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STATE OF WISCONSIN

IN THE COURT OF APPEALS

DISTRICT IV

Appeal No. 2012AP002067

Circuit Court Case No. 2011CV003774

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

Plaintiffs-Respondents,

-vs-

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

Defendants-Co-Appellants,

APPEAL FROM THE STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE JUAN B. COLAS,
CIRCUIT JUDGE PRESIDING

AMICI CURIAE BRIEF FOR LABORER'S LOCAL 236 AND AFSCME LOCAL 60

Dated: December 28, 2012

Respectfully Submitted,

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AND AFSCME LOCAL 60

INTRODUCTION

The subject of the instant appeal is 2011 Wisconsin Act 10, the so-called Budget Repair Bill. As is well known, this Budget Repair Bill made significant changes in the statutory provisions that had been enacted over the past fifty years

or so to protect the right of public employees collectively to bargain with their employers concerning their wages and other conditions of employment.

In an action challenging the constitutionality of the indicated statutory changes, the Circuit Court below determined that a number of the provisions of 2011 Wisconsin Act 10, which had amended Sec. 111.70, Wis. Stat., which also is known as the Municipal Employment Relations Act or MERA, impermissibly had impaired the so-called general public employees' exercise of rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United States Constitution. The Circuit Court's determination regarding the unconstitutionality of certain provisions of 2011 Wisconsin Act 10 is solidly supported by a long line of appellate court decisions, both Federal and State. Beyond this, regardless of the unconstitutionality of particular provisions of Act 10, the cumulative effect of the changes made by Act 10 effectively has been the denial of general public employees' ability to associate together for the purpose of petitioning their employers concerning their wages and other conditions of employment. This substantially impairs the exercise of the said employees' rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United States Constitution.

Only if the general public employees petition their employers concerning such matters as individuals, "hat in hand", so to speak, do they have a right to be heard by their government. This, together with the fact that not all public employees are subject to this restriction on the exercise of their constitutionally

secured rights, denies the general employees who wish to associate together for this purpose, the equal protection of the law that is called for by the Wisconsin and the United States Constitutions.

ARGUMENT

I. THE ACTIVITY OF BARGAINING COLLECTIVELY AND THE STATUTORY RIGHT TO "COLLECTIVELY BARGAIN".

Historically, in the United States the term "collective bargaining" has been used to describe two legally different things. The first way in which the term has been used has been to describe an activity that is an element of the right of individual citizens to associate together for the purpose of advocating regarding matters of mutual interest or concern, in particular, matters concerning wages and employment conditions. When used in this way the term "collective bargaining" is descriptive of a collective effort and refers to an activity where the party that is the object of the advocacy, the employer, has no legal obligation to respond affirmatively to the advocacy, but may do so voluntarily.

At common law, individuals had a recognized right to associate together for the purpose of engaging in any activity that it was lawful for an individual to engage in as an individual. This included the right to associate together with others for the purpose of engaging in the activity of bargaining with their employer regarding wages and conditions of employment. E.g., Carew v. Rutherford, 106 Mass. 1, 14 (1870); Commonwealth v. Hunt, 45 Mass. 111, 129 (1842). This right has been characterized, in Wisconsin, as an "inherent liberty".

State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 534- 535, 90 N.W. 1098 (1902). Where employees, including public employees, engage in such collective bargaining with their employer incidental to their constitutionally secured right to associate together for the purpose of petitioning their employer regarding their wages and conditions of employment, e.g., AFSCME, AFL-CIO v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969), the employer is not constitutionally obligated to reach an agreement with them regarding those matters, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-465 (1979), although it may do so voluntarily, as often occurred, both in the case of private sector employees and also public employees, prior to when the collective bargaining statutes in Wisconsin were enacted.

For example, Laborers local 236, AFL-CIO, was chartered by the Laborers International Union of North America in 1934. It is an organization of individual employees of the City of Madison, Wisconsin who have associated together in order to bargain collectively with their employer, to educate the public regarding employees' right to engage in collective bargaining, to engage in legislative and other activities to promote and advance the welfare of workers and all people, to establish and support a retirement program for retirees and in order to engage in other lawful activities.

