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December 11, 2013

VIA FACSIMILE & U.S. MAIL

Honorable David Bastianelli
Kenosha County Courthouse, Branch 1
912 56th Street, Room 205
Kenosha, WI 53140

Re: Lacroix, et al, v. Kenosha Unified School District Board of Education, Kenosha Unified School District and Kenosha Education Association Building Corporation
Case No. 13-CV-1899

Dear Judge Bastianelli:

Enclosed please find a copy of Defendant Kenosha Education Association's Brief in Opposition to Plaintiffs' Motion for Temporary Injunction in the above-referenced matter. The original is being sent to the Kenosha County Clerk of Court for filing.

I certify by copy of this letter and enclosure, copies of the same have been served on all counsel of record by electronic and U.S. first-class mail this date.

Thank you for your attention to this matter. Please contact me with any questions or concerns.

Very truly yours,

CULLEN WESTON PINES & BACH LLP

Lester A. Pines

LAP:hkb
Enclosure
cc: Joseph A. Kiriaki
Richard Esenberg
Brian McGrath
Steven Zach
JoAnn M. Hart
Suzanne M. Glisch
Joel S. Aziere

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 KENOSHA COUNTY

KRISTI LACROIX and
CARRIE ANN GLEMBOCKI,

Plaintiffs,

Case No. 13cv1899

v.

KENOSHA UNIFIED SCHOOL
DISTRICT BOARD OF EDUCATION,
KENOSHA UNIFIED SCHOOL DISTRICT, and
KENOSHA EDUCATION ASSOCIATION,

Defendants.

DEFENDANT KENOSHA EDUCATION ASSOCIATION'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

The Kenosha Education Association ("KEA") adopts and incorporates the arguments made by the Kenosha Unified School District ("the KUSD") and the KUSD Board of Education in their Brief in Opposition to Plaintiffs' Motion for a Temporary Injunction ("the KUSD's brief"). As described in the KUSD's brief, the Plaintiffs have failed to meet the high standards for granting a temporary injunction. In addition, as discussed below, the statutory provisions that the Plaintiffs rely on are and have been for quite some time now null, void, and without legal effect, as declared by the Dane County Circuit Court, the Honorable Juan Colás, presiding. For that reason as well the Plaintiffs do not have a reasonable likelihood of success on the merits and their Motion should be denied.

I. THE KEA WAS CHOSEN AS THE EMPLOYEES' AGENT LONG AGO, AND THE DUTY TO BARGAIN IN GOOD FAITH REMAINS.

The Municipal Employment Relations Act ("MERA"), Wis. Stat. § 111.70 *et seq.*, has been in effect in Wisconsin for over 40 years. Under the protection of that Act, municipal employees, a term that includes employees of school districts, have had the opportunity to be represented by certified collective bargaining agents who negotiate agreements that set the terms of their wages, hours and working conditions. The KEA is a labor union that has for decades been one of those agents.

To become a certified collective bargaining agent, the agent must be chosen by the employees it is to represent. The KEA long ago was chosen by the employees of the Kenosha Unified School District to be their certified collective bargaining agent. Prior to the efforts to amend significant parts of MERA through 2010 WI Act 10 and 2010 WI Act 32 ("Act 10"), which went into effect in 2011, at any time, 30% of the individuals who were represented by the KEA could have sought an election to decertify the KEA or to propose an alternative to the KEA. No such request was ever made, or even attempted.

Under MERA, even after Act 10, an employer like the KUSD has an obligation to engage in good faith negotiations with a certified collective bargaining agent, like the KEA, with the goal of reaching a collective bargaining agreement. Otherwise, the employer has violated the law by engaging in a prohibited practice. Wis. Stat. § 111.70(3)(a)(4). After reaching such an agreement, its terms are submitted to the

employer's governing body for approval and submitted to the employees in the collective bargaining agreement for ratification.

Claims that a party has engaged in a prohibited practice are brought to and adjudicated by the Wisconsin Employment Relations Commission ("the WERC"), which is the body that enforces MERA to ensure that entities subject to it follow the law. The WERC is comprised of three commissioners appointed by the Governor.

