COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1454 **Cir. Ct. No. 2014CV9441**

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

MICHAEL MORGAN,

PETITIONER-APPELLANT,

V.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 BRASH, J. Michael Morgan appeals an order of the circuit court affirming a decision by the Department of Workforce Development (DWD), Division of Vocational Rehabilitation (DVR) denying Morgan's request for tuition payments for a master's degree program. Morgan argues that: (1) the decision on

review is that of the Division of Hearings and Appeals (DHA), not the decision of DWD and, as such, we should review DHA's decision *de novo*; (2) his request for funding his master's degree was reasonable and consistent with the principles of informed choice and maximizing employment; and (3) the decision denying his request for funding to obtain a master's degree lacked any legal support and was not supported by sufficient facts in the record. We disagree and affirm.

BACKGROUND

¶2 Morgan is a consumer of vocational rehabilitation services. As an individual with disabilities, Morgan is eligible to receive services intended to assist him in attaining certain employment goals. *See* 34 C.F.R. § 361.48. These services are derived from the federal Rehabilitation Act, 29 U.S.C. §§ 701-797. In Wisconsin, the Rehabilitation Act is administered by DVR, within DWD.[1] *See* WIS. STAT. § 47.02 (2013-14).[2] Under the Rehabilitation Act, states are required to provide vocational rehabilitation services to assist individuals with disabilities "in preparing for, securing, retaining, or regaining an employment outcome that is consistent with the individual's strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice." 34 C.F.R. § 361.48.

¶3 A central component of the Rehabilitation Act is the requirement that the responsible state agency work with every eligible individual to develop an individualized plan for employment (IPE). *See* 34 C.F.R. § 361.45(a)(1). In

[1] For clarity, because DVR is a part of DWD, going forward, this decision will only refer to DWD unless context requires otherwise.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

developing these IPEs, the state agency must work with the individual to establish a specific "employment outcome" for the individual, as well as the "nature and scope of vocational rehabilitation services to be included in the IPE." 34 C.F.R. § 361.45(b)(1). The state must ensure that the IPE is developed in a manner that allows the individual to exercise informed choice. *See* 34 C.F.R. § 361.45(b)(2). The final IPE must be agreed to and signed by the individual and a qualified vocation rehabilitation counselor. *See* 34 C.F.R. § 361.45(d)(3)-(7). The final IPE must be reviewed and amended as needed on at least an annual basis. *See* ***id.***

¶4 Between November 2013 and July 2014, Morgan entered into four separate IPEs that were developed in coordination with counselors in DVR. Morgan signed all four IPEs. In each of the four IPEs, Morgan stated that his long-term employment goal was to work as an Alcohol and Other Drug Addiction (AODA) counselor.

¶5 Prior to signing the first IPE, Morgan had earned an associate degree in AODA counseling from Milwaukee Area Technical College. Central to the IPEs was an agreement that Morgan would complete his bachelor's degree no later than December 2013, and that DWD would provide funding for that degree. The IPEs also included other services that DWD would provide to Morgan. Those services included:

- internship placement related to AODA counseling;
- funding for clothing;
- benefits counseling;
- job development assistance;
- on-the-job training;
- payment of Morgan's car insurance deductible;

- payment for car repairs; and
- payment for computer repairs.

¶6 Separate from the IPEs, there was also an agreement that, upon obtaining his bachelor's degree, Morgan would seek employment as an AODA counselor. In compliance with the IPEs, Morgan obtained his bachelor's degree in December 2013; this degree was funded by DWD. Following graduation, Morgan was licensed to practice as a Substance Abuse Counselor-in-Training (SACT), allowing him to work as an AODA counselor, his stated employment goal.

¶7 In January 2014, however, Morgan enrolled in a master's degree program at Springfield College in Milwaukee. That same month, Morgan met with his DVR counselor and requested funding for his master's degree. Morgan's counselor, however, informed him that DWD's focus at that time was to support Morgan in finding employment, and that DWD would not be able to provide funding for the master's program. On April 22, 2014, DWD formally denied Morgan's request for funding for his master's degree. On July 30, 2014, Morgan filed a request for a hearing to appeal that denial.

