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MUNICIPAL LAW NEWSLETTER

Volume 19, Issue 1, January/February 2013

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Act 10 Legal Status Update

There are several lawsuits making their way through federal and state courts which challenge 2011 Wisconsin Acts 10 and 32 (Act 10) on a variety of constitutional grounds. Recently, two courts issued orders addressing those claims.

1. Wisconsin State Court - *Madison Teachers, Inc. v. Scott Walker*

This lawsuit challenges several portions of Act 10 on state and federal constitutional grounds. As reported in prior newsletters, Dane County Circuit Court Judge Juan Colas found certain Act 10 provisions unconstitutional, including its prohibitions on bargaining subjects other than base wage rates and on voluntary dues deduction, and its requirement for annual certification elections. The State appealed that decision and asked Judge Colas to stay his decision until the appeal was completed. Judge Colas denied that motion. The State filed a similar motion with the court of appeals and we have been waiting for that decision for a couple of months.

On December 31, 2012, the court of appeals issued an order seeking further briefing from the parties on the issue of a stay, setting forth several specific questions that the court wanted the parties to address. The central theme of those questions was whether the *Colas* decision was binding on municipalities not parties to the lawsuit. It appears from the court's questions that the court would not be inclined to issue a stay of the *Colas* decision if it did not bind any parties other than those in the lawsuit. If the court of appeals concludes that the *Colas* decision is not binding on parties not in the lawsuit, this would have the same effect on municipalities as a stay; i.e., municipalities would still be governed by Act 10 unless and until such time as the court of appeals finds it unconstitutional.

The parties in the *Colas* case will conclude briefing by the first week of February. The parties expect a ruling on the motion for stay sometime that month.

2. Federal Court - *WEAC v. Walker*

The plantiffs in this case alleged that Act 10 was unconstitutional on federal Equal Protection and First Amendment grounds. Last year, federal Judge William Conley issued a decision in the case finding Act 10

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constitutional with the exception of the prohibition of voluntary dues deductions and the requirement for annual certification elections. Both parties appealed that decision to the United States Seventh Circuit Court of Appeals.

On Friday, January 18, 2013, a three-judge panel of the Seventh Circuit issued a decision upholding Act 10 in its entirety. First, the panel concluded that Act 10's payroll deduction prohibitions do not violate the First Amendment. Second, the panel concluded that Act 10's limitation on collective bargaining, the recertification requirements, and the prohibition on payroll deduction of dues did not violate the Equal Protection Clause. Thus, the panel affirmed the district court's ruling regarding the collective bargaining provisions and reversed the district court's ruling regarding the recertification provisions and payroll deductions. One judge, however, dissented from the majority decision with respect to voluntary dues deductions and found that provision to be unconstitutional.

The plaintiffs have the right to ask the entire panel of Seventh Circuit appellate judges to review the panel's decision. That time deadline has not expired and, therefore, the panel decision is not final at this time. The plaintiffs also have the right to appeal the Seventh Circuit decision to the United States Supreme Court.

3. What do these cases mean?

The Seventh Circuit panel decision is a major victory for supporters of Act 10 and, if it becomes a final decision in its current form, will have several ramifications:

- From a federal constitutional standpoint, Act 10's significant restrictions on public sector collective bargaining survive. This may have some impact on the state constitutional questions raised in the Colas case because Wisconsin appellate courts have long recognized federal constitutional analysis in reviewing state constitutional issues. The Seventh Circuit panel decision contains an extensive analysis of the Equal Protection and First Amendment issues, which are at issue in the *Colas* appeal.

- Municipalities were required to honor voluntary dues deduction requests filed by bargaining unit members according to the Conley decision. In fact, that decision required Wisconsin municipalities to do so. In light of the Seventh Circuit panel decision, a question arises as to whether municipalities can continue to honor such voluntary requests. Since the Seventh Circuit panel found Act 10's prohibition on voluntary dues deductions to be constitutional, that provision again governs municipalities from a federal perspective. However, the *Colas* decision found that provision to be unconstitutional on state constitutional grounds, giving rise to the question of whether the *Colas* decision is binding on parties not in that case even after the Seventh Circuit decision. It is our view that the *Colas* decision is not binding, nonetheless, municipalities will want to wait for the Seventh Circuit decision to become final and for the Wisconsin Court of Appeals decision on the stay before discontinuing dues deductions. We anticipate that the latter will either provide guidance on the impact of the *Colas* decision on non-parties or will stay the decision.

