COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP443 **Cir. Ct. No. 2011CV3796**

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

WISCONSIN STATE EMPLOYEES UNION, AFSCME, AFL-CIO,

PETITIONER-RESPONDENT,

V.

STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, MICHAEL HUEBSCH, SECRETARY AND OFFICE OF STATE EMPLOYMENT RELATIONS, GREGORY GRACZ, DIRECTOR,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Reversed and cause remanded with directions*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, P.J.[1] This appeal concerns the disparity in the number of furlough days imposed, during the 2009-11 biennium, on members of the Wisconsin State Employees Union (WSEU) compared with members of some other state employee unions. However, the issues before us do not require that we address the merits of WSEU's argument that its members were treated unequally in violation of an agreement, a statute, and an administrative rule. Rather, the question here is whether the State's sovereign immunity prevents the merits of WSEU's claim from being litigated in this action. For the reasons below, we conclude that sovereign immunity precludes WSEU's action. Accordingly, we reverse the circuit court and remand with directions that the circuit court enter a final order dismissing the action.

Background

¶2 On June 23, 2009, the Office of State Employment Relations (OSER) issued a document titled "Administrative Guidance on Furloughs." This document asserted that furloughing state employees "equally across state service" and avoiding permanent layoffs and program cuts was one way of addressing the state's projected deficit over the 2009-11 biennium. Further details in this document do not matter for purposes of this appeal. It is sufficient to note that, in argument before the circuit court and this court, WSEU asserts that, with respect to WSEU members, the director of OSER, Gregory Gracz, acted contrary to directives in this document.

[1] We granted leave to appeal the order that is being appealed in this case. *See* WIS. STAT. RULE 809.50(3) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 During the 2009-11 biennium, WSEU was the exclusive bargaining agent for a large number of state employees. On July 6, 2009, WSEU entered into a written agreement titled "Memorandum of Understanding, Furlough Implementation" (Memorandum of Understanding) with the State. The Memorandum of Understanding governed the "implementation of furloughs for state employees." The agreement required WSEU members to take sixteen unpaid furlough days.

¶4 On May 6, 2011, officers of WSEU learned that the Association of State Prosecutors had obtained for its members an agreement requiring only ten furlough days. Officers of WSEU then met with OSER Director Gracz seeking restoration of six furlough days, arguing that WSEU members were entitled to equal treatment. Director Gracz took the position that WSEU members were not entitled to the restoration of the furlough days.[2]

¶5 On August 19, 2011, WSEU filed this action under the Uniform Declaratory Judgments Act, WIS. STAT. § 806.04, against the State of Wisconsin, the Department of Administration (DOA), the Secretary of DOA Michael Huebsch, OSER, and OSER Director Gregory Gracz.[3] The complaint briefly explained that both the Memorandum of Understanding and the OSER

[2] The appellants inform us that some unions representing other state employees bargained for language giving their members the benefit of a lower number of furlough days if any other bargaining unit obtained an agreement for a lower number of furlough days and that, subsequent to the furlough days agreement with the Association of State Prosecutors, these other unions obtained sabbatical leave time for the equivalent of six furlough days for their members. While this information might be relevant to the merits of whether WSEU members were improperly denied equal treatment, it is not relevant to any disputed issue on appeal.

[3] The appellants note that the complaint does not expressly name Michael Huebsch or Gregory Gracz as respondents, but, so far as we can tell, all parties treat them as if they were named respondents, at least for purposes of this appeal.

"Administrative Guidance" document contained equitable treatment language.[4] In terms of relief, WSEU requested:

> a. The court enter a declaratory judgment that the language contained in the July 6, 2009, furlough [Memorandum of Understanding] between [WSEU] and the State requires the equal treatment of all state employees in respect to the number of furlough days mandated for 2009-2011. Wis. Stat. § 806.04(2).
>
> b. The court order [WSEU] members be restored the equivalent of six furlough days, commensurate with the restoration of furlough days for [the Association of State Prosecutors] and the other bargaining units treated in a like manner by the respondents. Wis. Stat. § 806.04(8).
>
> c. The court require that the terms and conditions outlined in the addenda to the furlough [Memorandums of Understanding] for the six bargaining units receiving restoration of furlough days be applied to the restoration of furlough days for [WSEU] members in accordance with the requirements of the July 6, 2009, furlough [Memorandum of Understanding]. Wis. Stat. § 806.04(8).
>
> d. The court grant such further relief, based upon the declaratory judgment, as may be necessary or proper. Wis. Stat. § 806.04(8).
>
> e. The court award costs, as may seem equitable and just. Wis. Stat. § 806.04(10).

