

COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 29, 1991

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

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No. 90-2140-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE EX REL. DANI R. BERGMAN,

Plaintiff-Appellant,

v.

WISCONSIN LABOR AND INDUSTRY
REVIEW COMMISSION,

Defendant-Respondent,

OF CABBAGES AND KINGS, LTD.

Defendant.

APPEAL from a judgment of the circuit court for Washburn county: DENNIS C. BAILEY, Judge. *Reversed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Dani Bergman appeals a judgment affirming a Labor and Industry Review Commission redetermination of Bergman's unemployment compensation

benefits.¹ LIRC determined that Bergman had received an overpayment of \$10,783. Bergman contends that the statute permitting redetermination did not authorize redetermination of Bergman's benefits because the redetermination was not based either on new information received by the commission or on a technical or clerical mistake. Because we conclude the commission had no statutory authority to redetermine Bergman's benefits, we reverse.

Bergman owned fifteen and one-half shares out of 130 total shares of corporate stock in Of Cabbages and Kings, Ltd., a seasonal drive-in restaurant. Bergman served as manager, corporate officer and cook. In 1981, James Bethel, the majority stockholder, sold his seventy-three and one-half shares to the corporation for \$4,100, to be paid over four and one-half years. Bethel retained ownership of the stock, which was placed in an escrow account, until the purchase price was fully paid. While in escrow, all voting rights to that stock accrued to the corporation.

When the restaurant closed for the winter in 1982, Bergman applied for and received unemployment compensation benefits. However, before approving benefits, department employees met with Bergman concerning his

¹ This is an expedited appeal under Rule 809.17.

interest in the company. The department similarly investigated and approved Bergman's applications in 1983 and 1984.

In 1984, an unemployment compensation audit report indicated that Bethel's stock, which was in escrow, was treasury stock. Accordingly, there were only fifty-six and one-half outstanding shares. This new calculation raised Bergman's interest in the corporation to more than twenty-five percent. Bergman objected to the audit report, contending that Bethel's shares should not be considered treasury stock until they were fully paid. An initial department determination concluded that Bergman owned less than twenty-five percent of the corporate shares. An investigative determination was then issued that again concluded Bergman owned less than twenty-five percent of the corporate shares.

In 1985, however, the department issued a redetermination that set aside Bergman's benefits from 1982, 1983 and 1984. This left Bergman with a \$10,783 overpayment. Bergman appealed the redetermination. A hearing examiner concluded that Bergman owned or controlled more than twenty-five percent of the stock and was, therefore, ineligible for unemployment benefits in 1982, 1983 and 1984. LIRC and the circuit court affirmed the examiner's determination.

The department's authority to redetermine unemployment compensation benefits is established by sec. 108.09(2)(c), Stats., which provides: "The department may set aside or amend a determination at any time on the basis of subsequent information or to correct a technical or clerical mistake, unless a party has filed a timely request for hearing as to the determination."² An administrative agency's action is limited to the authority granted to them by the statute from which they derive their power. *State v. DILHR*, 77 Wis.2d 126, 136, 252 N.W.2d 353, 357 (1977). Accordingly, the issue is whether the department based its redetermination of Bergman's benefits on subsequent information or a technical or clerical mistake, thus acting within its authority. We conclude that it did not.

The application of a statute to a particular set of facts is a question of law. *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 417, 280 N.W.2d 142, 146-47 (1979). We give great weight to the department's determination. *Kimberly-Clark Corp. v. PSC*, 110 Wis.2d 455, 466, 329 N.W.2d 143, 148

² The legislature amended sec. 108.09(2)(c), effective January 7, 1990. The statute now reads: "The department may set aside or amend a determination within one year of the date of the determination on the basis of subsequent information or to correct a mistake, including an error of law, or at any time if the department finds that fraud or concealment occurred, unless a party has filed a timely request for hearing as to the determination." Section 23, 1989 Wis. Act 77.

(1983). However, we give less deference to an agency's view regarding the extent of its authority. See *Wisconsin's Environment Decade v. PSC*, 81 Wis.2d 344, 351, 260 N.W.2d 712, 716 (1978).

The statute in question unambiguously authorizes the department to redetermine benefits on the basis of subsequent information or to correct technical or clerical mistakes. The department does not dispute that it did not make its redetermination based on subsequent information. The question thus becomes whether the redetermination corrected a previous technical or clerical mistake.

The department made a thorough and complete investigation of the facts and determined that Bergman owned less than twenty-five percent of the outstanding corporate shares. Based upon the same information, the department subsequently concluded that Bethel's shares should be classified as treasury shares, which would increase Bergman's interest in the corporation to more than twenty-five percent. The failure to initially classify these shares as treasury shares was not a clerical mistake made in the processing or administering of Bergman's unemployment compensation claim.

Similarly, the department's decision to reclassify these shares was not a technical mistake. The

department first treated Bethel's shares as outstanding shares. The department subsequently made a conscious decision to treat those same shares as treasury shares. While the department may have made an error of law by initially concluding that Bethel's shares were outstanding shares, such error cannot be deemed a technical mistake.

The department had a full and complete opportunity to determine Bergman's interest in the corporation. Bergman provided all information necessary for the department to make this determination. Each year the department called Bergman in for a meeting concerning his stock ownership, and in each instance it determined Bergman was eligible for unemployment benefits. The department eventually concluded that its initial determinations were in error. No new information or additional facts led to the department's conclusion. While the department's earlier determinations may have been in error, not every error authorizes a redetermination. The error must be technical or clerical in nature. This error was neither. We therefore conclude that the department had no statutory basis upon which to redetermine Bergman's unemployment compensation benefits.

Because we conclude that the department was without authority to redetermine Bergman's benefits, we need not consider Bergman's position that the department was equitably estopped from making a redetermination.

By the Court.--Judgment reversed.

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