Appeal No. 2004AP3306 **Cir. Ct. No. 2003CV8737**

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE EX REL. JOSE CASTANEDA,

PLAINTIFF-RESPONDENT,

V.

WOODY WELCH, CHAIRMAN, MILWAUKEE FIRE AND POLICE COMMISSION, ERIC MANDEL JOHNSON, VICE CHAIR, MILWAUKEE FIRE AND POLICE COMMISSION, CARLA Y. CROSS, LEONARD J. SOBCZAK, ERNESTO A. BACA, MEMBERS OF THE MILWAUKEE FIRE AND POLICE COMMISSION, DAVID L. HEARD, EXECUTIVE DIRECTOR AND MILWAUKEE FIRE AND POLICE COMMISSION,

DEFENDANTS-APPELLANTS.

FILED

SEP 28, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

We certify this appeal, which will determine the scope of the Milwaukee Fire and Police Commission's rule-making authority.

FACTS

This case concerns the rule-making authority of a commission with authority over the largest contingent of police officers and firefighters in the state, the Milwaukee Fire and Police Commission. At stake is the ability of that commission to promulgate rules that affect whether citizen complaints against police officers and firefighters will be processed in a fair manner. If the

commission's view of its authority is correct, a complaint against a police officer must be dismissed if it fails to identify the officer, even if the officer conceals his or her identity. If the citizen complainant in this appeal is correct, the commission has no authority to adopt rules that screen out meritless complaints and the commission can be compelled to conduct a trial in virtually every instance in which a complaint is made.

The underlying incident involved several police officers who executed a search warrant at a grocery store. The complainant, Jose Castaneda, alleged police misconduct, but did not identify individual officers because the officers' badges and name plates were concealed. The police department supplied the commission with the names of all officers involved in the incident, but the commission took no action on the complaints because none of the complainants could associate a particular officer with a particular act of misconduct. In its decision not to proceed, the commission relied on the administrative rules it had enacted for handling citizen complaints. The commission's rules, among other things, required that citizens must identify the accused officer or officers in complaints.

Complainant Castaneda commenced this action and moved for a judgment declaring invalid the commission's citizen complaint rules because the commission lacked the statutory authority to enact them. The trial court granted judgment to Castaneda on his claim, holding that the commission had no authority to enact rules regarding citizen complaints. The court also held that even if the commission had authority to enact such rules, they were invalid because they conflicted with the legislative intent to facilitate rather than impede the filing and disposition of citizen complaints. The trial court's decision has resulted in this appeal.

DISCUSSION

An agency's rule-making authority must be expressly conferred or necessarily implied by the statutes under which it operates. ***Citizens Concerned for Cranes and Doves v. DNR***, 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612. We strictly construe the agency's enabling statutes, and resolve reasonable doubts concerning implied powers against the agency. ***Id.*** A rule that conflicts with the legislative intent is invalid. ***Id.***

WISCONSIN STAT. § 62.50 (2003-04)[1] contains legislative provisions concerning the operation of fire and police departments in first-class cities, and the operation of the fire and police commissions that supervise them. Section 62.50 contains no express, unambiguous grant of authority to make rules regarding disciplinary proceedings, whether initiated within the department, by complaint to the chief, or by citizen complaint to the commission. Subsection 62.50(12) provides that on a complaint of a member's misconduct made to the chief, the commission must schedule a trial on the complaint, "under this section." Subsections 62.50(13), (14), (15) and (16) set forth, in detail, the procedures the commission must follow in its trials and on member appeals of discharges, or suspensions imposed within the department, and the standards for imposing discipline on a member. With regard to citizen complaints to the commission, subsec. 62.50(19), provides in relevant part:

> CHARGES BY AGGRIEVED PERSON. In cases where duly verified charges are filed by any aggrieved person with the board of fire and police commissioners, setting forth sufficient cause for the removal of any member of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> either of the departments, including the chiefs or their assistants, the board or chief may suspend such member or officer pending disposition of such charges. The board shall cause notice of the filing of the charges with a copy to be served upon the accused and shall set a date for the trial and investigation of the charges, following the procedure under this section.

The legislature has expressly granted rule-making authority to fire and police commissions in first-class cities to make rules for the "government of the members of each department." WIS. STAT. § 62.50(3)(a). The commission contends that this authority, to make rules for the government of the fire and police department members, must necessarily include the authority to make rules for receiving and processing complaints about them. But if the commission's rule-making authority is as broad as it contends, it seems odd that the legislature would permit it to delegate that authority to chiefs who could use it to screen out complaints that might result in their own dismissal or suspension. Additionally, if the legislature intended a broad application of the rule-making authority under para. 62.50(3)(a), to all aspects of a commission's supervisory operations, there was little need to enact other specific grants of rule-making authority to the commissions, such as para. 62.50(3)(b), regarding hiring and appointments, and subsec. 62.50(7), concerning promotion to vacant positions. It would seem that if discipline falls within the category of "government," as para. 62.50(3)(a) uses that term, so would hiring and promotion, thus rendering the latter provisions superfluous.

Perhaps a better argument for the commission's rule-making authority lies in the fact that, despite the detailed procedural rules for conducting trials on complaints, WIS. STAT. § 62.50 provides little or no guidance on how to resolve frivolous or unfounded allegations against department members short of a full trial of the matter. Nor does it provide any guidance on how to address the

precise problem here, which is the fact that the alleged misconduct included concealment of the offending officers' identities. The commission contends that the logical extension of Castaneda's argument would bar implementation of any type of screening procedure, and require the commission to try every single complaint made to the chiefs and commission.

A primary argument in support of the trial court's ruling is the fact that the legislature has granted fire and police commissions in other than first-class cities express and unequivocal authority to enact rules governing "disciplinary actions against subordinates," with "subordinates" meaning all departmental members except chiefs. *See* WIS. STAT. § 62.13(5)(g). That is by no means the only difference between the statutory schemes for disciplinary and complaint procedures for first-class city commissions and those for second-, third- and fourth-class city commissions, and it is not immediately clear why the enabling statutes are so different. However, the existence of express rule-making authority for disciplinary proceedings for one set of cities and the absence of it for another might indicate a deliberate legislative choice. *See* ***State v. Polashek***, 2002 WI 74, ¶30, 253 Wis. 2d 527, 646 N.W.2d 330.

We believe that this appeal raises a significant issue of statutory construction, and policy, of considerable importance to the citizens, fire and police departments and fire and police commissions of Milwaukee, Wisconsin's, largest city. It is an appropriate case for supreme court resolution.