

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0408

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**AL BELMORE, AS BUSINESS MANAGER, AND
SPRINKLER FITTERS LOCAL #183,**

Plaintiffs-Appellants,

v.

**DEPARTMENT OF INDUSTRY, LABOR AND HUMAN
RELATIONS, AND CAROL SKORNICKA,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

DYKMAN, P.J. Al Belmore and Sprinkler Fitters Local #183 appeal from an order denying their petition for a writ of mandamus. The appellants sought the assistance of the circuit court to compel the Department of Industry, Labor and Human Relations (DILHR) to interpret Chapter 145, STATS., and WIS. ADM. CODE § ILHR 81.10(6) as requiring that licensed fitters perform

all installation and maintenance of water-based fire protection systems, except for weekly or monthly testing. The circuit court denied the appellants' petition, ruling that mandamus is inappropriate in this case. The appellants raise the following issues on appeal: (1) whether mandamus is an appropriate remedy to compel DILHR to change its interpretation of Chapter 145 and § ILHR 81.10(6); and (2) whether the trial court erred in deferring to DILHR's interpretation of the rule. We conclude that the trial court did not erroneously exercise its discretion in denying the petition and that the agency's interpretation of Chapter 145 and § ILHR 81.10(6) was reasonable. We therefore affirm.

BACKGROUND

In January 1994, DILHR enacted a rule which adopted NFPA 25. NFPA 25, established by the National Fire Protection Association, contains the minimum requirements for the inspection, testing and maintenance of existing water-based fire protection systems.

With the adoption of the new requirements of NFPA 25, DILHR began to receive inquiries questioning who may conduct the inspection, testing and maintenance of existing water-based fire protection systems. On June 30 and July 14, 1994, DILHR concluded that weekly and monthly testing could be conducted by unlicensed individuals, but all other inspection, testing and maintenance could only be performed by licensed journeyman automatic fire sprinkler fitters, employed by licensed automatic fire sprinkler contractors.¹ On January 3, 1995, DILHR changed its interpretation, concluding that automatic fire sprinkler contractors may assign inspection and testing activities to any of their employees who they feel are qualified to perform the work.²

Al Belmore and Sprinkler Fitters Local #183 petitioned for a writ of mandamus to compel DILHR to return to its original interpretation. The circuit court denied the petition, and Belmore and Local #183 appeal.

¹ The June 30 and July 14, 1994 interpretations were provided by Duane Strassman, Chief of DILHR's Section of General Plumbing, Fire Sprinkler and Licensing.

² The January 3, 1995 interpretation was provided by Robert DuPont, Director of DILHR's Bureau of Building Water Systems.

WRIT OF MANDAMUS

In reviewing a mandamus action, we will uphold the action of the trial court in either granting or denying the writ unless the court erroneously exercised its discretion. *State ex rel. Kurkierewicz v. Cannon*, 42 Wis.2d 368, 375-76, 166 N.W.2d 255, 258 (1969). In *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis.2d 157, 170, 540 N.W.2d 189, 194 (1995), the supreme court stated:

Mandamus is an extraordinary legal remedy, available only to parties that can show that the writ is based on a "clear, specific legal right which is free from substantial doubt." A party seeking mandamus must also show that the duty sought to be enforced is positive and plain; that substantial damage will result if the duty is not performed; and that no other adequate remedy at law exists.

(Citations omitted.)

The circuit court did not erroneously exercise its discretion in denying the appellants' petition for a writ of mandamus. "A writ of mandamus lies to compel public officers to perform their prescribed statutory duties." *Morrisette v. DeZonia*, 63 Wis.2d 429, 432, 217 N.W.2d 377, 379 (1974). The appellants cite no authority indicating that DILHR has a positive and plain duty to interpret Chapter 145, STATS., and WIS. ADM. CODE § IHLR 81.10(6) in the manner they desired. Therefore, mandamus does not lie.

The appellants argue that DILHR's obligation may be compelled by mandamus despite the fact that the court needed to interpret Chapter 145, STATS., and WIS. ADM. CODE § IHLR 81.10(6) in determining DILHR's duty. They rely on *State ex rel. Althouse v. City of Madison*, 79 Wis.2d 97, 255 N.W.2d 449 (1977) and *Morrisette v. DeZonia*, 63 Wis.2d 429, 217 N.W.2d 377 (1974). In both *Althouse* and *Morrisette*, the supreme court engaged in statutory construction before concluding that mandamus was appropriate. In *Althouse*, the court concluded, "[T]he fact that the duty imposed involves the

construction of a statute does not mean that the obligation set forth in the statute may not be compelled by mandamus." *Id.* at 106, 255 N.W.2d at 453.

The appellants' reliance on *Althouse* and *Morrisette* is misplaced. The circuit court did not deny the appellants' petition because the issue involved statutory construction. Rather, the court denied the appellants' petition because DILHR did not have a duty to interpret Chapter 145 and § IHLR 81.10(6) in the manner desired by the appellants.