¶8 On September 8, 2014, a hearing was conducted by Administrative Law Judge (ALJ) Mayumi Ishii of DHA. The issue presented at the hearing was "[w]hether [DWD] correctly denied the Petitioner's request for funding for a [m]aster's [d]egree." At the hearing, Morgan testified on his behalf, and testimony was also given by one of his instructors at Springfield College. On behalf of DWD there was testimony by Morgan's DVR counselor, Suzanne Walter, and the Milwaukee regional director of DVR, Lea Collins-Worachek.

¶9 On October 7, 2014, ALJ Ishii issued a written decision concluding that DWD had reasonably denied Morgan's request for funding for his master's

degree. Specifically, ALJ Ishii concluded that: (1) there was not sufficient evidence in the record to support any conclusion that Morgan had made the maximum efforts to obtain alternate funding for the master's program, as required under 34 C.F.R. § 361.48(f); and (2) funding for a master's degree "is not appropriate to [Morgan's] vocational rehabilitative needs, because a master's degree is not necessary for obtaining employment in [Morgan's] chosen profession as an AODA counselor."

¶10 On November 3, 2014, Morgan petitioned for judicial review pursuant to WIS. STAT. § 227.52. On June 2, 2015, the circuit court, in a written decision, affirmed the decision denying funding for Morgan's master's degree. This appeal follows.

DISCUSSION

¶11 On appeal, Morgan argues that: (1) the decision on review is that of DHA, not the decision of DWD and, as such, we should review DHA's decision *de novo*; (2) his request for funding his master's degree was reasonable and consistent with the principles of maximizing employment and informed choice; and (3) the decision denying his request for funding to obtain a master's degree lacked any legal support and was not supported by sufficient facts in the record.

¶12 In an appeal of an administrative agency decision, we review the decision of the agency, not that of the circuit court. *See* ***Hilton ex rel. Pages Homeowners' Ass'n v. DNR***, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166. Our review is limited to the record developed before the agency. *See* ***Lake Beulah Mgmt. Dist. v. DNR***, 2011 WI 54, ¶7, 335 Wis. 2d 47, 799 N.W.2d 73; *see also* WIS. STAT. § 227.57.

¶13 We uphold an agency's findings of fact if they are supported by substantial evidence. *See* ***Wisconsin Cent. Ltd. v. PSC***, 170 Wis. 2d 558, 568, 490 N.W.2d 27 (Ct. App. 1992). The substantial evidence standard is satisfied if, "after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." ***Volvo Trucks N. Am. v. DOT***, 2010 WI 15, ¶19, 323 Wis. 2d 294, 779 N.W.2d 423.

¶14 We grant an agency's conclusions of law and statutory interpretations one of three levels of deference: great weight, due weight, or no deference. *See* ***Wisconsin Indus. Energy Grp., Inc., v. PSC***, 2012 WI 89, ¶19, 342 Wis. 2d 576, 819 N.W.2d 240. The applicable level of deference depends upon multiple considerations, including the '"agency's experience, technical competence, and specialized knowledge."' ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶38, 282 Wis. 2d 250, 700 N.W.2d 768 (citations and one set of quotation marks omitted).

¶15 Great weight deference, the highest level of deference, is appropriate when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the statute is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

Wisconsin Indus. Energy Grp., Inc., 342 Wis. 2d 576, ¶20 (citations omitted). These factors do not require the agency to have examined the statute under the precise facts presented in a given case. *See* ***id.***, ¶21. Rather, great weight deference is appropriate when "the agency has substantial experience interpreting the statutory scheme at issue." *See* ***id.*** Under great weight deference, we will

uphold the agency's interpretation if it "is reasonable, even if a more reasonable interpretation exists." *See* ***id.***

¶16 Due weight deference is appropriate "where an agency has some experience interpreting the statutory scheme at issue, but the agency has not developed any particular expertise interpreting and applying the statutes to place the agency in a better position than a reviewing court." ***Id.***, ¶22. We grant due weight deference to an agency decision not based on the agency's experience, but rather because the legislature granted the agency authority to interpret the statute at issue. *See* ***id.*** Under due weight deference, we will uphold an agency's interpretation where it "is reasonable, and where there is not a more reasonable interpretation." *See* ***id.***

¶17 No deference, or a *de novo* standard of review, is appropriate when "an interpretation of the statute is a first for the agency, or where the agency's interpretation of the statute has been so inconsistent that it provides a court no real guidance." ***Id.***, ¶23. Under *de novo* review, we give no weight to an agency's decision. *See* ***id.***

I. Due Weight is the Appropriate Level of Deference.

¶18 Morgan argues that because DHA conducted the hearing and issued the October 7, 2014 decision concluding that DWD had reasonably denied Morgan's request for funding for his master's degree, we should limit our review to DHA's decision. Moreover, Morgan argues that because DHA is a general administrative agency, not the agency charged with administration of the Rehabilitation Act statutes and regulations, our review of DHA's decision should be *de novo*. We disagree.

