

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2013-XX-1404

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

v.

SCOTT WALKER, Defendant,
JAMES R. SCOTT, Defendant-Appellant,
JUDITH NEUMANN, Defendant, and
RODNEY G. PASCH, Defendant-Appellant

v.

WISCONSIN EDUCATION ASSOC., COUNCIL,
AFT-WISCONSIN, AFL-CIO, SEIU HEALTHCARE
WISCONSIN, CTW, CLC, WISCONSIN FEDERATION OF
NURSES AND HEALTH CARE PROFESSIONALS, AFT,
AFL-CIO, and KENOSHA EDUCATION ASSOC.,
Movants-Respondents.

On Appeal from an October 25, 2013,
Order Granting Motion to Hold Defendants James R. Scott and
Rodney G. Pasch in Contempt of Court and for Remedial Sanctions
by the Dane County Circuit Court, Hon. Juan B. Colás, Presiding
Case No. 2011-CV-3774

***AMICI CURIAE* BRIEF OF AMY ROSNO, NICHOLAS JOHNSON,
TRACIE HAPPEL, JENNIFER HENDERSON, AND ELIJAH
GRAJKOWSKI IN SUPPORT OF EMERGENCY MOTION FOR
STAY PENDING APPEAL**

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INTRODUCTION

Amici are individual Wisconsin teachers (the “Individual Teachers”) and are general municipal employees as defined in Section 111.70(1)(fm) Wis. Stats. Each of them has the right under Section 111.70(4)(d) to vote next month as to whether they will or will not be represented by a particular union in negotiations with their employers. All of them want to be heard on whether or not they must abide by the terms and conditions of employment negotiated for them by a collective bargaining agent. Each of them prefers to deal with his or her employer as an individual rather than as part of a collective bargaining unit.

There are tens of thousands of general municipal employees in the same position as the Individual Teachers. None of them are parties to this lawsuit. Not one of these public employees is bound by the Circuit Court’s Orders in this matter, yet the Circuit Court’s recent Contempt Order directed against the Wisconsin Employment Relations Commission deprives each of them of their statutory right to vote next month. In order to protect their rights under Act 10, on October 29, 2013, the Individual Teachers filed an action in the Waukesha County Circuit Court as Case No. 2013-CV-2473 (the “Waukesha County Action”).

In the Waukesha County Action, the Individual Teachers have sued James Scott and Rodney Pasch, in their official capacities as Commissioners of the Wisconsin Employment Relations Commission (“WERC”), seeking a declaration that WERC must hold elections for certified bargaining agents in 2013, or that, in the alternative, if WERC does not conduct certification elections, the Individual Teachers will have no collective bargaining agent in 2014 and cannot be bound by any collective bargaining agreement negotiated in 2014. A copy of the Complaint in the Waukesha County Action is attached hereto.

In the Waukesha County Action, the Individual Teachers are entitled to rely on the strong presumption that Act 10 is constitutional. The Waukesha County Circuit Court is not bound by the Circuit Court’s decision in this case, either as a matter of precedent or issue preclusion. Indeed, the United States District Court for the Western District of Wisconsin recently rejected the very constitutional challenge accepted by the Circuit Court in this matter. *Laborers Local 236, AFL-CIO v. Walker*, No. 11-cv-462, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013). Moreover, the United States Court of Appeals for the Seventh Circuit rejected a related challenge in *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013), as did a

separate Dane County Circuit Court judge in another action, *Wisconsin Law Enforcement Ass'n v. Walker*, Case No. 12-CV-4474 (Order dated Oct. 23, 2013).

Act 10 is presumptively applicable to all local units of government and public employees not parties to this case; it has been upheld by three separate courts. Until a court with jurisdiction over them or whose decision has precedential effect says otherwise, all local units of government and all public employees and their unions are bound to follow Act 10 and honor the rights granted thereunder. The Circuit Court's (effectively) state-wide injunction in this case (expressed as a Contempt Order) improperly deprives the Individual Teachers of their rights under Act 10, and the Individual Teachers request that this Court stay the Circuit Court's Contempt Order.

I) WERC Has the Obligation to Protect the Rights of the Individual Teachers.

WERC has the ministerial duty to oversee certification and recertification elections, verify their results, and certify or decertify exclusive bargaining representatives based on those results. Wis. Stat. § 111.70(4)(d)3.b. The unions that seek to represent the Individual Teachers

are bound to stand for recertification elections every year under Act 10. *Id.* The Circuit Court has no authority to relieve the unions of that duty, as it has no jurisdiction over the Individual Teachers, the school districts for which the Individual Teachers work, or the unions that seek to represent the Individual Teachers. WERC must apply the law to which those unions and employers are bound and must protect the rights afforded the Individual Teachers under Act 10.

