STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 LA CROSSE COUNTY

RICHARD HELLERUDE,

Petitioner,

vs.

MEMORANDUM DECISION AND ORDER
Case No. 96-CV-254

LABOR AND INDUSTRY REVIEW COMMISSION

Respondent,

FACTUAL BACKGROUND

For a number of years, Richard Hellerude has serviced Ansul Fire Suppression Systems in La Crosse County. The petitioner is not a factory-authorized service representative of Ansul. Wis. Adm. Code § ILHR 14.31(3)(c) requires that fire extinguishing systems "[B]e inspected semi-annually and checked for operation by a factory-authorized service representative." The La Crosse Fire Department, the Onalaska Fire Department, and the La Crosse County District Attorney have all warned Hellerude in the past that he must stop servicing Ansul Systems unless he could certify that he was a factory-authorized service representative. On March 28, 1996, Hellerude was ordered by the La Crosse County District Attorney to stop servicing Ansul Fire Suppression Systems in La Crosse County.

On August 23, 1995, Hellerude filed a "discrimination" complaint under the Wisconsin Fair Employment Act, § 111.31-111.395, STATS., against the State of Wisconsin Division of Safety and Buildings. The petitioner alleged that Wis. Adm. Code § ILHR 14.31(3)(c)

prevents him from engaging in his business which includes servicing Ansul systems. On September 5, 1995, Hellerude clarified his complaint to allege that he was being discriminated against on the basis of "use or nonuse of lawful products off the employer's premises during nonworking hours" within the meaning of § 111.321, STATS.

On January 9, 1996, the Wisconsin Equal Rights Division of the Department of Industry, Labor, and Human Relations preliminarily determined that Hellerude's complaint failed to state a claim of discrimination under the Wisconsin Fair Employment Act. On January 17, 1996, Helllerude appealed from the preliminary determination and argued, inter alia, that Wis. Adm. Code § ILHR 14.31(3)(c) violates his rights under the Fourteenth Amemdment to the United States Constitution based on his privilege to employment being infringed upon by the State of Wisconsin. On February 22, 1996, an administrative law judge issued a decision on the appeal of the preliminary determination. The administrative law judge affirmed the preliminary determination and dismissed Hellerude's complaint.

On March 13, 1996, Hellerude petitioned for Labor and Industry Review Commission review of the decision of the administrative law judge. In his petition, Hellerude conceded that his case did not seem to fit any place under the Wisconsin Fair Employment Act. Hellerude reiterated his argument that he was being deprived of his rights under the Fourteenth Amendment. On March 25, 1996, the Commission issued its decision affirming the decision of the administrative law judge. The petitioner now seeks judicial review of the Commission's decision and order dismissing his complaint under the Wisconsin Fair

Employment Act.

STANDARD OF REVIEW

1. Findings of fact

§ 111.395 and Ch. 227, STATS., govern judicial review of LIRC decisions based on the Wisconsin Fair Employment Act. § 227.57(6), STATS., provides:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, 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 on the record.

A finding of fact under § 227.57(6), STATS., if reasonable minds could arrive at the same conclusion. *Westring v. James*, 71 Wis.2d 462, 238 N.W.2d 695 (1975).

2. Conclusions of law

The court is not bound by the commission's determinations on questions of law. *Wehr Steel v. DILHR*, 106 Wis.2d 111, 315 N.W.2d 357 (1982). However, § 227.57, STATS., provides:

> (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
>
> (8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its

judgement for that of the agency on an issue of discretion.

> (10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

In fact, the courts will ordinarily defer to the agency's construction and application of a statute if it is reasonable. *Jenke v. DILHR*, 107 Wis.2d 714, 321 N.W.2d 347 (Ct. App. 1982); *Marathon Electric Mfg. Corp., v. Industrial Commission*, 269 Wis. 394, 69 N.W.2d 573 (1957).

