

# Municipal Law Newsletter

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## ***New Law Governs Police Officer Hiring and Record Retention***

On November 9, 2021, Wisconsin Act 82 took effect which creates new requirements for police departments in their hiring practices for police officers and for the records they must keep when an officer separates from department employment. Act 82 also establishes new standards for the Law Enforcement Standards Board to consider with respect to decertification of any police officer.

### **Hiring Practices**

The new law requires the following:

- A police department which is engaged in a hiring process for a new officer must require each candidate that it interviews for that position, and who is or has been employed by another police department, to execute a written waiver that explicitly authorizes those other departments to disclose the applicant's employment files to the hiring department.
- The waiver must also contain language that releases the hiring department and each department that employs or has employed the applicant from any liability related to the use and disclosure of the applicant's employment files.
- Any applicant who refuses to execute the waiver cannot be considered for employment by the hiring department or be considered for certification by the Law Enforcement Standards Board.
- The hiring department must, at least 30 days prior to making its hiring decision, submit the waiver to each department that has employed the applicant.
- A department that receives a waiver must make the requested employment files available to the hiring department not more than 21 days after receiving the waiver.

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## **New Law Governs Police Officer Hiring and Record Retention**

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- The hiring department may also conduct an official oral interview of individuals from departments that employed the applicant.
- A department which is provided with such a waiver must disclose the applicant's employment files by either providing copies to the hiring department or allowing that department the opportunity to review the files at the hiring department's offices.

Under these provisions, a department is only required to obtain waivers from any applicant it intends to interview for the position. Therefore, if the department is engaged in a screening process prior to interviewing, it need not obtain waivers of those applicants it screens out prior to the interview process. As a practical matter, it is more efficient to have each applicant sign a waiver and require it to be submitted along with the rest of the application documents submitted to the hiring department.

These new requirements do not require a hiring department to conduct a background check of each interviewed applicant's employment files from other agencies. Rather, the new law requires only that the hiring department submit the waiver to each department that employed the applicant at least 30 days prior to the hiring decision. It is significant that the statutory language identifies the applicant for whom this must be done in the singular. That implies that a hiring department need only submit the waiver with respect to the applicant who emerges as the leading candidate for the position subject to a background check, which must be done at least 30 days prior to the hiring decision. Because of this time frame, and the potential that other aspects of the background check may be completed prior to 30 days of a conditional offer of employment, departments may wish to submit the waivers to one or more applicants under consideration so that its hiring decision is not held up until the 30 days have expired.

Finally, the new statute provides immunity from liability to those departments for complying with these requirements.

### **Record Detention**

The new law provides a new, broad definition of the "employment file" that is required to be maintained by a police department and disclosed pursuant to a waiver presented to it by any other department which is interviewing a current or separated officer from the police department. This file includes all files relating to a person's employment, including performance reviews, files related to job performance, internal affairs investigative files, administrative files, previous personnel applications, personnel-related claims, disciplinary actions, and all substantiated complaints and commendations. It does not include pay or benefit information, similar administrative data or information that does not relate to performance or conduct, or medical files unless the medical file relates to mental competency issues bearing on the person's suitability for a law enforcement, tribal law enforcement, jail, or juvenile detention officer position.

The potential impact of this definition of "employment file" is to require that all investigative materials, and any separation agreements entered into between an officer and a department and one of its officers, be disclosed to any department subsequently seeking to hire that officer. The intent of this new definition is to prohibit a department from not disclosing such records on the basis that they are not technically part of the officer's personnel file, either because the officer resigned prior to the beginning or completion of an investigation or negotiated into a separation agreement a non-disclosure provision.

As a practical matter, many departments utilized broad waivers in their hiring practices that required previous employing departments to disclose many, if not all, of the documents contained in the new definition of "employment file," either through document disclosure or background interview. In addition,

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separation agreements generally are considered subject to disclosure under Wisconsin's Open Records Law, notwithstanding the presence of a non-disclosure provision; however this new definition removes all doubt. Interestingly, however, the new law specifies that its mandate does not extend to separation agreements or personnel documents that contained non-disclosure provisions prior to November 9, 2021, which suggests an on-going practice in some departments of honoring such provisions notwithstanding the existence of a broad waiver covering such documents or a broad application of the Open Records Law.

