COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2727 **Cir. Ct. No. 2013CV1940**

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

GREEN BAY PROFESSIONAL POLICE ASSOCIATION,

PLAINTIFF-APPELLANT,

V.

CITY OF GREEN BAY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. The Green Bay Professional Police Association (the Association) and the City of Green Bay (the City) engaged in arbitration after failing to reach a successor agreement to their 2009-11 collective bargaining agreement. Both sides submitted final offers to the arbitrator, and the arbitrator

selected the City's offer. The circuit court subsequently denied the Association's motion to vacate or modify the arbitration award and granted the City's motion to confirm the award.

¶2 The Association appeals, arguing the circuit court should have vacated the arbitration award because the City's offer violated WIS. STAT. § 62.13(7), which prohibits a municipality from decreasing police officers' salaries without a previous recommendation from the board of police and fire commissioners.[1] The Association also argues the award should have been vacated because the arbitrator exceeded his authority by failing to give weight to the effect of health insurance on overall compensation, as required by WIS. STAT. § 111.77(6)(bm)6. Finally, the Association argues the circuit court should have modified the award because it is based on an evident material mistake. We reject these arguments and affirm.

BACKGROUND

¶3 The Association and the City were parties to a collective bargaining agreement from 2009 to 2011. Before the 2009-11 agreement expired, the parties began negotiating a successor agreement. However, they reached impasse in mid-2013. After an unsuccessful attempt at mediation through the Wisconsin Employment Relations Commission, the parties proceeded to arbitration under WIS. STAT. § 111.77(4)(b). Pursuant to that statute, each party submitted its final offer to the arbitrator, and the arbitrator was asked to select one offer in its entirety, without modification. *See* ***id.***

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 In its final offer, the City proposed a four-year contract lasting from January 1, 2012, until December 31, 2015. As relevant to this appeal, the City's offer included no wage increases in 2012 or 2013, a 2% wage increase effective August 24, 2014, and an additional 4% wage increase effective February 22, 2015.

¶5 Under prior collective bargaining agreements, the City paid both the employee-required and employer-required contributions to the Wisconsin Retirement System (WRS) on behalf of the Association's members. However, the offer the City submitted to the arbitrator provided that all officers hired before July 1, 2011 would be required to pay their own employee-required WRS contributions, effective June 30, 2013.[2] The employee-required WRS contribution for public safety employees was 6.65% of earnings for the year 2013. The City's offer further provided that "[a]ny retroactive employee WRS contributions due to the City will be deducted from the officer's pay in equal installments over the remaining payroll periods in the 2013 calendar year."

¶6 The Association, in turn, proposed a two-year contract lasting from January 1, 2012 until December 31, 2013. The Association's offer included wage increases totaling 6.65% over the term of the agreement. The Association's offer also provided that officers hired before July 1, 2011, would make WRS contributions in the following amounts:

[2] Municipal employers are prohibited from bargaining regarding employer payment of employee-required WRS contributions for public safety employees hired on or after July 1, 2011. *See* WIS. STAT. § 111.70(4)(mc)5. The City asserts that police officers hired on or after July 1, 2011, began paying employee-required WRS contributions in January 2012. The Association does not dispute that assertion.

- Effective January 1, 2012: 1.61% of earnings (compared to 5.9%—the employee-required WRS contribution for 2012).

- Effective January 1, 2013: An additional 0.33% of earnings, for a total of 1.94% (compared to 6.65%—the employee-required WRS contribution for 2013).

- Effective April 1, 2013: An additional 1.53% of earnings, for a total of 3.47%.

- Effective July 1, 2013: An additional 3.18% of earnings, for a total of 6.65%.

Under the Association's offer, after July 1, 2013, WRS contributions by officers hired before July 1, 2011, would be capped at 6.65%. The Association's offer did not contain any requirement that officers repay the City for employee-required contributions it previously made on their behalf.

