STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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 CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE JUAN COLAS, PRESIDING (BRANCH 10)
TRIAL COURT CASE NO. 2011-CV-003774

BRIEF OF *AMICUS CURIAE* CITY OF MILWAUKEE

GRANT F. LANGLEY
City Attorney (SB #01013700)

RUDOLPH M. KONRAD
Deputy City Attorney (SB #01015041)
STUART S. MUKAMAL
Assistant City Attorney (SB #01016992)
DONALD L. SCHRIEFER
Assistant City Attorney (SB #01010693)
Attorney for *Amicus Curiae* City of Milwaukee

ADDRESS:
200 E. Wells Street #800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8550

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Wisconsin Cases

Other Cases

Wisconsin Constitution

Wisconsin Statutes

Milwaukee City Charter

Other Authorities

STATEMENT OF FACTS[1]

This Brief concerns the constitutionality of Wis. Stat. § 62.623(1) (A-App. p. 057) adopted by the Wisconsin Legislature as § 149 of 2011 Wis. Act 10. It requires that, unless otherwise specified in a valid collective bargaining agreement, City employees must pay employee-required contributions for benefits payable under the Milwaukee Employes' Retirement System ("ERS") and that the City cannot pay such contributions.

ERS was established by ch. 396 L. 1937; its governance, funding and administration were transferred to exclusive control by the City in ch. 441 L. 1947. The 1947 enactment expressly: (1) brought the governance, funding and administration of ERS within the ambit of the City's constitutional home rule authority as established by Art. XI § 3(1) of the Wisconsin Constitution; and (2) provided that all pension benefits and the terms and conditions under which such benefits are provided, constitute vested "benefit contracts" inuring to the benefit of each individual employee/member as of their initial dates of employment, which could not be diminished or impaired by subsequent legislation or other means without the express consent of the individual employee/member.

The City exercised its constitutional home rule authority per Wis. Stat. § 66.0101 by enacting Charter ch. 36 (A-App. pp. 069-133), which continues to serve as ERS's governing law. At no time until enactment of Wis. Stat.

[1] References to the Brief of the Appellants are denoted as "A-Br. p. __" and references to the attached Appendix are denoted as "A-App. p. __."

§ 62.623(1), as part of 2011 Act 10, did the State attempt to interfere with the City's governance of ERS, or with the benefits afforded to ERS members or the terms and conditions under which such benefits were afforded.

ARGUMENT

1. Introduction

The City supports the argument advanced by the Plaintiffs-Respondents at pp. 45-67 of their Brief regarding the requirement in Wis. Stat. § 62.623(1) that ERS members pay employee-required contributions and prohibiting the City from making those contributions. This statute: (1) unconstitutionally interferes with the City's home-rule authority over ERS, given certain vested rights and benefits that have accrued to City employees who are members of ERS; and (2) constitutes an unconstitutional impairment of contract rights under the Wisconsin Constitution. It also abrogates the terms and conditions of the Global Pension Settlement ("GPS") described below.

2. Wisconsin Stat. § 62.623(1) Violates the City of Milwaukee's Constitutional Home Rule Authority.

The adoption of Article XI, § 3(1) of the Wisconsin Constitution established municipal home rule. It reads:

> Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

This Home Rule Amendment limits the powers of the Legislature in dealing with the local affairs and government of cities and villages. *Van Gilder v. City of Madison ("Van Gilder")*, 222 Wis. 58, 83-84, 267 N.W. 25 (1936). Wisconsin courts have repeatedly held that the breadth of constitutional home rule shall be liberally construed. *Local Union No. 487, IAFF-CIO v. City of Eau Claire*, 147 Wis. 2d 519, 522, 433 N.W.2d 578 (1989); *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526, 253 N.W.2d 505 (1977); *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 639, 209 N.W. 860 (1926).

A salient attribute of constitutional home rule is that, given its origins in the Constitution, the Legislature's power to modify or abrogate municipal enactments falling within the home-rule ambit is sharply curtailed; if the subject matter of a municipal ordinance pertains to local affairs and government, the Legislature cannot interfere with the enactment unless it: (a) contravenes the constitution itself; or (b) contravenes a legislative enactment of "state-wide concern as with uniformity shall affect every city or every village." The former is not at issue. To satisfy the latter, the legislative enactment must meet *two* tests—"state-wide concern" *and* "uniformity." *Thompson v. Kenosha County*, 64 Wis. 2d 673, 683, 221 N.W.2d 845 (1974).

