2017 WI App 82

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2016AP1525

†Petition for review filed

Complete Title of Case:

MILWAUKEE DISTRICT COUNCIL 48,

PLAINTIFF-RESPONDENT,†

V.

MILWAUKEE COUNTY,

DEFENDANT-APPELLANT.

Opinion Filed:	November 7, 2017
Submitted on Briefs:	June 6, 2017
Oral Argument:	

JUDGES:	Brennan, P.J., Kessler, and Dugan, JJ.
Concurred:	
Dissented:	

Appellant ATTORNEYS:	On behalf of the plaintiff-appellant, the cause was submitted on the brief of *Mark A. Sweet* of *Sweet and Associates, LLC*.
Respondent ATTORNEYS:	On behalf of the defendant-respondent, the cause was submitted on the brief of *Alan M. Levy* of *Lindner and Marsack, S.C.*

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COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2016AP1525 **Cir. Ct. No. 2011CV16826**

STATE OF WISCONSIN **IN COURT OF APPEALS**

MILWAUKEE DISTRICT COUNCIL 48,

PLAINTIFF-RESPONDENT,

V.

MILWAUKEE COUNTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 KESSLER, J. Milwaukee County appeals an order granting summary judgment to Milwaukee District Council 48 (DC 48) finding that certain Milwaukee County employees, represented by DC 48, were not covered by a

collective bargaining agreement (CBA) at the time Milwaukee County General Ordinance (MCGO) § 201.24(4.1) took effect, thus rendering them eligible for certain retirement benefits. We affirm.

BACKGROUND

¶2 At issue in this appeal is whether certain Milwaukee County employees, represented by DC 48, were eligible to utilize full pension benefits upon retirement from the County. The material facts underlying this appeal are not in dispute. For decades, Milwaukee County has provided retirement benefits to employees pursuant to ordinance. Those employees are considered "members" of the County's Employee Retirement System (ERS). In 1993, the County adopted the ordinance commonly referred to as the "Rule of 75," by which an "employee not covered by the terms of a collective bargaining agreement at the time his employment is terminated and who retires on or after September 1, 1993," received a full pension if the employee's age added with his or her years of service equaled seventy-five. Later that year, the County Board agreed to a collective bargaining agreement with DC 48, in which the Rule of 75 was extended to employees represented by the union who had become ERS members prior to January 1, 1994.

¶3 In 2005, the County amended the ordinance to end the Rule of 75 for ERS members who were not covered by a CBA if they first entered ERS after January 1, 2006. Those covered by the union's CBA continued to receive the Rule of 75 benefit only if they had been hired prior to January 1, 1994. The last CBA between the union and the County expired on December 31, 2008. By agreement, the CBA was extended to March 31, 2009. No successor CBA between DC 48 and the County was ever reached.

¶4 In 2011, the Wisconsin legislature adopted Act 10. *See* 2011 Wis. Act 10. Act 10 took effect on June 29, 2011. As relevant to this appeal, Act 10 drastically curtailed collective bargaining by prohibiting municipal employees represented by unions from negotiating pension provisions.[1] Act 10 amended WIS. STAT. § 111.70 (2011-12)[2] by limiting the scope of bargaining between municipalities and "general municipal employees" represented by a union to the "base wage" and it limited any increase in the base wage to the increase in the consumer price index. *See* § 111.70. Specifically, Act 10 defined "collective bargaining" as:

> [T]he performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement, or to resolve questions arising under such an agreement *with respect to wages* … for general municipal employees.

2011 Wis. Act 10 § 210 (emphasis added); WIS. STAT. § 111.70(1)(a).

¶5 Thereafter, on September 29, 2011, the County Board adopted an amendment to MCGO § 201.24(4.1) to extend the Rule of 75 to certain additional employees not covered by a CBA on that date:

[1] Act 10 removed collective bargaining rights from state university faculty, University of Wisconsin Hospital and Clinics employees, and day care and home health providers. The Act divided the remaining public employees into two groups: public safety employees and general employees. Public safety employees are subject to certain exemptions. *See* 2011 Wis. Act 10 § 210. This appeal concerns general employees.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> 2.(a) A *member* [3] *who*, on September 29, 2011 is employed and *is not covered by the terms of a collective bargaining agreement*, and whose initial membership in the retirement system under section 201.24 began prior to January 1, 2006, and who retires on and after September 1, 1993, shall be eligible for a normal pension when the age of the member when added to his years of service equals seventy-five (75)….
>
> (b) A member who, on September 29, 2011, is employed and *is covered by the terms of a collective bargaining agreement* with … District Council 48 … and whose initial membership date is prior to January 1, 1994, shall be eligible for a normal pension when the age of the member when added to his years of service equals seventy-five (75)….

