COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP852 **Cir. Ct. No. 2006CV501**

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

CEDARBURG EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

CEDARBURG BOARD OF EDUCATION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. Cedarburg Education Association (the Union) appeals from a circuit court order reversing an arbitration award in its favor. The arbitrator held that the Cedarburg Board of Education (the Board) did not have just

cause to terminate the employment of Cedarburg teacher Robert Zellner, and the circuit court reversed on grounds the award violated Wisconsin public policy as expressed in WIS. STAT. § 115.31(1)(c) (2005-06).[1] The Union contends that the circuit court exceeded its authority and applied the wrong legal standard to conclude that the award violated public policy. We disagree and affirm the order of the circuit court.

BACKGROUND

¶2 The relevant facts are brief and undisputed.[2] The Union and the Board agreed to enter binding arbitration to resolve whether the Board violated the parties' collective bargaining agreement (CBA) when it terminated a district teacher, Robert Zellner. 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.

¶3 The arbitrator based the award on the view that the school district had proved only three of its many accusations against Zellner: (1) that Zellner had signed a computer policy on August 31, 2005; (2) that, despite signing the policy, Zellner had viewed adult images for one minute and seven seconds; and (3) that

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

[2] The historical facts of this case have been the subject of prior litigation in the supreme court and need not be repeated here. *See* ***Zellner v. Cedarburg Sch. Dist.***, 2007 WI 53, 300 Wis. 2d 290,731 N.W.2d 240. It is sufficient to state that the background includes a teacher's use of a school computer to view adult images and the school district's subsequent firing of that teacher. The issue here arises from the procedural history that picks up from the point of the firing.

Zellner acknowledged he had done so. Other claims of misconduct were rejected by the arbitrator as unsupported by the facts or "simply inflammatory." The arbitrator concluded that a single rule violation did not warrant termination and noted that Zellner had been treated differently from other employees in the district. The arbitrator ultimately held that the district had failed to adequately demonstrate just cause for Zellner's termination.

¶4 The Board refused to honor the arbitration award and refused to reinstate Zellner. The Union filed a complaint in the circuit court, seeking to enforce the arbitration award. The Board responded that the circuit court should vacate the award because the arbitrator exceeded his authority under the CBA and because the award was against public policy. The circuit court vacated the arbitration award, taking issue with the arbitrator's conclusion that "the record herein does not support the District's claim, that an immoral behavior is automatic grounds for termination." The court rejected the arbitrator's conclusion, stating that it completely ignored the fact that immoral conduct provides grounds for license revocation under WIS. STAT. § 115.31(2).

¶5 The circuit court characterized the arbitrator's determination as one that "lumped" immoral conduct with other types of violations, and the court concluded this was "clearly at odds with Wisconsin law."

> While this court agrees that the arbitrator correctly observed that the district didn't raise the morality issue during the original disciplinary hearing, and therefore had waived its right to do so in arbitration, clearly the expression of the public policy of this State as set forth in [WIS. STAT. §] 115.31 should be sufficient notice to any person that there will be severe consequences when any rule violation crosses into such type of conduct.

¶6 Zellner appealed and we certified the following question to the supreme court: "Does a reviewing court have the power to vacate an arbitration award that the court concludes is contrary to public policy?" The court denied certification. We placed this appeal on hold pending the supreme court's opinion in ***Racine County v. International Association of Machinists and Aerospace Workers District 10***, which was released on June 26, 2008. *See* 2008 WI 70, No. 2006AP0964. We now revisit the issues with the benefit of the supreme court's ***Racine County*** ruling.

DISCUSSION

¶7 The Union advances several arguments on appeal. The pressing question, however, is whether the circuit court exceeded its authority when it vacated the arbitrator's award. We begin by observing that an arbitrator's award is presumptively valid, and can be disturbed only when its invalidity is demonstrated by clear and convincing evidence. ***Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n***, 118 Wis. 2d 707, 712, 348 N.W.2d 175 (1984). A court *must* vacate an arbitration award if the award was procured by fraud, if there was evident partiality or corruption on the part of the arbitrator, if the arbitrator's misconduct prejudiced a party, or where the arbitrator exceeded his or her powers. *See* WIS. STAT. § 788.10(1).

¶8 Wisconsin has a strong legislative policy favoring arbitration as a settlement tool when disputes arise between labor organizations and municipal employers. *See* ***Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass'n***, 78 Wis. 2d 94, 112, 253 N.W.2d 536 (1977). "Deference to arbitration decisions is particularly important in the area of public employment, where binding arbitration is set forth in [the Municipal Employment Relations Act] as an aid to labor peace." ***Fortney***

v. School Dist. of West Salem, 108 Wis. 2d 167, 178, 321 N.W.2d 225 (1982). The long held policy of Wisconsin courts is to engage in "very limited" review of arbitration awards. *See* ***Joint Dist. No. 10***, 78 Wis. 2d at 117. The court's role is supervisory in nature and it acts to ensure that the parties received what they bargained for when they agreed to settle disputes through binding arbitration. ***Id.*** Whether an award was properly vacated is a question of law, which we review de novo. ***Racine County***, 2008 WI 70, ¶11.

