

**CITY OF WEST BEND,**

**Plaintiff,**

**Vs.**

**Case No. 06CV2834**

**EMPLOYEE TRUST FUNDS BOARD,**

**Defendant.**

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**DECISION AND ORDER**

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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.<sup>1</sup>

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

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<sup>1</sup> 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:

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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."

The Board's determination to issue its own final decision is entitled to controlling weight because it is reasonable and consistent with the purpose of the entire administrative rule. Section ETF 11.08 promotes the efficient disposition of cases by allowing the hearing examiner to issue the final decision in unambiguous cases and, in § ETF 11.08(4), when the Board delegates final authority to the hearing examiner for a specific appeal. When the hearing examiner himself elects to issue a proposed decision because the law is not clear, however, the examiner does so in accordance with the purpose of the rule, which is to preserve the Board's authority to issue final decisions when statutory interpretation is required. The Board had authority to reject the hearing examiner's proposed decision and issue its own decision.

## **II. THE EMPLOYEES' APPEALS WERE TIMELY.**

The Board's June 24, 2005 decision determined that the employee appeals were timely filed and remanded to the hearing examiner for a "determination on the merits of whether the employer correctly determined that each appellant was not a participating employee in the WRF or WRS, respectively, during the relevant time period" (R. A152). The Board's June 23, 2006 decision rejected the City's defense to the claims based on the equitable doctrine of laches (R. B7). The City advances both the statute of limitations and laches defenses on this certiorari review.

### **A. The seven-year statute of limitations**

The employees filed their claims for WRS system participant status for pre-1984 employment in August 2003. The City invokes the seven-year statute of limitations in § 40.06(1)(e)1., Wis. Stats., effective April 27, 1984, as barring the employees' claims for pre-1984 participant status.

Section 40.06(1)(e)1., provides:

An employee may appeal a determination under par. (d), including a determination that the employee is not a participating employee, to the board by filing a written appeal with the board. An appeal under this paragraph does not apply to any service rendered more than 7 years prior to the date on which the appeal is received by the board. The board shall consider the appeal and mail a report of its decision to the employee and the participating employer or state agency.

The legislature adopted § 40.06 as part of the merger of Wisconsin public employee retirement systems created by Laws of 1975, Ch. 280 and effective January 1, 1982. The initial legislation created a two-year limitation period and was amended in 1984 to establish the current seven-year limitation period.

In rejecting the City's defense based on the after-enacted statute of limitations, the Board relied on the Court of Appeals decision in *State ex rel. Dicks v. Employee Trust Funds Bd.*, 202 Wis. 2d 703, 551 N.W. 2d 845 (1996).<sup>2</sup> In *Dicks*, the Court held that the legislature could not enact a limitation "which would extinguish an employee's claim to pension rights in WRS without a fair notice of the after-adopted limitation and without a fair opportunity to preserve

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<sup>2</sup> The Board noted that it relies on *Benson v. Gates*, 188 Wis. 2d 389, 525 N.W. 2d 278 (Ct. App. 1994) "only to the extent that the *Dicks* court expressly relied on the reasoning of the *Benson* court" (R. 152).

that claim.” 202 Wis. 2d at 711. The Court adopted the reasoning expressed in *Benson v. Gates*, 188 Wis. 2d 389, 525 N.W. 2d 278 (Ct. App. 1994), that pension rights are contractual and constitutionally protected, and thus cannot be impaired without fair notice and fair opportunity to preserve those rights. The *Dicks* Court determined that the claimant had not been timely notified of the seven-year limitation on his right to appeal his participant status. The Court also noted that it could find no prior limitation period to that established in § 40.06(1)(e)1. 202 Wis. 2d at 711.

Applying *Dicks* to the West Bend police officers’ claims, the Board concluded that the City had not satisfied the “fair notice” and “fair opportunity” tests. The City argued, as it does on this review, that the May 1993 Trust Fund News and the annual statements of participants’ benefits provided notice of the seven-year statute of limitation. Those generic notifications, however, did not expressly warn of the seven-year limitation period, nor did they directly address participant status claims. Moreover, as the Board observed, the annual statement of benefits could not have been intended to notify those who had been denied participant status because the statements are only sent to WRS participants (R. A151).

