

RECEIVED

09-04-2013

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012-AP-2067

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

On Appeal from the Decision and Final Order Dated September 14, 2012 in
Dane County Circuit Court Case 11-CV-3774, The Honorable Juan B.
Colas, Presiding, on Certification From the Court of Appeals, District IV

***AMICI CURIAE* BRIEF FOR WISCONSIN COUNTY
MUTUAL INSURANCE CORPORATION AND
COMMUNITY INSURANCE CORPORATION**

Phillips Borowski S.C.
Andrew T. Phillips, WBN 1022232
Daniel J. Borowski, WBN 1011636
Jacob J. Curtis, WBN 1072735

10140 N. Port Washington Road
Mequon, WI 53092

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ARGUMENT.....	4
I. THE CIRCUIT COURT’S ANALYSIS IS BASED ON THE FLAWED ASSUMPTION THAT NON-REPRESENTED PUBLIC EMPLOYEES HAVE BARGAINING PRIVILEGES.....	4
II. THE CLASSIFICATIONS AND REGULATIONS IMPOSED BY THE LEGISLATURE IN ENACTING ACT 10 ARE CONSTITUTIONAL.....	7
A. The Seventh Circuit Applied Traditional Constitutional Analysis to Find Act 10 Constitutional in its Entirety.....	7
B. This Court Should Uphold the Constitutionality of Act 10 Based on the Seventh Circuit’s Decision.....	9
III. THE CIRCUIT COURT’S FLAWED ANALYSIS HAS DEVASTATING ECONOMIC CONSEQUENCES TO MUNICIPAL EMPLOYERS.....	11
A. The Impact of Restored Bargaining.....	11
B. The Circuit Court’s Decision Represents an Unfunded Mandate.....	13
CONCLUSION.....	14
CERTIFICATIONS.....	16
CERTIFICATE OF MAILING.....	17

TABLE OF AUTHORITIES

Wisconsin Cases

<i>Dunn v. Milwaukee County</i> , 2005 WI App 27, ¶¶ 10-11, 279 Wis.2d 370, 693 N.W.2d 82.....	5
--	---

Other Cases

<i>Wis. Educ. Ass’n Council v. Walker</i> , 705 F.3d 640 (7 th Cir. 2013).....	7-9
---	-----

Wisconsin Statutes

Wis. Stat. § 111.70 et seq,.....	5
----------------------------------	---

INTRODUCTION

Before this Court is the constitutionality of Act 10 which was enacted by the legislature to provide economic and workplace management relief to municipal employers. Act 10 fundamentally altered municipal employee relations by eliminating all but total base wage bargaining for general municipal employee groups thereby freeing municipal employers to make needed economic and operational changes in a declining economic environment without having to bargain those changes with employee union groups. Act 10 further increased regulations on general municipal employee collective bargaining by requiring annual union recertification elections for general municipal employees and prohibiting union due withdrawals and fair share agreements.

The Circuit Court and the opponents of Act 10 have impermissibly portrayed the legislation as something it plainly is not: unconstitutional. Public sector collective bargaining is a creature of legislative grace and may be granted, regulated and eliminated at the will of the legislature without running afoul of constitutional principles. The Circuit Court's conclusion that Act 10 unconstitutionally "discriminates" against represented general municipal employees over their non-represented counterparts by restricting

bargaining to total base wages, placing a cap on what increases can be bargained without a referendum and imposing regulations on union elections and payroll deductions is flawed. Non-represented employees do not have *any* bargaining rights and, subject to federal and state employment laws, are at-will employees whose employment may be terminated at any time. By *preserving* the collective bargaining for general municipal employees, albeit on a limited basis, Act 10 left general municipal employees with bargaining privileges that are entirely unavailable to non-represented employees.

