



December 12, 2014

Via Hand Delivery

Mr. Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse, Room 1000
215 South Hamilton Street
Madison, Wisconsin 53703

**RE: David Blaska v. Madison Metropolitan School District
Board of Education, et al.
Case No.: 14-CV-2578**

Dear Mr. Esqueda:

Enclosed for filing is MMSD Defendants' Brief in Support of Motion to Strike. A copy is being served on counsel by email today, together with a copy of this letter. Thank you.

Sincerely,

BOARDMAN & CLARK LLP



Andrew N. DeClercq

AND/ms

Enclosure

cc: Attorney Richard M. Esenberg (*w/enc., via email only*)
Attorney Lester A. Pines (*w/enc., via email only*)
Attorney Tamara B. Packard (*w/enc., via email only*)

DAVID BLASKA,

Plaintiff,

v.

Case No.: 14-cv-2578

Case Code: 30701

Declaratory Judgment

MADISON METROPOLITAN SCHOOL
DISTRICT BOARD OF EDUCATION,
MADISON METROPOLITAN SCHOOL DISTRICT
and MADISON TEACHERS, INC.,

Defendants.

MMSD DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STRIKE

Plaintiff David Blaska (“Blaska”) has brought a taxpayer action for a declaratory judgment that, among other things, the 2014-2015 and 2015-2016 collective bargaining agreements (“CBAs”) between the Madison Metropolitan School District (the “District”) and Madison Teachers, Inc. (“MTI”) violate the rights of teachers under Wis. Stat. § 111.70(2). Specifically, Blaska alleges that the CBAs violate teachers’ statutory rights to refrain from union activities and to not pay union dues or any amount under a fair-share agreement. Blaska, however, does not have standing to raise these claims, even in his capacity as a taxpayer. To have standing to bring a declaratory judgment action regarding rights under a statute, a plaintiff must have suffered (or be threatened with) a direct injury that falls within the zone of interests that the statute seeks to protect. Here, Blaska has alleged no injury to himself that is related to any of the alleged violations of teachers’ rights. Even if he had, any such injury would not fall into the zone of interests that § 111.70(2) seeks to protect because that statute pertains to the rights of municipal employees, and Blaska does not allege to be a municipal employee. Finally,

even though Wisconsin recognizes a taxpayer's standing to seek declaratory relief regarding governmental decisions that injure taxpayers, Blaska has not alleged the necessary type of injury to support such standing in regard to any of the alleged violations of the rights of teachers. Those allegations should therefore be stricken from his Complaint.

Background

On September 8, 2014, Blaska filed a Complaint against the District, the Madison Metropolitan Board of Education (the "Board"), and MTI, seeking declaratory relief on three issues:

Plaintiff seeks a declaration that the 2014-2015 and the 2015-2016 collective bargaining agreements (the "CBAs") between the School District and MTI are unlawful, invalid and void on the grounds that (a) the CBAs are the product of unlawful collective bargaining in violation of Wis. Stat. § 111.70(4)(mb); (b) the CBAs contain terms that violate Wisconsin law; and (c) the CBAs violate the rights of teachers under Wis. Stat. § 111.70(2).

Compl. ¶ 1. With respect to the third issue, Blaska's Complaint included the specific allegations that the CBAs violate teachers' statutory rights under § 111.70(2) to refrain from union activities and to not pay union dues or any amount under a fair-share agreement. Compl., ¶¶ 11, 25, 28, 33, 41.

On October 1, 2014, the District and the Board (collectively, "Defendants") answered the Complaint and included a motion to strike Blaska's allegations regarding alleged violations of teachers' rights on the basis that Blaska lacked standing and any factual basis to make those allegations. Answer, 1-2. Specifically, Defendants sought to strike paragraphs 1(c), 11, 25 (in part), 28, 33, and 41, all of which included allegations regarding supposed violations of teachers' rights. Defendants asserted that Blaska's allegation that he is a taxpayer is inadequate to support these allegations. MTI joined in the motion to strike with its Answer, filed October 3, 2014.

MTI Answer, ¶¶ 1, 11, 28, 33, 41.

