STATE OF WISCONSIN

TAX APPEALS COMMISSION

XEROX CORPORATION,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent,

vs.

CITY OF MILWAUKEE and CITY OF LA CROSSE,

Intervenors.

DOCKET NOS. 02-M-66 02-M-67

DECISION AND ORDER ON REMAND

JENNIFER E. NASHOLD, CHAIRPERSON:

This case was remanded to the Commission from Dane County Circuit Court by a Decision and Order dated July 12, 2006.[1] *Xerox Corp. v. Wis. Dep't of Revenue*, Wis. Tax. Rptr. (CCH) ¶400-919 (Dane Co. Cir. Ct. 2006). The circuit court remanded on grounds that the Commission did not consult with former Commissioner Don Millis before reaching a decision in this case, which the court stated was contrary to Wis. Stat. § 73.01(4)(b) as interpreted in *Wrigley v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-905 (Dane Co. Cir. Ct. 1986).

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[1] The Commission received the record back from the circuit court with a Certificate of Transmittal on October 3, 2006.

BACKGROUND

Former Commissioner Millis presided over the trial in this matter which was held on November 3-4, 2003; however, his last day with the Commission was on July 14, 2004, prior to the Commission's issuance of its February 17, 2005 Decision and Order.[2]

Attorney Millis is now an attorney in private practice, and represents taxpayers before the Commission and courts.

In accordance with the circuit court's decision in this case, Chairperson Nashold contacted Attorney Millis to arrange for him to review the record and make his own determination as to how best to implement or comply with the circuit court's decision.[3]

Attorney Millis reviewed the record and provided a thirteen-page Memorandum to the Commission members dated February 13, 2007 ("Memorandum"), which is attached hereto. The Memorandum contains two parts. The first section suggests revisions to the Commission's findings of fact as stated in the original Decision and Order, and the second recites the proposed findings of fact offered by petitioner

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[2] The final brief in this case was submitted July 22, 2004, after Attorney Millis had left the Commission.

[3] Former Commissioner Millis was aware of the *Wrigley* decision at the time he served on the Commission. Before he left the Commission, he had informed Commissioner Nashold that, pursuant to *Wrigley*, he had left a memorandum in another case over which he presided but would not decide, *Milwaukee Symphony Orchestra v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-959 (December 15, 2006) (containing Mr. Millis's memorandum). Chairperson Nashold understood that the reason Attorney Millis had not left a memorandum in any other case, including this one, was because he did not believe the decisions hinged on, or necessarily required, credibility determinations.

which were not incorporated into the Decision and Order but which Attorney Millis believed were supported by the record.[4]

ANALYSIS

Wisconsin Stat. § 73.01(b) states:

> Any matter required to be heard by the Commission may be heard by any member of the Commission or its hearing examiner[5] and reported to the Commission, and hearings of matters pending before it shall be assigned to members of the Commission or its hearing examiner by the chairperson.

This provision only requires that the presiding commissioner "report[]" to the Commission. It does not state what that "reporting" consists of or what the Commission is required to do following such reporting. There is almost no appellate precedent interpreting this statute. The lone case which exists suggests that the "reporting" requirements are minimal. *See Neu's Supply Line, Inc. v. Wisconsin Dept. of Revenue*, 52 Wis. 2d 386, 395, 190 N.W. 2d 213 (1971) ("In this case one member of the Commission, Chairman C. L. Finch, was present at the hearing, and the entire Commission signed the decision and order. That is all the statute [§ 73.01(4)(b)] requires.") Nor is there any authority indicating what would occur if a former commissioner who had not previously reported to the Commission regarding a hearing over which he or she

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[4] With regard to the latter section, Attorney Millis stated in his Memorandum, "Including these Findings of Fact does not represent a determination as to whether these additional facts are relevant to the Commission's ultimate holding. Such a determination is beyond the scope of this report." (Memorandum at 2).

