

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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No. 00-2968

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DANIEL T. MAYER, JERALD W. NELSON AND CAPITOL
INDEMNITY CORPORATION,**

**PLAINTIFFS-RESPONDENTS-CROSS-
APPELLANTS,**

V.

STATE OF WISCONSIN DEPARTMENT OF AGRICULTURE,

**DEFENDANT-APPELLANT-CROSS-
RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. The State of Wisconsin Department of Agriculture appeals a judgment that it lacks statutory authority to issue orders regarding the liability of trustees and sureties to pay producers. The department contends that it

has either express or implied statutory authority,¹ under WIS. STAT. chs. 93 and 100,² to order payment to milk producers and determine trustee liability. The trustees maintain that the department lacks express or implied authority. We conclude that, when chs. 93 and 100 are read together, statutory authority to determine trustee breaches of obligation is necessarily implied. Our resolution of this case does not require us to address the cross-appeal. We reverse the judgment of the trial court and remand for further proceedings.

I. STATUTORY FRAMEWORK

¶2 WISCONSIN STAT. § 100.06 is part of the regulatory scheme enacted to reasonably assure a safe supply of dairy products. The purpose of WIS. STAT. § 100.06 is to “provide farmers with a means of recompense where they have suffered a loss in the milk delivered to the plant.” *Columbus Milk Producers v. Department of Ag.*, 48 Wis. 2d 451, 461, 180 N.W.2d 617 (1970). Farmers normally deliver milk to dairy plants on credit, and they receive payment when the plant sells the finished dairy products. The process set forth in § 100.06 furthers the statutory goal and allows farmers to be paid promptly for losses.

¶3 Before an individual can obtain a license to operate a dairy plant, the department must be satisfied that the individual’s “financial condition is such as to reasonably assure prompt payment to milk producers for the milk to be purchased

¹ The contention the department briefed was that it had express authority. It alternatively proposed at oral argument that it had implied authority.

² All references are to the 1997-98 statutes unless otherwise noted. At oral argument, we learned that the statutes in question have been revised and replaced with a new procedure for dairy plant trusteeships. As a result, this decision will have little prospective effect. Therefore, although it involves statutory interpretation, it will not be published.

by him or her as and when the same becomes due and payable.” WIS. STAT. § 100.06(1g)(a). One of the three ways to satisfy the financial condition requirement is “[t]he filing of an agreement providing for the complete control over all manufactured or processed milk and dairy products by a trustee to be selected at least annually by the milk producers.” WIS. STAT. § 100.06(2)(b).

¶4 In addition to the trust agreement, dairy plant trustees must file with the department a trustees’ bond and the contracts providing that all payments be made directly to the trustees. WIS. STAT. § 100.06(2)(b). In a dairy plant trustee licensing arrangement, the trustee acts as the “dairy plant operator” when paying the producers and collecting the payments for dairy products. The trustees distribute excess funds to the actual dairy plant operator only after all producers have been paid in full. WIS. ADMIN. CODE § ATCP 100.94(4).

¶5 WISCONSIN STAT. § 100.06(4)(a) provides:

Any milk producer injured by the breach of any obligation under this section may file with the department a verified proof of claim. Upon receipt of such claim or any other evidence of default, the department, by order, may require all interested creditors to file their verified proofs of claim before a certain date or be barred from participating in any recovery made by the department. Notice of the entry of such order shall be given by posting a copy thereof on the premises described in the license and by publication of a class 3 notice, under ch. 985, in the affected area. The date of last insertion shall not be less than 30 days prior to the last date for the filing of such claims. The department shall make the necessary audit and by order allow or disallow all claims presented.

Under this statute, a milk producer injured by a trustee breach of obligation files a verified proof of claim with the department. The department audits the claims and allows or disallows each producer claim by issuing an order. WIS. STAT. § 100.06(4)(a). A breach of the payment obligations set out in WIS. STAT.

§ 100.06(2m) leads to a financial default proceeding conducted pursuant to WIS. ADMIN. CODE § ATPC 100.60.

¶6 Procedures in the Wisconsin Administrative Code provide trustees with notice at each stage of a financial default proceeding. WIS. ADMIN. CODE § ATPC 100.60. They receive copies of the order for interested producers to file claims, proposed order, and notice of hearing. *Id.* Notice is given to the trustees to participate in a contested case, conduct discovery and present evidence under §§ ATPC 1.23 and 1.25. Both parties concede that the resultant order is subject to review under WIS. STAT. ch. 227.

