Appeal No. 2007AP2584 **Cir. Ct. No. 2007CV26**

WISCONSIN COURT OF APPEALS
DISTRICT II

ROBERT ZELLNER,

PLAINTIFF-RESPONDENT,

V.

DARYL HERRICK AND CEDARBURG SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS,

HEIDI MORGAN,

INTERVENOR-APPELLANT.

FILED

NOV 26, 2008

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Snyder and Neubauer, JJ.

Pursuant to WIS. STAT. RULE 809.61, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Is a transcript of a closed arbitration proceeding a public record under Wisconsin's "public records" law?

2. If the transcript is a public record, must all personal and medical information be redacted before release?

BACKGROUND

This is part of the litigation arising from the Cedarburg School District's discharge of Robert Zellner for viewing pornography on a District-provided computer. In ***Zellner v. Cedarburg School District***, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240, the Wisconsin Supreme Court affirmed the circuit court's denial of Zellner's request for an injunction prohibiting the Cedarburg School District from releasing a memorandum and a compact disc containing adult images and internet searches that Zellner allegedly viewed and conducted on his school computer. In ***Cedarburg Education Ass'n v. Cedarburg Board of Education***, No. 2007AP852, unpub. slip op. (Wis. Ct. App. July 23, 2008), *petition for review pending*, we affirmed the circuit court's conclusion that an arbitration panel exceeded its authority when it ordered Zellner to be reinstated in contradiction of public policy that immoral behavior in our public schools is grounds for immediate termination.

Following a public evidentiary hearing, the District discharged Zellner for viewing adult images on a school computer. ***Zellner***, 300 Wis. 2d 290, ¶7. The Cedarburg Education Association (CEA) filed a grievance on his behalf. ***Id.***, ¶9. After private discussions were unsuccessful, the parties went to arbitration. ***Id.***, ¶13. The arbitration provisions of the collective bargaining agreement (CBA) provide that the parties "shall share equally the costs and expenses of the arbitration proceeding, including transcript fees and fees of the arbitrator." "The arbitrator determined that the Board had violated the CBA, which provides that no permanently employed teacher may be discharged except for just cause, and ordered the school district to reinstate Zellner, reduce his discipline to a letter of reprimand, and compensate him for lost wages and benefits." ***Cedarburg Educ. Ass'n***, No. 2007AP852, unpublished slip. op. ¶2.

After the District decided not to reinstate Zellner as ordered by the arbitration award, Heidi Morgan, a private citizen, filed a formal request under WIS. STAT. § 19.35 (2005-06)[1] for the transcript of the closed arbitration proceeding. As an "authority," the District determined that the transcript was a public record and, under the requirements of WIS. STAT. § 19.356(2)(a), it notified Zellner of its intent to release the transcript. Zellner sought de novo judicial review contending that the transcript was not a "public record" and, in the alternative, if it was a public record, certain personal and medical information must be redacted prior to release of the transcript.

The circuit court applied the two-step test of ***Linzmeyer v. D.J. Forcey***, 2002 WI 84, ¶¶10-11, 254 Wis. 2d 306, 646 N.W.2d 811, and determined that the transcript was a "public record" and that no statutory or common law exceptions exempted the transcript from release. The court then considered "whether the presumption of openness under the open records law is overcome by any other public policy." ***Id.*** The court reasoned that WIS. STAT. § 904.085 embodied the "public policy of recognizing alternative dispute resolution and encouraging parties to resolve disputes in these alternative dispute resolution forums." And it concluded that allowing disclosure of the transcript would defeat the purpose of closed arbitration proceedings. Because the court held that the transcript was not to be released, it did not address Zellner's alternative request that, if released, all personal and medical information must be redacted from the transcript.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Pursuant to WIS. STAT. § 19.356(4), Morgan intervened and appealed the decision of the circuit court.[2]

WISCONSIN STAT. § 19.32(2) provides a comprehensive definition of what is a "public record":

> "Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

The circuit court concluded that the transcript is a public record because "[i]t's kept by the school district or one of their agents." The court dismissed Zellner's contention that the CEA and District's sharing of the cost of preparation takes the transcript outside of the definition of "record."