[5] The Commission does not utilize hearing examiners, although their use is permitted under Wis. Stat. § 73.01(4)(b). Instead, an individual Commissioner presides over hearings. The Commission is aware of only one instance when a hearing examiner was used by the Commission for several weeks in July and August of 2004, under rather extreme circumstances, when the Commission had only one Commissioner and that Commissioner was on parental leave. That hearing examiner, however, did not preside over any hearings.

presided declined to do so despite a circuit court's remand, or could not so report due to a conflict of interest, death or illness.

It is clear that at least where a hearing examiner is involved, a deciding entity need not adopt the credibility determinations of the hearing examiner, but that when it rejects the findings of the hearing examiner, it must indicate why. *See e.g., Hakes v. Labor and Industry Review Commission*, 187 Wis. 2d 582, 589, 523 N.W. 2d 155 (Ct. App. 1994) (citations omitted) ("[T]he Commission, not the hearing examiner, is vested with the responsibility of making credibility determinations. The hearing examiner may make initial determinations on witness credibility, but these determinations are subject to the Commission's independent review."); *Transamerica Ins. Co. v. Dept. of ILHR*, 54 Wis. 2d 272, 195 N.W. 2d 656 (1972) (requiring deciding body to state its reasons for reversing a hearing examiner's credibility determinations).

The Commission does not adopt the modifications and proposed findings of fact contained in the Memorandum for the following reasons. First, none of the proposed findings contained in the Memorandum are dependent upon Attorney Millis having been the presiding commissioner. In other words, he was in no better position than the deciding commissioners to make any of the proposed factual determinations. As with the commissioners who decided the case, Attorney Millis's proposed findings were based on his review of "the trial transcript, the record evidence, [his] notes taken during trial[6] and the briefs submitted by the parties." (Memorandum at 2). As with the presiding commissioners, Attorney Millis made these factual determinations years after the hearing was held; in fact, he made them over two years later than the deciding

[6] Attorney Millis's notes were kept in the Commission's file in this case upon his departure.

Commission made its findings and over three years after the hearing was held. None of the proposed findings are dependent upon the demeanor of the witnesses, which is the only reason a presiding commissioner would have an advantage over a non-presiding commissioner in determining the facts of a case.

The ability to observe a witness's demeanor was the primary factor in the *Wrigley* holding and in the precedent upon which the *Wrigley* court relied. In *Wrigley*, Circuit Court Judge Nowakowski held:

> The demeanor of a witness taken together with the actual words used in his or her testimony may justifiably lead the finder of fact to accord greater or lesser weight to the content of what is said or to draw one inference as opposed to another. This combination of demeanor and word choice will not always be of significance, but the point is that in some instances it may be critical.
>
> This feature of live witness testimony is clearly unavailable to the fact-finder who does not see the witness testify. In order to offset this loss, the legislature required the next best alternative, i.e., that the testimony be reported to the non-present agency members who were to participate in the fact-finding function.

Wis. Tax Rptr. (CCH) ¶202-905, p. 13,576.

The importance of demeanor is also borne out by the facts of *Wrigley* and the judge's conclusions regarding those facts. In *Wrigley*, Judge Nowakowski recited the Commission's finding that "On occasion, several times per year, the regional sales manager interceded in credit matters when a good account was involved." *Id*., p. 13,575. Judge Nowakowski determined that this fact was material to the Commission's decision. He further noted that one witness, John Kroyer, who had been a regional manager for the taxpayer Wrigley, testified in accordance with the Commission's finding, whereas another witness, Gary Hecht, who had also been a regional manager

for Wrigley, testified to the contrary. Judge Nowakowski concluded that the only way the Commission could have reached the factual determination it did was "to have concluded that Gary Hecht was lying." *Id*., p. 13,576. Judge Nowakowski stated that Mr. Hecht's testimony "was not patently absurd nor contrary to the laws of nature so as to permit ignoring it or finding its opposite. Rather, the finding could only have [been] made through an assessment of Hecht's credibility. To have done so without the benefit of Commissioner Smith's impressions of Mr. Hecht violates Wrigley's rights to due process." *Id*.[7]