MCGO § 201.24(4.1)(2) (2011) (emphasis added). Thus, the County specifically gave "members" who were employed by the County the benefit of the Rule of 75 whether or not the employees were covered by CBAs, but depending on when the employee became a member of the County's retirement system.

¶6 Pursuant to additional changes made by Act 10, DC 48's certification as a representative of the County general employees was revoked by the Wisconsin Employment Relations Commission effective January 30, 2012.

¶7 Following DC 48's decertification, the County moved for declaratory judgment, and ultimately summary judgment, on the grounds that, pursuant to MCGO § 201.24(4.1), the Rule of 75 benefit was not applicable to employees represented by DC 48 on September 29, 2011, if those employees

[3] *See* MCGO §§ 201.24(2.1) and (2.5). "Member" refers to an employee covered by the County retirement system. The parties do not dispute this.

entered ERS between January 1, 1994, and December 31, 2005.[4] The County argued that the employees at issue were covered by a CBA on September 29, 2011, because DC 48 was not decertified until January 2012.

¶8 DC 48 filed its own summary judgment motion, arguing that its members *were not* represented by a CBA at the time MCGO § 201.24(4.1) was amended, and thus were eligible for the Rule of 75 benefit.

¶9 Ultimately, the circuit court granted summary judgment in favor of DC 48, stating:

> There is no question that the collective bargaining agreement between the parties expired on March 31, 2009 and no successor agreement was ever agreed upon, or received final formal approval of the union or the County. Further, there were no settled-upon expectations between the parties based upon an exchange of promises and consideration….
>
> Therefore, the court finds that, as it pertains solely to the plaintiffs and defendant in the instant case, upon the effective date of Wisconsin 2011 Act 10, there was no collective bargaining agreement in effect, or executed, or even being negotiated; there was no *status quo* protection existing under [the Municipal Employment Relations Act] with regard to "conditions of employment;" and therefore there was no pre-existing legal obligation between the parties as it related to conditions of employment beyond wages. Therefore, because no collective bargaining agreement was in effect, the plaintiffs were not "covered by the terms of a collective bargaining agreement" as used in [the ordinance] for purposes of evaluating their eligibility for the Rule of 75.

[4] The County filed its original summary judgment motion on January 25, 2013. That motion was denied. The County filed a renewed summary judgment motion, which is now on appeal.

(Italics added.) This appeal follows.

DISCUSSION

¶10 The central question in this appeal is whether, as of September 29, 2011, County employees who were in the bargaining unit represented by DC 48 and who entered ERS between January 1, 1994, and December 31, 2005, were covered by the terms of a CBA. We agree with the circuit court that the employees *were not* covered by the terms of a CBA and thus *were* eligible for the Rule of 75 benefit.

¶11 In reviewing the grant or denial of a summary judgment, we apply the same methodology as the circuit court and review *de novo* the grant or denial of summary judgment. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Here, there are no disputed facts; the issue before us is purely one of law involving the construction of statutes and an ordinance.

¶12 It is undisputed that the CBA between the County and DC 48 expired on March 31, 2009, and that the parties did not negotiate toward a new CBA. Relying on a series of cases discussing various scenarios in which there was an expired CBA, the County maintains that the employees at issue remained represented by a CBA between the date the CBA expired and the date the DC 48 was decertified. The County contends that the enactment of Act 10 did not "end the parties' reciprocal bargaining obligations and the preservation of the *status quo* after contract expiration." (Italics added.) In other words, the County contends that because DC 48 maintained a duty to bargain about wages as of September 29, 2011, until its decertification, the employees remained "covered" by the terms of a

CBA and were not entitled to the Rule of 75 benefit under the ordinance. Accordingly, we briefly discuss the purpose of a CBA, some of the cases relied upon by the County, and the plain language of the ordinance at issue.

¶13 Fifty years ago, the Supreme Court succinctly explained the role and function of a CBA:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578 (1960) (internal citation and footnote omitted). Following that understanding, the law relating to collective bargaining evolved. Two years later, in ***National Labor Relations Board v. Katz***, 369 U.S. 736 (1962), the Supreme Court dealt with duties when a collective bargaining agreement had expired. The court phrased the question before it as:

> Is it a violation of the duty "to bargain collectively" imposed by [§] 8(a)(5) of the National Labor Relations Act for an employer, without first consulting a union with which it is *carrying on bona fide contract negotiations*, to institute changes regarding matters which are subjects of mandatory bargaining under [§] 8(d) and which are in fact under discussion?