¶7 Once claims have been allowed or disallowed by the department, WIS. STAT. § 100.06(4)(c) requires notice to and allows collection from the trustees as principal. The department may “demand, collect and receive” from the trustee or sureties “the amount determined necessary to satisfy the claims, plus interest.” WIS. STAT. § 100.06(4)(c). If trustees or sureties do not pay the claim voluntarily pursuant to § 100.06(4)(c), then the department may go to circuit court to collect the amounts determined to be owing by the same remedies available to any other judgment creditor. Section 100.06(4)(d) grants the department the power to go to circuit court for “the purpose of collecting *claims*, plus interest” if trustees and sureties do not pay demands made under § 100.06(4)(c). (Emphasis added.)

¶8 The department has a duty to make regulations necessary and proper for the enforcement of WIS. STAT. chs. 93 to 100. WIS. STAT. § 93.07(1). It has a general duty to enforce all laws entrusted to the department’s administration and the special duty to enforce laws regarding the production, manufacture and sale of dairy products. WIS. STAT. § 93.07(24). Pursuant to WIS. STAT. § 93.14, the

department may, in relation to any matter within its power, conduct hearings, administer oaths, issue subpoenas and take testimony.

II. BACKGROUND

¶9 Because there is no challenge to the sufficiency of the evidence, we rely on the agency's findings of fact. The Dairy Maid Cooperative of Augusta, Wisconsin, has manufactured cheese since at least 1959. It was licensed to operate its dairy plant under the trustee method. On July 31, 1990, Dairy Maid filed a trust agreement with the department, appointing Daniel Mayer and Jerald Nelson, individually, as the trustees of Dairy Maid. Mayer and Nelson were the trustees throughout the period material to this action.

¶10 Pursuant to WIS. STAT. § 100.06(2)(b), the trustees filed their original dairy plant trustee bond on August 1, 1990, and later increased it by a rider on December 16, 1996. This bond and rider continuously bonded the trustees for \$379,300. The bonding companies and sureties are Capitol Indemnity Corporation and American Bankers Insurance Company. The bond conditioned that the trustees discharge *their duties* “according to law and the rules and regulations of the Wisconsin Department of Agriculture, Trade and Consumer Protection, and pay the Obligee [department] such pecuniary damages that may be sustained by said producers *through failure to faithfully discharge* such duties.” (Emphasis added.)

¶11 On May 1, 1998, the department sent letters to Capitol Indemnity and American Bankers, giving notice that the trustees may have failed to carry out trustee obligations under the trust agreement and performance bond. Further, the department received a written notice of default from producers who had delivered milk to Dairy Maid on May 5, 1998. The default notice advised the department

that producers had not received payment for milk delivered in the first half of April 1998, when the payment became due and payable on May 3, 1998. The trustees did not execute or deliver checks to producers for milk delivered in April 1998. The department issued a claim filing order on May 5, 1998, and it published and posted the notice as required under WIS. STAT. § 100.06(4). The department gathered evidence relating to the amount and identity of claims and conducted an audit of the dairy plant trusteeship accounts. The trustees and sureties filed their objections.

¶12 The department conducted a hearing May 10-14 and June 28-30, 1999. Subsequently, the parties submitted their briefs, and the ALJ issued its proposed decision. On February 1, 2000, the secretary issued the final department decision holding the trustees liable for breaches of statutory and administrative code obligations and ordering that payments be made directly to producers. The department made a number of findings that the trustees breached their obligations under the statutes, administrative code, trustee agreement and performance bond.

¶13 The trustees challenged the department's order in circuit court. On October 13, 2000, the court concluded that the legislature neither expressly, nor implicitly, conferred on the department the authority to determine trustee liability.

¶14 The department now appeals. At oral argument, the trustees conceded that they breached regulations and that the department could determine whether there had been a breach. They nevertheless contend that the department

does not have the authority to determine whether the trustees' breach of statutory and regulatory obligations caused harm and resulted in damages to the producers.³

III. STANDARD OF REVIEW

¶15 On appeal, we review the decision of the agency, not the trial court. *See City of La Crosse v. DNR*, 120 Wis. 2d 168, 179, 353 N.W.2d 68 (Ct. App. 1984). Our scope of review is identical to that of the trial court. *Id.* Both parties agree that the extent of the Department of Agriculture's statutory authority is a question of law. *See WP&L Co. v. PSC*, 181 Wis. 2d 385, 392, 511 N.W.2d 291 (1994). Although the department argues that its interpretation of the statute and past practice should guide this court, it nevertheless concedes that the review is de novo. We give no deference to the agency's decision regarding its own statutory authority. *See id.*

IV. DISCUSSION

¶16 We conclude that if the department has the authority to determine trustee liability under WIS. STAT. § 100.06, it is implied rather than express.⁴

³ Specifically, the trustees contend the circuit court is the proper forum to discuss issues including comparative fault and contributory negligence. Thus, although the trustees concede the department can determine whether there has been a breach, they maintain a circuit court must determine causation and the extent of damage.