The circuit court's denial of the appellants' petition is consistent with *Althouse* and *Morrisette*. The *Althouse* court concluded that mandamus was appropriate because the duty imposed by statute was "unequivocally of a mandatory, ministerial, nondiscretionary nature.... The duty on its face is positive, plain, and unequivocal." *Id.* at 107, 255 N.W.2d at 453. Likewise, the *Morrisette* court concluded that mandamus was appropriate because the applicable statute set up a "clear and unambiguous duty." 63 Wis.2d at 433, 217 N.W.2d at 379. DILHR, on the other hand, did not have a positive and plain duty to interpret WIS. ADM. CODE § ILHR 81.10(6) in the way appellants suggest. Rather, DILHR's interpretation was a discretionary act. Because DILHR does not have a plain and unequivocal duty to interpret § IHLR 81.10(6) in the manner desired by the appellants, the circuit court did not erroneously exercise its discretion in denying the petition.³

DECLARATORY RELIEF

The appellants argue that when a circuit court decides that mandamus is not appropriate, it should treat the action as if it had been brought as an action for declaratory relief. *See Milwaukee County v. Schmidt*, 52 Wis.2d

³ The circuit court also denied the appellants' petition because it concluded that § 227.12, STATS., which allows labor groups to request that an agency promulgate a rule, provided the appellants with an adequate legal remedy, and mandamus is appropriate only when no other adequate remedy at law exists. *See Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis.2d 157, 170, 540 N.W.2d 189, 194 (1995). The appellants argue that § 227.12 does not provide an adequate remedy. We do not need to address this issue, however, because we have concluded on other grounds that mandamus is not appropriate. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

58, 65-66, 187 N.W.2d 777, 780-81 (1971). DILHR does not dispute this contention. We will do so.

DILHR interpreted Wis. ADM. CODE § ILHR 81.10(6)⁴ and § 145.15(4), STATS., in concluding that automatic fire sprinkler contractors may assign inspection and testing activities to any of their employees who they feel are qualified to perform the work. "We accord great weight to DILHR'S interpretation of its own rules, unless the interpretation is plainly erroneous or inconsistent with DILHR's rules." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis.2d 299, 314, 493 N.W.2d 744, 750 (Ct. App. 1992). In addition, we will accord either great weight or due weight to DILHR's interpretation of § 145.15(4) because DILHR has expertise and specialized knowledge in the area of automatic fire sprinkler fitter licensing, as evidenced by the administrative rules in § IHLR 81.10 regulating the area. *See UFE Inc. v. LIRC*, 201 Wis.2d 274, 284-87, 548 N.W.2d 57, 61-63 (1996). Under either level of deference, we will uphold DILHR's interpretation unless a more reasonable interpretation is available. *Id.* at 287 n.3, 548 N.W.2d at 63.

WISCONSIN ADM. CODE § ILHR 81.10(6) provides: "ALLOWABLE MAINTENANCE. The weekly or monthly testing of sprinkler alarm equipment, fire pumps, vales, or appurtenances; the refilling of storage and pressure tanks; or the replacement of automatic fire sprinkler heads under emergency conditions, shall not require licensure under ch. 145, Stats." The appellants argue that Wis. ADM. CODE § ILHR 81.10(6), by providing that weekly or monthly testing does not require licensure, implies that all other installation, maintenance, testing and inspection of automatic fire protection systems requires a licensed sprinkler fitter. The appellants' interpretation of § ILHR 81.10(6) is reasonable. However, when we accord great weight to an agency's interpretation, we will uphold the interpretation as long as it is reasonable and consistent with the rule's language, regardless of whether other interpretations are reasonable. *See DILHR v. LIRC*, 193 Wis.2d 391, 397, 535 N.W.2d 6, 9 (Ct. App. 1995).

⁴ The legislature has charged DILHR with the authority to prescribe rules as to the qualifications, examination and licensing of journeymen automatic fire sprinkler system fitters and automatic fire sprinkler fire contractors. Section 145.17(2), STATS. DILHR adopted Wis. ADM. CODE § ILHR 81.10(6) pursuant to this authority.

WISCONSIN ADM. CODE § ILHR 81.10(6) is silent as to whether testing and maintenance other than weekly or monthly testing must be performed by licensed sprinkler fitters. Section 145.15(4), STATS., provides that all installation of automatic fire sprinkler systems must be performed by licensed individuals, but the statutes do not address whether unlicensed individuals may perform maintenance and testing. Because § 145.15(4) only requires licensure for sprinkler system installation, DILHR infers that licensure is not required for persons who perform maintenance and repair or testing and inspection. DILHR's interpretation is as reasonable as the appellants' interpretation and is not erroneous or inconsistent with its rules. Therefore, we uphold its interpretation.

The appellants argue that DILHR's interpretation is inconsistent with § 145.06(1)(a), STATS., which provides: "No person may engage in or work at plumbing in the state unless licensed to do so by the department." The appellants argue that automatic fire protection systems are plumbing⁵ and, therefore, no person may "engage in or work at" automatic fire protection systems unless licensed to do so by DILHR. We disagree.

The legislature provided a separate statutory provision for the licensure of automatic fire sprinkler system installers. Section 145.15(4), STATS., provides in relevant part: "No person may install automatic fire sprinkler systems unless licensed or registered to do so by the department." If we were to apply § 145.06(1)(a), STATS., to automatic fire protection systems, we would render § 145.15(4) superfluous. In *State ex rel. Briggs & Stratton v. Noll*, 100 Wis.2d 650, 655, 302 N.W.2d 487, 490 (1981), the supreme court stated: "It is a cardinal rule of construction that a statute must be construed if possible so that every portion of it is given effect. A statute should be so construed that no part of it is rendered superfluous by the construction given." (Citations omitted.) To give effect to § 145.15(4), we conclude that § 145.06(1)(a) does not apply to automatic fire sprinkler systems. Therefore, DILHR's interpretation is not inconsistent with § 145.06(1)(a).

⁵ "Plumbing" includes: "All piping, fixtures, appliances, equipment, devices and appurtenances in connection with the water supply, water distribution and drainage systems, including hot water storage tanks, water softeners and water heaters connected with such water and drainage systems and also includes the installation thereof." Section 145.01(10)(a), STATS.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.