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Dane County Circuit Court Denies Stay Of Act 10 Decision

As reported in the September/October 2012 edition, on September 14, 2012, Dane County Circuit Judge Juan Colas issued a decision finding portions of 2011 Wisconsin Acts 10 and 32 ("the Acts") unconstitutional. The State appealed that decision to the Wisconsin Court of Appeals and filed a motion with Judge Colas seeking to have his decision stayed pending a decision on appeal.

On October 22, 2012, Judge Colas denied the motion for a stay. The State argued there would be harm to the public if his decision invalidating parts of the Act were in effect during appeal because the shifting legal landscape would confuse municipalities during budget processes, contract negotiations and handbook implementation. Judge Colas dismissed these concerns saying that his decision was narrow and specific and that there was inadequate proof presented to substantiate the state's concerns.

After Judge Colas refuse to stay his decision, the State filed a similar petition with the Court of Appeals. The parties are in the process of briefing that petition. A decision is not expected for a few weeks.

The impact of a stay of Judge Colas' decision on municipalities is significant. If Judge Colas' decision on the Acts is stayed, municipalities would be prohibited from bargaining anything other than base wage rates until the Court of Appeals settles the constitutional issues. Even then, a question exists as to how to calculate base wage rates since the Wisconsin Employment Relations Commission ("WERC") emergency rules defining base wage rate calculations has expired. The WERC is in the process of drafting new rules. In the interim, municipalities should work with legal counsel on how to calculate base wages under the Acts.

If the Court of Appeals does not stay the decision, several considerations come into play:

- The issue of whether non-parties are bound by Judge Colas' decision is unclear. Although the WERC Commissioners were a party to the Dane County litigation, Judge Colas did not enjoin the WERC from enforcing those provisions of the Acts he found unconstitutional. Circuit courts are not, as a general rule, bound by the decisions of other circuit courts; however, the unions argued in their briefs that other circuit courts would be precluded from reaching a different decision than Judge Colas under the legal doctrine of issue preclusion, which applies in subsequent cases involving the same legal and factual issues. That issue could arise if a municipality were to seek a ruling from a different circuit court on the constitutionality of the Acts. Whether the Dane County decision would preclude another circuit court from deciding the constitutionality of the Acts differently than Judge Colas would only be made in that subsequent case by the judge handling that matter. This obviously would take time and legal expense to litigate.
- Under Judge Colas' decision, municipalities would be required to bargain "wages." That term is not specifically defined in the Acts, but the Acts set forth what elements of compensation comprise "base wages" and what elements are excluded from that definition. Thus, an argument can be made that the mandatory duty to bargain under the Acts is limited to those elements of wages which are identified for purposes of defining "base wages." On the other hand, in decisions prior to the adoption of the Acts, the WERC has defined "wages" more expansively as encompassing any "economic benefit flowing from the employment relation-

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Wisconsin Attorney General Issues Revised Public Records Outline

Recently, Attorney General J. B. Van Hollen announced that the Wisconsin Department of Justice (DOJ) had issued a revised edition of the Wisconsin Public Records Compliance Outline ("Outline"). This September 2012 revision replaces the prior August 2010 version of the outline. The Outline is available at the DOJ's website at http://www.doj.state.wi.us/dls/OMPR/2012OMCG-PRO/2012_Pub_Rec_Outline.pdf and includes links to court cases. In his announcement, the Attorney General noted that knowledge of the Public Records Law helps to prevent violations and ensures that government is functioning as it was designed. Although the Attorney General's guidance is not binding legal authority, it should be seriously considered in any analysis, considering that the Attorney General is charged with enforcement of the Public Records Law. This article will address some of the important changes to the Outline.

Guidance on Fees For Responding to Requests. In a recent decision, *Milwaukee Journal Sentinel v. City of Milwaukee*, the Wisconsin Supreme Court concluded that the Public Records Law did not allow a school district to charge for the time spent redacting records; instead, it could only charge for those costs specified in the law, including reproducing and locating. In response to this decision, the Outline includes definitions for the "reproducing" and "locating," which are acts for which a district may charge under the statute. In contrast, other acts may not be charged. Specifically, according to the Outline, "[a]n authority may not charge a requester for the costs of deleting or 'redacting' nondisclosable information included in responsive records." The Outline also now specifies that "[g]enerally, the rate for an actual, necessary and direct charge for staff time should be based on the pay rate of the lowest paid employee capable of performing the task."

