COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 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

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No. 94-2484

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

SANFORD GIBSON,

Plaintiff-Appellant,

v.

DEPARTMENT OF CORRECTIONS,
MICHAEL SULLIVAN
AND KEN J. SONDALLE,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Reversed and cause remanded with directions*.

Before Eich, C.J., Dykman and Sundby, JJ.

SUNDBY J. Sanford Gibson, an inmate in the Wisconsin Correctional System, brought this action under §§ 227.40 and 806.04, STATS., to have the circuit court declare that the Department of Correction's policy which stamps every inmate's outgoing correspondence--"**THIS LETTER HAS BEEN MAILED FROM THE WISCONSIN PRISON SYSTEM**"--is a "rule" as defined

in § 227.01(13), STATS., and must be promulgated as such. We agree and reverse the summary judgment and direct that on remand the trial court shall grant Gibson's motion for summary judgment.

Section 227.01(13), STATS., provides in part:

> "Rule" means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" does not include ... any action ... which:
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> (a) Concerns the internal management of an agency and does not affect private rights or interests.

Effective November 1, 1993, the department adopted DOC 309, Internal Management Procedure #35 (IMP #35) which provides:

GENERAL:

> The Department of Corrections encourages communications between inmates and their families, friends, government officials, courts and other people concerned with the welfare of inmates. Such communication fosters reintegration into the community and the maintenance of family ties. It helps to motivate inmates and thus contribute[s] to high morale and to the security of inmates and staff.

PURPOSE:

> As the Department of Corrections does not routinely censor or inspect inmate mail, correspondence between inmates and the general public or businesses can imply institution approval of or

> obligation for the contents. The stamping of inmate mail will be used to prevent fraudulent use of the mail, misrepresentation, harassment of victims and others and nefarious use of the mail by inmates confined in Wisconsin correctional institutions and correctional centers.

RESPONSIBILITY:

> It will be the responsibility of each institution or center to stamp outgoing inmate mail as follows: THIS LETTER HAS BEEN MAILED FROM THE WISCONSIN PRISON SYSTEM.

POLICY:

> All outgoing inmate mail will be stamped on the back of the envelope. The stamp will identify the mail as coming from the Wisconsin Prison System. Each institution will develop a procedure for compliance with this directive.

The document cross-references WIS. ADM. CODE § DOC 309.05. That rule makes elaborate regulations of an inmate's incoming and outgoing mail but does not authorize an institution or center to add to the rule by administrative directive.

The department adopted IMP #35 August 10, 1993, to be implemented November 1, 1993, by all wardens and center superintendents. Wisconsin Legislative Council Staff Memorandum, *Stamping of Inmate Mail*, at 1 (October 25, 1993). On October 25, 1993, the Wisconsin Legislative Council staff issued a staff memorandum in which its senior staff attorney opined that IMP #35 was a "rule" which should be promulgated as required by subch. II, Administrative Rules, ch. 227, STATS. Legislative Council Staff Memorandum at 7. In that memorandum, Council staff predicted that Wisconsin courts would narrowly construe the "internal management" exception of § 227.01(13)(a), STATS., and hold that when an agency action affects the rights of an individual, that action will be subject to the rule promulgation requirements of ch. 227. ***Id***. at 6. Apparently, the department believed that the question was close enough

that it would await an interpretation of the Wisconsin courts. We now consider the department's position.

The department argues that: "The stamping policy under consideration ... is reasonably related to a legitimate correctional objective." It explains why it became necessary for the department to establish its stamping policy. For years, the department received numerous complaints "concerning inmate harassment and fraud perpetrated through the mail." The issue presented, however, is not the need for the procedure or whether it is an appropriate response to the problem; the issue is whether IMP #35 is a "rule," as defined in § 227.01(13), STATS. This issue presents a question of law which we decide without deference to the trial court's decision, except insofar as its reasoning is persuasive. ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977). We do not defer to the department's conclusion that IMP #35 is not a "rule." *See* ***Lisney v. LIRC***, 171 Wis.2d 499, 505, 493 N.W.2d 14, 16 (1992) ("The interpretation of a statute presents a question of law, and the `blackletter' rule is that a court is not bound by an agency's interpretation.").

We have reviewed the Legislative Council's staff memorandum and conclude that it states the law correctly.

