

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1771

Cir. Ct. No. 2006CV7882

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KATHERINE THOMAS AND MILWAUKEE POLICE ASSOCIATION,

PLAINTIFFS-RESPONDENTS,

v.

MILWAUKEE CITY BOARD OF FIRE AND POLICE COMMISSIONERS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer¹ and Kessler, JJ.

¹ This opinion was circulated and approved before Judge Wedemeyer's death.

¶1 WEDEMEYER, J. The Milwaukee City Board of Fire and Police Commissioners appeals from a circuit court order remanding the matter to the Board for an appeal hearing. The Board also appeals from an order denying its motion seeking reconsideration. The Board contends that the circuit court erred, claiming that because Thomas resided outside the City of Milwaukee, she vacated her position as a matter of law; and therefore, the Board does not have jurisdiction to hold a hearing on Thomas's claim that the Police Chief erred in removing Thomas from the City of Milwaukee Police force. Because the circuit court did not err in ruling that the Board has jurisdiction to hear Thomas's appeal of her removal from office, we affirm.

BACKGROUND

¶2 Katherine E. Thomas was hired as a Milwaukee Police Officer in March 1994. On December 30, 1995, she married Paul Thomas. In May 1998, Paul was hired as a police officer for the City of Watertown, which required its police officers to reside within fifteen miles of Watertown's City Hall. In June, Katherine requested an exemption from the City of Milwaukee from her residency requirement due to the marriage. The Board denied her request in July 1995. Katherine appealed the decision of the Board to the circuit court, which remanded the matter to the Board for further proceedings.

¶3 In April 2001, the matter came back to the Board, and the parties stipulated to certain facts. In May 2001, Katherine withdrew her request for a residency exemption because a request for an exemption from the Watertown police had been granted. In November 2005, Katherine renewed her request for a residency exemption, asking that the exemption be permitted until their children graduated from high school. The Thomas's had built a home in Watertown and

had adopted two children from a Russian orphanage. They intended to adopt two more children from Russia and, in order to do so, needed to reside together in the same home. The intent was to keep the children in the same Watertown home environment they had known. In the past, Katherine had a Milwaukee apartment in order to maintain her residency requirement, but, due to the special needs of the adopted Russian children, believed it was necessary for her to reside in the Watertown home. Katherine admitted that due to the special nighttime needs of her children, she was “residing” there.

¶4 The request was placed on the Board’s agenda for March 2, 2006, at which time a closed hearing was convened. The Board was advised of the reasons for the exemption request, and Katherine testified that she had never been late for work or for any court appearance even when having to drive in from Watertown. She pointed out that she has been an exemplary employee for the City of Milwaukee and loves her job as a police officer. The Board was also advised that Paul had applied to the Milwaukee Police department several times before being hired in Watertown. He was rejected each time by Milwaukee. At the conclusion of the hearing, the Board called for a staff recommendation in order to make a decision. During the discussion, the Assistant City Attorney for the City of Milwaukee, opined that the federal court ruling of *Cardenas v. Fire and Police Comm’n of the City of Milwaukee*, 167 F. Supp. 2d 1055 (E.D. Wis. 2001) permitted the Board to look at the totality of the circumstances in deciding whether an exemption should be granted. Based on this ruling, the city attorney advised that the hardship ordinance language could be broadly construed to permit

an exemption.² The key factor to examine was whether the residency exemption would impact negatively on the needs of the service to the city.

¶15 Two weeks later, on March 16, 2006, Katherine was notified via Personnel Order 2006-73 that she had been removed from public office by operation of law, because she had established her residence outside the City of Milwaukee, and thus, had “vacated” her “public office.” In response, Katherine sent a letter pursuant to WIS. STAT. § 62.50 (2005-06)³ appealing the police chief’s finding that she had vacated her public office. She also objected to the use of her waiver hearing as a basis to terminate her. The Board then requested an opinion from the city attorney’s office as to whether it had jurisdiction to hear the appeal. The city attorney responded that the Board needed to decide whether Katherine had “vacated her position” and if so, then the Board had no jurisdiction to hear her appeal.

