**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 24, 2018**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal No. 2017AP749** **Cir. Ct. No. 2015CV1284**

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

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**LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,**

**PETITIONER-RESPONDENT,**

**V.**

**CITY OF SUN PRAIRIE,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Fitzpatrick, JJ.

¶1 PER CURIAM. The City of Sun Prairie appeals the circuit court's judgment confirming an arbitration award in favor of two individuals the City employed as paramedics. We affirm based on mootness, but also explain why the City's arguments do not demonstrate why we should reverse the circuit court's decision affirming the arbitration award.

## *Background*

¶2 The Union represents the two paramedics, who the City contends mishandled a medical situation. An investigation into the alleged mishandling led to the City's EMS Medical Director withdrawing the paramedics' "credentials." The EMS Medical Director was not a City employee but served as the City's EMS Medical Director pursuant to a contract with the City. Although disputed by the Union on appeal, we will assume without deciding that, under Wisconsin law, the paramedics needed credentials in order to perform their jobs. The City terminated the paramedics because of a lack of credentials.

¶3 Pursuant to a collective bargaining agreement, the matter went to arbitration. The Union prevailed before the arbitrator and the circuit court.

## *Discussion*

¶4 With one exception, the City's arguments on appeal boil down to a single issue: whether the damages award ordered as a remedy should be vacated because the arbitrator would have exceeded his authority if he had ordered the City to reinstate the paramedics to their former positions even though the paramedics lacked credentialing. For the reasons that follow, we conclude that this reinstatement remedy issue raised by the City is moot, and that the City's one remaining argument is not persuasive. We do not address arguments that the City

raises for the first time in its reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

¶5 The arbitrator concluded that the City terminated the two paramedics without just cause, contrary to the governing collective bargaining agreement. The arbitrator's detailed reasoning is not easily summarized but, for purposes here, it is enough to point out two of the arbitrator's closely related factual findings. First, the arbitrator found that the City conducted a biased and flawed investigation into the paramedics' conduct, and, second, the arbitrator found that the EMS Medical Director's decision to withdraw credentials was based on that flawed investigation.

¶6 On appeal, the City does not challenge the arbitrator's finding that the City's investigation was flawed and thus that the withdrawal of the paramedics' credentials was improper. Instead, the City contends that, regardless whether the basis for the termination (a flawed City investigation resulting in the withdrawal of credentials) was improper, the City was entitled, and indeed required, to terminate the paramedics because of the lack of credentials. That is to say, the issue on appeal is not whether the arbitrator correctly found that the City conducted a flawed investigation that led to the paramedics' termination, but rather the issue is the remedy for that flawed investigation.

¶7 As to remedy, it appears that the parties and the arbitrator assumed that the arbitrator lacked the authority to order the EMS Medical Director to rescind her credentialing decision. In any event, without ordering the Medical Director to restore credentials to the paramedics, the arbitrator ordered the City to reinstate the paramedics. Before and after reinstatement was ordered, the City opposed this reinstatement remedy, arguing that the arbitrator lacked the authority

to reinstate the paramedics for the same reason the City argued that the paramedics were properly terminated in the first place, a lack of credentials. As we understand it, and as pertinent here, the City contended that, regardless of the propriety of the decision to withdraw the credentials, credentials are a condition of employment and the arbitrator lacked the authority to order the City to reinstate uncredentialed paramedics.

¶8 The arbitrator was apparently willing to revisit his reinstatement decision, and held further proceedings to address the dispute over that remedy. In the course of those proceedings, the parties entered into a stipulation in which the Union agreed to forgo reinstatement as a remedy in exchange for the City's agreement that the City would forgo its challenge to the arbitrator's authority to include "future damages" as part of a money damages award. The future damages issue, more specifically, involved "front pay." Front pay compensates "an employee for the difference in earnings between what the employee would have received in his or her former employment, and what he or she can expect to receive in his or her present and future employment." ***Salveson v. Douglas Cty.***, 2001 WI 100, ¶47, 245 Wis. 2d 497, 630 N.W.2d 182.

