COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1513

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

WALGREEN CO.,

PETITIONER-RESPONDENT,

v.

WISCONSIN PHARMACY EXAMINING BOARD AND WISCONSIN DEPARTMENT OF REGULATION AND LICENSING,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Eich, C.J., Dykman, P.J., and Roggensack, J.

EICH, C.J. The Wisconsin Pharmacy Examining Board appeals from an order reversing its ruling that the Walgreen Company, the owner and operator of several pharmacies in Wisconsin, violated various regulatory statutes

and administrative rules relating to pharmacies when, as part of a test program, it accepted prescription orders from physicians *via* a computer electronic mail system, and provided used computers for some of the physicians participating in the test. The board concluded that: (1) the use of computer-transmitted prescriptions violated § 450.11(1), STATS., which requires written prescription orders to be signed by the prescribing physician;[1] and (2) Walgreen's provision of computers to some of the participating physicians violated WIS. ADM. CODE § PHAR 10.03(14), which prohibits pharmacies from participating in "rebate or fee-splitting arrangements" with physicians.[2]

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[1] Section 450.11(1), STATS., provides:

> **(1)** DISPENSING. No person may dispense any prescribed drug or device except upon the prescription order of a [physician]. All prescription orders shall specify the date of issue, the name and address of the patient, the name and address of the [physician], the name and quantity of the drug … prescribed, directions for the use of the drug … *and, if the order is written by the [physician], the signature of the [physician]. Any oral prescription order shall be immediately reduced to writing by the pharmacist and filed ….*

(Emphasis added.)

The statute uses the term "practitioner" rather than "physician," defining the former as "a person licensed in this state to prescribe and administer drugs." *See* § 450.01(17), STATS. For simplicity, we use the term "physician."

[2] WISCONSIN ADM. CODE § PHAR 10.03(14) provides:

> **Phar. 10.03 Unprofessional Conduct.** The following … are violations of standards of professional conduct … :
>
> (14) Participating in rebate or fee-splitting arrangements with … [physicians] or with health care facilities.

While we pay due deference to the board's decision,[3] we are satisfied that its interpretation of § 450.11(1), STATS., while reasonable, is overcome by a more reasonable interpretation and that its determination that Walgreen's program violated the "rebate" rule lacks any reasonable basis in the record. We therefore reverse the board's decision and affirm the circuit court's order.

The facts are not in dispute. Walgreen tested a computer system it had developed whereby ten physicians electronically transmitted prescriptions to a Walgreen pharmacy. Each electronically transmitted prescription contained the same information as a written or faxed prescription but did not include the physician's signature. Walgreen provided the necessary software to the ten participating physicians and also supplied six of them with used computers and modems at no cost.

In determining that Walgreen's program violated § 450.11(1), STATS., the board reasoned that, because the statute does not specifically mention electronic transmissions, but rather defines a "prescription order" as simply "a written or oral order by a [physician] for a drug or device for a particular patient," § 450.01(21), STATS., an electronic transmission is the equivalent of a written order and thus subject to the signature requirement of the statute. The board determined that the program also violated the "rebate" rule because Walgreen received a financial benefit by providing free computer equipment to several of the

[3] The board also determined that because Walgreen's corporate logo appeared on the computerized prescription form the physicians used, the program violated WIS. ADM. CODE § PHAR 10.03(15), which prohibits the use of prescription order blanks imprinted with the name of a specific pharmacy. Walgreen has not appealed from that ruling, however, and it is not before us.

participating physicians—although it never estimated either the value of the equipment or the nature of the "benefit" to Walgreen. Having so found, the board assessed a forfeiture of $89,200 against Walgreen.

Walgreen sought judicial review of the board's decision and the circuit court reversed, concluding with respect to the § 450.11(1), STATS., violation that prescriptions transmitted electronically were more analogous to prescriptions ordered by telephone, which, under the statute, a physician need not sign. The court also rejected the board's determination that Walgreen's program violated the "rebate" rule because the board failed to determine the extent of any financial benefit to either Walgreen or the participating physicians.

The board appeals, reasserting the arguments it raised before the trial court.

I. Standard of Review

The parties differ over the appropriate standards by which we are to review the board's decision.[4] The board argues that its interpretation of the statute and rule is entitled to great deference, while Walgreen maintains that we owe no deference at all to the board's decision.

