COURT OF APPEALS
DECISION
DATED AND RELEASED

August 8, 1995

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. 94-2060

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

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent-Respondent,

FLOW,

Participant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. The Milwaukee Metropolitan Sewerage District appeals from a trial court order affirming the decision of an administrative law judge that modified a DNR decision regarding a MMSD discharge permit. MMSD raises numerous arguments, all of which we reject. We affirm.

I. BACKGROUND

This case is yet another skirmish in the apparently never-ending "Sewer Wars" between MMSD and FLOW.[1] By written contracts, MMSD provided sewer services to the FLOW communities. Since 1984, when the written contracts were terminated, MMSD attempted to charge the FLOW communities for MMSD capital improvements on the basis of the FLOW communities' assessed property values. The FLOW communities refused to pay on that basis and the dispute between MMSD and the FLOW communities has continued.

While attempting to negotiate a new contract with MMSD, the FLOW communities came to believe that the capacities allocated to them by MMSD under the terms of the tentative agreement were based on inappropriate data and would be inadequate to handle expected sewage if the communities developed as anticipated by the 208 Plan (the comprehensive area-wide water quality management plan prepared by the Southeastern Wisconsin Regional Planning Commission pursuant to § 208 of the Clean Water Act) and the Master Facilities Plan ("MFP"). After the new contract negotiations were unsuccessful, FLOW informed the DNR that MMSD had told the FLOW communities that the capacities to be allocated to them under the terms of the proposed agreement represented maximum capacity available to each of the communities and that MMSD lacked sufficient conveyance or storage capacity to meet the anticipated needs of the communities. MMSD also had enacted regulations restricting access to its facilities, and has required the installation of flow restrictors to limit sewage entering its interceptors from the FLOW communities to the flows allocated to those communities.

[1] FLOW is an acronym for Fair Liquidation of Waste, a coalition of municipalities that presently consists of Mequon, Brookfield, Elm Grove, New Berlin, Butler, and Menomonee Falls.

The DNR concluded that it should determine whether there was a capacity problem. The NRB (Natural Resources Board) became involved in the situation, reviewed various options available to the DNR, and allowed the parties an opportunity to address the NRB. The NRB asked the DNR to prepare a report on the issues for consideration at a subsequent NRB meeting. The DNR's report set forth various options, and the NRB adopted a resolution endorsing the DNR recommendation that MMSD's discharge permit be modified. Pursuant to § 147.13, STATS., a public informational hearing was held and the DNR modified MMSD's discharge permit to require MMSD to conduct capacity studies for the purpose of determining whether its conveyance, storage and treatment facilities have sufficient capacity to accommodate the needs of communities within its service area through the year 2005.

Following the DNR's modification of the discharge permit, MMSD filed a petition for a contested case hearing. After a contested hearing, the administrative law judge concluded that none of the parties knew the as-built capacity of the MMSD system. The ALJ further concluded that there was a "lack of information and changed circumstances from the conditions at the time of the [Master Facilities Plan which] plainly demonstrate the need for a study of the capacity of the system and for revised facility planning." The ALJ issued a decision and order, which modified the DNR's order from requiring a study of capacity allocations to one requiring facility planning that must consider various options for provided capacity until 2010 and a determination of any needed additional conveyance, storage and treatment facilities. In ordering facility planning, the ALJ incorporated information from Gary Gagnon, a MMSD engineer, and Wayne St. John, the MMSD Director of Operations, who stated that MMSD had already committed to do facility planning prior to the DNR's permit modification. The ALJ's order also directed that MMSD "shall not exclude any community from facility planning because of disputes relating to capital cost allocation."

MMSD then petitioned for circuit court review of the ALJ's order. The circuit court affirmed. MMSD appeals.

II. STANDARD OF REVIEW

An appellate court's review of a decision or order of an administrative agency is identical to that of a circuit court. *See* ***West Bend Co. v. LIRC***, 149 Wis.2d 110, 117, 438 N.W.2d 823, 826-827 (1989). Unless grounds exist to set aside, modify, or remand the matter to the agency under a specific provision of § 227.57, STATS., we must affirm the agency action. Section 227.57(2), STATS. Additionally, where procedural error is alleged, we must remand if "either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure." Section 227.57(4), STATS.; *see also* ***Seebach v. Public Serv. Comm'n***, 97 Wis.2d 712, 718-721, 295 N.W.2d 753, 757-759 (Ct. App. 1980) (appellant must demonstrate impairment amounting to prejudice).

