STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Norman Sannes

Plaintiff,

v.

Case No. 15-CV-974

Madison Metropolitan School District Board of Education, et al.,

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE

The Defendants, Madison Metropolitan School District Board of Education and the Madison Metropolitan School District (collectively the "School District"), have filed a "Motion to Strike." The motion requests that the Court strike certain portions of the Complaint which allege that the Collective Bargaining Agreements ("CBAs") between the School District and Madison Teachers, Inc. are illegal because the CBAs violate the rights of teachers.[1] The School District argues that even if the CBAs do violate the rights of teachers, Plaintiff Sannes does not have standing to assert that the CBAs are void on that basis.

The School District's motion should be denied for three reasons; (1) it does not satisfy the standards for a motion to strike under Wis. Stat. § 802.06(6), (2) as a taxpayer, Plaintiff Sannes has standing to challenge any and all aspects of illegality in the CBAs, and (3) the precise same argument was rejected by the Court in *Blaska v. Madison Metropolitan School District Board of Education, et al*, Case No. 14-CV-2578.

I. THE SCHOOL DISTRICT'S MOTION TO STRIKE DOES NOT MEET THE STANDARDS IN WIS. STAT. §802.06(6).

Under Wis. Stat. §802.06(6) a motion to strike must be made "by a party before responding to a pleading" (emphasis added). The School District's motion was made in its responsive pleading (not before) and was not briefed until long after its pleading. It is untimely under §802.06(6).

Further, to be stricken, a pleading must be "redundant, immaterial, impertinent, scandalous or indecent." §802.06(6). The School District does not attempt to show that any part

[1] The defendant, Madison Teachers, Inc., has joined in the School District's motion and brief.

of the Complaint satisfies this standard. What the School District is doing is improperly using a "motion to strike" as a disguised dispositive motion. If the School District believes that Mr. Sannes lacks standing to bring the claims contained in the Complaint, the School District could have filed a motion to dismiss on that basis but did not do so. In the "motion to strike," the School District does not contend that Mr. Sannes actually lacks standing to bring his claim for a declaration that the CBAs are unlawful and void (his First Cause of Action) or his claim that the Court should enjoin enforcement of the CBAs (his Second Cause of Action).

Instead, what the School District wants is partial summary judgment in its favor dismissing the portion of Mr. Sannes's Complaint that asserts that the CBAs should be declared void based upon the fact that they violate the rights of teachers. The School District has not submitted affidavits or other evidentiary facts, has not submitted a statement of undisputed facts, or done any of the other things necessary to support a motion for partial summary judgment.

The School District is using a "motion to strike" inappropriately and inartfully. It is asking the Court to rule on a dispositive motion on a portion of the Plaintiff's claim and it wants the Court to do so without giving the Plaintiff any opportunity to submit evidence to the Court. The Court can and should deny the motion because it is untimely and does not meet the substantive standard contained within §802.06(6).

II. AS A TAXPAYER, MR. SANNES HAS STANDING TO CHALLENGE THE LEGALITY OF THE CBAs.

If the Court disagrees with respect to the procedural problems with the School District's motion and decides to rule on the merits of the standing issue raised by the motion, then the motion should be denied because, as a taxpayer, Mr. Sannes has standing to challenge any illegal action by a government entity that results in the expenditure of taxpayer funds. Any money spent pursuant to an illegal contract – regardless of the reason the contract is illegal – causes harm to taxpayers.

A. As a Taxpayer, the Plaintiff Is Harmed by any Illegal Expenditure of Taxpayer Funds.

At pages 3 and 4 of its brief, the School District starts its argument by discussing a series of Wisconsin standing cases (*Chenequa Land Conservancy, Loy, State ex rel. First Nat'l Bank and Foley-Ciccantelli)* but none of those cases deal with taxpayer standing. Thus, they have little or nothing to do with this case. This is a taxpayer case in which Mr. Sannes asserts that the

School District has acted unlawfully by entering into CBAs which violate the law and are therefore void. Whether he has standing is determined by Wisconsin law dealing specifically with taxpayer standing.

