STATE OF WISCONSIN PERSONNEL COMMISSION

DOUGLAS J. SMITH,

Appellant,

v.

Administrator, DIVISION OF MERIT, RECRUITMENT and SELECTION,

Respondent.

Case No. 90-0032-PC

FINAL DECISION AND ORDER

A proposed decision and order in the above-noted matter was mailed to the parties on May 11, 1995. The parties filed written objections and, on July 19, 1995, presented oral arguments to the Commission. An interim decision and order was mailed to the parties on August 4, 1995, and such order reserved jurisdiction to provide Mr. Smith an opportunity to submit a request for fees and costs.

The Commission issued a ruling regarding Mr. Smith's request for fees and costs. The ruling is dated October 27, 1995, and contains the following order:

> Appellant will have 20 days from the date of service in which to file and serve an affidavit or other evidence of his adjusted gross income, in accordance with s. 227.485(7), Stats. Respondent will have 10 days after service of said document in which to serve and file any objection thereto. In the absence of meritorious objection, an order will be entered finalizing the decision of this case and awarding the [costs enumerated in the ruling].

Mr. Smith timely submitted the required affidavit on November 15, 1995. DMRS replied by letter dated November 24, 1995, stating it had no objection in regard to Mr. Smith's affidavit. DMRS, however, further stated as shown below. (Emphasis appears in the original document.)

> Even though the Commission has not yet issued a final order in this matter, Respondent DMRS believes it has an obligation to call to the Commission's attention a Court of Appeals Decision, issued July 20, 1995, of which the undersigned recently

became aware, and which Respondent believes affects the Commission's analysis and reasoning in its "Ruling on s. 227.485 Motion for Fees and Costs," issued October 27, 1995.

The Court of Appeals decision is in the case of Wis. Retired Teachers Assn., et al. v. E.T.F., et al., (Ct. Apps., Dist IV), Case No. 94-0712.[1] (A copy of the entire decision is enclosed.) In this case, two of the issues were whether a particular statute concerning the retirement laws was constitutional and whether the members of the ETF Board breached their fiduciary duties by relying upon the advice of the Attorney General that the statute was constitutional when they decided to implement the statute (which was later found to be unconstitutional).

The trial court in the case held, in part, that the legislation in question violated the Wisconsin Constitution and constituted an "unconstitutional taking" of plaintiffs' property. The trial court further held that the trustees had breached their fiduciary duty of impartiality owed to the plaintiffs; that reliance on the attorney general's opinion they obtained did not excuse the breach; and the board should have sought instructions from a court about the legislation before implementing it. (Ct. Apps. Dec., pp. 13-14 and 33).

Although the Court of Appeals agreed that the legislation created an "unconstitutional taking" of property without just compensation (Ct. Apps. Dec., p. 15), the Court of Appeals reached a different conclusion about the breach of fiduciary duties and the effect of the board's reliance upon the opinion of the attorney general. (Ct. Apps. Dec., p. 33.) The Court of Appeals stated:

> *State ex rel Morse* does not require resort to a court where the attorney general has already rendered an opinion. In another context, our supreme court has recognized that it would be unfair to penalize public officials for relying on the advice of governmental counsel. *See State v. Davis*, 63 Wis. 2d 75, 81-82, 216 N.W.2d 31, 34 (1974) (good faith reliance on the legal opinion of governmental counsel whose statutorily-created duties include the rendering of legal opinions is a defense in a criminal action against a public official). There is no evidence that Gates and the trustees acted other than in good faith in relying on the attorney general's opinion. We conclude that they did not breach their fiduciary duties by failing to seek a

---

[1] This case recently has been published in the advance sheets at 195 Wis. 2d 1001, __ N.W.2d __.

> court ruling before implementing the SIPD legislation. [195 Wis. 2d at 1043]

(Emphasis added.) (Ct. Apps. Dec., p. 35)

Respondent DMRS respectfully asks that the Commission, *sua sponte*, consider the Court of Appeals Decision and its reasoning before issuing a final decision and order in this matter.