The opinion of the Council's senior staff attorney that IMP #35 is a rule is merely the opinion of an attorney. The dissent complains that we are giving "special deference" to that opinion. A state agency does not exist in the abstract; it is staffed by people and it is the people who have the expertise to whom we defer. Further, we do not defer to the Legislative Council staff but we consider its interpretation of the statutes prescribing rule-making because the legislature has delegated that responsibility to the Council, undoubtedly because of the fifty years of experience which the Council has had in developing and interpreting legislation.

The Joint Legislative Council consists of the Speaker of the Assembly and the President of the Senate, the Speaker pro tempore of the Assembly and the President pro tempore of the Senate, the Senate and Assembly majority and minority leaders, the two co-chairpersons of the Joint Committee on Finance, the ranking minority member of the Joint Committee on Finance from each house, and five Senators and five Representatives to the

legislature appointed as are the members of standing committees in their respective houses. Section 13.81(1), STATS. The Council is an adjunct agency of the legislature and makes interim studies of subjects proposed by the legislature for study, investigation and legislative action. Section 13.82(1), STATS.

The dissent complains that: "The council neither administers nor enforces § 227.01, *or any other statute*." Dis. op. at 2 (emphasis added). That is not the case. The legislature has delegated directly to the Legislative Council staff the administration of rule-making for all state agencies. Section 227.15, STATS. Subsection (2) requires the Legislative Council staff to review any rule proposed by a state agency. The staff is charged with the duty to "[r]eview the statutory authority under which the agency intends to promulgate the proposed rule." Section 227.15(2)(a). The Council staff also has the responsibility, with the Revisor of Statutes, to provide agencies with information on drafting and promulgating rules. Because of these duties, the Council staff has acquired an expertise in determining whether an agency directive or procedure is a "rule." Since any agency proposing a rule must submit the rule to the Legislative Council staff for review and the staff must review the statutory authority under which the agency intends to promulgate the proposed rule, we believe that the results of the review process are very persuasive in determining the appropriateness of the agency's proposed rule.

The dissent also notes that the staff's review in this case was not directed to the agency but a member of the legislature. Since the legislature must ultimately review agency rules before promulgation, § 227.19, STATS., we find it highly appropriate for the Legislative Council staff to advise legislators when an agency acts beyond the bounds of its delegated authority in making rules. In fact, the Legislative Council staff has a responsibility to the public with respect to rule-making. Section 227.15(6), STATS., provides in part: "The legislative council staff shall assist the public in resolving problems related to rules."

The dissent further argues that the Legislative Council staff memorandum was not prepared "under the aegis of the statute." Dis. op. at 2 n.3. My colleague suggests that an agency may avoid the rule-making requirements of the statutes by ignoring those requirements when it is promulgating a rule. Those procedures include public notice and a public hearing. Commentators have long regarded administrative rules as "secret" legislation. We contribute to that perception if we allow the agencies

themselves to decide what is a rule. We believe it is the responsibility of the Legislative Council staff, especially when requested by a legislator, to review agency action to determine whether the agency proposes to exceed its delegated authority. That is precisely what the Legislative Council staff did in this case.

We find the following reasoning of the Council persuasive:

> Internal management procedure #35 ... if implemented, will have general application and the effect of law. In this case, the mail stamping procedure will apply to a class of persons described as the inmates of correctional institutions. This class is not closed; some members will be leaving and new members will be added. The private interests of these persons will be legally and directly affected by the procedure because their mail may not be delivered without the required identifying stamp. If an inmate wishes his or her mailing location to be anonymous, in order to protect privacy interests relating to the disclosure of personal information, the inmate will be prohibited from using the U.S. mail system to deliver mail. Conversely, in order to communicate through the U.S. mail, an inmate will be required to submit to the marking of his or her mail.

Legislative Council Staff Memorandum at 3.

We agree that "internal management procedure #35 appears to be related to more than internal management and appears to affect private rights or interests. As such, it is an agency action that ... meets the general definition of `rule' in s. 227.01(13)(intro.), STATS.," ***id***. at 7, and must be promulgated as an administrative rule. We therefore reverse the order and direct that the trial court grant plaintiff's motion for declaratory relief.

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

Not recommended for publication in the official reports.

