STATE OF WISCONSIN
IN SUPREME COURT

No. 2012-AP-2067

MADISON TEACHERS, INC.
PEGGY COYNE, PUBLIC
EMPLOYEES LOCAL 61,
AFL-CIO, AND JOHN WEIGMAN,
Plaintiffs-Respondents,

v.

SCOTT WALKER, JAMES R.
SCOTT, JUDITH NEUMANN
AND RODNEY G. PASCH,
Defendants-Appellants.

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE JUAN B. COLAS, PRESIDING, CIRCUIT COURT CASE NO. 2011-CV-3774, AND ON CERTIFICATION FROM THE COURT OF APPEALS (DISTRICT IV)

RESPONDENTS' SURREPLY BRIEF TO APPELLANTS' ARGUMENT REGARDING WIS. STAT. §62.63

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Dated: October 18, 2013.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Milwaukee Charter

INTRODUCTION

The appellant's reply brief, filed with the Court on August 28, 2013, asserts that the Milwaukee Employes' Retirement System ("Milwaukee ERS") falls within the purview of Wis. Stat. §62.63 and therefore constitutes a matter of statewide concern.

This argument is erroneous given that Wis. Stat. §62.63 does not control Milwaukee's ERS.

ARGUMENT

A. The appellants' reliance on Wis. Stat. §62.63 is fundamentally flawed because Milwaukee's ERS was not established under Wis. Stat. §62.63.

The appellants' reliance on Wis. Stat. §62.63 (hereinafter "§62.63" or "Section 62.63") is fundamentally flawed because Milwaukee's ERS was not established under the authority of Wis. Stat. §62.63. The City of Milwaukee's ERS was established under Chapter 396 of the Laws of 1937 (hereinafter "Chapter 396"), and then adopted by the City of Milwaukee into its municipal charter ordinance.

Section 62.63 was enacted on May 14, 1937 as Wis. Stat. §62.69 under Chapter 134, Laws of 1937. It has been renumbered numerous times: From 1937 to 1957 it was known as Wis. Stat. §62.29; from 1957 to 2000 it was known as Wis. Stat. §66.80; and from 2000 to present it has been known as Wis. Stat. §62.63.

Section 62.63 is a permissive enabling statute that allows the common council of a 1st class city, at its discretion, to establish and maintain annuity and

benefit funds for city officers and employees and to establish a retirement board to administer such funds. Section 62.63 has no application here because the Common Council of the City of Milwaukee never exercised its discretionary authority to create an annuity and benefit fund or to create a retirement board under the authority of §62.63.

In contrast to §62.63, Chapter 396 is/was not an enabling provision. Chapter 396 was enacted on July 15, 1937, subsequent to the enactment of §62.63, and established Milwaukee's ERS. Chapter 396 is entirely unrelated to §62.63 and the provisions are distinct for several reasons.

The first distinction lies in the fact that §62.63 has remained as a published state law since 1937 (though renumbered several times), whereas Chapter 396 established Milwaukee's ERS by private session law. Chapter 396 has never been a part of the published Wisconsin State Statutes. Second, Chapter 396 and §62.63 differ in their manner of operation. Section 62.63 is an enabling statute that merely allows a 1st class city's pension board to establish an annuity fund. Chapter 396 actually created an entire retirement system specifically designed for the City of Milwaukee and mandated that it be implemented. Third, §62.63 and Chapter 396 differ substantively with regard to both the scope of the plan and the beneficiaries. Section 62.63 provides statutory authority to establish a "pension and annuity fund," whereas Chapter 396 creates a "retirement system." Section 62.63 grants statutory authority for the board to create a fund for only "officers and employees." Chapter 396 expands coverage to ensure that

"widows and children" of employees are included as beneficiaries in the "retirement system." Fourth, the provisions differ in the composition of the entity administering the plan. Section 62.63 mandates that the pension and annuity board consist of city employees and mayoral appointments. Chapter 396 provides that the board consist of the city comptroller, city employees and common council appointments. Milwaukee's ERS now requires that at least one retiree member serve on the board. In contrast to §62.63, Milwaukee's ERS ensures that retirees have a say in changes that affect the "retirement system."