The ERS was created in ch. 396, Laws of 1937. In 1947, the Legislature enacted § 31(1) of ch. 441, Laws of 1947, to transfer authority over ERS from the Legislature to the City. It declared:

> For the purpose of giving to cities of the first class the largest measure of self-government with respect to pension annuity and retirement systems compatible with the constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this act are matters of local affair and government and shall not be construed as an enactment of state-wide concern.

Charter § 36-14 ("Home Rule") contains the same language (A-App. p. 129). This language is clear, unambiguous and explicitly applies to "all future amendments" to ERS's governing law, Charter ch. 36.

The broad declaration that pension systems of first-class cities are purely matters of local concern is entitled to great weight by the courts. *State ex rel. Brelsford v. Retirement Bd. of the Policemen's Annuity and Benefit Fund of Milwaukee*, 41 Wis. 2d 77, 86, 163 N.W.2d 153 (1968). The public policy of the Legislature is explicit and should be given decisive weight here. The subject matter of pensions for City of Milwaukee employees is a matter of local and not state-wide concern.

The Legislature cannot withdraw the characterization of the right, contained in ch. 441 L. 1947 and codified in Charter § 36-14, to first class cities to operate and maintain their pension systems as matters of local affairs and government. The court held in *Van Gilder, supra*, that "when a power is conferred by the home-rule amendment, it is within the protection of the Constitution and cannot be withdrawn by legislative act." 222 Wis. at 72. In *State ex rel. Michalek v. LeGrand, supra*, the Court stated: "as to an area solely or paramountly in the constitutionally protected area of "local affairs and government, the state

legislature's delegation of authority to legislate is unnecessary and its preemption or ban on local legislative action would be unconstitutional." 77 Wis. 2d at 529.

The appellants' argument that Wis. Stat. § 62.623(1) overcomes the City's constitutional home rule powers because it is part of a "uniform enactment" (2011 Act 10) is unpersuasive. This reasoning relies upon a conclusion that the Legislature may override constitutional home rule, even with respect to matters within the ambit of "local affairs and government," merely by enacting measures of uniform state-wide applicability. This conclusion contravenes the literal text of the Home Rule Amendment, and would essentially nullify the concept of constitutional home rule. The current appeal concerns a subject that is not only entirely a matter of local concern, but is also one that has been *expressly declared* to be such by the Legislature. This declaration may not be withdrawn by an attempted subsequent legislative enactment such as Wis. Stat. § 62.623(1). *Van Gilder, supra*, 222 Wis. at 74.

The appellants also focus upon the phrase, "compatible with the Constitution and general law," in the Home Rule Amendment and claim this phrase constitutes a significant limitation upon that amendment. (A-Br. pp. 47-48). This misreads the language of the Amendment and was appropriately addressed by the Circuit Court (A-App. p. 021), which noted that such an interpretation would render the Amendment a nullity by empowering the Legislature to enact *any* "general law" that would override matters otherwise clearly within Home Rule Amendment purview. (A-App. p. 021). The phrase "Constitution and general law"

is an explanation of the purpose of the Amendment, not a broad limitation upon its scope.

Finally, the appellants' contend, citing *Wisconsin Professional Police Association v. Lightbourn*, 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807, that the governance, funding and administration of ERS constitute matters of state-wide concern because the State has been "creating and amending public employee retirement systems since 1891." (A-Br. p. 51). The ERS, however, is *distinct* from every other public pension system in Wisconsin. The Legislature transferred full control of ERS, including its governance, finances and administration, to the City in 1947. *Lightbourn* itself expressly notes that the State *only* regulates and administers "non-Milwaukee pension plans," *id.* at ¶ 9, 243 Wis. 2d at 532.

The City's payment of "employee required contributions" to the ERS is a proper exercise of the City's constitutional home rule powers under Wis. Const. Art. XI, § 3(1). The Legislature cannot modify or withdraw that power by subsequent legislative enactment. Wisconsin Stat. § 62.623(1) attempts to do just that.

3. Wisconsin Stat. § 62.623(1) Unlawfully Infringes Upon ERS Members' Vested Contractual Rights.

As noted, ERS was created by the Legislature in ch. 396, Laws of 1937, as amended by ch. 441, Laws of 1947. It created the contractual relationships and vested rights at issue here. Of particular significance are §§ 30 and 31(1) of the 1947 session law.

Section 30 of ch. 441, Laws of 1947, added new § 14(2) of ch. 396, Laws of 1937, entitled "CONTRACTS TO ASSURE BENEFITS," which repeatedly describes ERS member benefits as constituting "*benefit contracts*" and "*vested rights*" inuring to each ERS member upon the terms and conditions prevailing *as of the commencement of each member's employment*.