In so holding, Judge Nowakowski relied on *Shawley v. Industrial Commission*, 16 Wis. 2d 535, 114 N.W. 2d 872 (1962). *Shawley* involved a worker's compensation case "where the medical testimony was in sharp conflict." 16 Wis. 2d at 541. At the initial hearing before Examiner Retelle, two physicians from the Mayo Clinic testified favorably to the plaintiff. Due to illness, Examiner Retelle did not participate in the second hearing before Examiner Martin where a different doctor, Doctor Wirka, testified in contradiction to the Mayo Clinic physicians. The court held, "Where credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing." *Id*. at 542.

[7] On remand in *Wrigley*, the former commissioner did not issue a report but instead, spoke with all of the commissioners (who at that time numbered five) during the course of two meetings. He stated his impressions that both Mr. Kroyer and Mr. Hecht were extremely credible. The Commission reaffirmed its original decision, stating that the credibility of neither Mr. Hecht nor Mr. Kroyer was ever questioned by the Commission, and that the Commission's conclusions were based on the fact that Mr. Hecht had no involvement of any kind in credit transactions with Wrigley customers while Mr. Kroyer did. *Wrigley v. Wis. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶202-926 (WTAC 1987).

This holding contains the important qualification, "[w]here the credibility of witnesses is at issue." It is clear from the facts and the court's reasoning in *Shawley* that the court was primarily concerned with the ability of the hearing examiner to assess the *demeanor* of the witnesses. In determining that the notes left by Examiner Retelle were insufficient, the court reasoned that the notes did "not embody Examiner Retelle's conclusions with respect to the personal impression the witnesses made upon him" which "might play a very material part in determining the weight to be given to the testimony of the two Mayo physicians as opposed to the testimony of Dr. Wirka, whose appearance was fresh in the mind of Examiner Martin at the time he made his original findings and order." *Id*.

Wright v. Industrial Comm., the case on which *Shawley* relied and which appears to be the first case addressing this issue also stresses witness demeanor:

> "Where there is a conflict in the testimony, and the weight and credibility to be given testimony of the various witnesses is the determining factor, in order to accord a 'full hearing' to which all litigants are entitled, the person who conducts the hearing, hears the testimony and sees the witnesses while testifying . . . must either participate in the decision, or where, at the time the decision is rendered, he has severed his connections with the board, Commission or fact-finding body, the record must show that the one who finds the facts had access to the benefit of his findings, conclusions, and impressions of such testimony, by either written or oral reports thereof."

10 Wis. 2d 653, 659-60, 103 N.W. 2d 531 (1960) (quoting *Crow v. Industrial Comm.*, 140 P.2d 321, 322 (Utah 1943) (emphasis removed).

Cases interpreting and applying *Shawley* or its rationale further clarify that *Shawley*'s holding is predicated on grounds that the hearing examiner has the opportunity to observe the witness's demeanor. *See Falke v. Industrial Comm'n*, 17 Wis.

2d 289, 295, 116 N.W. 2d 125 (1962) (characterizing *Shawley* as involving the "constitutional right to the benefit of demeanor evidence" when "credibility of a witness is a substantial element in the case"); *see also*, *Thomsen v. Wisconsin Employment Relations Comm'n*, 2000 WI App. 90 ¶30, 234 Wis. 2d 494, 610 N.W. 2d 155 ("[O]ne appearing before an administrative tribunal is entitled to have determinations of witness credibility made either by the examiner who saw and heard the witnesses testify, or by another official who had the benefit of the examiner's impressions on witness demeanor and credibility, at least where the agency is reversing the examiner."); *Burton v. Industrial Comm.*, 43 Wis. 2d 218, 223, 168 N.W. 2d 196 (1969) (emphasizing the "importance of the opportunity to observe the witnesses in determining credibility" and to observe their "manner of testifying, demeanor, hesitancies and inflections"); *Braun v. Industrial Commission*, 36 Wis. 2d 48, 57, 153 N.W. 2d 81 (1967) ("However, like Examiner Retelle's notes in *Shawley*, the instant examiner's notes do not embody his conclusions with respect to the personal impressions that the witnesses made upon him. For example, there is no mention of the witnesses' demeanor during their testimony. Where, as here, witnesses have directly contradicted each other, the impression the fact finder has of their demeanor is likely to be the decisive factor in determining who is telling the truth.").

