COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP824 **Cir. Ct. No. 2009CV2996**

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

ROBERT J. WETZLER, MD,

PETITIONER-APPELLANT,

V.

DIVISION OF HEARINGS AND APPEALS AND DEPARTMENT OF REGULATION AND LICENSING,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

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

¶1 NEUBAUER, P.J. Robert Wetzler, M.D., is the subject of an investigation by the State of Wisconsin Department of Regulation and Licensing (DRL). Under the terms of a stipulation in a previous disciplinary proceeding

conducted by the Wisconsin Medical Examining Board (MEB), Wetzler submitted to an evaluation of his professional competency by the Physician Assessment Service (PAS) at the University of Wisconsin School of Medicine and Public Health. The PAS evaluation resulted in a Final Report prepared by Michael Bowman, M.D. Wetzler now argues that the administrative law judge (ALJ) assigned by the Division of Hearings and Appeals (DHA) erred in denying his request to seal the PAS's Final Report and in denying his request to close portions of an evidentiary hearing involving the Final Report. Wetzler appeals from a circuit court order upholding the ALJ's decision. Wetzler also challenges the circuit court's determination that he lacks standing to enjoin the release of the Final Report because the Final Report does not fall within the limited categories of public records set forth in WIS. STAT. § 19.356 (2007-08)[1] for which a right to seek injunctive relief exists. We reject Wetzler's challenges. We uphold the ALJ's decision and affirm both aspects of the circuit court's order.

BACKGROUND

¶2 The DRL filed a complaint against Wetzler in December 2008 alleging that he had violated a previous final decision and order of the MEB and had "committed unprofessional conduct as defined by WIS. ADMIN. CODE § MED 10.02(2)(b)." The DRL's previous final decision and order, entered in December 2007, resulted from a stipulation entered into by the parties as a resolution to the then-pending investigation. The final decision and order set forth in relevant part:

> Respondent shall undergo an assessment to evaluate respondent's current abilities to practice medicine at his

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

> current practice, given his current patient population and the facts of this case. The assessment shall be performed under the direction of the University of Wisconsin Continuing Medical Education Program[2] (UW-CME), and may include a cognitive screening assessment, peer interview, and/or physical examination. (Footnote added.)

The board ordered Wetzler to complete any educational programs indicated by his assessment results. The order additionally states: "The results of the assessment shall be admissible as evidence in any subsequent proceedings in this action."

¶3 In preparation for the evidentiary hearing on the December 2008 complaint, the DRL filed a preliminary witness list notifying Wetzler of its intent to call Bowman, the physician who had authored the Final Report resulting from Wetzler's assessment. In response, Wetzler's attorney sent letters to the DRL's attorney and records custodian asserting that the Final Report and physician's statements regarding that report were confidential and privileged under WIS. STAT. §§ 19.35(1)(a), (1)(am)1. and 19.36 (protecting records kept by public officials); WIS. STAT. § 146.38 (protecting health services review information); and WIS. STAT. §§ 146.81(4), 146.82 and 146.83 (protecting health care records). That same day, Wetzler filed a motion before the MEB for a protective order and a motion to make portions of the evidentiary hearing a closed proceeding. Following a hearing on June 30, 2009, the ALJ denied Wetzler's motion based on a determination that the proceedings are presumptively open, the assessment of Wetzler's abilities did not fall under the peer health services review statute, and Wetzler had not received health care services from Bowman.

[2] According to the Final Report, the PAS is administered by the Office of Continuing Professional Development at the University of Wisconsin School of Medicine and Public Health.

¶4 Wetzler filed a petition for circuit court review of the ALJ's decision. The circuit court held a hearing on January 21, 2010, after which it denied Wetzler's motion and affirmed the ALJ's decision. The circuit court expressly rejected Wetzler's contention that the Final Report "is not subject to public records requests, is a peer review document and is a health care record." The circuit court expressly found that (1) the document is being held by the DRL and is subject to an open records request under WIS. STAT. § 19.32, (2) Wetzler lacks standing under WIS. STAT. § 19.356 to bring a declaratory judgment action requesting the court to declare the Final Report confidential, (3) WIS. STAT. § 146.38 does not apply to the Final Report, and (4) the Final Report is not a "patient health record" within the meaning of WIS. STAT. § 146.82. The court further found that the report resulted from a stipulation as to discipline and that "[t]he DRL made no assurances of the confidentiality of the PAS report and none was demanded by Dr. Wetzler." Wetzler appeals.

