CIRCUIT COURT BRANCH 15
JUDGE: Stuart A. Schwartz

MADISON TEACHERS, INC. (Supportive Educational Employees), Complainant,
vs.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

DECISION NO. 28254-A
Case No. 95-CV-0067

MADISON TEACHERS, INC. (Educational Assistants), Petitioner,
vs.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent.

DECISION NO. 28252-A
Case No. 95-CV-0068

NOTICE OF ENTRY OF DECISION AND ORDER

TO: Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, 20 North Carroll Street, Madison, WI 53703

Ms. Malina R. P. Fischer, Lathrop & Clark, 122 West Washington Avenue, Suite 1000, Post Office Box 1507, Madison, WI 53701-1507

PLEASE TAKE NOTICE that a decision and order affirming the decisions of the Wisconsin Employment Relations Commission, of which a true and correct copy is hereto attached, was signed by the court on the lst day of October, 1996, and duly entered in the Circuit Court for Dane County, Wisconsin, on the lst day of October, 1996.

Notice of entry of this decision and order is being given pursuant to secs. 806.06(5) and 808.04(l), Stats.

Dated this 9th day of October, 1996.

JAMES E. DOYLE, Attorney General

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DECISION AND ORDER

Petitioner Madison Teachers Inc. (MTI), commenced these consolidated proceedings on January 9, 1995, seeking judicial review of two declaratory rulings made by the State of Wisconsin Employment Relations Commission (WERC). MTI contends that the decisions of WERC were erroneous as a matter of law, and denied to MTI a meaningful review of the underlying arbitrators' awards.

BACKGROUND

MTI is the exclusive collective bargaining representative for two bargaining units of workers employed by the Madison Board of Education, Joint School District No. 8 (the "District"). The Supportive Educational Employees ("MTI-SEE") unit, consists of employees engaged in secretarial, clerical, technical and related duties. The Educational Assistants ("MTI-EA") unit, consists of educational assistants.

In 1992, MTI and the District were deadlocked in negotiations over wages to be paid under the next two-year collective bargaining agreement. MTI was seeking increases of 4.34 percent for the 199293 school year, and 4 percent for the 1993-94 school year. The District proposed increases of 4 and 3.5 percent, respectively. Pursuant to Sec. 111.70(4)(cm), Stats., MTI filed petitions for interest arbitration in each action. After an investigation, WERC determined that the parties were at an

impasse, and arbitration proceedings were commenced.

The parties submitted their final offers in March 1993. The offers were certified in April 1993, and two arbitrators were appointed. Arbitrator Richard Tyson ("Tyson") was named to resolve the MTI-SEE dispute, and Arbitrator Frank P. Ziedler was named to resolve the MTI-EA dispute.

In the MTI-SEE case, a hearing was held on June 2, 1993. Arbitrator Tyson's award accepting the District's final offer was issued August 31, 1993. In The MTI-EA case, a hearing was held on July 27, 1993, and Arbitrator Ziedler's award was issued on October 20, 1993. Ziedler's award was also in favor of the District's final offer. At the hearings the parties were given opportunities to present exhibits and testimony, and outline their arguments. In both cases the parties submitted briefs after the hearings.

In stating the rationale for their decisions, both arbitrators mentioned recent budget restraint legislation; this was understood by the parties to refer to 1993 Wisconsin Act 16 ("Act 16"), which was signed into law on August 10, 1993. Arbitrator Ziedler's award also made express reference to the outcome of the earlier award issued by Arbitrator Tyson, indicating that it was a change in an internal factor in the District's favor.

MTI sought a declaratory ruling from WERC that the arbitrators exceeded their powers by considering Act 16 without giving the parties an opportunity to brief that issue directly. MTI requested that the awards be revised or remanded. See., Wis. Adm. Code, Sec. ERC 32.16(l)(d), and 32.17(3).