Id. at 737 (emphasis added; footnote omitted). In ***Katz*** the court held that "an employer's unilateral change in conditions of employment *under negotiation* is … a circumvention of the duty to negotiate." ***Id.*** at 743 (emphasis added).

¶14 In ***Berns v. WERC***, 94 Wis. 2d 214, 287 N.W.2d 829 (Ct. App. 1979), we had to determine whether two unions committed prohibited practices by

retroactively deducting fair share fees for a period where no CBA was in effect. ***Id.*** at 216-217. The employees were employed by the Milwaukee Board of School Directors. ***Id.*** at 218. The CBA between the Board and the union contained a "fair share" agreement, "which provided that the Board would deduct an amount equal to the monthly dues paid by union members from the earnings of non-union members every month." ***Id.*** The CBA expired and the parties did not reach an extension agreement. ***Id.*** at 219. Two months later, the parties reached a new agreement which was ratified two months later. ***Id.*** The new agreement was to be applied retroactively, by its own terms, and again contained a fair share agreement. ***Id.*** The Board deducted fair share fees for the period during which there was no CBA. ***Id.*** We held that the fair share agreements "become effective, and continue in effect by their own terms according to the parties' agreements and understandings." ***Id.*** at 223. In essence, we held that the fair share agreements were in effect during the CBA hiatus. ***Id.*** at 223-24.

¶15 In ***St. Croix Falls School District v. WERC***, 186 Wis. 2d 671, 522 N.W.2d 507 (Ct. App. 1994), we held that the school district engaged in a prohibited practice when it altered its rules governing sick leave following the expiration of a CBA but prior to the enactment of a successor agreement. ***Id.*** at 674-75. We concluded "[w]hile *status quo* recognizes that changes can occur during a contract hiatus if such changes would otherwise have been permitted under the expired contract, it does not permit an employer to make unilateral changes in areas that are otherwise mandatory subjects for the collective bargaining table," such as sick leave. ***Id.*** at 680 (italics added).

¶16 In ***Jefferson County v. WERC***, 187 Wis. 2d 647, 523 N.W.2d 172 (Ct. App. 1994), we held that Jefferson County violated its duty to bargain with the union representing certain employees when the County "refused to apply the

'contingency pay' provisions of its existing pay plan applicable to nonrepresented employees during initial contract negotiations with several recently created bargaining units." ***Id.*** at 649. In that case, the County adopted a pay plan that contained provisions for "contingency pay" applicable only to nonrepresented employees. ***Id.*** at 650. The contingency pay was initially granted to an employee with ten years in a position and increased after the fifteenth year based on years of service and merit. ***Id.*** Ultimately, the union became the certified bargaining representative for certain County employees and began negotiations. ***Id.*** During negotiations, three members of the new bargaining unit, who were previously unrepresented, reached their tenth and fifteenth years. ***Id.*** at 650-51. The County refused to apply the contingency pay provisions to them, "believing that it was required to do so in order to maintain the *status quo* during the contract negotiations." ***Id.*** at 651. We concluded that the County "short-circuited" the contingency pay procedures based solely on the employees' union membership and the Commission reasonably determined that the County failed to maintain the *status quo* during negotiations. ***Id.*** at 657-58.

¶17 Here, the County relies on the above-discussed cases to put forth the following argument:

> Act 10 does not end the parties' reciprocal bargaining obligations and the preservation of the *status quo* after contract expiration. Rather, the scope of future negotiations is amended to require good faith bargaining over wages, but not other areas which had been mandatory subjects of bargaining…. As to wages, the employer still cannot "refuse to bargain collectively." WIS. STAT. § 111.70(3)(a)(4). And that duty to bargain continues to preserve the *status quo* as to wages while a successor agreement is being pursued.
>
> In turn, the employees represented by the Union here are "covered by" the terms of a CBA because their prior agreement set the terms of their wages which had to

> be continued as of September 29, 2011. It was not until the Union was decertified the following year that the duty to bargain, with its accompanying preservation of the prior agreement's wage structure, no longer covered these employees.

We disagree and conclude not only that the case law relied upon by the County is inapplicable, but also that the County's interpretation of the ordinance would yield absurd results.

