Wisconsin Employment Relations Commission

STATE BAR LABOR LAW SECTION

April 19, 2007-Milwaukee, Wisconsin

April 20, 2007-Madison, Wisconsin

WERC UPDATE

BY PETER G. DAVIS
WERC GENERAL COUNSEL**

I. WERC Operations

Chairperson Judy Neumann – confirmed for a term which expired March 2007.
Commissioner Paul Gordon –confirmed for a term expiring March 2009.
Commissioner Sue Bauman –confirmed for a term expiring March 2011.

Sixteen attorneys (9 in Madison and 7 out state) and 4.5 support staff.

Budget developments

Retirement of Dave Shaw

New Hire-Danielle Carne

Additional retirements anticipated

Website is http://werc.wi.gov/index.htm

*** * The speaker's remarks do not necessarily represent the views of the WERC.**

II. New WERC Administrative Rules

Applicable to all matters filed on or after August 30, 2006. Rule text available on WERC website.

-Fax and e-mail service and delivery
    -New Forms
-Timing of motions to make complaint more definite and certain
    -Revised service letter
-Complaint Conciliation
-Failure to Appear
-Answers to Complaint
    -Timing
    -Waiver of Affirmative Defenses
    -Revised service letter
-Timing of objections to final offer.

III. Recent WERC Decisions

KETTLE MORAINE SCHOOLS, DEC. NO. 30904-D (WERC, 4/07)

Employer did not violate Secs. 111.70 (3) (a) 1 or 4, Stats. by comments made to employees and Union in an effort to pressure Union into changing bargaining position.

As long as direct communications to employees discuss an offer already made to the union, are not deceptive, misleading or threatening, do not directly disparage the union, and do not offer a better deal to employees, said communications remain within the employer's "free speech" rights and tactical choices.

At the bargaining table, employer is entitled to predict the negative consequences of a settlement/interest arbitration award sought by the union so long as the prediction is based on demonstrable realities and not unlawful animus.

By unilaterally altering the number of hours that constitute the "normal" or "general" work year (and thus employee wages and fringe benefits) on a permanent rather than temporary basis and by altering the number of hours of work for all employees without regard to seniority, the Employer breached its obligation to maintain the status quo during a contract hiatus and thus violated Secs. 111.70 (3) (a) 4 and 1, Stats.

CITY OF MENOMONIE, DEC. NO. 32066 (WERC, 4/07)

Administrative Assistant to Police Chief is a confidential employee based on duties to report potential leave abuse by employees in three bargaining units, take notes at monthly supervisory meetings where confidential labor relations matters are discussed, type drafts of bargaining proposals, disciplinary letters and grievance responses, and take notes during investigatory interviews of witnesses regarding potential employee discipline.

Given variety of locales in which the confidential duties will be performed and the full work schedule of Employer's one other confidential employee, it would be unduly disruptive of Employer's operations to have the one other confidential employee perform this work.

CITY OF SOUTH MILWAUKEE, DEC. NO. 32059 (WERC, 3/07)

In context of contention by Union that Employer must bargain over decision to reduce the number of fire fighters on a shift due to impact on employee safety, WERC rejects Employer argument that City's ongoing compliance with Wisconsin Department of Commerce administrative rules regarding fire fighter safety precludes WERC from concluding that no duty to bargain exists. WERC further concludes that Union has no obligation to exhaust any Department of Commerce remedies before proceeding on the duty to bargain dispute.

PORT EDWARDS SCHOOL DISTRICT, DEC. NO. 32049 (WERC, 3/07)

If existing fringe benefit is illegal, Employer must propose and implement a legal benefit of equal value if it wishes to make and implement a valid QEO.

WESTON SCHOOL DISTRICT, DEC. NO. 29633-B (WERC, 3/07)

Manager of Technology Services is neither a professional employee nor a managerial or confidential employee.

DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 2/07); APPEAL PENDING CIR CT DODGE

Employer's renunciation of unwritten practice of paying teachers extra for an extra period of work is effective with the execution of a successor agreement that does not contain contract language continuing the practice. Union has burden of securing contract language to maintain practice. But Employer has obligation to continue the practice/extra payments as part of the status quo during a contract hiatus.

