GUNDERSON RAYMOND AND DEBRA 96CV953 120296 DANE CTY CIR CT

STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

RAYMOND and DEBRA GUNDERSON,

Petitioner,

vs.

DECISION AND ORDER
96 CV 953

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

This matter comes before the court on a Petition by Raymond and Debra Gunderson (Gundersons). Petitioners commenced this action on April 30, 1996, seeking judicial review of a ruling and order made by the Wisconsin Tax Appeals Commission (Commission), affirming income tax assessments made by the Wisconsin Department of Revenue (Department). The Gundersons contend that the Commission erred when it refused to allow them to withdraw their deemed admissions pursuant to §804.11(2), Stats.

BACKGROUND

The following history is undisputed. In 1992, the Wisconsin Department of Revenue conducted an audit of the Gundersons' tax returns for the years 1980 through 1991. Following this audit, in December 1992 the Department requested from the Gundersons various documents and records verifying their returns. The Gundersons did not respond to the Department's requests, and on March 1, 1993, the Gundersons were assessed an additional $19,239.97 in taxes and

interest.

On April 29, 1993, the Gundersons filed a petition for redetermination with the Department. In this petition the Gundersons noted that although the adjusted assessment had been based on a lack of information, that information was "now available."

A conference was scheduled for October 14, 1993, and the Gundersons were asked to bring any supporting documents with them to that meeting. The day before the scheduled conference, the petitioners requested that the meeting be rescheduled because Raymond Gunderson was otherwise unable to attend. The meeting was rescheduled to December 10, 1993. A letter was mailed to the Gundersons and their "personal representative"[1] confirming this new date. Neither the Gundersons nor their representative appeared at the scheduled meeting.

Another meeting was then scheduled for March 11, 1994. Written notice of the meeting was provided to the Gundersons, but they again failed to appear. No documents or other information were provided to the Department.

On March 24, 1994, a letter was sent to the Gundersons asking them to mail in their supporting documents by April 20, 1994, or their appeal would have to be denied. The Gunderson's representative asked for, and was granted, a two to three week

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[1] The Gundersons employed the services of a Mr. Robert Wicker to assist them in their tax preparation and subsequent audits. Mr. Wicker is not an attorney, but as evidenced by the record, his name is familiar to the respondents.

extension.

No documents had been received by the Department on June 23, 1994; therefore, the Gundersons were again contacted by letter. This time the Gundersons were asked to provide the documents within 15 days. Their representative phoned and promised to provide the documents by July 12, 1994. That date passed and no documents or other communication were received from the Gundersons.

The Department denied the Gundersons' appeal on July 25, 1994. The Gunderson's appealed that decision to the Commission on September 27, 1994.

The Gundersons were served with a discovery request on October 26, 1994. Included with the request for admissions was the caveat that failure to reply within thirty days would constitute an admission. The Gundersons did not timely reply to the discovery request.

On November 29, 1994, the Gundersons were notified by the Department that the time for responding to the discovery request had elapsed. The Gundersons were advised to immediately notify the Department of any reasons why the requested admissions should not be deemed admitted. The Gundersons did not reply. The Department repeated this inquiry on December 15, 1994. The Gundersons did not reply.

The Department filed a motion for summary judgment on December 20, 1994. The Gundersons finally responded to the discovery requests by answer filed December 27, 1994. The Gundersons moved to withdraw the deemed admissions on February 10, 1995. They also

moved for a continuance until November 1995.[2] In April 1995, the Commission denied both of the Gundersons' motions, and in June 1995, denied their subsequent motion to reconsider.

On April 1, 1996, the Commission granted the Department's motion for summary judgment, based largely on the effect of the deemed admissions. The Gundersons filed this petition for certiorari review of that decision, alleging that the Commission erred by refusing to allow them to withdraw their admissions.