We must affirm an agency's findings of fact if they are supported by "substantial evidence." ***Madison Gas & Elec. Co. v. Public Serv. Comm'n***, 109 Wis.2d 127, 133, 325 N.W.2d 339, 342-343 (1982). The test for "substantial evidence" is whether reasonable minds could arrive at the same conclusion. ***Id.*** We cannot substitute our judgment for that of the ALJ regarding the weight and credibility of the evidence. *See* § 227.57(6), STATS.

Generally speaking, a reviewing court is not bound by an agency's statutory interpretation or application. ***William Wrigley, Jr. Co. v. DOR***, 160 Wis.2d 53, 69, 465 N.W.2d 800, 806 (1991), *rev'd on other grounds*, 505 U.S. 214 (1992). "In some instances, however, a court will give deference to an agency's interpretation of a statute." ***Id.*** Section 227.57(10) mandates that "due weight" be given "the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Where legal questions are intertwined with factual determinations or policy determinations, or where the agency has long-standing experience in the interpretation and application of the applicable law, a reviewing court should be deferential to the agency's determination. ***William Wrigley, Jr. Co.***, 160 Wis.2d at 70, 465 N.W.2d at 806.

III. DISCUSSION

A. Alleged NRB\DNR "Irregularities." MMSD contends that the NRB "direct[ed]" modification of the permit. MMSD alleges that the NRB vote was

taken without affording MMSD the opportunity for a hearing and that the NRB vote violated the Open Meetings Law.

We disagree. As the ALJ decision stated:

> The resolution adopted by the NRB was to support the DNR staff recommendation to modify the MMSD [discharge] permit. This resolution did not deprive [MMSD] of the usual public notice of a proposed modification of [the permit]. The NRB resolution did not constitute a "final decision" by DNR to modify the MMSD discharge permit.

The ALJ also noted that the NRB vote was a "non-binding resolution." He explained that following the DNR's public hearing on permit modification, the DNR had "'several options, including finalizing, revising or withdrawing the initial proposal,'" and that the DNR could have even "stop[ed] the process of modifying the permit if [public] comments warranted it." Following the NRB vote and prior to the DNR modification of MMSD's discharge permit, the DNR held a public informational hearing, which MMSD attended. The DNR subsequently made the final determination to modify MMSD's permit on September 29, 1992. Substantial evidence supports the ALJ's findings and conclusion that the decision to modify MMSD's discharge permit was not made by the NRB, but was made by the DNR after MMSD was afforded the opportunity for a hearing.

As to MMSD's allegations that the NRB violated the Open Meetings Law, the ALJ stated:

> [MMSD] has not carried its burden of proof in proving violations of Chapter 19, Wis. Stats. Even if [MMSD] had carried its burden of proving an open meetings violation, such violation would not be dispositive with respect to the necessity or reasonableness of the permit modification because the NRB resolution to support the DNR staff

> recommendation to modify the permit was not a prerequisite to such permit modification.

We need not determine whether the NRB violated the Open Meetings Law for several reasons. First, the NRB's resolution was "non-binding." It was ultimately the DNR that had the final decision-making authority on whether to pursue or abandon modification of MMSD's discharge permit. Second, before a private citizen can bring a claim alleging an Open Meetings Law violation, the District Attorney must refuse to commence an action to enforce the Open Meetings Law. *See* § 19.97(4), STATS.; ***State ex rel. Hodge v. Turtle Lake***, 180 Wis.2d 62, 74-75, 508 N.W.2d 603, 607 (1993). There is no evidence in the record to indicate that this prerequisite has been satisfied. Finally, even if one were to assume an Open Meetings Law violation for the sake of argument, MMSD failed to demonstrate that the public interest in the enforcement of the Open Meetings Law outweighs any public interest which there may be in sustaining the validity of the action taken. *See* § 19.97(3), STATS.

