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October 5, 2015

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

RE: Norman Sannes v. Madison Metropolitan School District, et al.
Case No.: 15-CV-974

Dear Mr. Esqueda:

Enclosed for filing is MMSD Defendants' Summary Judgment Reply. A copy is being sent to Judge Anderson and all counsel of record by email today, together with a copy of this letter. Thank you.

Very truly yours,

BOARDMAN & CLARK LLP

Andrew N. DeClercq

AND/ms
Enclosures
cc: Honorable Peter C. Anderson (*w/enc., via email* only)
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*)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

NORMAN SANNES,

Plaintiff,

v.

MADISON METROPOLITAN SCHOOL DISTRICT BOARD OF EDUCATION, MADISON METROPOLITAN SCHOOL DISTRICT

and

MADISON TEACHERS INC.,

Defendants.

Case No.: 15-cv-974
Case Code: 30701
Declaratory Judgment

MMSD DEFENDANTS' SUMMARY JUDGMENT REPLY

To survive defendants' motion for summary judgment, Sannes must introduce evidence supporting his claims and demonstrating a genuine issue of material fact. He has failed to do so. Instead, he has submitted a response to defendants' motion that is breathtaking in its hyperbole, unanchored by legal authority, and rife with faulty logic. Sannes's arguments are inconsistent with binding Wisconsin precedent that requires that the CBAs—which were negotiated and executed in compliance with the law—be given their effect. Summary judgment for defendants is therefore warranted.

Argument

Sannes asserts that MMSD has "concede[d] that the CBAs violate Act 10 in numerous ways." Pl. Resp.[1], at 2. Not so. Nothing MMSD or MTI did in negotiating and executing the CBAs violated Act 10, because the relevant portions of Act 10 were not in effect for MMSD and

[1] "Pl. Resp." refers to Plaintiff Norman Sannes' Brief Opposing the Defendants' Motion for Summary Judgment, and Reply Brief in Support of the Plaintiff's Motion for Summary Judgment filed on September 21, 2015.

MTI when the CBAs were negotiated and executed. Further, even after Act 10 became fully effective for MMSD and MTI, Wisconsin law, including Act 10 itself, requires that the CBAs be given their effect until their expiration. None of the arguments raised in Sannes's response compel a different result.

I. MMSD Properly Relied on Judge Colás's Order.

Sannes first argues that the Order has no precedential effect. But this argument misses the point. MMSD does not claim a ***precedential*** effect. Rather, the Order was valid and binding on MMSD and MTI at the time the CBAs were executed, and therefore, under Wisconsin law, the CBAs are entitled to the protection of the Order even after its reversal. MMSD Br.[2], at 5-10. There is a distinction between continued reliance on precedent that has been overturned (which is improper) and the continuation of obligations entered into in reliance on a valid and binding final order of a circuit court even after that order has been reversed (which is proper). Sannes's argument fails because it misses this distinction.

Sannes further contends that MMSD, as a non-party in *MTI v. Walker*, has no basis to rely on the Order. Wisconsin law holds to the contrary. *See* MMSD Br., at 8-9 (discussing *Slabosheske*). Sannes next erroneously claims that the Wisconsin Supreme Court held that MMSD cannot rely on the Order. Pl. Resp., at 4. Not only is Sannes's citation of this unpublished per curiam order improper, *see* Wis. Stat. § 809.23(3)(a), his interpretation of it is wrong—the Wisconsin Supreme Court did not hold that Judge Colás's Order in *MTI v. Walker* did not apply to non-parties. Rather than addressing which ***parties*** were subject to the Order (as Sannes contends), the per curiam order addressed whether the Order could be expanded to

[2] "MMSD Br." refers to the MMSD Defendants' Combined Motion for Summary Judgment, Brief in Support of their Motion for Summary Judgment, and Response to Plaintiff's Motion for Summary Judgment filed on September 10, 2015.

provide a new ***type*** of relief. Judge Colás's Order granted a declaratory judgment but not any injunctive relief. A year after he issued the Order, Judge Colás issued a separate contempt order against the two Wisconsin Employment Relations Commission ("WERC") Commissioners who were defendants in *MTI v. Walker*. (McGrath Aff.[3], Ex. 8, ¶ 2.) The per curiam order addressed whether this contempt order was properly issued while the appeal of the original Order was pending. The supreme court determined that it was not, because it expanded the original Order by granting a new type of relief. (*Id.* ¶ 20.) The per curiam order did not discuss whether Judge Colás's original Order applied to non-parties, much less hold that it did not.