To say that WERC itself is bound by the Circuit Court's ruling does not change that result. In administering the required elections, WERC is not asserting its own rights, but protecting the rights of the Individual Teachers and all general municipal employees who are entitled to vote. In performing that function, WERC cannot be bound to follow the Circuit Court's decision in a case to which these others were not parties. To hold otherwise would deprive the Individual Teachers of their rights under Act 10 and give an action for declaratory relief an impact on non-parties that it plainly does not – and cannot – have. *See Wis. Stat. § 806.04(11)* (“no declaration may prejudice the right of persons not party to the proceedings.”)

II) Not Granting A Stay Would Create Irreconcilable Paradoxes and Lose-Lose Situations

The Circuit Court's Contempt Order has needlessly created a situation of nightmarish complexity throughout the state. Prior to that ruling, WERC was bound to follow the Circuit Court's earlier decision with respect only to the two unions that are parties to this litigation.¹ But Act 10 remained in force for every other union, and local unit of government. Public employees who wanted to assert their rights under Act 10 were free to do so.

But now the rights of those teachers are in doubt. The Individual Teachers are at risk of losing their right to vote as to whether they will be represented for collective bargaining purposes and have filed a lawsuit to protect their rights. But WERC has been ordered to refrain from conducting the elections in which their right to vote is to be exercised.

That order should be stayed. Holding elections preserves the rights of not only the Individual Teachers, but every general municipal employee in the state. For those employees who wish to certify a bargaining agent, taking away this November's election means that if Act 10 is upheld, they

¹ However, if the Circuit Court's decision is reversed, any contract entered into in violation of Act 10 would be invalid.

will have missed their opportunity to elect a bargaining representative. No union will have the right to be the exclusive bargaining representatives for teachers in 2014,² because there was no election prior to December 1, 2013 certifying any bargaining agents for 2014 as required by Section 111.70(4)(d)3.b.

Teachers who do not want to certify a collective bargaining agent for 2014, as is their right under Act 10, would also be prejudiced because they would be denied the right to vote for their union's decertification. This prejudices the Individual Teachers who have the right not to be represented, the right not to be bound by a collective bargaining agreement, and the right to bargain individually. The only way to prevent these complications is to stay the Contempt Order of the Circuit Court.

CONCLUSION

For the reasons set forth above the Individual Teachers request that this Court stay the Contempt Order and permit WERC to administer the elections set for November, 2013.

² Unless the union currently has a collective bargaining agreement, in which case they will lose their status as the exclusive bargaining representative when the agreement expires.

Dated this 30th day of October, 2013.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH
RULE 809.19(8)(b) AND (c)

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with proportional serif font. This brief is 1,194 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: 10/30/13


THOMAS C. KAMENICK

CERTIFICATE OF COMPLIANCE
WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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: 10/30/13



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and

ELIJAH GRAJKOWSKI
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Plaintiffs,

v.

Declaratory Judgment

Case Code: 30701

Case No. 13-CV-

JAMES R. SCOTT and RODNEY G. PASCH,
In their official capacity as Members of the
Wisconsin Employment Relations Commission,
1457 East Washington Avenue, Suite 101
Madison, WI 53704,

Defendants.

CLERK OF COURTS

OCT 29 2013

THIS IS AN AUTHENTICATED COPY OF AN
ORIGINAL DOCUMENT FILED IN THE CLERK
OF COURTS OFFICE WAUKESHA COUNTY.

COMPLAINT

Plaintiffs, Amy Rosno, Nicholas Johnson, Tracie Happel, Jennifer Henderson, and Elijah Grajkowski, by their counsel, the Wisconsin Institute for Law & Liberty, as and for their Complaint against Defendants, James R. Scott and Rodney G. Pasch, allege to the Court as follows:

INTRODUCTION

1. In 2011, the Wisconsin Legislature enacted a comprehensive reform of Wisconsin labor law as it relates to public employees, commonly known as Act 10. Among other things, public employees were given the right to participate in an annual election to determine whether or not they and their fellow employees will be represented in the upcoming year by a collective bargaining agent in negotiations with their employers. This is an action for declaratory judgment under Wis. Stat. § 806.04 to enforce that right, as well as other rights given to general municipal employees under Act 10.

