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Seventh Circuit Sides with Cities on Taxicab Deregulation

Last month, the Seventh Circuit Court of Appeals (whose rulings create binding precedent in Wisconsin) issued two related decisions upholding a city's right to allow for increased competition in the taxicab industry.

The last clause of the Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation. This is commonly referred to as the "takings clause." At issue in the two cases was whether the takings clause prohibited cities from allowing competition with established taxi services in the city, whether from new taxi companies (in Milwaukee) or from ride sharing services like Uber (in Chicago).

In *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, No. 16-1008 (7th Cir. Oct. 7, 2016), the court concluded that the City of Milwaukee could dramatically increase the number of taxicab permits it issued without running afoul of the takings clause. From 1992 to 2013, a Milwaukee ordinance had capped the number of taxicab permits to the number that were in existence on January 1, 1992 and that were renewed. The City refused to issue new permits, although existing permits could be sold on the open market. Over time, by virtue of non-renewals, this resulted in the number of taxicab permits in Milwaukee falling from 370 to 320, which caused the price of a permit on the open market to climb as high as $150,000.

A 2013 lawsuit successfully challenged this permit-cap ordinance as a violation of the equal protection and substantive due process clauses of the Wisconsin Constitution. In response, Milwaukee began issuing a new permit to every qualified applicant. This diminished the profitability of existing taxi companies, which had faced very little competition under the old, limited-permit regime.

The existing taxicab companies sued, arguing that by increasing the number of permits available, the City had taken property away from them without compensation. The Seventh Circuit upheld Milwaukee's new permitting ordinance and soundly rejected the existing taxicab companies' takings clause argument, declaring that the argument "borders on the absurd."

The court observed that, while property can sometimes take an intangible form (e.g., patents), a taxicab permit merely grants the right to operate a taxi, not to exclude others from doing so. As such, the existing companies were not deprived of any property right when the city decided to begin issuing new permits. The city did not enter into any contract with the taxi companies to freeze permits for a certain period of time, and the companies were on notice that there was no guarantee that the ordinance would remain in force indefinitely. The court acknowledged that the city's decision to free up entry into the taxi business would reduce the revenues of individual taxicab companies, but it observed that that is simply the normal consequence of replacing a cartelized market with a competitive one.

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Federal Court Upholds a Provision in Wisconsin's Right-To-Work Law

In a decision dated September 26, 2016, U.S. District Judge J.P. Stadtmueller granted the State of Wisconsin's motion to find judgment in its favor, thus upholding a specific provision of Wisconsin's right-to-work law, in a lawsuit brought by two unions in *International Union of Operating Engineers Local 139 v. Schimel, et al*.

As background, the plaintiffs are two Wisconsin labor unions representing around 11,000 Wisconsin employees in a variety of collective bargaining agreements across the state. Before Wisconsin's right-to-work law (Act 1) was enacted, each of these unions had clauses in their collective bargaining agreements that required all bargaining unit employees to pay their "fair share" for the union's representation. In other words, unions could charge non-union member employees in the bargaining unit representation fees for (1) collective bargaining negotiation; (2) contract administration; and (3) grievance responses.

When Act 1 was enacted, one of its provisions (Wis. Stat. § 111.04(3)(a)(3)) prohibited unions from compelling workers to pay any dues, including those related to collective bargaining, contract administration and grievance processing. In response to these changes, one of the plaintiff unions proposed to several employers that they enter into a "Fair Representation Fee Agreement" that contains, more or less, a conditional representation fee requirement. Knowing that these agreements could only be enforced if a court found that Act 1 did not preclude their enforcement, the plaintiff unions brought suit against Attorney General Brad Schimel and James Scott, Chair of the Wisconsin Employment Relations Commission.

The plaintiffs made two arguments why Section 111.04(3)(a)(3) of Act 1 was unconstitutional. First, they argued that it was preempted by the National Labor Relations Act (29 U.S.C. § 164(b)). Specifically, they argued that it attempts to regulate activities that are protected or prohibited by the NLRA and, because federal law preempts state law, this Section was unconstitutional. Second, they argued that the Section violates the Fifth Amendment of the United States Constitution because they were forced to provide equal representation services to dues-paying and non-dues-paying members, which constitutes a "taking" of their property. They lost on both of these arguments.

In a swift decision, the court dismissed the preemption argument, finding the Seventh Circuit Court of Appeals decision in *Sweeney v. Pence*, 767 F. 3d 654 (7th Cir. 2014), binding. In Sweeney, plaintiffs challenged Indiana's right-to-work law. Finding that the NLRA gives states wide latitude to regulate unions, the court held that Indiana's law was not preempted under the NLRA. While the parties in *Sweeney* did not raise the Fifth Amendment "taking" argument, the court, appearing to recognize the argument would be raised in future cases, discussed it at length and rejected it. Specifically, it held that there was no taking because under the NLRA, the unions are "compensated" by their exclusive "seat at the negotiation table."