None of the proposed findings contained in Attorney Millis's Memorandum are based on demeanor evidence or on credibility determinations of any kind. To the extent they can be construed to involve credibility determinations or weighing of the evidence which is was not based on the demeanor of the witnesses, the

deciding commissioners were in the same position to make such determinations from the record as Attorney Millis.

Moreover, the Commission, in reaching its decision, did not make credibility determinations or weigh the evidence in the manner contemplated by the *Wrigley/Shawley* line of cases. The circuit court determined that Wis. Stat. § 73.01(4)(b) requires the presiding commissioner to "report his findings and observations to the non-present commissioners where issues of credibility, the weight of the evidence, and the drawing of factual inferences are involved." *Xerox*, Wis. Tax Rptr. (CCH) ¶400-919, p. 33,886. The circuit court then addressed whether the Commission's findings involved either issues of credibility, the weight of the evidence or factual inferences. Relying on *Spacesaver Corporation v. Wisconsin Department of Revenue*, 140 Wis. 2d 498, 410 N.W. 2d 646 (Ct. App. 1987), the court determined that because the Commission did not adopt all of the proposed findings of fact offered by petitioner which were not disputed by the Department, the Commission necessarily made credibility determinations or weighed the evidence with regard to those proposed facts.

That a fact-finder declines to adopt an undisputed proposed fact does not always reflect a credibility determination or weighing of the evidence as contemplated by *Wrigley* and its predecessors. In the instant case, for example, the Commission did not adopt all of the undisputed proposed facts for one of several other reasons; namely, they were irrelevant in light of the Commission's analysis of the law, they were not

borne out by the record, or they reflected conclusions of law rather than facts based on the record.[8]

The Commission declines to address each of the proposed facts contained in Attorney Millis's Memorandum, but will instead discuss a few examples of why it did not, and does not now, adopt them. One example of a conclusion of law offered by petitioner as a proposed finding of fact and adopted by Attorney Millis is the following: "None of the MFD's at issue in this case is either a copier or a digital copier." (Memorandum at 8, Proposed Finding of Fact No. 21). This proposed "fact" goes way beyond making a credibility determination or weighing competing evidence or inferences; instead, it is a ruling on the ultimate legal issue in the case. The exemption statute governing this case, Wis. Stat. § 70.11(39), states, "The exemption under this subsection does not apply to . . . copiers." One of the primary legal questions here is whether the Document Centres, which are MFDs, are non-exempt copiers, as alleged by the Department, or one of the exempt items enumerated in § 70.11(39), as alleged by petitioner. The Commission held that petitioner did not meet its burden of establishing that the Department incorrectly classified the Document Centres as printers rather than as one of the exempted items under § 70.11(39).

Another example is Attorney Millis's proposed revision to the Commission's Finding of Fact No. 50, which deletes the phrase, "'He further testified

[8] In addition, unlike the instant case, *Spacesaver* did not involve the Commission's decision not to adopt an *undisputed proposed finding of fact*; but rather, its decision not to adopt undisputed (and presumably relevant) *testimony*. Not adopting testimony itself is far more likely to involve a determination as to that testimony's credibility or weight than is not adopting a party's characterization of the testimony. However, even when testimony is involved, there are still many reasons, aside from making a credibility determination or weighing the evidence, that an undisputed statement will not be incorporated into findings of fact, such as where a witness testifies as to a legal conclusion which is in the province of the fact-finder to decide, or where the witness's testimony is irrelevant.