II. KEY PROVISIONS OF ACT 10 ARE NULL AND VOID.

Specific parts of Act 10 were challenged as unconstitutional in the case of *Madison Teachers Inc., Peggy Coyne, Public Employees Local 61, AFL-CIO, and John Weigman v. Scott Walker, James R. Scott, Judith Neumann and Rodney G. Pasch* (Dane County Case No. 11CV3774, the Honorable Judge Juan Colás, presiding, and Appellate Case No. 12AP2067, currently pending before the Wisconsin Supreme Court)("the MTI case"). Walker, Scott, Pasch and Neumann were sued in their official capacities. Scott and Pasch remain WERC commissioners today. Neumann left the Commission and has not yet been replaced.

In the MTI case, Judge Colás issued a declaratory judgment on September 14, 2012, with a clarifying order dated October 10, 2012, holding that the following provisions of Act 10, which sought to amend MERA, were *facially* unconstitutional, null and void:

- Wis. Stat. §§ 111.70(4)(mb), 66.0506, and 118.245 which prohibit municipal employers from collectively bargaining with the certified exclusive agents of municipal general employees ("certified agents" or "representatives") on anything other than base wages, which may not exceed the annual increase in the Consumer Price Index unless approved in a municipal voter referendum;

- Wis. Stat. § 111.70(3g) which prohibit municipal employers from deducting union dues from the wages of general municipal employees as authorized by the employees;

- Wis. Stat. § 111.70(1)(f) and the third sentence of Wis. Stat. § 111.70(2) which prohibit municipal employers from entering agreements with certified agents to require all represented employees to pay their proportionate share of the cost of collective bargaining and contract administration, while still mandating that the certified agents provide those services to all employees in the bargaining unit; and

- Wis. Stat. § 111.70(4)(d)3. which requires certified agents to undergo mandatory annual certification elections, for which the agents are forced to bear the costs, and require at least 51% of all employees of the bargaining unit vote in favor of the agent for it to be certified.

A declaratory judgment action challenging the constitutionality of a state statute is properly brought against the state agency or officials charged with its administration. *Lister v. Board of Regents*, 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976). Such an action is brought against the officer or agency charged with administering the statute on the premise that the officer or agency is acting outside the bounds of his or its constitutional or jurisdictional authority by enforcing or implementing the law. *Id.* That is precisely why the Plaintiffs in the MTI case sued the WERC Commissioners and the Governor.

When a statute is declared facially unconstitutional, it is null and void from inception. A statutory provision that has been declared facially unconstitutional cannot be enforced against anyone, including non-parties. The Wisconsin Supreme Court has recognized this principle:

> The difference between challenging the constitutionality of a statute on its face and challenging it as applied is important. **"If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances**, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to

particular facts, the state may enforce the statute in different circumstances." (Emphasis added)

State v. Konrath, 218 Wis. 2d 290, 304, n. 13, 577 N.W.2d 601 (1998). See also *In re the Commitment of Bush*, 2005 WI 80, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80 ("If a statute is unconstitutional on its face, any action premised upon that statute fails to present any civil or criminal matter in the first instance.").

Once the question of the constitutionality of a statute has been raised and decided by a lower court with jurisdiction, that determination is final but it is open to direct review on appeal. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377-378 (1940); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (state court's ruling on a federal constitutional question is effective and conclusive adjudication, unless and until reversed or modified by Supreme Court).

This is not to say that circuit court rulings are binding precedent; rather, when a circuit court (1) renders a judgment, (2) declaring that a statute is facially unconstitutional, (3) in a case where the state officials charged with enforcing the law are parties, that judgment resolves the issue until and unless a higher court decides otherwise.

In the MTI case, the circuit court determined that the challenged provisions are unconstitutional , and therefore are not law. The WERC Commissioners, Scott and Pasch, the state officials charged with enforcing the law, were and are parties to that case in their official capacities. The circuit court had the jurisdiction and power to issue the declaratory judgment. The WERC Commissioners are bound by that decision.

The WERC Commissioners sought a stay pending appeal of the declaratory judgment from every court with jurisdiction to grant one. The circuit court denied a stay on October 22, 2012. The Court of Appeals denied a stay on March 12, 2013. The Wisconsin Supreme Court denied a stay on November 21, 2013. Thus, the provisions of Act 10 that were declared to be unconstitutional on September 12, 2012 cannot be enforced against anyone.

