COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-2668

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

GRANVILLE RODGERS,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE AND
CITY OF MILWAUKEE EMPLOYES'
RETIREMENT SYSTEM/ANNUITY
AND PENSION BOARD,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

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

¶1 SCHUDSON, J. Granville Rodgers appeals from the circuit court order granting summary judgment to the City of Milwaukee and the City of Milwaukee Employes' Retirement System/Annuity and Pension Board. He argues

that the court erred in concluding that the City's telephonic communication, informing him that he had been denied a duty disability retirement allowance (DDRA), constituted notice regardless of whether the call conveyed information about his right to appeal the denial. We affirm.

¶2 The circuit court considered the parties' cross motions for summary judgment based on the following undisputed facts. Rodgers was a City of Milwaukee Police Officer and, therefore, a member of the City of Milwaukee Employes' Retirement System, potentially eligible to receive DDRA. In 1986, he suffered a back injury during the course of his duties. As a result, he was assigned to a limited duty position in the police department until 1991, when he was suspended after being charged with theft by fraud. In 1993, he was terminated as a result of being convicted of a crime.

¶3 In 1993, following his termination, Rodgers applied for DDRA. Based on the information received from the three doctors comprising the medical panel responsible for examining Rodgers, the Board denied the application because Rodgers, had he not been fired, still could have performed police duties in a limited capacity. The denial was consistent with the Board's position that an officer who could do limited duty was not eligible for DDRA because the officer was not totally and permanently incapacitated. This position was based on a 1987 memorandum from the chief of police creating a formal limited duty program for injured officers.

¶4 In October 1993, the Board attempted to notify Rodgers of the denial and his appeal rights by sending a certified letter to the street address he had provided in his application. The letter was returned, stamped "Unclaimed." In November 1993, the Board next attempted to notify Rodgers by sending the

information by regular mail to the same address. That letter also was returned, stamped: "Moved. Left No Address."

¶5 In December 1993, Dolores Rudolph, a Board employee and the pension counseling supervisor who had helped Rodgers prepare his application, informed Rodgers by telephone that his application had been denied. As the parties clarified at oral argument, whether Rudolph, in that phone call, also informed Rodgers of his appeal rights, and whether someone else in Rudolph's office then sent Rodgers copies of the October and November letters that included information about his appeal rights, may be in dispute. For purposes of the circuit court's summary judgment decision, however, the parties agreed that, based on the undisputed evidence, Rodgers did not receive information about his appeal rights.

¶6 Meanwhile, other events bearing on Rodgers' claim were unfolding. In 1991, City of Milwaukee Police Officer Peggy A. Pikalek applied for DDRA and, ultimately, challenged the Board's position that an officer who is able to work in a limited duty capacity could not receive DDRA. On appeal, we concluded, in an unpublished opinion, that the Board had not acted according to law in denying DDRA to Pikalek. *See* ***Pikalek v. City of Milwaukee***, No. 94-2955, unpublished slip op. at 4 (Wis. Ct. App. Oct. 3, 1995). We explained that the Board's position, based on the police chief's memorandum, constituted a reinterpretation of a contractual provision, resulting in the loss of duty disability benefits to which Officer Pikalek previously had been entitled. ***Id.*** at 5-6. We held, therefore, that the Board had violated provisions of the Milwaukee City Charter by retroactively reducing Pikalek's contractual benefits. ***Id.***

¶7 In February 1996, after learning that the Board, based on ***Pikalek***, had altered its position and no longer was denying DDRA to officers solely on the

basis that they were able to work in a limited duty capacity, Rodgers asked the Board to reconsider his application. Based on the City Attorney's opinion that reconsideration was not possible because Rodgers had not "exercise[d] his appeal rights within the time allotted," the Board declined to reconsider.[1] As a result, in April 1996, Rodgers submitted a new application. Based on the new application, the Board granted DDRA, effective May 23, 1996. The Board, however, refused to award Rodgers retroactive DDRA for the 1993-96 period between the denial of his first application and the grant of his second. Rodgers then filed the action leading to this appeal, seeking retroactive benefits.