that.'" (Memorandum at 3, Proposed Finding of Fact No. 13). If the Commission were to adopt this suggestion, Finding of Fact No. 50 would read, "The WorkCentres are MFD's with fax capabilities; they are not fax machines." During the period under review, fax machines were not exempt under Wis. Stat. § 70.11(39) or any other statute.[9] The Department's assessment with respect to the WorkCentres was based on its conclusion that the WorkCentres were fax machines as contemplated by § 70.11(39). The Commission held that petitioner failed to show otherwise.

The Commission's original legal conclusions cannot be reconciled with these and other proposed findings of fact contained in Attorney Millis's Memorandum. If the Commission is required to adopt his singular interpretation of the record in this case, it will be required to reverse its holding. This case would effectively be decided by a non-member of the Commission, an attorney who appears regularly before the Commission representing taxpayers.

Examples of undisputed proposed facts which the Commission deems irrelevant include all of the testimony as to what experts in the document processing industry believed were meant by the statutory terms, "copier," "digital copier," "computer," "server," "electronic peripheral equipment," or "embedded computerized components," and their views that the MFDs were not copiers or fax machines under their definitions, notwithstanding petitioner's marketing materials which characterized them as copiers or fax machines. (Memorandum at 3, 8-10, Proposed Finding of Fact

[9] Fax machines are now exempt under Wis. Stat. § 70.11 (39m), unless they are also copiers.

Nos. 8, 9, 10, 22, 23, 28, 30).[10] As stated in the Commission's Decision and Order, because the Commission applied common and approved usage of these statutory terms, it was "not bound by definitions provided by petitioner's experts or the experts' views of which statutory terms best describe the property." *Xerox*, Wis. Tax Rptr. (CCH) ¶400-814, p. 33,246. Instead, the Commission found the characterizations in petitioner's advertising materials relevant precisely because that material was for public consumption and reflected the common and approved usage of the relevant terms.

Also irrelevant are proposed findings of fact that the main controller or network controller are "computers." (Memorandum at 2-3, Proposed Finding of Fact Nos. 2, 3, 6). The Commission's decision emphasized that there is no statutory exemption for computers generally, only for the specific types of computers enumerated in the statute, and that petitioner did not show that any of the property at issue was one of the specified computers. More importantly, however, is the following language from the Commission's Decision and Order:

> The Department does not explicitly dispute that the Main Controller contained in all of the equipment or the Network Controller contained in the ST Document Centre Models are some type of "computer." However, to be exempt under § 70.11(39), it is not sufficient to demonstrate that the equipment *contains* a statutorily exempted item; rather, it must be shown that the equipment *is* an exempted item. Thus, if the MFD is a copier or a fax machine, the fact that it may contain some exempt item such as a server, one of the enumerated computers, or some other exempt device does not make the MFD as a whole exempt. Because the

[10] With regard to the terms, "copier" and "digital copier," the Commission's original decision contained the definitions offered by petitioner's experts at Finding of Fact Nos. 45 and 46, as well as their views that under these definitions, the MFD's are not copiers or digital copiers, at Finding of Fact No. 47. Because the Commission did not deem it relevant as to whether or not the document processing industry defined these terms in a particular way, the Commission prefaced Finding of Fact Nos. 45 and 46 with "Petitioner's experts testified that . . . " Deleting the phrase, "Petitioner's experts testified that," as recommended by Attorney Millis, would have no impact on the Commission's conclusions.

> Commission concludes that the Department properly classified the Document Centres as copiers and the WorkCentres as fax machines, that classification does not change because the copiers or fax machines are technologically enhanced with exempt devices.

Xerox, Wis. Tax Rptr. (CCH) ¶ 400-814, p. 33,248. Thus, whether the property contains a component that is an exempt computer or some other exempt item is not the issue here. The issue is whether the property itself is a statutorily exempt item.