¶9 The Union argues that public policy should rarely be used to vacate an arbitrator's award. It directs us to ***Chrysler Motors Corp. v. Int'l Union, Allied Indus. Workers of America***, 748 F.Supp. 1352, 1361 (E.D. Wis. 1990) for the following guidance:

> In the wake of the Supreme Court's [***United Paperworkers Int'l Union v. Misco, Inc.***, 484 U.S. 29 (1987)] decision narrowing the public policy exception, most courts have refused to vacate an arbitrator's award of reinstatement on public policy grounds – particularly when the arbitrator has found that the employee received no prior warnings or discipline; or that the employee could be rehabilitated; or that the employer had a progressive discipline policy.

The Union emphasizes that we should respect the deference owed arbitration awards and should accept the arbitrator's determination that a penalty other than termination was proper under the circumstances. It urges us to reject the notion that a strong public policy against immoral conduct in schools can be employed to upset the arbitration award, particularly given Zellner's lack of prior discipline and the availability of less extreme disciplinary measures.

¶10 However, our supreme court has long recognized that a court may vacate an arbitrator's award "if the award itself is illegal or violates strong public policy." ***City of Madsion v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d

576, 585-86, 425 N.W.2d 8 (1988) (considering whether the arbitrator made an error of law in determining that the police association's contract superseded a residency ordinance); ***Milwaukee Bd. of Sch. Directors v. Milwaukee Teachers' Educ. Ass'n***, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (whether the arbitrator exceeded his authority by ordering the school board to appoint substitute teachers to regular teaching positions); ***Scherrer Constr. Co., Inc. v. Burlington Mem'l Hosp.***, 64 Wis. 2d 720, 725-26, 221 N.W.2d 855 (1974) (whether the arbitrators exceeded their authority by misconstruing a construction contract).[3]

¶11 Our supreme court recently confirmed that when an arbitration award violates the law or a strong public policy, the arbitrator has exceeded his or her powers and the award must be vacated. *See* ***Racine County***, 2008 WI 70, ¶11. Furthermore, where relevant law or public policy is ignored, the arbitrator has exceeded his or her powers. *See* ***id.***, ¶33 (arbitrator exceeded her powers by exhibiting "manifest disregard" for relevant law). In ***Racine County***, an arbitrator determined that the County had violated the terms of a CBA with the Union by orchestrating the retirement of two of its social workers and negotiating their return as independent contractors. ***Id.***, ¶¶4, 6-7. The arbitrator concluded that the County replaced union worker positions with identical service provided under individual contracts with the retired employees in order to take the positions off the tax levy. ***Id.***, ¶7. The County filed a motion to vacate the arbitration award and the circuit court granted the motion. ***Id.***, ¶8.

[3] For the proposition that an award may be vacated for violations of strong public policy, the court in ***Scherrer Constr. Co. v. Burlington Mem'l Hosp.***, 64 Wis. 2d 720, 729, 221 N.W.2d 855 (1974), cited Domke on Commercial Arbitration, ch. 34, pp. 312-31 (1968).

¶12 The Union appealed and we reversed the circuit court and reinstated the arbitration award. ***Racine County v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. 10***, No. 2006AP964, unpublished slip op. at ¶1 (Wis. Ct. App. May 9, 2007). We based our reversal on the limited scope of review that courts have when an arbitration award is contested. *See* ***id.***, ¶10. Applying the strict deference generally afforded such awards, we concluded that the circuit court had improperly vacated the award. ***Id.***

¶13 On review, the supreme court reversed, stating:

> We hold that the circuit court properly vacated the arbitration award here that was contrary to statutory law, specifically WIS. STAT. § 767.405, and to constitutional separation of powers principles. We also hold that the arbitration award in this case was properly vacated because the arbitrator exceeded her authority under WIS. STAT. § 788.10(1)(d) by not considering § 767.405 and the relevant case law.

Racine County, 2008 WI 70, ¶3. The court explained that an arbitrator exceeds his or her powers when the arbitrator "manifestly disregards the law, when the award is illegal, or when the award violates a strong public policy." ***Id.***, ¶34.

