COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV

KAREN SCHILL, TRACI PRONGA, KIMBERLY MARTIN, ROBERT DRESSER AND MARK LARSON

Plaintiffs - Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT AND ROBERT CRIST

Defendants - Respondents,

and

DON BUBOLZ,

Intervenor - Respondent.

Appeal No. 2008AOP000967

Circuit Court Case No. 07CV304

Appeal From The Circuit Court For Wood County
The Honorable Charles A. Pollex,
Adams County Circuit Court Judge Presiding

BRIEF OF INTERVENOR - RESPONDENT DON BUBOLZ

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August 25, 2008

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ISSUES PRESENTED

(1) Whether correspondences on public employee's government-owned computer systems are public records regardless of whether the contents of the email correspondences are purely personal or related to the conduct of official business.

(2) If the first issue is resolved in the affirmative, does the public's interest in maintaining the privacy of such correspondences outweigh the public records law's presumption in favor of disclosure?

The Circuit Court resolved the issues as follows:

(1) As to issue one, the court found that the emails were public records.

(2) As to issue two, the court found that the public's interest in non-disclosure did not outweigh the presumption in favor of disclosure and thus ordered disclosure.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Intervenor does not feel that oral argument will serve to better inform the court with respect to the issues presented and the relevant legal issues. Intervenor does believe that publication of this opinion is very important because there does not appear to be any published Wisconsin court opinions addressing these issues as presented. This case will have statewide applications for all public employees and would give necessary guidance to public employers throughout the state.

INTRODUCTION

The Intervenor wholeheartedly agrees with the information, case law and arguments presented by the Defendants-Respondents Wisconsin Rapids School District and Robert Crist brief and will not insult the intelligence nor take the time of the Court by repeating those same arguments in this brief.

However, it is necessary for this Court to realize the Association has attempted to contend throughout this entire proceeding that the Intervenor, by his request, simply wanted to know if the teachers were following the email policy. Thus, they continue to request to have the entirety of the emails in question redacted. Yet, they have been consistently wrong. The School District has a number of policies and it is those policies the Intervenor was concerned about ascertaining whether they were violated. As an example, the policy regarding teacher involvement in political campaigns. If the entire content of the emails is redacted, then the public will never know if policies other than the email policy were violated.

The Association states Assoc. Br. at 16 & 17 that the Circuit Court "hypothesized" the District may have had concerns about the extent of the teachers' email usage, but the District has never made those allegations. The general public is not privy to District concerns regarding personnel issues or discipline of teachers, plus that was not the issue of this case. Consequently, it would not have been discussed in these proceedings. There have been no known allegations of misconduct because without the content of the emails, how would a member of the public bring them to the attention of an administration unable to monitor every email by every teacher or even know if the school administration did their job. However, there does not always have to be allegations of misconduct for

monitoring in school districts to occur. One example is the extemporaneous observation by a principal of an employee. Monitoring is allowed in the Computer Use policy of the District and is not predicated on misconduct allegations.

The Intervenor believes this entire case is an attempt by the Association to narrowly define Wisconsin's Open Records Law to allow public employees on their taxpayer paid work time to conduct personal business without any monitoring or accountability to the public or taxpayers. However, the attorney representing the teachers in this case gave written advice to the Association's members statewide in a publication (recently added to the Index of Appeal by Order August 14, 2008 as Exhibit B to my letter to Judge Potter) shortly after the initial filing by the Plaintiffs (Appellants) that completely contradicts the Appellant's basic premise of this case. In that document, Attorney Jonen states to the Association members, "Don't write anything in an email you wouldn't feel comfortable seeing printed on the front page of the local newspaper." The Intervenor believes the Association's attorney with this advice not only supports, but makes a solid case for Judge Pollex decision and Order to be affirmed in its entirely.

I. THE ASSOCIATION'S ATTEMPTS TO NARROWLY DEFINE PUBLIC OFFICIALS, OFFICIAL BUSINESS, OFFICIAL ACTS AND A LACK OF JOB NEXUS ARE MISLEADING AND SHOULD NOT BE USED.

The Association states repeatedly throughout their brief that the teachers' "personal emails" had nothing to do with public officers. However, the Intervenor believes if the teachers' emails, sent or received, discussed school board members, school board proceedings, school board candidates or organizations supporting or opposing school board members or candidates, then they would be discussing public officials and/or the

operation of the government agency or the affairs of government which would make the records public. Redacting the entire message content would make this impossible to prove or demonstrate, and having school officials review each email message would be cost prohibitive.

The Association states Assoc. Br. at 9 "The records must possess the requisite nexus to official duties in order to be public records." Irrespective of whether teachers can use the school district's email for limited personal use, whenever the teacher is on taxpayer paid time during their paid workday, they are performing official duties. If they were not performing official duties or on official business, they should not have been paid. As contracted employees, they are only paid to perform duties for which they were contracted.

Teachers perform a number of official acts throughout their workday such as teaching, tutoring, supervising, getting mail from the office, receiving and making phone calls or messages. However, during the entire time they are paid as professionals, they are expected to perform in an appropriate manner. To try to distinguish some duties as personal and not official would relegate them to a "punch clock" status and make accountability in schools impossible because anytime they would do something inappropriate, they would simply state they were acting on personal time and outside the realm of their official duties.