¶7 An arbitration hearing was held on July 29, 2013, after which the parties submitted posthearing briefs. On November 25, 2013, the arbitrator issued a thirty-seven-page decision adopting the City's final offer. The following day, the Association filed a motion for reconsideration, which the arbitrator denied. Thereafter, the City implemented the arbitrator's award and required all officers hired on or after July 1, 2011, to make both retroactive and prospective WRS contributions.

¶8 On December 9, 2013, the Association moved the circuit court to vacate or modify the arbitration award, pursuant to WIS. STAT. §§ 788.10 and 788.11. In response, the City moved to confirm the award, pursuant to WIS. STAT. § 788.09. On October 7, 2014, the circuit court issued a written decision in favor

of the City. The court subsequently entered a final order denying the Association's motion to vacate or modify the award and granting the City's motion to confirm the award. The Association now appeals.

DISCUSSION

¶9 Whether an arbitration award should be vacated or modified is a question of law that we review independently. ***Orlowski v. State Farm Mut. Auto. Ins. Co.***, 2012 WI 21, ¶14, 339 Wis. 2d 1, 810 N.W.2d 775. Our role in reviewing an arbitration award is "essentially supervisory in nature." ***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. Our goal is to "ensure that the parties received what they bargained for when they agreed to resolve their disputes through final and binding arbitration." ***Id.*** In so doing, we are guided by the statutory standards set forth in WIS. STAT. §§ 788.10 and 788.11 and by the standards developed at common law. ***Baldwin-Woodville***, 317 Wis. 2d 691, ¶20. We defer to the arbitrator's factual and legal conclusions, and if the statutory and common law standards are not violated, we will affirm the arbitrator's award. ***Id.***

I. Motion to vacate the arbitration award

¶10 We will vacate an arbitration award when the arbitrator exceeded his or her power through perverse misconstruction, positive misconduct, or a manifest disregard of the law, or when the award is illegal or in violation of strong public policy. ***Id.***, ¶21. Here, the Association argues the arbitrator exceeded his power by selecting the City's offer because that offer violated WIS. STAT. § 62.13(7). The Association also argues the arbitrator exceeded his power by failing to give weight to the effect of health insurance on Association members' overall

compensation, as required by WIS. STAT. § 111.77(6)(bm)6. We address these arguments in turn.

A. WISCONSIN STAT. § 62.13(7)

¶11 The Association argues the City's final offer violated WIS. STAT. § 62.13(7), and, as a result, the arbitrator's selection of the City's offer also violated that statute.[3] Section 62.13(7) provides, in relevant part:

> COMPENSATION. The salaries of chiefs and subordinates shall be fixed by the [common] council. … *Such salaries when so fixed may be increased but not decreased by the council without a previous recommendation of the board [of police and fire commissioners]*.

(Emphasis added.) It is undisputed that the salaries of the Association's members were "fixed" when the common council approved the 2009-11 collective bargaining agreement. It is also undisputed that the City submitted its final offer to the arbitrator without first obtaining a recommendation from the board of police and fire commissioners regarding any reduction in salaries. The disputed issue on appeal is whether the City's offer actually reduced the salaries of the Association's members.

¶12 Resolution of this issue requires us to interpret the term "salaries" as it is used in WIS. STAT. § 62.13(7). This presents a question of law that we review independently. *See* ***Noffke ex rel. Swenson v. Bakke***, 2009 WI 10, ¶9, 315

[3] The City argues the Association forfeited this argument by failing to raise it before the arbitrator. Because we conclude the City's offer did not violate WIS. STAT. § 62.13(7), we need not address the City's forfeiture argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (When a decision on one issue is dispositive, we need not reach other issues raised.); *see also* ***LaBeree v. LIRC***, 2010 WI App 148, ¶33, 330 Wis. 2d 101, 793 N.W.2d 77 (The forfeiture rule is one of administration, not jurisdiction.).