Importantly, §62.63 was established prior to Chapter 396. Had statutory authority in §62.63 been sufficient to establish a complete retirement system the legislature would have had no reason to adopt Chapter 396 and create Milwaukee's "retirement system." The legislature enacted Chapter 396 to create a fully inclusive retirement system to assure that both public servants and their families would be financially secure in the future.

B. Milwaukee's ERS was established by Chapter 396 and has remained under the control of the City of Milwaukee since 1937.

Milwaukee's ERS was established by Chapter 396, Laws of 1937. It has been maintained and administered continuously since 1937 under the authority of Chapter 396 and two succeeding enactments.

The first succeeding enactment was the City of Milwaukee's adoption of Chapter 396 into Milwaukee's charter ordinance. Mil. Charter Ord. §36-02-2 (A-App. p. 184). Milwaukee's charter ordinance defines the "act" pursuant to which

Milwaukee's ERS was created as: "the employees' retirement act as created by the provisions of **ch. 396, laws of 1937**, and as amended thereafter, including amendments enacted by the common council **under its home rule powers.**" Mil. Charter §36-02-2 (emphasis added) (A-App. p. 184). Importantly, Milwaukee's charter ordinance makes clear that Milwaukee adopted the provisions of Chapter 396 and amended its ERS under its Home Rule powers. Milwaukee's ERS was not created under the authority of §62.63.

The second succeeding enactment of Milwaukee's ERS occurred in 1947, when the State Legislature declared that Milwaukee's ERS should be controlled exclusively by the City of Milwaukee. Ch. 441, L. 1947. The legislature also sought to protect Milwaukee's ERS under home rule by declaring unequivocally that Milwaukee's ERS is not a matter of Statewide concern. Ch. 441, L. 1947.

Milwaukee's ERS has remained under the City of Milwaukee's exclusive control since it was created in 1937.

The City of Milwaukee has adopted numerous amendments to its ERS since that time, including the provision at issue here: employer funded contributions. Milwaukee's ERS provision requiring employer funded contributions was negotiated in the early 1970s as a quid pro quo for a reduction in base wage increases. The results of the negotiation were adopted by the City of Milwaukee on December 7, 1971 as §36-08-07-a-1 of its municipal charter ordinance. Milwaukee's ERS employer funded contribution requirement was

enacted long after the State ceded control of Milwaukee's ERS to the City of Milwaukee.

Importantly, the adoption of Milwaukee's ERS and its ensuing municipal charter amendments were extensions of Chapter 396. The amendments were not made under the mechanism provided under §62.63.

A review of Wisconsin's Constitutional Home Rule Amendment will help to explain why the establishment of Milwaukee's ERS by private law, and the City of Milwaukee's subsequent adoption of Milwaukee's ERS as a municipal charter ordinance, prevents the State from interfering with Milwaukee's ERS.

Wisconsin's Home Rule Amendment was adopted in 1924 to create a two-part test to determine whether state legislation can supersede a municipal charter ordinance: the law must be (1) of statewide concern and (2) affect all cities and villages uniformly. *See* WIS. CONST. ART. XI, §3(1). The 1924 Home Rule Amendment was adopted specifically to add the statewide concern requirement to the analysis.

At the time the Home Rule Amendment was adopted in 1924, Wisconsin's Constitution already required that laws operate uniformly to supersede a municipal charter ordinance. In 1871, Wisconsin had adopted Wis. Const. Article IV, sections 31 and 32. These sections prohibited State legislation from superseding a municipal charter unless the law operated uniformly. Article IV, §31 prohibited the legislature from "enacting any special or private laws" to amend a municipal charter. *See* Art. IV, §31(9). Article IV, §32 provided the State

legislature with authority to amend a municipal charter if the law was "uniform in operation throughout the state." These sections make no mention of statewide concern.

