COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1604 **Cir. Ct. No. 2012CV374**

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

MARINETTE COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 1752-A, AFSCME, AFL-CIO,

PLAINTIFF-RESPONDENT,

V.

MARINETTE COUNTY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Marinette County appeals an order confirming an arbitration award. The County argues the arbitrator exceeded its powers and/or manifestly disregarded the law with respect to two statutes. Specifically, the

County argues the parties' labor contract violated either the pre-2011 Wis. Act 10 version of WIS. STAT. § 111.70(3)(a)4. (2009-10), or Act 10. We reject the County's arguments, admonish the County and its counsel for attempting to mislead us, and affirm.

BACKGROUND

¶2 In September 2009, the County entered into a collective bargaining agreement with the Marinette County Professional Employees Local 1752-A, AFSCME, AFL-CIO union. Article 31.01 of the agreement stated: "This agreement shall be effective January 1, 2009 through December 31, 2011 [sic] shall continue in full force and effect from year to year unless either party gives written notice to the other requesting changes prior to June 1, 2011."

¶3 After a budget repair bill was introduced in February 2011, the Union approached the County about negotiating a new agreement. The County responded that it was not interested, and no negotiations occurred. 2011 Wis. Act 10 became law on June 29, 2011, thereby extinguishing most collective bargaining privileges for general municipal employees, commencing "on the day [an existing] agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." Act 10, §§ 245, 9332.

¶4 In July 2011, the Union claimed the parties' existing agreement had automatically extended for an additional year because neither party had given notice before June 1. The County disputed this assertion, and the Union filed a grievance seeking a one-year extension. The County denied the grievance and the matter proceeded to arbitration.

¶5 Following a hearing and submission of briefs, the arbitrator ruled in favor of the Union, explaining: "The parties' failure to act by the June 1 date extended the labor agreement and since this occurred in advance of the Act 10 effective date, I conclude that the 2009-11 collective bargaining agreement was automatically extended through December 31, 2012." The circuit court subsequently granted the Union's motion to confirm the arbitration award. The County now appeals.

DISCUSSION

¶6 "When a court is reviewing an arbitrator's award, its function is essentially supervisory in nature, 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. "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 decision of the arbitrator will not be disturbed for an error of law or fact." ***City of Milwaukee v. Milwaukee Police Ass'n***, 97 Wis. 2d 15, 24-25, 292 N.W.2d 841 (1980).

¶7 Accordingly, we may overturn an arbitration award only in very limited circumstances. We must overturn an arbitrator's award when the arbitrator exceeded its powers. WIS. STAT. § 788.10(1)(d).[1] "An arbitrator exceeds [its] powers when the arbitrator demonstrates either 'perverse misconstruction' or 'positive misconduct,' when the arbitrator manifestly disregards the law, when the

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

award is illegal, or when the award violates a strong public policy." ***Racine Cnty.***, 310 Wis. 2d 508, ¶11 (citing ***Lukowski v. Dankert***, 184 Wis. 2d 142, 149, 515 N.W.2d 883 (1994)).

Application of WIS. STAT. § 111.70(3)(a)4. (2009-10)

¶8 The County first argues the arbitrator exceeded its powers by not applying WIS. STAT. § 111.70(3)(a)4. (2009-10). The County argues the agreement's provision for a one-year automatic extension violates § 111.70(3)(a)4. (2009-10), which limited collective bargaining agreements to a maximum of three years.

¶9 As the County acknowledges, the circuit court held the County waived its argument that extending the Agreement would be illegal under WIS. STAT. § 111.70(3)(a)4. (2009-10). Nonetheless, in support of this argument, the County asserts in its primary brief that:

> [T]he County argued that state statute prohibits the Agreement's continuation.
>
> ….
>
> The County argued that the Circuit Court must vacate the award because the award violates state statutes. … Specifically, the award violated WIS. STAT. § 111.70(3)(a)4., which (prior to the effective date of Act 10) prohibited the parties from extending the term of the Agreement beyond three years.
>
> ….
>
> Contrary to the Circuit Court's conclusion, the County raised the issue of the legality of the proposed extension. In fact, the arbitration award summarizes the County's argument as follows: "State statute prohibits [the Agreement's] continuation and the grievance should be denied."

¶10 Similarly, in its reply brief, the County asserts:

> The Union's claim that [the County] waived the issue of illegality under WIS. STAT. § 111.70(3)(a)4. is baseless. The arbitration award reflects that the County challenged the legality of the extension of the agreement during arbitration.
>
> ….
>
> The issue of the legality of the extension was always at issue during the arbitration.

¶11 The County's argument is disingenuous.[2] The County never presented the arbitrator with any issue concerning WIS. STAT. § 111.70(3)(a)4. (2009-10). The County's continued denial in its reply brief is confounding. As documented in the Union's response brief, when the circuit court asked whether the County had raised § 111.70(3)(a)4. (2009-10), before the arbitrator, the County's attorney responded, "[T]he answer is no." When asked why not, the attorney responded, "I don't have an answer to that …." The County also does not dispute the Union's assertion that the County's reference to "state statute" referred to 2011 Wis. Act 10. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). It should go without saying that challenging a contract provision's "legality" under "state statute" does not constitute a challenge under every conceivable statute, so as to preserve all arguments based upon any statute. Moreover, the County tacitly admits its failure to preserve the issue before the arbitrator when, after asserting it raised the issue, it argues we should nonetheless address the issue even if it was not specifically presented to the arbitrator.