DISCUSSION

¶5 *Standard of Review*. In administrative appeals, we review the agency's decision, not the circuit court's. ***Roehl Transp., Inc. v. Wisconsin Div. of Hearings and Appeals***, 213 Wis. 2d 452, 458, 570 N.W.2d 864 (Ct. App. 1997). We will uphold an agency's factual findings if they are supported by substantial evidence. ***Krahenbuhl v. Wisconsin Dentistry Examining Bd.***, 2006 WI App 73, ¶18, 292 Wis. 2d 154, 713 N.W.2d 152; *see also* WIS. STAT. § 227.57(6). "When we review an administrative agency's interpretation or application of a statute, we apply one of the following: great weight deference, due weight deference, or no deference." ***DaimlerChrysler Servs. N. Am. LLC v. DOR***, 2006 WI App 265, ¶6, 298 Wis. 2d 119, 726 N.W.2d 312. No deference is appropriate when any of the following is true: (1) the issue before the agency is

clearly one of first impression, (2) a legal question is presented and there is no evidence of any special agency expertise or experience, or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance. ***Id.***, ¶9. Here, the parties agree that the ALJ's decision is subject to de novo review. We agree and conduct our review accordingly.

¶6 *The Final Report is a public record.* Wetzler contends that evidentiary hearings *may* be held in closed session pursuant to WIS. STAT. § 19.85(1)(b). He further contends that portions of the evidentiary hearing yet to be held in this matter should be held in closed session because the Final Report is not a public record under WIS. STAT. § 19.32. Whether the Final Report is a public record under § 19.32 presents a question of statutory interpretation. *See* ***Zellner v. Herrick***, 2009 WI 80, ¶¶2, 12, 319 Wis. 2d 532, 770 N.W.2d 305.

¶7 WISCONSIN STAT. ch. 19 governs public records and property. It defines a "record" as "any material … which has been created or is being kept by an authority." WIS. STAT. § 19.32(2). An "authority," as defined in § 19.32(1) includes "a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order." Wetzler contends that because neither Bowman nor the University of Wisconsin Hospital[3] is an "authority" as defined by statute, the Final Report is not a public record. While the circuit court found that

[3] Although Wetzler identifies UW-Hospital as the entity that created the Final Report, the report indicates that Bowman, its author, is associated with the UW School of Medicine and Public Health. The supreme court has likewise held the UW School system, including its medical and law schools, are subject to open records requests under WIS. STAT. § 19.35. *See generally* ***Osborn v. Board of Regents of Univ. of Wis. Sys.***, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158.

the Final Report "is being kept" by the DRL, Wetzler contends that he consented to its release to the DRL and MEB, but not to the public. We reject Wetzler's arguments. Whether the Final Report was created by or is being kept by the University of Wisconsin Hospital or the DRL, the record is being kept by an "authority" under § 19.32 and is therefore a public record.

¶8 First, the record was prepared for and is being kept by the DRL, which is undisputedly an "authority" under WIS. STAT. § 19.32(1). Second, our supreme court has expressly recognized that the University of Wisconsin Hospital and Clinics Authority is a "statutorily-created, public body corporate and politic." ***Rouse v. Theda Clark Med. Ctr., Inc.***, 2007 WI 87, ¶2, 302 Wis. 2d 358, 735 N.W.2d 30; *see also* ***Lewis v. Physicians Ins. Co.***, 2001 WI 60, ¶25 n.18, 243 Wis. 2d 648, 627 N.W.2d 484 (noting that the UWHCA was one of three government-owned hospitals in Wisconsin). As such, the UW-Hospital is an "authority" as defined by § 19.32(1) and any record created or kept by the hospital would be subject to an open records request unless otherwise excepted. We therefore turn to Wetzler's contention that the Final Report falls under an exception to the open record rule.