The City nonetheless contends that “fair notice” is a low threshold, analogous to notice pleading requirements in civil cases and vagueness challenges to criminal statutes. These analogies fail. The notice contemplated in *Dicks* —sufficient to avoid the impairment of protected pension rights—must

apprise the individual that he or she must act within a specific time period or risk the loss of a significant interest. Any other reading would nullify *Dicks* and the reasoning upon which it is premised.

Because, as the Board determined, the West Bend employees did not have "fair notice" of the limitation, it necessarily follows that the employees did not have a fair opportunity to preserve their claims.

On this certiorari review the Board advances an alternative analysis to the *Dicks* reasoning, based on the presumption that statutes operate prospectively only unless the legislation indicates otherwise. The Board suggests that *Benson* and *Dicks* presume retroactive operation of § 40.06(1)e)1., and thus fail to conduct the correct retroactivity analysis expressed in a trio of Wisconsin Supreme Court cases, *Martin v. Richards*, 192 Wis. 2d 156, 531 N.W. 2d 70 (1995), *Nieman v. Amer. Nat. Prop. & Cas. Co.*, 2000 WI 83, 236 Wis. 2d 411, and *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, 244 Wis. 2d 720.

The Court in *Benson*, 188 Wis. 2d at 405, cited a retroactivity case, *Shaurette v. Capitol Erecting Co*, 23 Wis. 2d 538, 544-48, 128 N.W. 2d 34 (1964), for the proposition that the legislature cannot enact a limitation period that extinguishes a participant's claim without fair notice of the change and a fair opportunity to preserve that claim. The *Dicks* court's reliance on *Shaurette* demonstrates the similarity between the retroactivity analysis and the *Dicks/Benson* reasoning. The common core is that after-enacted laws cannot extinguish accrued claims. This underlies the general rule that statutes of

limitation are prospective only and that statutes which purport to operate retroactively receive scrutiny. As the Board discusses in its brief, retroactive statutes impairing contractual rights do not satisfy due process unless, on balance, a broad public interest outweighs the private interests affected.

Here, however, there is no indication that the legislature intended Wis. Stats. § 40.06(1)(e)1. to apply retroactively. This lends further support to the Board's ultimate conclusion that the seven-year statute of limitations does not bar the employees' claims for WRS participation bases on pre-1984 service.

In its reply brief, the City argues for the first time that in the absence of an applicable statute of limitations for pre-1984 service, the employees should have filed their claims within the 30-day period established for claims against municipalities in Wis. Stats. § 68.08 (1975-76) or within the 120-day notice period for claims against governmental bodies in § 893.80. Leaving no statute unturned, the City alternatively suggests the six-year catchall limitation period established in § 893.93(1)(a). The Court in *Dicks*, however, expressly acknowledged that prior to the enactment of § 40.06(1)(e)1., there was no requirement that an appeal be filed within a given time. 202 Wis. 2d at 711. *Dicks* leaves no room for the City's newfound argument.

When a court grants due weight deference to an agency's interpretation of law, it will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available. *UFE, Inc., v. LIRC*, 201 Wis. 2d 274, 286-

287, 548 N.W. 2d 57 (1996). The Board in this case interpreted § 40.06(1)(e)1., Wis. Stats., to preclude its retroactive operation. This interpretation comports with controlling case law as expressed in *Benson, Dicks*, and the retroactivity cases. Lacking a more reasonable interpretation, the court must affirm the Board's June 24, 2005 decision allowing the employees' claims to be heard and determined on their merits.

### **B. The equitable doctrine of laches**

Laches is an equitable defense based on a plaintiff's unreasonable delay in bringing suit under circumstances in which the defendant is prejudiced by the delay. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W. 2d 423 (1999). Characterized in *Sheldon v. Rockwell*, 9 Wis. 158, 162 (1859) as a "very ancient doctrine," it is founded on the maxim that "[t]he court lends its aid only to the vigilant, active and faithful. . . Unreasonable delay, and mere lapse of time, independently of any statute of limitations, constitute a defense in a court of equity." *Id.*

As the Board recognized in its June 23, 2006 decision, the ETF Board is not a court of equity. Wisconsin Administrative Code § ETF 11.03(2)(a) provides that the "employee trust funds board has no equity powers, except as provided under s. 40.03(1)(a), Stats., to correct inequity in the computation of the amount of an annuity or death benefit resulting from a participant's combination of full-time and part-time service, a change in annual earnings period during the high years of earnings or the previous receipt and termination of an annuity."