The Commission treated DMRS' letter of November 24, 1995, as a request for reconsideration. On November 29, 1995, the Commission sent Mr. Smith a memo which provided an opportunity "to submit any response to respondent's November 24, 1995 request for reconsideration", by filing a reply on or before Dec-ember 6, 1995. Mr. Smith filed a timely reply. Appellant contends the request for reconsideration should be denied because this case had been resolved except for the limited steps of first allowing him to supplement his petition for costs, and then allowing respondent to raise any objections to his affidavit concerning his income. Appellant also presented arguments on the substance of respondent's request for reconsideration, contending that the WRTA case has no bearing on the issue in the instant case. Finally, he concluded as follows:

> The appellant urges the Commission to deny the respondent's reconsideration request and proceed in issuing a final decision on this case. Again, if the Commission should disagree with appellant's position and thinks it is fair and necessary to prolong this case, and must offer reconsideration for this last minute, remotely related citation, the appellant requests a briefing scheduling be established.

Appellant was given and exercised an opportunity to respond to respondent's request for reconsideration. His request for further briefing is denied.

DISCUSSION

Timing of Respondent's Request for Reconsideration

While respondent's request for reconsideration comes late in this proceeding, the general rule is that "an administrative agency has the power to reconsider its own decisions since the power to decide carries with it the power to reconsider." State Public Intervenor v. DNR, 177 Wis. 2d 666, 675-76,

503 N.W. 2d 305 (Ct. App. 1993) revered on other grounds, 184 Wis. 2d 407, 515 N.W. 2d 897 (1994); see also, 2 Am Jur 2d Administrative Law s. 392 ("So long as an agency retains jurisdiction over a controversy, it may revise its orders." (citation omitted)); Spilde v. DER, 86-0040-PC (1/8/87) (Administrative Procedure Act requirements for petition for rehearing not applicable to request for reconsideration of nonfinal order). The Commission also notes that the Court of Appeals' decision on which respondent relies, while dated July 20, 1995, apparently had not been included in the published advance sheets as of the date of respondent's request for reconsideration.[2] For these reasons, the Commission will consider the merits of respondent's request for reconsideration.

Turning to the question of whether the Commission should change its ruling on costs, it should be noted that the Commission has not been asked to and does not reconsider the underlying question on the merits -- i.e., whether "respondent's act of allowing a nonresident to compete for the classified position in question in violation of s. 230.16, Stats., constituted an illegal act or an abuse of discretion." October 27, 1995, decision, p. 1 (footnote omitted) Rather, the question is whether respondent had a reasonable basis in law for its decision, and more specifically, whether respondent's action "can be concluded to have involved 'advancing a novel but credible extension or interpretation of the law.' Sheely v. DHSS, 150 Wis.2d 320, 338, 442 N.W. 2d 1 (1989) (citation and footnote omitted)." Id. However, in order to better analyze the issues raised by respondent's request for reconsideration with regard to costs, it is helpful to elaborate somewhat on the issues involved in the underlying decision.

The Commission concluded, in the context of the stipulated abuse of discretion issue, that the decision in question did not involve a discretionary transaction:

> In applying and interpreting the statutory framework for the classified civil service merit system, DMRS no doubt not infrequently must exercise its discretion. However, the question of whether to allow a nonresident to compete for a position does not require the exercise of discretion, because the controlling

---

[2] The Commission received its copy of the advance sheet in question from the publisher on December 1, 1995.

> statute clearly prohibits this (in the absence of the determination of a critical need, which did not occur here.)
>
> Decision dated August 3, 1995, pp. 1-2

The Commission went on to discuss whether there was a legal basis for respondent to have elected not to enforce the statutory residency requirements, quoting the hearing examiner's proposed decision as follows:

> "Respondent has cited no authority for the proposition that an administrative agency may decline to enforce a statute it is charged to enforce because of an opinion that it is unconstitutional, and Nodell Ins. Corp. v. Glendale, 78 Wis. 2d 416, 426, 254 N.W. 2d 310 (1977), suggests the contrary: 'the administrative agency has no right to repeal or declare unconstitutional zoning ordinances enacted by the legislative body from which [it] derives its existence.' (footnote omitted)"
>
> Id. p. 3

