COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP314 **Cir. Ct. No. 2009CV5898**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARK E. RYAN AND COLLEEN RYAN,

PETITIONERS-APPELLANTS,

V.

COUNTY OF MILWAUKEE PENSION BOARD OF THE EMPLOYEES' RETIREMENT SYSTEM,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Mark Ryan appeals the circuit court's order vacating the denial of his claim for additional pension benefits and remanding for

further proceedings before the County of Milwaukee Pension Board of the Employees' Retirement System.[1] Ryan's claim before the Pension Board is based on his assertion that he did not validly waive the retention incentive bonus and therefore this bonus should be included in calculating his pension benefit. Ryan contends the court erred by not reversing the Pension Board's denial and ordering that it grant his claim. As grounds for error, Ryan asserts: (1) the undisputed facts show that he did not make a valid waiver of the retention incentive bonus; (2) even if the waiver is otherwise valid, it is invalid because there is no consideration; and (3) even if the waiver is otherwise valid, WIS. STAT. § 59.22(1)(a)1. (2009-10)[2] prohibits enforcement. For the reasons we explain below, we affirm the circuit court's order.

BACKGROUND

¶2 Ryan became a Milwaukee County employee in 1980, was appointed county clerk in 1999, and was subsequently elected to that office in 2000, 2002, 2004, and 2006.

¶3 In 2000 the Milwaukee County Board of Supervisors enacted ordinances providing for two new pension benefits, and Ryan was eligible for both. The "backdrop benefit" permitted members of the Employees' Retirement System (ERS) hired prior to 2001 to elect to receive a lump sum payment upon retirement followed by reduced monthly payments, rather than full monthly

[1] Colleen Ryan, Mark Ryan's wife, is also an appellant and a petitioner in this action, but the subject matter concerns Mark's pension. For simplicity's sake, we refer only to Mark ("Ryan") as appellant and petitioner.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

payments. The "retention incentive bonus" permitted ERS members hired prior to 1982 to receive a bonus that increased the member's final average salary for pension calculation purposes. *See* MILWAUKEE COUNTY CODE OF GENERAL ORDINANCES 201.24 §§ 5.16 & 5.15 (Dec. 2006).[3]

¶4 In early 2002 the County Board of Supervisors eliminated the backdrop benefit and retention incentive bonus for those who became ERS members after March 15, 2002. MILWAUKEE COUNTY CODE OF GENERAL ORDINANCES 201.24 §§ 5.16 & 5.15(1)(a). Current ERS members were given the option of waiving the two benefits. ***Id.*** The County Board of Supervisors established administrative procedures for ERS members to follow in waiving these benefits, creating a "Consent to Waiver" form for each benefit. *See* MILWAUKEE COUNTY CODE OF GENERAL ORDINANCES, Appendix B, § 1033.

¶5 On June 11, 2002, Ryan executed a backdrop benefit waiver form and went to the ERS office to submit it. According to Ryan's affidavit, the ERS staff person on duty would not accept it and informed him that the Pension Board could not accept an executed backdrop benefit waiver form without a simultaneous filing of an executed retention incentive bonus waiver form. Ryan subsequently executed a retention incentive bonus waiver form and filed both waiver forms with the ERS on June 13, 2002.

¶6 Just prior to Ryan's retirement on July 1, 2008, he received a pension benefits estimate from ERS that did not include either the backdrop benefit or the retention incentive bonus. Ryan, through his attorney, wrote a letter

[3] All references to the Milwaukee County Code of General Ordinances are to the December 2006 version.

to ERS challenging the validity of his waiver of the retention incentive bonus and asking that his pension benefits be recalculated, taking into account this bonus. The letter asserted that Ryan's waiver of the retention incentive bonus was not valid because he signed that waiver form only because a Pension Board staff member told him he had to do so in order to waive the backdrop benefit. The Pension Board had no authority, the letter asserted, to require an elected official to waive both benefits instead of just one.