B. The Authority of the DNR and ALJ to Modify MMSD's Discharge Permit. MMSD argues that the DNR and ALJ lacked authority to modify its discharge permit so long as it was in compliance with the 1981 MFP. MMSD maintains this position despite its acknowledgement that it lacked information regarding capacity issues. Additionally, MMSD argues that the DNR-ordered modification was, in any event, unnecessary because MMSD had already committed to undertake a facilities study prior to the DNR-ordered modification. We reject these arguments.

According to the published notice of hearing and intent to modify MMSD's permit, the DNR stated that the modification compelling a capacity study was necessary because "[s]everal communities in MMSD's service area are seeking capacity greater than that allocated by MMSD." On review the ALJ further stated that two of the reasons justifying modification of the permit were: (1) "a lack of knowledge on all sides of the as-built capacity of the system," a contention which is not disputed by the parties; and (2) "the capacity study as proposed and as revised is needed to help avoid bypassing or surcharging in the MMSD system in the future." The ALJ also noted:

> The results of such a capacity problem would be serious environmental damage. Gagnon [a MMSD engineer] testified that the results of a capacity problem in the MMSD system could be: 1). Sewer surcharging, causing either a backup into basements or an overflow; 2). Exceedance of storage capacity, causing a bypass of separated sewage or reduction in the combined sewer level protection; or 3). A sewage treatment problem. The consequence of such surcharging can be untreated sewage in waterways, rivers and lakes.

Stating why he modified the permit to require facility planning instead of a capacity study, the ALJ explained:

> The only criticism of [the] DNR that MMSD demonstrated was that the modified permit was issued without substantial input from the permit-holder MMSD. DNR offered little if any opportunity for the District to respond to the proposed permit modification *prior* to it being "public-noticed." After the formal public notice period, MMSD exacerbated this problem by refusing to provide substantive comments during the notice period. Instead, MMSD set forth its sometimes strained legal arguments objecting to the procedures followed in issuance of the modification. The result of this two-pronged failure of communication between MMSD and [the] DNR was the flawed capacity study set forth in the September permit modification.

The ALJ further stated:

> 5. Unlike the capacity study in the modified ... permit, MMSD facility planning would start from a uniform set of engineering assumptions and would uniformly address the needs of the entire MMSD

service area, including but not limited to the FLOW communities. The capacity study described in the modified permit elicits less useful data than that which would be required in connection with facilities planning because it allows MMSD service area communities to identify flow "needs" in excess of flows approvable for construction under NR 110, Wis. Adm. Code.

Further, under the capacity study in the modified permit because MMSD would not be bound by any community's characterization of peak flow needs greater than those assigned by [MMSD], the likely result of the capacity study in the modified permit would be a new series of disputes regarding the reasonableness of capacity needs identified by individual communities.

6. Revised facilities planning, unlike the proposed capacity study, will directly lead to the implementation of any new policies and/or the construction of any new facilities identified as needed under the plan.

7. Taken as a whole, a clear preponderance of the evidence supports a revision of the modified permit to incorporate the advantages of MMSD revised facilities planning and to delete the capacity study as set forth in the modified permit. In so doing, the ALJ relies heavily on the alternate permit language suggested by Mr. St. John [MMSD Director of Operations].

....

Plainly MMSD needs to have more current information and revised long-term plans relating to its ability to meet the capacity needs of the twenty-eight communities served by the District. However, the focus of such efforts must be upon planning for future needs and not endlessly disputing the validity

> of previous planning assumptions.... First and foremost, facilities planning will eliminate the uncertainty associated with polling individual communities and the possibility of protracted disputes regarding whether or not a community has proposed realistic capacity needs. Because facilities planning is subject to Federal and State statutes and administrative code provisions, a uniform set of engineering and planning assumptions will be employed. Facilities planning is far more likely to lead to real-world implementation and any necessary construction than the capacity study. Further, the facilities plan will extend the planning horizon to the year 2010 and will be more likely to involve all twenty-eight communities in the MMSD service area.
>
> Overall, the modified permit as revised represents a systematic, thorough response to the original concerns which gave rise to the modified permit.