Nor would such a holding make any sense. As Sannes concedes, MTI was entitled to the benefit of the Order against the defendants in that case, including the WERC Commissioners. *See* Pl. Resp., at 5. Had the District ignored the Order and refused to bargain with MTI, it would have committed a prohibited practice. *See* Wis. Stat. § 111.70(3)(a)4. As such, MTI would have been able to bring a prohibited practice complaint to the WERC, or sought an expedited order directing the District to bargain, and the WERC would have been bound by Judge Colás's Order to find for MTI. *See* Wis. Stat. §111.70(4)(a) and (b); Wis. Stat. § 111.07(1). Thus, the District's only choice absent costly litigation with MTI was to rely on and follow the law as declared by Judge Colás and bargain with MTI. Sannes nevertheless suggests that the District should have exposed itself to this costly litigation to advance the interests of some speculative taxpayer. The District does not have to embroil itself in litigation and flout the law as declared by a competent court because some taxpayer might want to sue the District in the future if that declaration is eventually reversed.

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[3] "McGrath Aff." refers to the July 14, 2015 affidavit of Mr. McGrath that was filed in support of Sannes's motion for summary judgment.

The District was not at liberty to ignore Judge Colás's Order, and Sannes has offered no authority that would have permitted the District to unilaterally determine that, contrary to the Order, Act 10 did, in fact, govern the bargaining relationship between it and MTI. It is the courts' role to make that determination, and it would have been improper for the District to usurp that role. *See Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976) (fact that an order or judgment is erroneously or improvidently rendered does not justify failing to abide by its terms). Sannes's proposed reading of the law would have put the District in a catch-22: rely on the Order and face liability for violating Act 10, or ignore the Order and face liability for improperly flouting a final and binding ruling of a circuit court. The rule of *Slabosheske*, which demonstrates that the proper course was for the District to follow the Order, exists specifically to avoid such a catch-22.

Sannes's attempts to distinguish *Slabosheske* fail. Sannes first misconstrues MMSD's position. He contends that MMSD is asserting that "actions rendered unlawful" by the supreme court's reversal of the Order may "continue following voiding" of the Order. Pl. Resp., at 6. Similarly, he contends that MMSD is arguing that everyone in the state was bound by Judge Colás's Order. Pl. Resp., at 7 n.3. MMSD makes neither of these assertions. Rather, MMSD asserts that under the plain language of *Slabosheske*, because the CBAs were validly entered into, they are now entitled to their effect. MMSD and MTI have not engaged in any collective bargaining since the supreme court's July 31, 2014 decision reversing the Order, nor do they claim that today they are entitled to bargain terms not allowed under Act 10. The fact that the CBAs include terms that Act 10 would have prohibited had it been effective when the CBAs were executed does not render the CBAs invalid or unenforceable. *See* MMSD Br., at 31-32.[4]

[4] Sannes's attempt to distinguish *Slabosheske* based on *Heritage Farms* and *Newhouse*, *see* Pl. Resp., at 8-9, are addressed in detail in MMSD's previous brief, *see* MMSD Br., at 22-28. As explained in detail

Sannes next makes a confused argument that the rule of *Slabosheske* may be invoked only "on a party to a case where the party wanted to avoid the effect of the judgment." Pl. Resp., at 7. *Slabosheske* makes no such limitation. Rather, it held that "for the protection of those acting in reliance upon it," the final judgment of a circuit court "must be considered effective until reversed." 273 Wis. at 152.

Sannes finally argues that the District and MTI did not rely in good faith on Judge Colás's Order but offers no such evidence. *See* Pl. Resp., at 8, 10-11, 13-14. And there is simply no evidentiary basis to support such a claim. To the contrary, MMSD has submitted affidavits from District Superintendent Jennifer Cheatham ("Cheatham") and MTI Executive Director John Matthews ("Matthews"). Both testified about what they and their organizations relied on in bargaining, and that testimony does not support Sannes's speculative suppositions.[5] Sannes provides no evidence to contradict the testimony of Cheatham and Matthews. The fact that there were other Act 10 cases or that Attorney Esenberg sent a letter[6] to MMSD provides no

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there, *Heritage Farms* is inapplicable because it addressed the impact of a court overturning an established rule of common law, not the reversal of a circuit court decision (the issue here). *Newhouse* is similarly off point because it addresses the procedure an insurer must follow in fulfilling its contractual duty to defend an insured—an issue that has absolutely no bearing on this case. *See* MMSD Br., at 26-28.

[5] For example, Sannes speculates that MMSD "saw the handwriting on the wall and took the extraordinary step of negotiating new collective bargaining agreements that would continue through June 30, 2016 despite the existence of substantial adverse authority" (Pl. Br., at 10), and that the "Defendants went into the CBAs knowing there was substantial adverse legal authority" (Pl. Br., at 13-14).

