STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1862

Timothy Zangs,
Appellant,

vs.

The City of Saint Paul,
Respondent.

Filed September 23, 2008
Affirmed
Kalitowski, Judge

Ramsey County District Court
File No. CX-06-2707

Thomas F. DeVincke, Bonner & Borhart LLP, 1950 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402 (for appellant)

John J. Choi, St. Paul City Attorney, James F.X. Jerskey, Assistant City Attorney, 750 City Hall and Courthouse, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

On appeal from the district court's grant of partial summary judgment for appellant Timothy Zangs against the City of Saint Paul (city) for violation of the Minnesota Government Data Practices Act (MGDPA), appellant argues that (1) the city's failure to create, maintain, and provide appellant with individual raters' notes regarding the video portion of his civil service promotional exam violated both the MGDPA and the Official Records Act (ORA) and (2) the district court erred in limiting appellant's remedy under the MGDPA to an award of attorney fees. We affirm.

FACTS

In December 2003, appellant Timothy Zangs took a three-part civil service exam (exam) administered by the city. The exam included written, fire simulator, and video components that were scored and then averaged together to determine a candidate's ranking for promotion within the city's fire department. The city contracted with a California company, B-PAD, to create and score the video component of its 2003 civil service exam. The video test required candidates to respond to eight different on-the-job scenarios depicted in a video. These responses were then reviewed and graded by B-PAD test examiners. On January 15, 2004, results from the exam were mailed to each candidate; these results included each individual's score on all three parts of the exam, as well as each individual's averaged, overall score.

In March 2004, appellant filed a grievance with the St. Paul Civil Service Commission (CSC) challenging the city's refusal to give him further data regarding his

video test, including the individual raters' notes, as a violation of St. Paul Civil Service Rule 6E.[1] After reviewing appellant's complaint, the CSC ordered the city's human resource department to obtain additional documentation from B-PAD, including "any and all individual performance evaluations and notes related to the individual's performance rating used by scorers of the [video] test" so that it could assess whether the city's testing process was fair and impartial. The city's human resource department contacted B-PAD in October 2004 to ask for this additional information, but B-PAD informed the city that no additional data regarding the scoring of appellant's video test was available. And B-PAD further noted that producing the individual raters' notes requested was impossible because it never requested or received individual performance evaluations or notes from the individuals it employed to score the video test.

Subsequently, the CSC issued additional findings of fact, conclusions, and an order informing the parties that no additional information was available from B-PAD. Although the CSC's additional findings noted that the lack of available records defeated appellant's ability to effectively challenge the validity of the test under Civil Service Rule 6E, the CSC upheld the validity of the B-PAD exam as "accurately reflect[ing] the duties and performance of a fire captain." In arriving at this conclusion, the CSC noted that appellant was allowed to review all information available regarding his performance on

[1] St. Paul's Civil Service Rule 6E states that "Every applicant shall be given an opportunity to inspect the scoring of their papers, and any 'short answer' questions and answers used in the examination – except where standardized, copyrighted tests have been used and the inspection is prohibited as a requirement of the person('s), business, or agency which obtains the copyright on the test."

the video portion of the exam and there was no testimony or evidence to support his assertion that the test was unfairly scored.

On August 11, 2005, appellant requested a complete record of his video test from the city, but appellant's request was refused. Appellant sought an advisory opinion from the Information Policy Analysis Division of the Minnesota Department of Administration regarding the city's failure to provide him with the requested information. On November 30, 2005, the Commissioner of Administration (commissioner) issued an advisory opinion finding that the city's response to appellant's request failed to comply with the MGDPA and the ORA.

In February 2006 the city obtained additional data from B-PAD, including appellant's score per scene, raw score, and percentile score on the video portion of the exam. The city initially withheld this additional information from appellant for a period of five months. On March 17, 2006, appellant filed a civil action alleging that the city had violated the MGDPA and the ORA. Appellant sought temporary injunctive relief, but the district court denied appellant's motion because appellant failed to show irreparable harm. Appellant then made a motion for partial summary judgment on liability. Following a hearing, the district court granted appellant's motion for summary judgment in part, finding that: (1) the city had no duty to produce the individual raters' notes; (2) the city's record-keeping practice did not violate the ORA; and (3) the city violated the MGDPA by withholding for five months the additional data it received from B-PAD in February 2006. As a remedy for this violation, the district court directed the city to provide appellant with the relevant data in its possession and pay the reasonable

attorney fees incurred by appellant in making the motion to compel disclosure of these records.