Wis. 2d 350, 760 N.W.2d 156. When interpreting a statute, our objective "is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Our analysis begins with the plain language of the statute. ***Id.***, ¶45. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** "'If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.'" ***Id.***, ¶46 (quoted source omitted).

¶13 The Association argues a reduction in "salary," as that term is used in WIS. STAT. § 62.13(7), "includes <u>any</u> reduction in pay that is mandated by a municipal employer and results in less compensation to police officers." The Association therefore argues the City's offer reduced its members' "salaries" because it reduced their "paychecks" by forcing them to make prospective employee-required WRS contributions and to re-pay the City for contributions it previously made on their behalf, "without any wage increase to offset those losses[.]" Accordingly, the Association argues the City violated § 62.13(7) by submitting its offer to the arbitrator without first obtaining a recommendation from the board of police and fire commissioners.

¶14 The Association interprets the term "salary" too broadly. Contrary to the Association's assertion, "salary" is not equivalent to net take-home pay. Instead, the common, ordinary, and accepted meaning of "salary" is "fixed compensation paid regularly for services[.]" WEBSTER'S NEW COLLEGIATE

DICTIONARY 1019 (1977).[4] Applying this definition, the City's offer did not reduce the salaries of the Association's members. It merely eliminated a fringe benefit they had previously received—that is, employer payment of their employee-required WRS contributions—and required them to repay the City for any employee-required contributions it made on their behalf after June 30, 2013. The arbitrator's selection of the City's offer resulted in a reduction in the net take-home pay received by the Association's members. However, a reduction in net take-home pay is not equivalent to a reduction in "salary," as that term is commonly used.

¶15 The Association argues ***Gold v. City of Adams***, 2002 WI App 45, 251 Wis. 2d 312, 641 N.W.2d 446, supports its interpretation of the term "salary." In that case, Gold, the police chief for the City of Adams, received compensation from the City in three separate components: (1) an annual base salary; (2) a longevity bonus; and (3) additional cash payments. ***Id.***, ¶2. The City reduced, and ultimately eliminated, the longevity bonus, but it increased Gold's base salary. ***Id.***, ¶3. Gold sued, asserting the City violated WIS. STAT. § 62.13(7) by reducing his salary without first obtaining a recommendation from the board of police and fire commissioners. ***Gold***, 251 Wis. 2d 312, ¶4. The circuit court agreed that the City violated § 62.13(7), to the extent it decreased Gold's "total cash payments" in any of the years at issue. ***Gold***, 251 Wis. 2d 312, ¶5. However, the court refused to "separately compare the amount of each component [of Gold's salary] in a

[4] The common, ordinary, and accepted meaning of an undefined statutory term "may be ascertained from a recognized dictionary." ***State v. Morse***, 126 Wis. 2d 1, 4, 374 N.W.2d 388 (Ct. App. 1985).

given year to what that component had been in the previous year, as Gold had argued it should." ***Id.***, ¶4.

¶16 Gold appealed, and we affirmed the circuit court's decision. ***Id.***, ¶1. We reasoned:

> [W]e fail to see how individually protecting the various components of an overall salary formula would further the purpose of the statute, which is to promote the independence of the police department and to protect the police chief from arbitrary, imprudent or improperly motivated decreases in the payments made by the municipality. All the payments at issue here are cash payments, making them all fungible components of Gold's salary. Therefore, Gold could make a mortgage payment or purchase tickets for a ball game just as easily with the cash he received from his base salary as he could with the cash he received from a longevity bonus. Accordingly, reducing the cash payments of one component while increasing them in another could not compromise Gold's independence as a member of the police department through financial pressure. Decreases would run contrary to the purpose of the statute only if Gold had less total cash to cover his expenses and discretionary spending choices. Accordingly, we conclude that the circuit court properly interpreted and applied WIS. STAT. § 62.13(7) by comparing Gold's total cash receipts for each year at issue with his total cash receipts for the immediately preceding year.

Id., ¶13 (citation omitted).

