COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP951 **Cir. Ct. No. 2006CV1810**

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

MADISON METROPOLITAN SCHOOL DISTRICT,

PETITIONER-APPELLANT,

V.

MADISON TEACHERS, INC.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. The Madison Metropolitan School District appeals from an order confirming an arbitration award in favor of a teacher who was issued a letter of reprimand for violating District policies on release of confidential

student information. Based on the limited standard that applies to our review of arbitration decisions, we affirm.

¶2 The facts found by the arbitrator do not appear to have been in significant dispute during the arbitration, and are not now. Debra Tichenor is employed by the District as a special education teacher. During a previous disciplinary proceeding, Tichenor provided her union-appointed attorney with a copy of an individualized education program (IEP) for a student. The District issued Tichenor a written reprimand for releasing a student record to an unauthorized third party without written consent or authorization alleging the action was a violation of two board policies. Tichenor's union, Madison Teachers, Inc., filed a grievance, which eventually went to arbitration. The arbitrator concluded that Tichenor was permitted to provide her union representative with the IEP during the grievance process, and therefore the District violated the collective bargaining agreement by imposing discipline without just cause.

¶3 The board policies at issue were numbers 4150 and 4157. Board policy number 4150 provided that all student records maintained by the District "shall be confidential and are designed to ensure compliance with federal and state legislation," and shall be open for inspection "only in accordance with Board policy." The second policy provided that the District "will not disclose student records, including personally identifiable student information from the educational records of the student without prior written consent of the parent or eligible student, except as otherwise permitted by state and federal legislation."

¶4 On appeal, the parties agree that our review of arbitration awards is very limited. "Courts will overturn an arbitration award only if there is a perverse misconstruction or if there is positive misconduct plainly established, or if there is

a manifest disregard of the law, or if the award is illegal or violates strong public policy." ***Lukowski v. Dankert***, 184 Wis. 2d 142, 149, 515 N.W.2d 883 (1994) (citation omitted). "Because arbitration is what the parties have contracted for, the parties get the arbitrator's award, whether that award is correct or incorrect as a matter of fact or law." ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 586, 425 N.W.2d 8 (1988). Mistakes of either fact or law are not grounds for review of or setting aside an award. ***Scherrer Constr. Co. v. Burlington Mem. Hosp.***, 64 Wis. 2d 720, 728, 221 N.W.2d 855 (1974).

¶5 The District first argues that there was manifest disregard of law. An arbitrator shows manifest disregard for the law when he or she understood and correctly stated the law but ignored it. ***City of Madison v. Local 311, Int'l Ass'n of Firefighters***, 133 Wis. 2d 186, 191, 394 N.W.2d 766 (Ct. App. 1986). The District argues that the arbitrator correctly stated, but then ignored, the federal Family Educational Rights and Privacy Act (FERPA) and the Wisconsin pupil records law found in WIS. STAT. § 118.125 (2005-06).[1]

¶6 More specifically, the District argues that the arbitrator showed manifest disregard for the law because he first concluded that Tichenor violated these statutes by disclosing certain "personally identifiable information," but then went on to hold that Tichenor was nonetheless permitted, by virtue of the collective bargaining agreement and her right to due process, to make a limited disclosure of that information to her attorney in the grievance process. The District argues that in this analysis the arbitrator "correctly stated the law" in

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

holding that Tichenor violated the statutes, but then "ignored" it by concluding that her disclosure was nonetheless authorized.

¶7 We reject this argument because we do not agree with the District's assertion that the arbitrator found Tichenor to have violated federal or state law. Although the District's opening brief repeatedly asserts, without citation to the record, that the arbitrator made such a finding, no such conclusion is expressly stated in the arbitrator's lengthy and thorough decision. The decision does include considerable discussion of FERPA, but that discussion is primarily directed at using the law, and its implementing rules, to determine what was meant in the board's policy by the phrase "personally identifiable student information." It is clear from that portion of the decision that the arbitrator's goal was to determine whether Tichenor violated *board policies*, rather than any law.

¶8 This focus is made most clear, perhaps, in the arbitrator's eventual conclusion near the end of the discussion: "Based on my examination of the exhibits, I conclude that Ms. Tichenor's failure to redact the student's I.D. numbers contained in the student's IEP she provided to her attorney did constitute a disclosure of 'personally identifiable information,' which, unless otherwise privileged, creates culpability of Tichenor *under Board policies*." (Emphasis added.)

¶9 Another indication that the arbitrator did not hold Tichenor in violation of federal or state law is that at no point in the decision did he clearly describe any such law that would regulate conduct by Tichenor personally, as opposed to regulating conduct of the District as an institutional body. Furthermore, in the concluding section of the decision, where the arbitrator concluded that Tichenor's conduct was otherwise authorized, the decision

discussed the need to balance her grievance and due process rights only against board policies, and not against any statutes or other law.