Assertions that Act 10 impermissibly impinges on the fundamental free speech, association and equal protection rights of general municipal employees have already been expressly rejected by the Seventh Circuit federal court of appeals. The Seventh Circuit upheld Act 10 against claims that Act 10 unconstitutionally imposed limitations on the permissible subjects of collective bargaining, imposed stricter recertification requirements and prohibited payroll deductions for union dues for general municipal employees. In upholding Act 10 “in its entirety,” the Seventh Circuit ruled that Act 10 did not impair any fundamental First Amendment right—the union employees were free to speak as they saw fit, and by necessary extension, to associate with each other notwithstanding any of Act

10's limitations. Moreover, because no fundamental rights were impacted, the Court applied a rational basis test to Act 10's provisions which created two classes of employees with bargaining privileges and upheld these classifications under an equal protection challenge.

Any deviation from the constitutional analysis employed by the Seventh Circuit will have devastating financial consequences to municipal employers who have been utilizing the provisions of Act 10 to meet their financial obligations and to maintain service levels in light of reductions in state revenues and declining economic conditions. The Circuit Court's unprecedented constitutional analysis and rewrite of Act 10 imposes collective bargaining and financial obligations on municipal employers for which they have no money to pay. The decision represents an unfunded mandate which, in the absence of further appropriations from the legislature or an increase in the property tax levy, will put many municipal governments on the brink of insolvency with only the choice of cutting needed services to survive.

Act 10 is in all respects constitutional. This Court should reverse the decision of the Circuit Court and uphold Act 10 "in its entirety."

ARGUMENT

I. THE CIRCUIT COURT’S ANALYSIS IS BASED ON THE FLAWED ASSUMPTION THAT NON-REPRESENTED PUBLIC EMPLOYEES HAVE BARGAINING PRIVILEGES.

The Circuit Court’s constitutional analysis rests on its finding that Act 10 penalizes general municipal employees for seeking to remain represented. As the story adopted by the Circuit Court goes, Act 10 required general municipal employees to “surrender” negotiating “rights” otherwise available to them as non-represented employees in order “choose to associate” in a labor organization and exercise the privilege to collectively bargain with their municipal employers. In reaching this conclusion, the Circuit Court took specific issue with Act 10’s cap on the permissible increase in total base wages that can be bargained without a referendum, the prohibition on union due deductions and fair share agreements and the union recertification election requirements.

The Circuit Court’s analysis is based on a fundamental misunderstanding of employment law in Wisconsin and the “rights” of non-represented employees and is simply wrong. Under Wisconsin law, non-represented employees are at-will employees who have *no rights* to negotiate or receive any level of wages or benefits, much less one that is capped by the

CPIU. *See Dunn v. Milwaukee County*, 2005 WI App 27, ¶¶ 10-11, 279 Wis.2d 370, 693 N.W.2d 82. A municipal employer correspondingly has absolutely no duty to bargain with a non-represented employee over total base wages or any other matter.

Rather than requiring general municipal employees to “surrender” benefits as the Circuit Court contends, Act 10 actually provides benefits to employees who decide to join a union which are unavailable to non-represented employees. These include the ability to require their municipal employers to: (1) meet and confer at reasonable times; (2) in good faith; (3) with the intention of reaching an agreement or to resolve questions arising under an agreement; (4) with respect to total base wages. *See Wis. Stat. § 111.70(1)(a)*. General municipal employees further have recourse through the WERC and/or the circuit courts to compel a municipal employer in the event that a municipal employer refuses to bargain.

Act 10 further provides general municipal employees with the benefits of both the represented and non-represented employee worlds. In this regard, Act 10 only prohibits general municipal employees from *collectively bargaining* base wages increases beyond the CPIU without a referendum. Act 10 does not prohibit general municipal employees from individually

receiving (through negotiation or unilateral employer action) any other form of compensation, such as overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions which could result in increases greater than the CPIU. General municipal employees therefore get to compel their municipal employers to collectively bargain while at the same time maintain the ability to individually negotiate total compensation increases above the CPIU.

General municipal employees also are in the same level as their non-represented counterparts as it relates to prohibition of dues deductions and fair share agreements as well as recertification elections. In this respect, non-represented employees have *no* ability to compel their employers to subsidize any groups to which they belong, to compel the government to collect dues from employees who are not part of a particular non-represented employee group or to enjoy any lesser restrictions on collective bargaining in the event they decide to unionize.