¶7 After receiving pension checks that did not include the retention incentive bonus, Ryan filed an appeal with the Pension Board, pursuant to ERS Rule 1016. *See* MILWAUKEE COUNTY CODE OF GENERAL ORDINANCES, Appendix B, § 1016. The Pension Board took up the appeal at a meeting at which Ryan's counsel addressed the Board. Ryan did not appear but submitted his affidavit with attachments, the affidavit of his wife, and counsel's memorandum in support of his appeal.

¶8 The Pension Board voted to deny Ryan's appeal, stating the following grounds in the minutes of the meeting and in a subsequent letter to Ryan's counsel:

> [T]he Pension Board denies the pension benefit appeal by Mark Ryan, consistent with the discretion assigned to the Pension Board by Ordinance section 8.17 to interpret the Ordinances and Rules of ERS, due to uncertainty regarding Mr. Ryan's evidential support and pursuant to legal precedents regarding negligent misrepresentation, mistake of fact, rescission of contract due to misrepresentation, lack of consideration and an impermissible decrease in benefits.

¶9 Ryan appealed the Pension Board's decision by petition for a writ of certiorari in the circuit court. The court vacated the Pension Board's decision and remanded to the Board. The court concluded that the Pension Board had failed to

issue a written decision, failed to make findings of fact, and failed to explain the reasons for its decision, as required by MILWAUKEE COUNTY CODE OF ORDINANCES, Appendix B, § 1016(b). In arriving at its decision to vacate and remand, the court rejected Ryan's argument that the undisputed facts before the Pension Board supported only one conclusion: that Ryan did not voluntarily and knowingly waive his right to the retention incentive bonus.

¶10 The circuit court also made rulings on two other arguments advanced by Ryan. First, the court concluded that, as a matter of law, consideration is not required in order for the waiver to be valid. Second, the court concluded that WIS. STAT. § 59.22(1)(a)1. does not prevent enforcement of Ryan's waiver. This statute provides that "the compensation established [for elected county officials] shall not be increased nor diminished during the officer's term …."

DISCUSSION

¶11 On appeal Ryan contends the circuit court erred on three grounds. First, he asserts, the undisputed facts show that he did not make a valid waiver of the retention incentive bonus. Therefore, according to Ryan, the circuit court should not have vacated the Pension Board's decision and remanded; instead it should have reversed the decision and ordered the Pension Board to include this bonus in calculating his pension benefits. Second, Ryan asserts, even if the waiver is otherwise valid, it is invalid because there is no consideration. Third, even if his waiver is otherwise valid, WIS. STAT. § 59.22(1)(a)1. prohibits enforcement.

I. Propriety of Remand

¶12 The circuit court decided that the Pension Board failed to issue a written decision, make findings of fact, and explain the reasons for its decision. It concluded that a remand was appropriate because the evidence would permit more than one reasonable inference on whether Ryan's waiver of the retention incentive bonus met the standard for a valid waiver. A waiver is the "voluntary and intentional relinquishment of a known right." ***Milas v. Labor Ass'n of Wisconsin, Inc.***, 214 Wis. 2d 1, 9, 571 N.W.2d 656 (1997) (citation omitted).

¶13 In response to Ryan's challenge on appeal to the circuit court's ruling, the Pension Board does not argue that the circuit court was correct to remand to the Board. Instead, the Pension Board argues that the circuit court should have affirmed the Board under the standard for certiorari review because there is evidence, or reasonable inferences from the evidence, to support the Pension Board's decision.[4] In other words, the Pension Board is not asking that we affirm the circuit court's remand order but instead is asking that we modify the order so that it affirms the Board. A respondent seeking a modification of the circuit court's order is required to file a cross-appeal. WIS. STAT. § 809.10(2)(b).

[4] When a court reviews the decision of a board or agency on a petition for a writ of certiorari, review is limited to determining whether: (1) the board kept within its jurisdiction; (2) it proceeded on a correct theory of law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that the board might make the decision it did. ***Board of Regents of Univ. of Wisconsin v. Dane Cnty. Bd. of Adjustment,*** 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. This standard of review applies to both the circuit court and this court.

However, the Pension Board did not file a cross-appeal. Thus, our review is limited to the propriety of the remand order.[5]

¶14 Ryan's contention that there is no basis for a remand to the Pension Board rests on his assertion that the only evidence before the Board was that he signed the waiver form for the retention incentive bonus only because he was given incorrect information by a Pension Board employee. This is the only evidence, according to Ryan, because this is what his affidavit averred, supported by his wife's affidavit, and there is no contrary evidence.