¶10 Our conclusion that the arbitrator did not find Tichenor in violation of these statutes eviscerates the District's argument that the arbitrator demonstrated manifest disregard for law by then also concluding that Tichenor was otherwise permitted to disclose the record. At most, the arbitrator's conclusion demonstrated manifest disregard for *board policy*. However, disregard for board policy is not a basis for vacating the award under the applicable standard of review, which is directed only at disregard of the law.

¶11 The District argues that a violation by Tichenor of board policies that were intended to comply with these statutes is necessarily a violation of those statutes. That argument fails if the statutes regulate only the District's conduct, not individual teachers. And, in a different portion of its brief, the District itself appears to concede that acts by individual teachers are probably not covered by FERPA. In its opening brief, the District states that FERPA recognizes that isolated, inadvertent disclosures will inevitably occur, and that the statute thus requires that there be a school-wide policy or practice before federal funding will be jeopardized, which is the only sanction the arbitrator or the District has mentioned FERPA provides.

¶12 The District further concedes that the idea of school-wide policy or practice means that "FERPA likely excludes most of the instances in which violations of FERPA rights occur, e.g., when an individual school officer, either by happenstance or ignorance of the law, takes (or fails to take) an action that results in the denial of the FERPA rights of a particular parent in a particular instance." Even though the District asserts later, in its reply brief, that the

arbitrator's finding that Tichenor violated board policies is necessarily a finding that she violated the statutes they were intended to implement, the District still does not cite to any portion of FERPA that regulates the conduct of teachers personally. Therefore, we reject the argument that Tichenor's violation of board policies was necessarily a violation of statutes those policies were intended to implement.

¶13 The District also argues that Tichenor's release of the record was barred by the Individuals with Disabilities Education Act (IDEA). We need not decide whether any provision of that federal statute regulated Tichenor's personal conduct or whether she violated it. That is because it is clear the *arbitrator* did not reach any such conclusion in his decision. He specifically stated that, while brief references in passing had been made to that law during the hearing, "it has no apparent impact on the instant proceeding." As with the other statutes, if the arbitrator did not reach any conclusion about IDEA's applicability to Tichenor's conduct, then it cannot be said that the arbitrator understood and correctly stated that law but ignored it.

¶14 In addition to manifest disregard, the District argues that the arbitration award should be vacated because it violates strong public policy. An award may be overturned "if the award itself is illegal or violates strong public policy." ***Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Educ. Ass'n***, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980). The District argues that the arbitrator's decision violates public policies that favor limited disclosure of student records.

¶15 In reviewing this issue, we note that the standard focuses on the "award itself," and not on the legal reasoning of the arbitrator that led to the

award. If this test were interpreted as a means to examine the arbitrator's legal reasoning, then it would simply become a back-door method of allowing us to review arbitration decisions for errors of law, which, as noted above, we are not permitted to do.

¶16 The award itself in this case was an order for the District to expunge its reprimand letter to Tichenor. There is nothing inherently illegal or against public policy about an award of this type. The award does not direct the District to take any illegal action. Specifically with respect to public policies regarding student records, the award does not direct the District to release any student record, or to permit Tichenor to release any record in the future. Therefore, we conclude that the award itself is not illegal or against strong public policy.

¶17 Finally, we address the District's argument that the arbitrator's decision puts it in an untenable position that imperils its federal funding. This argument was a theme common to both its manifest disregard and public policy arguments. The District argues that it is now in the position where, if it accedes to this arbitration decision holding the teacher's release of the record to be permitted, its federal funding will be at risk because it will now have a school-wide practice or policy of allowing teachers to make such releases. For example, the District argues that the arbitrator's decision "is so broadly written that his decision in effect established a de facto policy in the District."

¶18 This argument implicitly assumes that the arbitrator's analysis and conclusion are binding on the District in other employee discipline cases or in making other records decisions. However, the District has cited no persuasive authority in support of that proposition. It does not cite any statute or any provision of the labor agreement that gives this arbitration decision such wide

effect. This is not a class or organizational grievance. Therefore, in analyzing the manifest disregard and public policy arguments in this opinion, we have not accepted the District's concern about the effect of this arbitration decision on federal funding. We have considered this as one decision by one arbitrator in one grievance involving one teacher.

¶19 We further emphasize that nothing in this opinion should be read as expressing or implying a decision about the correctness of any legal analysis or conclusion by the arbitrator. We have simply applied the limited standard of review that applies to arbitration decisions and conclude that the District has not shown a basis to vacate the award.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.