The Circuit Court's finding that Act 10 is unconstitutional because it requires employees who wish to remain in a union to surrender certain rights is groundless. Accordingly, the Circuit Court's decision should be reversed.

II. THE CLASSIFICATIONS AND REGULATIONS IMPOSED BY THE LEGISLATURE IN ENACTING ACT 10 ARE CONSTITUTIONAL.

A. The Seventh Circuit Applied Traditional Constitutional Analysis to Find Act 10 Constitutional in its Entirety.

The Seventh Circuit found Act 10 constitutional based upon the fundamental premise that “Wisconsin was free to impose any of Act 10’s restrictions on all unions.” *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013). The Court recognized that public employees have no constitutional right to collectively bargain—any privilege granted to do so is created by statute. *Id.* Because collective bargaining privileges are statutory in nature, the Court found that the legislature could constitutionally extend, regulate and limit the ability of public employees to collectively bargain in accordance with the budgetary and other needs of the State. *Id.*

In upholding Act 10, the Court first found that Act 10’s payroll deductions limitations did not violate employees’ First Amendment speech or association rights. *Id.* at 645. The Court found use of the state’s payroll systems to collect union dues is a state subsidy of speech that only requires viewpoint neutrality. *Id.* Applying this rule, the Court proceeded to determine that the challenged payroll provisions of Act 10 were

viewpoint neutral because they did not place any obstacles in the way of expressing any particular viewpoint and were not a façade for invidious discrimination. *Id.* at 646-652. Because the payroll provisions did not impact any fundamental First Amendment right, the Court determined that rational basis review of Act 10 was appropriate. *Id.* at 645, 652-653.

The Court proceeded to analyze whether the legislature's decision to provide different collective bargaining privileges to general municipal and public safety employees passed constitutional muster. Applying a rational basis review, the Court concluded that the different levels of privileges provided to general municipal and public safety employees were in all respects constitutional. *Id.* at 653-656. The Court recognized that the legislature could have rationally determined that it was necessary to differentiate and provide greater bargaining rights to public safety employees in order to avoid labor unrest among public safety employees. *Id.* at 655. The Court refused to second guess the line drawn by the legislature between general municipal and public safety groups because it was for the legislature, not the courts, to establish such classifications. *Id.*

The Court also upheld Act 10's recertification requirements. *Id.* at 656-657. The Court found that the State had a rational basis in requiring

general municipal unions to annually recertify (rather than allowing automatic recertification) in order to ensure that union employees remained committed to the union cause. *Id.*

Finally, the Court upheld Act 10's provisions prohibiting payroll deductions for union dues for general municipal employees. *Id.* at 657. The Court found that nothing constitutionally required the State of Wisconsin to assist general municipal unions in funding the expression of their ideas through payroll deductions. *Id.* at 657. The Court emphasized that the First Amendment only prohibits the government from imposing obstacles on the exercise of First Amendment Rights – it does not require the government to subsidize speech. *Id.* at 647-648, 657.

B. This Court Should Uphold the Constitutionality of Act 10 Based on the Seventh Circuit's Decision.

Act 10's provisions do not run afoul of the United States or Wisconsin constitutions. Rather, they reflect the legislature's policy decision to strictly regulate the subject matter which may be collectively bargained, the rules under which bargaining may take place, the union activities which may be subsidized and the monetary obligations which a municipal employer may undertake in a collective bargaining agreement.

The Circuit Court's conclusion that Act 10 burdened the exercise of free speech and associational rights by imposing regulations on the ability of general municipal employees to organize, bargain and subsidize their operations was in all respects rejected by the Seventh Circuit. The Seventh Circuit correctly found that Act 10 constitutionally regulated collective bargaining and placed regulations on subsidizing general municipal unions through payroll deductions because none of these provisions place obstacles in the way of free speech or associational rights.