Another example of a proposed finding of fact which is irrelevant is referred to in the circuit court's decision: "the images created by . . . Xerox's MFD's are created from original source data each time" and that "the equipment here does not create copies but, rather prints fresh, unique images from digital representations." (Memorandum at 8, Proposed Finding of Fact No. 20); *Xerox*, Wis. Tax Rptr. (CCH) ¶ 202-905, p. 33,885.[11]

The Department classified the Document Centres as copiers. The evidence showed that both the DC and ST types of Document Centres may be operated by placing an original document in them and creating a reproduction of that original document. Even if an image of that original document is manipulated and transformed before it is reproduced, that fact is consistent with the Department's characterization as copiers, as that term is generally understood.

In short, neither the circuit court's decision remanding this case, the

[11] The original Commission decision did incorporate this concept into its Findings of Fact but in the context of petitioner's experts having testified to it. It was handled this way because it did not matter whether what the experts said was true or not.

reporting requirement contained in Wis. Stat. § 73.01(4)(b), nor any judicial precedent requires the Commission to adopt the proposed findings contained in the Memorandum. For the reasons set forth above, the Commission declines to do so. That said, however, with the exception of those proposed "findings" which are actually conclusions of law, even if the Commission were to adopt the other proposed facts contained in the Memorandum, its decision would not change.

The Commission concludes with some final observations regarding the potentially negative effects of a broad reading of Wis. Stat. § 73.01(4)(b) and of the *Wrigley/Shawley* line of cases. A commissioner's departure from the Commission is not an infrequent occurrence and it is sometimes not possible to issue a decision before the presiding commissioner leaves. If the departing commissioner goes on to practice state tax law and appears before the Commission, as was true here, additional concerns arise when that commissioner is asked by the Commission to discuss an ongoing case that will serve as precedent in future cases. That commissioner may also be placed in the position of having to second-guess the commissioners before whom he or she practices or to assist in affirming a Commission decision that may be at odds with the interests of current or future clients. Also, that former commissioner is asked to volunteer his or her time in reviewing and reporting to the Commission regarding a case the former commissioner presided over long ago.[12]

[12] In this case, Attorney Millis not only spent most of a working day at the Commission's office, but also took materials with him back to the office and completed his Memorandum several weeks later.

Finally, as a practical matter, many of the Commission's written decisions reflect a collaborative effort, even with respect to the findings of fact, and non-presiding commissioners are always free to disagree with the presiding commissioner. Indeed, a draft circulated by a presiding commissioner may not be accepted by the two other commissioners, one of whom might circulate a competing draft, which may then become the majority decision which the presiding commissioner either may dissent from or join. In such situations, the facts and conclusions of law of the non-presiding commissioners become the majority decision and the presiding commissioner's views of the facts may be entirely disregarded.[13]

CONCLUSION

The circuit court directed that Attorney Millis report to the Commission, pursuant to Wis. Stat. § 73.01(4)(b) and *Wrigley*, and Attorney Millis has done so. After careful review of Attorney Millis's proposed findings, the Commission concludes that his report does not change any finding of fact or conclusion of law contained in the Commission's February 17, 2005 Decision and Order.

[13] If former Commissioner Millis had still been on the Commission at the time the original Commission Decision and Order was issued, the Commission's decision might still have been the same and his proposed findings of facts may have only been contained in a dissenting opinion, with the other two commissioners who authored the original decision constituting the majority opinion.

IT IS ORDERED

That the State Board of Assessors' Notices of Determination are again affirmed.

Dated at Madison, Wisconsin, this 23rd day of March, 2007.

WISCONSIN TAX APPEALS COMMISSION

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Jennifer E. Nashold, Chairperson

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Diane E. Norman, Commissioner

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David C. Swanson, Commissioner

ATTACHMENTS: **"NOTICE OF APPEAL INFORMATION"**
MEMORANDUM WITH COVER LETTER