Commission precedent (RACINE SCHOOLS, DEC. NO. 29203-B) that established status quo obligation of union to exhaust grievance procedure during contract hiatus before breach of status quo complaint can be filed does not apply because grievance procedure does not apply to unwritten practice.

WERC rejects Employer's request for relief from the large back pay consequences of Employer's violation of law but explicitly invites parties to bargain modifications if they wish.

CITY OF NEW BERLIN, DEC. NO. 32015 (WERC, 2/07)

Citing general concept of unwillingness to exclude regular part-time employees from a bargaining unit of full-time employees if both groups perform similar work under similar conditions, WERC concludes bargaining unit of 5 full-time firefighters sought by Union is not appropriate because 79 regularly scheduled (600 hours a year) have substantial community of interest with the full-time firefighters and creation of 5 employee unit in context of overall size of Employer workforce (470 employees) was at odds with statutory anti-fragmentation policy.

CITY OF MADISON, DEC. NO. 31997 (WERC, 1/07)

WERC concludes Stagehands working at Overture Center and Monona Terrace are municipal employees not independent contractors. Stagehands have no investment or assumption of risk as to the work they perform; no profit or loss depends on their efficiency or ability; pay is based on time worked rather than result; and they do not exercise independent judgment and initiative in determining when, where and how they accomplish the job.

MILWAUKEE SCHOOLS/SEIU 150, DEC. NO. 31602-C (WERC, 1/07)

Union breached its duty of fair representation to discharged employee by totality of its conduct including: (1) failure to advise employee that Union may not take grievance to arbitration in employee rejects Employer settlement offer; (2) allowing grievance to languish for a year after settlement offer despite grievant's repeated attempts to contact Union as to status; and (3) Union failure to explicitly or implicitly weigh the MAHNKE factors when deciding not to arbitrate grievance.

Union ordered to pay costs/attorneys fees incurred by employee litigating the merits of her discharge before WERC examiner.

WISCONSIN INDIANHEAD TECHNICAL COLLEGE, DEC. NO. 31947 (WERC, 12/06) APPEAL PENDING CIR CT WASHBURN

Career Specialist and Disability Specialist are not managerial employees.

Managerial employee status requires either: (1) **formulation**, determination and implementation of policy at a **"relatively high level"**; or (2) effective authority to commit the employer's resources regarding the type and level of services to be provided.

CITY OF MILWAUKEE, DEC. NO. 31936 (WERC, 11/06)

Union has no right to bargain over minimum job-related qualifications for a job or how those minimum job-related qualifications are measured.

Union has a right to bargain over which qualified employee is entitled to job and over procedures which allow it to challenge the employer's judgment that an employee is not minimally qualified or that the minimum qualifications are job-related.

Interplay between duty to provide information pursuant to duty to bargain and recently created limitations on public records access to employee personnel records (See Sec. 19.36 (10), Stats.) discussed.

MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 10882-B (WERC, 11/06)

WERC will honor "deal" to exclude an employee/position from bargaining unit and a "deal" can be established by union's knowledge of employee/position and failure to seek inclusion for lengthy period of time. But no "deal" present where large workforce and frequent job title and composition changes mean union is not aware of employee/position.

CITY OF STURGEON BAY, DEC. NO. 31880 (WERC, 10/06)

Statement by interest arbitrator that "the arbitrator will effect simultaneous exchange and declare the hearing closed upon receipt of the briefs." cannot reasonably be understood to also mean that the record cannot be reopened, upon motion, for receipt of relevant evidence not available at the time of the hearing. Thus, the interest arbitrator did not err by considering interest arbitration award issued by another arbitrator involving a different bargaining unit of employees of the same municipal employer which award was relevant evidence as it constituted "Changes in . . . circumstances during the pendency of the arbitration proceedings." within the meaning of Sec. 111.70 (4)(cm) 7r., Stats.

SAUK COUNTY, DEC. NO. 27107-B (WERC, 10/06)

Employee who participated in hiring decisions, independently evaluated employees, issued recorded verbal reprimands, and directed the work of four employees on a daily basis is a supervisor.