On October 8, 2014, Blaska filed an Initial Response to Defendants’ motion to strike. In his Initial Response, Blaska asserted that he has standing to bring his claims regarding teachers’ rights because he is a taxpayer, and a taxpayer has standing “to challenge any unlawful action by a government entity that results in the expenditure of public funds.” Intl. Resp., 1. According to Blaska, because the CBAs are illegal contracts that will result in the expenditure of public funds, he has taxpayer standing to assert claims to protect the rights of teachers that are allegedly violated by the CBAs. In addition, Blaska argued that these alleged violations of teachers’ rights expose the District to potential claims by teachers, which “causes increased financial harm to taxpayers.” *Id.* at 2.

Legal Standard

A plaintiff may not maintain a declaratory judgment action unless there is a “justifiable controversy,” which exists when the following four requirements are met:

- (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
- (2) The controversy must be between persons whose interests are adverse.
- (3) The party seeking declaratory relief must have a legal interest in the controversy — that is to say, a legally protectable interest.
- (4) The issue involved in the controversy must be ripe for judicial determination.

Chenequa Land Conservancy v. Village of Hartland, 2004 WI App 144, ¶ 11, 275 Wis. 2d 533, 685 N.W.2d 573 (quoting *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)).

The third of these requirements is the requirement of standing. In order to have standing to bring an action for a declaratory judgment, a plaintiff “must have suffered or be threatened with an injury to an interest that is legally protectable, meaning that the interest is arguably within the zone of interests that [the statute at issue] seeks to protect.” *Id.* ¶ 16. This is a two-part test under which a plaintiff must assert:

- (1) Some threatened or actual injury (i.e., a personal stake in the outcome of the controversy); and
- (2) A logical nexus between the status asserted and the claim sought to be adjudicated (i.e., that the provision on which the claim rests properly can be understood to grant people in the plaintiff's position a right to judicial relief).

State ex rel. First Nat'l Bank of Wis. Rapids v. M&I Peoples Bank of Coloma, 95 Wis. 2d 303, 308-09, 290 N.W.2d 321 (1980); *see also Foley-Ciccantelli v. Bishop's Grove Condo. Assn., Inc.*, 2011 WI 36, ¶¶ 54-55, 333 Wis.2d 402, 797 N.W.2d 789 (the "essence of the question of standing" is "whether there is an injury and whether the interest of the party whose standing is challenged falls within the ambit of the statute . . . involved."); *Foley-Ciccantelli*, 2011 WI 36, ¶¶ 121-24 (Prosser, J., concurring). Therefore, for Blaska to seek a declaratory judgment pertaining to the rights of teachers under Wis. Stat. § 111.70(2), the allegations in his Complaint must establish (1) that *he* has suffered (or is threatened with) an actual injury and (2) that the injury is within the zone of interests protected by § 111.70(2).

Argument

The concept of standing is rooted in the idea that in order to pursue a lawsuit, an individual should have "a personal stake in the outcome of the controversy." *State ex rel. First National Bank*, 95 Wis. 2d at 309 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, to have standing, "the plaintiff himself [must have] suffered some threatened or actual injury resulting from the putatively illegal action." *Id.* at 308 (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). In addition, when the action concerns a declaratory judgment regarding a particular statute, the plaintiff must also establish that the injury is of the type the statute is intended to protect against. *Chenequa Land Conservancy*, 2004 WI App 144, ¶ 16.

As shown below, Blaska's allegations regarding violations of teachers' rights completely fail to meet either prong of the standing test. First, Blaska has not alleged any threatened or actual injury, even in his capacity as a taxpayer. Second, even if Blaska had alleged an injury, that injury would not have a logical nexus with or fall within the zone of interests protected by § 111.70(2) because that statute protects the rights of teachers and other municipal employees, and Blaska has not alleged that he is a teacher or municipal employee.

I. Blaska does not have standing to pursue a declaratory judgment action regarding the rights of teachers because Blaska has not alleged any actual or threatened injury to himself, even as a taxpayer.

For an individual to have standing to bring a declaratory judgment action regarding statutory rights, the statutory rights implicated must implicate his or her individual rights. *Chenequa Land Conservancy*, 2004 WI App 144, ¶ 17 (“The injury asserted must be such that it gives the plaintiff a personal stake in the outcome of the controversy.”); *cf. Sharping v. Johnson*, 32 Wis. 2d 383, 395, 145 N.W.2d 691 (1966) (“It is familiar Wisconsin law that a party may not urge the unconstitutionality of a statute upon a point not affecting his rights.”). Here, however, Blaska's allegations relate to the rights of others. He is seeking a declaratory judgment that “the CBAs violate the rights of teachers under Wis. Stat. § 111.70(2).” Compl., ¶ 1. But Blaska does not allege that he is a teacher or that he is otherwise directly injured by any of the alleged violations of teachers' rights. As such, Blaska's Complaint fails to allege the type of injury necessary for him to pursue a declaratory judgment regarding the rights of teachers under § 111.70(2).

