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JoAnn Hart Named a "Lawyer of the Year" by Best Lawyers®

We are proud to announce that Boardman & Clark attorney JoAnn Hart was named the *Best Lawyers®* 2017 Employment "Lawyer of the Year" in Madison.

Employee Requests to Review Personnel Records: Responding Lawfully

Wisconsin municipalities should be mindful of their obligation to lawfully respond to requests from employees and former employees for access to certain personnel records. Wisconsin's Personnel Records Law, Wis. Stat. § 103.13, grants employees and former employees the right to review and supplement certain of their personnel records.

Under Wisconsin's Personnel Records Law, any Wisconsin employee, including a municipal employee, has the right to inspect any personnel documents maintained by the employer which "are used or which have been used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records," with some limited exceptions, discussed later.

The employer must provide the employee with the opportunity to see the personnel records within seven working days after the employee makes the request. In addition, if the employee is currently involved in a grievance against the employer, he or she may designate in writing a representative of the employee's union, collective bargaining unit, or other designated representative to review the employee's personnel records covered by the law which may have a bearing on the grievance.

The law does not attempt to define the term "personnel document." Instead, if an employee makes a request, the employer has to review the documents for that employee and determine whether the documents "are used or ... have been used" for any of the purposes listed in the statute. It is important for Wisconsin employers to realize that the location of a document does not determine whether an employee has a right to see the document.

For example, if the municipality uses annual written performance reviews to determine annual pay increases, but elects not to maintain the document in the employee's "personnel file," the employee still has a right to see the reviews. By the same token, if a municipality discusses a personnel situation with the attorney for the municipality and makes notes of the conversation and puts the notes in the employee's "personnel file" (not recommended), the fact that the notes happen to be in the employee's "personnel file" does not give the employee the right to see the notes under the statute. The notes are still confidential and protected by the attorney-client privilege. To avoid errors regarding such documents, the notes should always be maintained in a separate, more secure location.

Certain records are expressly excluded from the documents an employee is entitled to see. An employee does not have the right to see:

- (1) Records relating to the investigation of possible criminal offenses committed by the employee.
- (2) Letters of reference for the employee.
- (3) Any portion of a test document, except that the employee may see a cumulative total test score for either a section of the test document or for the entire test document.
- (4) Materials used by the employer for staff management planning, including judgments or recommendations concerning future salary increases and other wage treatments, management bonus plans, promotions and job assignments or other comments or

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ratings used for the employer's planning purposes.

- (5) Information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.
- (6) Records relevant to any other pending claim between the employer and the employee which may be discovered in a judicial proceeding. In other words, if the employee has the right to discovery of the documents through litigation, the employer can refuse to show the employee the documents under Wis. Stat. § 103.13.
- (7) Medical records if the employer believes that disclosure of the employee's medical records would have a detrimental effect on the employee. In such a case, the employer may release the medical records to the employee's physician or through a physician designated by the employee, and the physician may in turn release the medical records to the employee or to the employee's immediate family.

A municipal employer should take the following steps to respond to an employee's request to review personnel records:

- (1) Make sure the requester has the right to see the documents under Wis. Stat. § 103.13. Remember, "employee" always includes "former employee" and sometimes includes representative of the employee when the request is for records relating to the employee's grievance.
- (2) Gather all documents, wherever located, which may be within the scope of the request.
- (3) Review the documents to determine whether they must be disclosed, because they are used or have been used in determining qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, or are medical records.
- (4) Identify whether any of the exceptions noted above apply.
- (5) Consider getting legal advice for documents that fall into a gray area, such as documents that may fall into one of the statutory exceptions, or may constitute personal notes of a non-criminal investigation, notes of conversations with your attorney, documents that raise other legal issues, etc.
- (6) Within seven working days, arrange for a time for the employee or proper representative to review the records. Make sure the employee is supervised at all times while the employee is reviewing original personnel documents.
- (7) Make copies of any records requested by the employee. The municipality may charge a reasonable fee for providing copies of records, which may not exceed the actual cost of reproduction.
- (8) Permit the employee to submit any written statements concerning the records. If the employee disagrees with any information contained in the personnel records, the employee may request that the employer remove or correct that information. If the employee and employer cannot reach agreement on modification of the record, the employee must be permitted to submit a written statement explaining the employee's position. The employer must

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Focus On Energy Faces Uncertain Future

Focus on Energy ("FOE") is a statewide program that provides incentives and technical assistance to homes and businesses -- including local governments -- to reduce energy use and install customer-owned renewable energy. Since its inception in 1999 by act of state legislature, it has been widely viewed as a success story, providing over \$750 million in economic benefits to the state, according to one independent evaluation by the Cadmus group.

Recently, however, funding for the program has come under pressure. The statutes require the state's public utilities to spend 1.2% of their operating revenues to support the statewide program; municipal utilities and electric cooperatives can contribute additional funding at an average of \$8 per meter or opt to fund their own energy efficiency programs. Governor Walker's 2016 budget bill modified the support requirements by removing \$7 million in operating revenues associated with non-retail sales, saving money for ratepayers, but reducing overall funding for the program.

The Public Service Commission of Wisconsin ("PSCW"), which is charged with overseeing FOE, has yet to make budgetary decisions on allocations for renewable energy incentives in 2017 and 2018, so it remains unclear whether, or how much, money is available for renewable energy cash grants for businesses during the next two years.

The PSCW has, however, stepped up funding on researching ways to make the program more effective. It also provided additional funding support for a 0% interest revolving loan program, launched in January, designed to help businesses (including municipalities) interested in pursuing solar installations. Unfortunately, less than 10% of that money has been committed to actual projects and little appetite for the loan program has been demonstrated.

