

STATE OF WISCONSIN

**CIRCUIT COURT
BRANCH 2**

COUNTY OF DANE

CITY OF WEST BEND,

Plaintiff,

Vs.

Case No. 06CV2834

EMPLOYEE TRUST FUNDS BOARD,

Defendant.

DECISION AND ORDER

This case concerns the eligibility for Wisconsin Retirement System (WRS) participation of fourteen City of West Bend employees who served as part-time police officers between 1968 and 1984. Plaintiff City of West Bend seeks certiorari review pursuant to Wis. Stats. § 40.08(12) of the June 24, 2005 and June 23, 2006 decisions of the Wisconsin Employee Trust Funds Board (ETF or Board). The Board's June 24, 2005 decision determined that the employees' appeals were timely filed. The Board's June 23, 2006 Final Decision ordered the City to report the fourteen employees as Wisconsin Retirement System participants for the relevant time periods (R. B14).

FACTS

For purposes of the administrative hearing the parties reached a stipulation of facts, which states:

Each appellant, at various points of time, worked for the Respondent City of West Bend's police department in a capacity

designated as "part-time." Subsequent to this "part-time" employment, each Appellant worked for the City of West Bend as a "full-time" police officer. Appellants Bateman, Bertler, Flitter, Froehlich, Hoogester, Lieven, Rettler, Sawyer, Towler and Vetter are still employed by the City of West Bend as "full-time" police officers. Appellants Shane, Uelman, Vandenberg and Thiesen are retired.

Respondent, the City of West Bend, was a participating "employer" or "municipality" during all times material to this consolidated appeal.

The City of West Bend did not report Appellants as eligible for participation in the Wisconsin Retirement System or its predecessor, the Wisconsin Retirement Fund, during Appellants' respective "part-time" employment periods, and has not reported any of Appellants' service or earnings, and has not made any corresponding retirement contributions to the WRS for any of the service during those "part-time" periods.

The City of West Bend has reported each Appellant as a participating employee each year beginning with the first year of the "full-time" employment period.

(R. 516).

The City's threshold argument is that under applicable administrative code provisions, Wis. Admin. Code Ch. ETF 11, the Board lacked jurisdiction to issue its June 2005 decision that the appeal was within the statute of limitations. The City also contends that the Board erroneously determined that the appeals were not barred by the statute of limitations or laches. The City further maintains that the part-time police officers were not entitled to WRS participant status because the position did not "normally require" the performance of 600 hours or more of work per year. Finally, the City argues that the Board's decision was not reasonable based on the evidence before it.

STANDARD OF REVIEW

On certiorari, courts review an agency's decision "by determining whether the agency kept within its jurisdiction, acted according to law, acted arbitrarily, and made, under the evidence presented, a reasonable order or determination upon the issue in question." *Schmidt v. Employee Trust Funds Board*, 153 Wis. 2d 35, 40, 449 N.W. 2d 268 (1990). The issue of the sufficiency of the evidence falls within the third and fourth standards. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶ 6, fn. 5, 278 Wis. 2d 111, 117. The City's challenges to the Board's jurisdiction, its conclusions with respect to the timeliness of the appeals and its legal interpretation of the term "employee" for purposes of WRS participation are questions of law.

Courts grant deference to agency interpretations of law on three levels, depending on the question presented and the agency's expertise and experience on the subject. Courts apply great weight deference when: "(1) the agency is charged with administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its interpretation will provide uniformity and consistency in the application of the statute." *Solie v. Employee Trust Funds Bd.*, 2005 WI 42, ¶ 25, 279 Wis. 2d 615, 632.

A lesser degree of deference, due weight, is appropriate when an agency has some experience in the area but not the expertise that places it in a better position than a court to interpret and apply a statute. No deference is given to

an agency interpretation if the issue is of first impression, the agency has no special expertise, or where the agency's position has been so inconsistent that it provides no useful guidance. *Beecher v. LIRC*, 2004 WI 88, ¶ 23, 273 Wis. 2d 136, 153.