The Home Rule Amendment was adopted in 1924, more than fifty years after Article IV §§31-32, and created a new, two-part test that required both (1) statewide concern and (2) uniformity. The 1924 Home Rule Amendment was adopted for the specific purpose of adding statewide concern to the analysis. Had the framers of the Home Rule Amendment intended that legislation be merely uniform to supersede a municipal charter, there would have been no reason to adopt the 1924 amendment.

Wisconsin's Home Rule Amendment protects Milwaukee's ERS because Milwaukee's ERS was established by a "private law" in Chapter 396, Laws of 1937 and then adopted by the City of Milwaukee into its municipal charter ordinance. The legislature then transferred full control of Milwaukee's ERS to the City of Milwaukee in 1947 under Chapter 441, Laws of 1947 and declared that Milwaukee's ERS was not a matter of statewide concern. Milwaukee's ERS was not enacted under the pretense of a "general law" such as §62.63.

The Legislature created Milwaukee's ERS as a private law in Chapter 396 to ensure that full power and control could be transferred to the City of Milwaukee. Milwaukee then adopted its ERS as a municipal charter ordinance to forever protect Milwaukee's ERS under Wisconsin's Constitutional Home Rule Amendment.

C. The appellants waived their argument regarding §62.63 because they failed to raise the argument at any point earlier in these proceedings.

The appellants raised Wis. Stat. §62.63 for the first time in their reply brief. An issue not raised in circuit court and raised for the first time on appeal is deemed waived.

"One of the rules of well-nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal." *Cappon v. O'Day*, 165 Wis. 486, 490, 162 N.W. 655 (1917). "The practice of this court is not to consider an issue raised for the first time on appeal." *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). The Supreme Court set forth the reasoning behind the rule in *State v. Huebner*:

> It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court.
>
> We have described this rule as the "waiver rule," in the sense that issues that are not preserved are deemed waived. The waiver rule is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. The rule promotes both efficiency and fairness, and "go[es] to the heart of the common law tradition and the adversary system."

Huebner, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, ¶¶10-11 (citations omitted). The *Huebner Court* explained how the rule accomplishes many objectives crucial to the efficient functioning of a fair judicial system:

> Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. Finally, the rule prevents attorneys from "sandbagging" errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal. For all of these reasons, the waiver rule is essential to the efficient and fair conduct of our adversary system of justice.

Id. at ¶12 (citations omitted).

The appellants raised Wis. Stat. §62.63 for the first time in their reply brief and any argument relating to Wis. Stat. §62.63 has been waived. *Cappon*, 165 Wis. at 490.

CONCLUSION

Stated simply, Wis. Stat. §62.63 has never had any relationship to Milwaukee's ERS and is of no consequence to this proceeding.

For the foregoing reasons, the plaintiff-respondents respectfully request that the Court (1) disregard the appellants' argument relying on Wis. Stat. §62.63 as set forth at page 14 of the appellants' reply brief filed with the Court on August 28, 2013; or in the alternative (2) accept the arguments set forth in sections one and two of this brief as the respondents' surreply brief demonstrating that Wis. Stat. §62.63 has no applicability to the matter before this Court.

Dated at Milwaukee, Wisconsin this 18 day of October, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 1,966 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §8019.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 18th day of October, 2013.

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CERTIFICATE OF MAILING

Rachel Boylan herein certifies that she is employed by Padway & Padway, Ltd., located at 633 West Wisconsin Avenue, Suite 1900, Milwaukee, Wisconsin 53203; that on the 18th day of October, 2013, she filed 22 copies of the *Respondents' Surreply Brief to Appellants' Argument Regarding Wis. Stat. §62.63,* in the above-entitled case, addressed to: Ms. Diane M. Fremgen, Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

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