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COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

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

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

Decision No. 8932-M

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.