In its ruling on costs, the commission relied on basic constitutional principles,[3] as well as the absence of any citation of authority by respondent for its position, in reaching the conclusion that respondent did not have a reasonable basis in law for its position that it could elect to ignore the clear mandate of s. 230.16(2), Stats., on the basis of an attorney general's opinion as to the unconstitutionality of that provision. While the Commission did not discuss the distinction between ministerial and discretionary acts by state officials, this particular area of the law does have some materiality with respect to these issues.

The general rule is that if an act to be performed by a public official is ministerial, the official is required to comply with the statutory requirement, and does not have the same latitude as does an official faced with the performance of a discretionary act. This principle is illustrated by several cases.

In State ex rel Martin v. Zimmerman, 233 Wis. 16, 20-21, 288 N.W. 454 (1939), the Secretary of State refused to publish a bill because of his belief that

---

[3] Art. V, s. 4, Wisconsin Constitution; s. 14.001(1), Stats.; 16 Am Jur 2d Constitutional Law s. 150.

it had not been validly enacted. He contended that the Governor had exercised a partial veto after the adjournment of the legislature, in violation of the state constitution. The court concluded that the statutes and constitutional provisions governing the Secretary of State's responsibilities with respect to the publication of laws imposed a duty which was purely ministerial. Therefore, the Secretary of State could not refuse to exercise that duty because of concerns about the constitutionality of the law-making process:

> Neither the constitution nor the laws enacted pursuant thereto confer upon the secretary of state any discretion with respect to what he shall do with an act which reaches his office in the manner prescribed by law and in the form of law. No discretionary power to pass upon the constitutionality of acts so authenticated and deposited with him can be inferred. The statute is mandatory and imposes upon him the duty to publish which is a purely ministerial function.
>
> The constitution prescribes and defines the powers of the legislative and executive departments of the government, and all officers in the discharge of their functions are under an obligation to comply with its requirements. The secretary of state is not vested by virtue of his office with the power of interpreting the constitution for other officers in the discharge of their duties. When the secretary of state refuses to perform a duty imposed upon him by law on the ground that some other official has not performed his duty in accordance with the provisions of the constitution, he acts judicially and exercises a power not conferred upon him.
>
> The whole governmental process would be thrown into utter confusion if ministerial officers in one department in the absence of legislative authority assumed to exercise the power to pass upon the validity and constitutionality of the acts of officers of co-ordinate departments of government. If one ministerial officer or one officer in the performance of a ministerial duty may constitute himself a tribunal to pass upon the acts of other officers, such power might be assumed by all officers and the governmental process would be brought to a halt.

This case was followed in State ex rel Madison v. Bareis, 248 Wis. 387, 21 N.W. 2d 721 (1946), where the city clerk refused to take the statutory steps necessary to effectuate a municipal bond issue that the city council had authorized. The basis for the clerk's decision was his opinion, based on the advice of counsel, that the proposed bond issue was invalid because it was "not within the purposes for which utility mortgage bonds may be issued under sec. 3 of Art. XI, Wis. Const.; and that as an issue of general obligation bonds of the

city it is invalid, because not supported by a direct annual tax, as required by said sec. 3." 248 Wis. at 388. The court held:

> Under those provisions in sec. 66.06 (9) (b) 1 and 13, Stats. 1945, and in the ordinance and the resolution adopted thereunder by the common council and the mandatory directions therein in prescribing duties of the city clerk in the above-stated respects, the clerk's functions were purely ministerial and the performance thereof by him was not discretionary. Consequently, in the performance of those duties as city clerk it was neither within his province to pass upon the constitutionality or validity of those provisions in the statutes, ordinance, and resolution, or the validity of the bonds, nor to decline or refuse, upon his counsel's advice that the bonds would not be valid, to sign and execute them and advertise the sale thereof as directed by the ordinance and resolution.
>
> 248 Wis. at 391.