¶9 *The Final Report is not a "peer review record" or health services review record under WIS. STAT. § 146.38.* Wetzler contends that even if the Final Report is a public record, it is privileged under § 146.38 as a peer review record. While both parties refer to § 146.38 as the "peer review" statute and privilege, this court has rejected this characterization, *see* ***Franzen v. Children's Hosp.***, 169 Wis. 2d 366, 383 n.29, 485 N.W.2d 603 (Ct. App. 1992), and we will therefore refer to it as the health care services review privilege, *see* ***Phelps v. Physicians Ins. Co.***, 2005 WI 85, ¶4, 282 Wis. 2d 69, 698 N.W.2d 643. Resolution of this privilege issue requires us to interpret § 146.38, an exercise we undertake

independently of the circuit court. *See* ***Mallon v. Campbell***, 178 Wis. 2d 278, 283, 504 N.W.2d 357 (Ct. App. 1993).

¶10 WISCONSIN STAT. § 146.38 governs "[h]ealth care services review" and the confidentiality of the information resulting from such a review. It provides in relevant part:

> **(1m)** No person who participates in the review or evaluation of the services of health care providers or facilities or charges for such services may disclose any information acquired in connection with such review or evaluation except as provided in sub. (3).
>
> **(2)** All organizations or evaluators reviewing or evaluating the services of health care providers shall keep a record of their investigations, inquiries, proceedings and conclusions. No such record may be released to any person under s. 804.10(4) or otherwise except as provided in sub. (3)….
>
> **(3)** Information acquired in connection with the review and evaluation of health care services shall be disclosed and records of such review and evaluation shall be released, with the identity of any patient whose treatment is reviewed being withheld unless the patient has granted permission to disclose identity, in the following circumstances:
>
> ….
>
> (f) To the appropriate examining or licensing board or agency, when the organization or evaluator conducting the review or evaluation determines that such action is advisable.

Sec. 146.38(1m), (2), (3)(f). The purpose of the privilege created by § 146.38 is "to protect the confidentiality of the peer review process, in the hope that confidentiality would encourage free and open discussion, among physicians knowledgeable in an area, of the quality of treatment rendered by other physicians." ***Braverman v. Columbia Hosp., Inc.***, 2001 WI App 106, ¶14, 244 Wis. 2d 98, 629 N.W.2d 66 (citing ***State ex rel. Good Samaritan Med. Center-Deaconess Hosp. Campus v. Moroney***, 123 Wis. 2d 89, 365 N.W.2d 887 (Ct.

App. 1985)). "The review contemplated by the statute is intended to aid physicians on the hospital staff in maintaining and improving the quality of their work, and the review lies at the core of the protection afforded by the statute." ***Braverman***, 244 Wis. 2d 98, ¶14.

¶11 The DHA and DRL (collectively the Departments) argue that WIS. STAT. § 146.38 does not apply because its text "refers explicitly to the review of services by *institutions* providing health care services." We reject the Departments' argument. The statute applies to "the review or evaluation of the services of health care providers or facilities," § 146.38(1m), and case law confirms that this provision applies to the review or evaluation of the services provided by an individual health care provider, *see* ***Moroney***, 123 Wis. 2d at 98, (noting that § 146.38 was intended to encourage free and open discussion among physicians knowledgeable in an area, of the quality of treatment rendered by other physicians). More persuasive, however, is the Departments' contention that the disciplinary proceedings and resulting reviews conducted by the MEB are more specifically governed under WIS. STAT. ch. 448.

¶12 The MEB's authority is derived from WIS. STAT. § 448.02, and its responsibilities include the licensing of persons to practice medicine and surgery in Wisconsin under § 448.02(1). Pursuant to § 448.02(3), "[t]he board shall investigate allegations of unprofessional conduct" and in doing so "may require a person holding a license … to undergo and may consider the results of one or more physical, mental or professional competency examinations if the board believes that the results of any such examinations may be useful to the board in conducting its investigation." Here, Wetzler stipulated to an assessment by the PAS in the context of a disciplinary proceeding conducted by the MEB under WIS. STAT. ch. 448; the assessment did not result from a health services review under

WIS. STAT. § 146.38; rather, the competency examination was a report ordered by the regulatory agency.[4] Indeed, as the ALJ observed, the Final Report is not a review or evaluation of past health services rendered by Wetzler as contemplated by § 146.38, but rather an assessment of his current abilities. The health services review statute makes no mention of competency reports that a regulatory agency requires a health care provider to give or disclose.[5]

¶13 We uphold the ALJ's determination that the Final Report resulting from the DRL's disciplinary proceeding does not fall under the health services review exception as set forth in WIS. STAT. § 146.38 and is, therefore, subject to an open records request under WIS. STAT. § 19.35(1).

