COURT OF APPEALS
DECISION
DATED AND FILED

October 21, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2008AP519 **Cir. Ct. No. 2007CV658**

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

BALDWIN-WOODVILLE AREA SCHOOL DISTRICT,

PLAINTIFF-APPELLANT,

V.

WEST CENTRAL EDUCATION ASSOCIATION - BALDWIN WOODVILLE UNIT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Baldwin-Woodville Area School District appeals an order denying its motion to vacate an arbitration award. The District challenges an arbitrator's conclusion that Christine Johnson, a teacher represented by the West Central Education Association-Baldwin Woodville Unit, filed a timely

grievance for back pay. We agree the grievance was untimely and reverse the circuit court's order. On remand, we direct the court to vacate the arbitration award.

BACKGROUND

¶2 According to the arbitrator's findings, Johnson has been a full-time teacher at the District's Greenwood Elementary School since the 2002-03 school year. At the time of her initial employment in August 2002, Johnson was placed in the BA +8 lane of the applicable compensation schedule, which reflected her education level. As relevant here, the "+8" was based on her graduate-level education credits. Her resulting salary was $28,808.

¶3 Shortly thereafter, the Association and District entered into a new collective bargaining agreement, and Johnson signed a new contract in October 2002. Her salary was reduced to $28,148 because she was placed in the BA, rather than BA +8, compensation lane. However, Johnson did not realize she had been placed in a different compensation lane.

¶4 Through successive teaching contracts for the 2003-04 and 2004-05 school years, Johnson continued to be compensated in the BA lane, earning $29,749 and $31,279 respectively for those years. Had she been in the BA +8 lane, her salary would have been $30,146 and $31,983. At no time in 2003 or 2004 did Johnson inquire about, or challenge, her placement in the BA lane.

¶5 In August 2005, Johnson became aware she was not being compensated in the BA +8 lane. On August 30, she submitted a form entitled "Request to Change Lanes for the 2005-06 School Year." After verifying

Johnson's graduate credits, the District placed Johnson in the BA +8 lane for the 2005-06 school year.

¶6 Later in the school year, in May 2006, Johnson "realized … that the District was not making her whole for the salary she would have earned" had she been placed in the BA +8 lane since October 2002. She and the local Association president met with the school superintendant, who brought the matter to the school board. In "late June," the school board rejected Johnson's request for back pay.

¶7 On June 26, the Association filed a grievance with the superintendant on Johnson's behalf, alleging violations of the collective bargaining agreement. The grievance was denied in a letter from the District's counsel, which stated in part that the grievance was untimely. A subsequent grievance was addressed to the school board and was also denied.

¶8 The dispute went to binding arbitration before a Wisconsin Employment Relations Commission arbitrator. The arbitrator first decided whether the grievance was timely under the collective bargaining agreement. Under the agreement, Step 1 of the grievance procedure requires:

> a. An earnest effort shall first be made to settle the matter informally between the teacher and his immediate supervisor.
>
> b. If the matter is not resolved, the grievance shall be presented in writing by the teacher or employee representative to the immediate supervisor *within fifteen (15) days after the facts upon which the grievance is based first occur or first become known*…. (Emphasis added.)

The District argued the grievance was untimely because it was not filed within fifteen days of when Johnson became aware that she was not being paid in the BA +8 lane, which was in August 2005. The arbitrator rejected this argument

because "the grievant is challenging … the District's denial of back pay, not the District's initial placement of Johnson in the BA lane." The arbitrator reasoned that the June 26, 2006 grievance was therefore timely because it was within fifteen days of when District denied her request for back pay in "late June." After addressing the merits of the grievance, the arbitrator awarded Johnson the difference between the BA and BA +8 compensation lanes for the time Johnson was paid in the BA lane.

¶9 The District moved to vacate the arbitrator's award in the circuit court, contending the award "exceeded [the arbitrator's] powers and authority and manifestly disregarded the law in violation of Wis. Stat. § 788.10(1)(d)." In a memorandum decision and order filed January 17, 2008, the circuit court denied the District's motion, concluding the arbitrator's decision was rational and supported by the evidence. A final order was entered on January 28, 2008.

