

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 02-1317
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-2782

**IN COURT OF APPEALS
DISTRICT IV**

MATTHEW TRIOLO,

PLAINTIFF-APPELLANT,

v.

**EMPLOYEE TRUST FUNDS BOARD AND COUNTY OF
MARATHON,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Matthew Triolo appeals an order affirming the decision of the Employee Trust Funds Board. The issue is whether the Board properly concluded that Triolo is not a “protective occupation participant,” as

defined in WIS. STAT. § 40.02(48)(a) (1999-2000).¹ We conclude it did, and therefore we affirm.

¶2 Triolo is employed as a Special Investigator in the office of the Marathon County District Attorney. Triolo previously argued to the Board that he should be classified as a protective occupation participant, but the Board rejected that argument in 1996. Triolo commenced a new review in 1999, and the Board again rejected his argument. He then commenced this action for certiorari review, and the circuit court affirmed the Board.

¶3 The parties disagree as to the standard of review we should apply. We have previously held that we will give “great weight” deference to the Board’s “interpretation and application” of WIS. STAT. § 40.02(48), which defines the term “protective occupation participant.” *Mattila v. Employee Trust Funds Bd.*, 2001 WI App 79, ¶12, 243 Wis. 2d 90, 626 N.W.2d 33. Triolo argues that we should not give that deference in his case because the Board’s interpretation of the statute has been inconsistent over time. However, our adoption of this standard in *Mattila* was not based on the Board’s consistency on the specific issue then before it, but rather on the Board’s general history of interpreting and applying this statute. In *Mattila*, we said that “there can be little dispute that the Board has acquired considerable experience, expertise, and specialized knowledge regarding ‘protective occupation’ determinations, that it used its expertise and knowledge in deciding this appeal, and that its interpretation fosters the uniform and consistent

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

application of the statute.” *Id.* at ¶10. This is equally true in Triolo’s case. The test, therefore, is whether the Board’s interpretation is reasonable. *See id.* at ¶12.

¶4 WISCONSIN STAT. § 40.02(48)(a) provides, in relevant part: “‘Protective occupation participant’ means any participant whose principal duties are determined by the participating employer ... to involve active law enforcement or active fire suppression or prevention, provided the duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.” The Board has previously concluded that “principal duties” means 51% or more of the duties. *See Mattila*, 2001 WI App 79 at ¶14 n.3. Triolo does not dispute that interpretation.

¶5 The Board found that Triolo’s primary function is to provide litigation support to the district attorney, “generally as a supplement to the investigations conducted by local law enforcement agencies, with an emphasis on follow-up investigations and on pretrial preparation.” It found that “about half” of his work is finding the present locations of persons the prosecutors want to call as witnesses, and serving subpoenas. The Board further found that Triolo does not carry a firearm in the performance of his duties, and that he is prohibited by the district attorney from carrying a firearm or handcuffs or from making an arrest without the express authority of the district attorney. Further, the Board found that Triolo has never arrested or apprehended a criminal suspect in the course of his work in this position. Triolo does not appear to dispute these findings.

¶6 The Board’s main legal focus was on whether Triolo’s principal duties involved “active law enforcement.” The Board noted that this phrase was not defined in the statute, and stated that the Board has adopted the following “working definition” of that term:

[T]o hold an office or public employment lawfully vested with a duty to maintain public order, being duly authorized to make arrests for violations of the laws or ordinances the person is employed by the participating employer to enforce and (while in said office or employment) to be actively, currently and directly involved in detecting and preventing crime and enforcing laws or the ordinances of a participating employer.

In addition, the Board concluded that the legislature intended the phrase to mean “something more directly and immediately related to detecting and preventing crime and enforcing law than merely providing litigation support for prosecutors engaged in subsequent criminal prosecutions.” The Board concluded that Triolo’s principal duties, as described above, are not active law enforcement.

¶7 We conclude that the Board’s decision was reasonable. The status of protective occupation participant was intended to be limited to a narrow class of employees meeting stringent standards. *See County of La Crosse v. WERC*, 170 Wis. 2d 155, 167-68, 488 N.W.2d 94 (Ct. App. 1992), *rev’d on other grounds*, 180 Wis. 2d 100, 508 N.W.2d 9 (1993). It was expected that the individual’s duties would subject him or her to periods of great mental and physical stress as well as possible personal injury or perhaps even death. *See id.* at 167. It was reasonable for the Board to conclude that this intent did not encompass persons providing investigative litigation support for prosecutors. The Board’s “working definition” of “active law enforcement” is a reasonable one that attempts to distinguish between those persons who are in the most physically demanding roles of law enforcement and those whose functions can be described, in some sense, as “enforcing laws,” but who are not subject to the same physical demands. In addition, the Board reasonably applied this definition by concluding that Triolo’s duties were not primarily in active law enforcement.

By the Court.—Order affirmed.

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

