COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2557 **Cir. Ct. No. 2006CV1661**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MADISON METROPOLITAN SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

RESPONDENT,

MADISON TEACHERS INC.,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. This is an appeal and cross-appeal by Madison Teachers, Inc., and the Madison Metropolitan School District from a circuit court order remanding to the Wisconsin Employment Relations Commission. We conclude that, by not first seeking commission review of a hearing examiner's decision, the District failed to exhaust its administrative remedies before seeking judicial review under WIS. STAT. ch. 227 (2007-08).[1] Accordingly, we reverse the circuit court's order and remand to the circuit court with directions to dismiss the judicial review petition without further proceedings.

¶2 Madison Teachers, Inc., is a teachers union. The union filed a complaint before the commission alleging a prohibited practice by the District under WIS. STAT. ch. 111. The hearing examiner held in favor of the union. Under WIS. STAT. § 111.07(5), a party dissatisfied with the examiner's decision may petition within twenty days for review by the commission as a body. If no such petition is filed, "such findings or order shall be considered the findings or order of the commission as a body." ***Id.*** In this case, the District did not petition for commission review. The commission then issued a decision informing the parties that the examiner's decision had become its own "[b]y operation of" the above statute. Included in the cover letter with that decision was a notice stating that the commission "hereby notifies the parties that … a petition for judicial review naming the Commission as Respondent may be filed by following the procedures set forth in Sec. 227.53, Stats."

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 The District filed a petition for judicial review under WIS. STAT. § 227.53. The circuit court appears to have identified the same problem that we have identified, namely, that the commission should have been given an opportunity to weigh in on the matter prior to judicial review. However, in the absence of an exhaustion argument by the union, the circuit court determined that the best course of action was to remand to the commission for further proceedings. The circuit court remanded to the commission for further action, including an evidentiary hearing "if necessary," to decide whether the District's conduct that was the subject of the union's complaint was a mandatory subject of bargaining. The union appealed, and the District cross-appealed. Both parties argue that the remand was erroneous, and that we should resolve the substantive issues in this court without further administrative proceedings.

¶4 After reviewing the parties' briefs and the record, we issued an order suggesting that the District failed to exhaust its administrative remedies. We allowed the parties to file letter briefs addressing exhaustion and the relief we should order, if the District did not exhaust its remedies. Both parties filed briefs. The District opposes application of the doctrine, while the union favors it.

¶5 The exhaustion of administrative remedies doctrine generally requires a party to complete all administrative proceedings before coming into court. ***Metz v. Veterinary Examining Bd.***, 2007 WI App 220, ¶13, 305 Wis. 2d 788, 741 N.W.2d 244. The purpose of the doctrine is to allow the administrative agency to perform the functions the legislature has delegated to it and to employ its special expertise and fact-finding facility. ***Id.*** Preventing premature judicial intervention also allows the agency to correct its own error, thus promoting judicial efficiency. ***Id.*** And, in the event judicial review is necessary, the

complete administrative process may provide a greater clarification of the issues. ***Id.***

¶6 "However, a court need 'not apply the exhaustion doctrine when a good reason exists for making an exception.'" ***Id.***, ¶14 (citation omitted). Courts determine this by considering "the circumstances under which the doctrine arises and the reasons for the doctrine … balancing the advantages and disadvantages of applying the doctrine in a particular case, including the litigant's need for judicial review, the agency's interests in precluding litigation, and the public's interest in the sound administration of justice." ***Id.*** Situations that courts have held to constitute exceptions to the exhaustion doctrine include: "the administrative body does not have the authority to provide the relief sought; the party who failed to exhaust would have no judicial review in circumstances that would be harsh or unfair; and the agency has already informed the party of its position on a question of law where the facts are not disputed." ***Id.***, ¶15. The doctrine is one of common law, in addition to specific applications mandated by statute, and therefore applies even when not required by statute. ***Estate of Szleszinski v. LIRC***, 2007 WI 106, ¶47, 304 Wis. 2d 258, 736 N.W.2d 111.

