COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1497

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

MILWAUKEE EMPLOYES' RETIREMENT SYSTEM AND ANNUITY AND PENSION BOARD,

PLAINTIFFS-RESPONDENTS,

v.

CITY OF MILWAUKEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. The City of Milwaukee appeals from the trial court judgment denying its motion for summary judgment and granting declaratory relief and summary judgment to the Milwaukee Employes' Retirement System (ERS) and the Annuity and Pension Board (the Board). The City argues

that the trial court erred in concluding that performance-based investment management fees were necessary operating expenses the Board was authorized to incur, and that the City's refusal to budget funds to pay the fees violated requirements of the City of Milwaukee Charter. We affirm.

The parties submitted a stipulation of facts to the trial court. The stipulation explains that in its 1937-38 session, the state legislature created: (1) the Milwaukee Employes' Retirement System "to provide retirement and other benefits to certain employes of the City of Milwaukee and its agencies"; and (2) the Annuity and Pension Board to carry out the administration and operation of the retirement system, and to be the trustee of the several retirement system funds.[1] The stipulation further explains that under the applicable Charter provisions codifying the statutes, "the Board is authorized to engage such actuarial and other services as shall be required to transact the business of the retirement system," and "is required to contract for investment management services." Further, "the Board is authorized to retain two or more investment managers to perform the duties and assume the responsibilities" for making investments.

[1] According to the stipulation:

> The Board is an eight member board chosen pursuant to § 36-15-2 of the [City of Milwaukee] Charter. It consists of three members who are appointed by the president of the Common Council, three members who are elected by members of the ERS, a member who is elected by the retirees of the ERS and the City Comptroller who is an ex officio member.

The parties agree that payment for the administration and operation of the retirement system, including fees for investment services, is governed by certain provisions of the Charter.[2] Under § 36-08-3 of the Charter:

> The expense fund shall be the fund to which shall be credited all money to pay the administration expenses of the retirement system; and from which *shall be paid all the expenses necessary in connection with the administration and operation of the system*. Annually, *the board shall estimate the amount of money which shall be deemed necessary to be paid into the expense fund* during the ensuing year to provide for the expense of operation of the retirement system, *and such amount shall be paid to the expense fund for this purpose by the city* and city agencies. On or before June 1 of each year the board shall file with the mayor a detailed statement of all estimated expenses which are to be incurred during the ensuing calendar year, and such statement shall be reviewed and approved as are all other budgetary requests under ch. 18 [regarding "Budget and Tax Levy"].

(emphases added). Further, under § 36-13-4-b of the Charter, "*all expenses in connection with the administration and operation of the retirement system are hereby made obligations of the city* and city agencies." (emphasis added).

The dispute in this case arises from a change in the way in which investment management fees were calculated under the Board's contracts on behalf of the ERS with the ERS investment managers. Prior to 1996, the contracts provided for the managers' compensation according to an asset-based formula, pegging their fees as a percentage of the market value of assets under their management. In 1996, however, the Board, for the first time, entered into performance-based contracts with its investment managers. Intended to provide

[2] The Charter provisions quoted in this opinion are those governing the instant case. According to the ERS/Board brief, however, the Milwaukee Common Council amended some of them "to provide that beginning in 1998 investment related expenses are not obligations of the City but are to be paid out of the earnings of the []ERS."

added incentive to produce good investments, these contracts, while retaining an asset-based fee formula for the calculation of some of the managers' compensation, added a performance-based fee formula that, depending on the investment returns, would result in additional compensation.[3]

On May 14, 1996, the Board submitted the ERS budget for 1997 to the Budget and Management Division of the City. The Board's submission included estimated investment management fees of $8,992,602—a 292% increase over the 1996 ERS budget of $2,295,000 for investment management fees.[4] According to the parties' stipulation of facts, the Milwaukee city attorney concluded that the asset-based fees were "an expense and therefore a tax levy obligation of the City of Milwaukee, but that the performance fees were not an expense and therefore should not be included in the ERS budget." The mayor, however, included neither kind of fee in his 1997 executive budget. Upon the recommendation of the Finance and Personnel Committee, the Common Council

[3] According to the stipulation, the performance-based formula provided a number of variables including a phase-in provision and a condition that additional fees would be payable only if the investments produced a return exceeding the combined return of an agreed-upon benchmark amount plus the cost of the asset-based fee. Further, the performance-based fee was not unlimited; it "varie[d] with the amount of the return above the benchmark until a maximum fee [was] reached."

[4] The stipulation explained that in the Board's submission:

> The sum of $5,350,000 was included in the estimate to cover the investment management fees to be paid in 1997 under three contracts entered into between the ERS and active equity investment managers in 1996 calling for the payment of base fees and performance fees. Of the total, $405,000 was attributable to base fees with $4,945,000 attributable to performance fees. The ERS budget estimate for performance fees represented an estimate of the maximum performance fees that would be due and owing in 1997.

then amended the budget to provide for the asset-based fees, but provided nothing to cover the performance-based fees.