The exercise of equitable powers would presumably include the power to dismiss claims the Board thought untimely regardless of any statute of limitations. Because the Board's equity powers are strictly and specifically limited to the computation corrections specified in Wis. Admin. Code § ETF 11.03(2)(a), however, neither the Board nor the court can unilaterally expand those powers to include consideration of defenses based on laches. The Board's interpretation of § ETF 11.03(1)(a) is entitled to controlling weight, and the court must defer to a reasonable interpretation if it is consistent with the purpose of the regulation. *Hillhaven Corp. v. DHFS*, 2000 WI App 20, fn. 6. The whole of Wis. Admin. Code § ETF 11.03, entitled "Process and proceedings," delineates the limitations on the powers of the governing boards of the Department of Employee Trust Funds. Among other purposes, these limitations protect the integrity of the boards, and the significant funds they manage, by insuring that the boards act only within their statutory powers. The ETF Board's interpretation of its own authority is consistent with that purpose.

Even if laches could be asserted, the City has the burden of proof as to each of the three elements of the laches defense: (1) an unreasonable delay in bringing the claim; (2) the party asserting laches lacked knowledge that the claim would be brought; and (3) the party asserting laches suffers prejudice. *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 28, ¶ 38, 290 Wis. 2d 352.

The Board's findings of fact reveal the City's difficulty in satisfying, at a minimum, the second element of the defense, lack of knowledge. Those findings

include that the Chief of Police hired in 1978 testified that the City was “entrenched” in its practice of using part-time officers despite concerns regarding the City’s liability (R. B5-B6, R. 586). Other evidence at the administrative hearing led to the Board’s finding that “[o]fficers had made inquiries about benefits generally at various times, but were told by the City that they were ineligible. After the City’s part-time mayor was included in the WRS in [the] 1990s, one of the officers, David Bateman, became interested in his own eligibility” (R. B6, ¶ 20). The Board correctly rejected the City’s laches defense.

**THE BOARD’S INTERPRETATION OF THE STATUTORY DEFINITION OF  
“EMPLOYEE” WAS REASONABLE.**

The City challenges the Board’s interpretation of the relevant statutory definition of “employee” for purposes of Wisconsin Retirement Fund (pre-WRS) eligibility. Pursuant to the applicable statute at the time in question, Wis. Stats. § 66.901(4)(c) (1967), the term “employee” included any person who “is employed in a position normally requiring actual performance of duty during not less than 600 hours a year in such municipality.”<sup>3</sup> The City maintains that the appropriate inquiry is “what is formally required of the position as an established rule or norm” (brief at p. 24). In the City’s view, because the City established no minimum hour requirement for its part-time police officers, the statute cannot reasonably be interpreted to include the claimants in this case as WRS participants.

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<sup>3</sup> Despite renumbering and minor revisions, there is no dispute that the statute in effect at the times relevant to these appeals required employment “in a position normally requiring actual performance of duty during not less than 600 hours a year.” City’s initial brief at p. 19.

The Board, however, determined that the statute requires consideration of the number of hours ordinarily expended in the performance of the duties of the position, and not the formal demand of the employer:

The use of the adverb "normally" to modify "requiring" in the statutes suggests a less strict compulsion, indicating a determination of the number of hours typically needed for an employee to carry out the duties of a position. It would make little sense for the statute to include "normally" if "requiring" is read as an employer's formal demand: there appears no reason why the legislature would provide for situations where the employer "normally," but did not in every case, require the employee to work a certain number of hours. In contrast, if the analysis is what the job entailed, "normally" makes sense: the demands of a job may fluctuate, and the employee should be reported if those demands "normally" entail a minimum number of hours.

(R. B9, ¶ 30).

The Board supports its interpretation by reference to two contemporaneous Department of Employee Trust Funds manuals, the 1971 "Instructions to Municipalities" and the 1978 Employer's Manual, which indicate that the demands of the position, not the formal demands of the employer, govern. (R. B9-B12).

The flaw in the City's interpretation is that it effectively excludes the word "normally" from the statutory description of the position conferring eligibility. The Indiana Court of Appeals reached a similar conclusion interpreting identical language in *Board of Trustees of Public Employees' Retirement Fund v. Baughman*, 450 N.E. 2d 95 (Ind. App. 1983). In that case, the Court rejected as "too narrow" the Board's contention that "positions normally requiring" 600 hours a year meant only the hours the employer specifically assigned the employee to

work within the employment agreement. 450 N.E. 2d at 97. As the Court recognized, the demands of a particular position may fluctuate and the inquiry should thus focus on what the position *normally* requires, as our statute provides.