¶9 To be clear, the City did not dispute the arbitrator's authority to award damages for past lost wages. Rather, the City believed it could contest the arbitrator's authority to award "front pay" damages. In the stipulation, the City voluntarily dropped that argument to avoid reinstatement as a remedy. In his final award, the arbitrator ordered damages, roughly half of which consisted of "front pay." One paramedic was awarded $308,372, and the other $313,880. In making this award, the arbitrator relied on case law stating that, "[w]hen reinstatement is not appropriate, courts often award front pay." *See* ***id.***

¶10 As noted, the City now argues on appeal that the arbitrator lacked the authority to order the City to reinstate uncredentialed paramedics. The City seemingly assumes, without explaining why, that, if we were to conclude that the arbitrator lacked the authority to order reinstatement as a remedy, then we must reverse the alternative damages remedy that the arbitrator imposed pursuant to the stipulation. Although our review of arbitration awards is limited, we will vacate an arbitration award when the arbitrator exceeds the arbitrator's authority. *See* WIS. STAT. § 788.10(1)(d)[1]; ***Racine Cty. v. International Ass'n of Machinists & Aerospace Workers Dist. 10, AFL-CIO***, 2008 WI 70, ¶34, 310 Wis. 2d 508, 751 N.W.2d 312 ("Wis. Stat. § 788.10(1)(d) requires a court to vacate an arbitrator's award when the arbitrator exceeds his or her powers.").

¶11 The Union makes several arguments in support of upholding the arbitration award. One argument that is plainly stated in the Union's appellate brief, albeit without a dedicated heading, is that the authority-to-reinstate issue that the City raises on appeal is moot because of the parties' stipulation regarding damages and the resulting money damages award. "An issue is moot when a determination is sought that will have no practical effect on an existing legal controversy." ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶17, 270 Wis. 2d 1, 676 N.W.2d 426.

¶12 The City does not respond to the Union's mootness argument. We take the City's lack of argument on this topic as a concession and, on that basis, we conclude that the authority-to-reinstate issue is moot. *See* ***United Coop. v.***

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

***Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

¶13 We might choose to ignore the City's failure to address mootness if it was readily apparent that the authority-to-reinstate issue raised by the City was not moot. But that is not the case. In particular, it is not apparent to us how we could decide the issue in favor of the City, and vacate the damages award, without subverting the alternative remedy that the arbitrator awarded based on the City's flawed investigation which, in turn, was the cause of the paramedics' termination. We note that language used by the City, when presenting the stipulation to the arbitrator, conceded the arbitrator's authority to award future damages and there was no dispute regarding the arbitrator's authority to award past lost wages. And, importantly, the City did not attempt to reserve the right to later challenge the damages remedy by challenging the arbitrator's authority to order reinstatement as a remedy.

¶14 We are not putting form over substance. It is not simply that the City failed to reply to the Union's argument using mootness language. The City did not reply to the underlying substance of the Union's mootness argument about the import of the stipulation.

¶15 The City asserts that the stipulation "does not in any way suggest that the City was acceding to an award of damages." But the City does not even begin to explain why that assertion is consistent with the stipulation. Moreover, the City's bald assertion conflicts with the arbitrator's view of the stipulation, to which we defer. The arbitrator found that the stipulation was an agreement that the arbitrator would make the paramedics whole by awarding damages, including

future damages, in lieu of reinstatement. The arbitrator also more specifically found that the parties stipulated that "reinstatement is not an available remedy, provided front pay is considered in its stead." The City does not challenge this interpretation of the stipulation, nor could it reasonably do so.

¶16 In sum, we conclude that the City has conceded the Union's mootness argument by failing to respond to that argument and, therefore, we deem the City's authority-to-reinstate argument moot.

¶17 We turn to the City's remaining argument that is not already resolved by our discussion above.

¶18 We understand the City to be arguing that, even if the arbitrator had authority pursuant to the stipulation to order money damages, the paramedics were not entitled to the full amount awarded under the facts here because the paramedics rejected the City's offer to provide them with a pathway to re-credentialing. As we understand it, this is a failure-to-mitigate-damages argument. That is, we understand the City to be arguing that the paramedics are not entitled to damages because the paramedics failed to mitigate their damages by accepting the City's re-credentialing offer.

¶19 When we turn to the arbitrator's damages award, we see that the arbitrator rejected a similar City argument. The arbitrator found that the City's re-credentialing offer included requirements based on the same flawed City investigation that led to the withdrawal of the paramedics' credentials in the first place. And, based on that finding, the arbitrator rejected a City argument that the paramedics' failure to accept the offer mattered for purposes of the damages amount.

¶20 The City's argument on appeal effectively asks us to disregard the arbitrator's fact finding and to address the damages issue de novo. This argument is plainly contrary to our standards of review for arbitration awards, and we reject the argument on that basis. *See* ***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 ("[Courts] give deference to the arbitrator's factual and legal conclusions."); ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988) ("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 of law.").

## *Conclusion*

¶21 For the reasons stated above, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

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