II. THE ASSOCIATION'S ATTEMPT TO USE OTHER STATES OR FEDERAL JURISDICTION, AS WELL AS REDACTED INFORMATION, SHOULD BE DISREGARDED SINCE THEY ARE NOT THE SAME AS WISCONSIN OPEN RECORDS LAW OR THE CIRCUIT COURT RULING.

The Association uses in its brief various other State and Federal court rulings to be instructive as to how this Court should rule Assoc. Br. at 15. However, there is no background or specific language of any of those states' laws, their relevant case law or the interpretations in those states. This case is not about children on playgrounds, material in law enforcement personnel files or the Freedom of Information Act, which are the issues of those cases. This case is about Wisconsin's Open Records Law as it is written, the case law in Wisconsin and the facts of this case.

The Circuit Court's decision and Judge Pollex Order redacted all the personal information that was challenged by the Association in this case, including the bank account and personal health information. However, the Association continues to use this as a basis for their appeal, irrespective of the Circuit Court Ruling and Order.

III. THE SCHOOL DISTRICT COMPUTER USAGE POLICY AND ATTORNEY JONEN'S ADVICE TO TEACHERS STATEWIDE SHOULD NOT BE SUMMARILY IGNORED TO PROTECT THESE TEACHER EMAILS OR GAIN RIGHTS AND PRIVACY THEY DID NOT POSSESS.

The Wisconsin Rapids School District has a computer use policy (365.1 Network and Internet Acceptable Use Policy) which was referred to in the Intervenor's Response Brief

dated March 8, 2008 and attached to that document. It should have also been provided to this Court in the Index to Appeal (10:14).

Each employee (including teachers) sign the statement referred to in the same document which was attached (Court 10:14) indicating they are aware of the policy and agree to comply with it. The last sentence of the second paragraph on page one states "Users of the WRDN (Wisconsin Rapids District Network) should not assume that information stored and/or transmitted is confidential or secure." Therefore, the teachers in the instant case knew or should have known the email information was not confidential and should not now after the fact be able to gain that right.

The Policy 365.1 RULE "Network and Acceptable Use Guidelines" on page one, paragraph four states, "District employees will be required to sign the WRDN Employee Acknowledgement (sic) and Waiver form. The form states, "By signing below I acknowledge that e-mail messages and Internet usage are not private and recognize that all employees' activities on the WRDN may be monitored." The Policy and Rule of the Wisconsin Rapids School District (365.1) is what was in effect when the teachers wrote those emails and their signed statements indicate they acknowledge the lack of confidentiality and privacy. This is what people knew and coming up with after the fact arguments to render useless that Policy should not be accepted by this Court.

After the Plaintiffs initiated this action in Circuit Court, Attorney Jonen in a statewide Association publication stated in an article regarding email, "Don't write anything in an e-mail you wouldn't feel comfortable seeing printed on the front page of the local newspaper." Her advice contradicts and flies directly in the face of her arguments throughout this case on behalf of the Appellants. Attorney Jonen must have known

Association members did not have the rights she is now arguing to attain for them, otherwise her advice would not have been as stated. This Court should not allow the Association to gain personal privacy and confidentiality for the Wisconsin Rapids teachers, which the local School District Policy expressly did not provide and which Attorney Jonen specifically advised against during the course of these proceedings. The Association may have a fear of the posting of the emails on the Internet Assoc. Br. at 16, but the Internet is no different than the front page of a local newspaper, which was used in their warning to their members.

CONCLUSION

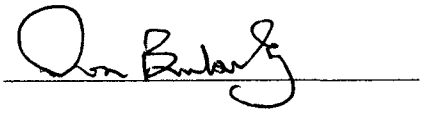
The Association in its brief and the representation of its members has attempted to narrowly define the Wisconsin Open Records Law by making the law give rights to individuals and shutting out the public or in the alternative requiring School Administration specifically review each and every email for content. This should not be allowed.

The Association should not be allowed by this Court to use other states' laws or rulings to define Wisconsin Law since there may be a multitude of extenuating facts and circumstances leading to those decisions. This case should be decided on the case law, interpretation and specific facts, not on whether other states' rulings confirm or oppose their position.

This Court need not look any farther than the Policy, Rule and signed Acknowledgment form in effect at the time the emails were written to see that the Appellants waived their privacy and confidentiality rights prior to writing the emails. This case should not restore

those rights once waived which was also acknowledged by the warning given by the Appellants' Attorney.

Therefore, for the reasons stated in the Defendants-Respondents Brief and those stated herein, I respectfully request this Court to Affirm the Ruling and Order of the Circuit Court as written without modification.

Dated this 24th day of August, 2008 By: 

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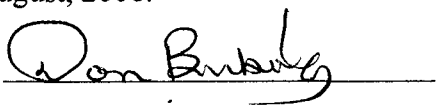
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the best of my ability with the rules contained in Wisconsin Statutes 809.19 (8) (b) and (c) for a brief produced with a monospaced font.

The length of this brief is eight (8) pages.

Respectfully submitted this 24th day of August, 2008.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused three (3) true and correct copies of the foregoing Brief and Appendix to be served upon all counsel of record via first class mail as follows:

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Dated this 24th day of August, 2008.

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