¶19 DHA contracts with DWD to administratively adjudicate disputes between DWD and applicants and/or recipients of its programs. *See* WIS. STAT. § 227.43(1m). When hearing disputes, DHA has jurisdiction concurrent with DWD. *See* ***Racine Harley-Davidson, Inc. v. Division of Hearings and Appeals***, 2006 WI 86, ¶53, 292 Wis. 2d 549, 717 N.W.2d 184. DHA conducts these hearings in compliance with WIS. ADMIN. CODE § DWD 75. Within thirty days of a hearing, DHA's hearing officer shall issue a written decision stating that the "decision is final unless the administrator's representative, applicant or eligible individual, or the representative of the applicant or eligible individual, requests a review of the decision of the hearing officer within 20 calendar days after the decision is issued, under s. DWD 75.19," or the appellant "chooses to petition the circuit court." *See* WIS. ADMIN. CODE § DWD 75.17.

¶20 DWD "may by rule or in a particular case may by order direct that the hearing examiner's decision be the final decision of the agency." *See* ***Racine Harley-Davidson, Inc.***, 292 Wis. 2d 549, ¶53. For hearings related to the administration of the Rehabilitation Act, DWD has done just that: where a hearing officer outside DWD conducts the hearing, "the decision of the hearing officer is final" except when the administrator acts under WIS. ADMIN. CODE § DWD 75.19 to change the decision. *See* WIS. ADMIN. CODE § DWD 75.13(3).

¶21 In the present case, therefore, DWD adopted DHA's decision as its own when it declined to change the decision under WIS. ADMIN. CODE § DWD 75.19. Morgan argues that DWD never formally adopted DHA's decision because the administrator of DWD could have reviewed the decision pursuant to WIS. ADMIN. CODE § DWD 75.19, but chose not to do so. Morgan, however, fails to point to any authority that requires DWD to make any additional declaration for DHA's decision to be adopted. Indeed, an affirmative act is required only if DWD

seeks to change DHA's decision. *See* WIS. ADMIN. CODE §§ DWD 75.13(3) and 75.19. As such, we will review the October 7, 2014 decision concluding that DWD had reasonably denied Morgan's request for funding for his master's degree as if it had been made by DWD.

¶22 When the legislature grants an agency authority to interpret a statute, we grant due weight deference to that agency's interpretation of the statute at issue. *See* ***Wisconsin Indus. Energy Grp., Inc.***, 342 Wis. 2d 576, ¶22. Here, DWD is charged by the legislature with administering the Rehabilitation Act by providing vocation rehabilitation services to eligible Wisconsin residents. *See* WIS. STAT. § 47.02(3m). Accordingly, we grant DWD's interpretation due weight deference. We will uphold DWD's decision, therefore, if it is based on a reasonable interpretation of the relevant statutory and regulatory provisions, and there is not a more reasonable interpretation. *See* ***Wisconsin Indus. Energy Grp., Inc.***, 342 Wis. 2d 576, ¶22.

II. Findings of Fact.

¶23 Before addressing DWD's legal conclusions, we briefly address Morgan's limited attack on DWD's factual findings.

¶24 Much of Morgan's argument is based on the premise that his agreed-upon goal was to obtain certification as a Clinical Substance Abuse Counselor. From this premise, Morgan argues that he needed a master's degree to reach this goal. This argument is misguided.

¶25 DWD found that in each of Morgan's four IPEs, he stated that his long-term employment goal was to work as an AODA counselor. On appeal, Morgan never asserts that he took formal steps to change his employment goal

with DWD from AODA counselor to the more specific Clinical Substance Abuse Counselor prior to enrolling in master's degree courses. Because an individual's desire to change an employment goal in an IPE must be addressed to the agency first, Morgan cannot now argue that he wished to change his employment goal; our review is limited to the record developed before the agency. *See* ***Lake Beulah Mgmt. Dist.***, 335 Wis. 2d 47, ¶7.