⁴ The department fails to set forth implied authority precedent in its brief because it argues only express authority. While the department characterizes its argument as one for express authority, we perceive that it actually is arguing implied statutory authority. Therefore, we will set forth and address the department's statutory arguments as claims of implied authority.

Nothing in § 100.06 expressly states that the department is authorized to determine liability.⁵

¶17 “An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates.” *Oneida County v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993). As indicated, the statutes do not expressly authorize the department to determine the liability of dairy plant trustees. Therefore, we must determine whether the power is implied from the language of the statutes.

¶18 Statutes generally are strictly construed to preclude the exercise of power that is not expressly granted. *Browne v. Milwaukee Bd. of Sch. Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978). Administrative powers are not freely and readily implied. *Madison Metro. Sch. Dist. v. DPI*, 199 Wis. 2d 1, 13, 543 N.W.2d 843 (Ct. App. 1995). Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the existence of that power. *Id.* Whether a power is to be implied turns on the intent of the legislature. *Id.* Intent to confer such power may be inferred when the power rises from fair implication from expressed powers, or when the power is necessarily implied by the statutes under which the agency operates. *Id.*

¶19 The trustees argue, and we agree, that the State’s express authority arguments are in reality contentions that the department has implied authority.⁶

⁵ This is contrary to instances where the legislature explicitly granted authority. For example, the legislature expressly delegated authority to determine causation and damages in workers compensation cases. WIS. STAT. § 102.03. Workers compensation laws are predicated on the legislative exchange of efficiency and guaranteed payment to an injured employee for agency adjudication.

The department argues that WIS. STAT. § 100.06 should be interpreted in conjunction with the department powers and duties set forth in WIS. STAT. ch. 93. The trustees maintain that the department lacks implied authority to determine trustee liability and claim that the standard in Wisconsin for finding implied power is too stringent for the department to meet. We conclude that the standard for finding implied authority is satisfied here. Specifically, the legislature vested the department with implied statutory authority to determine trustee liability.

¶20 While the standard for implied authority is difficult to satisfy, this court has recognized instances where an agency's authority was implied. For example, we recognized that the Department of Natural Resources has jurisdiction to issue after-the-fact permits, as well as those issued before the commencement of construction, even though no statutory section expressly so provides. *Capoun Revocable Trust v. Ansari*, 2000 WI App 83, ¶13, 234 Wis. 2d 335, 610 N.W.2d 129. The legislature charged the DNR with administering permits relating to waterways. *Id.* at ¶11. Rather than adopting a narrow construction of the statutes, we read pertinent sections together to determine the overall legislative intent. *Id.* at ¶12. Because one section referred to permit applications after a project has begun, we determined that it was implied that such permits were possible. *Id.* at ¶13.

¶21 In *Jocz v. LIRC*, 196 Wis. 2d 273, 292-93, 538 N.W.2d 96 (Ct. App. 1995), we determined that LIRC had subject matter jurisdiction over all claims under the Wisconsin Fair Employment Act (WFEA), even an employment discrimination complaint filed against a religious association. The legislature

⁶ And, indeed, the department's implied authority analysis at oral argument essentially mirrored its express authority argument.

conferred on LIRC the authority to “administer” the WFEA, including the power to conduct any “proceeding, hearing, investigation or inquiry necessary to perform its functions.” *Id.* LIRC also had the power to receive and investigate complaints charging discrimination. *Id.* at 293. We determined that the legislature clearly conferred power upon the department to receive and investigate all WFEA claims and department jurisdiction over all complaints brought under the WFEA logically follows. *Id.*

¶22 The powers granted LIRC by the legislature are similar to those enumerated in WIS. STAT. ch. 93. Also, LIRC’s power to “administer” the WFEA is akin to the department’s special duty to enforce laws relating to dairy products. It logically follows that the department has implied authority to adjudicate trustee liability when the general powers and specific duties in ch. 93 are read in concert with WIS. STAT. § 100.06 regarding dairy plant trustees. Chapters 93 and 100 are, as the assistant attorney general commented at oral argument, “connected at the hip.”

