

FILED
03-10-2022
Clerk of Circuit Court
La Crosse County WI
2021CV000454

BY THE COURT:

DATE SIGNED: March 10, 2022

Electronically signed by Todd W. Bjerke
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

LA CROSSE COUNTY

WEST SALEM POLICE ASSOCIATION,

Plaintiff,

Vs

VILLAGE OF WEST SALEM,

Defendant.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND
DECISION**

21-CV-454

WERC Decision # 39416

DECISION OF THE COURT

Having reviewed the filings of the parties and having heard their arguments on December 20, 2021, the Court, for the reasons set forth herein, hereby Orders:

Arbitration Award No. 7978 is VACATED.

The matter is REMANDED to the WERC.

The parties shall select another arbitrator to hear this matter.

PROCEDURAL HISTORY OF THE CASE

The above captioned matter began with the filing of a Summons and Petition (**Doc. 2**) by the Plaintiff, West Salem Police Association, hereinafter “WSPA” or “Plaintiff,” on September 7, 2021. The Complaint alleges that the Village of West Salem, hereinafter “Village” or “Defendant,” are parties to a 2020–2022 collective bargaining agreement, hereinafter “CBA,”

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which provides for binding arbitration of grievances. While the CBA was in effect, a grievance arose between the parties. The grievance was advanced to arbitration by the WSPA through the grievance process outlined in Article VIII of the CBA. Arbitrator Peter Davis of the Wisconsin Employee Relations Commission, hereinafter “WERC,” was selected by the parties as the Arbitrator. The matter was designated WERC Case No. 612.0000. An arbitration hearing was held in West Salem on March 10, 2021. Arbitrator Davis issued his arbitration award denying the grievance, designated as Award No. 7978, hereinafter referred to as “Award,” on June 11, 2021.

WSPA alleges further, in their brief in support of their Motion to Vacate Arbitration Award (**Doc. 4**), filed on September 7, 2021, that Arbitrator Davis, in drafting the Award, exceeded his powers and so imperfectly executed his powers such that a mutual, final and definite award upon the subject matter submitted was not made, as required by Wis. Stat. § 788.10(1)(d). The WSPA seeks an order declaring that the Award by Arbitrator Davis be vacated, that the matter be remanded to the WERC, that the parties be ordered to select another arbitrator, and that the matter be reheard in front of another arbitrator. Said brief is supported by an affidavit, which contains various relevant documents. (**Schauer Aff., Doc. 5, Sept. 7, 2021**).

The Village filed an Answer (**Doc. 8**) to this action on September 13, 2021, denying the allegations and seeking dismissal of the matter on the merits, with prejudice, and with taxable costs.

On October 18, 2021, the Court held a scheduling conference and thereafter set a briefing schedule.

The Village filed their brief in opposition to the WSPA’s allegations on November 12,

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2021 (**Doc. 13**). Said brief was supported by an affidavit, which includes a transcript of the hearing before Arbitrator Davis (**Doc. 14, Nov. 12, 2021**).

The WSPA filed a Reply Brief in Support of Motion to Vacate on December 9, 2021 (**Doc. 16**). Said brief was supported by an affidavit, which included numerous relevant documents (**Doc. 15, Dec. 9, 2021**).

The Court heard argument from the parties on this matter on December 20, 2021, via Zoom video conference.

FACTS

The issues at hand stemmed from an incident which the Court accepts as summarized in a stipulation agreed to by the parties. On February 25, 2021, counsel for the employer and counsel for the association submitted the following stipulations for Arbitrator Davis to consider in reaching his Award (set forth verbatim):

STIPULATIONS

1. The Employer and the Association are parties to a Collective Bargaining Agreement (the “CBA,” Joint Exhibit 1) which is in full force and effect. (*This is exhibit 1A of Document 5, pages 6–28.*)
2. Officer Donley was hired by the Employer in June, 2017 as a Police Officer of the Employer. Officer Donley is a full-time officer with the Department in good standing.
3. In September 2020, Officer Donley attended firearms training as an Officer of the Department. At that work-related training, he was determined to be in close contact with a fellow officer who tested positive for COVID-19.
4. Officer Donley was required by West Salem Police Chief Jeremy Randall to quarantine for 14 days from September 11, 2020 through September 24, 2020.