¶8 The circuit court commented that Rodgers "was clearly aware of the den[ia]l of his request," but that he "failed to make any effort to appeal the decision until years later." The court emphasized, "Instead of doing anything affirmatively to determine what his contract entitled him to after the denial of his disability request …, he basically let it slide." Granting the City's motion for summary judgment on three bases, the court concluded that: Rodgers had failed to exhaust his administrative remedies; his action was barred by the thirty-day statute of limitations, *see* WIS. STAT. § 68.13; and his action was barred under the doctrine of estoppel.

¶9 At oral argument, the parties confirmed what seemed to emerge from between the lines of their appellate briefs–that they were pursuing very narrow theories on appeal. The City clarified that, on appeal, it was not contending that notice, in legal effect, was accomplished by its two mailings or by its possible

[1] We note, however, that the City Attorney's opinion, expressed in the April 9, 1996 letter to the executive director and secretary of the Employes' Retirement System, was premised, in part, on the understanding that "Rodgers was notified of his appeal rights, but he did not exercise them."

third mailing following the Rudolph-Rodgers phone conversation. Instead, the City explained, it was arguing that notice, under WIS. STAT. § 68.08, does not require notice of appeal rights and, therefore, that the Rudolph phone communication provided notice. Rodgers clarified that he was not arguing that the City had a duty to inform him of the ***Pikalek*** decision. Instead, Rodgers explained, he was conceding, for purposes of appeal, that Rudolph telephonically provided notice *if* informing him of his appeal rights was not required.

¶10 Therefore, the issue on appeal is narrow: whether Rudolph's telephonic communication with Rodgers constituted notice, assuming that Rudolph, in that call, did not inform Rodgers of his appeal rights. Thus, in specific statutory terms, the issue reduces to whether notice, under WIS. STAT. § 68.08, requires that a person be informed not only of the denial of his or her DDRA application, but also of the right to appeal the denial.[2]

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[2] For further clarification of what the issue is *not*, we note that Rodgers is making no argument under WIS. STAT. § 68.07, which provides:

> If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and *shall advise such person of the right to have such determination reviewed*, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

(Emphasis added.) Although it would seem that this section should be central to Rodgers's theory, the City explains that § 68.07 "has not been adopted by the Board and is therefore inapplicable." *See* § 36-15-18 of the Milwaukee City Charter (providing that duty disability applicant can have Board's determination "reviewed in accordance with the procedures established under ss. 68.08 to 68.18, Wis. Stats."). Additionally, the parties clarified that WIS. STAT. § 68.09(5), dealing with a subsequent level of review, following the denial of a request for review of a determination under WIS. STAT. § 68.08, also is not at issue.

¶11 We review summary judgment rulings *de novo*, applying the same methodology as the circuit court, as delineated in WIS. STAT. § 802.08(2). *See* ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). We also review the construction of statutes or administrative rules *de novo*. *See* ***Kennedy v. DHSS***, 199 Wis. 2d 442, 448, 544 N.W.2d 917 (Ct. App. 1996). "We first examine the language of the statute to determine the legislature's intent and if that language is clear and unambiguous, we go no further." ***Id.***

¶12 WISCONSIN STAT. § 68.08 provides:

> **Request for review of determination.** Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employe, agent, agency, committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

¶13 The City maintains that WIS. STAT. § 68.08 "is unambiguous and does not require notification of the procedure for seeking review." Rodgers, while noting that neither "notice" nor "determination" is defined in chapter 68, "beyond a brief enunciation of specific types of determinations that are reviewable," never actually argues that WIS. STAT. § 68.08 is ambiguous. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not consider "amorphous and insufficiently developed" arguments). Thus, we accept the City's argument. Explicitly, § 68.08 links "notice" to "such determination"—i.e., to the denial of the application for DDRA. It does not, however, provide any reference linking "notice" to any appeal procedure or right.