² The Milwaukee City Charter provides in pertinent part:

7. HARDSHIP EXCEPTIONS.

....

b. In the event that a city employe weds an employe of another jurisdiction which also has a residency requirement, mandating that its employe reside within that jurisdiction’s boundaries, and if that employment is in effect at the time of the marriage, the city service commission may grant the city employe an exemption from the city’s residency requirements....

The Board’s earlier denial of the residency exemption was based on the language in this ordinance, which states “if that employment is in effect at the time of the marriage.” The Board ruled that because Paul became employed *after* the marriage, the exemption would not apply. The city attorney opined, based on the subsequent federal ruling that the Board has the discretion to apply the hardship exception broadly, based on the totality of the circumstances.

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 The Board then requested the opinion of Katherine’s counsel, who responded that Katherine had a right to a decision by the Board. The matter was set for trial. Katherine filed a brief with the Board, arguing that residency determinations are to be made by the Board, that WIS. STAT. § 62.50 applied to this case and that Katherine was not “holding public office” for purposes of WIS. STAT. § 17.03.⁴ On August 15, 2006, the city attorney’s office submitted a letter to the Board stating that the Board did not have jurisdiction over Katherine because she had not admitted nor denied the police chief’s finding that Katherine established residency outside of Milwaukee. It also stated that the chief had found that Katherine was no longer living in Milwaukee and the matter could not be heard by the Board.

¶7 On August 17, 2006, the Board convened and the city attorney asked the Board to rule that it lacked jurisdiction to hear Katherine’s case. Katherine argued that the Board had jurisdiction. The Board decided that it did not have jurisdiction to proceed with the matter of Katherine’s appeal from her removal as a Milwaukee police officer. Katherine appealed the decision of the Board to the circuit court. The circuit court ruled in her favor and remanded the matter to the Board to conduct the appeal hearing. The Board moved for reconsideration, which was also denied. The Board now appeals to this court.

⁴ WISCONSIN STAT. § 17.03 provides in pertinent part:

Vacancies, how caused. Except as otherwise provided, a public office is vacant when: [t]he incumbent ceases to be a resident of: ... [if] the office is local and appointive, and residency is a local requirement, the county, city ... or area within which the duties of the office are required to be discharged.

DISCUSSION

¶8 When the Board ruled that it did not have jurisdiction to hear Katherine's appeal following the police chief's action removing her from office on the basis that she had "vacated her public office," Katherine filed an appeal with the circuit court, seeking both certiorari and statutory review, pursuant to WIS. STAT. § 62.50. As indicated, the circuit court ruled in Katherine's favor in a written decision, dated May 31, 2007. In that decision, the circuit court held: "that the Board has jurisdiction to hear [Katherine's] appeal of her removal from office and remands this matter to the Board for a hearing consistent with this decision."

¶9 The issue in this case involves the interpretation of statutes, which presents a question of law, although we benefit from the interpretation of the circuit court. See *Gentilli v. Bd. of Fire and Police Comm'rs of the City of Madison*, 2004 WI 60, 272 Wis. 2d 1, 680 N.W.2d 335. The purpose of statutory interpretation is to discern the intent of the legislature. *McEvoy v. Group Health Coop.*, 213 Wis. 2d 507, 528, 570 N.W.2d 397 (1997). To determine this intent, we look first to the plain language of the statute. *Id.* A statute will be found to be ambiguous only if it is capable of more than one reasonable interpretation. *Id.* This court is also mindful of the standard of review, consistent with appeals from administrative agencies. *Sliwinski v. Bd. of Fire and Police Comm'rs of the City of Milwaukee*, 2006 WI App 27, 289 Wis. 2d 422, 711 N.W.2d 271.

¶10 The dispositive issue here is whether Katherine is entitled to a review pursuant to WIS. STAT. § 62.50 following the police chief's removal of her as a police officer for the City of Milwaukee. The dispute essentially is whether WIS. STAT. § 17.03 applies to Katherine. That is, is Katherine in "public office" as

that term is used in WIS. STAT. § 17.03? Relying on *Wellnitz v. Bd. of Police and Fire Comm'rs of the City of Wauwatosa*, 151 Wis. 2d 306, 444 N.W.2d 412 (Ct. App. 1989), the Board asserts that when Katherine established a residence in Watertown, she *vacated her public office*, and therefore, as a matter of law, she is no longer a police officer and as a result, the Board has no jurisdiction over her. The circuit court rejected this argument in a well-reasoned analysis, which this court adopts as its own:

Wellnitz involved the position of Chief of Police in a municipality (Wauwatosa) governed by Wis. Stats. § 62.09(1). That statute specifically defined the Chief of Police as an “officer” of the city and the *Wellnitz* court reasoned that the office of chief of police was therefore a “public office” as denied in Wis. Stats. § 17.03. As noted above, pursuant to that statute, the incumbent of that office vacates the office when he or she “ceases to be a resident of the city in which the duties of office are to be discharged.”

