No. 99-0500

IN COURT OF APPEALS OF WISCONSIN
DISTRICT IV

FILED
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Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

CITY OF MADISON, A MUNICIPAL CORPORATION OF DANE COUNTY, WISCONSIN,

PETITIONER-APPELLANT,

BOARD OF POLICE AND FIRE COMMISSIONERS OF THE CITY OF MADISON,

INTERVENOR-PETITIONER,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, AND IAFF LOCAL 311,

RESPONDENTS-RESPONDENTS.

[Decision No. 28920-G]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

CERTIFICATION BY COURT OF APPEALS OF WISCONSIN

Before Dykman, P.J., Vergeront and Deininger, J.J.

Pursuant to WIS. STAT. RULE 809.61 (1999-2000),[1] this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination. This case presents an issue expressly held open by the supreme court in ***Antisdel v. City of Oak Creek Police & Fire Comm'n***, 2000 WI 35, 234 Wis. 2d 154, 609 N.W.2d 464: whether a firefighter who is promoted on a

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

probationary basis but is returned to his or her former rank for failing to successfully complete probation for a non-disciplinary reason is entitled to the "just cause" protections of WIS. STAT. § 62.13(5)(em).

If the supreme court concludes the firefighter is not entitled to the just cause protections of WIS. STAT. § 62.13(5)(em), or otherwise concludes that remand for a just cause hearing is inappropriate at this stage in the proceedings, this appeal also raises an issue that requires application of arguably conflicting precedent: whether the fire chief's decision not to recommend successful completion of a probationary period for a promotion of a tenured firefighter to a higher position is subject to arbitration. The analysis employed by the supreme court in ***Milwaukee Police Ass'n v. City of Milwaukee (Milwaukee I)***, 92 Wis. 2d 145, 152, 285 N.W.2d 119 (1979), and ***City of Milwaukee v. Milwaukee Police Ass'n (Milwaukee II)***, 97 Wis. 2d 15, 22, 292 N.W.2d 841 (1980), suggests that the dispute is subject to arbitration. This court's decision in ***Milwaukee Police Ass'n v. City of Milwaukee (Milwaukee III)***, 113 Wis. 2d 192, 335 N.W.2d 417 (Ct. App. 1983), *review denied*, 114 Wis. 2d 602, 340 N.W.2d 201 (Wis. Sept. 19, 1983) (No. 82-1282), suggest that the dispute is not subject to arbitration. We believe that a supreme court decision is necessary to clarify the correct legal standard.

Chris Gentilli had worked as a firefighter for the Madison Fire Department for approximately eighteen years when he was promoted to the position of fire apparatus engineer, subject to successful completion of a probationary period. After eleven months on probation, the fire chief informed Gentilli that his probation had been revoked and he was reduced to his former rank of firefighter.

The International Association of Fire Fighters, Local 311 (Union) filed a grievance on behalf of Gentilli requesting a hearing before the Board of Police and Fire Commissioners for the City of Madison (PFC) pursuant to WIS. STAT. § 62.13(5)(em). That statute provides that "[n]o subordinate may be suspended, reduced in rank, suspended and reduced in rank, or removed by the board … unless the board determines whether there is just cause … to sustain the charges." Section 62.13(5)(em). The PFC refused to hear the grievance because it concluded that failure to pass a probationary period after a promotion is not a "reduction in rank" under § 62.13(5)(em).

Having been denied a hearing before the PFC under WIS. STAT. § 62.13(5)(em), Gentilli attempted to assert his rights under the collective bargaining agreement. The Union requested that the dispute be submitted to an arbitrator.[2] The City refused. The Union then filed a "prohibited practices" complaint against the City with the Wisconsin Employment Relations Commission (WERC), arguing that the City was in violation of WIS. STAT. § 111.70(3)(a)5 for refusing to submit to arbitration. WERC ordered the City to submit to arbitration. The City appealed to the circuit court. The circuit court also concluded that the City must arbitrate the dispute.