[2] We remind counsel of their professional obligations under SCR 20:3.1 Meritorious claims and contentions, and 20:3.3 Candor toward the tribunal.

¶12 As noted, the County argues the arbitrator exceeded its authority by not applying WIS. STAT. § 111.70(3)(a)4. (2009-10) to determine that the automatic extension provision of the collective bargaining agreement was illegal. We find it patently absurd to argue an arbitrator's award could be overturned for failing to consider arguments or authority that were never presented to the arbitrator. Not surprisingly, the County cites no authority for this proposition. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not address arguments not supported by citation to legal authority). Indeed, if this case had originated in circuit court, the County's failure to raise an issue of law subject to de novo review would constitute forfeiture of the issue. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. The County's failure to raise the issue in arbitration proceedings, of which we exercise only a limited supervisory review, *see* ***Racine Cnty.***, 310 Wis. 2d 508, ¶11, precludes us from reviewing it now, *see* ***Finkenbinder v. State Farm Mut. Auto Ins. Co.***, 215 Wis. 2d 145, 153, 572 N.W.2d 501 (Ct. App. 1997) (failure to raise issue before arbitrator deemed a forfeiture of the issue on appeal).

Application of 2011 Wis. Act 10

¶13 The County alternatively argues the arbitrator exceeded its powers when resolving the issue the County actually presented to the arbitrator, namely, whether the one-year automatic extension of the arbitration agreement violated 2011 Wis. Act 10.

¶14 When 2011 Wis. Act 10 became law, it prohibited municipal employers from bargaining with general municipal employees over any factor or condition of employment except total base wages. *See* WIS. STAT. § 111.70(4)(mb). For employees covered by an existing collective bargaining

agreement at the time of Act 10's June 29, 2011 effective date, the prohibition on bargaining first applied "on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." Act 10, § 9332.

¶15 The County does not challenge the arbitrator's factual determination that neither party gave written notice to the other requesting changes prior to June 1, 2011. However, the County argues that because the original term of the agreement ended on December 13, 2011, the one-year extension did not occur until January 1, 2012, well after 2011 Wis. Act 10's effective date.

¶16 Citing the agreement's language that, in the event of failure to give notice by June 1, the agreement would "continue in full force and effect from year to year," the County argues:

> [A]n extension must have occurred on January 1, 2012, not on June 1, 2011 as the Arbitrator concluded. Logically, the only date the extension could occur is January 1, 2012[,] after the original three-year term expired on December 31, 2011. There is no other reasonable interpretation which gives meaning to the words "from year to year" in Article 31[.01].

We disagree.

¶17 The arbitrator could reasonably determine that the parties' collective bargaining agreement was "extended" on June 1, when the parties, through their actions, agreed to a one-year extension. It is not illogical that parties could extend an agreement prior to its expiration date. Notably, the agreement states it would "continue" upon the failure to give notice before June 1. However, we need not independently determine on which date the agreement extended. "The decision of the arbitrator will not be disturbed for an error of law …." ***City of Milwaukee***, 97

Wis. 2d at 24-25. As our supreme court has stated, even if we "disagree with the interpretation of the contract reached by the arbitrator, we will not substitute our judgment for that of the arbitrator. The parties contracted for the arbitrator's settlement of the grievance and that is what they received." ***Dehnart v. Waukesha Brewing Co.***, 17 Wis. 2d 44, 51, 115 N.W.2d 490 (1962).[3]

¶18 The County next argues the arbitrator exhibited a manifest disregard for the law, "by failing to properly interpret or apply Act 10." A mere error of law does not satisfy the manifest-disregard standard. *See* ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988). As the County acknowledges in its brief, a manifest disregard occurs when an arbitrator makes "no attempt to apply or interpret the relevant statutory [or case] law." ***Racine Cnty.***, 310 Wis. 2d 508, ¶¶33, 36. "The fact that an arbitrator makes a mistake, by erroneously rejecting a valid, or even a dispositive legal defense, does not provide grounds for vacating an award unless the arbitrator deliberately disregarded what [it] knew to be the law." ***Flexible Mfg. Systems Pty. Ltd. v. Super Prods. Corp.***, 86 F.3d 96, 98, 100 (7th Cir. 1996) (citing WIS. STAT. § 788.10(1)(d); ***City of Madison***, 144 Wis. 2d at 586). The County does not assert the arbitrator here made no attempt to apply 2011 Wis. Act 10; it asserts only that

[3] The County further argues the arbitrator's determination was unreasonable because "[a]ccording to the Arbitrator, the parties could avoid Act 10 forever by virtue of their failure to give notice by June 1, 2011 and endlessly continue the Agreement as of that date." This assertion, unsupported by record citation, is merely a straw man. The only remedy sought by the Union, and the only remedy awarded by the Arbitrator, was a single, one-year extension.

Moreover, the County's argument assumes the County would not simply give written notice prior to June 1 of any subsequent year. The argument also fails to acknowledge that, in the event the County failed to give such notice, the next June 1 one-year extension would occur after Act 10's effective date and therefore be invalid. The only way the County's argument makes sense is if the June 1, 2011 extension had extended the agreement indefinitely. Nobody has made such an absurd claim.

the arbitrator did so incorrectly. The County's manifest-disregard argument consequently fails.

By the Court.—Order affirmed.

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