The DNR's initial modification of MMSD's permit was certainly within its authority and was supported by sufficient "cause" under § 147.03(2), STATS. A discharge permit issued by the DNR may, "on the basis of any information available":

> be modified, suspended or revoked, in whole or in part, *for cause, including but not limited to*:
>
> 1. Violation of any terms or conditions of the permit;
>
> 2. Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts;
>
> 3. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

Section 147.03(2)(a) & (b), STATS., (emphasis added). Undisputed uncertainty over limited and possibly inadequate sewage capacity in light of the potentially devastating environmental impact clearly meets the requisite "cause" to allow permit modification. Further, the DNR is not required to wait until a violation or pollution occurs. *See* ***State ex rel. Martin v. Juneau***, 238 Wis. 564, 573, 300 N.W. 187, 191 (1941) (power of state board of health or state committee on water pollution "extend[ed] to prevention as well as to the remediation of conditions which are destructive to the public health"). Additionally, the DNR is legislatively charged with:

> serv[ing] as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this section is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this section and all rules and orders promulgated under this section shall be liberally construed in favor of the policy objectives set forth in this section.

Section 144.025(1), STATS.; *see also* § 144.025(2), STATS. (The DNR has "general supervision and control over the waters of the state."). The record clearly establishes that the DNR was concerned with alleged limited capacity or inability to handle sewage from the communities MMSD serviced, and the DNR-ordered modification was well within its authority.

We further reject MMSD's argument that the ALJ lacked authority to modify the capacity study ordered by the DNR. The ALJ did not invent completely new or different reasons for modifying the discharge permit; he simply articulated the DNR's larger concerns regarding the capacity issue. His additional modification by requiring facility planning was also clearly authorized under § 147.20, STATS. *See* § 147.20(1)(b), STATS. (on review of permit modification, ALJ "shall consider anew all matters concerning the permit ... modification"); *see also* § 227.46(3), STATS. (ALJ decision may become final DNR decision).[2]

MMSD also disputes the provision from the ALJ's order that prohibited MMSD from excluding "any community from facility planning because of disputes relating to capital cost allocation." MMSD claims that "[t]his language purports to define the MMSD 'service area' for facilities planning purposes," as defined under § 66.88(10), STATS., and that this was not an issue at the contested hearing.[3] On appeal, however, MMSD admits that the FLOW communities are within its service area. MMSD's admission combined with its failure to explain the significance of its position begs the obvious question, "'So what?'" *See* ***State v. Riley***, 175 Wis.2d 214, 219, 498 N.W.2d 884, 886 (Ct. App. 1993) (quoting ***Public Serv. Comm'n v. Wycoff Co.***, 344 U.S. 237, 244 (1952)). Because MMSD failed to adequately brief this issue, we decline to address it.

C. Notice of "Facility Planning" at the Contested Hearing. Finally, MMSD argues that it was not given notice that facility planning would be an issue at

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[2] To this end, MMSD's reliance on ***Village of Thiensville v. DNR***, 130 Wis.2d 276, 386 N.W.2d 519 (Ct. App. 1986), is misplaced. That case held that an ALJ was precluded from examining an issue that had not previously been examined by the DNR. *See* ***id.*** at 279-282, 386 N.W.2d at 520-522. Here, in contrast, the evidence at the contested hearing was the same as that before the DNR.

[3] Section 66.88(10), STATS., provides that "'[s]ewerage service area' means the area of the district and the area for which service is provided by contract under s. 66.898."

the contested hearing and claims that as a result it suffered "[g]reat prejudice." We reject this claim as well.

The ALJ's order was a response to an acknowledged problem and was merely a modification of the DNR-ordered remedy, based on the testimony of MMSD's witnesses, to make it more consistent with that which MMSD had voluntarily undertaken. We agree with the circuit court that in light of these circumstances, "[i]t's difficult to see how the District is prejudiced."

Therefore, we affirm the circuit court's order affirming the ALJ's decision.[4]

By the Court. – Order affirmed.

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

[4] MMSD also argues that "[t]he contested case proceeding in this matter, which was designated a Class 1 proceeding within the meaning of Sec. 227.01 should have been designated a Class 2 proceeding, thus shifting the burden of proof to the DNR to establish sufficient cause to support its unilateral decision to modify the MMSD discharge permit." MMSD also admits, however, that this issue was not raised in the circuit court. We decline to address it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-444, 287 N.W.2d 140, 145-146 (1980) (appellate courts generally will not address an issue raised for the first time on appeal).