We believe that certification of this case is appropriate because this case presents a question expressly held open by the supreme court in ***Antisdel***. In ***Antisdel***, the supreme court held that a police officer who was promoted on a probationary basis, but did not successfully complete probation and was returned

[2] The collective bargaining agreement provides that "[a]rbitration shall be limited to grievances over matters involving interpretation, application, or enforcement of the terms of this Agreement," but "shall not apply where Section 62.13 of the Wisconsin Statutes is applicable."

to his former position for disciplinary reasons, was entitled to a just cause determination by the PFC pursuant to WIS. STAT. § 62.13(5)(em). ***Antisdel***, 2000 WI 35 at ¶2. The court rejected the PFC's argument that the officer had not been "reduced in rank" as that phrase is used in § 62.13(5)(em), concluding that he "had been promoted to sergeant on a probationary basis" and was reduced in rank when he returned to his former position. ***Id***. at ¶21. The court expressly declined to decide whether it would have reached the same result if the officer had been reduced in rank for failing to meet performance standards or for some other non-disciplinary reason. ***Id***. at ¶26.[3] The supreme court suggested that prior decisions of this court appeared to reach conflicting results as to whether the just cause protections of § 62.13(5)(em) apply to employment decisions that are based on non-disciplinary reasons. ***Id***. at ¶26n.16.[4]

In this case, the PFC refused to hold a just cause hearing under WIS. STAT. § 62.13(5)(em) because it concluded that Gentilli was not "reduced in rank." Based on the reasoning in ***Antisdel***, however, Gentilli *was* "reduced in rank" when his probationary promotion for fire apparatus engineer was revoked. Because Gentilli's failure to pass probation was not based on disciplinary charges brought against him,[5] this case presents the issue of whether a firefighter should be

[3] WISCONSIN STAT. § 62.13(5) does not expressly limit just cause proceedings to employment decisions made for disciplinary reasons. However, the title of the statute is "Disciplinary Actions Against Subordinates."

[4] *Compare* ***Eastman v. City of Madison***,117 Wis. 2d 106, 115, 342 N.W.2d 764 (Ct. App. 1983), *and* ***Hussey v. Outagamie County***, 201 Wis. 2d 14, 20, 548 N.W.2d 848 (Ct. App. 1996).

[5] Gentilli's probation was revoke shortly after having a "heated discussion" with a supervisor. When the fire chief informed Gentilli by letter that his probation was being revoked, the chief provided no explanation for his decision. The City has maintained that Gentilli's probation was not revoked for disciplinary reasons. Assistant Fire Chief Frederick Kinney testified before the hearing examiner that failure to pass a probationary period after being promoted is not a "disciplinary action."

afforded a just cause hearing under § 62.13(5)(em) based on his or her failure to successfully complete probation for non-disciplinary reasons. We believe the supreme court is the best forum to decide this issue because the court left the question open in ***Antisdel***; the supreme court noted in ***Antisdel*** that prior decisions of this court appear to reach conflicting results and the issue is of statewide importance.

If the supreme court concludes that the just cause provisions of WIS. STAT. § 62.13(5)(em) do not apply to Gentilli, or concludes that remand for a hearing before the PFC is otherwise inappropriate,[6] we believe that another issue presented is also appropriate for certification to the supreme court: whether Gentilli's grievance is subject to arbitration. Resolution of this issue requires the application of arguably conflicting precedent.

It is well established that "'[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" ***Milwaukee I***, 92 Wis. 2d at 152 (quotation source omitted). There is "a broad presumption of arbitrability," and courts are limited to determining "whether the arbitration clause can be construed to cover the grievance on its face

[6] The Union strenuously objects to this case being remanded for a hearing before the PFC at this juncture. The Union argues that it has expended substantial effort and expense pursuing the question of whether Gentilli's grievance was arbitrable under the collective bargaining agreement after the PFC denied Gentilli's request for a hearing under WIS. STAT. § 62.13(5)(em). The Union contends that it would be unjust to address the propriety of the PFC's refusal to hold a just cause hearing at this late stage in the litigation based on the supreme court's recent decision in ***Antisdel***. The City also argues that this case should not be remanded for a just cause hearing based on ***Antisdel***, citing factual and procedural differences between the cases. But, as noted by WERC, if the PFC *did* have authority to determine whether there was just cause to reduce Gentilli in rank under § 62.13, the PFC's authority was arguably exclusive of alternative procedures available under the parties' collective bargaining agreement. *See* § 62.13(5)(i); ***City of Janesville v. WERC***, 193 Wis. 2d 492, 511, 535 N.W.2d 34 (Ct. App. 1995).

and whether any other provision of the contract specifically excludes it." ***Milwaukee II***, 97 Wis. 2d at 20, 22. The supreme court has emphasized that "'[d]oubts should be resolved in favor of coverage.'" ***Milwaukee I***, 92 Wis. 2d at 152 (quotation source omitted).