The primary case explaining the grounds for taxpayer standing in this context is *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961), in which the Wisconsin Supreme Court held that taxpayers have standing to challenge any unlawful action by a government entity that results in the expenditure of public funds. While the School District is correct that a taxpayer plaintiff, like other plaintiffs, must allege pecuniary loss to have standing, in *S.D. Realty,* the Wisconsin Supreme Court said that:

> **Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss.** This is because it results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit.

15 Wis. 2d at 22, 112 N.W.2d at 181 (emphasis added).

S.D. Realty involved a challenge that a lease entered into between the defendant Sewerage District and certain developers was illegal and void. The plaintiff was not a party to the lease, and the defendants challenged the plaintiff's standing to bring the claim. The plaintiff argued that the disbursement of public money (in any amount) was sufficient to provide taxpayer standing to challenge a contract. The trial court agreed with the defendants and granted summary judgment to the defendants based on lack of standing, but the Wisconsin Supreme Court reversed, stating:

> "The illegal disbursement of this money would constitute an invasion of the funds of the city in which each individual taxpayer has a substantial interest, notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation."

15 Wis. 2d at 22, 112 N.W.2d at 181, (quoting *Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207, 208 (1928)).

Wisconsin's broad grant of standing to taxpayers to challenge illegal contracts was reaffirmed in *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993). In *Hart*, a group of taxpayers challenged a contract transferring the Milwaukee County Museum to a private non-profit organization. The defendants challenged the plaintiffs' standing based on the argument

that taxpayers were not harmed by the contract because the contract would actually save taxpayers money. The County contended that it would spend less on the museum after the transfer than before. The Wisconsin Supreme Court, citing *S.D. Realty*, rejected the defendants' argument on standing stating that while taxpayers must allege pecuniary harm:

> The alleged pecuniary loss need not be substantial in amount. Even a loss or potential loss which is infinitesimally small with respect to each individual taxpayer will suffice to sustain a taxpayer suit.
>
> The plaintiffs possess standing to bring this action because they have alleged that they may suffer a pecuniary loss from the challenged transaction. All 25 plaintiffs are taxpayers in Milwaukee County. As such, they each have a "financial interest in public funds ... akin to that of a stockholder in a private corporation." [citations omitted] Plaintiffs sue not only in their own right, but as representatives of all Milwaukee County taxpayers.

176 Wis. 2d at 699, 500 N.W.2d at 314; *see also Bechthold v. City of Wauwatosa*, 228 Wis. 544, 277 N.W. 657, 659 on reh'g, 228 Wis. 544, 280 N.W. 320 (1938) ("It is clear that a taxpayers' action may be maintained to restrain the performance of a contract when it appears that the contract is invalid and that loss will ensue to the taxpayers if the municipality performs under it"); *Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207, 208 (1928) (taxpayer has standing to challenge printing contract entered into by city as illegal even though the taxpayer was not a party to the contract).

S.D. Realty, *Hart*, *Bechtold*, and *Wagner* all directly contradict the School District's argument on standing. The School District is making the same failed argument the government made in *S.D. Realty* – that the plaintiff lacks standing because the plaintiff will suffer no pecuniary loss under the contract. (School District Br. at 6.) The School District says at page 7 of its brief that "as a matter of logic" Mr. Sannes could not be harmed by the violation of teacher rights because he was not a teacher and thus, not subject to the contract. But exactly the same thing could be said of the plaintiff in *S.D. Realty*: "as a matter of logic" it could not be harmed by the lease because it was not a party to the lease. But the Wisconsin Supreme Court disagreed. As a taxpayer, the plaintiff in *S.D Realty* was harmed if the Sewerage District (to which the plaintiff paid taxes) was a party to an illegal contract. The same is true here.

