

SUPREME COURT OF WISCONSIN

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

11-05

PETITIONER'S REPLY BRIEF

On October 15, 2011, petitioner Steven Levine received the State Bar's brief in this proceeding. Three points deserve reply.

Beginning at page 2 of its brief, the State Bar argues that de novo review of the arbitrator's decision is warranted under Wis. Stats. Ch. 788, because de novo consideration of the issue is available in the form of an action under 42 U.S.C. sec. 1983. These two types of actions – arbitration and civil rights action – are two different types of actions with entirely different procedures and ramifications. The availability of a civil rights action is irrelevant to arbitration procedures, which are governed by an entirely different law, Wis. Stat. Ch. 788.

More important, the State Bar glosses over the point of whether it and this court have the authority to, de facto, amend Ch. 788 by adopting or approving the bylaw amendment at issue in this case providing for de novo review of the arbitrator's decision. The State Bar has no such authority, nor does this court. The State Bar is a private, professional association of lawyers regulated by the court. The court is the highest court in the state's judicial branch of government. Neither the State Bar nor the court have some sort of pseudo-legislative or quasi-legislative authority to amend Ch. 788 of the statutes by amending or approving this bylaw provision. Only the legislature has the legislative authority to amend the statutes. If the Bar wishes to have Ch. 788 amended, it must convince the legislature to act. Amending one of its

bylaws to allow de novo review will not suffice to amend Ch. 788. (Please see page two, petitioner's initial brief.)

Second, beginning at page 4 of its brief, the State Bar argues that in reviewing a State Bar bylaw under SRC 10.13(2), the court is limited to "Approval or Rejection of the Petition Challenging the Proposed Bylaw." To begin with, in a proceeding under SCR 10.13(2), the court is reviewing the State Bar bylaw, not – as asserted by the State Bar – "the Petition Challenging the Proposed Bylaw." As discussed at pages 3-4 of petitioners' initial brief, a regulatory body such as this court has the authority to approve, reject, or approve with conditions the bylaw at issue in a proceeding under SCR 10.13(2). Such conditions may include amended language, whether proposed by petitioners or the court itself, intended to improve the State Bar's proposed bylaw. Imposition of conditions by the court to make the bylaw amendment fair is especially appropriate here, where the arbitration bylaw has been imposed by one party – the State Bar – and is not the result of negotiations by both sides.

Third, petitioner takes strong issue with two incorrect statements in the State Bar's brief. At page 3 of its brief, the Bar states, ". . . the standard of review applicable to the arbitrator's decision was raised as an issue in *Kingstad*." Not so! The standard of review was not raised, briefed, or argued by appellants in *Kingstad*. The standard of review discussion in that case was not an issue in the case at all. The court sua sponte determined against the strong protests of appellants that the court would supplant the arbitrator and decide the merits of the arbitration issue itself, instead of remanding to the arbitrator, as the court should have done under Wisconsin arbitration law. The court's "standard of review" discussion was sua sponte dicta.

Likewise, petitioner takes strong issue with the State Bar's discussion at page 7 of its brief that the process of drafting the bylaw at issue in this proceeding was open and considered all viewpoints. Members of the committee which drafted the bylaw amendments were privately appointed by the State Bar president, with no representation except that favorable to the State Bar. The committee met in secret and presented the Board of Governors with a fait accompli. The bylaw at issue in this proceeding was developed to protect the State Bar's interest, not to be fair to all arbitration participants.

Conclusion. Neither the State Bar nor this court possess the authority to de facto amend Wis. Stats. Ch. 788 by amending or approving the bylaw at issue in this case, providing for de novo review of the arbitrator's decision. The court, as regulator of the State Bar, does have the authority to impose conditions on the Bar if it approves the Bar's proposed bylaw, including language changes proposed by petitioners or by the court itself.

Respectfully submitted,

/s/ Steven Levine

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