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

WISCONSIN COURT OF APPEALS
DISTRICT II

CEDARBURG EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

v.

CEDARBURG BOARD OF EDUCATION,

RESPONDENT-RESPONDENT.

FILED

APR 02, 2008

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

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.

ISSUE

Does a reviewing court have the power to vacate an arbitration award that the court concludes is contrary to public policy?[1]

BACKGROUND

The relevant facts are brief and undisputed.[2] The Cedarburg Education Association (the Union) and the Cedarburg School 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 written reprimand, and compensate him for lost wages and benefits.

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,

[1] The supreme court has before it the issue of whether courts have the power to vacate an arbitration award that is contrary to statutory law. *See* ***Racine County v. International Ass'n. of Machinists and Aerospace Workers***, 2006AP964. Oral arguments took place in January 2008 and the decision of the supreme court is pending. This certification will give the supreme court the opportunity to address what is clearly a current and recurring issue: the power of courts to vacate arbitration awards under circumstance not specifically enumerated in WIS. STAT. § 788.10 (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[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 had viewed adult images for one minute and seven seconds; and (3) that 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.

The Board refused to honor the arbitration award and refused to reinstate Zellner. The Union filed a complaint in 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 definition of "immoral conduct" in WIS. STAT. § 115.31(1)(c), which states:

> "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.

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.

Zellner appeals.

DISCUSSION

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. Sch. 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 Sch. 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.***

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 arbitrators, if the arbitrators' misconduct prejudiced a party, or where the arbitrators exceeded their powers. *See* WIS. STAT. § 788.10(1).

We observe that the supreme court has stated in the past that a court may vacate an arbitrator's award "if the award itself … violates strong public policy." ***City of Madsion v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988). However, the issue in ***City of Madison*** was not one of public policy, but rather whether the arbitrator had exceeded his authority when making the award. ***Id.*** at 585 (considering whether the arbitrator made an error of law in determining that the police association's contract superseded a residency ordinance). Furthermore, the two cases cited by the ***City of Madison*** court for the proposition that awards can be vacated for violations of "strong public policy" did not stem from public policy concerns. *See* ***Milwaukee Bd. of Sch. Dirs. 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. 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 and whether the award was mutual, final and definite).[3] Though these cases present the proposition that awards contrary to public policy may be vacated, they do not address the public policy issue head on.

The question presented here is whether invalidity can be founded on the reviewing court's public policy concern about the award, particularly when the public policy concern stems from the court's independent interpretation of the facts measured against legal standards first addressed by the court. It is

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

appropriate for the supreme court to speak to the power of the court to vacate arbitration awards on public policy grounds, because that authority is not expressly conferred by WIS. STAT. § 788.10(1). Furthermore, the fact that a similar issue regarding the court's power to vacate awards is pending with the court demonstrates the recurrent nature of this question. The impact of the supreme court's decision will reach every employee and every employer who enters into a collective bargaining agreement with a binding arbitration clause. We respectfully certify the issue.