¶17 The Association argues ***Gold*** stands for the proposition that any change that "results in less net cash" to the employee constitutes a reduction in salary for purposes of WIS. STAT. § 62.13(7). However, the Association reads ***Gold*** too broadly. ***Gold*** addressed a specific fact situation in which an employee received multiple types of cash payments from his employer as compensation for his work. The ***Gold*** court merely held that those payments had to be considered together to determine whether the employee suffered an overall reduction in salary, for purposes of § 62.13(7). ***Gold*** did not address a situation, like the one in

this case, in which an employee's base salary remains the same but the employee's net take-home pay is reduced due to elimination of a fringe benefit. As the circuit court aptly stated:

> Although the Association is correct that [its members] will have less money to spend, the reduction is not the result of a decrease in salary. The change in contributions to WRS cannot be described as a "cash payment" in the same way that an annual bonus can. In fact, [the Association's members] did not receive a cash payment that they now no longer receive.

¶18 Other case law supports our conclusion that fringe benefits like WRS contributions do not constitute part of an employee's salary. For instance, in ***State ex rel. City of Manitowoc v. Police Pension Board***, 56 Wis. 2d 602, 606, 203 N.W.2d 74 (1973), our supreme court considered a statute that stated a police officer's pension was to be "equal to one-half his monthly compensation" at the time of retirement. The issue on appeal was whether the term "monthly compensation" included the employer's monthly contributions to the employee's pension, health insurance, and life insurance. ***Id.*** at 608. The supreme court concluded the term "monthly compensation" was synonymous with "salary" and did not include "fringe benefits" such as insurance premiums and pension contributions. ***Id.*** at 610-11, 612a.

¶19 We similarly distinguished fringe benefits from compensation in ***Cramer v. Eau Claire County***, 2013 WI App 67, 348 Wis. 2d 154, 833 N.W.2d 172. There, Cramer sued the County after it began deducting employee-required WRS contributions from his paychecks. ***Id.***, ¶¶2-3. Cramer argued this change violated WIS. STAT. § 59.22(1)(a)1. (2011-12), which stated, in relevant part:

> Except as provided in subd. 2., the annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part

> fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in the resolution or ordinance. *The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.*

(Emphasis added.) Cramer's "overarching position" on appeal was that the term "compensation" in § 59.22(1)(a)1. had to be construed to include fringe benefits like WRS contributions. ***Cramer***, 348 Wis. 2d 154, ¶6. He therefore argued the County was prohibited from altering his WRS contributions during his term in office. ***Id.***, ¶3.

¶20 We rejected Cramer's argument, reasoning, in part, that even if the term compensation meant "only salary," the change to Cramer's WRS contributions diminished his take-home pay, not his salary. ***Id.***, ¶8. We explained:

> Clearly, a county board cannot set a precise take-home pay for elected officials at any time, much less in advance of knowing who will be elected to the position. Various deductions are beyond the County's control, some of which are entirely dependent on the elected official's personal situation, including for example, family size, voluntary retirement contributions, and state and federal tax withholding choices. The plain meaning of salary is fixed compensation for a set duration of time, not take-home pay. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2003 (unabr. 1993)[.]

Id.

¶21 Both ***Police Pension Board*** and ***Cramer*** stand for the proposition that the term "compensation," when used to mean "salary," does not include fringe benefits. These cases support our conclusion that the term "salary," as used in WIS. STAT. § 62.13(7), does not encompass fringe benefits such as WRS

contributions. This is true both for the prospective WRS contributions required by the City's offer, as well as the retrospective payments Association members were required to make for WRS contributions the City had already paid on their behalf. Thus, the City was not required to obtain approval for its offer from the board of police and fire commissioners because the offer did not decrease Association members' salaries. As a result, we reject the Association's argument that the circuit court should have vacated the arbitrator's award because the City's offer—and, by extension, the award itself—violated § 62.13(7).[5]

¶22 In a related argument, the Association contends the circuit court should have vacated the arbitrator's award because it violated a "strong public policy" identified in WIS. STAT. § 62.13(7). *See* ***Baldwin-Woodville***, 317 Wis. 2d 691, ¶21 (We will vacate an arbitration award where it violates a strong public policy.). Specifically, the Association contends § 62.13(7) sets forth a strong public policy "as to what must (and must not) be done prior to unilaterally reducing police officers' salaries." This argument fails, however, because we have already determined the City's offer did not reduce the salaries of the Association's members. Thus, any public policy regarding what "must (and must not) be done" before reducing police officers' salaries is inapplicable under the circumstances.