### **Law Enforcement Standards Board**

The new law also now requires the Law Enforcement Standards Board to decertify, among other reasons, any officer who:

- Fails to comply with the waiver provisions;
- Resigns in lieu of termination or is terminated for just cause unless the Board determines decertification for these reasons is not warranted; or
- Is convicted of a felony or domestic abuse and requires an officer to notify the Board within 30 days of the conviction.

### **Conclusion**

The goal of this new law is to provide transparency in the hiring process of police officers and to eliminate any practices which shield employing departments from learning about the disciplinary history of applicants. One potential impact of this new legislation is that there may be circumstances in which an officer faced with potential discipline will be more inclined to challenge disciplinary charges under Wis. Stat. § 62.13(5)(em) rather than voluntarily resigning, because under the latter option the officer will not be able to avoid the disclosure of the underlying issues by entering into a separation agreement and seeking employment elsewhere.

— *Steven C. Zach*

## ***Financing Opportunities for Local Governments under the Infrastructure Investment and Jobs Act***

On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) became law. This is the single largest hard infrastructure investment in American history at roughly \$1.2 trillion, which includes \$550 billion in new investments for transportation, natural resources, power and energy, environmental remediation, broadband, cybersecurity and resilience.

With the IIJA's enactment, the focus now shifts to its implementation. Federal agencies like the Department of Transportation, Department of Energy, and the Environmental Protection Agency will be responsible for implementing the law and will need to administer the billions of dollars in grants provided by the IIJA. Local governments should begin planning now for the financing opportunities afforded by the IIJA.

Local governments can access IIJA funds in three general ways: (1) meeting certain eligibility criteria for formula funds; (2) receiving suballocations from state governments; and/or (3) applying for competitive grant opportunities.

Below is a summary of notable financing opportunities for local governments under the IIJA:

### **Transportation:**

- New \$5.0 billion Safe Streets and Roads for All program to directly support local initiatives to prevent death and serious injury on roads and streets (commonly referred to as "Vision Zero" or "Toward Zero Deaths").
- New \$7.3 billion PROTECT program to be administered by U.S. DOT. Competitive planning grants will be available for communities to assess vulnerabilities to current and future weather events, natural disasters, and

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## Financing Opportunities for Local Governments

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changing conditions; and to plan transportation improvements and emergency response strategies to address those vulnerabilities. Competitive resilience improvement grants will also be available for communities to carry out resilience improvements and strategies.

- New \$15.8 billion Bridge Investment Program to improve the safety, efficiency, and reliability of both large bridges in poor condition as well as bridges that are in rural and tribal areas.
- New \$500 million Strengthening Mobility and Revolutionizing Transportation (SMART) Grant Program for projects demonstrating transportation technology integrations, building on the success of smart cities and prior challenges.
- New \$2.5 billion Charging and Fueling Infrastructure Grant to strategically deploy publicly accessible infrastructure for electric vehicle charging, hydrogen fueling, propane fueling, and natural gas fueling infrastructure along designated alternative fuel corridors or in certain other locations. Priority will be given to rural areas in low and moderate income neighborhoods and communities with a low ratio of private parking spaces to households or a high ratio of multiunit dwellings to single family homes. Local governments are authorized to provide a portion of these funds to a private entity for operating assistance.
- New \$500 million Reconnecting Communities pilot program to support planning and construction to remove barriers to community connectivity and rectify harms caused by past transportation investments.
- \$2.0 billion Rural Surface Transportation Grant Program available to local governments to improve and expand the surface transportation infrastructure in rural areas.

- New \$3 billion Railroad Crossing Elimination Program to fix rail and road crossing congestion in communities.
- Appropriates \$21.25 billion for Federal Transit Funding, including the reauthorization of \$15 billion for the Fixed Guideway Capital Investment Grant program, a new \$1.75 billion All Stations Accessibility Program, and \$250 million for the Enhanced Mobility for Seniors and Individuals with Disabilities program.
- \$25 billion for Airport Infrastructure Grants, the Airport Terminal Program, and the Federal Aviation Administration (FAA) Facilities and Equipment program.
- New \$10.0 billion National Infrastructure Project Assistance program for projects generating national or regional economic, mobility, or safety benefits for large and smaller scale projects.
- Additional \$7.5 billion for the Local and Regional Project Assistance program (the RAISE/BUILD program) for surface transportation projects that will have significant local or regional impacts.

