STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MADISON METROPOLITAN SCHOOL DISTRICT, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE; THE BOARD OF EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT, CITY OF MADISON, ET AL.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 159-417

Decision No. 15007-B

BEFORE: HON. GEORGE R. CURRIE, Reserve Circuit Judge

This is a proceeding under sec. 111.07(7), Stats., and ch. 227, Stats. to review an order of the respondent commission (hereafter WERC) dated June 2, 1977, which ordered the petitioners to cease and desist from refusing to comply with an arbitration award dated August 16, 1976, and to take specified affirmative action to comply therewith.

STATEMENT OF FACTS

The relevant collective bargaining agreement between petitioner school district and the intervenor Madison Teachers Incorporated (hereafter MTI) was dated January 1, 1975, and provided a calendar of required attendance work days for the 1975-1976 school year. This calendar identified December 12, 1975 as a work day.

Negotiations for a new contract to succeed the 1975 agreement had commenced in May, 1975, between petitioner Board of Education (hereafter the Board) and MTI and continued over a long period of time. Finally on December 5, 1975, the Board filed a petition with WERC alleging that a deadlock existed and that fact-finding should be ordered pursuant to sec. 111.70(4)(c)3, Stats. Also in December MTI planned and organized a sham, "sick-in" to bring pressure on the Board with respect to the stalled negotiations for a new contract. MTI asked its members to report in sick on December 12th, and prior to December 12th a large proportion of its membership indicated to their principals that they would not report for duty on that date. MTI advised the public at 3:00 p.m. on December 11th that it was apparent that an extremely high number of teachers would fail to report for work on Friday, December 12th. As a result of these actions by MTI the Board decided to close the district's schools on December 12th, and announcement of this decision was made over the local media during the evening of December 11th. The arbitrator subsequently found that the closing of the schools on December 12th by the board "was clearly reasonable and directly related to MTI's successful "sick-in campaign."

The Board subsequently did not pay the teachers in the bargaining unit for the day of December 12, 1975, and this included those on sick and other leaves of absence, who would have been paid for that day under the collective bargaining agreement if schools had been open on that day.

Commencing on January 5, 1976, MTI engaged in a strike and another ten school days originally provided for in the collective bargaining agreement were lost due to the closing of the schools on those ten days. Subsequently, MTI proposed there be eleven additional make-up days of school held, and this was compromised by the Board and MTI agreeing to have eight additional days of make-up days of school.

On March 16, 1976, MTI filed a grievance under the grievance procedure provided in the collective bargaining agreement for a class of teachers who were on sick or other paid leave of absence status on December 12, 1975, asking that they be paid for that day. The Board denied the grievance and MTI took the matter to arbitration and Professor June Weisberger was selected as arbitrator to hear and determine the grievance, all as also provided in the collective bargaining agreement. On August 16, 1976, Arbitrator Weisberger made this award:

> "Based upon a careful consideration of the evidence, arguments and briefs submitted by the parties, the undersigned makes the following award:
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> The School District is directed to make grievants whole for the deduction of salary and other fringe benefits lost for their absences on December 12, 1975. Grievants covered by this award shall be those already stipulated to by the parties but shall exclude grievant John Chvala."

The reason Chvala was denied relief is because he at the time was president of MTI and had been involved in planning the sick-in. The other members of the class had not been so involved in the sick-in.

The Board ignored the arbitrator's award and took no steps to comply therewith. Finally on October 20, 1976, MTI filed a complaint with WERC alleging that the Board was committing a prohibited labor practice by refusing to comply with the arbitrator's award. A hearing was held on November 18, 1976 regarding the complaint. The Board answered the complaint, alleging affirmatively that the award of Arbitrator Weisberger exceeded her authority and should be vacated.

The Examiner concluded that the arbitration award was based upon the arbitrator's interpretation and application of the terms of the collective bargaining agreement existing between the parties and that accordingly the award was within her authority. He found the Board's refusal to comply with the award a prohibited labor practice and ordered the District to cease and desist from refusing to comply with the award. The Board filed a petition for review by the Commission of the Examiner's findings of fact, conclusions of law and order. WERC then issued its order affirming the examiner's decision which order is the subject of this review.

THE ISSUES

The briefs submitted raise these issues:

(1) What is the standard of court review to be applied in this matter?

(2) Is such standard of review affected by the fact that petitioners did not seek court vacation of the award within the three month period provided by sec. 298.13, Stats?

(3) After applying the proper standard for review, should WERC's order be set aside by this court on the basis that the arbitrator exceeded her powers?

Petitioner's brief states that the issue to be decided is:

> "Whether the arbitration award rendered by June Weisberger violates the statutory standards set out in section 298,10 of the Wisconsin Statutes."