A. Blaska alleges no violation of his individual rights or any pecuniary injury to himself as an individual.

As noted above, Blaska's Complaint includes allegations related to three specific alleged violations of teachers' rights: (1) the right to refrain from union activities, (2) the right not to

pay union dues, and (3) the right not to pay any amount under a fair-share agreement. Blaska's Complaint does not, however, include any allegations that would establish that these alleged violations of teachers' rights would interfere with *his* individual rights or cause *him* any direct pecuniary harm as an individual. Nor could he, as each of these alleged violations is specific to *teachers*, and Blaska has not alleged that he is a teacher.

B. Blaska alleges no actual or threatened injury to himself as a taxpayer or to taxpayers generally that would support taxpayer standing.

Blaska asserts that he can pursue a declaratory judgment regarding the rights of teachers because this is a "taxpayer action." Compl., ¶ 1. It is true that Wisconsin recognizes that a taxpayer has standing to challenge governmental actions in certain circumstances. But "[a] taxpayer does not have standing to challenge [a governmental action] merely because he or she disagrees with the [governmental body]." *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 10, 256 Wis. 2d 859, 650 N.W.2d 81. Rather, to bring a taxpayer action, "the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988). Blaska has not done so. As such, the Complaint fails to establish taxpayer standing for Blaska to pursue his claims regarding the rights of teachers under § 111.70(2). *McClutchy v. Milwaukee County*, 239 Wis. 139, 141, 300 N.W. 224 (1941) ("It is fundamental that in order to maintain such an action the taxpayer and taxpayers as a class must have sustained or will sustain some pecuniary loss.").

1. Blaska does not allege that any violation of teachers' rights alleged in his Complaint will result in an increase in his taxes.

Wisconsin courts have found taxpayer standing where there is a challenge to a governmental action that will raise a taxpayer's taxes. *See, e.g., City of Appleton*, 142 Wis. 2d at 883-84. But Blaska's Complaint includes no allegation that any of the alleged violations of

teachers' rights will cause an increase in his taxes. Moreover, as a matter of logic, none of alleged violations would do so, because the harm (if any) suffered as a result of the alleged violations would be limited to the teachers themselves, and neither the District nor the Board (or any other governmental entity) would face a financial consequence as a result that harm. As such, there would be no potential for an increase in taxes due to any of the alleged violations of teachers' rights.

2. Blaska does not allege that any violation of teachers' rights will result in an expenditure of public funds.

Under Wisconsin law, taxpayers may be injured when their payment of taxes is used to fund illegal expenditures. *See, e.g., Tooley v. O'Connell*, 77 Wis. 2d 422, 438-39, 253 N.W.2d 335 (1977) (challenge to a statute establishing the financing of Milwaukee public schools which required the expenditure of public funds); *Thompson v. Kenosha County*, 64 Wis. 2d 673, 680, 221 N.W.2d 845 (1974); *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by, DNR v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994) ("A taxpayer does not have standing to challenge an ordinance merely because he disagrees with a legislative body. . . . An allegation that the city has spent, or proposes to spend, public funds illegally is, however, sufficient to confer standing on a taxpayer."). In his Initial Response, Blaska argued that the alleged violations of teachers' rights would result in the unlawful expenditure of public funds, which would serve a basis for taxpayer standing. *Intl. Resp.*, at 1-2. Here, again, the allegations made in Blaska's Complaint do not support his argument.

Blaska's allegations regarding the specific rights that will be violated by the CBAs all pertain to things that the *teachers* will be required to do. None of these allegations relate to anything that the District or the Board (or any other governmental entity) will be required to do.

More specifically, there is no allegation that the alleged violations of teachers' rights will cause the District or the Board (or any other governmental entity) to expend any public funds. Because Blaska's Complaint does not include any allegations that would indicate that the alleged violations of teachers rights have or will result in any expenditure of public funds, Blaska cannot rely on this theory as a basis for taxpayer standing.