Generally, the interpretation and application of statutes is a question of law for the courts to decide. There is, however, an important countervailing principle that accords varying degrees of deference to decisions of administrative agencies. At the top end of the scale, we will pay "great deference" to an agency's

[4] In administrative appeals, we review the agency's decision, not the circuit court's. ***Sterlingworth Condominium Ass'n v. DNR,*** 205 Wis.2d 710, 720, 556 N.W.2d 791, 794 (Ct. App. 1996).

decision where: (1) the legislature has charged the agency with the administration and enforcement of the statute in dispute; (2) the agency's interpretation "is one of long-standing"; (3) the agency employed its "expertise or specialized knowledge" in arriving at its interpretation; and (4) the interpretation "will provide uniformity and consistency in the application of the statue."[5] ***Harnischfeger Corp. v. LIRC,*** 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995). Where this standard is applicable, we will uphold the agency's interpretation and application of the statute as long as it is reasonable—even though an alternative interpretation may be more reasonable. ***Barron Elec. Coop. v. Public Serv. Comm'n,*** 212 Wis.2d 752, 761, 569 N.W.2d 726, 731 (Ct. App. 1997).

We will pay a slightly lesser degree of deference where the agency, while possessing some experience in the area in question, has not developed the expertise that necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court. In that situation we will accord "due-weight deference" to the agency's interpretation. ***UFE Inc. v. LIRC,*** 201 Wis.2d 274, 286, 548 N.W.2d 57, 62 (1996).[6] Where the due-weight deference standard is applicable, we will still sustain the agency's decision if it is reasonable—even in situations where another interpretation is equally reasonable—but "[w]e will not do so … if another interpretation is *more*

[5] We will also pay great deference to an agency's interpretation "if it is intertwined with value and policy determinations" inherent in the agency's decisionmaking function. ***Barron Elec. Coop. v. Public Serv. Comm'n***, 212 Wis.2d 752, 761, 569 N.W.2d 726, 731 (Ct. App. 1997) (internal quotation marks and quoted source omitted).

[6] We base our deference in this situation more on the agency's duty to enforce the statute in question and less on its knowledge or skill. ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 286, 548 N.W.2d 57, 62 (1996).

reasonable than the one employed by the agency." ***Barron Elec. Coop.***, 212 Wis.2d at 763, 569 N.W.2d at 732 (citation omitted) (emphasis in original).

Finally, where "the issue before the agency is clearly one of first impression, or when [the] agency's position on [the] issue has been so inconsistent so as to provide no real guidance," we will owe no deference to the agency's interpretation; we will review it *de novo*, giving it "no weight at all." ***UFE,*** 201 Wis.2d at 285, 548 N.W.2d at 62 (citations omitted); ***Barron Elec. Coop.,*** 212 Wis.2d at 763, 569 N.W.2d at 732 (quoting ***Local No. 695 v. LIRC***, 154 Wis.2d 75, 84, 452 N.W.2d 368, 372 (1990)).

Characterizing this as a "test case," Walgreen argues that *de novo* review is appropriate because the board's determination is one of first impression. Walgreen also asserts that the decision "has no precedent in agency action" and that the board's interpretation and application of the statute and rule are not of long-standing.

While the board's decision addresses a new technology—electronic transmission of information—the board's experience in administering the statutes in question is more relevant to our inquiry than its experience with computers. The legislature has charged the board to regulate pharmacies—including the making and filling of prescriptions—since at least 1955, and it has promulgated a variety of rules in its regulatory role. *See* §§ 151.01 and 151.07, STATS. (1955-56). Although this is the first case before the board involving computer transmission of prescriptions from physician to pharmacy, it has applied § 450.11(1), STATS., to facsimile prescription transmissions in at least one prior

case, apparently concluding that such transmissions are equivalent to telephone orders.[7]

It was argued in ***Barron*** that because the Wisconsin Public Service Commission had not applied the statute under consideration "to facts that are wholly analogous, or nearly so, to the particular facts of [the instant] case," the administrative decision was one "of first impression" subject to *de novo* review. ***Barron Elec. Coop***., 212 Wis.2d at 764, 569 N.W.2d at 732. We rejected the argument, noting:

> The test is not … whether the commission has ruled on the precise—or even substantially similar—facts in prior cases. If it were, given the myriad factual situations to which the provisions of [the statutes administered by the commission] may apply, deference would indeed be a rarity. Rather, the cases tell us that the key in determining what, if any, deference courts are to pay to an administrative agency's interpretation of a statute is the agency's experience in administering the particular statutory scheme—and that experience must necessarily derive from consideration of a variety of factual situations and circumstances. Indeed, we have recognized in a series of cases that an agency's experience and expertise need not have been exercised on the precise—or even substantially similar—facts in order for its decisions to be entitled to judicial deference.