"The general rule is that collective bargaining agreements arrived at under § 111.70, STATS. [which imposes a duty on municipal employers to bargain collectively with their employees], and statutes relating to such agreements should be harmonized whenever possible." ***City of Janesville v. WERC,*** 193 Wis. 2d 492, 500, 535 N.W.2d 34 (Ct. App. 1995); ***Glendale Prof'l Policeman's Ass'n v. City of Glendale***, 83 Wis. 2d 90, 106, 264 N.W.2d 594 (1978). However, a provision in a collective bargaining agreement that cannot be reconciled with a specific statutory provision is unenforceable. ***Glendale***, 83 Wis. 2d at 106-07 (approving a collective bargaining agreement provision that limited, but did not transfer, the chief's exercise of statutory authority to appoint subordinates under WIS. STAT. § 62.13(4)).

Relying on ***Glendale, Milwaukee I*** and ***Milwaukee II***, WERC concluded that Gentilli's grievance was subject to arbitration. WERC explained that the collective bargaining agreement contained a broad arbitration clause and the agreement specifically allowed grievances to be filed challenging "the reasonableness" of the chief's exercise of his management rights, including the chief's right to promote employees. Rejecting the City's argument to the contrary, WERC concluded that these provisions of the collective bargaining agreement could be interpreted so as to not conflict with WIS. STAT. § 62.13(4), which vests

in the chief the authority to appoint subordinates.[7] WERC reasoned that the agreement limited the chief's authority to appoint subordinates under § 62.13(4) by subjecting the exercise of that right to a "reasonableness" requirement, which could be the subject of an arbitrable employee grievance, but that the agreement did not "transfer" the chief's statutory power to appoint subordinates to the arbitrator.

The City's argument that the grievance is not subject to arbitration is based primarily on ***Milwaukee III***, 113 Wis. 2d at 198.[8] In ***Milwaukee III***, this court held that a newly-hired probationary police officer who was terminated was not entitled to file a grievance under the collective bargaining agreement because WIS. STAT. § 62.13(4) vested authority in police chiefs and boards to select subordinates and this statutory authority would be usurped by a collective bargaining agreement provision that permitted a newly-hired probationary police officer to grieve the chief's decision. ***Milwaukee III,*** 113 Wis. 2d at 196.[9] However, ***Milwaukee III*** did not employ the arbitrability analysis of ***Milwaukee I*** and ***Milwaukee II***. Instead, we stated that "[b]ecause the strong public policy behind [WIS. STAT. § 62.13 and § 165.85] would be thwarted if the broad, general, and not express language of the collective bargaining agreement were to read to make probationary terminations arbitrable, we reject so broad a reading and hold that the question is not arbitrable." ***Milwaukee III,*** 113 Wis. 2d at 198. In

[7] WISCONSIN STAT. § 62.13(4)(a) provides: "The chiefs shall appoint subordinates subject to approval by the board."

[8] The City also relies on ***Kaiser v. Bd. of Police & Fire Comm'rs***, 104 Wis. 2d 498, 311 N.W.2d 646 (1981), but we agree with WERC that ***Kaiser*** is of limited value because it did not involve the issue of arbitrability.

[9] The Supreme Court denied a petition for review in ***Milwaukee III.***

contrast, the supreme court in ***Milwaukee I*** stated that an issue should be arbitrated unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." ***Milwaukee I***, 92 Wis. 2d at 152; *see also* ***Milwaukee II***, 97 Wis. 2d at 22.

We believe the analysis in ***Milwaukee III*** substantially departs from prior supreme court precedent. The parties to this appeal all agree that ***Milwaukee III*** applies a different standard to arbitrability questions than prior cases of the supreme court.[10] ***Milwaukee III*** has been followed by subsequent decisions of this court. *See* ***City of Janesville***, 193 Wis. 2d at 511; ***Crawford County v. WERC***, 177 Wis. 2d 66, 74-75, 501 N.W.2d 836 (Ct. App. 1993). We believe that a supreme court decision is necessary to clarify the appropriate legal standards for deciding when a dispute may be arbitrated. WIS. STAT. RULE 809.62(1)(c).

[10] WERC and the Union contend that ***Milwaukee III*** should not be followed because it "failed to follow the arbitrability analysis required by the supreme court in ***Milwaukee I*** and ***Milwaukee II***." The City urges us to reverse WERC based on ***Milwaukee III***, contending that "***Milwaukee III*** and its progeny have changed the analytical scheme when the statutory authority of an entity, here the PFC, is implicated and there is an attempt to subject its decisions to arbitration."