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5. Officer Donley was scheduled to work 92 hours during that 14-day period, and Officer Donley was paid for 92 hours for that period.
6. After such payment was made, West Salem Village Administrator Teresa Delong advised Chief Randall that Officer Donley was only entitled to 80 hours of pay during the 14-day quarantine.
7. West Salem Lt. Kyle Holzhausen, pursuant to the direction of Chief Randall, then met with Officer Donley and gave him the choices of not being paid for 12 hours, or designating such time as holiday pay, sick pay or vacation pay.
8. Given these choices, Officer Donley elected to give back 12 hours of holiday pay to avoid losing 12 hours of pay from a subsequent check. Had he not elected to use 12 hours of benefit time, the Village admits that it would have deducted 12 hours of pay from a subsequent paycheck.
9. Officer Donley brought this matter to the attention of Wisconsin Professional Police Association Business Agent Michael Backus, who then contacted Chief Randall. On December 21, 2020, the Association filed a grievance form (Joint Exhibit 2) with the Employer. (*This is exhibit 1B of Document 5, page 29*)
10. On January 18, 2021, the Employer's attorney issued a letter and a "Findings of Fact and Decision" (Joint Exhibit 3). (*This is exhibit 1C of Document 5, pages 30–31.*)
11. The parties waive all procedural objections, and jointly request that the arbitrator decide this matter on the merits.
12. The parties agree to hold an arbitration hearing on March 10, 2021 starting at 2 pm, which shall be held by Zoom videoconference organized by the Association. Each party shall provide a list of witnesses and any additional documents they intend to [sic.] part of their case in chief to the other by March 3, 2021. The witness lists shall provide an e-mail address of each witness, who shall receive an invitation/weblink to the arbitration on March 9, 2021. Each witness and the arbitrator shall appear via their own computer with working webcam, microphone and internet connection.

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13. The parties agree that such videoconference shall be recorded, and such recording shall act as the official record of the proceedings in lieu of a court reporter and transcript. The Association shall provide a copy of the recording to the Arbitrator and Village as soon as practicable after the arbitration.

DOCUMENTS

The parties stipulate that the documents already provided to the arbitrator with the initial filing of this matter with the WERC shall be marked as Joint Exhibits 1-3 as described above. These documents are hereby made part of the record of this Arbitration. Additional documents brought as proposed exhibits in rebuttal may be presented electronically to the Arbitrator and opposing party via e-mail during the hearing.

(Schauer Aff. Ex. 2, Doc. 5 at 32–34, (citations to case record in 21-CV-454 added)).

The additional documents referenced above were included in the affidavit of WSPA. These documents are: a copy of the Brief filed by the Association (**Schauer Aff. Ex. 3, Doc. 5 at 35–50**); the Village of West Salem Brief (**Schauer Aff. Ex. 4, Doc. 5 at 51–53**); a letter Reply Brief by the Association to Arbitrator Davis (**Schauer Aff. Ex. 5, Doc. 5 at 54–56**); and a second Village Reply Brief (**Schauer Aff. Ex. 6, Doc. 5 at 57–59**). WSPA also included for this Court a copy of the Arbitrator's Award (**Schauer Aff. Ex. 7, Doc. 5 at 60–61**).

Arbitrator Davis, on June 11, 2021, issued the following as his Arbitration Award (set forth verbatim):

ARBITRATION AWARD

Pursuant to the terms of a collective bargaining agreement, the Wisconsin Employment Relation Commission assigned me to serve as arbitrator as to a holiday pay grievance. A ZOOM hearing was held and recorded on March 10, 2021. The parties thereafter filed briefs by May 12, 2021.

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ISSUE

The parties were unable to agree on a statement of the issue but did agree that I could fashion the issue after considering their respective positions. Having done so, I conclude the issue to be resolved is:

Did the Village violate the contract when it only provided the grievant with a statutorily required 80 hours of pay? Is [sic.] so, what remedy is appropriate?

DISCUSSION

The grievant was scheduled to work 92 hours from September 11-September 24, 2020. He was exposed to COVID-19 and ordered to stay home during that same period of time. Pursuant to the Families First Coronavirus Act, he received 80 hours of pay for that period of time. The Village gave the grievant the option of using various types of leave if he wished to be paid for 12 additional hours. He chose to use holiday pay hours.

The Association contends that the Village violated the Article 12 holiday pay provisions of the contract which give employees the “discretion” to use holiday pay in certain circumstances. The Association asserts that the grievant was not able to use his “discretion” because he was confronted with a “Hopson’s Choice” of using holiday pay or even less desirable leave options if he wished to be paid for 12 additional hours. I do not find the Association’s argument to be persuasive.

Boiled to its essence, the Association is actually arguing that the grievant should not have been obligated to use any type of leave. Essentially, the Association contends that once the grievant was scheduled to work 92 hours, the Village was contractually obligated to pay him for 92 hours even if COVID exposure led to a reasonable order that he stay home for two weeks. I do not find there to be any contract provision that creates that obligation. Clearly the Article 12 holiday leave “discretion” provision relied on by the Associations falls far short of any such pay guarantee.

Given the foregoing, I conclude the Village did not violate the contract.

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(Schauer Aff. Ex. 7, Doc. 5 at 60–61).