As it concerns the American Federation of State, County and Municipal Employees, or AFSCME, AFSCME Local 1 was established in May, 1932, in Wisconsin. The nation-wide AFSCME, which was affiliated with the then AFL

union, was established four years later, in September, 1936. The first President of the national union was Arnold Zander, a Wisconsin State government employee, who served in this position for almost three decades. D. Holter, Workers and Unions in Wisconsin at 161 (1999); R. W. Ozanne, The Labor Movement in Wisconsin at 74-77 (1984).

In 1936, the same year in which the national AFSCME union was established, AFSCME Local 60 was chartered by the new AFSCME. It is an organization of individual employees of the City of Madison, the Madison Metropolitan School District and other municipalities in Dane County, Wisconsin who have associated together in order to bargain collectively with their respective employers, to advance the social, economic, and general welfare of public sector employees, to cooperate in providing efficient public service, to foster and promote a liberal and progressive attitude toward public administration, and to engage in political and other lawful activities.

Both Laborers Local 236 and AFSCME Local 60 collectively bargained with the City of Madison and the other governmental employers who employed the employees who they represented, on behalf of those employees, before there was any statute in place protecting their right to do so.[1] The agreements that were reached as a result of that collective bargaining were enforceable at law, without regard to whether there was a statute confirming that obligation. E.g., AFSCME

[1] See, e.g., Non-Party, Amicus Brief of City of Madison at 11 fn 3 (Attachment A), dated March 5, 2012, Dane County Circuit Court Case No. 2011CV3774.

Local 1226 v. City of Rhinelander, 35 Wis. 2d 209, 215-216, 151 N.W. 2d 30 (1967).

In short, the activity of bargaining collectively is nothing more than two or more employees acting together to discuss proposals with their employer regarding their wages and conditions of employment, with the hope, and possibility, that they might reach an agreement with the employer regarding the same. This is one of those ordinary activities that is so widely accepted in our democratic society that we tend to take it for granted[2], like talking over the fence with the neighbor, or walking the dog around the neighborhood or taking the family to a municipal park for a picnic. It is a fundamental right that constitutionally is protected.

The second way in which the term "collective bargaining" has been used is to identify and refer to a statutorily established relationship between an association of employees and their employer, by the terms of which an employer and its employees legally are obligated to negotiate, in "good faith", for the purpose of reaching an agreement regarding the employees' wages and conditions of employment. See, e.g., Sec. 111.70(1)(a), Wis. Stat. See also The Developing Labor Law at 825-829 (5th ed 2006) (J.E. Higgins, Jr., Editor-in-Chief). Such statutorily defined "collective bargaining" is subject to legislative modification,

[2] The United States is a member of the United Nations International Labor Organization (ILO), which recognizes freedom of association, including the right of public employees to bargain with their employers, as a fundamental right. Article 2, Declaration on Fundamental Principles and Rights at Work (1998). See, e.g., 344th Report of the ILO Committee on Freedom of Association, Case No. 2460 Par. 995 (2007).

for the purpose, at least heretofore, of protecting the employees' right to bargain with their employer. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937); Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 263-264 (1940); State v. WERC, 90 Wis. 2d 426, 430-431, 280 N.W. 2d 150 (1979).

Whether invoked as a statutorily protected right or as a voluntary activity that has been characterized as a "liberty" interest, where bargaining in either sense of that term is an element of the employees' association for the purpose of seeking to maintain or improve their wages and conditions of employment in a relationship with their employer, it is an essential attribute of the association, one that inextricably is intertwined with the employees' freedoms of association and expression. The imposing of penalties on their exercise of the bargaining activity or the withholding of benefits from an association that has been established for the purpose of engaging in such activity, necessarily impairs the employees' exercise of the freedoms in question.

II. 2011 WISCONSIN ACT 10 IMPAIRS OR INTERFERES WITH THE EXERCISE OF FUNDAMENTAL RIGHTS THAT ARE SECURED AT ARTICLE I OF THE WISCONSIN CONSTITUTION AND THE Ist AND XIVth AMENDMENTS TO THE UNITED STATES CONSTITUTION.