WERC issued its ruling in each case on December 9, 1993. WERC found that the awards were lawfully made and did not require modification. WERC's rulings included a finding that the parties had fully litigated the impact or potential impact of the fiscal constraint legislation at issue.

MTI filed this consolidated petition on January 9, 1995, seeking review of WERC's decision.

MTI requests that the decision of WERC he reversed because the standard of review WERC applied to the arbitrator's decision was too deferential, and did not adequately scrutinize the arbitrators' reference to and reliance on the possible effects of 1993 Wisconsin Act 16. MTI asserts that the arbitrators "exceeded

[their] powers, or so imperfectly executed them that a mutual, final and definite interest arbitration award was not made." Wis. Adm. Code, ERC 32.16(l)(d).

1. Standard of Review

The issue before this court is not whether MTI should have been given an opportunity to brief a particular issue, but whether WERC's rulings are supported by substantial evidence in the record. The sole issue before WERC was whether the arbitrators had exceeded their powers by including in the calculus of their decisions the possible effects of certain fiscal legislation.

This action was brought pursuant to Sec. 227.52 and 227.57, Stats. Chapter 227, Wis. Stats., outlines the procedures applicable to the review of a final decision of an administrative agency. Statutory certiorari review is to be conducted based on the record of the proceedings below. Sec. 227.57, Stats. The court is confined to the defects appearing upon the return, and evidence dehors the record, and contradicting it, is not permitted in the absence of statutory authority. *State ex rel. Grant School Dist. V. School Bd.*, 4 Wis. 2d 499, 504 (1958), citing *Morris v. Ferguson*, 14 Wis. 266, 268 (1861), other citations omitted.

Agency findings of facts will be upheld on appeal if the agency's findings are supported by substantial evidence. Sec. 227.57(6), Stats.; *Omernick v. Dept. of Natural Resources*, 100 Wis.2d 234, 250 (1981), cert. denied 454 U.S. 883 (1982). Substantial evidence includes such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gilbert v. Wisconsin Medical Examining Bd.*, 119 Wis. 2d 168, 195 (1984), citing *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418 (1979).

In contrast, application of an agency's findings of fact to a statute is a question of law warranting independent review by the court. *In the Matter of the Arbitration among Madison Landfills, Inc. v. Libby Landfill Negotiating Comm.*, 179 Wis.2d 815, 825 (Ct. App. 1993) , aff'd 188 Wis.2d 613 (1994). Questions of law are reviewable ab initio and are properly subject to judicial substitution of judgment. Sec. 227.57(5), Stats.; *American Motors Corp. v. ILHR Dept,* 101 Wis.2d 337, 353-54 (1981). Nevertheless, courts accord varying degrees of deference to an administrative agency's interpretation of a statute it has been legislatively charged to administer. *Carrion Corp. v. DOR*, 179 Wis.2d 254, 264-65 (Ct. App. 1993), citing *West Bend Educ. Ass'n v. WERC*, 121 Wis.2d 1, 11-12 (1984).

WERC's ruling required an interpretation of statutory interest arbitration procedures, including the criteria contained in Sec. 111.70(4)(cm)(7), and Wis. Adm. Code, Sec. ERC 32.16. The application of a statute to a particular set of facts is a question of law. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 417 (1979). The general rule in Wisconsin is that "the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it is entitled to great weight." *Blackhawk Teachers' Fed'n Local 2308 v. WERC*, 109 Wis. 2d 415, 421 (Ct. App. 1982), citing *Beloit Education Ass'n v. WERC,* 73 Wis. 2d 43, 67 (1976). The highest degree of deference should be paid to an agency's interpretation of a statute when that interpretation "is of long standing" or "entails its expertise, technical competence and specialized knowledge," or when "through interpretation and application of the statute, the agency can provide uniformity and consistency in the field of its specialized knowledge." *Carrion*, at 264-5. If the agency's interpretation is one among several reasonable interpretations that can be made which are consistent with the purpose of the statute, a court must affirm the agency's choice. *DeLeeuw v. ILHR Dept*., 71 Wis.2d 446, 449 (1976). Courts, however, should not defer to an agency's interpretation of a statute when the court finds that the agency's interpretation "directly contravenes the words of that statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis." *Carrion*, 179 Wis.2d. at 265, citing *Lisney v. LIRC*, 171 Wis. 2d 499, 506 (1992).