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[4] Wetzler does not assert and does not point to any law dictating the confidentiality of a report resulting from a stipulated assessment conducted under WIS. STAT. ch. 448.

[5] The legislature recently approved significant changes to WIS. STAT. § 146.38. *See* 2011 Wis. Act 2, §§ 1-16. Included in these changes is the creation of § 146.38(6), which provides:

> **(6)** Health care provider specific information acquired by an administrative agency in order to help improve the quality of health care, to avoid the improper utilization of services of health care providers, or to determine the reasonable charges for health care services is exempt from inspection, copying, or receipt under [WIS. STAT. §] 19.35(1).

2011 Wis. Act 2, § 16. The effective date of these changes is February 1, 2011. *See* WIS. STAT. § 991.11.

The legislature also recently created WIS. STAT. § 904.16, which provides at subsec. (2)(a) that "[r]eports that a regulatory agency requires a health care provider to give or disclose to that regulatory agency" may not "be used as evidence in a civil or criminal action brought against a health care provider." *See* 2011 Wis. Act 2, § 32. Section 904.16 "first applies to health care provider reports received, and statements of, or records of interviews with, employees of a health care provider obtained, on the effective date of this subsection," which is February 1, 2011, *see* 2011 Wis. Act 2, § 45(4); WIS. STAT. § 991.11.

¶14 *The Final Report is not subject to patient/physician privilege under WIS. STAT. § 905.04 and is not a confidential health care record under WIS. STAT. § 146.81.* Wetzler argues that the Final Report is a "health care record" and is privileged under § 905.04. We reject Wetzler's contention. In order for the Final Report to be a health care record under § 146.81 or for Wetzler's communications with Bowman to be privileged under § 905.04, Wetzler must have been Bowman's patient. He was not. Section 146.81(3) defines "patient" as "a person who receives health care services from a health care provider." Here, as the Departments succinctly put it, "Wetzler went to the PAS on the orders from the [MEB] to determine whether he had the requisite degree of knowledge and ability to practice in his fields of medicine." We agree that Wetzler's encounter with Bowman for assessment purposes did not constitute the receipt of "health care services." Wetzler conceded as much before the ALJ.[6] Therefore Wetzler's assessment results do not constitute a "health care record" under § 146.81. Likewise, because Wetzler was not Bowman's "patient," there is no patient/physician privilege under § 905.04.

¶15 *Wetzler's standing under WIS. STAT. § 19.356.* One of the steps taken by Wetzler to protect the Final Report from being disseminated was to file a motion for a declaratory judgment before the circuit court.[7] The circuit court

[6] When asked by the ALJ whether Wetzler received "health care services from Dr. Bowman," Wetzler's attorney responded, "No."

[7] At the time of appeal, the Final Report had been released to two attorneys pursuant to a public records request. However, this court granted a stay prohibiting the release of the Final Report while this appeal was pending; the stay was based on the parties' stipulation. Currently, one public records request is pending.

denied the motion based on its determination that Wetzler lacked standing to bring a declaratory judgment action. Wetzler challenges the court's decision.

¶16 WISCONSIN STAT. § 19.356(1) provides:

> Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

Wetzler contends that the phrase "as otherwise provided by statute," coupled with his rights to privacy under the health services review statute, WIS. STAT. § 146.38(4), and his right to a physician/patient privilege under WIS. STAT. § 905.04 result in a right to judicial review under § 19.356(1). However, we have rejected Wetzler's contentions as to the other statutory sections and, therefore, his argument on these bases fails here as well. In light of § 19.356, we uphold the circuit court's determination that Wetzler lacks standing to bring an action for judicial review of the DRL's release of the Final Report.

CONCLUSION

¶17 We conclude that the Final Report prepared by the PAS as part of a stipulated order in a MEB disciplinary proceeding and held by the DRL is a public record subject to an open records request under WIS. STAT. § 19.32. We uphold the ALJ's determination that the Final Report is not excepted from the application of the open records statute on the basis of the health services review statute, WIS. STAT. § 146.38, or otherwise privileged as patient/physician communication, WIS. STAT. § 905.04, and thus may be used at an open evidentiary hearing. We affirm the circuit court's order as to these issues. We further affirm the circuit court's

determination that Wetzler lacks standing under WIS. STAT. § 19.356 to request a declaratory judgment prohibiting the dissemination of the Final Report.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.