Employment Law

Discipline of Public Employees – Due Process – Arbitration

***Green Bay Pro. Police Ass'n v. City of Green Bay*, 2023 WI 33 (filed April 27, 2023)**

HOLDING: An arbitrator did not manifestly disregard the law when he determined that the process afforded to the plaintiff (a police officer) in a disciplinary proceeding was constitutionally adequate.

SUMMARY: Andrew Weiss, a detective for the Green Bay Police Department, accessed sensitive information via the Green Bay Electronic Records Program regarding two sexual assault cases. He was not involved in either investigation. He thereafter used his personal cellphone to provide this information to a friend.

Following an internal investigation, the department issued a formal complaint alleging that Weiss violated four department policies: media relations, media requests, unauthorized disclosure, and conduct unbecoming an officer. The department held an investigative interview with Weiss and gave him an opportunity to address the allegations.

The following month, the department conducted a second interview with Weiss and provided him with an amended formal complaint alleging two additional violations of the department policy regarding the use of personal communication devices. At that interview, investigators asked Weiss to turn over his phone logs for the relevant period. When the parties reconvened for a third meeting, Weiss refused to turn over the logs and investigators gave him a copy of the department policy regarding cooperation with personnel complaint investigations.

One month later, the department issued a final notice informing Weiss that it was considering a serious level of discipline. The notice listed violations of the four policies noted above. A final hearing was held that same day, and Weiss was permitted to address the allegations. Both the department and Weiss referred to the final notice and final hearing as the "*Loudermill* notice" and "*Loudermill* hearing" in reference to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), which held that oral or written notice and opportunity to respond were required before termination of the subject public employee, who could only be terminated for cause (*see* ¶ 4 n.5).

One month after the final hearing, the department issued its disciplinary decision, in which it determined that Weiss violated the following policies: unauthorized disclosure, conduct unbecoming an officer, use of personal communication devices, and failure to cooperate in an investigation of personnel complaint. The department demoted Weiss from his position as a detective to a position as a patrol officer, resulting in the loss of an $80-per-month stipend associated with the detective assignment.

Weiss filed a grievance with the Green Bay Personnel Committee, and the committee denied the grievance. He then sought arbitration, arguing that the department did not have cause to discipline him and that his due-process rights under *Loudermill* were violated because he was ultimately disciplined for three policy violations that were not included in the *Loudermill* notice: use of personal communication devices (two separate charges) and failure to cooperate in an investigation of personnel complaint.

The arbitrator determined that the department had cause, as required by the collective bargaining agreement, to discipline Weiss by removing him from his detective assignment. The arbitrator concluded that the discipline was warranted because Weiss had violated all referenced department policies except for conduct unbecoming an officer (*see* ¶ 6). Additionally, the arbitrator concluded that the department's disciplinary procedures did not violate Weiss's constitutional due-process rights (*see* ¶ 1). The circuit court confirmed the arbitration award. In a published decision, the court of appeals affirmed. *See* 2021 WI App 73.

In a majority opinion authored by Justice Karofsky, the supreme court affirmed the court of appeals. It began its analysis by noting that "the court's role in reviewing an arbitrator's award is generally limited to ensuring that the parties received the arbitration process for which they bargained" (¶ 9). Courts must vacate an arbitration award if the arbitrator exceeded the arbitrator's powers.

One way in which an arbitrator exceeds powers is if the arbitrator manifestly disregards the law. In this case, Weiss argued, the arbitrator manifestly disregarded the law when the arbitrator determined that the department provided adequate notice to Weiss under *Loudermill*. Specifically, Weiss claimed that the department's *Loudermill* notice did not list three of the department policies for which Weiss ultimately was disciplined, depriving him of his opportunity to respond.