In ***Zignego Co. v. DOR***, 211 Wis.2d 817, 824, 565 N.W.2d 590, 593 (Ct. App. 1997), we concluded that where the legislature had charged the Wisconsin Tax Appeals Commission with enforcement of the statute under consideration, and the commission had "at least one opportunity to analyze that

[7] In its decision, the trial court referred to a prior case in which the board determined that "faxed prescriptions are permitted under [§ 450.11, STATS.]." And the parties stipulated in the proceedings before the board: "Prescriptions ... need not be in writing; they may be communicated to a pharmacist orally by telephone, or by fax."

statute and formulate a position," we would accord due deference to its interpretation.

In this case, the board has had years of experience in interpreting and applying § 450.11, STATS., and WIS. ADM. CODE § PHAR 10.03, and while it has not addressed the precise question before us, it had at least one opportunity to apply these authorities to a particularly analogous situation: the facsimile transmission of prescription orders. We conclude, therefore, that the board's interpretation and application of the statute and rule in this case are entitled to due-weight deference and should be affirmed if reasonable—but only if no other interpretation is more reasonable.

II. The Statutory Violation

Emphasizing that § 450.11(1), STATS., on its face, deals with only written and "oral" prescriptions, the board maintains that a computer electronic mail system is more analogous to a written prescription order than an oral one because "the communication between the doctor and the pharmacist is textual," involving the use of letters and numbers typed at one computer and read on another computer. Thus, according to the board, because a computer transmission lacks the prescribing physician's signature, Walgreen's system violates § 450.11(1).

It is in the nature of things that statutes must at times be applied to situations unforeseen at the time of their enactment. When this occurs, the statute can and should be considered in terms of its manifest intent to see, in Professor Hurst's words, whether the "pictures actually drawn by the statutory text … [are] sufficient to cover the new type of situation that the course of events ha[s] produced." JAMES W. HURST, DEALING WITH STATUTES 35 (1982). According to

Hurst, if the legislature has supplied "sufficient specifications to provide a discernible frame of reference within which the situation now presented quite clearly fits, even though it represents in some degree a new condition of affairs unknown to the lawmakers," the statute may be interpreted accordingly. ***Id***.

The circuit court, disagreeing with the board's conclusion that a computer-transmitted prescription was so analogous to a written prescription that it must be treated as such under the statute, ruled that it was more closely akin to a prescription transmitted orally—by telephone—which the legislature, in the concluding lines of § 450.11(1), STATS., expressly stated may be filled without being signed. That is, to us, a more reasonable interpretation than the board's in light of the simple facts of computer transmission: The prescription is put into a computer as text and the message is then electronically transmitted to the pharmacy's terminal, much as a telephone call—or a facsimile—would be.[8]

[8] Indeed, computer transmission presents an advantage over an oral prescription order—where the listener must record the order on paper—by greatly reducing the risk of misunderstanding because the prescription appears in written form on the pharmacy's terminal.

The board asserts that "security considerations" should bar us from considering a computer transmission as analogous to a telephone order. The board suggests in its brief that pharmacists can recognize the caller's voice over the telephone, and thus verify his or her identity, while "[a] computer, on the other hand, is more anonymous," creating a danger that the prescription information "will fall into the wrong hands." And, it maintains that we should defer to such concerns. The board failed to expressed such concerns, however, and we have not been pointed to any evidence in the record, or any findings or determinations made by the board, that touch on this point. The board's attorneys raise this unsupported argument for the first time on appeal. We owe the assertion no deference and we are not persuaded by the argument. We agree with Walgreen that the unsubstantiated statement that the pharmacists' ability to recognize prescribing physicians' voices—especially pharmacies in large metropolitan areas such as Milwaukee or Madison—will ensure that prescriptions are not pirated pales when contrasted with the benefits Walgreen's system has over written, faxed or telephone orders. As the trial court noted, and as the parties agreed in their stipulation of facts, such benefits include savings in time for both physician and pharmacist, elimination of the need to interpret physicians' handwriting, and removing the opportunity for patients to alter prescriptions.

Finally, we note that the circuit court's interpretation appears to be consistent with the board's own rule allowing electronic transmission of renewal prescription orders on a one-time basis between two pharmacies. *See* WIS. ADM. CODE § PHAR 7.05(3) and (5).[9]

We are thus satisfied that the circuit court properly reversed the board's conclusion that Walgreen's test program violated § 450.11(1), STATS.