The School District argues more specifically that Mr. Sannes's taxes will not rise because of any alleged violations of teachers' rights (School District Br. at 7), but that argument, too, has been rejected by the Wisconsin Supreme Court. Taxpayers are harmed by the unlawful

expenditure of public funds even if taxes are not increased, giving them standing to challenge such expenditures. *S.D. Realty*, 15 Wis. 2d at 22 ("The illegal disbursement of this money would constitute an invasion of the funds of the city in which each individual taxpayer has a substantial interest, notwithstanding the fact that the payment of this sum would not necessarily result in increased taxation"); *Hart*, 176 Wis. 2d at 699 (taxpayers have standing even if government entity might spend less tax money under illegal contract).

Nowhere in its brief does the School District cite a taxpayer standing case that is contrary to *S.D. Realty*, *Hart*, *Bechtold*, *and Wagner*. These cases establish the law of taxpayer standing in Wisconsin as it relates to challenging illegal contracts. The Court must apply those cases to the facts of this dispute.

B. Whether the Challenged Provision of a Contract Itself Requires the Expenditure of Taxpayer Funds Is Immaterial as Long as the Contract Itself Requires the Expenditure of Taxpayer Funds.

The School District also argues that Mr. Sannes cannot challenge the provisions related to the rights of teachers because those provisions, even if unlawful, do not require the expenditure of public funds (School District Br. at 7-8). This argument fails for two reasons: first, because it lacks any legal support, and second because it ignores the factual pleadings in the Complaint.

1. Taxpayer standing does not require the challenged provision of a contract itself to require the expenditure of taxpayer funds.

The School District offers no authority for the novel proposition that the specific aspect of a contract that allegedly makes the contract illegal must itself require the expenditure of taxpayer funds. Such a rule does not exist, and would run counter to Wisconsin's liberal rules of taxpayer standing. If the new rule proposed by the School District were adopted, taxpayers would be unable to challenge a contract that, for example, was not signed by the proper government representative. After all, the failure to obtain the right signature did not expend taxpayer funds. Similarly, a contract whose bidding process discriminated on the basis of race could not be challenged by a taxpayer, because the discrimination itself did not expend taxpayer funds.

None of the cases cited by the School District (School District Br. at 7) support the School District's argument. *Tooley v. O'Connell*, 77 Wis 2d 422, 253 N.W. 2d 673 (1977) is not even a contracts case. In *Tooley* the Wisconsin Supreme Court held that the taxpayer plaintiffs

had standing to challenge the statutory plan for school financing in Wisconsin. The challenge was not to the expenditure of taxpayer money but rather to the plan for levying taxes for schools. The Court found taxpayer standing in that case and nowhere in its decision does the Court say that in a taxpayer case challenging the illegality of a contract the taxpayer plaintiff must allege that the challenged provision, itself, involves the expenditure of taxpayer funds.

Likewise, *Thompson v. Kenosha County*, 64 Wis. 2d 673, 221 N.W. 2d 845, (1974) does not involve a challenge to an illegal contract. In that case, the Court held that taxpayers had standing to challenge a statute dealing with the appointment of county assessors and, again, the Court does not even discuss the proposition asserted by the School District.

Finally, *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 299 N.W. 2d 259 (Ct. App. 1980) was also not a challenge to an illegal contract. In that case, the Court held that taxpayers had standing to challenge the creation of a lake improvement district and there is no discussion on the proposition that in a taxpayer case challenging the illegality of a contract the taxpayer plaintiff must allege that the challenged provision, itself, involves the expenditure of taxpayer funds. .

Thus, in support of its position that a taxpayer lacks standing to challenge a specific portion of a contract unless that specific portion requires the expenditure of taxpayer funds, the School District relies on three cases that do not even involve a taxpayer challenge to an illegal contract. Moreover, the Courts found taxpayer standing in each of the cases and in none of the cases did the Court even discuss the School District's novel proposition.