Relying on the holding and taking language from *Sweeney* to reject both of plaintiffs' arguments, Judge Stadtmueller found in favor of AG Schimel and Mr. Scott and subsequently dismissed the lawsuit against them.

— Kate A. Harrell

Seventh Circuit Sides with Cities on Taxicab Deregulation

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In a companion lawsuit, *Illinois Transp. Trade Ass'n v. City of Chicago*, No. 16-2009 (7th Cir. Oct. 7, 2016), the court came to a similar conclusion with respect to taxicabs operating in Chicago. In that case, taxicab companies sued the city of Chicago arguing, among other things, that allowing ride-sharing companies such as Uber and Lyft to operate in the City violated the takings clause. The Seventh Circuit rejected that argument, observing that "'Property' does not include a right to be free from competition. A license to operate a coffee shop doesn't authorize the licensee to enjoin a tea shop from opening." Because the city did not take away existing companies' taxi permits, but merely granted other similar companies the right to compete in the same market, no property had been taken.

The existing companies also argued that the City discriminated against them by allowing Uber and other ride-sharing services to operate in the City without requiring them to comply with the same rules about licensing and fares as taxicabs. The court rejected this argument as well, pointing out that different products or services do not, as a matter of constitutional law, always require identical regulatory rules, so long as the differences in the regulatory schemes are not arbitrary. For example, the City pointed to the fact that ride-sharing users generally enter into a contractual relationship with the ride-sharing company that specifies terms such as fares, driver qualifications, and insurance. In contrast, someone hailing a taxi has no pre-existing contract with the taxicab company so it makes sense to have these terms set forth in regulations. In the end, the court concluded that the City had convincingly argued that there were enough differences between taxi service and ridesharing programs to justify different regulatory schemes.

While neither of these 7th Circuit cases requires that municipalities take steps to deregulate their taxicab markets, the Seventh Circuit has made clear that simply allowing for increased competition, whether by issuing more taxi permits or allowing ride-sharing companies to operate, does not give rise to constitutional takings clause claims against the municipality by existing taxicab companies.

— Julia Potter

Responding to Requests for Records under the Public Records Law

Responding to requests for records under the Wisconsin Public Records Law is an integral part of duties for officers within municipalities. Such responses, however, must follow important steps in order to be fully compliant with the Public Records Law. This article provides a brief overview of the various steps that should take place in responding to such requests.

An important initial step after receiving a request for records is to identify the relevant ordinances or policies that may dictate any response. These ordinances or policies are important because they may include provisions that are different than existing law. Further, such ordinances or policies usually identify the legal custodian of records. The request should be forwarded to the legal custodian's attention because the legal custodian is vested with the full legal power to render decisions and carry out the municipality's statutory public records responsibilities.

The next step in responding to any records request is to identify the manner and the time limits of a required response. Requests for records do not have to be made in writing, and as a result, oral requests must be considered. Officials cannot require requesters to put requests in writing, although they can ask the requester to provide a written request so that it is clear as to the exact records being requested. A municipality must "as soon as practicable and without delay" either fill the request or notify the requester of the determination to deny the request in whole or in part and the reasons therefore. The Department of Justice has stated that ten days generally is a reasonable time for a response, although this is dependent on several factors, including the press of other business.

After this step, it is important to analyze the request and gather all documents within the scope of the request. A request which reasonably describes the information or record requested is sufficient. A request for a record without a reasonable limitation as to subject matter or length of time does not constitute a sufficient request. The municipality is not required to create a new record by extracting information from existing records and compiling the information in a new format, and a request can be denied if the information sought is not contained in a record.

Next, a legal custodian should determine whether the document sought is a "record." A "record" is broadly defined to include "[a]ny material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority." There are certain documents that fall outside of this broad definition, including drafts, notes, and like materials prepared for the originator's personal use. Therefore, it is important to determine whether the type of document requested is even a "record" within the definition; if it is not a "record," the request can be denied.

After determining whether something is a record, the legal custodian must then determine whether the record is subject to disclosure. The Wisconsin legislature has directed public entities to construe the Public Records Law "with a presumption of complete public access" consistent with the public policy that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Despite this presumption of public access, there are certain statutory provisions and case law limitations that may exempt the records from disclosure. Further, legal custodians must generally apply a balancing test before permitting disclosure, weighing the public's interest in nondisclosure of the information against the public's interest in disclosure, and this balancing test may limit disclosure. However, a record may need to be disclosed in part, if only part of the record is exempt from disclosure.