### Natural Resources:

- \$11.713 billion each for the Clean Water and Drinking Water State Revolving Funds (SRFs) over five years (49% as principal forgiveness/grants, 51% as loans).
- \$15 billion over five years for lead pipe replacement through the Drinking Water SRF (49% as principal forgiveness/grants, 51% as loans).
- \$10 billion in grants over five years to address emerging contaminants and PFAS drinking water contamination (\$1 billion through the Clean Water SRF; \$4 billion through the Drinking Water SRF; \$5 billion for underserved communities).
- \$500 million for the STORM Act to provide support through loans and grants to local



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communities facing rising water levels, coastal erosion and flooding.

- \$3.5 billion for the FEMA Flood Mitigation Assistance program, which helps provide financial and technical assistance to states and communities to reduce the risk of flood damage to homes and businesses through buyouts, elevation, and other activities.
- \$1 billion for the FEMA Building Resilient Infrastructure and Communities (BRIC) Program, a pre-disaster mitigation program supporting states, local communities, tribes and territories undertaking hazard mitigation projects to reduce the risks they face from disasters and natural hazards.

### **Energy, Energy Efficiency, and Building Infrastructure:**

- \$550 million for the Energy Efficiency and Conservation Block Grant to fund activities to reduce fossil fuel emissions in a manner that is environmentally sustainable and to maximize benefits for local and regional communities.
- \$225 million for grants to implement updated building energy codes.
- \$50 million for Battery and Critical Mineral Recycling grants to establish or enhance programs for battery collection, recycling, and preprocessing.

### **Environmental:**

- \$1.5 billion over five years for the EPA Brownfields program to help communities, States, Tribes and others to assess, safely clean up and sustainably reuse contaminated properties.
- \$3.5 billion available for 5 years for the Hazardous Substance Superfund program to allow EPA to invest in clean-ups and continue moving forward on remedial actions for Superfund sites.

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## ***Anita Gallucci Wins Distinguished "Friend of Public Power Award"***

*By: Richard A. Heinemann*

Anita Gallucci, my friend and colleague at Boardman Clark, has been a trusted advisor of municipal utilities for nearly 35 years. Over that time, she has built on the legacy of other notable Boardman public power attorneys such as Dick Olson, Roy Thilly, Mike Stuart and Mike May, to become Wisconsin's foremost expert on such key areas such as municipal telecommunications, right of way and territorial issues. At this year's Municipal Electric Utilities of Wisconsin (MEUW) annual conference, her career achievements were warmly recognized when she was granted MEUW's "Friend of Public Power" award.

Anita's practice encompasses a wide range of areas in general municipal and public utility law. But as a recent MEUW profile recounted, Anita is best known for a number of notable cases that affirmed the right of municipal utilities to provide telecommunications services; established the right of municipal utilities to serve their own facilities in neighboring utility territory; affirmed the right of municipalities to charge reasonable pole attachment fees outside the framework of FCC rules; and established that utilities, not municipalities, are responsible for the cost of relocating utility poles.

In his remarks presenting the award to Anita, Tim Heinrich, MEUW's Executive Director, spoke admiringly about his first impressions of Anita shortly after he took on his position in 2017, observing that he quickly saw Anita as someone deeply committed to MEUW and its members. That commitment and passion has held true throughout her career. As Anita herself has said, "I love what I do and the clients I work for -- I really believe in public power as the embodiment of local control and have been proud to help municipal utilities succeed in whatever ways I can."

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## Financing Opportunities for Local Governments

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- \$75 million for grants to states and local governments focused on improving material recycling, recovery, management, and reduction. The new EPA program would help educate households and consumers about residential and community recycling to decrease contamination in the recycling stream.

### **Broadband:**

- \$42.45 billion for the Broadband Equity, Access and Deployment Program. This program will provide formula grants to state governments to award subgrants for broadband planning, mapping, deployment, and adoption programs, prioritizing unserved areas, underserved areas, and anchor institutions.
- \$1 billion for Broadband Middle-Mile Grants for construction, improvement, or acquisition of middle mile broadband infrastructure.
- \$1.25 billion for the Digital Equity Competitive Grant Program to support promotion of digital equity and inclusion, generally to address affordable broadband access and connecting devices, digital literacy, privacy, online availability of public resources and public services, and digital participation in economic, social, healthcare, and civic opportunities.

