COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP964 **Cir. Ct. No. 2005CV1152**

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

RACINE COUNTY AND KEVIN B. VAN KAMPEN, RACINE COUNTY FAMILY COURT COMMISSIONER AND DIRECTOR OF FAMILY COURT COUNSELING,

PETITIONERS-RESPONDENTS,

V.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 10, AFL-CIO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: WILBUR W. WARREN III, Judge. *Reversed and cause remanded*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 ANDERSON, J. The International Association of Machinists and Aerospace Workers, District 10, AFL-CIO appeals from a circuit court order

reversing the arbitrator's determination that Racine County and Kevin B. Van Kampen, Racine County Family Court Commissioner and Director of Family Court Counseling, violated the terms of the collective bargaining agreement between the Union and the County. We conclude the arbitrator properly held that the County violated the agreement by orchestrating the retirement of two of its social workers/case managers and negotiating their return as independent contractors and by laying off a social worker/case manager and replacing her with another independent contractor social worker/case manager that had previously been employed by the County. We reverse the order of the circuit court and remand the case so the court may reinstate the arbitrator's decision.

¶2 In the Fall of 2003, Donald LaFave and Judith Berndt, both Family Court social workers/case managers, were advised that their positions would be eliminated and if they chose not to exercise their bumping rights they would be placed on lay-off status. The County advised Janet Vuvunas, another social worker/case manager, that her position was being reduced to part-time and that if she did not accept part-time status or exercise her bumping rights, she would also be placed in lay-off status. The collective bargaining agreement expressly states that it covers "Social Workers/Case Managers who work in family court."

¶3 Around this time, Van Kampen met with LaFave, Berndt and John Engel, a retired County social worker supervisor. Van Kampen advised the social workers/case manager that the County was not going to fill the three positions, but that the County Executive directed him to continue to provide the statutorily-mandated counseling services "off the levy" by entering into individual contracts with social workers/case managers. At the behest of the county corporation counsel, Van Kampen also discussed setting up limited liability corporations with the social workers/case managers.

¶4 Wisconsin pension law required County employees to be retired from the County for a period of one month before providing services under contract with the County. LaFave had been employed by the County since 1967 and had been part of Family Court Counseling Services since 1978. He was able to retire on December 30, 2003. The parties agreed that Berndt would stay on longer as an employee to allow her to reach retirement age. She retired effective February 6, 2004. Vuvunas elected not to accept part-time status or to bump into another position and therefore was placed in lay-off status.

¶5 In February and March 2004, LaFave and Berndt entered into Family Court Counseling Services Agreements and resumed working for the county as independent contractors. Both LaFave and Berndt worked in offices in the Family Court Services area where they had been working prior to their retirement, Van Kampen continued to supervise them, they carried out their preretirement job responsibilities and their wages remained the same. As retirees, they were entitled to health insurance benefits, but the county did not pay employment taxes or provide other benefits.

¶6 In March, the Union filed a grievance against the County and the parties proceeded to arbitration. The arbitrator framed the issue as: "Did the [County] violate the provisions of the parties' Collective Bargaining Agreement when it entered into Services Agreements … with retired employees? If so, what is the remedy?" The Union argued that the County engaged in a subterfuge resulting in bargaining unit work being performed pursuant to individual contracts and in improper lay-offs. The County responded that the parties' collective bargaining agreement permits the process it followed in this case.

¶7 The arbitrator sustained the grievance, confining its discussion to the County's violation of terms of the agreement. The arbitrator held that the County improperly displaced three bargaining unit positions in violation of the agreement. The arbitrator found that the County did not eliminate two and reduce one of the social worker/case manager positions as it claimed. Rather, the County replaced those bargaining unit positions with the identical service provided under individual contracts in order to take the positions off of the tax levy. The arbitrator found that the County orchestrated LaFave's and Berndt's retirement, and the execution of Service Agreements that provided them with the same compensation they had been receiving and work they had been performing as employees for years. The arbitrator also determined that LaFave's, Berndt's and Engel's Service Agreements deprived Vuvunas of an opportunity to be fully employed in her position.

¶8 The arbitrator ordered the County to "cease and desist from continuing existing Service[s] Agreements or entering into new Agreements which displace Court Services Social Worker/Case Manager bargaining unit positions." The arbitrator further required the County to make the Union whole for damages which had been sustained including loss of dues, expenses to pursue this matter, and loss of wages and benefits without loss of seniority. The County filed a motion to vacate the arbitration award in the circuit court. The circuit court granted the motion and the Union now appeals.