The supreme court did not need to decide whether Weiss was afforded all the process due to him. "We need determine only whether the arbitrator exceeded his powers under Wis. Stat. § 788.10(1)(d) by manifestly disregarding the law" (¶ 12). The court also noted that the specific process outlined in *Loudermill* might not govern in this case; unlike the public employee in *Loudermill,* Weiss was not terminated from employment (*see* ¶ 15). Nonetheless, the court addressed Weiss's argument that the arbitrator's application of *Loudermill* demonstrated a manifest disregard of the law.

The arbitrator addressed Weiss's *Loudermill* arguments by explaining that the weight accorded to *Loudermill* varies according to the severity of the disciplinary action taken. Weiss offered no argument for why this statement was inaccurate, let alone how it manifestly disregarded *Loudermill* (*see* ¶ 16).

"The arbitrator then determined that, in light of his view of *Loudermill*, the process the Department afforded to Weiss – which included notice of all of Weiss's alleged policy violations, opportunities to be heard at four in-person hearings prior to the Department's disciplinary decision, and opportunity to bring post-disciplinary review through a Green Bay Personnel Committee grievance and arbitration – was constitutionally adequate. The arbitrator did not manifestly disregard *Loudermill* in doing so, and Weiss received the arbitration he bargained for. Thus, he is contractually bound by the arbitrator's decision" (¶ 17).

Chief Justice Ziegler and Justice R.G. Bradley filed concurring opinions.

Health Law

Medical Treatment – Injunctions – Abuse of Discretion – COVID-19

***Gahl v. Aurora Health Care*, 2023 WI 35 (filed May 2, 2023)**

HOLDING: The circuit court erroneously granted an injunction that compelled a health-care provider to administer ivermectin to a patient over the provider's objection.

SUMMARY: Gahl was agent on a family member's health-care power of attorney. The family member was a patient in the care of Aurora Health Care after testing positive for COVID-19. Gahl insisted that Aurora administer ivermectin, a drug used other than for treatment of COVID-19, to the family member. When Aurora refused, Gahl sued and obtained an injunction that compelled Aurora to administer ivermectin to the family member (*see* ¶ 12).

The court of appeals granted Aurora's petition for leave to appeal a nonfinal order, also staying the order compelling treatment. Later, in a published decision, the court of appeals reversed the circuit court order. *See* 2022 WI App 29.

The supreme court affirmed the court of appeals in a majority opinion authored by Justice Ann Walsh Bradley. Emphasizing its limited scope of review and disclaiming any need to assess "the efficacy of Ivermectin as a treatment for Covid-19," the court held that the trial judge had abused his discretion (¶ 19). The judge "cited no law in either [the] written order or [the] oral ruling" (¶ 21). Further, the judge did not analyze any of the factors that support an injunction.

Said the supreme court: "[W]e do not know what viable legal claim the circuit court thought Gahl had presented" (¶ 24). Although no "magic words" are necessary, "the record must make clear that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." The record here did none of that (¶ 26).

Justice R.G. Bradley dissented, finding that the judge had carved a "narrow remedy" using the court's equitable power (¶ 31).

Insurance

Underinsured Motorist Coverage – Reducing Clauses – Individual Limits

***Acuity v. Estate of Shimeta*, 2023 WI 28, (filed April 7, 2023)**

HOLDING: A reducing clause operated to reduce the "each person" limit, not the "each accident" limit, by the payments an individual received for the individual's injuries.

SUMMARY: Michael Shimeta was killed and his passenger, Scherr, gravely injured in an accident caused by the driver of an underinsured motor vehicle. The tortfeasor's auto policy paid Shimeta's estate and Scherr $250,000 each – the policy's limits. Shimeta was also covered under his Acuity policy, which provided $500,000 in underinsured motorist (UIM) coverage. There was no dispute that the tortfeasor's vehicle was underinsured. Acuity brought this declaratory action to establish that Acuity owed no UIM coverage because Shimeta and Scherr had each received $250,000, thus covering the limits of Acuity's $500,000 UIM "each accident" coverage.