It is not (or at least not necessarily) the particular illegality of a contract that harms taxpayers, it is the fact that the government is spending taxpayer funds that it has no lawful authority to spend. "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *S.D. Realty*, 15 Wis. 2d at 22. The expenditures are illegal because the contract is illegal, and therefore the School District has no authority to make those expenditures. *See Wagner*, 196 Wis. 328 (enjoining future expenditures of funds under a printing contract,[2] not because there was anything particularly illegal about paying printing shops for their services, but because the contract itself was illegal).

2 The Complaint alleges that the illegal provisions related to teachers require the expenditure of taxpayer funds.

[2] The Court also invalidated the actions of the city council, which had asserted the unilateral right to make the payments to the printer anyway, even if there was no valid contract. *Wagner*, 196 Wis. at 328.

Even if Wisconsin's rules for taxpayer standing require that each specific section of a contract being challenged involves the expenditure of taxpayer funds, the Complaint in this case satisfies that standard. A motion to strike admits the truth of all properly pleaded material facts and all reasonable inferences deriving from them. *First Nat. Bank of Wisconsin Rapids v. Dickinson*, 103 Wis. 2d 428, 432, 308 N.W.2d 910, 912 (Ct. App. 1981). Thus, for purposes of this motion, the Court must accept as true the allegations in the Complaint, including the following:

> 39. The Plaintiff and other taxpayers are irreparably harmed by the CBAs. The CBAs *require the expenditure of tax monies* that cannot be recovered.
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> 40. The CBAs require continuing payments in violation of Act 10 relating to monetary compensation including fringe benefits agreed to in the CBAs which will impose continuing costs on the School District, and *the School District must expend money to administer the CBAs including but not limited to administering the dues deductions for MTI.*
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> 41. In addition, the CBAs require School District employees covered under the CBAs to pay union dues or "fair share" payments in violation of Act 10 and prohibit them from negotiating their own terms and conditions of employment. *Continuing to implement the CBAs exposes the School District to financial exposure for claims by teachers for violation of this provision.*

(Complaint, ¶¶39-41 (emphasis added).) These allegations establish that taxpayers are harmed by the CBAs, including the aspects of the CBAs which infringe on the rights of teachers. For example, the School District must spend money administering the provisions of the CBAs relating to union dues and "fair share" payments. Further, teachers whose wages are reduced by the School District for payments of union dues would have claims against the School District if those payroll deductions are unlawful under Act 10. This causes increased pecuniary harm to taxpayers.

The School District asserts that some of this harm is speculative because no teacher has yet made a claim against the School District (School District Br. at 9), but that again misses the mark.[3] First, the Wisconsin Supreme Court in *Hart* found that taxpayer plaintiffs "possess standing to bring this action **because they have alleged that they may suffer a pecuniary loss**

[3] The School District relies heavily on federal case law regarding speculative injury. Federal case law does not recognize taxpayer standing, making those cases irrelevant to determining whether the plaintiff here can assert taxpayer standing in a Wisconsin State Court.

from the challenged transaction." 176 Wis. 2d at 699, 500 N.W.2d at 314 (emphasis added). Under the rule in *Hart*, even a potential future injury is sufficient. In *Hart*, the Wisconsin Supreme Court rejected the argument that a taxpayer lacked standing to challenge a contract that would save the government money. *Id.* at 699-700. The Court stated that the lowered costs could result in a reduction of services or in the quality of services, and that lower salaries could "lead to the loss of competent personnel," all of which could cause a net pecuniary loss to the taxpayers. *Id.* at 700. For purposes of standing, a taxpayer need not show that a loss will occur, only that it could occur.

Second, the fact asserted by the School District that no teacher has made a claim (School District Br. at 9) is not in the record before this Court. Whether teachers have made or have the ability to make claims are questions which, if they are material, will ultimately be resolved in discovery, investigation and briefing. The Court cannot accept as true the School District's factual statement that no teacher has made a claim against the School District for a violation of teacher rights under Wis. Stat. §11.70(2). If the School District wishes to assert that statement as a material fact, it must submit an affidavit in that regard, and the motion would then be treated as one for summary judgment.