STATE OF WISCONSIN, DEC. NO. 31271-B (WERC, 8/06)

Employer has no duty to bargain-related obligation to provide presumptively relevant names and addresses of current unit members to incumbent union where sole purpose for said information identified by incumbent was communicating with employees to persuade them to vote for incumbent in future representation election (i.e. for a purpose found to be outside the incumbent's current statutory duty as bargaining representative).

MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31732 (WERC, 8/06); AFF'D CIRCT MILW 06CV008395 3/07; APPEAL PENDING CT APP.

Commission concludes that during bargaining over a successor agreement, teachers have right to wear bargaining-related buttons in classroom and Commission majority (Commissioner Gordon dissenting) concludes that teachers have right to place bargaining-related signs in classroom in same location as teachers are allowed to place personal pictures/posters.

BROWN COUNTY, DEC. NO. 31476-C (WERC, 6/06); AFF'D CIRCT BROWN 2006CV 1322 11/06. APPEAL PENDING CT APP.

County discharge of care giver pursuant to Sec. 50.065 (5m), Stats is subject to de novo review under contractual/status quo just cause standard and County lacked just cause to discharge employee.

CITY OF EAU CLAIRE, DEC. NO. 29346-D (WERC, 6/06)

Commission departs from standard make whole remedy of ordering interest (at statutory rate of 12%) on back pay from date of violation because applicable rate of pay and/or number of hours of work could not determined until Commission issued decision.

RACINE COUNTY, DEC. NOS. 31377-C,31378-C (WERC, 6/06)

Commission exercises its remedial discretion and modifies Examiner order by eliminating employee obligation to repay monies saved by employees due to employer's unlawful unilateral modification of status quo as to health insurance premiums.

STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06)

Applying doctrine of issue preclusion to question of whether the employer had failed to comply with an arbitration award by subsequent discipline of grievant for same conduct found improper by arbitrator, Commission concludes that no violation of law occurred because it could not be determined from the expedited/no rationale nature of the award why the grievance was sustained.

IV. RECENT FINAL PUBLISHED COURT DECISIONS

DUNN COUNTY V WISCONSIN EMPLOYMENT RELATIONS COM'N 293 WIS 2D 637 (CT APP 2006)

Proposals for county law enforcement employee collective bargaining agreement that (1) prohibit non-unit employees from performing unit work except in emergencies; (2) require overtime to be first offered to unit employees; and (3) limit use of reserve/LTE deputies do not intrude into sheriff's constitutionally protected prerogatives because they are "internal management and administrative duties" which, while important, give neither character nor distinction to the office of the sheriff.

Proposal for county law enforcement employee collective bargaining unit that gave clerk of courts scheduling and supervisory authority over the court security officer interfered with the sheriff's duty of attendance on the court and thus did intrude into the sheriff's constitutionally protected prerogatives.

STERN V STATE OF WISCONSIN, 2006 WI App 193 (CT APP 2006)

Statutory time limit for filing personnel appeal with WERC can be waived because it affects WERC's competency to proceed and not WERC's subject matter jurisdiction.

V. PENDING COURT CASES

DODGELAND SCHOOLS, DEC. NO 31098-C-SEE ABOVE

MILWAUKEE SCHOOLS-DEC 31732-SEE ABOVE

BROWN COUNTY-DEC. NO 31476-C-SEE ABOVE

INDIANHEAD TECHNICAL COLLEGE, DEC.NO. 31947-SEE ABOVE

SUN PRAIRIE SCHOOLS, DEC. NO. 31190-B (WERC, 3/06), DEC. NO 31190-D (WERC, 8/06), APPEAL PENDING CIRCT DANE

Where long standing (20 year) past practice conflicts with clear contract language, Commission majority (Commissioner Gordon dissenting) employer can renounce practice (at least in presence of a zipper clause) and union has burden of acquiring contract language supporting continuation of the practice in the next contract. However, employer must maintain practice during any contract hiatus until new contract is reached.