Moreover, when a facial constitutional challenge to a statute is made under the Declaratory Judgment Act, a decision in favor of the challenger directly affects all of those subject to the statute, regardless of whether they participated in the litigation. *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, ¶¶17, 19, 296 Wis. 2d 880, 724 N.W.2d 208, *aff'd*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1. In *Helgeland*, the Court denied municipalities the opportunity to intervene in a case involving the constitutionality of a statute applied and enforced by the Wisconsin Department of Employee Trust Funds, and which affected the municipalities and their relations with their own employees. As the Wisconsin Supreme Court stated in *Helgeland*, "[O]n a practical level--the level at which our analysis must focus--the municipalities [who were not parties] arguably may be affected if a judgment is entered against DETF." *Helgeland*, 2008 WI 9, ¶58. Justice Prosser, while dissenting from the Court's ultimate decision, correctly observed that the case, brought under the Uniform Declaratory Judgment Act against state officers in their official capacity was, "As 'a practical matter,' . . . equivalent to a class action." *Helgeland*, 2008 WI 9, ¶167.

In rejecting the proposition that a declaratory judgment action should be brought as a class action in order to effectively prevent enforcement of a void legislative enactment, the Wisconsin Supreme Court said:

> the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly affect the interests of large numbers of people.

Helgeland, 2008 WI 9, ¶140, *quoting Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 334, 81 N.W.2d 713 (1957).

The bottom line is this: as of September 14, 2012 those provisions of Act 10 that were declared to be unconstitutional in the MTI case are null and void and have no legal effect whatsoever. The Plaintiffs in this case, however, persist in claiming that this court is not bound by Judge Colás' declaratory judgment and arguing therefore that the declaratory judgment is meaningless. It is correct that Judge Colás' decision is not precedential: this Court is not bound by Judge Colás' declaration as it would be by a published appellate court opinion. This is also irrelevant and it does not follow that the judgment is therefore meaningless.

What is relevant is that the Wisconsin Employment Relations Commissioners, who were parties to the MTI case, are indeed bound by the declaratory judgment. Judge Colás addressed this very issue:

> Defendant does not argue that a circuit court cannot find a statute unconstitutional on its face and void. Its argument is that the state, its agencies and officers who unsuccessfully defend the constitutionality of a statute can ignore the declaratory judgment of unconstitutionality with respect to all persons except those who were plaintiffs in the lawsuit. In effect, they say, any ruling that a statute is facially unconstitutional is only a ruling that it is unconstitutional as applied to the parties who sued. **This emphasis on the identity of the plaintiffs ignores that the declaratory judgment binds the defendants.** The plaintiffs do

not seek to enjoin non-parties or bind them to the judgment; only to enjoin the defendants who are already bound to the judgment. The defendants do not identify any case holding that state officials who are defendants in an action in which a statute was found to be unconstitutional on its face may continue executing the statute.

Defendants argue that a circuit court decision is not precedential. That is true and irrelevant. A court decision is precedential when it binds another court. **The question here is not whether other courts or non-parties are bound by this court's ruling. It is whether the defendants are bound by it. Plainly, they are as all parties of a lawsuit are, and in a case in which the statute was found facially unconstitutional they may not enforce it under any circumstances against anyone.** *State v Konrath*, 218 Wis. 2d 290, ¶20, n. 13, 577 N,W.2d 601, (1998), quoting Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 236 (1994).

MTI v Walker, Decision and Order on Petition for Injunction, September 17, 2013. (Attached) (emphasis added).

III. THE KEA HAS NO OBLIGATION TO COMPLY WITH NULL PROVISIONS THAT THE WERC HAS NO AUTHORITY TO ENFORCE, AND THE KUSD PROPERLY ENGAGED IN GOOD FAITH BARGAINING WITH THE KEA.

The KEA was not obligated to comply with unconstitutional statutes and the Wisconsin Employment Relations commissioners had no authority to enforce them.

The KEA was under no obligation to seek to be recertified through an election under Wis. Stat. §111.70(4)(d)3.b. It remains the certified collective bargaining agent for the employees of the KUSD because Wis. Stat. § 111.70(4)(d)3.b was declared facially unconstitutional in the MTI case. That judgment in that case was not stayed by the trial court, the Wisconsin Court of Appeals or the Wisconsin Supreme Court. The Wisconsin Employment Relations Commission has no authority to enforce Wis. Stat. § 111.70(4)(d)3.b. because as a result of the declaratory judgment in the MTI case, that language is not law, unless or until a higher court says it does.

