

This is the corrected
decision. PGD
1-18-83

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JAN 11 1983

A party may file with the Supreme Court a petition to review an adverse decision of the Court of Appeals pursuant to s. 808.1 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 81-1869

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

WISCONSIN COUNCIL OF COUNTY AND
MUNICIPAL EMPLOYEES (WCCME),
AFL-CIO, LOCAL 1752D,

Petitioner-Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Decision No. 17576

Respondent.

APPEAL from a judgment of the circuit court for
Marinette county: CHARLES D. HEATH, Judge. Affirmed.

Before Foley, P.J., Dean and Cane, JJ.

DEAN, J. The Wisconsin Council of County and Municipal Employees, Local 1752D (Union) appeals from a judgment upholding the declaratory ruling of the Wisconsin Employment Relations Commission (WERC) affirming an arbitration award. The Union alleges that (1) the arbitration award contained an unlawful retirement provision; (2) the arbitrator decided an issue upon which tentative agreement had previously been reached and stipulated; (3) the arbitrator permitted unlawful

ex parte contact; and (4) the arbitrator decided an issue that was not submitted and failed to decide an issue that was submitted. Because the WERC's declaratory ruling concerning the arbitrator's award is correct, we affirm the trial court.

The Union is the exclusive bargaining agent for individuals employed by the School District of Wausaukee (District). After unsuccessful collective bargaining negotiations, the arbitrator entered his decision adopting the District's final offer. The Union then filed a request for a declaratory ruling with the WERC, alleging that errors in the decision invalidated the award. The WERC affirmed the arbitrator's award, declaring that the award was lawfully made pursuant to the arbitration statute, sec. 111.70, Stats., because it did not violate the standards set forth in Wis. Admin. Code, sec. ERB 31.18 (1978). The Union appealed the declaratory ruling, requesting a judicial order to hold the provisions of the award null and void. The trial court affirmed the WERC.

In reviewing the trial court's decision affirming the WERC's decision, this court's scope of review is identical to that given to the trial court by sec. 227.20, Stats. See Boynton Cab Co. v. DILHR, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980); see also Sanitary Transfer & Landfill, Inc. v. DNR, 85 Wis.2d 1, 12, 270 N.W.2d 144, 149 (1978). The WERC's

findings of fact will not be reversed if they are supported by substantial evidence. See Boynton, 96 Wis.2d at 405, 291 N.W.2d at 855. Questions of law, including the construction, interpretation, or application of a statute are reviewable ab initio. See id. This court must accord due weight to the experience, technical competence, and specialized knowledge of the agency involved. Section 227.20(10), Stats; see Muskego-Norway Consolidated Schools Joint School District No. 9 v. WERB, 35 Wis.2d 540, 562, 151 N.W.2d 617, 628 (1967). Furthermore, the construction and interpretation of a statute by the administrative agency charged by the legislature with the duty of applying the law is entitled to great weight. See Libby, McNeill & Libby v. WERC, 48 Wis.2d 272, 280, 179 N.W.2d 805, 809 (1970). Standards concerning the lawfulness of an interest arbitration award are set forth in Wis. Admin. Code, sec. ERB 31.18 (1978).¹

The Union contends that the arbitrator included an unlawful retirement provision within the arbitrated contract and therefore the arbitrator committed prejudicial error in violation of sec. ERB 31.18(1)(c). The Union asserts that the retirement provision illegally excluded a group of Union cook members after the first year of the contract from coverage in the state's retirement fund established under ch. 41, Stats.,

and illegally provided for retroactive retirement coverage for the Union members back to 1977.

The WERC determined that the retirement provision was illegal because ch. 41 does not allow an employer to include some eligible employees and to exclude others because of occupational classification. The WERC concluded, however, that the arbitrator's error was not prejudicial under sec. ERB 31.18 because the District subsequently included all its eligible employees in its application for coverage under ch. 41, which the state accepted.² The WERC correctly concluded that the arbitrator's error was not prejudicial in violation of sec. ERB 31.18(1)(c). Because the Union's retirement provision was corrected to include the omitted cooks, no detriment occurred.