INDIANHEAD TECHNCIAL COLLEGE, DEC. NO. 317 (WERC, 7/06) APPEAL PENDING CIRCT WASHBURN

Certain individuals are not managerial employees.

MADISON SCHOOLS, DEC. NO. 31345-B (EMERY, 3/06) AFF'D BY OPERATION OF LAW, DEC. NO. 31345-C (WERC, 4/06); APPEAL PENDING CIRCT DANE.

Without regard to whether matter is mandatory or permissive subject of bargaining, employer violates Sec. 111.70 (3) (a) 4, Stats. if it bargains with individual employees instead of union.

*** In its brief to the circuit court, WERC confesses error to the extent the Examiner decision (which became the WERC decision when there was no appeal to Commission) concluded mandatory/permissive distinction was irrelevant.*

BROWN COUNTY, DEC. NO.11983-J (WERC, 3/06); APPEAL PENDING CIRCT BROWN

Judicial Assistants are County employees, are not confidential employees and can be included in a collective bargaining unit without violating the judiciary's constitutional authority (although certain contractual protections cannot be bargained on their behalf due to judges' statutory authority to select own Assistant).

CESA #3, DEC. NO. 31292 (WERC, 3/05), REV'D CIRCT GRANT CASE 05-CV-217 11/05, AFFIRMED CT APP. DIST III 10/06 (UNPUBLISHED);PETITION FOR SUP CT REVIEW GRANTED.

Commission concludes that proposal which requires employer to provide "appropriate remedial assistance prior to instituting disciplinary procedures unless circumstances make such assistance impossible." is a mandatory subject of bargaining primarily related to job security. Commission rejects argument that a prior decision of WERC and Wisconsin Supreme Court in Beloit Educ. Assoc. v. WERC, 73 Wis. 2d 43 (1976) warrants a contrary conclusion. Commission notes that the proposal does not dictate a specific type of assistance. Circuit Court reverses concluding WERC is attempting to reverse Supreme Court's decision in Beloit. Court of Appeal affirms WERC in per curium decision on basis of deference/standard of review.

BAYFIELD COUNTY, DEC. NO. 31291 (WERC, 3/05), REV'D CIRCT BAYFIELD, 05 CV 43 2/06; APPEAL PENDING CT APP

Commission concludes that Confidential Secretary/Office Supervisor is not a supervisor or a confidential employee. As to supervisory issue, Commission determines that only one employee is allegedly supervised, incumbent has no disciplinary authority (independent or effective recommendation), incumbent's role in hiring was significant but fell short of effective recommendation and incumbent spends little time supervising work. Circuit Court reverses as to supervisory issue concluding that incumbent has the effective authority to hire and the Commission undervalued the authority of the incumbent to effectively recommend the performance evaluations of the one employee.

EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) AFF'D CIRCT ROCK 05-CV-348 2/06 APPEAL PENDING CT APP

Commission concludes employer terminated all three bargaining unit employees at least in part out of unlawful animus. Commission further concludes that employer decision to eliminate its full-time fire fighters while continuing to provide the same level of service through volunteers is a mandatory subject of bargaining. Circuit Court affirms based on deference/standard of review.

ST. CROIX COUNTY, DEC. NO. 8932-M (WERC, 1/05) REV'D CIRCT ST. CROIX O5-CV-348 3/06, APPEAL PENDING CT APP

Commission concludes that neither the Recycling Technician nor the GIS Mapper is managerial employees. Commission determines that while both are skilled professionals making significant contributions to county programs, neither have the level of influence on policy needed to establish managerial status. Circuit Court reverses as to the Recycling Technician and determines that the incumbent has both sufficient policy role and sufficient budgetary/financial authority to establish managerial status.

VI. PENDING ISSUES

Rights/obligations of employer under Sec. 111.70 (4) (d) 1, Stats. to meet with employees and "representative of their own choosing." **MILWAUKEE SCHOOLS, Case 413**

Joint Employer status. **CITY OF MILWAUKEE, CASE 100**

Scope of right of incumbent union to drop pending grievances after it loses representation election but before new union becomes the representative. **STATE OF WISCONSIN, CASE 668**

COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1082 **Cir. Ct. No. 2005CV86**

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

ST. CROIX COUNTY (GOVERNMENT CENTER),

PETITIONER-RESPONDENT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

RESPONDENT-APPELLANT,

AFSCME LOCAL 576A AND 576B,

CO-APPELLANTS.