STANDARD OF REVIEW

The Plaintiff argues that the standard for review can be found in Wis. Stats. § 788.10(d), which states that arbitration awards must be vacated in two separate instances. The statute calls for an Award to be vacated when (1) the arbitrator exceeds their powers, or (2) an arbitrator so imperfectly executes their powers that a mutual, final and definite award upon the subject matter submitted was not made.” *See id.* If the Court vacates an arbitration award in one of these instances, it has discretion to direct a rehearing by the arbitrators if the time required in an agreement for the award to be made has not expired. Wis. Stat. § 788.10(2). The Court may instead order arbitrators to hear new testimony without ordering an entirely new panel and re-arbitration. *Gallagher v. Scherneck*, 60 Wis. 2d 143, 149–50, 208 N.W.2d 437 (1973).

The Plaintiff points to the case of *Baldwin-Woodville Area School Dist. v. West Central Education Ass’n*, 2009 WI 51, 317 Wis.2d 691, wherein the Wisconsin Supreme Court fleshed out what it means for an arbitrator to “exceed their powers.” In that case, the Supreme Court held that an arbitration award will be vacated when an arbitrator “exceeds their powers through perverse misconstruction, positive misconduct, a manifest disregard of the law, or when the award is illegal or in violation of strong public policy.” *Id.* at ¶ 21. The Supreme Court further held that the arbitrator’s decision must have a “foundation in reason.” *Id.* at ¶ 35. The *Baldwin-Woodville* Court explained that the court’s obligation “is not to review the merits of the award, but rather ensure that the parties received what they bargained for—resolution of the labor dispute within the terms of the collective bargaining agreement by an arbitrator who has not exceeded his authority by going beyond the terms of the contract.” *Id.*

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The Plaintiff believes that the many problems surrounding the “insubstantial and vapid” award by the arbitrator constitute the height of him “imperfectly executing [his powers such] that a mutual, final and definite award upon the subject matter submitted was not made.” *See* Wis. Stat. § 788.10(1)(d).

The Defendant seems to agree with the standard of review. The Defendant, however, indicates that trial courts are to apply an extremely deferential standard when reviewing an arbitration award. “The role of the court in reviewing an arbitration award is essentially supervisory in nature,” citing *Baldwin-Woodville* ¶ 20. The Defendant points out that courts accordingly grant deference to the arbitrator’s factual and legal conclusions. *City of Madison v. Madison Pro. Police Officers Ass’n*, 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988). The Defendant contends that “the grounds for overturning an arbitration award are extremely narrow; the Wisconsin Supreme Court has adopted a “hands-off” approach to arbitration awards. *Id.* at 587. The *City of Madison* Court explained this “handsoff” policy as follows:

The court will not overturn the 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.” These narrow grounds for overturning an arbitrator’s award are echoed in the controlling statute on arbitration.

Id. at 586. The Defendant asserts that an arbitrator’s award is “presumptively valid, and it will be disturbed only where invalidity is shown by clear and convincing evidence.” *Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers’ Educ. Ass’n*, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980).

The Defendant further states that trial courts should affirm an arbitrator’s award as long as the award does not violate the common law or statutory standards. *Lukowski v. Dankert*, 184

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Wis. 2d. 142, 150, 515 N.W.2d 883 (1994). Overturning an arbitrator's award is an extraordinary remedy that requires showings of extreme misconduct or incompetence. Wis. Stat. § 788.10(1). "Courts may not overturn an arbitrator's decision for 'mere errors of fact or law, but only when perverse misconstruction or positive misconduct [is] plainly established, or if there is a manifest disregard of the law, or the award itself is illegal or violates strong public policy.'" *Loren Imhoff Homebuilder, Inc. v. Taylor*, 2020 WI App 80 ¶ 16, 395 Wis. 2d 178, 953 N.W.2d 353 (citing *Madison Teachers Inc. v. Metro. Sch. Dist.*, 2004 WI App 54 ¶ 9, 271 Wis. 2d 697, 678 N.W.2d 311). "The rationale for not vacating awards because of error of fact or law is that, when parties have agreed to submit an issue to arbitration and have chosen the arbitrator, they have agreed to be bound by the arbitrator's judgment, whether correct or incorrect as a matter of fact or law." *Madison Teachers Inc.*, 2004 WI App 54 ¶ 9. "Arbitration awards [of course] will be vacated when the award is illegal." *Lukowski*, 184 Wis. 2d at 151–52 (citing *Jt. Sch. Dist. No. 10 v. Jefferson Educ. Ass'n*, 78 Wis. 2d 94, 117–18, 253 N.W.2d 536 (1977)).