D E C I S I O N

On appeal from a grant of summary judgment, we ask two questions: "(1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When there are no genuine issues of material fact and either party is entitled to judgment as a matter of law, a grant of summary judgment is appropriate. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). We review de novo the district court's grant of summary judgment based on legal conclusions, including the application of a statute to undisputed facts. *Lefto v. Hoggsbreath Enters, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

I.

Appellant argues that the city's failure to create, maintain, and provide appellant with individual raters' notes regarding the scoring of the video test violated both the MGDPA and the ORA. We disagree.

The MGDPA

> regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities. It establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public.

Minn. Stat. § 13.01, subd. 3 (2006). Because the MGDPA represents a "fundamental commitment to making the operations of our public institutions open to the public," we construe the MGDPA "in favor of public access." *Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 883-84 (Minn. App. 2003).

The MGDPA provides two mechanisms for appealing the government's determinations regarding data. An individual may request a written opinion from the commissioner regarding their rights and access to the data. Minn. Stat. § 13.072, subds. 1(a), 2 (2006). Additionally, an individual may bring a court action to enjoin practices in violation of, compel compliance with, or seek damages for violation of the MGDPA. Minn. Stat. § 13.08, subds. 1, 2, 4(a) (2006).

The ORA requires all government entities within the state to "make and preserve all records necessary to a full and accurate knowledge of their official activities." Minn. Stat. § 15.17, subd. 1 (2006). Subdivision 4 explains that public access to records containing such government data is governed by sections 13.03 and 138.17 of the MGDPA, but the statute does not define what constitutes an "official activity" sufficient to trigger the record-keeping requirements of the ORA. *Id.*, subd. 4 (2006).

The MGDPA allows a political entity to contract with a private party to perform any of its governmental functions or responsibilities under the Act. Minn. Stat. § 13.05, subd. 11(a) (2006). When a private party acts as a government entity, it is subject to the MGDPA's requirements and will be held liable for its failure to comply. *Id.* Thus, if a government entity enters into a contract with a private party to perform any of its functions, the MGDPA requires that the contract terms "make it clear that all of the data

created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of [the MGDPA] and that the private person must comply with those requirements as if it were a government entity." *Id.*

Here, appellant argues that the city has an obligation to create, maintain, and provide appellant with a complete record of the scoring of the video test, including individual raters' notes. The record indicates that although the city contracted with B-PAD to perform the governmental function of creating and scoring the video portion of its 2003 promotional exam, the agreement between B-PAD and the city failed to include any terms relating to B-PAD's obligations under the MGDPA. Appellant contends that, because the city's contractual relationship with B-PAD failed to comply with the requirements of section 13.05, subdivision 11(a), the city should not be allowed to evade liability under the MGDPA by arguing that the records sought by appellant were not in its possession.

We reject appellant's argument based on this court's decision in *WSDI, Inc. v. County of Steele*, 672 N.W.2d 617 (Minn. App. 2003). In *WSDI*, Steele County entered into an agreement with an architectural firm for the design of a new detention center. *Id.* at 619. WSDI, a subcontractor interested in bidding on the project, made a request pursuant to the MGDPA to require the county to obtain information from the architectural firm regarding the project's prequalification bid requirements. *Id.* But the county did not have possession of the data sought by WSDI, and thus did not comply with WSDI's request. *Id.* Although WSDI argued that the county should be held liable

for its failure to include language in its agreement with the architectural firm stating that all the data created, collected, or received by it while performing government functions was subject to the requirements of the MGDPA, we rejected WSDI's argument. *See id.* at 621-22. Refusing to infer liability to Steele County in the absence of any explicit language in the contract between it and the architectural firm, we held that a government entity does not have a duty under the MGDPA to obtain data from the private party it contracted with to perform its government function if it does not have possession of the requested data. *See id.* Similarly here, although the city's contract with B-PAD did not contain a specific provision inferring liability under the MGDPA as required under Minn. Stat. § 13.05, subd. 11, it is undisputed that individual raters' notes sought by appellant were not in the city's possession.

Appellant argues that under *Wiegel v. City of St. Paul* the city has an obligation to provide him with a complete record of the scoring of his video test, including individual raters' notes. 639 N.W.2d 378, 385 (Minn. 2002). But *Wiegel* is distinguishable from the facts here. In *Wiegel*, the supreme court determined that the names and notes of the interviewers from a civil service exam should be classified as private data on individuals, and thus be made available to examinees as a matter of right. *Id*. at 379-80, 384-85. But the data requested in *Wiegel* was in the possession of the city, whereas here, it is undisputed that neither the city nor B-PAD has possession of individual raters' notes because raters' notes do not exist. In addition, appellant has offered no evidence refuting B-PAD's assertion that it was impossible to produce raters' notes. Based on these facts,

we conclude that the district court did not err in determining that the city had no duty to produce nonexistent records.

