COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 96-2174

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

CENTRAL WISCONSIN INSPECTION SERVICE, INC.,

PETITIONER-APPELLANT,

CHIPPEWA FIRE PROTECTION DISTRICT, INC., INDEPENDENT INSPECTION, LTD. AND SUPERIOR FIRE DEPARTMENT,

PETITIONERS,

V.

WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS (SAFETY AND BUILDING DIVISION),

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Central Wisconsin Inspection Service, Inc. (CWIS) appeals an order affirming a decision of the Wisconsin Department of Industry, Labor and Human Relations (DILHR). The origin of the appeal lies in a dispute between CWIS and DILHR on fees CWIS may charge as DILHR's agent in regulating underground storage tanks. The dispositive issue is whether DILHR has properly interpreted and applied an administrative rule to limit the fees CWIS may collect from the regulated parties. We conclude that DILHR has reasonably interpreted and applied the administrative rule in question, and therefore affirm.

Pursuant to § 101.09(3), STATS., DILHR has regulated the installation, maintenance and removal of flammable and combustible liquid underground storage tanks for a number of years. In 1991, DILHR began contracting out its duties to various public and private agencies within the state, known as licensed program operators (LPO). In 1994, DILHR invited bids for LPO contracts, and CWIS became an LPO pursuant to a contract signed later that year. CWIS's duties included: reviewing plans for tank installation, installation inspections, annual inspections of certain tanks, ordering tank closures, inspecting tank closures, taking enforcement action on rule violations, educating tank system owners, and keeping various records. The contract also provided that CWIS and other LPOs would be paid from tank system permit revenue, installation inspection fees, locally generated plan review fees, and any other funds generated at the local level through local permits.

Subsequently, a dispute arose between the LPOs and DILHR over whether the LPOs could charge fees for tank removal inspections. That dispute eventually resulted in a cease and desist order, issued in October 1994, warning that funding would be canceled and the contract terminated for any LPO "[c]harging a fee for any activity other than a fee that is listed in § ILHR 2.43,

WIS. ADM. CODE, or a fee that has been specifically authorized by a municipal ordinance." As all parties agree the order was intended to bar LPOs from charging a tank removal inspection fee under the authority of § ILHR 2.43.

CWIS, and other LPO petitioners, sought administrative review of the cease and desist order. An Administrative Law Judge (ALJ) determined that DILHR was correct in issuing its order to cease charging fees beyond those expressly authorized. However, the ALJ did not specifically address whether the fees listed in WIS. ADM. CODE § ILHR 2.43 included or allowed tank removal inspection fees.

In the circuit court proceeding, on review of the ALJ decision, the trial court concluded that the ALJ erred by failing to address the underlying issue concerning the scope of WIS. ADM. CODE § ILHR 2.43.[1] However, the trial court resolved that issue in DILHR's favor, concluding that its interpretation of the rule was to be accorded great weight, and was reasonable. CWIS takes its appeal from that decision of the trial court.

We give great weight to an agency's interpretation and application of its own rules, especially where the agency has special expertise. ***A.O. Smith Corp. v. Oglesby***, 108 Wis.2d 583, 586, 323 N.W.2d 143, 144 (Ct. App. 1982). We will therefore set aside an interpretation or application only if it is unreasonable or inconsistent with the purpose of the governing statute. ***Beloit Corp. v. LIRC***, 152 Wis.2d 579, 592, 449 N.W.2d 299, 305 (Ct. App. 1989).

[1] Since the commencement of this appeal, WIS. ADM. CODE ch. ILHR 2 has been renamed ch. COMM 2.

WISCONSIN ADM. CODE § ILHR 2.43(1), entitled "Plan Examination And Inspection Fee," provides that "[f]ees for the examination of plans and site inspections for tanks used for the storage of flammable and combustible liquids, liquefied petroleum gas, liquefied natural gas and compressed natural gas shall be determined in accordance with Table 2.43." Table 2.43 provides a listing of fees under the general headings of "Plan Examination" and "Site Inspection Fees." In various letters and memoranda preceding the cease and desist order, and in the contract, the written request for bids, and a 1991 letter to all Wisconsin fire chiefs, DILHR interpreted § ILHR 2.43 to exclude authorization for tank removal inspection fees from its provisions and referred the LPOs to local municipalities for authorization of such fees. This is a reasonable interpretation because in all references within the rule and its accompanying table, "site inspection" appears in conjunction with "plan examination." Plan examination plainly and without dispute applies only to installation plans. Under these circumstances, DILHR could reasonably interpret "site inspection fee" as "site installation inspection fee." Additionally, such an interpretation does not conflict with § 101.09, STATS., directing DILHR to regulate underground storage tanks.

CWIS also suggests that DILHR should be estopped from applying its interpretation of the rule, because CWIS and other LPOs were misled by conflicting statements and practices in this regard. However, the factual record is insufficient to prove those allegedly conflicting statements and practices and the LPOs' reliance on them. Additionally, estoppel is not available to void a clearly expressed legislative intent. ***Grams v. Melrose-Mindoro Joint Sch. Dist. No. 1***, 78 Wis.2d 569, 578, 254 N.W.2d 730, 735 (1977). Here, the legislature requires that DILHR issue compliance orders "whenever, in the judgment of the department, the rules or standards [regulating storage of flammable and

combustible liquids] are threatened with violation, or are being violated or have been violated." Section 101.09(4)(b), STATS. DILHR is therefore not subject to an administrative or court order requiring it to tolerate collection of fees in violation of its reasonably interpreted regulation.

By the Court.—Order affirmed.

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