This standard of review is subject to various exceptions, as for instance, when the agency is interpreting a statute for the first or nearly the first time, or if there is no rational basis for the agency's conclusions. *Blackhawk*, at 422, citing *Beloit*, at 67-68. In this case, WERC's asserts that it has acquired substantial experience in reviewing arbitration awards under the Municipal Employment Relations Act, Sec. 111.70 - 111.77, Stats., this assertion is undisputed by MTI, and appears to be supported by the various rulings cited by WERC.

Wisconsin courts have repeatedly held that an arbitrator's award is presumptively valid, and will be disturbed only where invalidity is shown by clear and convincing evidence. *Stradinger v. City of Whitewater*, 89 Wis. 2d 19 (1979), citing to *Scherrer v. Brulington Memorial Hospital*, 64 Wis. 2d 720, 735 (1974). This was the standard employed by WERC to evaluate the arbitrators' awards.

DISCUSSION

MTI contends that WERC erred when it relied on *Scherrer* to establish the standard of review to be used on the underlying interest arbitration awards. MTI claims that interest arbitration is entitled to a qualitatively different standard of review than that accorded to rights arbitration. According to MTI, the *Scherrer* standard is inappropriate for interest arbitration awards because unlike rights arbitration, the parties have not yet bound themselves contractually to the arbitrator's decision and so the arbitrator is creating rather than interpreting contractual rights. MTI contends that the adoption of the *Scherrer* standard is contrary to various provisions of Chapter 227, because it denied to MTI a meaningful review of the arbitrators' decisions.

WERC asserts that its application of a limited, supervisory standard of review was proper, that its decision is entitled to deference because its findings are supported by substantial evidence in the record, and that its determination that the arbitration awards were lawfully made was reasonable. WERC disputes MTI's assertion that interest arbitration warrants application of a more stringent standard of review than is accorded to grievance arbitration. WERC points out that the purpose of a review in grievance arbitration is to ensure that the parties receive the arbitration they bargained for in their labor agreement, whereas review in interest arbitration is undertaken to ensure that the parties receive the arbitration to which they are entitled under the applicable statutes.

MTI cites to *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County*, 64 Wis. 2d 651 (1974), as providing a more appropriate standard of review for interest arbitration. In *Milwaukee Sheriffs*, the court held that the arbitrator had exceeded his powers when he permitted one of the parties to amend its final offer thereby introducing for the first time a contract period that had not been the subject of the preceding negotiations. The court ruled that amendments to the final offer contemplated by the statute were required to be germane, and must be confined to matters which had previously been the subject of collective bargaining agreements. *Id*. at 653.

The case at bar does not involve any amendments to the final offer of either of the parties. The District's final offers were unchanged, there was no attempt to modify the offers. This court is not persuaded by MTI's argument that *Milwaukee Sheriffs'* somehow supports a per se stricter standard of review for interest arbitration awards. MTI's reliance on *Milwaukee Sheriffs*, is

misplaced.