To begin with, Act 10, at Section 169, bars municipalities from engaging in the activity of bargaining collectively with general employees, except as provided

for at the amended Sec. 111.70, Wis. Stat., and it declares that any local ordinance or resolution to the contrary may not be enforced. This provision does two things.

First, it abolishes altogether the historical right of employees to engage in the voluntary activity of bargaining collectively with their employers, which right has been recognized as an "inherent liberty". State ex rel. Zillmer v. Kreutzberg, 114 Wis. at 534-535. While Act 10 permits individual employees to bargain with their municipal employers regarding their wages and conditions of employment, without any limitation, at the same time it bars the employees from engaging in the same activity, if they associate together for this purpose, in derogation of their constitutionally secured right to associate together and to join, support and be represented by a labor organization, e.g., Thomas v. Collins, 323 U.S. 516, 534 (1945); AFSCME, AFL-CIO v. Woodward, 406 F.2d at 139; McLaughlin v. Tilendis, 398 F. 2d 288, 288-289 (7th Cir. 1968), unless they do so subject to the severe limitations of the amended Sec. 111.70, Wis. Stat.

Second, it forces the employees, if they want to exercise any right to associate together for the purpose of petitioning their employer regarding their wages and conditions of employment, to do so within the limitations of the amended Sec. 111.70, Wis. Stat., which limitations render such activity effectively meaningless. The limitations of the amended Sec. 111.70, Wis. Stat., render the ability of the employees collectively to bargain with their municipal employers effectively meaningless in a number of ways.

For one thing, Act 10 limits "collective bargaining" to bargaining simply to maintain the employees' current base wage, plus the CPI, or the base wage, less the CPI, if the index goes down. Bargaining concerning conditions of employment is prohibited and declared to be unlawful. Act 10, at Sections 210, 245.

At the same time that Act 10 limits collective bargaining to an effectively meaningless exercise, it eliminates any procedure for the resolution of an impasse in the bargaining, should that occur, at Section 237, and limits the term of any agreement, if one somehow should be reached, to a term not to exceed one year, at Section 238. While imposing these severe restrictions on what the labor organization can do for those who it represents, Act 10 requires the organization, to run for re-election every year, and to "win" by obtaining the votes of not less than 51% of the eligible voters, regardless of the number who vote (which effectively creates a presumption of a vote against representation on the part of those who do not vote, regardless of their reason for not voting), at section 242, if it wants to be able to function as a recognized representative of the employees who want to associate and be represented by a labor organization in their relationship with their employer. This has a debilitating effect on the ability of the labor organization to campaign for re-election, especially where the bargaining unit employees do not work the same, regular hours, or where they work at geographically separated locations where maintaining contact with them is a problem.

In addition to imposing the foregoing burdens on the ability of the employees to associate together and act in concert with each other as it concerns their relationship with their municipal employer, Act 10, at Section 227, bars municipal employers from permitting payroll deductions for the payment of labor organization dues. (This is the only payroll deduction that the Wisconsin Statutes do not allow municipalities to make for their employees.) At the same time, Act 10 expressly permits "free riders" to claim labor organization representation, without paying anything for the services provided, at Sections 213, 219, and without foregoing their right to demand "fair representation" by the labor organization, see, e.g., Gray v. Marinette County, 200 Wis.2d 426, 411-422, 546 N.W. 2d 553 (Ct. App. 1996), should they require, for example, assistance in pursuing a "grievance" through the newly established grievance procedure, Act 10, at Section 170. Both of these measures have a negative impact on the ability of the labor organization to maintain itself as a financially viable entity.

Act 10 is a legislative enactment that singles out general employees for the destruction of their ability to associate for the purpose of expressing their views regarding matters of public concern, in concert with one another, and petitioning their employer regarding matters of mutual concern. It does not take much insight into human nature in order to understand how Act 10 has this impact.