On September 1, the PSCW issued a surprise notice of investigation (PSCW Docket 5-FE-102) into FOE funding mechanisms. The ostensible aim of the investigation is to explore how the program can be better utilized to serve rural areas. However, the notice makes clear that the PSCW will be considering the possibility of diverting FOE funds that are either currently unallocated, or that have been previously allocated but remain unspent or in reserve, to use for rural broadband development. Such diversion would further erode FOE funding support, notwithstanding the importance of addressing the issue of expanding broadband to underserved areas of Wisconsin.

Numerous stakeholders have intervened in the proceeding, including all the state's major utilities, consumer and environmental advocacy groups, and local governments that rely on FOE to support their own energy efficiency efforts and climate change goals.

At a time when state budgetary pressures are mounting, one of Wisconsin's most respected energy programs is proving vulnerable to attack.

— Richard A. Heinemann

Denial of Frac Sand Mining Permit Upheld by Appeals Court

In a published decision, the Wisconsin Court of Appeals upheld the denial by the Buffalo County Board of Adjustment ("BOA") of a conditional use permit for frac sand mining. *State ex rel. Earney v. Buffalo County Board of Adjustment*, 2016 WI App 66 (decision issued July 19, 2016, final publication Sept. 12, 2016) (petition for review pending). The decision affirmed the order of the circuit court, which had affirmed the denial upon certiorari review.

Petitioners (collectively referred to in the decision as "Earney") applied to the BOA for a conditional use permit to mine industrial sand for "gas and/or oil production and potential unknown markets." The process as described in the application included blasting, transportation of the raw material to a "wet processing facility," washing and sorting the material, treating and recycling the water used in the washing process, on-site stacking and drainage of wet sand and loading the wet sand onto trucks for transport to Minnesota. Mining would occur 200 days per year and the wet plant would operate five days a week for 18 hours per day. The mining would produce an average of 80 truck loads with an additional 80 return trips per day. All of the proposed hauling routes involved the use of Schoepps Valley Road, which has sharp corners throughout its length.

Earney submitted the applications to the Town of Waumandee and the Buffalo County Land Resources Committee seeking recommendations of approval to the BOA. The town recommended approval. The committee vote was split and no recommendation of approval was made. After filing the conditional use permit application, Earney submitted a proposed reclamation plan pursuant to the county's nonmetallic mining ordinance. The county engaged an outside engineering firm to review the plan. The firm concluded that "the majority of the reclamation plan" met the intent of the ordinance. However, the firm qualified its report, stating that its review had been " cursory."

The BOA held two hearings. The petitioners submitted lengthy testimony. Opponents of the application presented testimony from five experts. A soils scientist, formerly the chair of the soil science department at one university and the former dean at another university specializing in resource development, testified that the agricultural land would have zero possibility of producing agricultural crops and forest land would have only a 20% chance of succeeding after reclamation. An experienced mining engineer and employee of the U.S. Bureau of Mines testified about his concern about potential health risks from chemicals used in the washing process as well as the amount of water required. An education director for the National Eagle Center explained that the project would likely degrade and destroy winter habitat for Golden Eagles. A statistician talked about air quality concerns, particularly from the diesel fumes that would be spewed by all the trucks. Residents raised concerns about traffic, chemical use, property values and air quality among others.

After reviewing the standard broad array factors to be considered in reviewing applications for conditional use permits under Buffalo County's zoning ordinance, the BOA voted unanimously to deny the application. The board laid out numerous reasons for its denial. They included negative effects on tourism, air pollution, negative impacts on water quality and quantity,

decreased property values, the sharp corners on Schoepps Valley Road, traffic hazards to school children attending schools near the hauling routes as well as general traffic safety hazards to residents. The board also concluded that the project did not comply with the town's future land use plans.

On appeal, Earney made two principal arguments for overturning the BOA's decision. First, he contended that the BOA had exceeded its jurisdiction by relying on "reclamation standards prohibited by state law." He claimed that the engineering firm's report established that their reclamation plan would be successful. In addition, they argued that the board could not consider environmental factors in its zoning ordinance because the reclamation plan addressed those issues. The appeals court had no difficulty in rejecting Earney's argument for several reasons. Responsibility for approval of reclamation plans lies with the county's Land Resources Department, not with an engineer. The department had not conducted a hearing to discuss the plan, despite an obligation to do so under the mining ordinance. Moreover, the engineering firm's work hardly constituted a conclusive examination or approval of the plan. The court of appeals found that board properly considered all of the factors in the county's zoning ordinance regarding conditional use permits.

Earney's second principal argument on appeal was that the BOA was equitably estopped from considering the condition of Schoepps Valley Road because one of the petitioners informed the board at the first hearing that he was discussing a plan with town officials to improve the road at his expense. Earney asserted that a BOA member confirmed at that hearing that the road was under the town's jurisdiction and that the board would not be addressing concerns about the road in its assessment of the conditional use permit application. Rather than deciding whether these facts would satisfy the elements of equitable estoppel, the court noted that the BOA had cited many valid reasons for denying the application that went beyond issues relating to the road. Upholding the BOA's conclusions on any one of those criteria would be sufficient to affirm the board's decision. Consequently, the road issue was moot.

— Mark J. Steichen

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attach the employee's statement to the disputed portion of the personnel record. The employee's statement must be included whenever that disputed portion of the personnel record is released to a third party as long as the disputed record is a part of the file. This requirement is spelled out in Wis. Stat. § 103.13(4).

Municipalities should take care to comply with the law regarding requests to review personnel documents. An employer that violates the provisions of Wis. Stat. § 103.13 may be fined up to \$100 for each violation. Each day of refusal or failure to comply with the duties of Wis. Stat. § 103.13 is a separate violation.

— JoAnn M. Hart

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