Zellner stresses that arbitration was negotiated by the parties and they own it jointly; they both appoint an arbitrator; they share equally in all costs. He argues that to allow the District to unilaterally release the transcript that the parties negotiated to be closed would jeopardize the collective bargaining process.

[2] Zellner contends that Morgan's appeal is untimely under WIS. STAT. § 19.365(8). We do not certify this issue to the Wisconsin Supreme Court.

He argues that the parties voluntarily agreed to a closed process to settle labor differences, and a "public records" request cannot trump a negotiated closed proceeding.

After determining that the transcript was a "public record," the circuit court went on to find that there were no common law or statutory exceptions that barred release of the transcript. Zellner points out that the administrative rules controlling arbitration of grievances in the municipal sector, WIS. ADMIN. CODE §§ ERC 16.05 and 16.08 provide a general public policy that "[h]earings … shall be [sic] not be open to the public unless the parties jointly agree otherwise."[3] He asserts that the parties are bound by the rules of the Federal Mediation and Conciliation Service (FMCS) and under FMCS rules, "[w]hile FMCS encourages the publication of arbitration awards, arbitrators should not publicize if objected to by one of the parties." FMCS RULE 1404.14(d), http://www.fmcs.gov/internet/itemDetail.asp?categoryID=197&itemID=16959 (last visited Nov. 7, 2008). However, there is no FMCS rule requiring that arbitration proceedings are to be closed; hearings are conducted according to the terms of the collective bargaining agreement. FMCS RULE 1404.13 http://www.fmcs.gov/internet/itemDetail.asp?categoryID=197&itemID=16959 (last visited Nov. 7, 2008).

The circuit court then turned to the second prong of the ***Linzmeyer*** test, weighing "the public policies not in favor of release against the strong public policy that public records should be open for review." ***Linzmeyer***, 254 Wis. 2d

[3] Grievances filed against the District by members of the CEA are not subject to WIS. ADMIN. CODE ch. 16, "Arbitration of Municipal Sector Grievance Disputes," because the parties have agreed that all grievances will be submitted to Federal Mediation and Conciliation Service.

306, ¶12. Looking to WIS. STAT. § 904.085, the court concluded that the specific legislative grant of a privilege for communications in mediation—the court acknowledged there was no privilege for communications in arbitration—was reflective of the public policy of "recognizing alternative dispute resolution and encouraging parties to resolve disputes in these alternative dispute resolution forums." In other words, the court concluded that there was a public policy to encourage municipal employers and municipal employees to settle contract disputes through an "open and collaborative discussion or testimony" by providing privacy for arbitration proceedings.

Morgan argues that the court's reliance on WIS. STAT. § 904.085 is misplaced because the statute only supports a policy of promoting voluntary dispute resolution and Zellner and the District engaged in compulsory, binding arbitration. She points out that § 904.085(2) defines "mediation" to expressly "not include binding arbitration."

Zellner takes issue with Morgan's argument. He points out that the CEA and the District voluntarily negotiated a contract containing closed arbitration as a method to resolve labor disputes. He argues that WIS. STAT. § 904.085 only excludes arbitration as it relates to inadmissible evidence. Zellner asserts that the statute is a statement of strong public policy for encouraging candid discussions to resolve disputes and applies to compulsory, binding arbitration. Zellner submits that to make public closed arbitration proceedings by releasing transcripts of the proceedings will have a deleterious effect on municipal labor relations. He suggests that if grievants and witnesses are aware their testimony could become public, they will be reluctant to testify and arbitrators will be deprived of the relevant information needed to make an informed judgment to resolve the labor dispute.

Relying on ***Sands v. Whitnall School District***, 2007 WI App 3, 298 Wis. 2d 534, 728 N.W.2d 15, *reversed*, 2008 WI 89, ___ Wis. 2d ___, 754 N.W.2d 439, the circuit court held that releasing the transcript of the closed arbitration proceeding would circumvent the private nature of those proceedings. The supreme court's recent determination in ***Sands*** that discussions transpiring during a closed meeting are not privileged under the provisions of WIS. STAT. § 19.85, authorizing the closed meeting or, alternatively, under a "deliberative process privilege," ***Sands***, 298 Wis. 2d 534, ¶¶1, 5, supports Morgan's assertion that the circuit court's reliance on ***Sands*** was misplaced. *See* ***Sands v. Whitnall Sch. Dist.***, 2008 WI 89, ¶¶47-48, ___ Wis. 2d ___, 754 N.W.2d 439.