ARGUMENT OF COUNSEL

Plaintiff requests that the arbitration award be vacated due to the arbitrator's "manifest disregard of the law" and a misconstruction of the CBA. (**Br. in Supp. of Mot. to Vacate Arbitration Award, Doc. 4 at 12**). Defendant argues that the arbitrator did not exceed or imperfectly execute his powers, and that Plaintiff "is not entitled to a second bite at the apple simply because they do not like the final decision." (**Br. in Opp'n to Pl.'s Mot. to Vacate Arbitration Award, Doc. 13 at 1**).

As to the dispute underlying the arbitration at issue, Plaintiff points to Article IX of the

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CBA as dictating what officers in West Salem are entitled to be scheduled and paid for, rather than deferring to the federal Families First Coronavirus Response Act (FFCRA). Section 9.01(A) describes the work period as follows:

The work period shall be three (3) consecutive workdays followed by three (3) consecutive days off, with no minimum hours per year. The workdays will consist of two (2) twelve (12) hour shifts and one (1) eight (8) hour shift. To be fair and consistent with all officers, the placement of the eight (8) hour shift (on an officer's first day back or Friday) shall reverse every six (6) months.

(**Schauer Aff. Ex. 1A, Doc. 5 at 13**). Further, Plaintiff contends that Article XII of the CBA allows officers the “discretion” to select when to use their holiday, vacation and sick time, and that Officer Donley was deprived of this discretion when asked to choose to give up one of these forms of pay or have 12 hours of pay deducted from his next check.

Defendant argues that the FFCRA provides the base amount at which employees unable to work due to quarantine requirements must be paid and points to Article II of the CBA as its authority for determining the amount of hours to which Officer Donley was entitled for pay over quarantine. Section 2.01 lays out the Village's “rights and functions of management,” including “to determine . . . the allocation and assignment of workers; [and] to schedule when work shall be performed.” *Id.* at 8. Although Plaintiff acknowledges that the Village may have had the right to adjust Officer Donley's schedule, it argues the Village did not have the authority to do so retroactively, being months after he had already been paid for the time he had been scheduled.

LEGAL ANALYSIS

Courts may overturn an arbitration decision when it shows “a manifest disregard of the law.” *Baldwin-Woodville Area Sch. Dist.*, 2009 WI 51 ¶ 21. Arbitrator Davis showed a manifest disregard of the law when he relied on the FFCRA in determining how much pay to

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which Officer Donley was entitled without addressing the scheduling provisions of either Article IX or Article II of the CBA, which make up a substantial portion of each party's arguments.

Division E of the FFCRA, also referred to as the "Emergency Paid Sick Leave Act," provides that a full-time employee is, in general, entitled to 80 hours of paid sick time if subject to a quarantine or isolation order related to COVID-19, "[e]xcept that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection." Pub. L. No. 116-127, § 5102 (2020). The FFCRA also provides that nothing in the Act shall be construed "to in any way diminish the rights or benefits that an employee is entitled to under any . . . collective bargaining agreement" *Id.* at § 5107.

In this case, the CBA contract between the parties is determinative of the legality of the arbitrator's decision. If an award is illegal, it will be vacated. ***Lukowski, Id.*** Officers in West Salem expect to work and be paid for time in accordance with the CBA and its Articles IX and II. If a quarantine happens to fall in a two-week period when an officer expects to work, he or she would be denied of the benefits of the CBA if deprived of those work hours. The Court notes that the CBA sets a two week work schedule for the officers at 88 hours, *see*, CBA Section 9.01(A). It is not clear where the four extra hours came from or how they were counted. Since the CBA sets the officer's work schedule at 88 hours every two weeks, and since the CBA indicates that the Village can adjust work issues prospectively, it is clear that the decision of WERC is illegal.

DECISION OF THE COURT

This Court hereby vacates Arbitration Award No. 7978 due to a manifest disregard of the

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law that should have properly been applied regarding this dispute. Arbitrator Davis failed to address the relevant provisions of the CBA. Arbitrator Davis also clearly misapplied the FFCRA to this matter as the CBA would make any reliance on that Federal law irrelevant. The Court does not understand from the record how Plaintiff's 92 hours was arrived at, which is four hours more than the CBA requires officers to work. Additional testimony should have been requested by Arbitrator Davis to make a proper record. The Court has the authority to remand an arbitration for additional testimony in accordance with the Wisconsin Supreme Court's interpretation of Wis. Stat. § 788.10(2). *Gallagher v. Scherneck*, 60 Wis. 2d at 149–50.

ORDER OF THE COURT

The Court hereby enters the following Orders:

Arbitration Award No. 7978 is VACATED.

The matter is REMANDED to the WERC.

The parties shall select another arbitrator to hear this matter.

Dated at La Crosse, Wisconsin, this 10th day of March, 2022

BY THE COURT

[ELECTRONICALLY SIGNED]

Judge Todd W. Bjerke
Circuit Court Judge, Branch 3