¶7 The District argues that review by the commission is not required because, by statute, the examiner's decision becomes the decision of the commission, and the commission's decision is "subject to review under" WIS. STAT. ch. 227, as provided in WIS. STAT. § 111.07(8). However, we see nothing in those statutes that indicates an intent to abrogate the common law exhaustion doctrine, and thus give a party discretion to bypass the main administrative decisionmaker and obtain judicial review directly of the hearing examiner's decision. While these statutes allow the hearing examiner's decision to become the decision of the commission for purposes of enforcement and other matters,

there is nothing in them that expressly states such a decision will be judicially reviewed without regard to exhaustion principles. These statutes merely describe the procedural mechanism by which a party is authorized to seek judicial review. They do not guarantee that a substantive review of the merits will occur if that procedure is invoked. Rather, the exhaustion doctrine continues to stand, as it has for years, as a common law barrier that furthers the policy reasons described above.

¶8 The history of this case well demonstrates that the policy concerns described above are present. During proceedings before the circuit court, the commission attempted to disavow the decision of the examiner. This suggests that review by the commission might have corrected the hearing examiner decision the District opposes, without judicial involvement. The circuit court concluded that a remand was necessary for the commission to address additional issues not decided by the examiner, which is another problem that might have been solved had commission review occurred before judicial review. Further, this court, in considering the substantive issues argued by the parties, would have benefitted from a thorough decision by the administrative body with expertise in the area.

¶9 The District argues that the exhaustion doctrine bars judicial review only while administrative proceedings are still going on, and not when they are completed, as it asserts they have been in this case. The District cites no authority that limits the doctrine in this manner. The argument essentially hinges on different meanings of "completed." While it is true that the administrative proceeding here was completed in the sense that proceedings were no longer in progress, we regard completion as referring to use of the complete range of administrative remedies. This is implicit in the term "exhaustion" of remedies,

meaning to use up what is available, until nothing more is available in the administrative forum.

¶10 The District also claims it relied on the commission's notice stating that a petition for judicial review "may be filed by following the procedures set forth" in WIS. STAT. § 227.53. We see nothing in that notice that should lead a reader to rely on it as indicating that the exhaustion doctrine would not apply in such a review. It merely directs the reader to the relevant procedural device. Furthermore, the District did not receive this notice until *after* it had decided not to petition for commission review.

¶11 The District points to published opinions in 1985 and 1994 in which there was judicial review of hearing examiner decisions that became commission decisions by operation of law. ***County of La Crosse v. WERC***, 182 Wis. 2d 15, 513 N.W.2d 579 (1994); ***DER v. WERC***, 122 Wis. 2d 132, 361 N.W.2d 660 (1985). However, those opinions do not discuss exhaustion, and we do not know whether or how that issue was addressed earlier in those proceedings. In the absence of a direct holding, these opinions do not reasonably support an assumption that such review will always be permitted.

¶12 The District argues that if we believe there is an exhaustion problem, we have created a "new rule" that should only be applied prospectively. The District asserts that application of the exhaustion doctrine to this situation would be "unprecedented," but it cites no authority or other basis for that assertion, beyond its own lack of familiarity with previous similar applications. We are not applying a new rule. The exhaustion doctrine is long-standing. The absence of similar instances, rather than suggesting we have created a new rule, may instead

indicate that parties do not normally side-step substantive review by a commission and then seek judicial review.

¶13 The District argues that we should not order dismissal of the petition for judicial review because that will "leave this case unresolved." We disagree. The dispute has been resolved by the hearing examiner's decision and the relief he awarded, which then became the enforceable order of the commission. The District may not agree with the examiner's resolution, but it is a resolution.

¶14 Finally, the District argues that, even if the exhaustion doctrine does apply to this type of situation, we should not apply it here because the commission would have no procedural way of reviewing the case now, and so the result would be to terminate the process and leave the District "irreparably harmed" by application of the doctrine. This is not convincing because, if accepted, the argument would have the effect of nullifying the exhaustion doctrine in every case. The party against whom it is applied would always be irreparably harmed in this manner, if the party had sought judicial review after the time for commission action had passed.

¶15 If both parties were in agreement now that we should remand to the commission, instead of dismissing the judicial review entirely, we might consider that possibility further. However, it is clear that the union, although belatedly, now agrees that dismissal is appropriate. Under our analysis, that relief would have been appropriate if sought earlier in circuit court. Accordingly, we reverse the circuit court's order and remand with the instruction to dismiss the petition for judicial review without further proceedings.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.