APPEAL from an order of the circuit court for St. Croix County: EDWARD F. VLACK, III, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Wisconsin Employment Relations Commission and AFSCME Locals 576A and 576B appeal an order reversing the Commission's determination that St. Croix County's Recycling Specialist is not a managerial employee and therefore part of a collective bargaining unit. The court compared a prior Commission decision to the facts of this case and concluded the results should be identical. Because we give the Commission great weight deference, and the evidence supports its determination, we reverse.[1]

Background

¶2 On November 26, 2002, AFSCME filed a petition with the Commission seeking a ruling that the Recycling Specialist was a municipal employee under WIS. STAT. § 111.70(1)(i)[2] and therefore part of AFSCME's bargaining unit. The Commission concluded that the position was not managerial and, therefore, it must be municipal and part of the bargaining unit.

¶3 The County petitioned for judicial review. The circuit court concluded there was insufficient evidence to support the Commission's conclusion the position was not managerial. The court relied on the Commission's decision in CHIPPEWA COUNTY, WERC Dec. No. 10497-E (June 13, 2001), which held that Chippewa County's Solid Waste Program Assistant—a position very similar to the Recycling Specialist—was a managerial employee excluded from the bargaining

[1] The underlying action in this case involved a determination for both the Recycling Specialist and a "Planner/GIS Specialist." The Commission decision and court order address both positions. However, the appeal addresses only the determinations relating to the Recycling Specialist and, therefore, any issues related to the Planner are not before us and are not affected by this decision.

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

unit. The court concluded the Commission was required to follow its own precedent and reversed its determination about the Recycling Specialist. The Commission and AFSCME appeal.

Discussion

¶4 Under WIS. STAT. § 111.70, municipal employees generally have the right to unionize and engage in collective bargaining on certain subjects, such as wages. *See* WIS. STAT. § 111.70(2). A "municipal employee" is "any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee." WIS. STAT. § 111.70(1)(i). Here, the only question is whether the Recycling Specialist is a municipal employee or, rather, a managerial employee excluded from the municipal employee definition. This is a question of statutory interpretation.

¶5 The statutes, however, do not explicitly define "managerial employee." Thus, the Commission has developed its own definition to aid its interpretation of WIS. STAT. § 111.70(1)(i). Managerial employees are "those employees who participate in the formulation, determination, and implementation of management policy or who possess effective authority to commit the employer's resources." ***Eau Claire County v. WERC***, 122 Wis. 2d 363, 366, 362 N.W.2d 429 (Ct. App. 1984). Our supreme court has approved this definition. *See* ***City of Milwaukee v. WERC***, 71 Wis. 2d 709, 716-17, 239 N.W.2d 63 (1976).

¶6 When we decide an appeal from an order affirming or reversing an administrative agency decision, we review the decision of the agency, not the circuit court. ***Mineral Point Unified Sch. Dist. v. WERC***, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701. We are not bound by an agency's interpretation of law, such as statutory interpretation, but we may accord it

deference. *Id.* Here, the parties dispute the appropriate level of deference we owe, with the Commission and AFSCME arguing we should give great weight deference to the Commission's decision and the County suggesting that only due weight deference is appropriate.

¶7 Generally, an agency is entitled to great weight deference when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

Id., ¶13. Due weight deference is appropriate when the agency has some experience in an area but has not developed the expertise that necessarily places it in a better position to make judgments regarding statutory interpretation. *Id.*, ¶14.

¶8 Under great weight deference, we accept an agency's interpretation as long as it is reasonable. *Id.*, ¶13. Under due weight deference, we accept the agency's interpretation as long as it is at least as reasonable as any other interpretation. *Id.*, ¶14.

¶9 The County contends the Commission is only entitled to due weight deference because "[t]he Commission's departure from its 2001 [CHIPPEWA COUNTY] decision on virtually the same facts argues against according 'great weight' deference to its determination." This argument appears to be a challenge only to the fourth factor of the great weight test; the first three factors are unchallenged.