¶15 The question presented is whether the Pension Board could reasonably find on the evidence before it that Ryan voluntarily and intentionally waived the retention incentive bonus. This is a question of law, which we review de novo. *See* ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law) (citation omitted); ***Hoskins v. Dodge Cnty.***, 2002 WI App 40, ¶31, 251 Wis. 2d 276, 642 N.W.2d 213 (whether there are factual disputes is a question of law) (citation omitted). For the following reasons, we agree with the circuit court that the

[5] Even if the Pension Board had filed a cross-appeal, its argument in support of modifying the circuit court's decision to an affirm is incomplete. The Pension Board does not address the court's conclusion that the Board did not issue a written decision explaining the reasons for its decision as required by MILWAUKEE COUNTY CODE OF ORDINANCES, Appendix B, § 1016(b). As for the lack of factual findings by the Pension Board, which the circuit court also states as a reason for the vacation and remand, the Pension Board's response is that it "issued those findings consistent with the Circuit Court's remand order." However, the Pension Board's decision after remand was made after Ryan filed a notice of appeal of the circuit court's order vacating and remanding the Board's first decision. We have already determined that the circuit court's order vacating and remanding is a final order. Thus, the Pension Board's decision after remand is not before us and is not relevant to the correctness of the circuit court's decision to order a remand.

Pension Board could reasonably find that Ryan voluntarily and intentionally waived the retention incentive bonus.

¶16 Ryan's affidavit describes his signing of the waiver for both benefits as follows:

> Around June of 2002, I obtained a copy of the "Consent to Waiver Agreement" with respect to the Backdrop Benefit from the ERS office. I did not at that time obtain a waiver agreement for the Retention Benefit Bonus, as I did not intend or wish to waive that benefit. I signed the Backdrop Benefit waiver form on June 11, 2002 … [and that day] attempted to file [it]. However, the ERS staff person on duty at that time did not accept it, and informed me that it was the Pension Board's policy that the Board would not accept a Backdrop Benefit waiver form without a simultaneous filing of a waiver of the Retention Incentive Bonus. Given that the ERS administers members' pensions, I believed the information I was provided.
>
> ERS staff file-stamped my Backdrop Benefit waiver form on June 11, 2002 but refused to receive it for filing … [and] returned [it] to me. I was also provided a Retention Incentive Bonus waiver form at that time…. [B]ased on the representation by staff that the Backdrop Benefit waiver would only be accepted if the Retention Incentive Bonus waiver was also filed, on June 12, 2002, my wife and I signed a Retention Incentive Bonus waiver. We filed both [our waivers of that benefit] along with the previously signed and file stamped Backdrop Benefit waiver, on June 13, 2002.

The affidavit of Ryan's wife was consistent with the above averments.

¶17 The next event after June 13, 2002, that Ryan describes in his affidavit occurred in May 2008. In the process of considering retirement, he obtained an "Estimated Retirement Allowance" letter from ERS. He avers: "Given that the estimated retirement allowance letter from ERS did not include the Retirement Incentive Bonus, I requested that my Retention Incentive Bonus be reinstated based upon the incorrect information I had received from ERS staff

when I filed the waivers." Ryan's affidavit then relates his giving notice he was not going to run again, his resignation, and the steps he took to challenge the exclusion of the retention incentive bonus from the calculation of his final salary.

¶18 Absent from Ryan's affidavit is any explanation of when or how he learned that he had been misled to believe that he had to waive the retention incentive bonus if he wanted to waive the backdrop benefit. According to his affidavit, at the time that he received the ERS estimate in May 2008, he knew he had been given incorrect information on this point, but he relates nothing about how he had learned that. The estimate he received, attached to his affidavit, does not reveal any such information. Indeed, the estimate simply excluded both benefits, consistent with the two waivers he signed.