If the determination is made to disclose the records, the legal custodian must then take two additional steps. First, the legal custodian must determine whether to charge for fees (this decision can be made earlier in the process, but it is most often addressed here). In this respect, the legal custodian can charge for various fees, such as location fees (if over $50.00) and copying costs. A records custodian can also demand payment of fees in advance if fees exceed $5.00. Fees may not exceed the actual, necessary and direct costs to the municipality, and fees may not be charged to redact information from records. Second, the legal custodian must determine whether any person is entitled to notice of the disclosure of the record. The general rule is that no notification is required, but there are certain exceptions where notice must be provided to a "record subject" prior to providing a requester with access to a record. Legal counsel should be contacted in these situations.

The final step for any records request is either to disclose the record (which should be accompanied by a cover letter) or to not disclose the record and draft a denial letter. If denying the request, even in part, the denial letter must be sufficiently specific as to the reasons for denial. Any reason supporting the denial that is not properly raised in the letter might not be considered in any subsequent court challenge. The denial letter must also inform the requestor that he or she may seek review of the denial by the attorney general or a court.

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Supreme Court To Hear Case on Whether Internal Management Committee Meetings Are Subject to Open Records Law

The Wisconsin Supreme Court has agreed to hear a case involving the question of "Whether a formal committee, created by school district officials, pursuant to school district policies, in order to carry out school district functions, is a 'governmental body' subject to the Open Meetings Act." This case will be of great interest to municipalities as it will be one of the first court cases specifically addressing this issue. There are a handful of Attorney General Opinions and letters addressing aspects of when a "committee" meets the definition of a "governmental body" within the Open Meetings Law. Those Attorney General opinions, while useful, still leave a number of situations unresolved and are only considered persuasive authority and not binding on courts. The Court's decision in this matter, which is a review of an unpublished Court of Appeals case, will likely provide additional guidance to municipalities.

In this case, a parent complained about the content of reading materials for a course his freshman daughter was taking in the Appleton School District. He specifically requested that the district provide an alternative course, rather than a review of the existing course materials. In response to his request, the district superintendent directed two administrators, who were responsible for the planning, selection, revision, and implementation of curriculum within the district, to respond to the parent's request.

The two administrators ultimately decided to conduct a review of the existing books in the class the student was in to determine whether different books, as opposed to an entirely new course, would resolve the parent's concern. They formed a "Communication Arts 1 Materials Review Committee" ("Review Committee") to conduct the evaluation. During the course of the review, they expanded the Review Committee's duties to include a full review of the course materials because the materials had not been reviewed for eight years.

The administrators developed the procedures utilized for the Review Committee's evaluation of the course materials by using a modified version of a process described in a Board Rule and the Assessment, Curriculum, and Instruction Department Handbook. The Review Committee was not created based on any specific provision of the Board Rule or Handbook, and the Board never took formal action to approve or direct the Review Committee's creation or the processes of the Review Committee.

The Review Committee had seventeen members and held nine meetings between October 2011 and March 2012. The parent asked to attend the Review Committee meetings, but he was told they were closed to the public. The administrators acknowledged that one reason they wanted the meetings closed was to prevent parents from attending and publicizing statements made by Review Committee members about particular books. The administration explained that this parent had previously publicized teachers' statements made in a standard Review Committee meeting, and the teachers did not want that to occur again.

The Review Committee read approximately 93 fiction books and recommended a list of 23 books to the Board's Programs and Service Committee. In April 2012, the Programs and Service Committee adopted the recommended reading list as proposed, and the Board adopted that proposed list later that month.

The Review Committee meetings remained closed, and no public meeting notices were posted. The parent filed a complaint with the District Attorney who refused to prosecute. A private action was brought in circuit court alleging the Review Committee was a governmental body, which violated the Open Meetings Law by failing to give notice of the meetings and excluding the public. The circuit court held that the Review Committee was not a "governmental body" subject to the Open Meetings Law. The Court of Appeals affirmed that decision. The Court of Appeals determined that the precise issue in this case was whether the Review Committee was "created by" a "rule or order" within the meaning of the Open Meetings Law. The Court of Appeals focused on one particular Attorney General letter which attempted to provide guidance on this issue. The Court of Appeals noted that particular Attorney General letter described two scenarios with different results: (1) If a school board had in fact given a superintendent a directive to make a recommendation to it, which directive the superintendent then delegated to the management team, then the Open Meetings Law would apply. (2) If the management team had developed recommendations on its own initiative to submit to the board, then the Open Meetings Law would not apply.

In this case, the Court of Appeals held that because there was no established district procedure for requesting an alternative course or responding to the specific request the parent made in this instance, the Board Rule and Handbook did not determine how the Review Committee should proceed. Rather, the superintendent directed the administrators to respond to the parent's request and was not further involved in the development of any process. The Court of Appeals found the administrators decided on their own initiative to create the Review Committee and then subsequently expanded the scope of the Review Committee's work to include a review of the existing course materials and make a recommendation to the Board. As a result, the Court held the Review Committee was not a "governmental body" subject to the Open Meetings Law.