¶10 Comparison of cases with similar facts may sometimes aid in a determination of reasonableness. However, "the key in determining what, if any,

deference courts are to pay to an administrative agency's interpretation of a statute is the agency's experience in administering the particular statutory scheme." ***Barron Elec. Coop. v. PSC***, 212 Wis. 2d 752, 764, 569 N.W.2d 726 (Ct. App. 1997). Moreover, even though cases appear to have similar facts, the real question is whether the agency has consistently utilized its analytical framework, not whether it has always arrived at the same result. *See* ***Mineral Point***, 251 Wis. 2d 325, ¶21.

¶11 The County's challenge to what it perceives as the Commission's inconsistency is therefore insufficient to defeat the agency's entitlement to great weight deference. There is no dispute that the Commission has been charged by the legislature with administering the statute and no suggestion that the Commission failed to use its long standing, expertly defined interpretation in its analysis. Thus, the question is whether the Commission's decision that St. Croix County's Recycling Specialist is not a managerial employee is a reasonable determination. The burden of showing the Commission's decision was unreasonable is on the County. *See* ***id.***, ¶25. The Commission is not required to justify its interpretation. *See* ***id.***

¶12 In applying the definition of "managerial employee" approved in ***Eau Claire County*** and ***City of Milwaukee***, the Commission relied on the job description for the Recycling Specialist as well as testimony from the incumbent, Jennifer Havens, regarding her duties. The Commission first considered whether Havens had the ability to commit her employer's resources. The Commission noted that Havens distributes State recycling grants to municipalities, but this distribution is calculated through a preset formula. The Commission also noted that while Havens prepares an annual budget of about $250,000 per year, it goes through her immediate supervisor and then County committees for approval.

Once the budget is approved, Havens' discretionary spending is limited to transactions of $200 or less. The Commission thus concluded Havens did not have sufficient authority to commit her employer's sources and, therefore, she was not a managerial employee on this basis.

¶13 Because Havens lacked budgetary authority, the Commission then considered whether she sufficiently participated in policy formation.[3] The Commission noted that Havens works independently, has day-to-day decision making authority, and has developed and implemented new programs for the County. However, the Commission also noted that her programs are generally subject to approval from her supervisor and a County committee. Thus, the Commission concluded that although it was a "close question," Havens' responsibilities were "not sufficient to warrant managerial status" because such status "requires a level of influence greater than meeting one's professional responsibilities."

¶14 These conclusions are supported by the record. The County's true complaint is that the result is inconsistent with the result in the CHIPPEWA COUNTY case and the analysis there of the Solid Waste Program Assistant. The two positions do appear to have, at least on paper, similar duties. However, in CHIPPEWA COUNTY, as to the policy-making role, the Commission noted the assistant, Renee Yohnk, was virtually autonomous, seeking input from two supervisors only on matters that eventually went before the related County

[3] Contrary to the County's assertion, the Commission has not required Havens to meet both the budgetary and policy criteria. Otherwise, it would not have considered Havens' role in policy making once it concluded she lacked budgetary powers.

committee. Here, Havens appears to require approval for a greater scope of activities.

¶15 As to budget authority, once Yohnk's budget was approved, she had complete freedom to transfer funds among her projects. Havens could only deviate from budgeted expenditures by $200 before she needed approval from a supervisor. In addition, while Havens prepares grant applications for municipalities and submits them to the State, the policy is that her supervisor actually signs the applications. There is no indication Yohnk needed the same approval.

¶16 These are, admittedly, fine points on which to draw distinctions but they are, nevertheless, reasonable distinctions. Although the County claims the Commission's departure from CHIPPEWA COUNTY "cannot be justified by differing facts," that is the very essence of the review process. There is no general bright line rule for the Commission to apply; as such, its interpretations will often depend on a matter of degree. The Commission's experience in administering a specific statutory scheme "must necessarily derive from consideration of a variety of factual situations and circumstances." ***Barron Elec.***, 212 Wis. 2d at 764.

By the Court.—Order reversed.

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