Despite the fact that the KEA did not seek a recertification election, the WERC, through its Chief Legal Counsel, on October 27, 2013 informed the KUSD that the KEA remained the certified collective bargaining agent for the employees of the KUSD. (See attached email) It was only after that information did the KUSD engage in the collective bargaining that led to the contract that the Plaintiffs now challenge as "illegal."

Because the KEA remained the certified collective bargaining agent of the employees of the KUSD, the KUSD had the obligation to negotiate in good faith with the KEA toward reaching a collective bargaining agreement. Had it failed to do so, would have violated MERA, Wis. Stat. § 111.70(3)(a)(4), by committing a prohibited practice. And, because the limitation of wage negotiation was found to be facially unconstitutional in the MTI case, the KUSD and the KEA were not limited in their abilities to negotiate wages. The same is true for hours and working conditions, due deduction and fair share.

That the KUSD chose to follow the law, negotiate in good faith and reach a collective bargaining agreement with the KEA did not violate the Plaintiffs' or anyone else's rights. The contract that the KEA and the KUSD entered into is appropriate and legal. It neither violated law nor any public policy.

Because the Plaintiffs have no reasonable probability of success on the merits of their claim, their motion for temporary injunction must be denied.

CONCLUSION

Plaintiffs' Motion for Temporary Injunction should be denied.

Dated this 11th day of December, 2013.

Respectfully submitted,

CULLEN WESTON PINES & BACH LLP

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Attorney for Defendants
State Bar No. 1016543

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STATE OF WISCONSIN CIRCUIT CO Branch 1(NE COUNTY

Madison Teachers, Inc. et al.,
Plaintiffs

vs.

Scott Walker, et al.,

Defendants

FILED
SEP 17 2013
STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

Case No. 11CV3774

DECISION AND ORDER ON PETITION FOR INJUNCTION

This case is pending in the Supreme Court, on certification from the Court of Appeals. On April 23, 2013 plaintiffs filed a petition for injunctive relief pursuant to Wis. Stat. §806.04(8). and a proposed order to show cause why the petition should not be granted. The petition, and its supporting affidavit and brief, allege that the defendants are taking actions in execution of the laws the court found to be unconstitutional and null and void. On April 29, 2013 the court found the petition to be sufficient, approved the order to show cause and later set a briefing schedule. For the reasons stated below, though the defendants are bound by the court's judgment, even as to non-parties, the court denies the petition for an injunction.

The plaintiffs seek to enjoin the defendants from implementing or enforcing statutory provisions relating to municipal employee collective bargaining that the court found facially unconstitutional. Defendants do not dispute that they intend to implement and enforce those provisions with respect to non-parties. Def. Br. at 13.

1. **Jurisdiction or Competency To Proceed.** Defendants argue first that the court does not have jurisdiction or competency to act on the petition, because the case is on appeal. In its April 29th decision the court considered this question and concluded that it did have jurisdiction and competency. The arguments and authority offered by the defendants on this point do not persuade the court that its reasoning or conclusion was in error and for the reasons stated in that decision the court finds that it has jurisdiction and competency under Wis. Stat. §808.07(2)(a)2 to grant an

injunction even while the case is on appeal. That authority to grant an injunction is not constrained by the statute and so includes injunctions under §806.04(8).

2. Burden of Proof. In general a party seeking an injunction has the burden of proof, but §806.04(8) shifts that burden to the non-moving party. Although it is §808.07(2)(a)2 that grants the court authority to proceed under §804.06(8), it is §804.06(8) that governs the procedure and burden of proof. That statute places the burden on the defendants to show why the injunction should not be granted.

Defendants argue that the petition should be denied because plaintiffs already have their complete remedy in the declaratory judgment they were awarded and the Governor and WERC's acknowledgment that they may not enforce the provisions found unconstitutional against the plaintiffs. Defendants also argue the related point that "it is of no concern" to plaintiffs if the defendants are enforcing the unconstitutional provisions against others who are not plaintiffs.