[6] Sannes claims that a letter sent to MMSD from Attorney Esenberg on behalf of the Milwaukee-based Wisconsin Institute for Law and Liberty, telling MMSD that it had to "comply with the law," is an indication that MMSD did not act in good faith. Pl. Resp., at 10-11. But the law that applied to MMSD and MTI at the time of that letter was the law as defined by Judge Colás's Order. Moreover, Sannes's claim that this letter provided "specific notice that litigation would result" if MMSD did not ignore the Order is untrue. Though Sannes describes the letter as coming from "Plaintiff's counsel," there was no indication that Mr. Esenberg spoke on Sannes's behalf. Rather, it is apparent from the face of the letter that he spoke only on behalf of his organization, which had no standing to bring a suit against MMSD challenging the CBAs. Judge Niess's finding that this same letter was not a Notice of Claim on behalf of Blaska is instructive. *See* Decision and Order on Cross Motions for Summary Judgment in *Blaska v. MMSD*, Dane County Case No. 14-CV-2578, at 7-10 (Sept. 28, 2015) (hereinafter "Niess Decision"). Further, even if the threat of a lawsuit were real, MMSD faced a more credible threat of litigation if it

evidence of what MMSD and MTI relied on in bargaining and does not undermine or contradict the testimony of Cheatham and Matthews. Moreover, the circumstances themselves fully support the inference that MTI and the District relied in good faith on Judge Colás's Order. The law in Wisconsin is that a final order of a circuit court—even if mistaken—is "valid until reversed," *Harris v. Harris,* 141 Wis. 2d 569, 584, 415 N.W2d 586 (Ct. App. 1987), and MMSD faced likely litigation with MTI if it refused to bargain. The courts, not MTI or the District, have the role of determining whether the Order was correct, and they allowed the Order to remain in effect through its appeal, despite repeated requests for a stay. (Packard Aff., ¶¶ 5-9, Exs. 4-8.)

II. There Is No Continuing Violation of Act 10.

Sannes asserts that by continuing to operate under the CBAs, MMSD and MTI are engaging in a continuing violation of Act 10. Pl. Resp., at 14-15. To illustrate this point, Sannes contends: "Just as Mr. Slabosheske could not have continued to lend money to District No. 7 after the trial court decision was reversed and expect to be repaid, the Defendants herein cannot continue to enjoy the fruits of an unlawful contract." *Id.* at 15. Sannes is 100% wrong. The ruling in *Slabosheske* was that Mr. Slabosheske ***could*** continue to lend money and expect to be repaid under the agreement made ***prior*** to reversal of the circuit court's ruling. What he could not do was enter into a ***new*** lending agreement with District No. 7 after reversal and expect to be repaid. Likewise, MMSD does not dispute that ***after*** the circuit court's ruling was reversed it would be improper to rely on that ruling to enter into a ***new*** agreement. But this is not what the District and MTI did. Rather, ***just as Slabosheske and District No. 7 reached a loan agreement before the circuit court was reversed, and just as Slabosheske continued to enforce District No. 7's debt and collect payments after the reversal***, the District and MTI entered into the CBAs

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refused to bargain with MTI. Mr. Esenberg's letter, therefore, does not support an inference that MMSD somehow lacked acting in conformance with the law as it applied to MMSD and MTI at the time.

before Judge Colás's Order was reversed, and they are now continuing to execute their obligations under those agreements. Contrary to Sannes's assertion, the District and MTI did not enter into ***new*** CBAs after the Order was reversed.

III. Sannes Does Not Have Standing to Pursue His Claims.

MMSD has already addressed Sannes's lack of standing in its prior brief, *see* MMSD Br., at 10-15. As detailed there, at summary judgment, Sannes has the burden to present actual evidence to establish that he has standing. In responding to MMSD's motion, he has failed to come forward with any evidence of actual pecuniary harm to taxpayers. On those grounds alone, MMSD's motion should be granted.

Sannes misconstrues MMSD's argument regarding his failure to put forward any evidence of pecuniary harm to taxpayers. According to Sannes, "[t]he Board and the District assert that they could unilaterally give their employees everything contained in the CBAs and, as a result, there is no harm from them having unlawfully agreed to do so." Pl. Resp., at 15. This is not accurate. There are two issues here: the legality of employment terms and Sannes's taxpayer standing. As to the legality of employment terms, MMSD is not claiming that it could now impose terms and conditions of employment that violate Act 10, but rather that the CBAs, which were validly negotiated and executed prior to the relevant portions of Act 10 becoming effective, are entitled to their effect.

As to standing, none of the costs that Sannes cites demonstrate pecuniary harm to taxpayers. Rather, all of these costs—including the "costs … beyond salaries" (Pl. Resp., at 18)—are costs that MMSD would face even absent the CBAs. They merely reflect MMSD's costs of employing its employees, which are costs that would continue, under MMSD's unilateral authority to set terms and conditions of employment, even if the CBAs were removed.