¶9 On appeal, the Union rightly stresses the high deference a reviewing court must grant an arbitrator's award. The standard for our review of the arbitrator's decision is the same as the circuit court's, and we review the arbitrator's decision without deference to the decision of the circuit court. ***City of***

Madison v. Local 311, Int'l Ass'n of Firefighters, 133 Wis. 2d 186, 190, 394 N.W.2d 766 (Ct. App. 1986).

¶10 The scope of this court's review is limited. *See* ***City of Oshkosh v. Oshkosh Pub. Library Clerical & Maint. Employees: Union Local 796-A***, 99 Wis. 2d 95, 103, 299 N.W.2d 210 (1980). We presume the arbitrator's decision is valid, and we disturb that decision only where its invalidity is shown by clear and convincing evidence. ***Id.*** at 102-03. Essentially, the court's role is supervisory in nature—to ensure that the parties receive what they bargained for when they agreed to resolve certain disputes through final and binding arbitration. ***Id.*** at 103. Courts must resist the temptation to "reason out" the arbitrator's award. If, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct, judicial inquiry ceases and the award must be affirmed. Thus, courts may not overturn an arbitrator's decision for "mere errors of law or fact, 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.'" ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988) (citation omitted). These narrow grounds for overturning an arbitrator's award are echoed in WIS. STAT. § 788.10(1) (2005-06).[1] ***Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d at 586. Applying these principles here, we conclude that the circuit court improperly reversed the arbitrator's award.

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

¶11 The arbitrator determined the County's actions violated the Union Recognition, Seniority and Management provisions and thereby undermined the entire purpose of the agreement. The Recognition provision extends the agreement's protections to social worker/case manager bargaining unit positions. The Seniority provision dictates that employees will be laid off by seniority within organizational units. The transfer of work customarily performed by social workers/case managers in the bargaining unit to outside of the bargaining unit means a loss of job opportunities and seniority protection for the remaining employees in the event of layoffs of Union members. Thus, the County's action undermines the entire purpose of a collective bargaining agreement, which is to provide employees with a measure of job security through rules governing layoffs, retiring and transfer.

¶12 The County's argument rested heavily on the management provision. The management provision authorizes the County to assign work, to direct workers and generally to conduct its affairs in the interests of efficiency and effectiveness. As we see it, the arbitrator determined that the County could only exercise its powers under the provision within the framework of the limitations imposed by the other provisions in the contract. The arbitrator further interpreted the agreement as not containing an express or implied reservation of management rights to save costs in the manner in which the County tried to save labor costs in this case. This interpretation of the agreement is certainly within the realm of reason.

¶13 The County maintains that the arbitrator failed to issue a final or definite award and, as a result, we must vacate the award. *See* WIS. STAT. § 788.10(1)(d). The County directs our attention to the fact that the arbitrator retained jurisdiction so that the parties could negotiate the details of the

ramifications of the award under its direction if necessary. That the arbitrator saw fit to retain jurisdiction for these purposes does not trouble us. It is common for arbitrators to retain jurisdiction so that their awards are properly carried out and disagreements about the award can be resolved. FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 333 n.195 (Alan Miles Ruben ed., 6th ed. 2003). This makes perfect sense, as it ensures that grievances are resolved within the parties' own system of self-governance. ***Id.*** at 337.

¶14 In sum, there plainly is no "perverse misconstruction," "positive misconduct," a "manifest disregard of the law," "illegal award," or violation of "strong public policy" such that the award must be vacated. The arbitrator narrowly defined the scope of its review as being one of contract interpretation. The arbitrator's decision fits squarely within the language of the parties' agreement.[2] The trial court erred as a matter of law in vacating the arbitrator's decision. We reverse and remand the case to the circuit court to reinstate the arbitrator's decision.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[2] The County raises statutory and constitutional issues that fall outside the scope of our review. The arbitrator limited its discussion to the terms of the agreement and we, therefore, do the same.

¶15 NETTESHEIM, J. (*dissenting*). Read in a vacuum, the majority opinion appears to make sense. But I find the opinion wanting because it fails to address the trial court's rationale for overturning the arbitrator's ruling in favor of the union. Because I agree with the trial court's holding that the arbitrator exceeded her powers by failing to consider relevant statutory law, I respectfully dissent.