In State ex rel Roelvink v. Zeidler, 268 Wis. 34, 66 N.W. 2d 652 (1954), the factual circumstances present an apt illustration of the distinction between ministerial and discretionary decisions and the effect on the officials' latitude to act. This case involved an action by the Milwaukee common council to reconvey to its original owner property that had been acquired for a school that was never built. The mayor and city clerk refused to execute and deliver the deed, as necessary to effectuate the council action, on the ground that the school board had not given its statutorily-required consent to the conveyance. The court held that the clerk's role in this process was ministerial and he had no power "to question the resolution or decline to sign the deed." 268 Wis. at 41. The court distinguished the clerk's role from the mayor's role:

> It is especially noted that in his official capacity the mayor is charged with the responsibility of "taking care that the laws of the state are duly observed and enforced." Were he to knowingly fail in such regard, his conduct might well be construed as nonfeasance in office.
>
> As hereinbefore declared, the common council of the city of Milwaukee is not empowered by law to validly direct the conveyance of real estate in control of the board of school directors without that body's consent. Were the mayor to sign the deed, he too would participate in the illegal action of the common council and violate the law, the observance of which he is specifically charged to "take care of." The mayor, as chief executive of the city, occupies a position of responsibility

> comparable to that of the governor of the state in a matter of this nature.
>
> 268 Wis. at 42.

In Lister v. Board of Regents, 72 Wis. 2d 282, 301, 240 N.W. 2d 610 (1976), the court defined a ministerial duty as one which "is absolute, certain and imperative, involving merely the performance of a specific task when the law prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment and discretion." (citation omitted) In determining whether a particular act is discretionary or ministerial, it is necessary to focus on "the nature of the alleged unlawful act. . . .[I]t is the categorization of the specific act . . . and not the categorization of the general duties of the public officer "which determines whether an act is ministerial or discretionary." Scarpaci v. Milwaukee Co., 96 Wis. 2d 663, 685, 292 N.W. 2d 816 (1980).

With respect to the instant case, the mandate of s. 230.16(2), Stats., concerning residency is clear and straightforward. Notwithstanding the many discretionary aspects of respondent's role in the state civil service, the decision whether to restrict competition to residents (in the absence of a finding of "critical need", s. 230.16(2), Stats., is a ministerial act, and it would appear from the foregoing authority that respondent would have no discretion to exercise with respect to that provision.

The commission now turns to the question of the significance of Wisconsin Retired Teachers Assn. v. Employe Trust Funds Bd., 195 Wis. 2d 1001, __ N.W. 2d __ (Ct. App. 1995) (WRTA case). In this case, the court did not specifically address the question of whether the state agency (ETF) had the authority to decline to enforce a statute believed to be unconstitutional, which is an issue presented here. Rather, the question was whether the ETF officials had breached their fiduciary duties by implementing the legislation in question, an action which the court held amounted to an unconstitutional taking of property.[4] However, while the court addressed a different question

---

4 "We conclude that the SIPD [special investment performance dividend] legislation is a taking for public use without just compensation. The legislation takes the WRS [Wisconsin Retirement System] annuitants' private property interest in the earnings of the trust fund and uses those earnings for

than the one here presented, it could be argued that the obverse of the WRTA holding is that state officials have a duty to decline to enforce a statute when there is a reasonable basis to believe that doing so would lead to an unconstitutional result, and they may rely on the opinion of the attorney general regarding the constitutionality of the legislation in question. That is, if the defendants had no authority other than to have mechanically implemented the SIPD legislation, much of the court's opinion apparently would have been unnecessary to its decision. However, there are a number of other distinctions between these two cases.