However, whether this court is to determine this issue de novo is dependant on how Issue 1 above is resolved.

THE COURT'S DECISION

A. Standard of Review to be applied by Court.

WERC's Conclusion of Law 1 reads:

"That the award of Arbitrator Weisberger entered on August 16, 1976, was not imperfectly executed and was based upon her interpretation and application of the terms of the collective bargaining agreement existing between the parties and that accordingly said award was within Arbitrator Weisberger's authority."

The parties are in disagreement as to whether the court is required to make the determination of the issue of whether or not the arbitration award was based upon an interpretation of the collective bargaining agreement as if it were faced with the issue in a proceeding brought under ch. 298, Stats. for vacation of the award. Petitioners assert that the standard of review is that set forth in ch. 298, while the intervenor MTI argues the standard of review is that to be employed in any review arising under ch. 227, Stats.

MTI contends the standard of review under ch. 227 is that if there exists any rational basis for an agency's determination the court must affirm. However, the case cited in support of this contention is Milwaukee v. WERC, 21 Wis. 2d 709, 259 N.W. 2d 263 (1976) where the issue was whether WERC had properly construed a statute. Even in statutory interpretation cases where the agency's interpretation is one of first instance the Supreme Court would not apply the "any rational basis" test, but holds the reviewing court is to award the agency's interpretation "due weight". Beloit Education Assoc. v. WERC, 73 Wis. 2d 43, 67-68, 242 N.W. 2d 731 (1976).

The court is satisfied that the standard of review it is to follow in this case is that set forth in WERC v. Teamsters Local No. 563, 75 Wis. 2d 602, 610, 250 N.W. 2d 696 (1977) as follows:

"In Reviewing the WERC's order, the circuit court was, in essence, reviewing the award of an arbitrator and must follow the statutory standards for court review of arbitration awards. If the standards of secs. 298.10 and 298.11 were not violated by the arbitrator's award, the circuit court should not have set it aside."

In Glendale Prof. Policemen's Assoc. v. Glendale, 83 Wis. 90, ____ N.W. 2d ____ (1978), the petitioner association invoked the rule that the standard of review for rulings of WERC is whether the ruling constitutes a rational interpretation of a statute. The Supreme Court rejected this contention and stated (at p. 100):

"This appeal does not challenge a WERC order but an award of an individual WERC arbitrator. Judicial review of arbitration awards is governed by the standards of review, contained in sec. 298.10, Stats., and in the common law. The standards of review of arbitration awards provide that in the circumstances of this case the arbitrator's award is entitled to review de novo by the reviewing court under sec. 298.10(1)(d), Stats."

B. Failure of Petitioners to Seek Review Under Sec. 298.13, Stats.

Sec. 298.13, Stats., provides that a notice of a motion in court to vacate an arbitration award must be served on the adverse party or his attorney within three months after the award is filed or delivered. MTI contends that where, as here, the party against whom the award has been made does not seek court review of the award within this three month period the court should limit its review to a determination of whether WERC's conclusions of law are reasonable. While there is much logic to this contention neither the legislature nor the Supreme Court by any decision have seen fit to adopt such a rule. This court does not think it is within its province to do so in this case.

C. Did Arbitrator Exceed Her Power?

Sec. 298.10(1), Stats. specifies four specific bases for the setting aside of an arbitration award. The fourth of these bases covered by paragraph (d) of that subsection reads:

"Where 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."

The petitioners in their answer to the complaint filed by MTI with WERC set forth this affirmative defense:

"The Arbitrator exceeded the powers conferred upon her by the Collective Bargaining Agreement and so imperfectly executed them that a mutual, final and definite award upon the subject matter of the above-mentioned grievance was not made."

Petitioners' brief confines itself to the issue of the arbitrator exceeding her powers. This brief cites no provision in the collective bargaining agreement defining the power of the arbitrator and the court can find none in the agreement. Thus resort must be had to court decisions to ascertain what the powers of an arbitrator are who is appointed to decide a grievance arising under a collective bargaining agreement.

The principles to be kept in mind when courts are asked to set aside an arbitrator's award are well set forth in United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. (2d) 424 (1960), one of the three cases making up "the Steelworkers Triology," as follows:

". . . The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards . . . the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process . . . When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award . . . plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final for in reality it would almost never be final . . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his . . ." (Emphasis supplied)

Also pertinent in the Wisconsin Supreme Court's statement in Dehnart v. Waukesha Brewing Co., 17 Wis. 2d 44, 51, 115 N.W. 2d 490:

"While this court may 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."

This statement in the Dehnart case was quoted with approval in WERC v. Teamsters Local No. 563, supra, at page 610.