The classifications of employees drawn by Act 10 and the restrictions imposed on general municipal employee bargaining privileges pass constitutional muster under a rational basis test. At the time Act 10 was passed, the State of Wisconsin had a deficit in excess of three billion dollars and local governments were financially in no better position. The legislature determined that the cost of collective bargaining was prohibitive and unsustainable – the costs of employee wages and benefits as reflected in long-term collective bargaining agreements engulfed local government budgets and jeopardized the ability of governments to provide needed services to citizens. The legislature made changes to the statutory scheme of collective bargaining to enhance local governments' ability to manage

budgets and achieve financial stability, to ensure that union activities were no longer subsidized by the government and unwilling bargaining unit participants and to certify that general municipal unions have the support of the majority of the bargaining unit members.

The Seventh Circuit upheld the constitutionality of Act 10 in its entirety. Based on the Seventh Circuit's decision, this Court should uphold Act 10 as well.

III. THE CIRCUIT COURT'S FLAWED ANALYSIS HAS DEVASTATING ECONOMIC CONSEQUENCES TO MUNICIPAL EMPLOYERS.

A. The Impact of Restored Bargaining.

Since its passage, municipal employers have relied on the changes codified in Act 10, as they were required to do, and have made system-wide changes to create efficiencies to counteract the dramatic cuts in state aid and levy limits that accompanied Act 10 as well as struggling local economies. Act 10 has allowed municipal employers to move forward with necessary financial and operational changes without asking unions for permission to do so. The flexibility provided by the legislation has allowed local governments to maintain service and employment levels in a difficult, if not impossible, economic environment.

If the Circuit Court’s unprecedented constitutional analysis is affirmed by this Court, the flexibility provided by Act 10 will be lost and the consequences to municipal employers in terms of money and resources will be devastating. Municipal employers will be faced with immediate demands and litigation to restore any “wages” lost by general municipal employees as a result of changes made under Act 10. Municipal employers simply do not have the financial resources to pay or litigate such claims—the reason municipal employers made changes to wages and benefits after Act 10 is because they did not have the resources to fund them in the first instance.

Moreover, under the “Act 10” drafted by the Circuit Court, municipal employers will be precluded from making any future changes required to sustain necessary services unless and until they bargain the changes in “good faith” with general municipal employee unions. Anyone remotely familiar with the bargaining process understands that the foregoing steps, even in the absence of interest arbitration, could take more than a year to accomplish and cost thousands of dollars in the bargaining process alone. These costs do not include inevitable costs and delays that will be incurred litigating issues such as good faith bargaining, the proper scope of the duty to bargain and the

definitions of “wages” or “hours and conditions of employment” under the Circuit Court’s new law.

Equally important, while municipal employers are waiting for the bargaining process to be completed and litigation to be resolved, they will be required to fund existing levels of benefits under a “dynamic status quo” which they cannot afford. An additional tier of cost will be incurred once, if ever, agreements over wages, hours and conditions of employment are reached. Under Act 10, employers were free to make fiscal and operational changes (other than to total base wages) as often as they pleased. Under the Circuit Court’s decision, however, this flexibility is gone. Municipal employers are tied into any deal for at least one year and, more importantly, have no ability to fix or cure detrimental financial consequences of a bargain without union permission—the purported duty to bargain over “wages” is forever present.

B. The Circuit Court’s Decision Represents an Unfunded Mandate.

The Circuit Court did not provide municipal employers with any corresponding funding or ability to increase tax revenues to offset the costs of the bargaining process. As a natural result of the additional bargaining requirements and the costs associated with them, municipal employers will

be forced to take steps to either cut service levels or lay off employees until the required bargaining process necessary to make the changes can, if ever, be completed. If municipal employers still cannot pay their bills despite these efforts, they may be forced to consider bankruptcy which is an all too common occurrence among financially strapped municipal governments today. The cost of adopting the Circuit Court's unprecedented constitutional analysis of Act 10 is prohibitive and, accordingly, this Court should reject it.

CONCLUSION

For these reasons, the Circuit Court's holding that Act 10 is unconstitutional should be reversed and Act 10 upheld in its entirety.

Respectfully submitted this 4th day of September, 2013.