¶14 We recognize that parties who freely contract to take their disputes before an arbitrator should be bound by the result. Nonetheless, we are troubled by several aspects of the arbitrator's decision. In particular, we question the arbitrator's conclusion that the record did not support the school district's claim "that an immoral behavior is automatic grounds for termination." As the circuit court aptly observed:

> This conclusion on the part of the arbitrator apparently completely ignores the stated policy of the Wisconsin Legislature which defines as "immoral conduct" in [WIS. STAT. §] 115.31 and sets forth a disciplinary procedure to be followed by the Superintendent of

> Education in determining whether or not to revoke the teacher's license of any person engaging in such behavior. The arbitrator's conclusion that immoral behavior is some sort of infraction that can be lumped with other violations in [the] absence of a stated policy is clearly at odds with Wisconsin law.
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> ….
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> [T]he public policy of this State as set forth in [WIS. STAT. §] 115.31 should be sufficient notice to any person that there will be severe consequences when any rule violation crosses into such type of conduct.

¶15 Here the conduct prompting the Board's investigation and, ultimately, Zellner's dismissal is described by the Board as follows: On November 6, 2005, Zellner was on his school computer and visited the Internet search site Google, turned off the "SafeSearch" function, and purposefully searched for and accessed pornographic material. The Union concedes that Zellner "accessed adult images one time during the 2005-06 school year, for one minute and seven seconds."

¶16 By statute, our state superintendent of public instruction has the authority to revoke a teacher's license for immoral conduct. A statutory definition of immoral conduct is provided: "Immoral conduct means conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil." *See* WIS. STAT. § 115.31(1)(c). The circuit court turned to this statute as an indicator of Wisconsin's strong public policy against immoral conduct in schools. We agree that protection of children and the promotion of a safe educational environment is a clear and compelling public policy. For purposes of reviewing an arbitration award that reinstates a teacher who has accessed pornography while on school property, the stated public policy must be considered.

¶17 The arbitrator's rationale for overturning Zellner's dismissal relied on his view that a single rule violation and a single immoral act were insufficient to support dismissal. Further, the arbitrator opined that Zellner was being treated differently than other employees who had used school computers to access inappropriate sites. Finally, the arbitrator concluded that there was no evidence that students were present when Zellner "committed his actions." The arbitrator did not reject the characterization of Zellner's conduct as immoral, but rather held that the penalty, termination, was too harsh.

¶18 The Union urges us to accept the arbitrator's rationale and asserts that factors weighing in Zellner's favor should be considered. For example, it points to Zellner's otherwise unblemished eleven-year record with the school district. Further, it asserts that viewing adult images on his school computer does not make Zellner a threat to children. Zellner viewed the images on his office computer when no students were present. We are not convinced that Zellner's tenure and stealth provide sufficient counterweight to the public policy against immoral conduct in schools.

¶19 The arbitrator's decision does not offer an analysis of Zellner's conduct in light of public policy concerns. The circuit court voiced its concern that "the arbitrator apparently completely ignores the stated policy" of WIS. STAT. § 115.31, and we share that concern. We conclude that public policy concerns as embodied in the statute and apparently disregarded by the arbitrator prohibit the award in this case. We are satisfied that the arbitration award must be vacated. *Cf.* ***Racine County***, 2008 WI 70, ¶33 (award vacated where arbitrator failed to consider relevant statute and case law).

¶20 As a final matter, we note that the Board also asserts that the arbitrator's award contradicted the express terms of the arbitration agreement. The CBA identified "immorality" as *per se* just cause for dismissal. It also limited the arbitrator's authority, stating in relevant part, "[T]he Arbitration panel shall have no power of (sic) authority to add to or subtract from any of the provisions of this agreement …." Therefore, the Board's argument goes, the arbitrator's conclusion that the Board did not have just cause to dismiss Zellner clearly exceeded the arbitrator's authority; more specifically, once the arbitrator concluded there was just cause to discipline Zellner, he had no discretion to prescribe a penalty other than that imposed by the Board. As we have already explained, we are affirming on the basis that the circuit court had the authority to vacate the arbitration award on public policy grounds; therefore, we need not discuss whether the CBA further supports the court's order. *See* ***Gross v. Hoffman***, 227 Wis. 2d 296, 300, 277 N.W.2d 663 (1938) (where our decision on one issue resolves the appeal, we need not address additional issues).

CONCLUSION

¶21 Based on its view that the arbitration award violated the strong public policy against immoral conduct in schools, the court was obligated under WIS. STAT. § 788.10(1)(d) to vacate the award. When an arbitration award violates a strong public policy, the arbitrator has exceeded his or her powers. *See* ***Racine County***, 2008 WI 70, ¶11. The statute mandates that a court "must make an order vacating the award" where "the arbitrators exceeded their powers." Sec. 788.10(1)(d). Therefore, the circuit court properly vacated the arbitration award and we affirm.

By the Court.—Order affirmed.

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