With these principles in mind the court will now examine petitioners' argument as to why it contends that the arbitrator exceeded her powers. Petitioners stress the following facts in support of their position: Under the collective agreement employees on paid leaves of absence, such as the grievants were, did not receive pay for days not scheduled to be worked under the calendar for the school year 1975-1976

set forth in the agreement. The arbitrator found: "Although MTI . . . raised the question as to whether the School District acted reasonably in closing school on December 12, 1975, this line of speculation cannot be seriously pursued." After the strike was settled MTI asked for the scheduling of eleven make-up days of school to cover December 12, 1975, and the ten school days lost because of the strike, and this issue was settled by the two parties agreeing that eight make-up school days be scheduled. The arbitrator in her opinion stated, "the arbitrator does not believe that the subsequent negotiations between the parties concerning make-up days is relevant to this proceeding because payment to grievants for their absences on December 12, 1975 will not result in a windfall to them (i.e., an amount in excess of their negotiated school year salary)."

Based on these facts and certain provisions in the collective bargaining agreement, petitioners' brief advances this argument:

> "The parties also negotiated a contingency days' provision (snow days) into the calendar. Essentially this provision accorded the Board with authority to cancel school due to inclement weather and identify additional school days in June to make up for the days missed due to snow. The parties also negotiated several paid leave provisions. Section VI-A of the collective bargaining agreement refers to 'Absence allowance' and enumerates the various reasons for which one may be absent on a school day and suffer no deduction of pay. The essence of this section is an indemnity provision to make an employee whole when (legitimate) illness etc. prevents him from earning his normal pay. These contract provisions mean that a man is to be paid not because he is sick, etc. but because (and when) his illness prevents him from working. E.g., he would not be entitled to sick pay during an off period, such as a weekend, nor would an individual be entitled to demand such sick pay for an illness which befell him during his vacation period. Viewed realistically and fairly, the essence of the parties' agreement was to provide pay for the employee who is unable to work because of illness, not for the employee who happens to be or becomes ill at a time when because of a successful phony Union sick-in resulting in a school shut-down there is no work opportunity for him or any other member of the bargaining unit. If the grievants had been physically able to work, there would have been no work for them because schools were closed, as a direct result of their Union and co-workers phony sick-in. There were no earning opportunities for any of the members of the bargaining unit represented by MTI because of the action of MTI.
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> The parties have provided by specific agreement that when an act of God disrupts the school calendar that the school day missed will be made up in order to maintain normal pay. In the case under review it must be remembered that the conduct of the employees covered by the same collective bargaining agreement was what triggered the entire problem. The Board submits that it takes a perverse misconstruction of the parties' agreement to find that the indemnity provisions of the parties' negotiated agreement apply when one party to the agreement engages in illegal concerted action to disrupt the calendar agreed to and then fails to achieve an agreement that the days missed will be made up."

The court is of the opinion that the gist of this argument is that the arbitrator erroneously interpreted the collective bargaining agreement including what amounted to an amendment thereof by the subsequent agreement to have eight additional make-up days of school scheduled for the 1975-1976 school year. The arbitrator in holding the subsequent negotiations with respect to make-up days were not relevant to the grievance dispute was nevertheless making a contract interpretation. By arguing this was a perverse interpretation of the contract does not make it so. Under the authorities cited above this court is not to set aside the instant arbitration award because of a contract interpretation claimed to be erroneous as a matter of law.

In answer to petitioners' contention that the award added to or subtracted from the collective bargaining agreement, the court quotes this statement from

WERC Hearing Examiner Schoenfeld's memorandum accompanying his findings of fact, conclusion of law and order:

> "Arbitrator Weisberger found that under the contractual language the grievants qualify for pay on December 12, 1975, and that the contract fails to provide any authority for the Respondent's action in deducting pay from the grievants' salaries for December 12, 1975. The Examiner is convinced that Arbitrator Weisberger's interpretation of the contract draws its essence from the agreement. Arbitrator Weisberger found that the '36 grievances had completed all the requirements to qualify for paid leave absences on December 12 before the decision was made to close school.' Arbitrator Weisberger also found that 'there is no contractual or equitable justification to withhold their salaries . . .' (emphasis own). It is apparent to the Examiner that Arbitrator Weisberger was interpreting and enforcing the collective bargaining agreement when making her findings and award in which she directs Respondent to make the grievants whole for the deduction of salary and other fringe benefits lost for their absences on December 12, 1975."

Let judgment be entered affirming WERC's order which is the subject of this review.

Dated this 24th day of October, 1978.

By the Court:

George R. Currie /s/
Reserve Circuit Judge