- Once the Seventh Circuit panel decision becomes final, the Wisconsin Employment Relations Commission (WERC) will need to decide how to proceed with Act 10's mandate of annual certification elections, particularly in light of the *Colas* decision. The WERC commissioners were parties in their official capacity in the state court case, and a legal question exists as to whether they are bound to follow the *Colas* decision in addressing matters before them, including whether they are allowed to proceed with Act 10 annual certification elections. Judge Conley prohibited the WERC from conducting any further certification elections. Judge Colas, while having the authority to similarly enjoin the WERC from conducting further elections, did not do so. Whether his ruling prohibits the WERC from conducting further elections is one of the questions on which the state court of appeals asked for further briefing. We await its decision and guidance on how the WERC will respond to that decision.

The Act 10 landscape continues to be fluid. Municipalities should continue to keep in contact with legal counsel regarding these appeals and how best to respond.

— Steven C. Zach

Notices of Claims Against State Differ from Those Against Municipalities

A recent decision from the Wisconsin Supreme Court serves as a reminder of how strict the requirements are for filing notices of claims against the state. However, there are important distinctions between claims against the state versus against municipalities that make the decision inapplicable to the notices required to be filed against local governments.

The issue in *Hopgood v. Boyd*, the first supreme court decision to be released in 2013, was whether, in a notice of claim against the state, the notary must confirm that it was signed under oath or whether the confirmation may be made in the statement by the claimant. 2013 WI 1.

The state notice of claims statute, Wis. Stat. § 893.82, requires that the notice be "sworn to." In *Kellner v. Christian*, 197 Wis. 2d 183, 539 N.W.2d 685 (1995), the supreme court discussed the two requirements necessary to fulfill that obligation. First, the claimant must actually make a formal oath or affirmation that the statement is true. Second, the notice itself must contain a statement that the oath or affirmation occurred. In *Newkirk v. DOT*, 228 Wis. 2d 830, 598 N.W.2d 610 (Ct. App. 1999), the court of appeals expanded on these requirements in dicta to say that the written statement that the oath or affirmation was administered must be made by the notary.

In *Hopgood*, the notices contained statements by the claimants that the oath had been administered and that the facts in the notice were true. The notices contained the notaries' confirmation that the signatures were those of the claimants, but no statement by the notaries that they had administered the oath. On summary judgment, the notaries'

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Regulatory Watch

"Regulatory Watch" highlights federal and state agency actions of interest to municipalities and their utilities. It is presented as a regular feature of the Municipal Law Newsletter by Anita Gallucci, Rhonda Hazen, Richard Heinemann and Lawrie Kobza.

FEDERAL

FERC Revises Incentive Rate Policy

A policy statement issued by FERC on November 15th, 2012, clarifies how the Commission intends to review applications for electric transmission project incentive rates. Previously, FERC has allowed incentive rate applicants to demonstrate whether proposed projects are considered "routine" or "non-routine" rather than having to show a connection between the incentives sought and the alleged risks of the project. Now, applicants will be required to show enough detail to allow the Commission to evaluate such a connection. Incentive rates for new transmission projects can include a range of risk-reducing measures, from increased returns on equity, to recovery of construction work in progress, pre-commercial and abandoned plant cost recovery, and use of hypothetical (equity-enhancing) capital structures. Such rates are increasingly being sought -- and received -- by public power entities, consistent with stated Commission policy to encourage a wide range of investment in new transmission facilities. The new policy statement was issued in Docket No. RM11-26-000 and is available on FERC's website at the following link: http://www.ferc.gov/whats-new/comm-meet/2012/111512/E-3.pdf.