¶6 The appellants moved to dismiss the action based on sovereign immunity. The circuit court denied the motion in an order dated February 16, 2012. For purposes of appeal, the parties treat the circuit court's decision as having decided that the case could proceed against Director Gracz on the theory

[4] The appellants contend that WSEU is no longer the exclusive collective bargaining representative for all of the state employees WSEU represented at the time the Memorandum of Understanding was executed. WSEU appears to acknowledge that it might now represent only employees who have continued membership in WSEU. In light of our resolution of the issue on appeal, we need not concern ourselves with who might have benefitted if this action were allowed to proceed.

that Gracz exceeded his authority under a statute[5] and under OSER's "Administrative Guidance on Furloughs," which the circuit court deemed an administrative rule. In the court's view, with respect to furlough days, Director Gracz violated the statute and the administrative rule by refusing to treat WSEU members the same as state employees in other bargaining units.[6]

Discussion

¶7 Because of the nature of the proceedings below, the appellants make arguments in their brief-in-chief on appeal that, as it turns out, we can now deem conceded by WSEU. We begin with these concessions, and then turn our attention to the disputed issue.

¶8 First, the appellants argue that, if WSEU's action against them is a breach of contract action, it is barred by sovereign immunity. WSEU does not dispute that a contract action based on the facts in this case would be barred by sovereign immunity. Rather, as discussed below, WSEU's response to the appellants' contract action/sovereign immunity argument is that WSEU's suit is permissible because it is not a contract action, but rather a declaratory judgment action. Accordingly, we deem WSEU to have conceded the appellants' argument

[5] More specifically, the circuit court relied on WIS. STAT. § 111.815(2), which provides, in part: "The director of [OSER] shall establish and maintain, wherever practicable, consistent employment relations policies and practices throughout the state service."

[6] The circuit court did not actually name Director Gracz, but rather concluded that the action could proceed against the official who made the final decision to give some employees fewer furlough days than others. So far as we can determine, the parties now agree that that official is Director Gracz.

that, to the extent WSEU's action could be construed as a contract action, it is barred by sovereign immunity as to all appellants.[7]

¶9 Second, the appellants argue in their reply brief on appeal that WSEU has effectively conceded that all appellants except appellant Gracz should be dismissed. We agree. In their brief-in-chief, the appellants argued that, to the extent WSEU meant to bring a declaratory judgment action, that action was and should have been dismissed against the State of Wisconsin, DOA, DOA Secretary Michael Huebsch, and OSER because WSEU made no allegation that these appellants violated any law or exceeded their constitutional, statutory, or jurisdictional authority. In its responsive brief, WSEU does not directly address this argument, but we agree with the appellants that WSEU effectively concedes the matter. We observe that WSEU does not respond to the appellants' argument that the non-Gracz respondents-appellants should be dismissed from the lawsuit. We also observe that WSEU's brief argues solely that Director Gracz exceeded his authority and that Gracz's action should be declared a violation of a state statute and an administrative rule.[8]

[7] The appellants' contract action argument is based on the proposition that WSEU's complaint alleged a violation of the Memorandum of Understanding. To the extent the parties dispute whether the circuit court should have treated the complaint as alleging solely a violation of the Memorandum of Understanding, or instead as also alleging that Director Gracz violated a statute and an administrative rule, the dispute does not matter. As the appellants point out, regardless of the underlying legal theory, WSEU's action must be dismissed because of the remedy it seeks. Thus, for ease of discussion, in the remainder of this opinion we treat WSEU's action as one alleging that Director Gracz violated a statute and an administrative rule.

[8] WSEU's appellate brief exclusively targets Director Gracz. Among other statements, WSEU asserts: "Gracz acted in excess of his authority"; "Gracz misapplied the statutes and the administrative regulations, and accordingly, an action for declaratory judgment is fitting"; "by refusing to modify the provisions of the MOU, Gracz violated both Wis. Stat. § 111.815 and the Administrative Guidance rules issued by OSER"; and "[t]he actions of OSER Director Gracz are in violation of both state statute and state administrative regulation." Except for a heading (continued)

¶10 The issue that remains on appeal is whether WSEU's action is one for declaratory relief against Gracz and, therefore, is not barred by sovereign immunity. We will briefly describe sovereign immunity and the exception for declaratory actions, and then explain why the action here is not properly characterized as one seeking declaratory relief.