Act 10 has this impact as a result of three things that it does. First, it bars municipal employers from voluntarily "collectively" bargaining any agreement, regarding wages and conditions of employment, with a "labor organization", that

is, any association of employees, although there is no limitation on what an individual may negotiate with his or her employer. Second, it requires that any organization that seeks legal standing to represent general municipal employees in dealings with their employer, even in an extraordinarily limited capacity, must meet the onerous conditions imposed by the amended Sec. 111.70, Wis. Stat. And, third, it creates barriers to and discourages the voluntary payment of dues by employees who want to support a labor organization; and it encourages "free riders", by permitting them to claim union representation without having to pay anything for the services provided.

Again, it does not take much understanding of how people react to incentives and disincentives to see that Act 10 encourages individual employee dealings with their employers, in which situation there is no limit on the wages and conditions of employment that can be negotiated by the individual, while at the same time discouraging any employee association, by substantially limiting, if not eliminating altogether, any benefit to be derived from the association and, at the same time, undermining the financial wherewithal of the association. In short, the cumulative effect of the provisions of Act 10 is to impose a substantial burden on and impair the exercise by municipal employees of their constitutionally secured right to associate and assemble, and to express their views in concert with one another and to petition their State and local governments regarding matters that are of mutual concern to them, in derogation of the rights secured at Article I of the Wisconsin Constitution and the Ist and XIVth Amendments to the United

States Constitution. By abolishing the historical, voluntary collective bargaining, and then by imposing barriers to and penalties on any residual statutory right to bargain, thereby rendering it meaningless, by withholding the benefits of association, the provisions of Act 10, in their cumulative effect, impose burdens on and discourage the exercise of the constitutionally secured freedoms of association and expression by the general municipal employees who are represented by Laborers 236 and AFSCME Local 60.

III. THE CONSTITUTIONALLY SECURED RIGHT OF INDIVIDUALS TO ASSOCIATE TOGETHER FOR THE PURPOSE OF EXPRESSING THEIR VIEWS REGARDING MATTERS OF MUTUAL CONCERN, INCLUDING MATTERS RELATED TO THEIR EMPLOYMENT, MAY NOT BE DIRECTLY, NOR INDIRECTLY, IMPAIRED.

A. The Individual Rights At Stake In This Case Are "Fundamental Rights" Secured To The Plaintiff Labor Organizations And To The Employees Who They Represent Under Article I Of The Wisconsin Constitution And The Ist And XIVth Amendments To The United States Constitution.

Not quite fifty years ago the United States Supreme Court discussed the importance of the constitutionally secured right of individuals to associate, and to act in concert with each other for the purpose of petitioning their government regarding matters that are of mutual interest and concern, as follows:

> This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments, N.A.A.C.P. v. Alabama, 357 U.S. 559, …. as was said in N.A.A.C.P. v. Alabama, supra, "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech" 357 U.S., at 460 ….

> The First and Fourteenth Amendment rights of free speech and free association are fundamental and highly prized, and "need breathing space to survive." N.A.A.C.P. v. Button, 371 U.S. 415, 433, 405 "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates v. Little Rock, supra, 361 U.S., at 523 …. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 543-544 (1963).

This proposition repeatedly has been affirmed by the courts.

> Implicit in the First Amendment Freedoms of speech, assembly, and petition is the freedom to gather together to express ideas – the freedom to associate. …Christian Legal Society v. Walker, 453 F. 3d 853, 861 (7th Cir. 2006).
>
> …Indeed, the right of association guaranteed by the First Amendment is premised in part on the notion that some ideas will only be expressed through collective efforts ….In re Motor Fuel Temperature Sales Practices Litigation, 641 F. 3d 470, 479 (10th Cir. 2011).
>
> …by collective effort individuals can make their views known, when, individually, their voices would be faint or lost. … Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981).
>
> …the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer… is a fundamental right. … NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
>
> …Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. … Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548, 570 (1930).

This "fundamental" constitutionally secured right includes the right to join, support and be represented by a labor organization. E.g., Thomas v. Collins, 323 U.S. at 534; AFSCME, AFL-CIO v. Woodward, 406 F.2d at 139; McLaughlin v. Tilendis, 398 F.2d at 288-289.