ERS and the Board brought an action for declaratory and equitable relief, and for a money judgment to recover any ERS trust funds used to pay performance-based fees, claiming that the City had violated various requirements under the Charter by refusing to budget funds for the performance-based fees.[5] On cross-motions for summary judgment, the trial court agreed, concluding, in part:

> The charter requires the Board to contract for investment management services. It also confers on the Board the responsibility for hiring these managers, allocating the funds among the managers and establishing regulations for the administration of the funds.
>
> Although the charter in various places limits the management of the fund, it does not expressly limit the means of compensation for the investment managers.
>
> The Board is also responsible for making effective the provisions of the act as stated in the charter.
>
> The legislative policy regarding the creation of the fund is as follows: []"The purpose of this act is to strengthen the public service in cities of the first class by establishing the security of such retirement and death benefits[.]"[]
>
> Thus the fund's goal is to provide appealing benefits to attract employees. The Board deemed it a necessary operating expense to establish performance-based fees as means to increase the value of the pension fund.
>
> ….
>
> This Court finds that a reasonable interpretation of the language in the charter and ordinances is that performance-based fees are necessary operating expenses of the retirement system.

[5] The plaintiffs also challenged the City's refusal to budget for additional staff and renovation or relocation of office space. That dispute, however, was resolved while the case was pending before the trial court.

> Nothing in the applicable language precludes the use of performance-based fees. Indeed since the purpose of adopting such a means of compensating investment managers was to maximize the growth of the pension fund, this purpose falls squarely within the stated legislative goals for the fund. To then require the fund to pay the expense conflicts with the Board's responsibility to preserve the assets of the pension trust.
>
> … [I]t's doubtful such performance-based fees were contemplated in 1937; but that is not dispositive. Many of the expenses now incurred by the Board to which the City raises no objection were not foreseen in 1937.
>
> But it was anticipated that the Board would continue to manage the system in a professional and businesslike manner; and to do so, they would need to make changes as there were changes in society in general as to how one conducts business in a professional manner.
>
> Today performance-based fees are as much a regular feature of investment management contracts as computers are a regular feature of an office. Certainly it's something expended to secure a benefit or bring about a result.

Thus, the trial court concluded, "performance fees are an operating expense for which the City is obligated to pay." Accordingly, the court denied the City's motion for summary judgment, granted the plaintiffs' motion for declaratory relief and summary judgment, and entered judgment for the plaintiffs for the performance-based fees incurred in 1997.

Our review of a trial court's grant or denial of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Here, because the facts are undisputed, our determination of the issue on appeal involves only the interpretation of provisions of the City Charter and the application of the law to the facts. The interpretation and application of statutes and ordinances also are subject to our *de novo* review. *See* ***Truttschel v. Martin***, 208 Wis.2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997) ("Construction of a statute, or its application to undisputed facts, is a question of

law, which we decide independently, without deference to the trial court's determination.").

As the supreme court recently reiterated, "If the meaning of a statute is clear, we will not look outside the statute to ascertain its meaning. Instead, we will simply apply the plain meaning of the statute to the facts before us." ***Burnett v. Hill***, 207 Wis.2d 110, 118, 557 N.W.2d 800, 803 (1997) (citation omitted). Here, we conclude that the relevant Charter provisions are clear, and that the trial court correctly applied them to the undisputed facts.

Section 36-08-3 of the Charter provides the Board the authority to determine "the amount of money which shall be deemed necessary to be paid into the expense fund during the ensuing year to provide for the expense of operation of the retirement system." While challenging the propriety of performance-based fees, the City concedes that investment management fees are necessary expenses. Section 36-13-4-b of the Charter obligates the City to pay "all expenses in connection with the administration and operation of the retirement system." In its brief to this court, the City concedes the Charter provisions "require all necessary expenses in the operation and administration of the ERS for 1997 to be budgeted as part of the City's annual budget and included in the City levy as an obligation of the City."

Nevertheless, the City argues that the Charter provisions contain, "at the very least, a latent ambiguity" because "it is doubtful that performance-based fees were contemplated by the legislature at the time the statute was enacted." As the trial court effectively explained, however, the issue of whether the legislature contemplated a specific formula for payment of investment management fees is unrelated to the issue of whether the law requires the City to pay management fee

expenses deemed necessary by the Board. Indeed, the City cites no authority that even begins to close the gap between these two distinct issues.

The City also argues that the "all necessary expenses" terminology is ambiguous because what is "necessary" must always be subject to interpretation. Once again, the City's argument misses the mark. While it is true that what constitutes "all necessary expenses" may always be a potential subject of interpretation and debate, the Charter clearly gives the Board the responsibility to determine what it deems "all necessary expenses." Once the Board makes that determination, the Charter clearly requires the City to pay. Moreover, we must keep in mind that the City's stipulation included its concession that the Board "is required to contract for investment management services" and "is authorized to retain two or more investment managers." The City fails to explain how the Board possibly could "contract for investment management services" and "retain … investment managers" without being able to negotiate and contract for the formula used to compute compensation.

The City also offers what it concedes are policy arguments "in terms of the policy of the City budget law against permitting contingencies to be budgeted as an expense," and under the standards requiring prudent financing of the employee retirement system.[6] ERS and the Board also have addressed some of

[6] The City relies on § 36-09-1 of the Charter. It states, in part: "The board shall be the trustee of the several funds of the system and shall … exercise prudence in selecting the investment manager, but the exercise of prudence by the board shall not relieve the board from all liability and responsibility with respect to investment of the funds of the system." The City also relies on § 36-09-1-b of the Charter which provides, in part, that "the board shall evaluate the performance of the investment manager on a systematic and regularly scheduled basis." The City has failed to explain, however, how these provisions, relating to selection and evaluation of the investment manager, relate in any way to the Board's determination of whether performance-based fees are necessary expenses.

these policy concerns. The parties present a fair policy debate—a debate that may be properly presented to legislative bodies. Given the clear mandates of the Charter, however, it is a debate that this court need not address.

By the Court.—Judgment affirmed.

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