¶11 The State's sovereign immunity derives from Article IV, sec. 27 of the Wisconsin Constitution. That article provides: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." WIS. CONST. art. IV, § 27. This language means "that the legislature has the exclusive right to consent to a suit against the state," and that this legislative consent to suit "must be clear and express." ***State v. P.G. Miron Constr. Co.***, 181 Wis. 2d 1045, 1052-53, 512 N.W.2d 499 (1994). If the legislature does not clearly and expressly waive sovereign immunity, and if, as here, the defense of sovereign immunity is raised, the court has no personal jurisdiction over the State. *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). There is no dispute that, for purposes of this case, Director Gracz has immunity from suit unless an exception applies.

¶12 According to WSEU, the exception that applies here is based on the Uniform Declaratory Judgments Act, WIS. STAT. § 806.04, and case law which permits a declaratory judgment action to be brought, in the words of our supreme court, "against [an] officer or agency charged with administering [a] statute on the theory that a suit against a state officer or agency is not a suit against the state

---

mentioning appellant Michael Huebsch, WSEU's brief makes no similar assertions against other appellants.

when it is based on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority." ***Lister***, 72 Wis. 2d at 303, 307-08.

¶13 The appellants acknowledge that declaratory judgment actions may be brought, but correctly explain that such suits are permissible only to provide "a remedy which is primarily anticipatory or preventative in nature." *See* ***id.*** at 307. Thus, WSEU could, for example, seek a declaration that would prevent Director Gracz, or some other state official or entity, from wrongfully imposing furlough days on WSEU members in the future. But that is not the goal of WSEU's suit here.

¶14 In this case, WSEU is plainly seeking compensation for an alleged past wrong. The complaint requests that WSEU members "be restored the equivalent of six furlough days, commensurate with the restoration of furlough days for [the state prosecutor's bargaining unit] and the other bargaining units [that received fewer furlough days than WSEU members]." This is not a remedy that is "primarily anticipatory or preventative in nature." *See* ***id.***

¶15 We agree with the appellants that the situation here is comparable to the one faced by our supreme court in ***Lister***. In that case, university students sought a declaration that state officials had, in the past, exceeded their statutory authority by charging the students nonresident tuition. The ***Lister*** court concluded that the suit was barred by sovereign immunity because no anticipatory or preventative relief was sought. The court explained: "[T]he only purpose which a declaration of the plaintiffs' rights ... would serve would be to fix the state's obligation to refund the tuition." ***Id.*** at 308. The ***Lister*** court further explained:

> The fiction that an action for declaratory relief from the erroneous application of a statute is really against the individual officer or agency acting in excess of his or its authority becomes too apparent to be adhered to where no anticipatory or preventative objective will be served. A declaration which seeks to fix the state's responsibility to respond to a monetary claim is not authorized by Wisconsin's Declaratory Judgments Act.

Id. The same is true here. WSEU seeks to fix the State's obligation for an alleged past wrong.

¶16 WSEU contends that, unlike the students in ***Lister***, WSEU does not seek a monetary remedy. Rather, according to WSEU, the remedy sought is the return of six furlough days in the form of six paid sabbatical days which, according to WSEU, "may have some value, but [a] value [that] is indeterminable."

¶17 The proposition that WSEU is properly seeking a remedy that is "primarily anticipatory or preventative in nature" because WSEU is not seeking cash payments for the six furlough days makes no sense. This is not an effort by WSEU *anticipating* that Gracz might again violate the law or *preventing* him from doing so. This is an effort to obtain a remedy. And, the idea that WSEU is willing to accept sabbatical days in lieu of money does not transform the action into one seeking a remedy that is "primarily anticipatory or preventative in nature" within the meaning of ***Lister***.

¶18 For that matter, we question whether there is a meaningful difference between a monetary remedy and WSEU's proposed sabbatical days remedy. As the appellants explain, sabbatical days have monetary value. In effect, an employee would be paid for a day that he or she does not work. The monetary value of that day is easily calculated by looking at an employee's hourly rate of

pay when the sabbatical day is taken. That is to say, the employee does not work, but receives pay.

¶19 Accordingly, we reject WSEU's argument that the exception to sovereign immunity for declaratory judgment actions is applicable here. It follows that the suit against Director Gracz is barred by sovereign immunity. And, as we have explained, WSEU effectively concedes that sovereign immunity bars suit against the other appellants.

Conclusion

¶20 For the reasons above, we conclude that WSEU's suit against the appellants is barred by sovereign immunity. The appellants request that we reverse the order of the circuit court and remand with directions that the circuit court enter a final order dismissing the action. WSEU does not dispute that this is a proper course of action if we reject WSEU's declaratory judgment argument. Accordingly, we grant the appellants' request. We reverse the circuit court's order. On remand, the circuit court shall enter a final order dismissing the action.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.