Dodd Frank Uncertainty Continues

Municipal utilities and public power agencies accustomed to using energy swaps to hedge against operational risk continue to face uncertainty over implementation of the Dodd-Frank Wall Street Reform and Consumer Protect Act (Dodd-Frank). In July, 2012, the Commodity Futures Trading Commission (CFTC) issued its "Final Rule" on the treatment of swaps and swap dealers. The Final Rule failed to increase the threshold for the total amount of swaps that can be transacted by so-called "special entities," which include government-owned utilities. As a result, many independent generators and utility companies that do not want to be considered "swap dealers" for Dodd-Frank purposes are limiting their transactions with public power entities. The American Public Power Association (APPA), along with a number of other like-minded organizations, petitioned the CFTC in July for an exclusion of municipally-owned, operations-related swap transactions from counting toward the special entity threshold. The exclusion would effectively al-

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low such transactions to count toward the much larger $3 billion *de minimus* threshold that applies to swap transactions by investor-owned utilities. On October 15th, the CFTC issued a "no action" letter providing potential counterparties with temporary relief from the *de minimus* "special entity" threshold, but has thus far failed to act on the APPA petition.

Final RICE Rules Issued

The Environmental Protection Agency (EPA) issued the final amendments to its Reciprocal Internal Combustion Engines (RICE) rules on January 14, 2013. The Final Rules permit emergency engines to be used to prevent electrical outages and for testing and maintenance purposes for up to 100 hours per year without meeting emissions limits. Permitted uses include emergency demand response for Level 2 Energy Emergency alert situations; responding to situations where there is at least a 5 percent or more change in voltage, or operating for up to 50 hours to head off potential voltage collapse, or line overloads that can result in regional power disruption. In 2015, emergency engines will be required to use cleaner (i.e. ultra low sulfur diesel) fuel if they operate, or commit to operate, for more than 15 hours annually as part of blackout and brownout prevention programs. Owners of larger units (100 horsepower or more) will also have additional reporting requirements if they participate in such programs. Owners of RICE units who designate their units as emergency engines have until May 3, 2013, when the RICE rules are scheduled to take effect, to provide written notice to their applicable regional EPA offices and state departments of natural resources.

STATE

PSCW Sets Milwaukee Streetcar Case for Evidentiary Hearing

At its open meeting on September 27, 2012, the Commission discussed the petition of Brett Healy for a declaratory ruling to determine allocation of costs for relocation of utility structures for Milwaukee's proposed streetcar project. Chairperson Montgomery and Commissioner Callisto preliminarily determined that the proposed streetcar project was within the scope of the city's police powers (governmental, not proprietary). Commissioner Nowak determined that additional evidence was needed before a decision on the governmental versus proprietary nature of the project could be determined. All three Commissioners decided that an evidentiary hearing would be useful in order to determine the reasonableness of these relocation costs to be incurred by the utilities. The Commission directed the Administrative Law Judge to schedule an evidentiary hearing at which questions raised by the Commissioners would be addressed. (PSCW Docket No. 5-DR-109)

PSCW Weighs In on Advanced Meter Opt-out

At its open meeting on August 28, 2012, the Commission discussed customer opt-out of advanced meter infrastructure systems in the context of a request by customers of the Madison Water Utility. The Commission determined that each individual utility in conjunction with the its customers could decide whether to implement a formal opt-out policy that would allow individual customers to opt out of an advanced metering system. On October 24, 2012, the Commission approved an opt-out tariff filed by the Madison Water Utility and issued a written decision on November 1, 2012 (which can be viewed at http://psc.wi.gov/apps35/ERF_view/ viewdoc.aspx?docid=175834). (PSCW Docket No. 5-WI-101)

NSP Retail Rate Case Proceeding

In December, the PSCW partially approved NSPW's request for a retail rate increase for test year 2013. The company was seeking a retail electric rate increase of $39.1 million (6.7%). The Commission approved the application with certain adjustments, thereby reducing the company's requested increase to approximately $35.6 million (6.1%). The Final Decision may be viewed at http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=178198. (Docket No. 4220-UR-118)

Comission Approves WEPCO Purchase of Monfort Wind Farm

The PSCW conditionally approved Wisconsin Electric Power Company's proposal to buy Badger Windpower, LLC, which owns the Montfort Wind Energy Center in Eden, Wisconsin. WEPCO currently purchases part of the unit's output under a power purchase agreement. The Commission will allow WEPCO to purchase the entire 30 MW wind farm for $27 million with the proviso that WEPCO provide a report on maintenance required at the facility over the next two years. Commissioner Callisto dissented on the grounds that the additional renewable generation was not needed and that WEPCO ratepayers will be paying more for the output of the facility than they do now. The Final Decision may be found at http://psc.wi.gov/apps35/ERF_view/viewdoc.aspx?docid=178065 (PSCW Docket No. 6630-EB-103).