C. The potential for future litigation does not provide a basis for taxpayer standing.

In his Initial Response, Blaska also argued that taxpayer standing exists because the alleged violations of teachers' rights identified in his Complaint "expose the School District to future financial claims" by teachers. Intl. Resp., 2. (Blaska did not specifically allege any threat of future litigation in his Complaint.) But a "remote" and "hypothetical" future injury, such as an alleged threat of possible future litigation, is not sufficient to support standing. *See Fox v. DHSS*, 112 Wis. 2d 514, 527, 334 N.W.2d 532 (1983) (finding no standing where the injuries alleged were "simply too remote to be considered 'direct injury'"). Rather,

The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Id. at 525 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). The requirement of "real and immediate" harm is black letter law in Wisconsin, including in regard to alleged future harm.

Moreover, courts that have addressed the issue of whether the threat of future litigation is a sufficient basis to establish the type of direct injury that would confer standing have held that it is not. *See, e.g., Berger v. Weinstein*, 348 Fed. Appx. 751, 756 (3d Cir. Oct. 9, 2009) (unpub.) ("Any injury to [the plaintiff] that may result from a potential future lawsuit is hypothetical and cannot confer Article III standing."); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 35 (D.C. Cir. 1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149,

157 (1990)) (“Allegations of injury based on predictions regarding future legal proceedings are, however, ‘too speculative to invoke the jurisdiction of an Article III Court.’”); *County of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 998-99 (D. Minn. 2003) (“On the other hand, an amorphous threat of future liability alone does not result in injury. If such an inchoate claim could support standing, a court could intervene whenever any entity faced the possibility of future litigation.”).

Blaska’s assertion of possible future litigation from teachers is particularly speculative as no teacher has yet sued the District despite the fact that the parties are already operating under one set of the challenged CBAs and the supreme court’s ruling came down nearly six months ago. Blaska’s assertion of injury by possible future litigation, like the injuries asserted by the plaintiffs in *Fox*, is too remote to confer standing: “His claimed injuries will result only if a sequence of increasingly unlikely events actually occur.” *Fox*, 112 Wis. 2d at 529. Therefore, Blaska’s allegation that the violations of teachers’ rights alleged in his Complaint raise a threat of future litigation is not sufficient to establish taxpayer standing, even if he were to amend his Complaint to add allegations regarding the future possibility of litigation as an injury.

II. Even if Blaska had alleged an actual injury, he still would not have standing, because any alleged injury to Blaska would lack the necessary nexus with the rights of teachers under § 111.70(2).

For a plaintiff to have standing to pursue a declaratory judgment action regarding the rights of the parties under a statute, there must be a “logical nexus between the status asserted and the claim sought to be adjudicated.” *State ex rel. First Nat’l Bank of Wis. Rapids*, 95 Wis. 2d at 309. This “logical nexus” requirement means that “the actual or threatened injury [must] be to an interest that is arguably protected by the statutory or constitutional law upon which the plaintiff bases the claim for relief.” *Chenequa Land Conservancy*, 2004 WI App 144,

¶ 16. In this case, Blaska cannot meet this requirement in regard to any rights protected by § 111.70(2).

Section 111.70(2) is titled “Rights of Municipal Employees,” and that is precisely what it aims to protect; it does not address rights of private citizens. Blaska has not alleged that he is a teacher (or any other type of municipal employee). This means that any injury to him would necessarily fall outside of the “zone of interests” that § 111.70(2) seeks to protect. *See Chenequa Land Conservancy*, 2004 WI App 144, ¶ 16.

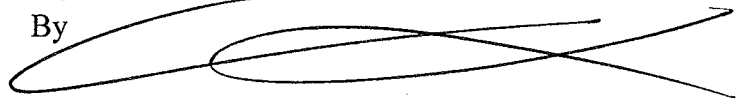
Conclusion

For the reasons stated above, Defendants respectfully request that the Court grant their motion to strike from plaintiff’s complaint paragraphs 1(c), 11, 28, 33, 41, and portions of paragraph 25 relating to deductions of union dues, fair share payments and the like.

Dated this 12th day of December, 2014.

BOARDMAN & CLARK LLP

By



Sarah A. Zylstra, State Bar No. 1033159
Andrew N. DeClercq, State Bar No. 1070624
Attorneys for Defendants Madison Metropolitan
School District Board of Education and
Madison Metropolitan School District
U.S. Bank Plaza, Suite 410
1 South Pinckney Street
P.O. Box 927
Madison, Wisconsin 53701-0927
(608) 257-9521
szylstra@boardmanclark.com
adeclercq@boardmanclark.com