¶26 Morgan also argues that DWD's decision was based on the unsupported finding that there were jobs available for him. Specifically, Morgan argues that DWD failed to show that there are available positions within his employment goal for which he is qualified. We disagree.

¶27 First, Morgan fails to show that DWD's findings about available jobs were not supported by substantial evidence. DWD's written decision examined the relevant job postings and concluded that, at Morgan's present level of schooling, he was qualified for most of the jobs listed. To the extent that Morgan would need additional work experience to obtain some of these jobs, that does not make DWD's decision any less reasonable. Nothing in the record suggests that a master's degree alone would qualify Morgan for the jobs identified by DWD, nor does Morgan present evidence that he is unable to get additional work experience without a master's degree.

¶28 Morgan fails to show that no reasonable trier of fact could have reached these same findings. *See* ***Volvo Trucks N. Am.***, 323 Wis. 2d 294, ¶19. Accordingly, because most of these jobs required a maximum education level of bachelor's degree, we conclude that DWD's finding that there were jobs available for Morgan is supported by substantial evidence.

III. Legal Conclusions.

¶29 Morgan argues that his choice to pursue a master's degree is consistent with the maximization principles of the Rehabilitation Act. Morgan further argues that DWD's decision not to fund his master's degree deprived him of informed choice. We address each in turn.

A. Maximization of Employment.

¶30 Morgan argues that the maximization principles of the Rehabilitation Act mean "maximization of achievement." Under this standard, Morgan argues, that DWD was required to assist him in reaching his highest level of achievement by obtaining a master's degree and securing a position as a Clinical Substance Abuse Counselor. We disagree.

¶31 The Rehabilitation Act sets as its first purpose "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1). The Rehabilitation Act's additional purposes are also employment-focused:

> (2) to maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for competitive integrated employment;
>
> (3) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living; [and]
>
> (4) to increase employment opportunities and employment outcomes for individuals with disabilities, including through encouraging meaningful input by employers and vocational rehabilitation service providers on successful and prospective employment and placement strategies[.]

29 U.S.C. §§ 701(b)(2)-(4). Nowhere in the Rehabilitation Act's purposes is there any reference to "maximization of achievement."

¶32 To support his argument, Morgan cites three non-Wisconsin cases. These cases, however, do not support his particular view.

¶33 First, Morgan points to ***Indiana Dep't of Human Services v. Firth***, 590 N.E.2d 154 (Ind. Ct. App. 1992). In ***Firth***, the issue was whether an individual who was deaf was eligible for any vocational services under the Rehabilitation Act. *See* ***id.*** at 155. The state agency concluded that this individual was not eligible for any services because he was "employable in the fields of advertising, marketing, and technical writing," and therefore was not "substantially handicapped." ***Id.*** at 156-57. ***Firth***, however, does not address DWD's conclusion here—DWD has never contested Morgan's eligibility for vocational rehabilitation services. Indeed, DWD continued to provide services and enter into IPEs with Morgan even after he decided to pursue his master's degree. ***Firth***, therefore, does nothing to undermine the reasonableness of DWD's interpretation.

¶34 Next, Morgan points to ***Polkabla v. Commission for the Blind and Visually Handicapped of the New York State Dep't of Social Services***, 183 A.D.2d 575 (N.Y. App. Div. 1992). In ***Polkabla***, the petitioner could not have achieved her stated employment goal of working as an attorney without attending law school. *See* ***id.*** at 576. The state agency, however, concluded that "although petitioner's career as a paralegal may not be the highest level obtainable by her, it was 'suitable employment,'" and thus satisfied the Rehabilitation Act. *See* ***id.*** On this rationale alone, the agency denied funding for the petitioner to complete her undergraduate degree and a law degree. *See* ***id.*** Here, in contrast, Morgan chose

an employment goal that was obtainable without earning a master's degree, as demonstrated by the various positions noted in DWD's findings. ***Polkabla***, therefore, also does nothing to undermine the reasonableness of DWD's interpretation.