¶23 From these cases, and especially from *Jocz*, it follows that the department can determine trustee breaches of obligation. WISCONSIN STAT. § 100.06(4)(c) allows the department to demand payment from trustees and sureties after the allowance of claims. Later, in § 100.06(4)(d), the department may commence collection actions in circuit court for payment. Neither of these sections mentions a prior action to determine trustee liability other than the department audit and allowance or disallowance of claims. We conclude that the procedure necessarily implies a determination of trustee liability by the department contemporaneous with its audit to allow or disallow claims. To provide for payment for trustee breaches of obligations without a department determination of trustee liability would render portions of § 100.06 meaningless. In its

determination of trustee liability, the department exercised only those powers expressly granted to it in ch. 93 to enforce § 100.06.

¶24 The department contends that WIS. STAT. § 100.06 mandates the department to determine whether trustees breached any of their obligations. It argues that § 100.06(4)(a) contains a statutory grant of authority to the department to “*both* determine the monetary amount of milk producer injury, and to determine whether there has been a breach of trustee obligation in the event of non-payment.” For this assertion, the department contends that the first sentence of the statutory section sets out a two-criteria test for department allowance or disallowance of a claim: (1) milk producer injury and (2) breach of trustee obligation.

¶25 The department maintains that a common sense reading of WIS. STAT. § 100.06(4) shows that the department must determine breaches of trustee obligations in order to allow or disallow claims. We agree. Our decision turns on the statutory language: “Any milk producer injured by the breach of *any* obligation under this section may file with the department a verified proof of claim.” WIS. STAT. § 100.06(4)(a). The trustees advocate two determinations of breach. First, consistent with WIS. STAT. § 100.06(4)(a), the department would make a generic finding that a breach has occurred, because producers had not received payment. Then the department would bundle the claims and send them to circuit court for a full hearing on the trustees’ liability.

¶26 WISCONSIN STAT. § 100.06(4)(a), however, is not limited to a breach of the payment obligation, but rather refers to the breach of *any* obligation. We conclude that the department has authority to determine the breach of any obligation by allowing or disallowing producer claims “by order.” It is not limited

to finding simply that there has been a breach. Because the department has the power to demand and collect from the trustees and sureties, it necessarily has the authority to make determinations that trigger the performance bond.

¶27 We agree with the department that the trustees' interpretation of WIS. STAT. § 100.06(4) renders much of the statutory scheme hollow and is at odds with the department's broad authority regarding dairy product regulation. If trustees or sureties do not pay the claim voluntarily, pursuant to § 100.06(4)(c), then the department may go to circuit court to collect the amounts determined to be owing by remedies available to any other judgment creditor.

¶28 We also look to the purpose of the statute to aid in its interpretation. As stated above, the trustees contend that the purpose of WIS. STAT. § 100.06 is to bundle the producer claims together for a "class action" determination of liability in the circuit court. Our supreme court has clearly articulated a contrary purpose: to provide farmers with a reasonable assurance of prompt payment for unpaid claims. *Columbus*, 48 Wis. 2d at 461. A circuit court action is likely to be more cumbersome and take longer than agency adjudication. The procedure advocated and implemented by the department in its regulations provides producers with a more efficient means to receive payment.

¶29 We note that the department allows or disallows claims by order, triggering due process and court review under WIS. STAT. ch. 227. WIS. STAT. § 100.06(4)(a). Chapter 227 "provides a comprehensive, fully defined, procedure for judicial review" of agency decisions. *Lee v. LIRC*, 202 Wis. 2d 558, 561, 550 N.W.2d 449 (Ct. App. 1996). WISCONSIN STAT. § 227.57 provides that judicial review of an administrative agency's decision "shall be conducted by the [circuit] court without a jury and shall be confined to the [agency] record" The

procedure contemplates review of a complete record and final decision from the agency, not an initial determination of trustee liability on claims bundled together by the department.

V. CROSS-APPEAL

¶30 The trustees filed a cross-appeal against the department. They argue that the trial court erred when it failed to vacate portions of the department's final order. They also request attorney fees for the trustees and sureties under WIS. STAT. § 227.485(3). Our resolution of this case does not require us to address these issues because we decide the case as a matter of law and the trustees no longer are the prevailing party.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