(*See* Cheatham Aff. ¶ 8.) Sannes asserts, incorrectly, that this is not supported by "evidentiary facts" (Pl. Br., at 18), but it is Sannes who has failed to meet his burden to put forward evidence to support his claims. He argues that it "defies common sense" to infer that MMSD's costs would not change absent the CBAs, Pl. Resp., at 19, but this is insufficient at the summary judgment stage to overcome MMSD's evidence on this issue (*see* Cheatham Aff. ¶ 8; Trendel Aff. ¶¶ 4-5). *See also* MMSD Br., at 11-12.

Further, Sannes's reliance on *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993) is misguided. *Hart* dealt with the ***pleading*** standards for taxpayer standing and is not applicable at the summary judgment stage where a plaintiff must put forward ***evidence*** of standing. *Hart* makes exactly this point: Even though the pleadings in *Hart* suggested no harm (they suggested a cost savings), the court found taxpayer standing had been ***pled*** because it was still ***possible*** that plaintiffs might later put forward ***evidence*** of harm. *Id.* at 700. Thus, for there to be taxpayer standing under *Hart*, there must be evidence that, on balance, taxpayers are worse off. There is no such evidence here.

Finally, the cases that Sannes cites to support his standing arguments contradict his position. For example, Sannes quotes *S.D. Realty* as follows :

> **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.

Pl. Resp., at 16 (emphasis Sannes's). But the sentence immediately following the sentence emphasized by Sannes squarely supports MMSD's position. It specifies that taxpayer standing is premised on a governmental action that "***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." *S.D. Realty,* 15 Wis. 2d at 22. Neither criterion is met here. Because the District's expenditures would not change absent the CBAs, the CBAs do not result in the District having less money or needing to levy additional taxes.[7]

IV. The "First-to-File" Issue Is Moot.

Judge Niess issued a final ruling in *Blaska* on September 28, 2015 dismissing Blaska's complaint, so the first-to-file issue is now moot. *See* MMSD Br., at 15 n.5.

V. Challenges to the 2014-2015 CBAs Are Moot.

Despite the fact that the 2014-2015 CBAs are now expired, Sannes asserts that a finding of mootness here would be improper because resolution of issues related to the 2014-2015 CBAs would have a "practical effect on the underlying controversy" and they are issues "of great public importance likely to arise again." Pl. Br., at 23-24. Sannes is incorrect.

First, Judge Niess considered Sannes's argument in *Blaska* and rejected it. As Judge Niess explained, the issues are the same for the 2015-2016 contracts. Therefore, there is no reason to address contracts that have already expired. Niess Decision, at 1 n.1 ("Here, any issues of great public importance arising from the 2014-2015 collective bargaining agreements likewise inhere in the 2015-2016 agreements, so there is nothing to be gained from addressing the expired contracts."). Judge Niess's logic and legal basis for this conclusion apply equally in this case.

Moreover, because Blaska and Sannes are the same plaintiff for purposes of their taxpayer claims, *see* MMSD Br., at 15-16, Judge Niess's decision in *Blaska* on this issue is preclusive against Sannes in this case under the doctrine of issue preclusion. *See Thermal Design, Inc. v. Project Coordinators, Inc.*, 2007 WI App 110, ¶ 26, 300 Wis. 2d 580, 730

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[7] Sannes's citation of *Bechthold v. City of Wauwatosa*, 228 Wis. 544, 277 N.W. 657, *on reh'g*, 228 Wis. 544, 280 N.W. 320 (1938), Pl. Resp., at 17, suffers from the same deficiency. As the portion of that case quoted by Sannes states, under the law of taxpayer standing, "a taxpayer must prove that a loss to him will ensue if the contract is permitted to be performed." Sannes has not done so.

N.W.2d 460 ("In order for this doctrine to apply, the question of fact or law sought to be litigated in the present action must have been actually litigated in the prior action and be necessary to the prior judgment, [citation omitted]; and the party against whom issue preclusion is asserted must have been a party in the prior action or in private or have sufficient identity of interests with a party in the prior action.").

Finally, Sannes points to no specific practical impact of the issues related to these expired CBAs. He suggests only that the public should know if a public body has exceeded its authority and if so that it has been held accountable. However, if that were sufficient to overcome the sound judicial policy of the mootness doctrine, no case involving a public body could ever be moot. That is obviously not the law because Sannes cites to no case for this proposition. Judge Niess correctly recognized that the challenge to the 2014-2015 CBAs is moot, and this court should follow that ruling.

VI. Sannes Is Not Entitled to an Injunction.

All of Sannes's arguments regarding entitlement to an injunction are addressed in MMSD's combined brief. *See* MMSD Br., at 33-39. Sannes simply has not established the elements necessary to entitle him to an injunction.

Conclusion

For the reasons discussed above, MMSD respectfully requests that the Court grant summary judgment in favor of Defendants and dismiss Sannes's claims in their entirety and with prejudice and with costs.

Dated this 5th day of October, 2015.

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