A. Public Interest

MTI and the District had agreed on the statutory criteria the Arbitrators were to consider in making an award. Among these criteria were: wage comparisons to other public and private sector employees, the public welfare and interest, the overall compensation received by the employees, and "other factors" relevant to the decision. Sec. 111.70(7)(c, d, e, f , h, i, j,) Stats. Consideration of the then-pending fiscal constraint legislation (Act 16) came under the criterion of "public interest." Sec. 111.70(4)(cm)(7)(c), Stats. 1/

According to WERC's Finding of Fact 4, in the MTI-SEE dispute, "[i]t is apparent . . . the parties vigorously litigated the impact on their respective offers of pending fiscal constraint legislation." During the course of the arbitration proceedings, discussions and arguments about Act 16 were confined to the effect of the legislation on the District's budget. At that time, MTI contended that the District's willingness to pay, rather than its ability to pay, was behind the District's public interest argument, and effectively declined to argue the issue in any further detail. MTI pointed to the support the community had shown for the current level of services. It was MTI's position that the District could easily meet MTI's offer by placing a referendum on the ballot to increase funding. Arbitrator Ziedler rejected this argument, and stated:

> [A]lthough the citizens of the District at a hearing supported the level of services of the District, they did not speak to whether they would support this level if it cost more.

Although MTI is correct that there was very little argument, substantive or otherwise, on the impacts of the fiscal constraint legislation on the collective bargaining agreements, the parties were nevertheless quite definitely afforded an opportunity to brief that issue in both arbitration proceedings.

The District had raised this issue at the hearing and in its briefs, arguing that the legislation was important because of the effect it would likely have on the District's budget. The District's briefs to the arbitrators include discussions on the District's ability to pay, and the District presented Exhibits that raised the issue of Act 16 (MTI-SEE, District Exhibits 99-

101; MTIEA, District Exhibits 49-56). These exhibits were also discussed during the hearing (see, MTI-SEE, Trans. 245-46; MTI-EA, Trans. 286-293, 295-300). MTI now argues that subsequent to the hearing, it was deprived of its right to make arguments to the arbitrator about the significance of Act 16 to the parties' positions. The parties submitted their briefs after the hearings. MTI made express references to the Act's impact in its arbitration briefs; it had been the subject of some discussion at the hearings. In its present briefs, 2/ MTI now also argues that Act 16 is per se inapplicable to the bargaining units that are parties to this action--this argument appears to be inapposite.

During the hearings, the subject of the fiscal legislation was discussed solely in the context of its possible overall effect on the District's budget. That was the purpose for which the District presented its exhibits, that was the basis for the rationale by which MTI denied its significance, and, most important, that was the meaning used by the arbitrators when rendering their decision. Citing again to Arbitrator Ziedler:

> The evidence is that the District would have the ability to pay the costs of the MTI offer, though with new budget restraints by the legislature, it might have to cut services if the MTI offer prevails. . . . In the presence of this effort to control and compress school budgets, it must be judged that the District offer, which is substantially higher in total compensation per employee than the Consumer Price Index changes, is more reasonable by responding to the changed conditions in legislation.

At no time during the arbitration process did MTI raise as an objection the alleged per se inapplicability of Act 16 to the immediate proceedings. That MTI for whatever reason, strategic or otherwise, chose not to argue in greater detail the merits of the District's claims, or to introduce into the record its own opposing evidence, does not mean that MTI was somehow denied altogether the opportunity to make those or other arguments to the arbitrators. "[I]f a party neglects to present evidence, it is the party's own fault; such failure to present evidence does not vitiate the award." *Stradinger v. City of Whitewater*, 89 Wis. 2d 19, 38 (1979), citing *Putterman v. Schmidt*, 209 Wis. 442, 451 (1932).

B. Reference to Tyson Award

MTI claims that Arbitrator Ziedler's reference to the Tyson award was improper because the Tyson award was itself improperly rendered. This claim lacks merit. For the reasons discussed above, the Tyson award was lawfully rendered, and its acknowledgment by Ziedler was permissible.

ORDER

For the reasons stated above, the court makes the following order:

The administrative decisions of WERC, in which WERC concluded that the Arbitrators had not exceeded their powers and that their awards had been lawfully rendered, are affirmed.

So ordered.

BY THE COURT:

Dated 1st day of October, 1996.

STUART A. SCHWARTZ
Circuit Judge Branch 15