PHILLIPS BOROWSKI, S.C.
Attorneys for *Amici* County Mutual and
CIC

By: /s/ Daniel J. Borowski
Andrew T. Phillips
State Bar No. 1022232
Daniel J. Borowski
State Bar No. 1011636
Jacob J. Curtis
State Bar No. 1072735

P.O. ADDRESS

10140 N. Port Washington Road

Mequon, WI 53092

Phone: (262) 241-7788

Fax: (262) 241-7779

Email: atp@phillipsborowski.com

djb@ phillipsborowski.com

jjc@phillipsborowski.com

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,629 words, calculated using the Word Count feature of the word processing system used to prepare this brief.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on opposing parties.

I further certify that the required number of copies of the brief and appendix correctly addressed have been submitted for delivery to the Supreme Court on September 4, 2013.

Dated this 4th day of September, 2013.

By: /s/ Jacob J. Curtis
Jacob J. Curtis
State Bar No. 1072735

CERTIFICATE OF MAILING

Stacie Eric herein certifies that she is employed by Phillips Borowski, S.C., which is located at 10140 N. Port Washington Road, Mequon, WI 53092, assigned to the duties of Administrative Assistant; that on the 4th day of September, 2013, she caused to be filed twenty-two copies of the Brief of *Amici Curiae* Wisconsin County Mutual Insurance Corporation and Community Insurance Corporation, in the above-entitled case with the Clerk of Wisconsin Supreme Court, 110 East Main, Suite 215, Madison, WI 53701-1688; and deposited in the U.S. mail, one copy of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

/s/ Stacie L. Eric

Stacie L. Eric

Bruce N. Cameron
Regent University School of Law
Robertson Hall #353
1000 Regent University Drive
Virginia Beach, VA 23464

Bruce F. Ehlke
Kathleen Meter Lounsbury
Ehlke, Bero-Lehmann & Lounsbury, S.C.
6502 Grand Teton Plz., Ste 202
Madison, WI 53719-1047

Aaron Halstead
Hawks Quindel S.C.
P.O. Box 2155
Madison, WI 53701

Stephen Pieroni
Kurt C. Kobelt
Wisconsin Education Association
P.O. Box 8003
Madison, WI 53708

Milton L. Chappell
Nathan J. McGrath
National Right to Work Legal Defense Foundation, Inc
8001 Braddock Rd, Suite 600
Springfield, Virginia 22160

Peggy A. Lautenschlager
Bauer & Bach LLC
123 E. Main Street, Suite 300
Madison, WI 53703

Marianne G. Robbins
Previant, Goldberg, Uelman, Gratz, Miller
1555 N. Rivercenter Drive, Suite 202
Milwaukee, WI 53212

Kevin M. St. John, Deputy Atty. General
Steven C. Kilpatrick, Steven P. Means
P.O. Box 7857, Madison, WI 53707-7857

N. Nicol Padway
Padway & Padway, Ltd.
633 W. Wisconsin Ave., #1900
Milwaukee, WI 53203-1908

Rudolph M. Konrad, Deputy City Atty.
Stuart S. Mukamal, Asst. City Atty.
200 E. Wells St., #800
Milwaukee, WI 53202-3515

Richard M. Esenberg
Thomas Claire Kamenick
WI Institute for Law & Liberty
1139 E. Knapp Street
Milwaukee, WI 53202-2828

Timothy E. Hawks
Barbara Z. Quindel
Hawks Quindel, S.C.
P.O. Box 442
Milwaukee, WI 53201-0442

Joseph Louis Olson
Michael Best & Friedrich LLP
100 E. Wisconsin Ave., Suite 3300
Milwaukee, WI 53202-4124

Michael P. Screnock
Michael Best & Friedrich LLP
P.O. Box 1806
Madison, WI 53202-4124

Lester A. Pines
Tamara Packard
Susan M. Crawford
122 W. Washington Ave., #900
Madison, WI 53703-2718

Michael P. May
City County Building, Rm. 401
210 Martin Luther King, Jr. Blvd.
Madison, WI 53703-3345

John W. Strange, Jr
Asst. City Attorney
210 Martin Luther King, Jr. Blvd., #401
Madison, WI 53703-334