2. The Plaintiffs are public school teachers who wish to exercise their right to vote in November on whether a union will represent them in collective bargaining in the coming year. Plaintiffs seek a declaration that they are entitled to vote in the election required by Act 10 and that Defendants Scott and Pasch, as Wisconsin Employment Relations Commission commissioners (collectively, "WERC"), are required by Wis. Stat. § 111.70(4)(d)3.b. to hold recertification elections prior to December 1, 2013. In the alternative, Plaintiffs seek a declaration that if no election is held, they are free to negotiate the factors and conditions of their employment, including base wages, without representation.

PARTIES

3. Plaintiff Amy Rosno is a teacher employed by the School District of Waukesha. She teaches English at eAchieve Academy. She is in a bargaining unit represented by the Education Association of Waukesha, but is not a member of that organization. She is a citizen of the State of Wisconsin, residing at 105 Woodfield Drive, Eagle, Wisconsin 53119.

4. Plaintiff Nicholas Johnson is a teacher employed by Milwaukee Public Schools. He teaches Grades 9-12 Music and Special Education at Ronald Reagan High School. He is in a bargaining unit represented by the Milwaukee Teachers' Education Association, but is not a

member of that organization. He is a citizen of the State of Wisconsin, residing at 2812 South 70th Street, Milwaukee, Wisconsin 53219.

5. Plaintiff Tracie Happel is a teacher employed by the School District of La Crosse. She teaches Second Grade at Northside Elementary School. She is in a bargaining unit represented by the La Crosse Education Association, but is not a member of that organization. She is a citizen of the State of Wisconsin, residing at N5653 Mohican Trail, Onalaska, Wisconsin 54650.

6. Plaintiff Jennifer Henderson is a teacher employed by the Racine Unified School District. She teaches Third Grade at Schulte Elementary School. She is in a bargaining unit represented by the Racine Education Association, but is not a member of that organization. She is a citizen of the State of Wisconsin, residing at 3041 97th Street, Sturtevant, Wisconsin 53177.

7. Plaintiff Elijah Grajkowski is a teacher employed by the Elmbrook School District. He teaches Fourth and Fifth Grade Band at Brookfield Elementary School. He is in a bargaining unit represented by the Elmbrook Education Association, but is not a member of that organization. He is a citizen of the State of Wisconsin, residing at 1529 South Carriage Lane, New Berlin, Wisconsin 53151.

8. All of the Plaintiffs want WERC to hold recertification elections as originally scheduled this November. Each intends to either vote or refrain from voting - which has the same effect as a "no" vote - in the recertification election

9. WERC has cancelled those elections as a result of the recent decision by the Dane County Circuit Court in *Madison Teachers, Inc. v. Walker*, Case No. 11CV3774, a case in which the WERC Commissioners were parties.

10. Defendant James R. Scott is a Member and the Chair, and Defendant Rodney G. Pasch is a Member, of the Wisconsin Employment Relations Commission. They are named as Defendants in their official capacities only, and their offices are located at 1457 East Washington Avenue, Suite 101, Madison, Wisconsin 53704.

11. The Wisconsin Employment Relations Commission and its Commissioners are the executive agency and executive officials, respectively, responsible for administering the Wisconsin labor relations statutes, including interpreting, implementing, enforcing, and administering the challenged provisions of the Municipal Employment Relations Act, as modified by 2011 Wisconsin Act 10 and 2011 Wisconsin Act 32.

JURISDICTION AND VENUE

12. This court has jurisdiction pursuant to Wis. Stat. § 806.04 in that: (a) there is a controversy between the parties as to the statutory duties of WERC with relation to the Plaintiffs; (b) the interests of Plaintiffs and Defendants are adverse in that the Plaintiffs wish WERC to hold recertification elections and WERC intends not to hold recertification elections; (c) Plaintiffs have a legally protected interest in exercising their right to vote in an annual recertification election; and (d) the controversy is ripe for determination in that WERC has committed to not holding recertification elections this November. Plaintiffs also have a legally protected interest in perfecting their rights under Act 10 in the event that no recertification election is held.

13. Venue is properly lodged in this Court pursuant to Wis. Stat. § 801.50(2)(a), because Plaintiffs Rosno and Grajkowski teach in school districts in this County and, as a result, their claims arise in this County, and pursuant to Wis. Stat. § 801.50(3)(a), because the sole Defendants are state officers, and the Plaintiffs hereby designate Waukesha County as the venue for this action.