No. 94-2484(C)

DYKMAN, J. (*concurring*). I agree with the lead opinion's conclusion, though not its reasoning, that DOC's mail stamp policy is a rule, and because it was not validly promulgated, it is invalid. I believe, however, that this case should be resolved by examining the plain language of § 227.01(13)(a), STATS., and our decision in ***Rossie v. DOR***, 133 Wis.2d 341, 395 N.W.2d 801 (Ct. App. 1986).

Section 227.01(13)(a), STATS., provides:

> "Rule" means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. "Rule" does not include, and s. 227.10 does not apply to, any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:
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> (1) Concerns the internal management of an agency and does not affect private rights or interests.

The meaning of § 227.01(13)(a) is unambiguous in the context of this case. I believe that Sanford Gibson has a private interest, but not a right,[1] in what is stamped on his outgoing mail because, as he asserts, when some people read the stamped message on his mail, they throw the mail away to avoid receiving mail from a prisoner.

While in ***Rossie***, we did not directly address the standard of review we apply to a Department of Revenue (DOR) interpretation of one of its directives, we decided *de novo* whether a DOR directive was a rule as defined in § 227.01(13)(a), STATS. This appears to be correct for an agency decision

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[1] I agree with the State that identifying outgoing prisoner mail as having been sent from a prison does not violate Gibson's First Amendment free speech or association rights, his Fourteenth Amendment liberty interests, or a generalized privacy right found in the United States Constitution. *See* ***Theriault v. Magnusson***, 698 F. Supp. 369 (D. Me. 1988).

determining that one of its directives is or is not a rule is akin to an agency decision determining the extent of its powers. In the latter case, we owe no deference to the decision of the agency. ***GTE North Inc. v. PSC***, 169 Wis.2d 649, 663, 486 N.W.2d 554, 559 (Ct. App. 1992), *rev'd on other grounds*, 176 Wis.2d 559, 500 N.W.2d 284 (1993).

In ***Rossie***, 133 Wis.2d at 348-50, 395 N.W.2d at 804-05, we concluded that an administrative directive preventing employees from smoking in DOR facilities would have been a rule but for the exception in § 227.01(13)(a), STATS., which provides that a rule does not include actions which concern the internal management of an agency and do not affect private rights or interests. We adopted the trial court's explanation of why no-smoking rules did not affect private rights or interests:

> "Private rights and interests" is not defined by statute or caselaw. However, it is apparent that they are rights and interests which are unrelated to the job or to the workplace. Otherwise, nearly all work rules would fail to meet sec. 227.01(11)'s exception because they are, by definition, some type of restriction on employees' rights and interests.

Id. at 349-50, 395 N.W.2d at 805. But ***Rossie*** is not altogether clear as to why the DOR directive did not affect private rights or interests. Nor is the ***Rossie*** trial court's explanation clear.[2] We reasoned that rights or interests cannot apply to the work place because all work rules would need to be adopted pursuant to ch. 227. That does not explain, however, why a no-smoking directive does not affect a smoker's private rights or interests. I am also not persuaded by the dissent which relies on ***Rossie*** and concludes that because a no-smoking

[2] Part of the difficulty might lie in that the trial court used "private rights" and "interests" in the conjunctive whereas the statute uses the terms in the disjunctive.

directive does not affect a smoker's private rights or interests, a mail room policy is a matter of the agency's internal management and does not affect a prisoner's private rights or interests.

That said, Gibson also asked the trial court for a declaratory judgment and an injunction. We have declared DOC's directive to be an invalid rule. However, that does not mean that a DOC mail room employee may not place a rubber stamp notation on outgoing prisoner mail. Much of most State employees' duties are carried out without the need for a properly enacted rule. The parties have not briefed the issue of the relief to which Gibson is entitled. The trial court did not reach this question. Whether to grant injunctive relief is a discretionary matter for the trial court, not this court. ***Spheeris Sporting Goods, Inc. v. Spheeris on Capitol***, 157 Wis.2d 298, 305-06, 459 N.W.2d 581, 585 (Ct. App. 1990). Thus, while I agree with the lead opinion's mandate that we must remand this case to the trial court, I conclude that the trial court must consider what relief, if any, Gibson should be granted.