In this action, the Board asks the court to grant great weight deference to the Board's legal determinations as to the standard for participant status under Wis. Stats. Ch. 40. With respect to review of the Board's interpretation of the WRS eligibility statutes for the relevant time periods, the court agrees that great weight deference is appropriate because the agency is charged with administration of the WRS program, it has developed and used its expertise in making the determination in this case, and its interpretation will provide consistency for future cases. Similarly, the Board's interpretation of its own procedures in Wis. Admin. Code Ch. ETF 11 is entitled to "controlling weight" deference. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 19.¹

Conversely, the Board's interpretation and application of Wisconsin case law concerning the applicable statute of limitations and the doctrine of laches is not entitled to great weight deference. This is because the agency's experience and expertise do not place it in a better position than a court to interpret and apply the relevant case law concerning the timeliness of actions. And, as the Court explained in *Solie v. Employee Trust Funds Bd.*, 2005 WI 42, ¶ 26, courts

¹ An agency's interpretation of its own rules generally receives only one level of deference, called either "great weight" or "controlling weight." "Despite the different terminology, the deference for an agency interpretation of its own rules appears to be similar to the 'great weight' level of deference applied to agency statutory interpretations, as both turn on whether the agency interpretation is reasonable and consistent with the meaning or purpose of the regulation or statute." *Hillhaven Corp. v. DHFS*, 2000 WI App 20, fn. 6, 232 Wis. 2d 400.

need not defer to agency interpretations of court decisions because the Supreme Court retains the power to explain, modify or even overrule its own precedents. Accordingly, this court will grant less deference—due weight—to *the* Board's conclusions with respect to the timeliness of the employees' appeals.

DECISION

I. THE BOARD ACTED WITHIN ITS AUTHORITY IN ISSUING ITS JUNE 2005 DECISION THAT THE APPEALS WERE TIMELY FILED.

As earlier noted, the City seeks review of two ETF decisions. The first decision, dated June 24, 2005 but issued August 2, 2005, determined that the fourteen appeals were not barred by the seven-year statute of limitations in Wis. Stats. § 40.06(1)(e)1. (R. A152). In so doing, the Board rejected the hearing examiner's proposed decision dismissing each of the appeals as untimely pursuant to § 40.06(1)(e)1. The City contends that the Board was required by its own rules to allow the proposed decision to stand instead of issuing an independent final decision.

Wisconsin Administrative Code § ETF 11.08(1) states that "[t]he hearing examiner's findings, conclusions and order dismissing an appeal as provided in this section shall be the final decision of the board." Subsection (2) directs the hearing examiner to issue a dismissal under the following circumstances:

(b) If the examiner determines that the appeal is wholly or partially time-barred for one or more of the following reasons:

.....

2. The issue is the classification of an employee as a protective occupation participant or participating employee and with respect to service rendered more than 7 years prior to the date the appeal is received by

the department. Any portion of the appeal not time-barred may proceed.

Despite the rule's grant of authority to hearing examiners to issue dismissals under well-defined circumstances, Wis. Admin. Code § ETF 11.08(6) reserves the hearing examiner's prerogative to issue a proposed decision:

(6) The hearing examiner may issue a proposed decision if the grant of final authority under this section is not, in the examiner's opinion, clearly applicable to the particular appeal before the examiner.

In this case, the hearing examiner's January 5, 2005 proposed decision concludes with this statement:

The application of Wis. Stat. § 40.06(1)(e) to participation appeals with respect to pre-1984 service under *Dicks*' fair notice/fair opportunity standard presents an unresolved legal question that the Wisconsin Court of Appeals may ultimately be called on to decide. The Employee Trust Funds Board should be afforded an opportunity to address this unresolved issue. Accordingly, this decision is issued as a proposed decision.

(R. 16).

In its June 24, 2005 decision, the Board relied upon Wis. Admin. Code § ETF 11.08(5), which circumscribes the hearing examiner's final decision-making authority by reference to specific subsections not applicable here. Nevertheless, the hearing examiner's issuance of a proposed decision falls within the catchall provision of § ETF 11.08(6), applicable when "the grant of final authority under this section is not, in the examiner's opinion, clearly applicable to the particular appeal before the examiner."