The WERC also found that the retirement provision did not provide for retroactive retirement coverage back to 1977. This finding is supported by substantial evidence. The District's final offer stated that the retirement proposal would be "effective upon acceptance by the State Retirement Fund." To be covered under the state retirement fund, the employer must apply to the state for coverage. The Department of Employee Trust Funds then determines whether the employer's application meets state requirements. The evidence shows that the arbitrator did not issue his award until October 9, 1978. The

administrator of the state employee trust fund testified that the earliest date of coverage for the Union members would have been January 1, 1979.

The Union contends that the arbitrator exceeded his powers by deciding health issues tentatively agreed to and stipulated for inclusion within the collective bargaining agreement by the Union and the District, but later submitted by the District in its final offer. The WERC concluded that the arbitrator did not exceed his powers by deciding the health insurance issues. We agree. An arbitrator does not exceed his powers if he decides issues that are disputed. See sec. 111.70(4)(cm)6d, Stats. Issues are disputed if they are contained within one of the bargaining parties' final offers to the arbitrator. See sec. 111.70(4)(cm)6a and 6d, Stats. The record does not indicate that the District and the Union agreed to limit their final offers to those items over which there had been no prior tentative agreement. Furthermore, there is no provision contained within sec. 111.70(4)(cm)6 prohibiting an arbitrator from deciding issues on which there had been tentative agreement, but later included in one of the bargaining parties' final offers. Additionally, the District's final offer contained different health insurance issues not stipulated and therefore disputed.

The Union contends that the arbitrator committed prejudicial misconduct because the District was given a formal opportunity to respond to the Union's exhibit, but the Union was not given a similar opportunity to respond to the District's exhibit. The WERC found that the Union Had notified the arbitrator of the errors in the District's delayed exhibit. It concluded that although the arbitrator committed misconduct by not allowing the Union a formal opportunity to comment on the District's exhibit, this conduct was not prejudicial and therefore was not a violation of sec. ERB 31.18(1)(c). The record indicates that prior to the arbitrator's decision, the Union made the arbitrator aware of the errors in the District's exhibit.

The Union finally contends that the arbitrator exceeded his powers by deciding a holiday issue on eligibility not submitted for arbitration and also by not deciding a disputed holiday issue concerning the number of holidays that the Union members were entitled to. The WERC found that the District had raised the issue of holiday eligibility. This finding is supported by the evidence. The evidence indicates that the holiday eligibility issue was contained within the District's final offer.

The WERC also found that the arbitrator's ultimate decision of which final offers to accept did not hinge on the holiday proposal. The WERC therefore concluded that the arbitrator's failure to address the holiday issue concerning the number of holidays the Union members were entitled to was not prejudicial to the arbitrator's ultimate award under sec. ERB 31.18. The WERC's finding that the arbitrator's decision did not hinge on the holiday proposal is supported by the evidence, and we therefore agree with its conclusion. The evidence indicates that the holiday proposal was only one of twelve disputed items submitted to the arbitrator for resolution. Other disputed items included such major issues as wages; retirement coverage; health, dental and life insurance; and the contract's duration.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

A P P E N D I X

- 1 Wis. Admin. Code, § ERB 31.18 (1978), provides in pertinent part:

In determining whether an interest arbitration award was lawfully made, the commission shall find that said award was not lawfully made under the following circumstances:

....

(c) Where the mediator-arbitrator was guilty of misconduct in refusing to conduct an arbitration meeting upon request or refusing to postpone the meeting upon sufficient cause shown, or in refusing to hear supporting arguments or evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

- 2 In an alternative line of analysis, the WERC concluded that the retirement provision's illegality could not be used to void the entire arbitration award because of a separability provision agreed to by the District and the Union. This provision provided that the contract's legality would not be affected by any part of the contract that was held to be illegal. Because the WERC correctly concluded that the arbitrator's misconduct was not prejudicial, we need not address the WERC's alternative conclusion.