¶16 The trial court held that the arbitrator had exceeded her powers by issuing an award that failed to consider the statutory implications of WIS. STAT. § 767.405.[1] Section 767.405(1m) creates the position of director of family court services and directs the circuit court judges of the county to appoint the director, subject to the approval of the chief judge. Pursuant to this authority, the Racine County circuit judges appointed Van Kampen as director. Section 767.405(2)(b) authorizes the director to contract "with a person or public or private entity to perform mediation and to perform any legal custody and physical placement study services" authorized under the statute. Pursuant to this authority, Van Kampen contracted with LaFave, Berndt, and Engel after the county eliminated the original positions covered under the collective bargaining agreement.

[1] The trial court's decision cites to WIS. STAT. § 767.11(2)(b) (2003-04). This statute was later renumbered by 2005 Wis. Act 443, § 57, as WIS. STAT. § 767.405(2)(b). The wording of the former and current statute remains the same. I will refer to the statute by its current number.

¶17 Based on WIS. STAT. § 767.405, the trial court saw this case not merely as a contract dispute between the union and the county, but also as a case that raised separation of powers concerns. The court correctly observed that director Van Kampen serves as an agent of the judicial branch of government and that the statute vests discretion in the director as to how the services mandated by the statute should be delivered. The court also correctly noted that when initially filling the positions at issue, Van Kampen could have used independent contractors and that the employees actually hired were not "bargained for positions." From this, the court concluded "that the Director had the authority under the statute to either hire employees to do the work, contract out to do the work or to combine the two methods of providing services in his discretion, subject only to the oversight of the Judiciary that appointed him."

¶18 In support of its ruling, the trial court cited to, among other authorities, ***Iowa County v. Iowa County Courthouse/Social Services Employees, Local 413***, 166 Wis. 2d 614, 480 N.W.2d 499 (1992), where the supreme court held that a collective bargaining agreement could not trump the statutory authority of a circuit judge to appoint a register in probate. ***Id***. at 618. There, the position of register in probate position was included in the bargaining unit represented by the union. ***Id***. at 617. When the position became vacant, the circuit judge appointed a successor register in probate pursuant to the statutory authority conferred by WIS. STAT. § 851.71. As a result, the vacancy was not posted as required by the collective bargaining agreement. ***Iowa County***, 166 Wis. 2d at 617. On judicial challenge, the circuit court held that the judicial power to appoint a register in probate "may not be superseded by a collective bargaining agreement." ***Id***.

¶19 On appellate review, the supreme court agreed. The court noted that a circuit court judge, although the hiring authority, is not a county employee or an agent of the county and therefore does not act in the role of a municipal employer. ***Id***. at 619-20. As such, the judge "is not a party to and cannot be bound by the provisions of a collective bargaining agreement entered into by Iowa County and [the union] which purport to regulate the appointment of a register in probate." ***Id***. at 620.

¶20 I see this case as an ***Iowa County*** case. Like the ***Iowa County*** register in probate position, the positions at issue here were covered by the collective bargaining agreement. Like the statutory authority conferred by WIS. STAT. § 851.71 on the ***Iowa County*** circuit judge to appoint a register in probate, here director Van Kampen, acting as an agent of the judiciary, has the statutory authority under WIS. STAT. § 767.405(2)(a) to employ staff to provide the mandated statutory services. And finally, like the ***Iowa County*** judge, director Van Kampen, although the hiring authority, is not the employer. Thus the question posed here is the same as that in ***Iowa County***—when the positions became vacant, was Van Kampen bound by the collective bargaining agreement, or was he free to exercise his statutory authority to employ outside the agreement? ***Iowa County*** answers in favor of the latter.[2]

[2] The trial court also cited to ***Barland v. Eau Claire County***, 216 Wis. 2d 560, 575 N.W.2d 691 (1998), where the supreme court again held that an employment decision within the exclusive province of the judiciary was not controlled by a collective bargaining agreement. ***Id***. at 566. ***Barland***, however, was premised on the inherent powers of the judiciary, not any statutory or constitutional provision. ***Id***. at 565. The trial court also cited to ***Crawford County v. WERC***, 177 Wis. 2d 66, 501 N.W.2d 836 (Ct. App. 1993), where the court of appeals extended the reasoning of ***Iowa County*** to registers of deeds and the clerks of courts, but not to district attorneys. ***Id***. at 73, 79.

¶21 I also agree with the trial court's determination that the county's reasons for creating the vacancies are irrelevant to the legal issue. Whether the county orchestrated the elimination of the positions for fiscal reasons or otherwise, it remains that director Van Kampen, acting on behalf of the Racine County circuit judges, had the statutory authority to hire replacement staff to carry out the statutorily mandated duties of the family court services agency.

¶22 For these reasons, I respectfully dissent.