III. The Rule Violation

The board also challenges the circuit court's reversal of its determination that Walgreen gave an illegal rebate to six physicians by providing them with computers and modems. The board's position that Walgreen's test program violates WIS. ADM. CODE § PHAR 10.03(14)—which, as indicated above, prohibits pharmacies from participating in "rebate or fee-splitting arrangements" with physicians—is based on its determination that Walgreen received "financial benefits," such as time and money savings, through the use of computer-transmitted prescriptions. The board maintains that, by providing the physicians with free computer equipment Walgreen "gave or rebated" the equivalent of the

[9] WISCONSIN ADM. CODE § PHAR 7.05(1) requires that records of filled prescriptions be maintained by the pharmacy for five years. Section 7.05(3)(a) permits "the transfer of original prescription order information for the purpose of renewal dispensing … between 2 pharmacies on a one-time basis," as long as certain requirements are met. Section 7.05(5) allows "[p]harmacies having access to a common central processing unit" to exchange renewal prescription orders on an unlimited basis. And § 7.05(6) states that "[a] computerized system may be used for maintaining a record … of prescription dispensing and transfers of original prescription order information for the purposes of renewal dispensing," if the system meets certain standards.

The board minimizes the similarity with electronic transmission of renewal prescription orders, noting that under WIS. ADM. CODE § PHAR 7.05(3) at least a written original prescription order would exist, and that, under the rule, pharmacists are required to communicate directly with each other before sending the electronic mail. But a signature may not appear on the "original" order if it was a telephone order. *See* § 450.11(1), STATS.

then-current market value of the equipment to them. According to the board, Walgreen also received a "financial gain" in the form of time savings, "which translated into more profits."

Here, too, we agree with the circuit court. WISCONSIN ADM. CODE § PHAR 10.03 does not define either "fee-splitting" or "rebate." In the absence of a statutory definition, we look to recognized dictionaries to ascertain the common and approved meaning of nontechnical terms. ***Luetzow Indus. v. DOR,*** 197 Wis.2d 916, 925, 541 N.W.2d 810, 814 (Ct. App. 1995). The board, relying on the dictionary definition of "rebate" as "[a] deduction from an amount to be paid or a return of part of an amount given in payment," AMERICAN HERITAGE DICTIONARY 1031 (2d college ed. 1982), argues that Walgreen achieved that precise effect by providing computers to six physicians.

The evidence is undisputed, however, that the computers were provided to the six physicians solely to allow them to participate in the test program. No evidence suggests that the physicians used the computers for other purposes, or that any fees or payments were split by anyone. Indeed, the record is devoid of any information relating to either the purported value of the computers to the physicians or the benefits accruing to Walgreen as a result of their use in the test. As the circuit court noted, "[T]he [physician]s' agreement to participate in the [test program] may well have had more value to Walgreen than the market price of the outmoded equipment, as the testing would allow Walgreen to assess the feasibility of implementing the system on a larger scale." We believe the circuit court is correct: in the absence of any evidence establishing the value of the computers—or the value of any benefits to Walgreen from the physicians' use of them—the board's conclusion is arbitrary and unreasonable and cannot stand.

IV. Forfeiture

The board also appeals the circuit court's determination that the $89,200 forfeiture must be "significant[ly] adjust[ed]" because the court reversed two of the violations against Walgreen. The board argues that the penalty—which was well below the $500,000 sought by the prosecuting attorney—constituted an appropriate exercise of discretion.

It is true, as the board points out, that we will generally defer to an administrative agency's exercise of discretion. We will not do so, however, and will reverse, when the agency either has failed to exercise its discretion or has exercised its discretion in violation of the law, agency policy, or practice. ***Galang v. Medical Examining Bd.,*** 168 Wis.2d 695, 699-700, 484 N.W.2d 375, 377 (Ct. App. 1992). Stated another way, if the agency's determination is "[not] one a reasonable tribunal could reach" on the facts of the case, or is "[in]consistent with applicable law," we may reverse. ***Id***. at 700, 484 N.W.2d at 377.

We think this is such a case. The board based the forfeiture on its conclusion that Walgreen was guilty of three separate violations of the applicable statutes and rules. We have reversed two of those rulings, and in light of those reversals, we think it entirely appropriate to remand the case to the board for reconsideration of the forfeiture.

By the Court.–Order affirmed.

Recommended for publication in the official reports.