FACTS

Act 10

14. In 2011, the Wisconsin Legislature enacted sweeping changes to the statutes that govern collective bargaining between public employees and their employers. These changes included Act 10 as well as Act 32, which amended and modified Act 10. Act 10 became the law in Wisconsin on June 29, 2011; Act 32 on July 1, 2011.

15. Act 32 and Act 10 (collectively, “Act 10”), among other things, amended Wis. Stat. § 111.70, the statute that governs collective bargaining between municipal employers and unions representing their employees. Section 111.70(4)(d), as amended by Act 10, now requires general municipal unions to stand for re-certification in an election every year and obtain at least 51 percent of the votes of all of the employees in the collective bargaining unit.

16. In particular, § 111.70(4)(d)3.b. states that annually, WERC “shall conduct an election to certify the representative of the collective bargaining unit,” and that “election shall occur no later than December 1 for a collective bargaining unit containing school district employees.” (Emphasis added.)

17. “If no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented.” *Id.* (emphasis added).

18. Thus, among the many other rights given to public employees by Act 10, the Plaintiffs have a right to participate in an election and vote either in favor of or against representation by an exclusive bargaining representative every year. If no election results in a union obtaining votes from 51 percent of the collective bargaining unit by December 1, the Plaintiffs have the right to represent themselves to individually negotiate the factors and conditions of their employment, including base wages, with their employers.

19. Under WERC regulations, teachers have 20 days to vote, starting November 1st, 2013. Voting is done by a teacher in a school district calling a toll-free number and answering the following question: “Do you want to continue to be represented by (name of union) for the purpose of collective bargaining?”

Litigation

20. In the wake of its passage by the Legislature, several lawsuits were filed that challenged the validity of Act 10 on constitutional or other grounds. The U.S. District Court for the Western District of Wisconsin upheld portions of Act 10 and struck down other portions. *WEAC v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). On appeal, the U.S. Court of Appeals for the Seventh Circuit dismissed all challenges to the statute on federal constitutional grounds, upholding the statute in its entirety. *WEAC v. Walker*, 705 F.3d 640 (7th Cir. 2013).

21. On September 11, 2013, the U.S. District Court of the Western District of Wisconsin upheld Act 10 against a related constitutional challenge, dismissing that case as well. *Laborers Local 236, AFL-CIO v. Walker*, 2013 WL 4875995 (W.D. Wis. Sept. 11, 2013).

22. On October 23, 2013, the Dane County Circuit Court, the Honorable John Markson, presiding, upheld Act 10 against a related constitutional challenge brought by state employees and a union representing them, dismissing that case. *Wisconsin Law Enforcement Association v. Walker*, Dane County Circuit Court No. 12CV4474, Order dated Oct. 23, 2013.

23. But on September 14, 2012, the Dane County Circuit Court, the Honorable Juan Colás, presiding, held parts of Act 10 to be in violation of the Wisconsin State Constitution,

including those provisions that require annual recertification elections. *Madison Teachers, Inc. v. Walker*, Dane County Circuit Court No. 11CV3774, Order dated Sept. 14, 2012. An appeal from the Circuit Court's decision is currently pending before the Wisconsin Supreme Court, with oral arguments scheduled on November 11, 2013.

24. During the appeal, the State requested a stay of the lower court's order. In denying that request, the Wisconsin Court of Appeals, District IV, held that the lower court's decision has no precedential value and is not binding on other courts, rejecting "out of hand the proposition that the circuit court's decision has the same effect as a published opinion of [the court of appeals] or the supreme court." It also stated that "different courts might make different decisions on [whether to follow the Dane County decision]." The Court held that a stay of the Dane County decision was not appropriate because, among other things, the decision did not have statewide effect. *Madison Teachers, Inc. v. Walker*, 2012AP2067, Wis. Ct. App. Order dated March 12, 2013, *14.

25. The Dane County Circuit Court, ignoring the court of appeals, in an oral ruling on October 21, 2013, (memorialized in an October 25, 2013, written order) attempted to give its ruling statewide effect by holding WERC in contempt for scheduling recertification elections under 111.70(4)(d)3.b. for unions that were not parties to *Madison Teachers*.

26. Although WERC disagrees with the Circuit Court's decision (and that decision is the subject of an emergency proceeding in both the Supreme Court and the Court of Appeals), WERC indicated that it intends to follow the Circuit Court's decision pending final resolution. It has already written to one union rescinding its earlier decertification notice, and is cancelling hundreds of elections already scheduled to take place in November.