[5] In support of its argument that the City's offer reduces Association members' salaries, the Association relies heavily on a graph the City presented to the arbitrator. The graph, entitled "Internal Safety Units—Net Salaries," illustrates how the City's offer would reduce Association members' take-home pay, assuming a base salary of $60,000 for the year 2011. The Association seems to assert that, by using the terms "base salary" and "net salaries" on this graph, the City conceded its offer would reduce Association members' salaries. We reject that interpretation of the graph, instead concluding the graph shows a reduction in net take-home pay. In any event, even if we viewed the graph as a concession of the issue, we observe we are not bound by a party's concession of law. *See* ***State v. Carter***, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516.

B. WISCONSIN STAT. § 111.77(6)(bm)6.

¶23 Arbitration of disputes between municipalities and their public safety employees is governed by WIS. STAT. § 111.77(3)-(7). Section 111.77(6)(bm) provides that, in reaching a decision, an arbitrator "shall give weight" to certain enumerated factors. One of these factors is "[t]he overall compensation presently received by the employees, 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." Sec. 111.77(6)(bm)6.

¶24 The Association argues the arbitrator failed to give weight to the effect of health insurance on Association members' overall compensation, as required by WIS. STAT. § 111.77(6)(bm)6. The Association therefore argues the arbitrator exceeded his authority, and the circuit court should have vacated the arbitration award. *See* ***Racine Cnty. v. International Ass'n of Machinists Dist. 10***, 2008 WI 70, ¶34, 310 Wis. 2d 508, 751 N.W.2d 312 ("Arbitration awards … must be vacated when they conflict with governing law, as set forth in the constitution, a statute, or the case law interpreting the constitution or a statute.").

¶25 We disagree. Contrary to the Association's assertion, the arbitrator did not fail to give weight to the effect of health insurance on overall compensation. Instead, the arbitrator gave weight to this factor, but determined that, under the unique factual circumstances of this case, it did not significantly favor one side's offer over the other.

¶26 In 2011, the Wisconsin legislature enacted WIS. STAT. § 111.70(4)(mc)6., which provides that, with the exception of employee premium

contributions, a municipality is prohibited from collectively bargaining with public safety employees regarding

> all costs and payments associated with health care coverage plans and the design and selection of health care coverage plans by the municipal employer for public safety employees, and the impact of such costs and payments and the design and selection of the health care coverage plans on the wages, hours, and conditions of employment of the public safety employee.

A dispute between the City and the Association regarding the meaning of this statutory language was pending before the court of appeals when the arbitrator issued his decision, and it remains pending as of the date of this opinion.

¶27 In the introductory portion of his decision, the arbitrator outlined the parties' respective proposals regarding health insurance. However, the arbitrator then noted that WIS. STAT. § 111.70(4)(mc)6. "states that health insurance and the **impact** of the costs of plan designs and health insurance on employee wages, hours, and conditions of employment are prohibited subjects of bargaining." The arbitrator acknowledged the meaning of § 111.70(4)(mc)6. was "the core issue" the parties were litigating before the court of appeals. Consequently, the arbitrator stated:

> In the analysis that follows these introductory remarks, the Arbitrator excludes all reference to the costs of health insurance in the base year 2011 and in the subsequent years 2012 and 2013 under the [Association's] proposal and 2012 through 2015 under the City's final offer. In doing so, the Arbitrator removes health insurance as an independent issue that would serve as a basis of comparison of the parties' final offers and selection of one offer over the other.
>
> ….
>
> The Association notes that overall compensation and generally [WIS. STAT. §] 111.77 remain unaltered by [2011 Wis.] Act 32. Although the Arbitrator does not interpret