This provision now appears in Charter §§ 36-13-2-a, 2-b and (with some modifications not material here) 2-c. (A-App. p. 125). To the same effect are: Charter § 36-13-2-e (A-App. p. 126), which protects "rights, benefits or allowances" earned by ERS members from alteration, modification, reduction, change, cancellation, revocation or impairment to the disadvantage of members and their beneficiaries, by (among other things) subsequent legislation; and Charter § 36-13-2-g (A-App. p. 126), pertaining to members of the "Combined Fund,"[2] established as a consequence of the 2000 Global Pension Settlement, ("GPS"). These guarantees and vested rights are a distinct and key feature of ERS. By contrast, Wisconsin Retirement System ("WRS") has nothing comparable: it has expressly reserved the right to modify benefits on a prospective basis. Wis. Stat. § 40.19(1). The Charter contains no such "reservation" applicable to any City employee hired before November 23, 2011.

Of particular significance are provisions in the 1947 enactment and Charter ch. 36 that unequivocally *fix* and *vest* the contractual rights of ERS members and

[2] The label "Combined Fund" derives from one of the issues resolved by the GPS, which was the merger of the City's former disability fund into the ERS retirement fund.

beneficiaries *as of the date of the member's initial employment*. *See* § 30(2)(c) and § 31(1) of ch. 441, Laws of 1947; ch. §§ 36-13-2-a, 36-13-2-c, 36-13-2-g, 36-14 (A-App. 125-26, 129); *see also, Welter v. City of Milwaukee ("Welter")*, 214 Wis. 2d 485, 488, 494-95, 571 N.W.2d 459 (Ct. App. 1997). The rights so vested are not limited to benefits alone, but are identified to include "benefits," "terms and conditions" of those benefits, and all "other rights" of ERS members. The City's payment of the employee share of contributions to the ERS funds plainly qualifies as a benefit, a "term and condition" of the benefit contract, *and* a right (these three descriptive categories are not mutually exclusive) accruing to each member, and is protected from any alteration, impairment or diminution by subsequent legislation without the member's individual consent. "Pension laws should be liberally construed in favor of the persons intended to be benefited thereby." *Di Dio v. Board of Trustees of the Milwaukee Public School Teachers Annuity and Retirement Fund*, 38 Wis. 2d 261, 268-269, 156 N.W.2d 418 (1968). Requiring ERS members to pay the "member contributions" specified in Charter § 36-08-7 substantially diminishes their rights and the value of their benefits.

The language in Charter § 36-08-7 is not ambiguous. The payment of a member's "employee required contribution" by the City is expressed in mandatory language ("the city shall contribute") that establishes this as a guaranteed member right, benefit, and "term and condition" of that benefit. As noted by this Court in *Milwaukee Police Association v. City of Milwaukee*, 222 Wis. 2d 259, 267-68, 588 N.W.2d 636 (Ct. App. 1998) and *Welter, supra*, the rights and benefits in effect on

the date an employee becomes a member of the ERS vest immediately and cannot thereafter be taken away. The City's payment of pension contributions is such a right; it cannot be divested absent an employee's consent.

The Global Pension Settlement ("GPS") additionally confirms for that payment by the City of certain members' pension contributions is a vested right. The GPS was approved by the Milwaukee County Circuit Court in a judgment entered on November 16, 2000 in *In Re Global Pension Settlement Litigation*, Case No. 00-CV-003439, and was adopted by the City in Charter Ordinance No. 991585. Its provisions apply to all ERS-member City employees in active service on or after January 1, 2000 who participate in the Combined Fund (all incumbent employees who individually consented to the GPS). Charter Ord. § 36-08-9. (A-App. pp. 119-120). As part of the approved settlement, the following provision (in Ch. Ord. § 36-13-2-g (A-App. p. 126) was included in the implementation ordinance:

> Every member, retired member, survivor and beneficiary who participates in the combined fund **shall have a vested and contractual right to the benefits in the amount and on the terms and conditions** as provided in the law on the date the combined fund is created. [Emphasis added.]

Among the benefits, terms and conditions, and rights in effect on the effective date of the GPS were the provisions of Charter ch. 36 discussed above obligating the City to pay the employee share of members' pension contributions on their behalf.

4. Wisconsin Stat. § 62.623(1) Unconstitutionally Impairs the Obligation of Contracts in Violation of the Contracts Clause of the Wisconsin Constitution.

