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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2024AP0717

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE WISCONSIN,

Petitioner-Appellant,

UNIVERSITY OF WISCONSIN HOSPITALS AND
CLINICS AUTHORITY,

Other Party-Respondent,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent-Respondent.

ON REVIEW FROM DANE COUNTY CIRCUIT COURT
CASE NO. 22-CV-3199,
THE HON. JACOB B. FROST, PRESIDING

RESPONSE BRIEF OF
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

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STATEMENT OF THE ISSUE PRESENTED

Did the Wisconsin Employment Relations Commission (WERC) correctly conclude that the University of Wisconsin Hospitals and Clinics Authority (UWHCA) is not an “employer” within the meaning of Wis. Stat. § 111.02(7)?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs, taken together, fully present the issues and relevant legal authority. Publication of this decision is not warranted because none of the criteria in Wis. Stat. § 809.23(1)(a) applies.

STATEMENT OF THE CASE

I. Nature of the case.

This is a judicial review of an administrative agency decision pursuant to Wis. Stat. ch. 227. In its November 25, 2022, Findings of Fact, Conclusion of Law and Declaratory Ruling, the WERC concluded that the UWHCA is not an “employer” within the meaning of Wis. Stat. § 111.02(7).

II. Relevant Factual Background.

As part of an agreement to avoid a potential strike, the UWHCA and Service Employees International Union (SEIU) submitted the following issue to the WERC pursuant to Wis. Stat. § 227.41.

Does the Wisconsin Employment Peace Act, Wis. Stat. ch. 111 subch. 1 (WEPA), apply to UWHCA and its employees and their chosen representatives, if any?

III. Litigation History.

On November 25, 2022, the WERC issued Findings of Fact, Conclusion of Law and Declaratory Ruling concluding that the UWHCA is not an "employer" within the meaning of Wis. Stat. § 111.02(7) and thus that the Wisconsin Employment Peace Act, Wis.

Stat. ch. 111 subch. 1 (WEPA) does not apply to UWHCA and its employees and their chosen representatives, if any.

On March 26, 2024, the Circuit Court affirmed the WERC's determination. SEIU appealed that decision.

STANDARD OF REVIEW

This Court reviews the decision of the WERC, not the decision of the circuit court. *Wis. Prof'l Police Ass'n v. WERC*, 2013 WI App 145, ¶10, 352 Wis. 2d 218, 841 N.W. 2d 839.

“The burden in a ch. 227 review proceeding is on the party seeking to overturn the agency action, not on the agency to justify its action.” *City of La Crosse v. DNR*, 120 Wis.2d 168, 178 353 N.W. 2d 68 (Ct. App. 1984).

While the Court reviews an agency's interpretation of a statute de novo, due weight shall be given where appropriate to the agency's experience, technical competence, and specialized knowledge as well as the agency's discretionary authority. Wis. Stat. § 227.57(10)-(11).

ARGUMENT

WERC correctly concluded that the University of Wisconsin Hospital and Clinics Authority is not an "employer" within the meaning of Wis. Stat. § 111.02(7).

The WERC's analysis of the legal issue before it is set forth below.

FINDINGS OF FACT, CONCLUSION OF LAW, AND DECLARATORY RULING

FINDINGS OF FACT

...

3. Prior to July 1, 1997, the Wisconsin Employment Peace Act defined an “employer” as “a person who engages the services of an employe[e],” Wis. Stat. § 111.02(7) (1995–96), and defined the term “person” to include “individuals,

partnerships, associations, corporations, limited liability companies, legal representatives, trustees or receivers.” Wis. Stat. § 111.02(10) (1995–96):

4. Effective July 1, 1997, the Wisconsin Legislature amended the Peace Act definition of “employer” by adding a sentence to § 111.02(7) which stated: “For purposes of this subsection, a person who engages the services of an employe[e] includes the University of Wisconsin Hospitals and Clinics Authority.” 1995 Wis. Act 27 § 3782g; Wis. Stat. § 111.02(7) (1997–98).

5. Effective July 1, 1997, the Wisconsin Legislature created the following additional statutory provisions applicable to the UWHCA functioning as an “employer” under the Peace Act:

Wis. Stat. §§ 111.02(1), 111.02(7)(a)2., 111.02(7m), 111.02(9m), 111.02(10m), 111.05(5)–(6), 111.075, 111.115(2), 111.17(2); Wis. Stat. §§ 233.02(1)(h), 233.03(7), 233.10(2).

