

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 19, 2004**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 04-0692**

**Cir. Ct. No. 03CV1141**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**BROWN COUNTY,**

**PETITIONER-APPELLANT,**

**v.**

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Brown County:  
THOMAS S. WILLIAMS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Brown County appeals an order dismissing its motion for declaratory judgment. Brown County argues (1) the trial court improperly exercised its discretion because it “concluded in a cursory fashion” the issues to be resolved were factual rather than analyzing statutory and case law to resolve its

motion, and (2) the trial court should have found that including judicial assistants in a collective bargaining unit violated the separation of powers by infringing on the inherent constitutional authority of the judicial branch. Because we conclude the trial court properly exercised its discretion, we affirm the order without reaching the merits of any other claims raised by Brown County.

## **BACKGROUND**

¶2 Teamsters Local Union 75 initially filed a petition with the Wisconsin Employment Relations Commission (WERC) to clarify an existing Brown County bargaining unit by determining whether nine judicial assistants could be added to the unit. Before WERC had held any hearings, Brown County moved to dismiss the union’s petition on the grounds that adding judicial assistants to the bargaining unit would violate the separation of powers. The County also argued that judicial assistants are “confidential employees” within the meaning of the Municipal Employee Relations Act (MERA), WIS. STAT. § 111.70(1)(i), and not “municipal employees” who can become part of a collective bargaining unit.<sup>1</sup> WERC denied the motion to dismiss.

¶3 Subsequently, Brown County filed a motion for declaratory judgment in the circuit court, again arguing that either judicial assistants could not constitutionally be included in a collective bargaining unit or that they were “confidential employees” under MERA. The court dismissed the action under the doctrine of primary jurisdiction, concluding that WERC was the proper forum initially to address a number of factual matters, including whether a judicial

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

assistant is a confidential employee or a municipal employee, raised by this case. Brown County appeals.

## DISCUSSION

¶4 The doctrine of primary jurisdiction reflects judicial concern not with power, but with comity. *Wisconsin Collectors Ass'n v. Thorp Fin. Corp.*, 32 Wis. 2d 36, 145 N.W.2d 33 (1966). Questions of primary jurisdiction arise when both an administrative agency and a court have jurisdiction over the subject matter of the dispute. *Browne v. Milwaukee Bd. of Sch. Dirs.*, 69 Wis. 2d 169, 175, 230 N.W.2d 704 (1975). If, as a matter of law, concurrent jurisdiction exists, the trial court may in its discretion refuse to retain or exercise its jurisdiction until after the administrative agency has done its work. *McEwen v. Pierce County*, 90 Wis. 2d 256, 271, 279 N.W.2d 469 (1979).

¶5 The trial court's exercise of discretion should be guided by the purpose of the doctrine of primary jurisdiction, promoting the proper relationship between courts and administrative agencies. *Wisconsin Collectors*, 32 Wis. 2d at 36. "[W]here factual issues are significant, the better course may be for the court to decline jurisdiction; where statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings." *McEwen*, 90 Wis. 2d at 271; *see also Browne v. Milwaukee Bd. of Sch. Dirs.*, 83 Wis. 2d 316, 328-29, 265 N.W.2d 559 (1978). The trial court's decision should also reflect an understanding that the legislature created many agencies as forums for systematic policymaking and fact-finding. *McEwen*, 90 Wis. 2d at 271. The jurisdiction of such agencies should be given priority in the absence of a valid reason for judicial intervention. *Id.*

¶6 To be sustained, discretionary determinations must demonstrably be made and based on the facts appearing in the record and in reliance on appropriate and applicable law. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In addition, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination. *Id.*

¶7 WISCONSIN STAT. § 117.70(1) gives WERC the authority to determine which municipal employees may be part of collective bargaining units. To carry out that duty, WERC must develop factual records and make conclusions of law such as whether an individual is a municipal or a confidential employee. *See Mineral Point Unified Sch. Dist. v. WERC*, 2002 WI App 48, ¶17, 251 Wis. 2d 325, 641 N.W.2d 701. Circuit courts have original jurisdiction over all civil and criminal matters in the state, except as otherwise provided by law, and such appellate jurisdiction as the legislature may prescribe. WIS. CONST. art. VII, § 8. Where a claim is originally cognizable in the courts and the claim requires resolution of issues that, under a regulatory scheme, have been placed within the competence of an administrative agency, both the court and the agency have jurisdiction. *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956) (distinguishing between the exhaustion of remedies rule and the primary jurisdiction rule). WERC and the circuit court would thus ordinarily have concurrent jurisdiction over the kind of case brought by Brown County.

¶8 Brown County appears to argue on appeal either that the constitutional principle announced in *Barland v. Eau Claire County*, 216 Wis. 2d 560, 575 N.W.2d 691 (1998), is so clear that it governs the disposition of this case directly, negating any claims of concurrent jurisdiction, or that the court's failure

to recognize the significance of the constitutional question made the exercise of discretion erroneous. We are not persuaded by either argument.

¶9 The *Barland* court held that a "bumping" provision within a collective bargaining agreement could not be harmonized with the "circuit court judge's exclusive, inherent power to remove a judicial assistant." *Id.* at 596. Although the legislature has historically regulated hours, wages, and even posting procedures for judicial employees, the unilateral power to remove a judicial assistant does not fall within "an area of shared powers, but within an area that historically has belonged exclusively to the judiciary." *Id.* at 588. The bumping provision was thus an unconstitutional violation of the separation of powers implicit in Wisconsin's Constitution. *Id.* at 589-90. *Barland* is not so broad, however; the court declined to decide even the closely related question of whether the power to appoint an assistant after one has been removed is part of the judiciary's "core, inherent powers." *Id.* at 590. While the principle announced in *Barland* might have some application to the case before us, then, it does not necessarily directly control its disposition. Equally important, even if Brown County's expansive reading of *Barland* were correct, WERC could find that judicial assistants were confidential employees thereby avoiding the constitutional question entirely. See *WEAC v. State Elections Bd.*, 2000 WI App 89, ¶22, 234 Wis. 2d 349, 610 N.W.2d 108.

¶10 Brown County argues alternatively that the trial court's decision to decline jurisdiction was an erroneous exercise of discretion because the court "concluded in a cursory fashion" that the agency should have jurisdiction first to create a factual record. We disagree.

¶11 In its written decision, the court carefully examined the parties' claims, drawing on the appropriate and applicable law. The trial court properly rejected WERC's argument that the failure to exhaust available administrative remedies required dismissal. It made a thoughtful and reasonable determination that *Barland* did not cut off concurrent jurisdiction and that there were factual issues in the case, "including whether a [judicial assistant] is a confidential employee ... a municipal employee, [or] involved with labor relations," that are best addressed first by WERC. Case law supports the court's conclusion that the distinction between confidential and municipal employees often depends not on posted job descriptions but on a factual record that must be developed. Case law similarly supports the court's conclusion that WERC has expertise in building factual records and applying the relevant statutes to them. *See Mineral Point*, 251 Wis. 2d 325, ¶17. Finally, a WERC determination would not affect Brown County's right to judicial review or its ability to preserve constitutional claims.

¶12 Brown County thus identifies neither a valid reason for judicial intervention under the doctrine of primary jurisdiction nor any failure in the court's reasoning that would render its exercise of discretion erroneous. Therefore we affirm the order.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