Defendant does not argue that a circuit court cannot find a statute unconstitutional on its face and void. Its argument is that the state, its agencies and officers who unsuccessfully defend the constitutionality of a statute can ignore the declaratory judgment of unconstitutionality with respect to all persons except those who were plaintiffs in the lawsuit. In effect, they say, any ruling that a statute is facially unconstitutional is only a ruling that it is unconstitutional as applied to the parties who sued. This emphasis on the identity of the plaintiffs ignores that the declaratory judgment binds the defendants. The plaintiffs do not seek to enjoin non-parties or bind them to the judgment; only to enjoin the defendants who are already bound to the judgment. The defendants do not identify any case holding that state officials who are defendants in an action in which a statute was found to be unconstitutional on its face may continue executing that statute.

Defendants argue that a circuit court decision is not precedential. That is true and irrelevant. A court decision is precedential when it binds another court. The question here is not whether other courts or non- parties are bound by this court's ruling. It is whether the defendants are bound by it. Plainly they are, as all parties to a lawsuit are, and in a case in which the statute was found facially unconstitutional they may not enforce it under any circumstances, against anyone. "*State v.*

Konrath, 218 Wis. 2d 290, ¶20, n. 13, 577 N.W.2d 601, (1998), quoting Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 236 (1994).

3. Irreparable Harm. The remaining question is whether the requirements for issuing an injunction have been met. "To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of will and injure the plaintiff... the plaintiff must moreover establish that the injury is irreparable, i. e. not adequately compensable in damages. [citations omitted]. *Pure Milk Products Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). The defendants argue that plaintiffs are not harmed by their actions because they have specifically excluded the plaintiffs from implementation or enforcement of the invalid statutes. In support of this argument they offer evidence that the Wisconsin Employment Relations Commission's decision to implement the annual certification election provisions will not apply to the plaintiffs in this case unless this court's decision is no longer in effect. Kilpatrick Aff. Ex. B, Def. Br. at 13. The defendants have met their burden of showing that plaintiffs will not suffer irreparable harm and the plaintiff's have not offered evidence to rebut that showing.

The defendants may be causing irreparable harm to others, who are not plaintiffs in this case. However, the law of injunctions makes clear that the moving party must show irreparable harm to itself, and only if that exists may the court then consider the interests of third parties in fashioning relief. There does not appear to be any authority for the proposition that a plaintiff who is unable to show irreparable harm to itself may obtain an injunction based solely upon harm to others who are not parties. For that reason, though the defendants are bound by the court's judgment, even with respect to their actions toward non-parties, the court cannot issue the requested injunction.

CONCLUSION

For the reason stated above, the petition for an injunction is DENIED. This is a final order as defined by Wis. Stat. §808.03(1) for purposes of appeal.

Dated: September 17, 2013

BY THE COURT:

Juan B. Colás
Circuit Court Judge

Copy: Attys. Pines, Olson, Kilpatrick, Padway BY FAX ONLY

Lester Pines

From: Davis, Peter G - WERC <PeterG.Davis@wisconsin.gov>
Sent: Sunday, October 27, 2013 12:44 PM
To: Kiriaki, Joe
Cc: Lester Pines; Osborn, Rebecca Ferber; Sheronda Glass
Subject: RE: Kenosha Schools Request for Notice

Pursuant to Judge Colas' Order of October 25, 2013, the WERC hereby informs

- the Kenosha Unified School District (KUSD) that the prior communications from the Chief Legal Counsel of the WERC to KUSD with respect to the status of the Kenosha Education Association were in error and are withdrawn and affirmatively inform the KUSD that the Kenosha Education Association has the same status it would have had had ERC 70.03 not been enacted and had the withdrawn communications not been sent.

Peter Davis
WERC

From: Davis, Peter G - WERC
Sent: Monday, October 21, 2013 4:27 PM
To: Kiriaki, Joe
Cc: Lester Pines; Osborn, Rebecca Ferber; Sheronda Glass
Subject: RE: Kenosha Schools Request for Notice

Pursuant to Judge Colas' ruling today, the Commission's emergency administrative rules as to certification elections are, at the present time, null and void. Thus, at the present time, my prior emails to you and the District as to the impact of those rules on a union that did not file a certification are withdrawn.

WERC will be appealing the Judge's ruling but will be honoring it unless it is stayed or overturned.

Peter Davis
WERC