> the legislative language, the analysis below excludes health insurance as a totally separate subject of analysis. The Arbitrator does consider health insurance in the context of his discussion of the factor, "Overall Compensation."
>
> The Arbitrator has not taken into account the costs of health insurance or any of the proposals concerning caps for dental and for health insurance, the conversion of the employee contribution to a dollar equivalent, and the various other elements contained in the [Association's] final offer. The Arbitrator's selection of the final offer to be included in the successor agreement is independent of the health insurance issue. No matter how the litigation before the Court of Appeals proceeds on the matter of the interpretation of the statutory language, it should have no effect on this award which is determined independent of the health insurance proposals.

The Arbitrator also noted that the Association had agreed to the premium levels proposed by the City. Thus, the arbitrator stated the "one issue that is a proper subject of bargaining is not at issue, here."

¶28 The arbitrator again addressed health insurance in the portion of his decision analyzing the factors enumerated in WIS. STAT. § 111.77(6)(bm), under the heading "Overall Compensation." Once again, the arbitrator noted he "[did] not rest his decision on the parties' health insurance proposals" because the parties were "litigating health insurance proposals in the Court of Appeals." The arbitrator reiterated that his decision was "independent of health insurance." However, he noted, as a general matter, that

> the City participates in a group health insurance plan(s) that employees are free to take advantage of. It is part of the benefit package employees receive with their employment by [the City]. This observation does not serve to distinguish the final offers of the parties as a preferred offer for inclusion in a successor agreement.

¶29 The arbitrator's decision shows that he did give weight to the effect of health insurance on overall compensation. The record reflects the arbitrator

considered that health insurance could have an adverse effect on overall compensation. However, because of the unique factual circumstances of the case—that is, the parties' pending dispute before the court of appeals regarding the meaning of WIS. STAT. § 111.70(4)(mc)6.—the arbitrator determined he could not conclude that health insurance considerations significantly favored one party's offer over the other. In other words, because the extent to which the parties were prohibited from bargaining about health insurance had yet to be resolved, the effect of health insurance on overall compensation did not aid the arbitrator in selecting one party's offer. Moreover, the arbitrator specifically noted the parties had reached an agreement regarding employee premium contributions—the one aspect of health insurance on which § 111.70(4)(mc)6. indisputably did not prohibit collective bargaining.

¶30 On the whole, we agree with the circuit court's assessment of the arbitrator's decision:

> If the Arbitrator had analyzed [WIS. STAT. §] 111.77(6)(bm)6[.] as the Association suggests, the eventual decision of the Court of Appeals could affect the award. The Arbitrator wished to avoid that potential outcome while the issue is up on appeal. Therefore, the Arbitrator limited its consideration of health care coverage and gave it less weight than the Association feels is appropriate. However, from the decision it is clear that the Arbitrator did give weight to insurance and medical and health benefits as required by [§] 111.77(6)(bm)6. The Court will not substitute its own, or the Association's, determination of how much weight the Arbitrator afforded those issues.

¶31 The Association relies heavily on ***Racine County*** in support of its argument that the circuit court should have vacated the arbitration award due to the arbitrator's alleged failure to give weight to the effect of health insurance on overall compensation. However, ***Racine County*** is distinguishable. There, our

supreme court concluded an arbitration award was properly vacated because the arbitrator failed to consider a particular statute and the associated case law in reaching her decision. ***Racine Cnty.***, 310 Wis. 2d 508, ¶¶2-3. The supreme court concluded the arbitration award conflicted with the relevant statute and cases, and, accordingly, the arbitrator exceeded her authority. ***Id.***, ¶¶21-22, 33-34. Conversely, the arbitrator's decision in this case did not conflict with WIS. STAT. § 111.77(6)(bm)6. The arbitrator gave weight to the effect of health insurance on overall compensation, as required by the statute, but simply gave that factor less weight than the Association believes he should have. Unlike the arbitrator in ***Racine County***, the arbitrator here did not completely fail to address a relevant statute.