6. 2011 Wisconsin Act 10 eliminated all of the statutory provisions referenced in Findings of Fact 4 and 5 that became effective July 1, 1997.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following:

CONCLUSION OF LAW

The University of Wisconsin Hospitals and Clinics Authority is not an “employer” within the meaning of Wis. Stat. § 111.02(7).

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following:

DECLARATORY RULING

The Wisconsin Employment Peace Act, Wis. Stat. ch. 111, subch. 1 (WEPA) does not apply to the University of Wisconsin Hospitals and Clinics Authority and its employees and their chosen representatives, if any.

**MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW, AND
DECLARATORY RULING**

The parties seek an answer to the following question:

Does the Wisconsin Employment Peace Act,
Wis. Stat. ch. 111 subch. 1 (WEPA) apply to
UWHCA and its employees and their chosen
representatives, if any?

As well briefed by the parties, this question is answered by applying current Wisconsin Supreme Court precedent as to statutory interpretation. *See generally State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. The parties disagree as to whether statutory history is always to be considered when seeking the “plain meaning” of a statute. SEIU asserts that it is only appropriate to look at statutory history if it confirms the “plain meaning” derived from an analysis of the statutory language itself. UWHCA argues that statutory history is always to be considered. The Commission concludes that UWHCA is correct.

As our Supreme Court held recently in *Brey v. State Farm Mut. Automobile Ins. Co.*, 2022 WI 7, ¶ 20, 400 Wis. 2d 417, 970 N.W.2d 1400:

Statutory history, which involves comparing the statute with its prior versions, “may also be used as part of ‘plain meaning analysis.’” *James v. Heinrich*, 2021 WI 58, ¶26, 397 Wis.2d 517, 960 N.W.2d 350 (quoting *Richards v. Badger Mut. Insurance Co.*, 2008 WI 52, ¶22, 309 Wis.2d 541, 749 N.W.2d 581). Unlike legislative history, prior versions of statutory provisions were enacted law; as such, statutory history constitutes an intrinsic source that “is part of the context in which we interpret the words used in a statute.” *Richards*, 309 Wis.2d 541, ¶22; *see also United States v. Franklin*, 2019 WI 64, ¶13, 387 Wis. 2d 259, 928 N.W.2d 545 (quoting *Richards*, at ¶22).

Therefore, the Commission concludes it will consider both the current language of Wis. Stat. § 111.02(7) as well as the applicable statutory history when determining the statute’s “plain meaning.”

While the current version of Wis. Stat. § 111.02(7)¹ is certainly susceptible to the interpretation given it by SEIU, the statutory history summarized in Findings of Fact 3 – 6 provides clear determinative evidence of the Wisconsin Legislature’s intent. Act 10’s specific deletion of all statutory references related to the UWHCA as a Peace Act “employer” clearly establishes that the UWHCA is not an “employer” within the plain meaning of Wis. Stat. § 111.02(7). Contrary to the argument of SEIU, there are no plausible alternative explanations for the legislative deletions reflected in Act 10.²

Given the foregoing, the Commission declares that the Wisconsin Employment Peace Act, Wis. Stat. ch. 111, subch. 1 (WEPA) does not apply to the University of Wisconsin Hospitals and Clinics Authority and its employees and their chosen representatives, if any.

The WERC stands by the analysis set forth above. It is noteworthy that SEIU's brief to the Court does not specifically address or take issue with the *Brey v. State Farm Mut. Automobile Ins. Co.*, precedent upon which the WERC relied. Consideration of the statutory history is appropriate and leads inexorably to a conclusion that the UWHCA is not an employer covered by the Wisconsin Employment Peace Act.

¹ Wis. Stat. § 111.02(7), states:

(a) “Employer” means a person who engages the services of an employee, and includes a person acting on behalf of an employer within the scope of his or her authority, express or implied.

(b) “Employer” does not include any of the following:

1. The state or any political subdivision thereof.
2. Any labor organization or anyone acting on behalf of such organization other than when it is acting as an employer in fact.

² If it were concluded that consideration of the statutory text and the statutory history created ambiguity, resort to the legislative history would also yield a conclusion that the UWHCA is not an “employer” within the meaning of the Peace Act.

CONCLUSION

Respondent WERC respectfully requests that this Court affirm the WERC's November 25, 2022, Findings of Fact, Conclusion of Law and Declaratory Ruling.

Dated this 22nd day of August 2024

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a proportional serif font. The length of this brief is 2836 words.

Dated this 22nd day of August 2024.

Electronically signed by Peter G. Davis
Peter G. Davis, SBN 1016488

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of August 2024

Electronically signed by Peter G. Davis
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