COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1384 **Cir. Ct. No. 2012CV678**

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

MEQUON POLICE ASSOCIATION,

PLAINTIFF-APPELLANT,

V.

CITY OF MEQUON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: TODD K. MARTENS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 BROWN, C.J. This is an appeal from a decision of the circuit court affirming an arbitration order that resolved a collective bargaining dispute between the City of Mequon (the City) and the Mequon Police Association (the MPA). The arbitration award was issued after the parties failed to reach a new collective

bargaining agreement (CBA) when their old one expired at the end of 2011. Unable to reach an agreement on their own, in February 2012 the City and the MPA petitioned the Wisconsin Employment Relations Commission (WERC) for "compulsory, final and binding arbitration" of their impasse. *See* WIS. STAT. § 111.77(3) (2011-12).[1]

¶2 The parties selected an arbitrator and proceeded with the form of arbitration outlined in WIS. STAT. § 111.77(4)(b), under which each party advises WERC of its final offer, and the arbitrator selects one of the offers, unchanged.

> Neither party may amend its final offer thereafter, except with the written agreement of the other party. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

Sec. 111.77(4)(b). In November 2012, the arbitrator selected the City's offer. The MPA asked the circuit court to vacate the arbitration award,[2] but the circuit court upheld it. The MPA appeals.

¶3 With respect to arbitration awards, the courts perform an "essentially supervisory" function "to ensure that the parties to the collective bargaining agreement received the arbitration process for which they bargained." ***Racine Cnty. v. International Ass'n of Machinists & Aerospace Workers Dist. 10, AFL-CIO***, 2008 WI 70, ¶11, 310 Wis. 2d 508, 751 N.W.2d 312. We check for "perverse misconstruction" or "positive misconduct" by the arbitrator, such as

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The procedure for challenging an arbitration award is a motion to vacate the award. *See* WIS. STAT. § 788.10.

manifest disregard of the law or violation of the law or strong public policy. ***Id.*** Whether the arbitrator has exceeded his or her authority in such a manner is a question of law we review de novo. ***Id.***

¶4 In this appeal, the MPA argues that the arbitrator exceeded his authority by violating WIS. STAT. § 111.77(6)(am) and (bm), the statutory provision that identifies the factors the arbitrator must weigh in resolving a collective bargaining impasse. The statute directs the arbitrator to weigh the relevant factors as follows:

> In reaching a decision, the arbitrator shall give greater weight to the economic conditions in the jurisdiction of the municipal employer than the arbitrator gives to the [other] factors.... The arbitrator shall give an accounting of the consideration of this factor in the arbitrator's decision.
>
> [I]n addition to the [economic conditions in the jurisdiction of the municipal employer, just mentioned above], the arbitrator shall give weight to the following factors:
>
> 1. The lawful authority of the employer.
>
> 2. Stipulations of the parties.
>
> 3. The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
>
> 4. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally ….
>
> 5. The average consumer prices for goods and services, commonly known as the cost of living.
>
> 6. The overall compensation presently received by the employees ….
>
> 7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

> 8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration ….

Sec. 111.77(6).

¶5 The arbitrator's award demonstrates painstaking effort to weigh these and only these factors, in light of all of the evidence and arguments submitted by both sides. The fifty-four page award opens with discussion of historical background of the parties' relationship, proceeds to describe the parties' final offers, and then surveys all of the evidence and arguments submitted in favor of one offer or the other. In twenty single-spaced pages the arbitrator meticulously weighs each and every one of the statutorily-prescribed factors, from the first and most important factor ("the economic conditions in the jurisdiction") through all of the remaining factors ("lawful authority of the employer," "stipulations of the parties," "interests and welfare of the public and the financial ability of the unit of government," "cost of living," "overall compensation," "changes in any of the foregoing," and "such other factors" as are relevant).

¶6 Despite this seemingly thorough and balanced reasoning, the MPA asserts that the arbitrator manifestly disregarded law and strong public policy because he acknowledged "the City had the financial ability to meet" the MPA's final offer yet determined nonetheless that the City's offer was the more reasonable one. The MPA charges the arbitrator with making a "decision to equal the playing field between general employees and public safety (police) employees" in violation of 2011 Wis. Act. 10 (Act 10) and 2011 Wis. Act 32 (Act 32). Also, the MPA claims, the arbitrator disregarded WIS. STAT. § 111.77(6)(bm)4. in his consideration of the external comparables, and by including "any consideration of internal comparables."

¶7 The bottom line, according to the MPA, is that the arbitrator took on the role "of a legislator thereby violating the constitutional separation of powers principles" in an effort to undermine Acts 10 and 32. In support of this view, the MPA quotes from the decisions of other arbitrators in other collective bargaining disputes, including two that were resolved since Acts 10 and 32 became the law. But those decisions are not helpful to resolving the question before us: whether the arbitrator exceeded his authority or otherwise violated the law here.

¶8 It is true that the arbitrator heard and weighed the City's concerns about resentments between the employee factions created by Acts 10 and 32, but only as one of the many relevant factors. In fact, the arbitrator seemed to doubt that his decision could resolve that concern:

> [E]ffective abatement of the general municipals' understandable disappointment or resentment over not receiving anything near an equal package to what is being proposed or offered to the police may likely depend more on alternative future measures as to what the City is willing and financially able to restore to the group in the future, than what the Mequon police officers will receive in this dispute.
>
> However, in apparent good faith, the City now attempts to ameliorate any such resentment by offering what it perceives as a balance between what has been taken from the general, now unrepresented municipals, under color of state law, and the substantially better offer that other state law still permits the police to make to the City and requires the City to address….
>
> [T]he City is caught between the need to maintain both police morale and the morale of its general municipal employees. The City's challenge is further complicated by the need for any solution to be compatible with responsible budget balancing that meets the approval of a majority of Mequon voters and taxpayers.

¶9 We could quote additional passages of the arbitral award to demonstrate its balanced, logical reasoning, but suffice it to say that we have

found zero support in the award or the record[3] for the MPA's arguments that the arbitrator ignored law, disregarded Acts 10 or 32, or "render[ed] his own brand of justice" to "mitigate the practical impact of legislatively created 'haves and have-nots.'" To the contrary, the arbitrator appears to have carefully considered all of the relevant factors as directed by WIS. STAT. § 111.77 (and only those factors), *including* § 111.77(4), and to have made his best judgment as to which offer was the most reasonable one. As the circuit court said, "[d]issatisfaction with the Arbitrator's decision does not equal a showing the Arbitrator exceeded his powers, or perversely misconstrued or manifestly disregarded the law."

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] We have reviewed the record thoroughly despite the fact that the MPA for the most part cited its appendix rather than the record in its statement of the case. *See* WIS. STAT. § 809.19(1)(d) (directing the appellant to prepare a statement of the case with "appropriate references to the record").