1. Standard of Review

This action was brought pursuant to provisions of Chapters 75, and 227, Wis. Stats. Statutory certiorari review is to be conducted based on the record of the proceedings below. §227.57, Stats. The court is confined to the defects appearing upon the return, and the introduction of evidence is not permitted in the absence of statutory authority. State ex rel. Grant School Dist. v. School Bd., 4 Wis. 2d 499, 504 (1958), *citing* Morris v. Ferguson, 14 Wis. 266, 268 (1861), *other citations omitted.*

Agency findings of facts will be upheld on appeal if the

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[2] At the same time that they filed their motion to withdraw admissions, the Gundersons also filed a motion for a continuance. They sought a continuance until November 1995, the date by which it was expected that Raymond Gunderson would be released from federal prison. The Commissioner denied the motion because Mr. Gunderson did not enter prison until January 1, 1995, "well after the entirety of the time during which the admissions were supposed to have been answered or deemed admitted," (Tr. of Hearing, pp 20-21) and because Debra Gunderson could represent the petitioners' interests while her husband was in prison. The denial of the continuance is not at issue in this action.

agency's findings are supported by substantial evidence. §227.57(6), Stats.; Omernick v. Dept. of Natural Resources, 100 Wis. 2d 234, 250 (1981), cert. denied 454 U.S. 883 (1982). Substantial evidence includes such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gilbert v. Wisconsin Medical Examining Bd., 119 Wis. 2d 168, 195 (1984), *citing* Bucyrus-Erie Co. v. DILHR, 90 Wis. 2d 408, 418 (1979).

In contrast, application of an agency's findings of fact to a statute is a question of law warranting independent review by the court. In the Matter of the Arbitration among Madison Landfills Inc. v. Libby Landfill Negotiating Comm., 179 Wis. 2d 815, 825 (Ct. App. 1993), aff'd 188 Wis. 2d 613 (1994). Questions of law are reviewable *ab initio* and are properly subject to judicial substitution of judgment. §227.57(5), Stats.; American Motors Corp. v. ILHR Dep't, 101 Wis. 2d 337, 353-54 (1981).

It is an exercise of discretion whether or not to allow relief from the effects of an admission. Schmid v. Olson, 111 Wis. 2d 228, 237 (1983), *citing* Warren v. International Broth. of Teamsters, Etc., 544 F.2d 334, 340 (8th Cir. 1976). "It is well-established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should properly be based constitutes an abuse of discretion as a matter of law. . . . [However, a] reviewing court is obliged to uphold a discretionary decision of a trial court if it can conclude *ab initio* that there

are facts of record which would support the decision had discretion been exercised on the basis of those facts." Schmid, at 237 (*citations omitted*)

DISCUSSION

According to §804.11(1)(b), Stats.,[3] a matter is deemed admitted when no answer is received within 30 days of service of the request for admission. It is undisputed that the Gundersons failed to answer the Department's request for admission until December 27, 1994, well after the thirty day period specified by statute, and in fact did not file a formal motion to withdraw those admissions until February 10, 1995, some two and a half months

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[3] **804.11 Requests for Admission.**
(1) Request for Admission. (a) A party may serve upon any other party a written request for admission, for purposes of the pending action only, of the truth of any matters within the scope of s. 804.01(2) set forth in the request that relate to statements or opinions of fact, including the genuineness of any documents described in the request. . . .

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . .

(2) Effect of admission. Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to s. 802.11 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtains the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. . . .

after the admissions were first due, and a month and a half after the Department filed its motion for summary judgment based on those deemed admissions. The Commission rendered an oral decision on the Gundersons' motions in a hearing on April 17, 1995. The Commission denied the Gundersons' motion. The petitioners now contend that the Tax Appeals Commission erred when it refused to allow them to withdraw their deemed admissions, pursuant to §804.11(2), Stats.