B. Constitutionally Secured "Fundamental Rights" May Not Be Interfered With Or Impaired By The State, Except Where The "Infringement Is Narrowly Tailored To Serve A Compelling State Interest".

Where "fundamental" rights are implicated any state action that infringes on the exercise of the right must be "narrowly tailored to serve a compelling state interest". E.g., Reno v. Flores, 507 U.S. 292, 301(1993). Where a fundamental right is recognized, substantive due process forbids any infringement of that right "at all, … unless the infringement is narrowly tailored to serve a compelling state interest". Reno v. Flores, 507 U.S. at 301; Witt v. Department of the Air Force, 527 F. 3d 806, 817 (9th Cir. 2008).

> … a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest …. Kusper v. Pontikes, 414 U.S. 51, 58 (1973).
>
> … state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. NAACP v. State of Alabama ex rel. Patterson, 357 U.S. 449, 460-461 (1958).
>
> …Necessarily included with such constitutionally guaranteed incidents of liberty is the right to exercise the same in union with others through membership in organizations seeking political or economic change. …
>
> …The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally protected liberties than a direct criminal statute, but it may be equally violative of the constitution. Lawson v. Housing Authority of City of Milwaukee, 270 Wis. 269, 274-275, 70 N.W.2d 605 (1955)
>
> …Government action may impermissibly burden the freedom to associate in a variety of ways; two of them are "impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group" and "interfere[ing] with the internal organization or affairs of the group." Roberts, 468 U.S. at 623 ….
> …
> …The protections of the Constitution … are not limited to direct interference with First Amendment freedoms. …The Constitution also protects against indirect interference. …
> ….
> …violations of First Amendment rights are presumed to constitute irreparable injuries ….Christian Legal Society v. Walker, 453 F. 3d at 861, 865, 867.

The State's interest must be something more than an interest that is important in the abstract or merely conjectural: it must be real. See, e.g., Saieg v. City of Dearborn, 641 F. 3d 727, 736-737 (6th Cir. 2011).

In the case at hand, where the constitutionally secured rights of individuals to associate for the purpose of exercising their freedom to express their views regarding matters of mutual concern are implicated, the State was required to show that the challenged legislation was justified by the existence of a compelling state interest and that the Act was narrowly tailored to accomplish that interest. No such showing was made.

CONCLUSION

If 2011 Wisconsin Act 10 had been limited to the elimination of the statutory protection of the "collective bargaining" rights of the general employees, while preserving that protection for other, favored public employees, the issue presented would be one that concerned the equal protection of the law and whether the State had articulated any sort of rational basis for this disparate treatment of the public employees. But Act 10 was not so limited.

Instead, 2011 Wisconsin Act 10 went further and barred the general employees altogether from engaging in the fundamental activity of bargaining collectively, while at the same time it rendered any residual statutory right to bargain with their employers effectively meaningless. Again, the cumulative effect of the provisions of Act 10 has substantially impaired not only what had been the

statutory protection of the employees' rights, but also their basic constitutionally secured right to associate together for the purpose of petitioning their municipal employers regarding their wages and conditions of employment and otherwise expressing their views regarding matters of mutual interest and public concern. This case concerns the constitutionality of the provisions of a law that apply adversely to certain public employees, but not others. Given the interplay between the provisions in question, the cumulative effect of the provisions of 2011 Wisconsin Act 10 impermissibly impairs public employees' exercise of the rights secured at Article I of the Wisconsin Constitution and at the Ist and XIVth Amendments to the United States Constitution.

Dated: December 28, 2012

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CERTIFICATION

I hereby certify that this Amici Curiae Brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a Brief and appendix produced with a proportional serif font. The length of this brief is 3,985 words, exclusive of the case caption.

Dated this 28th day of December, 2012.

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BRUCE F. EHLKE

ELECTRONIC BRIEF CERTIFICATION

The text of the electronic copy of this Amici Curiae Brief is identical to the text of the paper copy of the Brief.

Dated this 28th day of December, 2012.

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BRUCE F. EHLKE