The City of Milwaukee is not subject to the provisions of Wis. Stats. § 62.09 and Petitioner in this case is not the chief of police. She was appointed to the “position” of police officer in the city of Milwaukee. The Wisconsin Supreme Court specifically rejected the contention that a police officer was a public officer, concluding instead that the police officer was simply an employee of a city. *Heffernan v. City of Janesville*, 248 Wis. 299, 21 N.W.2d 651 (1946).

The Board also relies on *Eastman v. City of Madison*, 117 Wis. 2d 106, 342 N.W.2d 764 (Wis. App. 1983), in support of its position. *Eastman* does not support the proposition that a police officer occupies a public office governed by Wis. Stats. § 17.03(4). To the contrary, much as in *Heffernan*, the officers in *Eastman* were characterized as “employees” of the city. The applicable city ordinance in *Eastman* provided that a city employee vacated their employment position with the city by ceasing to reside in Madison. *Id.* at 109. However, the applicable Milwaukee ordinance subjects an officer violating the residency requirements to removal pursuant to the disciplinary procedures of the City of Milwaukee Charter, § 5-02.9. Because Officer Thomas has not vacated a public office as in *Wellnitz* and the Milwaukee ordinance does not provide that an employee vacates her position, but rather

must be removed for violating the Milwaukee residency requirements, the removal procedures under the jurisdiction of the Board apply.

(Footnotes omitted). Based on the foregoing, this court concludes that *Wellnitz* is distinguishable from the facts and circumstances in the instant case. Katherine is an *employee*, not a police chief. WIS. STAT. § 62.50(2) refers to the *position* of police officer, whereas WIS. STAT. § 62.50(6) refers to the *office* of police chief. In order for Katherine to be subject to WIS. STAT. § 17.03, she would have to hold a *public office*, not a *public position*.

¶11 Thus, the City of Milwaukee, may remove Katherine from her position as police officer for violating the residency requirement; however, they must do so by following the procedures pertinent to removal of police officers set forth in WIS. STAT. § 62.50. The Board has the jurisdiction, pursuant to § 62.60, to remove Katherine from her position of police officer of the City of Milwaukee. Thus, the Board erred in ruling that it did not have jurisdiction to hear Katherine's appeal. Accordingly, the orders of the circuit court are affirmed, and this matter is remanded to the Board for further proceedings consistent with this opinion.⁵

⁵ This court notes the Board's reliance on *Klatt v. LIRC*, 2003 WI App 197, 266 Wis. 2d 1038, 669 N.W.2d 752. Although the *Klatt* case bears some similarity in initial facts to the instant case, the procedural avenue sought in *Klatt* is distinguishable. *Klatt*'s case involved the denial of unemployment compensation. *Id.*, ¶9. Accordingly, this court is not convinced that *Klatt* is applicable to the instant case.

This court also acknowledges the Board's attempt to convince us that Katherine vacated a "public office" under WIS. STAT. § 17.03 by citing the Charter of the City of Milwaukee at § 2-01, which refers to policemen as *officers* of the city. Katherine is undoubtedly a police *officer*. The distinction made by the circuit court, however, was that WIS. STAT. § 17.03, as analyzed in *Wellnitz v. Bd. of Police and Fire Comm'rs of the City of Wauwatosa*, 151 Wis. 2d 306, 444 N.W.2d 412 (Ct. App. 1989), was that the Police Chief holds *public office*. Police officers, however, hold *public positions*. This court holds that this is the only reasonable interpretation of reconciling the different statutes and ordinances at issue in this case.

By the Court.—Order affirmed.

Not recommended for publication in the official reports