On judicial review, there are three levels of deference which may be given to an administrative agency's conclusions of law and statutory interpretations, depending on the agency's experience, technical competence and knowledge in regard to the question presented. *Kelley Co. v. Marquardt*, 172 Wis.2d 234, 493 N.W.2d 68 (1992). These three levels are the great weight, the due weight, and the de novo standards. *Jicha v. DILHR*, 169 Wis.2d 284, 485 N.W.2d 256 (1992). In *UFE Incorporated and Pacific Indemnity Company v. Labor and Industry Review Commission and Jerry Huebner*, 201 Wis.2d 274, 284 (1996), the Wisconsin Supreme Court stated that four conditions must be met for an agency interpretation of a statute to be accorded great weight deference:

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

Under the great weight standard, a court will uphold the commission'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. *Id.* at 287.

In the *UFE* case the court also identified the two alternative levels of judicial deference, "due weight" and "de novo," which in the appropriate case may be applied to a decision of an administrative agency. The "due weight" standard is appropriate when an agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position than the court to make judgments regarding the interpretation of the statute. *Id.* at 286. Under the due weight standard, a court will not overturn a reasonable interpretation that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available. *Id.* at 286. The "de novo" standard is only applicable when the issue before the agency is clearly one of first impression or where the agency's position on an issue has been so inconsistent that it provides no real guidance. *Id.* at 285.

DECISION

1. The constitutionality of ILHR § 14.31(3)(c), STATS., may not be challenged in this proceeding.

The correct procedure to challenge the constitutional validity of the agency rule in this case is to seek a declaratory judgment. WIS. STAT. ANN. § 227.40(1). The exception of § 227.40(2)(a), STATS., is not available in this case. § 227.40(2)(a), STATS., provides:

> (2) The validity of a rule may be determined in any of the following judicial

proceedings when material therein:

> (a) Any civil proceeding by the state or any officer or agency thereof to enforce a statute or to recover thereunder, provided such proceeding is not based upon a matter as to which the opposing party is accorded an administrative review or a judicial review by other provisions of the statutes and such opposing party has failed to exercise such right to review so accorded;

While this is a civil proceeding by a state agency to enforce a statute, this proceeding is based upon a matter to which the petitioner is accorded an administrative review and a judicial review by other provisions of the statutes, namely § 111.395 and § 227.57, STATS.

2. The decision of the commission must be affirmed because it is a reasonable interpretation not contrary to the clear meaning of the statute.

Since no findings of fact of the commission are disputed, the question becomes which standard of review should be followed for conclusions of law of the Labor and Industry Review Commission. The court finds that the due weight standard of review is applicable. The commission has the duty of administering the statute. *Wis. Stat. Ann.* § 111.39(5)(a). The commission also has experience dealing with § 111. 31, STATS. However, no case law suggests that the commission's interpretation of the "use or nonuse of lawful products off the employer's premises" part of § 111.31, STATS., is one of long-standing or requires a level of expertise greater than that of this court. To review, under the due weight standard a court will not overturn a reasonable interpretation that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available. *UFE Incorporated and Pacific Indemnity Company v. Labor and Industry Review Commission and Jerry Huebner*, 201 Wis.2d 274, 284 (1996).

The court finds that the commission's decision that the petitioner was not discriminated against under the Wisconsin Fair Employment Act is a reasonable interpretation that comports with the purpose of the statute. It is clear from the plain meaning of the statute that to be discrimination under § 111.31, STATS., the petitioner would have to be an employee of an employer who would fire or not hire the petitioner based on the employee's use of lawful products, such as cigarettes. The petitioner is a self-employed person; thus, a reasonable interpretation of § 111.31, STATS., is that Hellerude not being allowed to service Ansul Fire Suppression Systems is not discrimination under the Wisconsin Fair Employment Act. The court finds that a more reasonable interpretation is not available.

ORDER

For the above stated reasons:

The decision of the Labor and Industry Review Commission is AFFIRMED.

Dated in La Crosse, Wisconsin, this 23rd day of ~~August,~~ Sept 1996.

BY THE COURT:

/s/

DENNIS G. MONTABON
Circuit Judge--Branch 3

cc: Assistant Attorney General David Rice
Richard Hellerude