Guidance on Access to Contractor's Records. The Outline also includes guidance related to the disclosure of contractor's records in light of a recent Wisconsin Court of Appeals decision, *Juneau County Star-Times v. Juneau County*. That case involved an interpretation of the provision in the Public Records Law (Wis. Stat. s. 19.36(3)), which states: "Each authority must make available for inspection and copying any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the records were maintained by the authority." The request in *Juneau County Star-Times* sought billing records from a law firm hired by an insurance company to represent Juneau County. In that case, the insurance company was the contractor and the law firm was a subcontractor to the insurance company. The Court of Appeals concluded that the records of the subcontractor were subject to disclosure under Wis. Stat. s. 19.36(3).

In response to this case, the Outline now clarifies that the term "collect" in the Wis. Stat. s. 19.36(3) language means "to bring together to one place." The court determined that the statute was not written so narrowly as to require that the contract be for the purpose of collecting the records, and could refer to a contract between the authority's contractor and a subcontractor. Thus, based on the above, records custodians should be prepared to respond to records requests for records related to contractors and subcontractors. It is important to note, however, that this case is currently before the Wisconsin Supreme Court for review and a decision is expected by or before mid-July 2013.

Other Guidance. The Outline includes a link to Public Records Board guidance entitled *Guidelines for the Management and Retention of Public Record E-mail*. This new guidance primarily concerns retention of records under Wisconsin Administrative Code chapter Adm 12, which governs the management of records stored exclusively in electronic format by state and local agencies. Another change relates to identifying electronic records that may constitute a "record" under the law. The Outline states that "[e]-mails and other records created or maintained on a personal computer or mobile device, or from a personal e-mail account, constitute records if they relate to government business." Electronic records include content posted by or on behalf of authorities to social media sites, such as Facebook and Twitter, to the extent that the content relates to government business. The Outline advises authorities to adopt procedures to retain and preserve all such records.

There are also brief revisions to the section on enforcement and penalties under the law. These revisions state that costs and fees are available only to those parties who have filed or required the district attorney or Department of Justice to file an original mandamus action and that a requester cannot obtain punitive damages unless it files a mandamus action in a timely manner and actual damages are awarded.

Additional materials from the DOJ's free public seminars in October on the public records and open meetings laws can be found on its website.

— Richard F. Verstegen

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ship." It sum, it is unclear at this time what municipalities are mandated to bargain as "wages" if the Dane County decision applies to the bargaining.

- Under the Dane County decision, municipalities are not required to agree to any proposals made in collective bargaining regardless of their scope and his decision did not restore binding arbitration. As a result, municipal employers would still be allowed to implement their final offers after good faith bargaining.
- Under the Dane County decision, what were prohibited subjects of bargaining under the Acts are permissive subjects of bargaining; that is, a municipality may, but is not obligated to, bargain subjects other than "wages." Unions have been requesting bargaining on permissive subjects after Judge Colas' decision.

Complicating the situation even further is the fact that the Western District of Wisconsin decision by Judge Conley found the Acts constitutional in almost all aspects, but is on appeal. In addition, Judge Conley has under consideration a case in which the constitutionality of the Acts is challenged on the same grounds as addressed by Judge Colas. Each of these federal cases has the potential of playing into the legal landscape of municipal collective bargaining under the Acts.

Given this confusing and shifting landscape, it is our best judgment that municipalities wait to make any decisions on how to proceed with collective bargaining or handbook adoption until the Wisconsin Court of Appeals issues a decision on whether to stay Judge Colas' decision pending appeal.

— Steven C. Zach

Milwaukee's Procedure for Non-renewal of Alcohol Licenses Upheld

The Wisconsin Court of appeals recently reversed a circuit court decision that would have ordered the City of Milwaukee to issue a renewal of an alcohol license. *Pop Promotions, LLC v. City of Milwaukee*, 2011 AP 2335 (Sept. 6, 2012). The court of appeals upheld the notice provided to the owner as well as the hearing procedure limiting the time allowed for testimony and argument.