¶35 Finally, Morgan points to ***Buchanan v. Ives***, 793 F. Supp. 361 (D. Me. 1991). The court in Buchanan stated that the purpose of the Rehabilitation Act is to "assist clients in achieving their highest level of achievement or a goal which is consistent with their maximum capacities and abilities." *See* ***id.*** at 365. Morgan relies on this language to support his argument that DVR should assist him in reaching his highest level of "achievement." The fundamental flaw with this argument, however, is that Morgan's goal of being an AODA counselor—a goal he expressly agreed to in four IPEs—was attainable without obtaining a master's degree. Therefore, once again, ***Buchanan*** does not undermine the reasonableness of DWD's interpretation.

¶36 Accordingly, we conclude that DWD's decision was a reasonable interpretation of the maximization principles of the Rehabilitation Act. Because Morgan has not shown that his interpretation is more reasonable, we reject his argument.

B. Informed Choice.

¶37 Morgan next argues that DWD's decision not to fund his master's degree deprived him of informed choice, and thus violated various provisions of the Rehabilitation Act and controlling regulations. We disagree.

¶38 Informed choice is referenced in 29 U.S.C. § 701(a)(6)(A), which states, "Congress finds that … the goals of the Nation properly include the goal of

providing individuals with disabilities with the tools necessary to … make informed choices and decisions." ***Id.*** (some formatting changed). "The IPE must be designed to achieve a specific employment outcome, as defined in [34 C.F.R.] § 361.5(b)(16), that is selected by the individual consistent with the individual's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice." 34 C.F.R. § 361.45(b)(2). "The State plan must assure that applicants and eligible individuals or, as appropriate, their representatives are provided information and support services to assist applicants and eligible individuals in exercising informed choice throughout the rehabilitation process." 34 C.F.R. § 361.52(a). This requirement includes "[a]ssisting eligible individuals … in acquiring information that enables them to exercise informed choice in the development of their IPEs with respect to the selection of the … [s]pecific vocational rehabilitation services needed to achieve the employment outcome." 34 C.F.R. § 361.52(b)(4)(ii). In addition, 34 C.F.R. § 361.52(c) states:

> In assisting an applicant and eligible individual in exercising informed choice during the assessment for determining eligibility and vocational rehabilitation needs and during development of the IPE, the designated State unit must provide the individual or the individual's representative … in acquiring, information necessary to make an informed choice about the specific vocational rehabilitation services, including the providers of those services, that are needed to achieve the individual's employment outcome.

¶39 DWD noted in its decision, under the applicable statutory and regulatory provisions outlined above, informed choice means that the responsible state agency is required to "provide individuals with adequate information[,] or in some circumstances, adequate access to information so that the individual can make meaningful choices about what their employment goal is, what vocational rehabilitation services they receive, how the services will be provided and by whom."

¶40 Morgan does not allege that DWD failed to provide him with sufficient information about potential employment goals or available services. Rather, Morgan's sole contention appears to be that, after he made those informed choices about his employment goal and useful services, he should also be able to decide how to allocate DWD's resources to achieve that goal. Nowhere in the statutory or regulatory provisions is there any suggestion that informed choice means that a consumer has freedom to dictate which services he will receive. *See* ***Mallett v. Wisconsin Div. of Vocational Rehab.***, 130 F.3d 1245, 1255 (7th Cir. 1997) (rejecting the argument that a consumer under the Rehabilitation Act has an absolute right to funding at a particular institution of higher learning).

¶41 Accordingly, we conclude that DWD's decision was a reasonable interpretation of the term "informed choice" under the Rehabilitation Act and the applicable regulations. Because Morgan has not shown that his interpretation is more reasonable, we reject his argument.

¶42 Morgan also takes issue with DWD's conclusion that his request for funding to obtain a master's degree cannot be granted under 34 C.F.R. § 361.48(f), because there is insufficient information in the record to support a finding that maximum efforts have been made to secure alternate funding. Because we find that DWD's denial of Morgan's request for funding to obtain a master's degree was based on a reasonable interpretation of the principals of maximization of employment and informed choice—as discussed above—and there is not a more reasonable interpretation, we need not address this argument. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (we decide cases on the narrowest grounds possible).

¶43 Morgan entered into four IPEs in which he stated his employment goal was to become an AODA counselor. These IPEs agreed to fund Morgan's bachelor's degree; he received a bachelor's degree. Furthermore, the record supports the finding that Morgan can get a job as an AODA counselor with a bachelor's degree. We find nothing in the record to support the notion that Morgan is entitled to funding for a master's degree at this time.

¶44 For the foregoing reasons, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.