### **Private Activity Bonds:**

- Local governments can now issue tax-exempt bonds to finance rural broadband projects. This will drive down the cost of deploying the technology in rural areas, as it allows for cheaper financing of new broadband to be installed in rural areas.
- Local governments can now issue private activity bonds to finance the purchase and installation of carbon capture, utilization, and storage equipment, as well as direct air capture

(DAC) projects. Carbon capture removes carbon dioxide from an emissions stream at a power plant or industrial facility reducing emissions from energy-intensive industries. DAC is an innovative emerging technology that removes carbon dioxide directly from the atmosphere. These technologies allow us to reduce emissions and protect the environment while continuing to use our natural resources, but first-generation facilities can cost upwards of \$1 billion.

### **Cybersecurity:**

- \$1 billion over 4 years for the State and Local Cybersecurity Grant Program that provides for states and localities to develop and implement cybersecurity plans and address imminent cybersecurity threats. This program will provide formula grants to state governments, of which states are required to subgrant 80% to local governments and 25% of funding must be provided to rural areas.
- \$250 million Rural and Municipal Utility Advanced Cybersecurity Grant and Technical Assistance Program for municipal utilities and other entities to deploy advanced cybersecurity technologies to improve their security practices. Grants will be awarded on a competitive basis, with priority given to entities that have limited cybersecurity resource, have assets critical to the reliability of an interconnected transmission network for electricity, or own facilities critical to national defense.

The deployment of IIJA funds and execution of new programs will be a massive effort that plays out over the coming months and even years. Local governments as the owners and operators of a substantial amount of infrastructure will have the job of designing, approving, and executing the projects funded by the IIJA. Local governments should start planning for these projects now to take advantage of all the opportunities afforded by the IIJA.

— *Eric Hagen*

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## ***Milwaukee Wins Tax Exemption Challenge When Plaintiff Files Claim Too Soon***

The City of Milwaukee recently won a tax appeal when the taxpayer failed to properly file its claim for a tax refund. The case instructs municipalities and their lawyers to look closely at the technical requirements for tax appeals, as a minor mistake may doom the appeal.

In *St. John's Communities, Inc. v. City of Milwaukee*, 2020 AP 1696 (Oct. 4, 2021), St. John's had operated a retirement community that the City found to be tax exempt. St. John's then built a new retirement facility, a high rise building that it marketed as "luxury retirement units." The City found that the new unit did not qualify for tax exemption.

St. John's objected and filed a claim against the City in November 2019. The city denied the claim, informing St. John's that the claim was premature since no tax had been levied and collected yet. The City relied upon Wis. Stat. sec. 74.35(2)(a), which provides in part:

"[a] person aggrieved by the *levy and collection* of an unlawful tax assessed against his or her property may file a claim to recover the unlawful tax *against the taxation district which collected the tax.*"

Emphasis added.

Because the tax had not yet been levied and collected, Milwaukee said the claim was too early.

St. John's filed an additional claim in December, which the City again denied as being too soon. In January, St. John's paid the first installment of the disputed tax on January 22, and sued the City that same day.

The Circuit Court ruled that the tax appeal was proper, since St. John's had filed a claim and had paid the tax before it brought suit. Milwaukee appealed, and the Court of Appeals reversed the Circuit Court and directed that the appeal should be dismissed because the claim was made before the tax was paid.

The Court of Appeals reasoned, in part (¶ 21):

. . . [t]he legislature chose language that requires all claims regarding the *recovery* of taxes on an allegedly exempt property to be filed against the taxation district by the taxpayer who was aggrieved by the *levy and collection* of the challenged tax. . . . The language of the statute clearly anticipates a claim being filed with the taxation district *after* the taxpayer has paid the challenged tax. An interpretation of § 74.35(2) (a) as suggested by Saint John's would render portions of the statute surplusage. (Emphasis in original)

In short, a taxpayer must first file a claim after the tax is levied and collected, and then it may sue the taxing district. Although this may seem to be a very technical application of the statutes, the rules regarding appeals of tax assessments are very technical. The tax is presumed to be proper, and the challenger bears the burden of proving the contrary. The challenger also bears the burden of following all the prerequisites to bringing the lawsuit.

The decision is recommended for publication.

— *Michael P. May*

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### **Anita Gallucci Wins Distinguished "Friend of Public Power Award"**

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Going forward, in addition to having a little more time for her family, her dogs, her photography, and her new camper, she plans to enjoy her of counsel status at Boardman by continuing to advise her municipal clients - and by making sure a new generation of Boardman Clark attorneys is well positioned to carry on the Firm's public power legacy.



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