27. It is well-established as a matter of Wisconsin law that Circuit Court decisions are not binding on anyone other than parties to the lawsuit, as the Court of Appeals stated in its decision on the stay. Thus, Act 10 remains the law of the land for everyone in Wisconsin except the parties in *Madison Teachers*, including the Plaintiffs and their employers.

28. No court with jurisdiction over the Plaintiffs or their employers has ever declared Act 10 to be unconstitutional. To the contrary, the only courts with even geographic jurisdiction over them (the U.S. Court of Appeals for the Seventh Circuit for all of them and the U.S. District Court for the Western District of Wisconsin for Plaintiff Happel) have declared that Act 10 is constitutional. Both of those courts expressly rejected the arguments accepted by Judge Colás.

29. Under the current state of the law, notwithstanding the Dane County decision, the Plaintiffs enjoy the full panoply of rights and benefits given to them by Act 10, including the right to vote in annual recertification elections.

FIRST CLAIM FOR RELIEF

For a Declaration that WERC Must Hold Recertification Elections

30. Plaintiffs incorporate the allegations of the previous paragraphs as if fully set forth herein.

31. Wis. Stat. § 111.70(4)(d)3.b. states that, “Annually, the commission shall conduct an election to certify the representative of the collective bargaining unit that contains a general municipal employee. The election shall occur no later than December 1 for a collective bargaining unit containing school district employees”

32. WERC currently intends to not hold recertification elections under § 111.70(4)(d)3.b. prior to December 1, 2013.

33. If WERC fails to hold these elections, Plaintiffs and tens of thousands of other teachers will be denied their right under Act 10 to vote either for or against the election of an exclusive bargaining representative.

34. Therefore, Plaintiffs are injured by WERC’s failure to hold the recertification elections, and pursuant to Wis. Stat. § 806.04 are entitled to a declaration that WERC must hold these elections and an order to the same effect.

SECOND CLAIM FOR RELIEF

For a Declaration, in the Alternative, that if No Recertification Election is Held, the Plaintiffs are Free to Individually Negotiate the Terms and Conditions of their Employment

35. Plaintiffs incorporate the allegations of the previous paragraphs as if fully set forth herein.

36. If WERC fails to hold a recertification election pursuant to § 111.70(4)(d)3.b prior to December 1, 2013, Act 10 provides that no union will be certified to represent the Plaintiffs and the other members of their collective bargaining unit in negotiations with their employers for 2014.

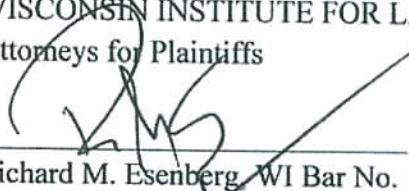
37. Accordingly, the Plaintiffs seeks a declaration that if no such election is held, they have no collective bargaining agent, are not and cannot be bound by any agreement made between their employers and any alleged collective bargaining agent, will be free to negotiate the factors and conditions of their employment, including base wages, individually with their employers, and are entitled to all of the other rights and privileges provided to them under Act 10, and that WERC may take no action that denies them the full benefits of such rights and privileges.

WHEREFORE, the Plaintiffs respectfully request this Court grant the following relief:

- A. A declaratory judgment stating that Plaintiffs enjoy the full panoply of rights and benefits given to them by Act 10;
- B. A declaratory judgment stating that WERC is lawfully required by Wis. Stat. § 111.70(4)(d)3.b. to hold recertification elections for those collective bargaining units to which the Plaintiffs belong before December 1, 2013;
- C. An order directing WERC to hold recertification elections for those collective bargaining units to which the Plaintiffs belong before December 1, 2013;
- D. In the alternative, a declaratory judgment stating that if WERC does not hold recertification elections under § 111.70(4)(d)3.b. for those collective bargaining units to which the Plaintiffs belong before December 1, 2013, the Plaintiffs have no collective bargaining agent, are not and cannot be bound by any agreement made between their employers and any alleged collective bargaining agent, will be free to negotiate the factors and conditions of their employment, including base wages, individually with their employers and are entitled to all of the other rights and privileges provided to them under Act 10, and that WERC may take no action that denies them the full benefits of such rights and privileges.
- E. Awarding Plaintiffs costs and attorney fees; and
- D. Granting Plaintiffs such other and further relief as the Courts deems appropriate.

Dated this 29th day of October, 2013.

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