In that case, a nightclub known as Texture owned by Pop Productions, LLC applied to the city for renewal of its Class B Tavern and Tavern Amusement licenses. The city clerk scheduled a hearing before the city License Committee and sent notice to the owner. Police reports consisting of five separate incident reports and a synopsis were attached to the notice. Referring to the police reports, the notice then recited what appears to be boilerplate language informing the owner of the possibility that its application may be denied for a variety of reasons, that the public would be able to provide evidence at the meeting, that the committee would receive and consider evidence, that the owner would be given the opportunity to speak on behalf of the application, to respond and challenge any charges, to present witnesses under oath and to cross-examine opposing witnesses under oath. At the end, the notice provided a phone number to contact the License Division with questions.

At the License Committee meeting, the chair called the Texture application matter for a "contested hearing." The owner appeared with counsel. Under Milwaukee ordinances, contested hearings are generally limited to 30 minutes per side but time extensions are allowed as appropriate. Six witnesses testified, including two for the owner and Texture's counsel presented a closing argument. The hearing lasted approximately 3 hours. At its conclusion, the committee voted 3-2 to recommend denial of the application to the common council. Subsequently Texture asked the committee to consider additional evidence and the committee conducted a second hearing lasting about another hour. Once again, the committee voted 3-2 to recommend denial of the application and the common council unanimously adopted the recommendation.

Texture sought certiorari review; the circuit court reversed the decision and ordered the city to issue the license. It found that the notice did not sufficiently apprise Texture of the committee's intent and the nature of the objection to the renewal, that Texture was not given a fair opportunity to be heard and that the decision was not based on substantial evidence. The Court of Appeals disagreed. Texture argued on appeal that the notice failed to adequately explain that the hearing would be a contested case or that there would be time limits on testimony. The Court of Appeals held, however, that there is no requirement that the notice itself set out all the procedures applicable to the hearing. It noted that litigants are often required to check statutes and rules to learn applicable procedures and that the Milwaukee ordinances spelled out the time restrictions. Moreover, the committee had extended the length of the hearings to a combined four hours; Texture was permitted to introduce all of the evidence it offered; its counsel lodged no objection to the time limits and identified no witnesses or evidence it was not allowed to produce. The Court of Appeals reviewed the evidence and concluded that there was substantial evidence to support the city's decision.

This case suggests that a standard notice of a hearing on alcohol license renewal is sufficient as long as it gives notice that the application may be denied and gives a basic explanation of the grounds on which the denial may be based, the procedure to be followed and attaches police reports setting out the details of the complaints made against renewal.

— Mark J. Steichen

Non-renewal of Liquor License Subject to De Novo Review

In a decision recommended for publication, the Wisconsin Court of Appeals has ruled that municipal denials of liquor license renewals are subject to de novo review by the courts under Wis. Stat. § 125.12. *Nowell v. City of Wausau*, 2011AP1045 (August 21, 2012).

The City of Wausau decided not to renew the Nowells' combined intoxicating liquor and fermented beverage license. The circuit court applied the certiorari standard for review, citing *Marquette Savings & Loan Ass'n v. Village of Twin Lakes*, 38 Wis. 2d 310, 316, 156 N.W.2d 425 (1968). It concluded that the city had kept within its jurisdiction, acted according to law, had not acted arbitrarily, and based its decision on evidence in the record. Accordingly, the court affirmed the city's decision. The Nowells appealed, arguing that they were entitled to de novo review of the denial. The Court of Appeals agreed, reversed the judgment and remanded for further proceedings.

The Court of Appeals found the issue to be a straight forward matter of statutory construction. At the time *Marquette* was decided, there were different statutes applicable to fermented beverage and intoxicating liquor licenses. The intoxicating liquor statute did not specify any manner for judicial review and the Supreme Court adopted the certiorari standard as being generally applicable to the review of municipal decisions. In 1981, the legislature consolidated the statutes and current version, section 125.12(2)(d), continues the standard for judicial review that applied to fermented beverages when *Marquette* decision was issued.

The statute provides that: "The procedure on review shall be the same as in civil actions instituted in the circuit court." The appealing party must file a pleading. The opposing party must file an answer within 20 days, after which a hearing may be had within as few as 5 days. The court has the authority to issue subpoenas and to compel the attendance of witnesses. The hearing is held before the judge without a jury and the court must issue a decision within 10 days of the hearing. There is no provision for filing the record from the municipality with the court. The Court of Appeals found that these procedures are simply incompatible with the common law and statutory certiorari process in which review is almost always limited to the record made before the lower body, no complaint or answer is required and no evidentiary hearing is conducted. Given the change in statutory language, *Marquette* was no longer controlling law.

— Mark J. Steichen

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