SUPREME COURT OF WISCONSIN

In the matter of the petition to review change in State Bar Bylaw 11-05

On October 7, 2011, the court issued an order calling for letter briefs concerning two issues in this docket: "(1) whether the amendments to Article I, Section 5 of the bylaws of the State Bar of Wisconsin providing for de novo judicial review of an arbitrator's decision is inconsistent with Wis. Stat. Ch. 788 (Arbitration) or cases interpreting that statute, and (2) whether the supreme court has the authority to adopt proposed bylaw language."

Issue 1. SCR 10.03(5)(b)1 presently provides in part: "The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association set forth in SCR 10.02(2). The State Bar may not use the compulsory dues of any member who objects pursuant to SCR 10.03(5)(b)3. for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services."

The issue for the arbitrator, therefore, is whether a challenged expenditure is "necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." This is an issue of fact, or some people might consider the issue of whether a State Bar expenditure meets a legal standard to be a mixed issue of fact and law. In either event, neither findings of fact by the arbitrator nor his/her interpretations of law are subject to review by a court. *Milwaukee v. Milwaukee Police Asso.*, 97 Wis. 2d 15, 24-25, 292 N.W.2d 841, 846 (1980):

> Judicial review of an arbitrator's decision is quite limited. The merits of the arbitration award are not within the province of courts on review. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under

> collective bargaining agreements." United Steelworkers Of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960). We are therefore bound to accept the arbitrator's finding that Marvin Lund was transferred for disciplinary reasons. We will not review the arbitrator's finding that the actions of the Chief of Police constituted a transfer and not a "reassignment." The definitions of the terms "transfer" and "discipline" can be given a broad or narrow meaning, but the interpretation of those terms given by the arbitrator is the interpretation bargained for by the parties. Denhart v. Waukesha Brewing Co., 17 Wis.2d at 51, 119 N.W.2d 490. The decision of the arbitrator will not be disturbed for an error of law or fact. Joint School District No. 10 v. Jefferson Ed. Asso., 78 Wis.2d 94, 117-118, 253 N.W.2d 536 (1977).

Furthermore, parties to an arbitration may not agree to arbitration terms which contravene arbitration statutes or case law – particularly statutes dealing with judicial review. See *Hall Street Associates, L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008) (interpreting the Federal Arbitration Act, which this court has relied on as persuasive authority in interpreting chapter 788: "Federal cases construing the Federal Arbitration Act are persuasive authority in interpreting § 788.10." *Borst v. Allstate Ins. Co.*, 2006 WI 70, ¶ 30 n. 4, 291 Wis.2d 361, 378 n. 4, 717 N.W.2d 42, 51 n. 4. See also, *Affymax, Inc. v. Ortho-McNeil Pharmaceuticals, Inc.*, --- F.3d --- , 2011 WL 4634222, (7th Cir. 2011) (". . . neither judges nor contracting parties can expand it" [the list of statutory grounds for judicial review of arbitration awards.]).

Here, of course, the parties have not mutually agreed to anything; the State Bar has unilaterally changed the terms of arbitration by amending Article I, Section 5 of the bylaws. The Bar's bylaw amendment contravenes the entire purpose of arbitration – to provide an expeditious, inexpensive alternative to litigation that resolves all issues (*Filnow v. City of Madison*, 148 Wis. 2d 414, 417, 435 N.W.2d 296 (Wis. App. 1988)) – and the amended bylaw substitutes arbitration as a prerequisite to litigation rather than an alternative to litigation, greatly increasing the time and expense involved.

The purpose of the State Bar's amendment to the arbitration process is to provide the State Bar with a second kick at the cat. If the Bar loses before the arbitrator, the proposed amendment to Bar Bylaw Article I, Section 5, is designed to provide the Bar with a "do over" – contrary to Ch. 788 and the entire idea of arbitration as an alternative to litigation. Arbitration rules already substantially favor the State Bar. The playing field need not be slanted any further.

Issue 2: Alternative Language. The court has also requested the parties to brief the issue of "whether the supreme court has the authority to adopt proposed bylaw language." Presumably, the court seeks input on whether it has the authority to adopt alternative language to that approved by the State Bar, whether that language is submitted by petitioners or originates with the court.

The bylaw amendments approved by the State Bar contain a number of parts in addition to that portion providing for de novo judicial review of the arbitrator's decision. For example, one portion of the amended bylaw (paragraph (e) iii)) concerns compensation for the arbitrator(s)' services. SCR 10.13(2) provides for a petition to the court to "review" a State Bar bylaw amendment, but does not explicitly state the court's role during such "review." Presumably, the court could approve or disapprove the amendment – otherwise there would be no purpose for any review. One online definition of "review" is to "look at something critically**:** to examine something to make sure that it is adequate, accurate, or correct." This definition implies the authority to amend the item being reviewed if it is found to be inadequate, inaccurate, or incorrect.

From a legal standpoint, the power of a regulating authority to approve or disapprove includes the power to approve with conditions. See *City of Appleton v. Transportation Comm.*, 116

Wis.2d 352, 358, 342 N.W.2d 68 (1983) and *Black River Country Bank v. Comm'r of Banking*, 201 Wis.2d 64, 70, 548 N.W.2d 114 (Wis. App. 1996). The Supreme Court regulates the State Bar as part of its inherent authority to regulate the practice of law. *State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis.2d 94, 101 454 N.W.2d 770 (1990). Therefore, the Supreme Court, in its regulatory capacity, may impose conditions on the State Bar as part of its bylaw review under SCR 10.13(2).\ Those conditions may include alternative language to the Bar's bylaw language, whether that alternative language is proposed by petitioners or by the court itself. On this review, therefore, the Court, is authorized to adopt bylaw language different from that adopted by the State Bar in amending bylaw Article I, Section 5.

Conclusion.

The State Bar's amendment of bylaw Article I, Section 5 to provide for de novo judicial review of the arbitrator's findings of fact or interpretations of law is contrary to the purpose of arbitration as well as the language of Wis. Stat. Ch. 788 and cases interpreting that chapter. That amendment should be rejected. As regulator of the State Bar, the court is authorized to approve other portions of the Bar's bylaw amendment with conditions – including alternative language submitted by petitioners or the court itself.

Respectfully submitted,

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