One important distinction is that the WRTA officials "were fiduciaries and had an obligation to administer the trust for the benefit of the trust beneficiaries." 195 Wis. 2d at 1041. The DMRS Administrator, whose powers and duties are set forth at s. 230.05, Stats., does not have an analogous fiduciary obligation. Furthermore, the ETF officials had to deal not only with their fiduciary obligations, but also with their "obligation to administer the trust according to the terms of the trust instrument, Ch. 40, STATS." Id. This presented a more immediate and direct conflict than the conflict between the DMRS Administrator's obligation to enforce state statutes governing merit recruitment and selection, and the possible invasion of the constitutional rights of nonresidents wishing to compete for jobs in the Wisconsin classified service. The ETF officials were not facing strictly a constitutional issue with respect to the implementation of the SIPD legislation, but a constitutional issue (unlawful taking of property) arising from a conflict between existing legislation and the SIPD legislation, both of which were binding on them:

> When the SIPD legislation amended ch. 40 in ways that appeared to conflict with existing provisions of ch. 40, Gates, on behalf of the board, appropriately requested an attorney general's opinion on the constitutionality of the legislation. The board did not implement the legislation until after receipt of the attorney general's opinion stating the legislation was not an unconstitutional impairment of contract.
>
> Id. (footnote omitted) (emphasis added)

---

a purpose not authorized by the trust -- to pay for supplemental benefits to pre-1974 annuitants." 195 Wis. 2d at 1024.

That is, the unconstitutional taking of property occurred because the plaintiffs had a property interest in the earnings of the trust fund. Id. at 1024-27. In reaching this conclusion, the court relied on State Teachers' Retirement Board v. Giessel, 12 Wis. 2d 5, 7, 106 N.W. 2d 301 (1960), where the court held: "The nature of the state teachers' retirement system and the rights of the members thereof have been the subject of four prior decisions of this court. The result of these decisions is that the teachers have a contractual relationship with the state and a vested right in the state teachers' retirement system." (citations omitted)

The seminal case among those cited by the court in Giessel was State ex rel Dudgeon v. Levitan, 181 Wis. 326, 193 N.W. 499 (1923), where the court interpreted the relevant legislation "as intended to vest existing teachers with the same title to the accumulations for their past services . . . that it accorded future entrants to the state's contributions . . . and that the same benefits inure to the estate of a deceased member in both instances." 181 Wis. at 338-39. The court further characterized the legislation as relating "to the conditions upon which the public will contract with those undertaking to teach in the schools of the state." 181 Wis. at 344.

The court in WRTA held that "[b]ecause the teachers' retirement fund was merged with other state employee retirement systems into the WRS, we consider that Giessel controls on the issue of whether the WRS annuitants have a property interest in the earnings of the trust fund." 195 Wis. 2d at 1026.

The statutory basis of the participants' vested property rights in the earnings of the trust fund is underscored by legislation which was in effect at the time the legislature enacted the SIPD provisions. For example, s. 40.19(1), Stats., provides: "Rights exercised and benefits accrued to an employe under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act." (emphasis added)

Because of the apparent conflict between the SIPD legislation and existing legislation, which in turn caused the constitutional question concerning an illegal taking of property, in the context of the defendants' fiduciary obligations as trustees of the WRS trust fund, a reasonable argument can be made that the defendants' action with respect to the implementation of the SIPD legislation was discretionary and did not meet the definition of

ministerial set forth in Lister v. Board of Regents, 72 Wis. 2d 282, 301, 240 N.W. 2d 610 (1976):

> A public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.

When new legislation is in apparent conflict with existing legislation, this in and of itself arguably takes the decision out of the ministerial category. However, it is difficult to determine from the WRTA opinion whether the court considered this duty ministerial or discretionary.

The plaintiffs argued that the defendants were personally liable as they had lost any official immunity because they had "negligently performed a ministerial duty to preserve the trust funds." 195 Wis. 2d at 1043. (Emphasis added, citation omitted). The court disagreed:

> We reject this argument for the same reason we held these defendants did not breach their fiduciary duties. The SIPD legislation mandated the expenditure of trust fund earnings for the SIPD. These defendants implemented that mandate after receiving an opinion from the attorney general that it was constitutional. They had no duty to refrain from implementing the legislation.
>
> Id. at 1044

It is unclear whether the court reached its holding on this point because of a conclusion that the duty involved was not ministerial or because of a conclusion that while the duty was ministerial, the defendants had not acted negligently in performing it. The court states that it relies on the same reason involved in its holding that the defendants did not breach their fiduciary duties.