Citizen's Failure to Swear to Complaint Deemed More Than Mere Technical Defect

At issue in *Park 6 LLC v. City of Racine*, 2011AP2282 (Oct. 10, 2012), was a liquor license revocation proceeding in which the Racine Common Council acted upon a citizen complaint that was not sworn.

Under Wis. Stat. § 125.12(2), any resident of a municipality may file a "sworn written complaint" alleging grounds for revocation or suspension of a liquor license. A resident of the City of Racine (who was also chief of police) filed a citizen's complaint initiating liquor license revocation proceedings against a Racine nightclub owner, alleging the nightclub operation was a "disorderly or riotous, indecent or improper house," and "created undesirable neighborhood problems." However, the complaint was not signed under oath or sworn as required by statute. Nonetheless, the city clerk presented the complaint to the Public Safety and Licensing Committee which, after a due process hearing, recommended to the Common Council that the owner's liquor license be revoked. The Council accepted the Committee's recommendation and revoked the license. The owner appealed to the circuit court, which sided with the owner and vacated the license revocation, holding that since the complaint was not properly sworn, a fundamental error occurred depriving the Public Safety and Licensing Committee of jurisdiction over the proceedings. The City appealed.

The sole issue raised in the Court of Appeals was whether the citizen's failure to swear to the complaint was enough to deprive the Committee of jurisdiction. The City argued that failure to swear to the complaint was merely a technical defect "cured" by the subsequent due process hearing, in which the nightclub owner and individual who filed the complaint participated. Additionally, it argued that failure to comply with an oath requirement is sometimes excused, and should be in the current case, as "sufficient safeguards of truthfulness were present," including that the complainant was also chief of police.

Affirming the circuit court's decision, the Court of Appeals emphasized the need for adequate safeguards against untruthfulness and the importance of an oath or swearing requirement. The Court rejected the City's assertion that there were adequate safeguards in place because the complainant was chief of police. While the City pointed to case law and its municipal code to argue that police officers tell the truth, the Court noted the officer filed the complaint as a private citizen. According to the court, the requirement that a complainant swear to his or her allegations forces the actor to consider the claims he or she is making and prevents baseless harassment of legitimate businesses. While § 125.12(2) provides a vehicle for citizens to initiate liquor license revocation proceedings, it also establishes minimal due process safeguards in the form of a swearing requirement.

— Jeffrey P. Clark

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affidavits, which were undisputed, confirmed that the claimants had taken an oath to tell the truth. Nevertheless, the circuit court dismissed the claim with prejudice and the court of appeals affirmed.

After a detailed statutory construction analysis, the supreme court concluded that the judicial gloss added by *Newkirk* went too far. As long as the notice of claim contained a confirmation that the claimants had sworn or affirmed that the claim was true, it did not matter whether that confirmation was made by the claimant or the notary. It reversed the court of appeals and remanded the case for further proceedings.

The *Hopgood* decision is a good reminder of how precisely the requirements in § 893.82 must be followed in order to preserve a claim against the state. The decision is not a blueprint for dealing with notices of claim against municipalities, however, because of the substantial differences between that statute and § 893.80.

First, § 893.82 expressly requires strict compliance, but § 893.80 does not. Second, claims against local governments do not need to be sworn to. Third, failure to comply with the requirements of § 893.82 deprives the court of subject matter jurisdiction over the claim. This means that the case must be dismissed at any stage of the proceedings when the defect is discovered. Under § 893.80, the municipality must raise the issue as an affirmative defense or it is waived. Fourth, if the municipality had actual notice of the claim, the delay or deficiency in the notice may not be fatal to the claim.

— Mark J. Steichen

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group - Water Division.

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