¶18 Unlike the case law relied upon by the County, here we do not have ongoing negotiations toward any new CBA. Here, there was never a subsequent CBA between the parties. We do not have a statutory bargaining scheme even remotely similar to that in place during the time period when the cases relied on by the County were decided. And perhaps most significantly, the statute governing municipal collective bargaining, and the permissible subjects thereof—WIS. STAT. § 111.70—was changed dramatically by Act 10. None of the rationales described by the courts in the context of prohibiting unilateral conduct during the hiatus between CBAs dealt with the sweeping statutory restrictions on bargaining of the type present here. We therefore conclude that none of the directives from prior case law are controlling, or of assistance, here.

¶19 Act 10 took effect on June 29, 2011. The statutes amended by Act 10 dramatically limited what municipal employers and represented general employees could bargain about and enumerated many subjects previously on the bargaining table about which the municipality was prohibited from bargaining. Employers were specifically prohibited from bargaining about anything that was not specifically "base wages" and even those were specifically capped by the consumer price index. Thus, in Wisconsin, the rationale for continuing the terms of a prior CBA during a hiatus can only apply to those "base wages," as collective

bargaining about everything else is specifically prohibited. Eligibility for a pension, a form of deferred compensation, is not a "base wage" as defined in WIS. STAT. § 111.70.

¶20 The circuit court found that beginning in 1994, the Rule of 75 was included in *every* CBA between the parties, including the CBA extended to March 31, 2009. That history strongly suggests that in September 2011, the County intended to protect the potential retirement economic benefit that the Rule of 75 represented for those employees described in the ordinance amendment.

¶21 Moreover, the language of the ordinance itself supports our conclusion. As stated, the County amended MCGO § 201.24(4.1)(2)(a) to permit retirement pursuant to the Rule of 75 for certain members of the County retirement system who were not covered by a CBA:

> 2.(a) A member who, on September 29, 2011 is employed and *is not covered by the terms of a collective bargaining agreement*, and whose initial membership in the retirement system under section 201.24 began prior to January 1, 2006, and who retires on and after September 1, 1993, shall be eligible for a normal pension when the age of the member added to his years of service equals seventy-five (75).

MCGO § 201.24(4.1)(2) (emphasis added).

¶22 The ordinance refers to "covered by the terms of" a CBA. The ordinance does not define "covered by." We look to dictionaries for common meanings relevant to the circumstances before us. Webster's Third New International Dictionary defines "cover" as "inclusion within the scope of a protective or beneficial plan." *See Cover*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr. 1961). The American Heritage Dictionary defines "cover," as a verb, as meaning "[t]o protect or shield from harm, loss or

danger." *See Cover*, THE AMERICAN HERITAGE DICTIONARY (3rd ed. 1992). Both definitions fit with the concept of a CBA, the purpose of which has generally been to protect or shield both labor and management from the harm, loss or danger caused by industrial strife. Historically, when the parties were "covered by" a CBA, it was in effect, governing their conduct and generally accomplished those goals.

¶23 Ordinances, like statutes, must be interpreted to avoid absurd results. *See* ***Walag v. Town of Bloomfield***, 171 Wis. 2d 659, 663, 492 N.W.2d 342 (Ct. App. 1992). We also presume legislative bodies act rationally. *See* ***Buhler v. Racine Cty.***, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966). If the County intended by the ordinance to *exclude* general county employees whose CBAs expired before the effective date, the County could have said so. The County was well aware of the expiration date as it had stipulated to it. However, the County chose instead to make the Rule of 75 available to general county employees "not covered by a collective bargaining agreement."

¶24 If, as the County argues, it was powerless under case law to act unilaterally because the expired CBA was still without a successor CBA, then either the County knowingly acted contrary to law when it amended the ordinance, or the County was empowered by the Act 10 amendments to act unilaterally on pension eligibility because it was not part of the "base wage." The County, perhaps a bit disingenuously, is now saying that the very category of employees it chose to protect in September 2011 (employees "not covered by" a CBA) does not apply here because the same people without a CBA were still represented by DC 48 on the date the ordinance was adopted. Simply still being represented by a union cannot magically revive the terms of a CBA which the parties agreed expired two years earlier, which is not the subject of continuing negotiations

toward a new CBA, and as to which the County is now prohibited from bargaining on anything except a strictly limited "base wage."

¶25 For the foregoing reasons, we affirm the circuit court.

By the Court—Judgment affirmed.