The decision to allow withdrawal of an admission constitutes an exercise of discretion that should be based on consideration of the statutory criteria. Schmid v. Olson, 111 Wis. 2d 228, 234 (1983). There is a two prong test for allowing withdrawal. "A court may permit withdrawal if withdrawal would further the presentation of the merits of the controversy and if the party who obtains the admission fails to satisfy the court that withdrawal will prejudice the party in maintaining the action or defense on the merits. Sec. 804.11(2)." Micro-Managers, Inc. v. Gregory, 147 Wis. 2d 500, 511 (Ct. App. 1988), *citing* Schmid at 237.

The Federal counterpart to §804.11, Stats., is Federal Rule of Civil Procedure §36. Federal decisions interpreting that rule have held that requests for admission may properly go to ultimate facts, and may also be dispositive of an entire case. Schmid, at 236. Deemed admissions may be used for summary judgment purposes. Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 651 (2nd. Cir. 1983), Bank of Two Rivers v. Zimmer, 112 Wis. 2d 624, 630 (1983).

The Department concedes that it would not have been substantially prejudiced by the withdrawal, and that the second

prong has not been met.[4] (Respondent's Brief, p. 18) It is therefore necessary to determine whether the first prong was met.

1. Subserve the Merits

Although ultimately the question before the court is whether the Commission acted appropriately in granting summary judgment in favor of the Department, because that decision was in large part based on deemed admissions, it is necessary to evaluate whether or not the underlying decision denying the Gundersons permission to withdraw their admissions was itself, proper.

The Gundersons contend that the denial of their motion to withdraw admissions was erroneous because it was reached "without any explanation and apparently without consideration of the factors denoted in §804.11(2), Stats." (Petitioner's Brief, p.2) The Department disputes this assertion, and contends that the denial was entirely proper.

The basis for the Commissioner's decision was his conclusion that the Gundersons had failed to provide the proper legal argument and that there was no factual basis to support the withdrawal of admissions (Trans. p. 24). Contrary to the Gundersons' assertions, there is evidence in the record that in reaching this conclusion

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[4] The prejudice contemplated by the rule is not simply that the party who initially obtained the admission will now have to convince the factfinder of its truth. Rather it relates to the difficult a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because if the sudden need to obtain evidence with respect to the questions previously answered by the admissions. Brook Village North Assoc's v. General Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982).

the Commissioner did consider the two factors necessary to allow withdrawal. At the hearing, the Commissioner expressly referenced Micro-Managers, Inc. v. Gregory, 147 Wis. 2d 500 (Ct. App. 1988), and stated to the Gundersons' attorney that he saw no evidence in either the arguments or the affidavits of "the two items that have to be advanced in order to obtain a withdrawal of admissions." (Trans. p. 23) In Micro-Managers, the defendant failed to timely respond to a request for admissions, and the trial court deemed them admitted. Although that portion of the trial court's decision was not at issue on appeal it was nevertheless significant, and the higher court noted the trial court's decision and cited to the statutory requirements of §804.11(2), Stats., and Schmid v. Olson, 111 Wis. 2d 228, 236 (1983). Micro-Managers, at 510-11.

While the nature of the deemed admissions were such as to effectively preclude a showing on the merits, even that does not mandate withdrawal--allowing withdrawal is discretionary with the court.[5] In Schmid, the leading Wisconsin case on this issue, the trial court had allowed a party to withdraw a deemed admission regarding negligence because it found the request for admission to be improper because it "ran to the complaint." Schmid, at 230. The Supreme Court held that finding was erroneous as a matter of

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[5] According to §804.11(2), Stats.: "the court *may* permit withdrawal . . . when the presentation of the merits of the action will be subserved thereby and the party who obtains the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits. . . . " (emphasis added).

law, and found that the trial court had abused its discretion. The court ordered the case remanded to the trial court for further proceedings however, because there had been no consideration of the second prong, prejudice, in the trial court's decision. Id., at 239. The situation in Schmid, is distinguishable from the present case however, because the Commissioner did not conclude that the Gundersons admissions could not be withdrawn because the admissions (or the request for admissions) went to the heart of the complaint, but because the Gundersons had failed to demonstrate that withdrawal would subserve the merits.