The CBAs impose costs on the School District and result in the expenditure of taxpayer money. This includes the original cost of negotiating the CBAs, the cost of administering and implementing the CBAs (including the dues deductions and "fair share" provisions in the CBAs), payments made under the CBAs, and the legal exposure of the School District to teachers whose rights are violated by the CBAs. As a taxpayer, Mr. Sannes has the right to challenge all illegal aspects of the CBAs in this Court.

III. The School District Has Already Lost this Identical Argument in Blaska v. Madison Metropolitan School District Board of Education, et al., Case No. 14-CV-2578.

The School District criticizes the decision of Judge Niess in the *Blaska* case on this same issue on two different bases (School District Br. at 10-14) but neither has merit. First, the School District argues Judge Niess failed to accurately read the complaint and, as a result, failed to understand that the complaint allegedly asserts it is teachers who are being forced to pay union and fair-share dues contrary to law and that the complaint does not allege the School District is required to do anything. The School District relies on Paragraph 11 of the Complaint for this argument.

The argument simply ignores other allegations of the Complaint. For example, Paragraph 27 alleges that "The provisions [of the CBAs in issue] that are not permissible under Act 10, as listed in the summaries, include but are not limited to provisions on working conditions, teacher assignments, fringe benefits, teacher tenure, deduction of union dues, "fair share" payments, employee healthcare contributions, retiree healthcare, pension, sick leave, and pay schedules." That is a plain and simple allegation that the CBAs are void, in part, because the sections on deduction of union dues and so-called "fair share" payments are illegal (and, as a result, subject to challenge by a taxpayer).

Similarly, Paragraph 35 alleges that "the CBAs violate Wis. Stat. § 111.70(2) by forcing teachers to pay union dues or "fair share" payments even if the teacher does not want to belong to the union. This allegation is coupled with the preceding allegations that assert that the School District illegally collectively bargained provisions that violated §111.70(2) (which is the subsection that includes teacher rights).

The Plaintiff's claim is that by collectively bargaining provisions that violate state law and agreeing to include those provisions in a CBA the Defendants have agreed to an illegal contract and the Plaintiff, as a taxpayer challenges those contracts. Judge Niess correctly read the Complaint and determined that the allegations in the *Blaska* Complaint identical to those described above were sufficient to establish taxpayer standing.

Second, the School District argues Judge Niess was wrong when he concluded that a taxpayer has standing to challenge the referenced sections of the Complaint because a teacher might bring suit in the future and thereby expose the School District to the costs of defending a future lawsuit (School District Br. at 12-14). In this section, the School District retreats to its earlier error and cites to cases that do not deal with taxpayer standing.

Despite having now briefed this issue twice (in *Blaska* and in this case), the School District continues to ignore the Wisconsin cases on taxpayer standing, while simultaneously arguing that a taxpayer lacks standing. The taxpayer standing case that directly covers this point is the Wisconsin Supreme Court in *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993).

Hart found that taxpayer plaintiffs "possess standing to bring this action **because they have alleged that they may suffer a pecuniary loss** from the challenged transaction." 176 Wis. 2d at 699, 500 N.W.2d at 314 (emphasis added). Under the rule in *Hart*, even a potential future injury is sufficient. In *Hart*, the Wisconsin Supreme Court rejected the argument that a taxpayer

lacked standing to challenge a contract that would allegedly save the government money. *Id.* at 699-700. The Court stated that the lowered costs could result in a reduction of services or in the quality of services, and that lower salaries could "lead to the loss of competent personnel," all of which could cause a net pecuniary loss to the taxpayers. *Id.* at 700. For purposes of standing, a taxpayer need not show that a loss will occur, only that it could occur. In *Blaska*, Judge Niess correctly concluded that the allegations in the Complaint that teachers could bring a claim against the School District for the violations of teacher rights were sufficient to establish harm to taxpayers, sufficient to show taxpayer standing.

CONCLUSION

For the reasons set forth above, the Plaintiff requests that the School District's motion to strike be denied.

Dated this 9th day of July, 2015.

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