¶19 Logically, if Ryan had initially been misinformed and then at some later time had learned the correct information, he would have taken some action at the time he learned of the error. But there is no reference in the affidavit to any event between his filing both waivers in June 2002 and his receipt of the ERS estimate in May 2008 to explain how he learned he was initially given incorrect information. During that time period, as his affidavit states, he was up for re-election three times. The Pension Board could reasonably infer from this that he had an incentive to waive both benefits because that would be viewed favorably by taxpayers. And from that inference, together with the absence of any explanation of when he learned that he could waive only one of the benefits, the Pension Board could reasonably infer that he knew all along that he did not have to waive both. Thus, the Pension Board could reasonably decide that Ryan had not proved that the "Consent to Waiver" he and his wife had signed regarding the retention incentive bonus was invalid because he relied on incorrect information from an ERS staff person.

¶20 There may be other reasonable inferences that a fact finder could draw from the record before the Pension Board that support the conclusion of a valid waiver of the retention incentive bonus. However, those we mention in the preceding paragraph are sufficient to defeat Ryan's argument that there was no factual basis for such a conclusion.

¶21 Ryan contends that ***Kilgust Heating v. Kemp***, 70 Wis. 2d 544, 549, 235 N.W.2d 292 (1975), supports his position, but we disagree. In ***Kilgust*** the court stated that "[p]ositive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court or jury in the absence of something in the case which discredits the same or renders it against the reasonable probabilities." ***Id.*** (citation omitted). A reasonable view of Ryan's affidavit is that his own account of how he was misled has a significant gap that discredits his account. ***Kilgust*** does not require a fact finder to accept his account as credible in this circumstance.[6]

¶22 We conclude that the evidence before the Pension Board did not require the Board to decide that Ryan had relied on incorrect information in

[6] For purposes of this opinion, we treat the quoted statement from ***Kilgust Heating v. Kemp***, 70 Wis. 2d 544, 549, 235 N.W.2d 292 (1975), on which Ryan relies, as a correct statement of the law. We note, however, that more recent cases have articulated the standard for court review of fact finding in a different way. *See* ***State v. Curiel***, 227 Wis. 2d 389, 420, 597 N.W.2d 697 (1999) ("'It is only when the evidence that the trier of fact has relied upon is inherently or patently incredible that the appellate court will substitute its judgment for that of the fact finder, who has the great advantage of being present at the trial.' … We have further explained that inherently or patently incredible evidence is that type of evidence which conflicts with nature or fully established or conceded facts." (citations omitted)); ***Yates v. Holt-Smith***, 2009 WI App 79, ¶25, 319 Wis. 2d 756, 768 N.W.2d 213 (opining that we will not overturn findings on credibility "unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts") (citation omitted)). Whether the later cases mean that ***Kilgust*** no longer states the correct law, or whether instead they are simply a different wording of the same standard, is an issue we need not resolve here.

waiving the retention incentive bonus. Therefore it was not error for the court to vacate and remand the Pension Board's decision instead of reversing and ordering the Board to include this bonus in calculating his pension benefits.

II. Necessity of Consideration for Valid Waiver

¶23 Ryan contends that an independent basis for reversing the Pension Board's decision is the absence of consideration for the waiver. The Pension Board responds that a unilateral waiver, as opposed to a waiver that is a term of a contract, does not require consideration. We agree with the Pension Board.[7]

¶24 The issue of the proper legal standard is a question of law, which we review de novo. ***Ulrich v. Zemke***, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458 (citation omitted). Putting this in the context of certiorari review, the issue is whether the Pension Board proceeded on a correct theory of law in rejecting Ryan's argument that his waiver of the retention incentive bonus was invalid for lack of consideration. *See* ***supra***, n.4.[8]

¶25 The only authority Ryan provides for his argument that his waiver requires consideration is ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 520 N.W.2d 93 (Ct. App. 1994). This case is plainly inapposite. In ***NBZ*** we held that an

[7] The Pension Board also responds that there was consideration, but it is unnecessary to address this argument.