No. 94-2484(D)

EICH, C.J. (*dissenting*). I respectfully dissent from the majority opinion for two reasons.

First, I do not agree that an appellate court owes special deference to the legal opinion of the senior staff attorney of the legislative council. It is true that, in certain situations, we will defer to the legal conclusions of state administrative agencies with respect to statutes they are "charged by the legislature [to] administ[er] and enforce[]." ***Mayville Sch. Dist. v. WERC***, 192 Wis.2d 379, 389 n.7, 531 N.W.2d 397, 401 (Ct. App. 1995). We also recognize, however, that even in that situation the rule is not absolute. We will, for example, accord no such deference where "the case is one of first impression and there is no evidence that the agency has any special expertise or experience on the subject matter of the statute being interpreted."[3] ***Id***.

In this case, the majority defers to the staff attorney's interpretation and application of § 227.01(13), STATS., the statute defining the term "rule."[4] However, in my opinion neither the legislative council nor its attorney qualify

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[3] Indeed, the supreme court has said that "[w]here a legal question is concerned and there is no evidence of any special expertise or experience, the weight to be afforded an agency interpretation is no weight at all." ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 84, 452 N.W.2d 368, 372 (1990).

[4] The statute provides as follows:

> "Rule" means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency. *"Rule" does not include ... any action or inaction of an agency, whether it would otherwise meet the definition under this subsection, which:*
>
> *(a) Concerns the internal management of an agency and does not affect private rights or interests.*

(Emphasis added.)

as a state agency of the type envisioned in ***Mayville, Local 695***, and the many other cases discussing when, and to what extent, courts will defer to an administrative agency's legal conclusions. The council neither administers nor enforces § 227.01, or any other statute. Nor is there any evidence in the record that the council or its attorneys possess special expertise or experience in interpreting or applying the statute.[5] Nor, finally, is there any evidence that the interpretation being advanced is one of long standing within the council. Under the law, and for reasons of policy, I would not defer to the legal interpretation of the legislative council's legal staff.

Finally, I disagree with that interpretation and the majority's adoption of it. We said in ***Rossie v. DOR,*** 133 Wis.2d 341, 348-49, 395 N.W.2d 801, 804-05 (Ct. App. 1986), that a department of revenue anti-smoking directive was not a "rule" within the meaning of § 227.01(13)(a), STATS., because it "[c]oncern[ed] the internal management of [the] agency," and did not affect

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[5] The majority, devoting a substantial portion of its opinion to critiquing this dissent, surmises that the legislative council has had "fifty years of experience ... in developing and interpreting legislation" and, further, that, given the statutes applicable to its operations, the council "has acquired an expertise in determining whether an agency directive or procedure is a `rule.'" As a result, says the majority, the opinion of the legislative council's staff attorney is entitled to deference by this court. Nowhere, however, does the majority refer to any "*evidence* of ... special expertise or experience" by the council or its attorney in making such a determination--evidence which the supreme court has said must exist somewhere in the record before courts will defer to an administrative agency's interpretation and application of a statute. ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 84, 452 N.W.2d 368, 372 (1990). As I noted earlier, *supra*, note 1, where, as here, no such evidence exists, courts are to give an agency's legal interpretation "no weight at all." ***Id.*** And despite its many protestations to the contrary, the majority decides this case not upon its own independent review of the legal question involved, but by deferring to the legal opinion of an agency attorney offered in response to the inquiry of an individual legislator.

Finally, as the majority mentions, § 227.15(2), STATS., designates the legislative council staff as a "clearinghouse for rule drafting" and directs it to review proposed rules promulgated by state agencies. The staff memo in question, however, does not appear to have been drafted in conformance with those provisions, but rather is directed to a member of the legislature and indicates that it was intended only to respond to questions raised by the legislator regarding the status of the proposal. Thus, even if it could be argued that § 227.15(2) clothed the council's staff attorney with some statutory responsibilities in the area--a proposition with which I would disagree--it does not appear that the memorandum in question was prepared under the aegis of the statute.

private rights or interests. I agree with the department of corrections that its policy directing its employees how to process mail, like the DOR no-smoking rule, is not a rule; it is a matter of the agency's internal management and does not affect private rights or interests.

I would affirm the trial court's order dismissing Gibson's action.