¶32 For the foregoing reasons, we conclude the arbitrator did not violate WIS. STAT. § 111.77(6)(bm)6., and, accordingly, the circuit court properly refused to vacate the arbitration award on that basis. However, the Association also argues the court should have vacated the award because it violated a strong public policy identified in § 111.77(6)(bm)6.—namely, "Wisconsin's public policy as to what must be considered in arbitration between municipalities and public safety employees." Even if the Association is correct that § 111.77(6)(bm)6. sets forth a strong public policy requiring an arbitrator to consider the effect on health insurance on overall compensation, we have already rejected the Association's argument that the arbitrator failed to consider that factor. The Association's public policy argument therefore fails.

¶33 Finally, the Association argues the circuit court should have vacated the arbitration award because "[t]he parties failed to receive what they bargained for when agreeing to arbitration, as the bargain included that the arbitrator would 'give weight' to all the factors required under [WIS. STAT. §] 111.77(6)(bm)6[.]"

This argument fails for the same reason as the Association's public policy argument: contrary to the Association's assertion, the arbitrator did not fail to give weight to the required statutory factors. Accordingly, the parties received what they bargained for when they agreed to arbitration.

II. Motion to modify the arbitration award

¶34 The Association next argues the circuit court erred by denying its motion to modify the arbitration award. WISCONSIN STAT. § 788.11(1)(a) provides that a court "must make an order modifying or correcting" an award "[w]here there was … an evident material mistake in the description of any … thing … referred to in the award[.]" The Association argues this standard is satisfied in the instant case because the arbitrator made an evident material mistake when he concluded there was "no evidence that any comparable police unit" had adopted a cap on employee-required WRS contributions like the one proposed in the Association's offer.

¶35 As discussed above, the Association proposed that, effective July 1, 2013, officers hired before July 1, 2011, would be required to contribute 6.65% of their earnings to WRS—the full amount of the employee-required WRS contribution for the year 2013. However, the Association's offer also provided that, after July 1, 2013, these officers' WRS contributions would "equal the employee's share for public safety/protectives, as determined on an annual basis by the WRS, capped at 6.65%." Accordingly, as the arbitrator acknowledged, even though the employee-required WRS contribution for public safety employees increased to 7% in 2014, under the Association's offer, officers hired before July 1, 2011, would continue paying only 6.65%, and the City would be required to make up the difference.

¶36 The Association's proposed cap on WRS contributions was a crucial factor in the arbitrator's decision to choose the City's offer over the Association's. The arbitrator explained that, when the parties began bargaining a successor to their 2009-11 collective bargaining agreement, "their challenge was to incorporate substantial employee contributions towards Wisconsin retirement and generate net pay that at the conclusion of the term of the agreement either approximated the net salaries at the beginning of the term of the agreement or provided at least some increase in net pay[.]" The arbitrator reasoned that, by proposing to cap employee contributions at the 2013 level, the Association "undermine[d] the very effort both parties [made] in their offers to absorb the employee contribution to retirement." The arbitrator observed that the Association's proposal would place the parties in a position "in which they would have to engage in the same fight to achieve a successor to the 2012-13 agreement[.]" Thus, the arbitrator stated the Association's proposed cap on WRS contributions was "counter productive" and "materially and substantially" detracted from the viability of the Association's offer. The arbitrator later reiterated that he found it "disturbing" that the Association's offer "would require the parties to engage the issue of employee contribution towards Wisconsin retirement in another round of bargaining."