Morgan asserts that the public policy of the Municipal Employment Relations Law is to foster voluntary settlements, WIS. STAT. § 111.70(6); she points out that Zellner and the District engaged in compulsory, binding arbitration and there is no public policy requiring that such proceedings remain private. She argues that while the grievance procedure is part of the collective bargaining process under WIS. STAT. § 19.85(1)(e), the only portion of the collective bargaining process that can be kept secret is the formulation of the governmental body's bargaining strategy.

On the other hand, Zellner argues that under Wisconsin law, the collective bargaining process is a closed process. He maintains that a closed arbitration session is sound public policy because it encourages the parties to use alternative dispute resolution rather than clog the judicial system. He points out that a closed process "protects the privacy and reputational interests of employees, who often need their personnel disputes handled in a sensitive manner in order for them to effectively continue their jobs." He concludes that making arbitration

transcripts public would not advance the collective bargaining process and makes the confidentiality now accorded the collective bargaining process superfluous.

If the supreme court decides that the strong public policy favoring public records being open for review outweighs those public policies favoring confidentiality, it will have to consider what, if any, personal information and medical information in the transcript can be released.

Zellner asserts that there is an express statutory exemption prohibiting the release of any medical information in the transcript. He begins his argument for redaction of all personal and medical information with WIS. STAT. § 19.36(1) that exempts from disclosure, as a public record, any record that by operation of state law is exempt from disclosure, and he moves to WIS. STAT. § 146.82 that specifically exempts patient health care records from disclosure. He argues that he may have consented to the release of his medical information to the District during a closed arbitration proceeding, but that does not relieve the District of its obligation to keep the medical information confidential. *See* ***id.***

He stresses that a holding that medical information disclosed during an arbitration proceeding can be released in a transcript of that hearing creates a "Morton's Fork" for all public employees. Either they can choose to enforce their rights and have any medical information disclosed be subject to release to the public or they can keep that information confidential and not prosecute grievances under a CBA. He suggests that a holding that the medical information in an arbitration proceeding transcript can be released to the public will have broad implications because public employees must reveal medical information to employers under a variety of circumstances, such as applying for family or medical leave, seeking special accommodations under the Americans with

Disability Act, applying for workers' compensation, and applying for long-term disability.

In the alternative, Zellner argues that if there is not an express statutory exemption preventing the release of medical and other personal information, Wisconsin's clear-cut public policy of protecting its citizens' reputations and privacy rights outweighs the public policy in favor of disclosure. He engages in a survey of statutory and case law to support his argument. To buttress his contention that the public policy of protecting privacy outweighs the public policy favoring disclosure, Zellner points to an exemption under the federal Freedom of Information Act that exempts from release "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In response, Morgan argues that by presenting medical and other personal information in his defense during the arbitration proceedings, Zellner waived any privilege he might have had under WIS. STAT. § 905.04(2). Morgan asserts that the public is entitled to judge the appropriateness of the District's decision to disregard the arbitration award, and it can only do so by access to all pertinent information in the arbitration proceeding transcript.

CONCLUSION

The answers to the two questions presented in this certification will have a significant impact on governmental labor relations throughout the state. Whether transcripts of arbitration proceedings should be disclosed as "public records" will have an impact on governmental bodies and public employees filing, pursuing and defending grievances. Both sides to a labor dispute may seek other, nonvoluntary, means to resolve grievances contrary to the express purpose of the

Municipal Employment Relations Law. The potential release of medical and other personal information, submitted to prosecute or defend a grievance, could deter public employees from fully exercising their rights under their CBA and the Municipal Employment Relations Law. Because the resolution of these issues will reverberate across the state, we certify them to the Wisconsin Supreme Court, which is solely invested with the power to oversee and implement the statewide development of the law.