The Gundersons themselves point out that under the two-prong test of §804.11(2), "the first prong imposes on the party seeking permission to withdraw their admissions the burden of proving that such withdrawal would subserve the presentation of the merits of the action." (Petitioner's Brief, p.5) Although the Gundersons are now arguing that withdrawal would subserve the merits, they seem to ignore the fact that as movants they failed to make any showing that withdrawal would subserve the merits.

A review of the record reveals that both parties were given an opportunity to fully argue the relative merits of the motion during the hearing held on the April 17, 1995. At that hearing, the Gundersons' attorney argued that the Commission should permit withdrawal of the admissions on two grounds: 1) the delay was not really the fault of the Gundersons but was attributable to the actions or inactions of a Mr. Wicker, the "personal representative" upon whom they relied for tax preparations; and 2) in any event,

the delay was not particularly egregious. (Trans. of Hearing, at 4-6, 9).[6] In support of the motion, the Gundersons also submitted the affidavit of Raymond Gunderson.[7] In substance, the affiant similarly attempted to excuse the delay by attributing it to the elusive Mr. Wicker.

Laying the blame for the delays on the shoulders of Mr. Wicker is not, however, tantamount to a showing that the delay was due to excusable neglect or error, let alone that withdrawal would subserve the merits. The Gundersons chose to continue to rely on and place their trust in Mr. Wicker for over two years, despite his alleged repeated failures and shortcomings. They also freely chose not to attend any of the numerous meetings the Department had arranged for their convenience. The record demonstrates that the Department gave the Gundersons ample and repeated notice regarding the potential effects of failure to respond to the request for admissions. "[D]eeming the matters admitted is a form of sanction and may be appropriate in certain cases." Gutting v. Falstaff Brewing Corp., 710 F.2d 1309, 1313 (8th Cir. 1983) (citations omitted). The Commissioner actually alluded to the possibility that the Gundersons, by their actions, could be subject to fines

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[6] The Gundersons' attorney also unsuccessfully attempted to assert that the Department had failed to make a formal motion to compel discovery pursuant to §804.12, Stats. (Trans. at 6-7). The Commissioner properly found that argument was inapposite to the question of admissions.

[7] A second, hand-written affidavit of Mr. Gunderson was submitted to the commission after the hearing ended. In substance, it does not differ greatly from the affidavit that had previously been filed with the commission.

under §73.01(4)(am), Stats., for undue delays. (Trans. pp 26-27). Clearly, if the Gundersons have "acted carelessly . . .. it would neither be fair nor just to protect [them] at the risk of harming [their] opponent." Branch Banking and Trust Co. v. Duetz-Allis Corp., 120 F.R.D. 655, 659 (E.D.N.C. 1988) In this case, however, the Gunderson's actions did not arise from negligence or carelessness. Moreover, by the very general nature of the admissions the Gundersons did eventually file, it is difficult to understand how they would have needed more than 30 days in which to respond. Kleckner v. Glover Trucking Corp., 103 F.R.D. 553, 557 (M.D. Pa. 1984).

The motion hearing was clearly the proper time and forum for the Gundersons to put forth the reasons supporting withdrawal of their admissions. They made no showing that withdrawal would subserve the merits, and presented no evidence even controverting the deemed admissions. The extensive procedural history of this matter does not support a finding that the Gundersons would suddenly be more forthcoming. The Commissioner may not have been as deliberate in his reasoning as the Gundersons would like, but he did make a finding that is adequately supported by evidence contained in the record. The Commissioner's determination is not contrary to law and does not constitute an abuse of discretion.

ORDER

For the reasons stated above, the petition for writ of certiorari is quashed.

So ordered.

Dated and mailed this 2nd day of ~~November~~ DECEMBER 1996.

By the Court

Stuart A. Schwartz
Circuit Judge
Branch 15