DISCUSSION

¶10 We review an arbitrator's award in the same manner as the circuit court, without deference to the circuit court's decision. ***Madison Teachers Inc. v. Madison Metro. Sch. Dist.***, 2004 WI App 54, ¶9, 271 Wis. 2d 697, 678 N.W.2d 311. Courts have limited power to vacate arbitration awards. *See* WIS. STAT. § 788.10.[1] WISCONSIN STAT. § 788.10(1)(d) permits courts to vacate arbitration awards "[w]here 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." Essentially, the courts' role is supervisory in nature, ensuring that the

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

parties received what they bargained for when they agreed to resolve their dispute through final and binding arbitration. ***Madison Teachers Inc.***, 271 Wis. 2d 697, ¶9.

¶11 Courts will not overturn an arbitrator's decision for "mere errors of fact or law, but only when perverse misconstruction or positive misconduct [is] plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy." ***Id.*** (citations omitted). An arbitrator has authority to construe ambiguous terms in a collective bargaining agreement, and the arbitrator's construction will not be a "perverse misconstruction" unless it has no foundation in reason. ***Id.***, ¶15. However, an arbitrator has no authority to disregard or modify an agreement's plain or unambiguous terms. ***Id.***

¶12 We conclude the arbitrator's construction of the fifteen-day time limit for filing grievances was a perverse misconstruction because it was contrary to the collective bargaining agreement's plain and unambiguous terms. Under those terms, the grievance was untimely, and the arbitration award must therefore be vacated.

¶13 The arbitrator concluded that the fact upon which the grievance was based was the school board's denial of Johnson's request for back pay in late June 2006. However, this conclusion is contrary to the procedures set forth in the collective bargaining agreement. As noted above, Step 1 of the grievance procedure requires an employee to first attempt to informally resolve a dispute with his or her immediate supervisor. If a dispute is not resolved informally, the employee must file a grievance within fifteen days "after the facts upon which the grievance is based first occur or first become known." Subsequent "Steps" are

also provided in the grievance procedure, including appeals to the superintendant and school board.

¶14 The issue before the arbitrator was whether the Association complied with Step 1 of the grievance procedure. Specifically, the question was whether the grievance was filed within fifteen days after the facts on which the grievance was based first occurred or became known. The grievance claimed Johnson was entitled to back pay. The fact underlying the grievance was that she was paid in the wrong compensation lane for most of the 2002-03 through 2004-05 school years. Therefore, for the grievance to be timely, it was required to be filed within fifteen days of when this fact occurred or became known.

¶15 Based on the arbitrator's findings, the latest possible point at which this fact became known was when Johnson "realized in May, 2006 that the District was not making her whole for the salary she would have earned…." Because the June 26, 2006 grievance was more than fifteen days later, it was untimely.

¶16 Therefore, the arbitrator's conclusion was contrary to the collective bargaining agreement's plain and unambiguous terms because it ignored the facts underlying the Johnson's complaint. Instead, the arbitrator engaged in a perverse misconstruction by using the school board's denial of Johnson's complaint to trigger the fifteen-day time limit. The collective bargaining agreement clearly makes the occurrence or knowledge of the facts underlying a complaint—not a subsequent response to a complaint—the triggering event for the fifteen-day time limit for filing a grievance.

¶17 The Association attempts to find support for the arbitrator's reasoning by relying on a decision in another arbitration, ***City of Phillips (Police Department) v. Phillips Professional Police Association Local 231, Labor***

Association of Wisconsin, Inc., WERC Dec. No. MA-12198 (2004) (Bielarczyk, Arb.).[2] There, the arbitrator concluded that a part-time police officer filed a timely grievance following the city's denial of his request for full-time back pay. ***Id.*** at 4. The contract required a grievance to be filed within ten working days of "when the grievant knew or should have known of the circumstances giving rise to the grievance." ***Id.*** at 9. The arbitrator concluded that the officer's grievance within ten days of the city's denial of his request for back pay was timely. ***Id.*** at 11.

¶18 However, the arbitrator's decision in ***City of Phillips*** was based on unique facts not present here. In ***City of Phillips***, the city's police chief had informed the officer that the city had a history of awarding back pay to part-time officers who worked full-time hours. ***Id.*** at 11. The police chief further informed the officer that his hours would be documented and, at the end of the year, "it would be decided what would happen to those hours." ***Id.*** Here, there are no facts suggesting that the issue of back pay for Johnson was expressly deferred to a later date.

By the Court.—Order reversed and cause remanded with directions.

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

[2] The Association cites no authority indicating what, if any, deference we owe to an arbitrator's construction of a different contract in a different arbitration. Because that arbitration is distinguishable on its facts, it is unnecessary for us to address this issue.