The court's discussion of the issue of breach of fiduciary duties includes the following:

> The trustees and Gates were fiduciaries and had an obligation to administer the trust for the benefit of the trust beneficiaries, in this case the WRS annuitants. But they also had an obligation to administer the trust according to the terms of the

> trust instrument, ch. 40, STATS. When the SIPD legislation amended ch. 40 in ways that appeared to conflict with existing provisions of ch. 40, Gates, on behalf of the board, appropriately requested an attorney general's opinion on the constitutionality of the legislation. The board did not implement the legislation until after receipt of the attorney general's opinion stating the legislation was not an unconstitutional impairment of contract.
>
> * * *
>
> Gates and the trustees did nothing other than comply with the SIPD legislation. The correspondence and actions plaintiffs point to in support of their claim that these defendants breached their fiduciary duties demonstrate only that they were attempting to, and did comply with, the mandates of the legislation. The only possible basis for finding a breach of their fiduciary duties is the fact that they carried out the legislation after receiving an attorney general opinion that it was constitutional, but without getting a court determination of constitutionality.
>
> Id. at 1041-42 (Footnotes omitted.)

Whereas the trial court had held that the defendants had breached their fiduciary duties by not getting a court ruling before implementing the SIPD legislation, the court of appeals concluded that it was unnecessary to get a court ruling where the attorney general had already issued an opinion.

Now, based on the preceding case law involving the distinction between, and the significance of, ministerial and discretionary acts, it could be argued that the court must have concluded that the implementation of the SIPD legislation involved a discretionary act, because if it had been ministerial, the defendants presumably would have had no option to have done otherwise than implement the legislation as written. They presumably would not have had the authority to have delayed implementation until obtaining an attorney general's opinion as to its constitutionality. Thus, if the act had been ministerial, the court presumably could have rested its decision simply on the fact that the defendants complied with the statutory mandate.

On the other hand, the court's analysis does not seem to comport with the approach that would be taken with respect to an issue of liability with respect to a discretionary function. Cf. Lister v. Board of Regents, 72 Wis. 2d 282, 301-02, 240 N.W. 2d 610 (1976) (citations omitted.):

> Beyond the question of liability for the negligent performance of purely ministerial duties, the most generally favored principle is that public officers are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions. Otherwise stated, there is no substantive liability for damages resulting from mistakes in judgment where the officer is specifically empowered to exercise such judgment. It must be conceded that an officer charged with the administration and application of the standards set forth in sec. 36.16, Stats., could make mistakes in judgment which would result in an erroneous classification [regarding eligibility for nonresident tuition]. However, at least in the absence of some malicious, willful and intentional misconduct, the policy considerations underlying the immunity principle require that the officer be free from the threat of personal liability for damages resulting from mistakes of judgment.

Furthermore, the portion of the court's opinion which addresses the issue of official immunity is written in a way which suggests the court accepted the premise of appellant's contention -- i.e., that defendants' duties were ministerial in nature. The court summarized the plaintiffs' position on this point as follows:

> Plaintiffs claim that the trustees and Gates are personally liable for any monetary award. They argue that official immunity, which protects public officers from personal liability for damages, does not apply because these defendants negligently performed a ministerial duty to preserve the trust funds. *See Lister v. Board of Regents*, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610, 621-22 (1976) (no immunity from personal liability where an official negligently performs a ministerial duty). Plaintiffs contend that because the trustees and Gates spent funds, or did not prevent the expenditure of funds, in spite of having reasonable cause to suspect the expenditure might be improper, they lost their immunity. 195 Wis. 2d at 1043

It is reasonable to assume that if the court had disagreed with the premise of this argument concerning the ministerial nature of the defendants' duties, it would have said so. Instead, the court appeared to base its ruling on the conclusion that the defendants did not act negligently in discharging their duties:

> We reject this argument for the same reason we held these defendants did not breach their fiduciary duties. The SIPD legislation mandated the expenditure of trust fund earnings for

> the SIPD. These defendants implemented that mandate after receiving an opinion from the attorney general that it was constitutional. They had no duty to refrain from implementing the legislation.