The Board's interpretation of the WRS eligibility statute in this case receives great weight deference, as earlier noted. "If great weight deference is appropriate, a court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable." *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 287, 548 N.W. 2d 57 (1996). The Board's interpretation of Wis. Stats. § 66.901(4)(c) (1967) is reasonable and not contrary to the clear meaning of the statute. To interpret the statute as the City suggests would re-write it to substitute the words "position normally requiring" with the phrase "position in which the employer requires." The Board's interpretation must be affirmed.

**THE BOARD'S FACTUAL FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE**

In its June 23, 2006 Final Decision the Board made detailed findings of fact based on the evidence and testimony received at the July 12-13, 2004 administrative hearing. Based on its findings, the Board concluded as follows:

The Board concludes that the appellants have established by the preponderance of the credible evidence that until January 1982, the position of part-time patrol officer with the City of West Bend normally required the performance of 600 or more hours of actual duty per year. Any appellant hired as a part-time officer

during this period is entitled to be reported as a WRF participant for his period of part-time employment.

(R. B12, ¶ 34).

The City claims that the evidence is insufficient to support the Board's findings because it "does not show a norm or pattern among the people employed in the position of part time officer" (brief at p. 22).

Review of the sufficiency of evidence on certiorari is governed by the same standard used to test the sufficiency of evidence for administrative determinations under Ch. 227, Wis. Stats. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶ 6. Section 227.57(6) provides that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." The substantial evidence test asks whether, taking into account all of the evidence in the record, reasonable minds could arrive at the same conclusion as the agency. The findings do not even need to reflect a preponderance of the evidence as long as the conclusions are reasonable. *Kitten v. Department of Workforce Development*, 2002 WI 54, ¶ 5, 252 Wis. 2d 561.

Viewed in light of this standard, the record on this certiorari review provides ample support for the Board's findings of fact. The Board found that the police officers' part-time employment followed a consistent pattern: at the time they applied, all were interested in obtaining full-time employment. The

City advised them that to increase their chances of full-time work, they should be available when asked to work and accept all shifts offered. The Board cites hearing testimony of several officers and the City does not offer significant evidence to the contrary (R. B4, ¶ 10).

The employees were able to reconstruct the number of hours for each calendar year they worked part-time, and the City did not dispute the computation of hours (R. B4, ¶ 12; A2). The Board found that most of the employees worked 600 or more hours in every calendar year of part-time work (R. B5). Although the City strenuously objected to this finding, the Board located no record support for the City's objection, stating that only three employees worked fewer than 600 hours in one of their part-time years (R. B5, fn. 1).

The Board then found, citing the hearing testimony of several of the part-time police officers, that working in excess of 600 hours per year was typical during the time period at issue (R. B5, ¶ 14). The Chief of Police hired in 1978 noted the City's heavy reliance on its part-time officers and proposed a plan to replace part-time with full-time officers. The Board found that the plan was not implemented prior to January 1982, as evidenced by the actual hours worked in 1981. The Board compared the number of patrol officers working with the 4,600 hours the City budgeted in 1981, and determined that the average hours needed would have been about 657 per officer (R. B6, ¶ 19).

Based on these findings, the Board concluded that the employees demonstrated by a preponderance of the credible evidence that prior to January

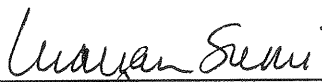
1982, the position of part-time police officer with the City of West Bend normally required the performance of 600 hours or more of actual duty per year. Although the City offers contrary evidence on many of the findings, the court is not at liberty to re-weigh the evidence. The record amply supports the Board's findings of fact and they must be affirmed.

**ORDER**

For the reasons stated above, the June 24, 2005 and June 23, 2006 decisions of the Wisconsin Employee Trust Funds Board are hereby AFFIRMED.

Dated this 26<sup>th</sup> day of March 2007.

BY THE COURT

  
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Maryann Sumi, Judge  
Circuit Court Branch 2

Cc: AAG Charlotte Gibson  
Atty. Lester Pines  
Atty. Mary Schanning