just select the certified final offer of the County and incorporate it as part of the labor agreement between the parties as the law commands. Instead, he accepted the County's final offer only with the caveat that the County would not reduce any current employees' wages." This argument merely reiterates the association's arguments made previously. Because the association failed to persuade us that the arbitrator exceeded his powers or so imperfectly executed

them that a mutual, final and definite award upon the subject matter was not made, we do not vacate the award.[6]

By the Court.—Judgment affirmed.

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

[6] In its reply brief, the association complains that the County included in its brief facts not of record. Our review of the briefs satisfies us that both parties failed to fully satisfy WIS. STAT. RULE 809.19(1) requiring appropriate record references. We disregard facts not of record. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).