[8] The Pension Board's statement denied Ryan's appeal "pursuant to legal precedents regarding … lack of consideration and an impermissible decrease in benefits." In its oral decision, the circuit court rejected Ryan's argument that he should prevail on these two grounds, thus apparently affirming the board's decision on these two grounds. The court's written order does not mention a partial affirmance; instead, it "vacate[s]" the Pension Board's "denial of [Ryan's] claim" and remands "[t]his matter … for further proceedings consistent with the Court's verbal decision." Apparently, both parties agree that, despite the absence of a reference to a partial affirmance in the court's written order, that is what occurred; and we accept this premise.

employee's covenant not to compete with the employer after employment termination requires consideration. ***Id.*** at 835, 837. The requirement of consideration is dependent upon our conclusions that "*[a] covenant not to compete is a contract*," common law requires consideration for contracts, and the statute governing covenants not to compete did not plainly express an intent to abrogate the common law requirements for forming a contract. ***Id.*** at 837 (emphasis added). There is no room for argument that Ryan's unilateral waiver of the retention incentive bonus was a contract. *See* BLACK'S LAW DICTIONARY 365 (9th ed. 2009) (A "contract" is "[a]n *agreement between two or more parties* creating obligations that are enforceable or otherwise recognizable at law." (emphasis added)).

¶26 Furthermore, the definition of a valid waiver has been consistent in our case law, *see* ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶¶35-37 & n.11, 325 Wis. 2d 135, 785 N.W.2d 302, and consideration is not part of that definition.

III. Applicability of WIS. STAT. § 59.22(1)(a)1. to Waiver

¶27 Ryan contends that, even if his waiver of the retention incentive bonus was otherwise valid, WIS. STAT. § 59.22(1)(a)1. prevents enforcement of the waiver. This statute provides:

> The board shall, before the earliest time for filing nomination papers for any elective office to be voted on in the county, other than supervisors and circuit judges, which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid to the officer exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3). Except as provided in subd. 2., the annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and

> other forms of compensation for services rendered, except those specifically reserved to the officer in the resolution or ordinance. *The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.* Court fees shall not be used for compensation for county officers. [Emphasis added.]

¶28 The Pension Board responds that this statute prevents the County Board of Supervisors from increasing or diminishing the officer's compensation during the officer's term and does not prevent an officer from waiving the retention incentive bonus, even assuming it is "compensation" within the meaning of the statute. We agree with the Pension Board.[9]

¶29 The proper construction of a statute presents a question of law, and we review de novo whether the Pension Board properly construed the statute.[10] *See* ***Cambier v. Integrity Mut. Ins. Co.***, 2007 WI App 200, ¶12, 305 Wis. 2d 337, 738 N.W.2d 181. When we construe a statute, we give the language its common meaning and consider the language in the context in which it is used. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110. If we conclude the statutory language has a plain meaning, then we apply the statute according to that plain meaning. ***Id.***, ¶46.

¶30 We conclude the language of WIS. STAT. § 59.22(1)(a)1. stating that "[t]he compensation established shall not be increased nor diminished during the

[9] Because we agree with the board on this point, we do not discuss its other arguments on WIS. STAT. § 59.22(1)(a)1.

[10] We do not understand the Pension Board to argue that it is entitled to deference with respect to its construction of the statute. However, even if this is the Pension Board's position, it is unnecessary for us to address the issue of deference because we affirm the Board's construction under a de novo standard of review.

officer's term" plainly applies to the County Board of Supervisors' authority to increase or decrease compensation. This is the only reasonable conclusion when this language is read in context. "Board" is defined in ch. 59 as "the county board of supervisors." § 59.001(1). The remainder of the sentence with the disputed language addresses the County Board of Supervisors' authority to change compensation in ensuing terms: "and shall remain for ensuing terms unless changed by the *board*." § 59.22(1)(a)1. (emphasis added). The sentences preceding this sentence in the subdivision address the manner in which the "board" must or may establish compensation. There is no basis for reading into this subdivision a prohibition on the officer himself or herself waiving compensation.

¶31 Thus, assuming without deciding that the retention incentive bonus is included within the meaning of "compensation" in WIS. STAT. § 59.22(1)(a)1., this subdivision does not prevent enforcement of Ryan's waiver.

CONCLUSION

¶32 We affirm the circuit court's order vacating the denial of Ryan's claim for additional pension benefits and remanding for further proceedings before the Pension Board.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.