The circuit court granted Acuity's motion. In a published decision, the court of appeals reversed, finding that the reducing clause operated only to reduce the "each person" limit. *See* 2021 WI App 64.

The supreme court affirmed in a majority opinion authored by Justice Karofsky. "We conclude that the reducing clause operates on an individual basis to reduce the $500,000 each person limit of liability by the $250,000 payment that Shimeta and Scherr each received from [the tortfeasor's] insurer. Consequently, Acuity owes Shimeta and Scherr $250,000 each" (¶ 2). The court observed that Acuity's policy took a "limits-to-limits" approach that "provide[s] a predetermined, fixed level of UIM recovery that is arrived at by combining payments from all sources legally responsible for the insured's damages" (¶ 10).

Parsing the policy's coverage clauses and the reducing clause, the court concluded that "the reducing clause operates to reduce recovery on an individual basis. That is, the reducing clause reduces the 'each person' limit for an insured by all payments for the insured's injury" (¶ 22). More precisely, "a reasonable insured would understand 'the limit of liability' to refer to one particular limit of liability, rather than both limits or either limit," and "a reasonable insured would understand 'the limit of liability' to unambiguously refer to the 'each person' limit" (¶ 30).

This reading did not cause the "'each accident' limit to be superfluous." "The 'each accident' limit remains a cap on what Acuity itself will ever pay for bodily injury resulting from any one accident" (¶ 36).

Chief Justice Ziegler filed a dissenting opinion that was joined by Justice R.G. Bradley. Justice Hagedorn filed a separate dissent that was also joined by Justice R.G. Bradley.

Real Property

Eminent Domain – Jurisdictional Offers – Actions Under Wis. Stat. section 32.05(5)

***DEKK Prop. Dev. LLC v. Wisconsin Dep't of Transp.*, 2023 WI 30 (filed April 18, 2023)**

HOLDING: Actions to recover damages under Wis. Stat. section 32.05(5) are limited to issues pertaining to the condemnation of the property described in the jurisdictional offer.

SUMMARY: DEKK Property Development LLC owns a four-acre parcel of land at the intersection of State Trunk Highway (STH) 50 and County Highway H in Kenosha County. As part of a project to improve STH 50, the Wisconsin Department of Transportation (DOT) sought to close a driveway from DEKK's property to STH 50. It also sought to purchase a different parcel of DEKK's property along County Highway H. The DOT issued a jurisdictional offer to purchase the County Highway H parcel. DEKK's access to STH 50 was not included in the jurisdictional offer.

DEKK did not challenge the acquisition of the parcel along County Highway H. However, it did challenge the DOT's right to remove DEKK's rights of access to STH 50. To make this challenge, DEKK filed a "right-to-take" action under Wis. Stat. section 32.05(5). This type of action is used to contest the DOT's right to take property that is described in the DOT's jurisdictional offer to purchase property.

The issue before the supreme court was whether DEKK could seek compensation for the closure of its driveway to STH 50 in a right-to-take action under Wis. Stat. section 32.05(5). In a majority opinion authored by Justice Karofsky, the court concluded that DEKK cannot bring its claim under this statute. "Actions under § 32.05(5) are limited to issues 'pertaining to the condemnation of the property described in the jurisdictional offer'" (¶ 18).

The parcel described in the DOT's jurisdictional offer does not touch the STH 50 driveway that was in dispute in this case. Thus, "DEKK may not recover damages for the closure of the STH 50 driveway under Wis. Stat. § 32.05(5) because the access rights that DEKK alleges it lost were distinct from the taking described in [the] DOT's jurisdictional offer" (¶ 24).

The majority did not decide whether DEKK might be owed compensation had it challenged the driveway closure via a different avenue (*see* ¶ 1).

Justice R.G. Bradley filed a concurring opinion. **WL**

BLINKA

HAMMER

In this column, Prof. Daniel D. Blinka and Prof. Thomas J. Hammer summarize all decisions of the Wisconsin Supreme Court (except those involving lawyer or judicial discipline).

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