¶37 The arbitrator ultimately concluded the Association's proposed cap on WRS contributions was so undesirable that he would instead adopt the City's offer, which he acknowledged was seriously flawed in its own right. He explained:

> The Arbitrator must select between the two final offers. At the end of the day, the proposal to cap the employee contribution towards employee retirement so damages the [Association's] proposal that the Arbitrator selects a seriously flawed City offer, an offer flawed by a proposal for two years of no increase and by wage increases particularly in the fourth year at a level that may well not

> be supported by an increase in the cost of living or by the finances of the City itself. The Arbitrator adopts the City's offer even though it does material damage to the parity that exists between wage increases between the Firefighter and Police units and despite the fact that its offer is not internally consistent in that all the settlements do not have a 15-month hiatus between the assumption of contribution towards Wisconsin retirement and an across the board wage increase. The cap proposal is that damaging to the [Association's] offer that it tips the balance, even with economic conditions favoring the adoption of the [Association's] offer.

¶38 In addition to these remarks, the arbitrator stated the Association's proposed cap on WRS contributions was "not supported by external comparables" and there was "no evidence that any comparable police unit had adopted such caps." The Association contends the arbitrator was mistaken in this regard because the record before him showed that the City of Sheboygan capped its police officers' WRS contributions at 5.9% through the year 2014, even though the employee-required contribution for public safety employees was 6.65% in 2013 and 7% in 2014. The Association argues the arbitrator's mistake regarding the existence of other caps on WRS contributions was "material" because it was the "tipping point" that caused him to select the City's offer. The Association therefore argues the circuit court should have modified the arbitration award "to award [the Association's] Offer as opposed to that of the City."

¶39 There are two problems with the Association's argument. First, although the Association's inclusion of a cap on WRS contributions was clearly a material factor in the arbitrator's decision to select the City's offer, the Association has not shown that the arbitrator's belief that no other cities had similar caps on WRS contributions was material, in and of itself. Even absent the arbitrator's statements about the lack of evidence of similar caps, the arbitrator presented a persuasive reason for his decision to reject the Association's offer due

to the proposed cap—namely, the fact that the cap would force the parties to engage in another round of bargaining related to WRS contributions.

¶40 Moreover, in his decision denying the Association's motion for reconsideration, the arbitrator conceded he had "overstate[d] … the status of the record" in his original decision when he stated no comparable cities had capped police officers' WRS contributions. However, citing page twenty-four of his original decision, the arbitrator stated he did "[take] note of the Sheboygan cap" and "did take account of the Sheboygan settlement." At page twenty-four of the original decision, the arbitrator acknowledged that Sheboygan had limited its officers' WRS contributions to 5.9%. Read together, the arbitrator's original decision and his decision denying reconsideration establish that the arbitrator was aware of the Sheboygan cap when he issued his original decision, but the existence of that cap did not change his conclusion that the Association's proposed cap militated in favor of the City's offer. In other words, the arbitrator implicitly concluded in his decision denying reconsideration that the existence or nonexistence of the Sheboygan cap was not material to his decision to select the City's offer. On our de novo review of the arbitration award, we similarly conclude, as a matter of law, that the arbitrator's misstatement about the existence of similar caps on WRS contributions was not material to his decision.

¶41 Second, the Association fails to cite or analyze WIS. STAT. § 788.11(2), which states that an order modifying an arbitration award "must modify and correct the award, so as to effect the intent thereof and promote justice between the parties." The City argues the intent of the arbitration award in this case is clear—the arbitrator intended to select the City's offer. The City continues:

> The Association, however, is asking the Court to modify the award in a manner so as to reverse the intent of the award. It cites no authority for the proposition that a modification or correction of an award under [WIS. STAT.] § 788.11 can result in a fundamental change in the outcome of the arbitration, rather than, as the statute expressly states, serve to effect the intent of the award. This is because there exists no such authority. Section 788.11 is clearly not intended to be wielded in the manner the Association suggests.

The Association fails to respond to the City's argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶42 Accordingly, we reject the Association's argument that the circuit court erred by denying the Association's motion to modify the arbitration award.

By the Court.—Order affirmed.

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