Furthermore, we reject appellant's argument that the district court failed to give appropriate deference to the commissioner's advisory opinion. Although an advisory opinion written by the commissioner is entitled to careful consideration, it is not binding on the district court. *See In re Admonition Issued In Panel File No. 99-42*, 621 N.W.2d 240, 244-45 (Minn. 2001). Here, appellant exercised his statutory right to request a written opinion from the commissioner, and the commissioner concluded that the city's response to appellant's request for more data violated both the MGDPA and the ORA. Similarly, the district court here found that the city violated the MGDPA by withholding the additional data it received from B-PAD in February 2006. But the district court's opinion differed in part from the commissioner's advisory opinion by properly holding that neither statute required the city to produce nonexistent individual raters' notes regarding the scoring of appellant's video test. We thus conclude that the district court gave the commissioner's advisory opinion adequate consideration. *See WSDI*, 672 N.W.2d at 621-22.

In sum, because the city did not have possession of the individual raters' notes, and because it is undisputed that these notes did not exist, the district court did not err in determining that the city had no duty to produce or create the additional records requested by appellant.

II.

Appellant argues that the district court erred by limiting appellant's remedy to an award of attorney fees because this remedy fell short of the statutory mandate set forth in Minn. Stat. § 13.08, subd. 4 (2006). Because no additional remedy is appropriately available to appellant, we disagree.

The MGDPA states that "any aggrieved person seeking to enforce the person's rights under this chapter or obtain access to data may bring an action in district court to compel compliance with this chapter and may recover costs and disbursements, including reasonable attorney[] fees, as determined by the court." Minn. Stat. § 13.08, subd. 4 (2006). In addition, Minn. Stat. § 13.04, subd. 4, provides a mechanism by which an individual who is the subject of public or private data can contest its accuracy, and states that "[d]ata on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by a [government entity] without regard to the requirements of section 138.17." Minn. Stat. § 13.04, subd. 4(b).

Generally, we review a district court's award or denial of attorney fees for an abuse of discretion. *Star Tribune v. City of St. Paul*, 660 N.W.2d 821, 827-28 (Minn. App. 2003). But when determining the appropriateness of a remedy requires construction of the MGDPA, such statutory construction presents a legal issue that we review de novo. *Deli v. Hasselmo*, 542 N.W.2d 649, 655 (Minn. App. 1996), *review denied* (Minn. Apr. 16, 1996); *Washington v. Indep. Sch. Dist. No. 625*, 610 N.W.2d 347, 349 (Minn. App. 2000).

Appellant contends that the attorney-fee remedy he was awarded fell short of the statutory mandate set forth in Minn. Stat. § 13.08, subd. 4, because to date, the city has failed to provide appellant with the individual raters' notes that he requested. But the parties do not dispute that because the individual raters' notes sought by appellant do not exist, the notes are not in the possession of either the city or B-PAD. Thus, production of these notes is not a viable remedy. *See Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005) (stating that an issue is moot if "an event occurs that resolves the issue or renders it impossible to grant effective relief."); *see also Adelman v. Onischuk*, 271 Minn. 216, 228, 135 N.W.2d 670, 678 (1965) (noting that when a statute provides a remedy, "such remedy is generally exclusive"). And although appellant argues that the city should be required to create these nonexistent notes, appellant has put forth no evidence showing that it would be possible for B-PAD's raters to go back in time and "recreate" notes that never existed detailing their mental evaluation of a video test they reviewed nearly five years ago.

The only other remedy available to appellant under Minn. Stat. § 13.08, subd. 4, in addition to the attorney fees he already received, would be an injunction compelling the city and its third-party contractor to make more thorough records of their exam-scoring procedures in the future. Minn. Stat. § 13.08, subd. 4. But the record here indicates that the city has already taken this action pursuant to an order from the CSC. Thus, no additional remedy is available for appellant.

Finally, we note that limiting appellant's remedy here to an award of attorney fees is not inequitable. Appellant exercised his right to challenge the fundamental fairness of the exam and seek additional equitable remedies before the CSC. Appellant did not prevail in that forum. The CSC found that "there is no testimony or evidence to support [appellant's assertion] that the tests were unfairly scored" and ordered that "the Fire Captain test from December 13, 2003 be upheld." Accordingly, on this record we conclude that the district court did not abuse its discretion by limiting appellant's remedy to an award of attorney fees.

Affirmed.