¶14 Rodgers acknowledges that WIS. STAT. § 68.08 includes no explicit requirement for notice of appeal rights. Essentially, however, he argues that notice of appeal rights is implicit, by virtue of the fundamental fairness he must be accorded consistent with due process following the denial of what he views as a property right, and by virtue of the City's practice of including a statement of appeal rights in the written notices it regularly provides to persons aggrieved by Board determinations.[3] He elaborates, "As a matter of contract, the Board and the City are bound not only by the language they have chosen in employing the statutory scheme of review enumerated in Chapter 68, … but [by] the practice of including this information as a matter of course with the Board's denial letter."

¶15 The City responds that Rodgers has provided no authority to support his theory "that the filing of an application for duty disability creates a property interest" triggering the due process right he claims, or to support his notion that the City's practice of informing applicants of their appeal rights should somehow be read into the statute. Moreover, at oral argument, the City maintained that this court's recent decision in ***Collins v. Policano***, 231 Wis. 2d 420, 605 N.W.2d 260 (Ct. App. 1999), refutes Rodgers' claim and is "dispositive."

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[3] The two letters mailed to Rodgers stated, *inter alia*:

> [I]f you wish to appeal this denial, you have the right to do so under the provisions of Charter Ordinance No. 478 (copy enclosed). If you so decide, your petition must be filed in accordance with this ordinance. A copy of the Rules and Regulations is also enclosed. Your petition must be filed within 30 days of receipt of this letter.

In concluding that the City was not required, as a matter of law, to inform Rodgers of his opportunity to appeal the determination, we do not mean to discourage the City from providing such information to applicants, as it customarily has done, as a matter of good practice.

¶16 Collins was a member of the business school faculty at the University of Wisconsin. *See* ***Collins***, 605 N.W.2d at 262. When he was denied tenure, he sought judicial review—by writ of certiorari, and as a statutory right, under WIS. STAT. ch. 227, as well as by a writ of mandamus to compel the University to provide him with a formal notice of his right to seek judicial review. *See* ***id.*** at 263-64. He contended that WIS. STAT. § 227.48(2) imposed a clear duty on the University to provide formal notice of his right to seek judicial review of the tenure denial. *See* ***id.*** at 264. Section 227.48(2) provides, in part, "Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions …."

¶17 The University responded that WIS. STAT. § 227.48(2) applied only to "contested cases," and that tenure decisions, under ch. 227, were not contested cases. *See* ***Collins***, 605 N.W.2d at 264. This court agreed. *See* ***id.*** at 265. But Collins also argued that even if his tenure denial had not come in a "contested case" as defined in ch. 227, he still was entitled to notice under § 227. 48(2). *See* ***id.*** Therefore, we had to decide "whether the notice requirement under § 227.48(2) applies to only contested cases under ch. 227, or whether its application is broader, such that the University was obligated to provide Collins formal notice of his appeal rights regarding the tenure denial." ***Id.*** After determining that the statute was ambiguous, *see* ***id.***, and after reviewing the statute's history, context, scope and purpose, *see* ***id.*** at 265-66, we concluded that formal notice of appeal rights was required only in contested cases and, therefore, that the statute's requirements did not apply to Collins's case. *See* ***id.*** at 268.

¶18 We reject the City's assertion that ***Collins*** is dispositive. ***Collins*** is distinguishable in several respects and deals with a different statute. Implicitly, however, ***Collins*** may provide some support for the City's position. After all, in

Collins, despite the statute's explicit reference to a mandatory "notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions," *see* WIS. STAT. § 227.48(2), this court concluded that the statute was inapplicable and that the University was not obligated to provide Collins with formal notice of his appeal rights. Rodgers relies on a statute that provides far less support than the one on which Collins attempted to rely. Unlike § 227.48(2), WIS. STAT. § 68.08 includes no explicit requirement for notice of appeal rights.

¶19 Thus, we conclude that while Rodgers was entitled to notice of the Board's "determination" that he was not eligible to receive DDRA, the express terms of WIS. STAT. § 68.08 did not require that he also be informed of his right to appeal that determination. Therefore, Rudolph's telephonic communication provided the notice to which Rodgers was entitled and, accordingly, the circuit court was correct to grant the City's motion for summary judgment.

By the Court.—Order affirmed.

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