In their briefs to the Court of Appeals, the parties noted the difficulty was trying to draw the line between when meetings

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of administrators, professionals and staff were just part of the ordinary day-to-day business of a school as opposed to when such meetings might be construed as being a meeting of a "governmental body." The district, in its argument to the Court, noted that, if the Open Meetings Law was interpreted as broadly as the parent was suggesting in this case, the number of meetings that would be required to be subject to the Open Meetings Law in not only this district but in all school districts across the state would be endless. Districts would be forced to notice and open to the public any employee or departmental meetings not only related to curriculum but in other areas such as building repairs, insurance, sanitary facilities, school hours, continuity of educational programing, and providing court mandated services. The district suggested such a broad interpretation would result in inefficiencies and handcuff superintendents and others from effectively running the school.

The parent had also raised an issue before the Court of Appeals as to whether, because the Review Committee was created by a "high ranking administrator," that it constituted a "governmental body." The Court of Appeals ruled the parent had forfeited that argument because it had not raised it at the circuit court level. The parent has renewed that argument in his brief to the Supreme Court. Whether the Supreme Court will address that argument and, if so, what affect it might have on the case also remains to be seen. The Attorney General has held in some circumstances that a directive from a high-ranking official creating a body and assigning it duties is a "rule or order" sufficient to bring the committee within the meaning of "governmental body" under the Open Meetings Law. In this case, an assistant superintendent was the person who formed the committee in response to the superintendent's directive to respond to the parent's complaint.

It will be interesting to see where the Supreme Court draws the line in these situations. Oral argument has not yet been scheduled, but a decision should be issued before next summer.

— Douglas E. Witte

Requests for Records under the Public Records Law

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Compliance with the Public Records Law is extremely important. Any missteps can result in litigation and substantial penalties. A requester may seek enforcement of the right of access to records by filing a lawsuit or by requesting the district attorney or the attorney general to bring an action. A requester who prevails in any action may generally be awarded reasonable attorneys' fees, damages, other actual costs, and in some cases punitive damages. As a result, municipalities should take steps to insure they are properly responding to records requests and seek legal advice as necessary.

— Richard Verstegen

WERC Announces Revised CPI-U

CPI-U REVISED for Bargaining Agreements Beginning January 1, 2017

On November 4, 2016, the Wisconsin Employment Relations Commission (WERC) published a revision to the Department of Revenue's calculation of the applicable CPI-U. This is a result of the Bureau of Labor Statistics (BLS) releasing four months of revisions due to an error it reported in October and described as a problem in the "indexes for prescription drugs… published for May 2016 through August 2016, which affected the U.S. All items index."

After reviewing all of the previously published rates, the only one affected by the revised BLS index is the one calculated for collective bargaining agreements with a beginning date of January 1, 2017. When originally reported, the cap was .68%. It has now been reduced to .67%.

If you are still bargaining to reach an agreement effective January 1, 2017, use the new CPI-U data. If the parties to such an agreement have previously settled for a stated base wage increase above .67%, they may wish to consult an attorney or the WERC to determine the potential impact.

The relevant portion of the WERC's table is reproduced below:

Consumer Price Index Calculation Chart (updated last on 11-07-16)

The Wisconsin Department of Revenue (DOR) has advised the Wisconsin Employment Relations Commission (WERC) that the CPI-U increase applicable to one year collective bargaining agreements with a term beginning on the following dates is as noted in the corresponding column in the chart below.

*Revised 11/4/2016.

Beginning date of one year collective bargaining agreement	Applicable CPI-U as determined by WI Department of Revenue
April 1, 2017	0.93%
March 1, 2017	0.80%
February 1, 2017	0.73%
January 1, 2017	0.67%*
January 1, 2017	0.68%

— Douglas E. Witte

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Boardman & Clark LLP
Fourth Floor
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701 -0927

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Eileen A. Brownlee	822-3251	ebrownlee@boardmanclark.com
Jeffrey P. Clark	286-7237	jclark@boardmanclark.com
Anita T. Gallucci	283-1770	agallucci@boardmanclark.com
Kathryn A. Harrell	283-1744	kharrell@boardmanclark.com
JoAnn M. Hart	286-7162	jhart@boardmanclark.com
Richard A. Heinemann	283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	286-7210	pjohnson@boardmanclark.com
Michael J. Julka	286-7238	mjulka@boardmanclark.com
Lawrie J. Kobza	283-1788	lkobza@boardmanclark.com
Julia K. Potter	283-1720	jpotter@boardmanclark.com
Mark J. Steichen	283-1767	msteichen@boardmanclark.com
Richard F. Verstegen	283-7233	rverstegen@boardmanclark.com
Douglas E. Witte	283-7529	dwitte@boardmanclark.com
Steven C. Zach	283-1736	szach@boardmanclark.com