Based on the foregoing, it is reasonable to contend that it can be inferred from the WRTA decision that a state official charged with performing a statutorily-prescribed, ministerial function should refrain from acting if the official has "reasonable cause to suspect," 195 Wis. 2d at 1043, that the action would lead to a constitutional violation, and that an attorney general's opinion to that end would supply such reasonable cause. As discussed above, however, there are factors distinguishing this case (Smith) and the WRTA.

In the instant case, the state officials declined to implement the residency law, while in WRTA the state officials did implement the SIPD legislation. However, if there simply were no legal basis for the officials in the WRTA case to have declined to perform a ministerial[5] function, the court presumably would have based its conclusion that the officials had not acted negligently in performing their ministerial duty on this more basic principle rather than relying on the fact that the officials had obtained an attorney general's opinion that the statute was constitutional before they acted.

This case can further be distinguished from WRTA by the fact that in WRTA the officials had to address not only a constitutional issue, but also their fiduciary obligations as trustees of the trust fund, and a conflict between the statutes they administered. While this is a significant distinction, the language in WRTA is broad enough to support at least a reasonable argument that it should apply here, because of the court's emphasis on the facts that the officials complied with the mandate of the SIPD legislation only after having obtained an attorney general's opinion as to its constitutionality.

These cases are also analogous in that the officials in both cases proceeded only after having obtained attorney general's opinions concerning the constitutional issues involved with the implementation of the legislation in question. The court in WRTA relied on State v. Davis, 63 Wis. 2d 75, 81-82, 216 N.W. 2d 31 (1974), in reaching its conclusion that the officials acted

---

5 As discussed above, while it is not completely clear, the court apparently considered the trustee's duties as ministerial.

appropriately in relying on this opinion rather than having sought resort to the judiciary. While there are a number of obvious distinctions between State v. Davis and both WRTA and the instant case, the court recognized this when it characterized that case as involving "another context," id., but it nevertheless concluded the principle enunciated in State v. Davis applied in the different context of the case before it.

Respondent obviously did not have the benefit of the WRTA opinion when it made the decision it would not enforce the s. 230.16(2), Stats., residency requirement. However, in that part of the WRTA decision relevant to this case, the court neither cited any recent (post 1987) authority nor suggested either that it was taking a new path with respect to any of the issues involved, or that it was dealing with a case of first impression. Therefore, it is reasonable to contend that WRTA reflects the extant established law on the issues relevant to this case. Cf., e.g., Laabs v. Tax Commission, 218 Wis. 414, 416, 261 N.W. 404 (1935) ("courts declare but do not make law.")

In conclusion, while WRTA is sufficiently distinguishable from the instant case to support a conclusion that it should not affect the August 3, 1995, ruling on the merits, the standard of a "reasonable basis in law", s. 227.485 (2)(f), Stats., is different from that utilized at the merits stage, see Murray v. DER, 91-0105-PC (4/6/95); affirmed, Murray v. Wisconsin Personnel Commission, 95CV0988 (Dane Co. Cir. Ct. Br. 10) (12/15/95); citing Sierra Club v. Secretary of the Army, 736 F.2d 513, 517 (1987): "the test of reasonableness in the precincts patrolled by the EAJA is different from that applied for purposes of determining whether agency action is 'reasonable' or 'unreasonable,' i.e., arbitrary and capricious." There are enough plausible analogies between WRTA and the instant case to support a reasonable argument that DMRS had the lawful authority to take the action it did.

ORDER

The commission's October 27, 1995, order on costs, and so much of the opinion that is inconsistent with the foregoing, are vacated. Appellant's petition for costs is denied and this matter is finalized in all respects.

Dated January 5, 1996.

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT

Parties:

Douglas Smith
1833 Baker Avenue
Madison, WI 53705

Robert Lavigna
Administrator, DMRS
P.O. Box 7855
Madison, WI 53707-7855

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's

decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95