The analytical framework for considering an impairment of contract claim under Art. I, § 12, of the Wisconsin Constitution is the same standard that applies to claims under the Article I, section 10, clause 1 of the U.S. Constitution:

> . . . the legislation must impair an existing contractual relationship; the impairment must be substantial; and if the impairment is substantial, the purpose of the state legislation must be examined to determine whether the impairment is justified.

Reserve Life Insurance Company v. LaFollette, 108 Wis. 2d 637, 644, 323 N.W.2d 173 (Ct. App. 1982), *citing Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 244-45, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). The City would only augment pertinent discussion the impairment issue on pages 61-66 of Plaintiffs-Respondents' brief with citation to a number of cases that bear relevantly upon key issues to such analysis.

As shown in Section 3, above, most current members of the ERS have a vested right to continued payment by the City of the employee share of their contributions to the ERS – the first criterion for an unconstitutional impairment of contract. As to the second and third criteria, a considerable body of case law holds that even impairments of public-sector employee contract rights that are less substantial than the impairment at issue here[3] are "substantial," and that even the

[3] An employee-member ERS contribution of 5.5 percent (7 percent for elected officials) involves a loss of 114.4 hours of pay (equivalent to 14.3 days of pay – almost three weeks) for an employee working a typical 2,080-hour work year with 8-hour days.

existence of extreme and dire economic circumstances are rarely sufficient to provide a constitutionally sufficient "justification" for such impairments. *See, e.g., University of Hawaii Professional Assembly v. Cayetano,* 183 F.3d 1096, 1099, 1106-1107 (9th Cir. 1999); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766, 769, 772-774 (2nd Cir. 1991); *Fraternal Order of Police v. Prince George's County,* 645 F.Supp. 2d 492, 500-501, 510-518 (D. Md. 2009), *rev'd on other grounds*, 608 F.3d 183 (4th Cir. 2010); *Baltimore Teachers Union v. Mayor and City of Baltimore,* 6 F.3d 1012, 1015, 1016-22 (4th Cir. 1993),[4] *reh. en banc den.* 6 F.3d 1012 at 1026, *cert. denied*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed. 2d 435 (1994); *Massachusetts Community College v. Commonwealth of Massachussetts*, 420 Mass. 126, 130, 131-32, 140, 649 N.E.2d 708 (Mass. 1995); *Association of Surrogates and Supreme Court Reporters v. State of New York,* 79 N.Y.2d 39, 43, 46 (N.Y. Ct. App. 1992).

5. The Constitutionally Proper Method of Amending ERS Benefits and Benefit Terms and Conditions.

Under § 31(1) L. 1947 and Charter § 36-14 (A-App. p. 129), there is a proper way to amend Charter Ch. 36: through a Charter amendment affecting new employees hired after the effective date of the Charter amendment in question. The City has done this through: (1) creation of Charter § 36-08-7-a-2 (A-App. p.

[4] In finding a limited furlough program that it found to impose a "substantial impairment" of contract rights to be constitutionally justified, *City of Baltimore* is very much an outlier; that aspect of its holding has been "severely criticized." *See University of Hawaii Professional Assembly, supra,* 183 F.3d at 1105, fn 6 (and authorities cited therein).

116), requiring employees hired on or after January 1, 2010 to contribute 5.5% of "earnable compensation" as a required contribution to ERS; and (2) creation of Charter § 36-13-2-h (A-App. p. 126), which incorporates a "reservation of rights" of similar effect to Wis. Stat. § 40.19(1), entitling the City to amend benefits and benefit terms and conditions on an ongoing basis for all City employees hired on or after November 23, 2011.

CONCLUSION

The City of Milwaukee respectfully submits that the Court should find Wis. Stat. § 62.623(1) violative of the Home Rule Amendment and the Contract Clause of the Wisconsin Constitution.

Dated and signed at Milwaukee, Wisconsin this 1st day of February, 2013.

GRANT F. LANGLEY
City Attorney

ADDRESS:
200 E. Wells Street, Rm. 800
Milwaukee, WI 53202
Telephone: (414) 286-2601
Fax: (414) 286-8500

s/ Stuart S. Mukamal
RUDOLPH M. KONRAD
Deputy City Attorney
State Bar No. 01015041
STUART S. MUKAMAL
Assistant City Attorney
State Bar No. 01016992
DONALD L. SCHRIEFER
Assistant City Attorney
State Bar No. 01010693
Attorney for *Amicus Curiae*
City of Milwaukee

1081-2012-2317:188659

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. The length of this brief is 2,939 words.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12), and that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify that the required number of copies of the brief and appendix correctly addressed have been submitted for delivery to the Court of Appeals on February 1, 2013.

GRANT F. LANGLEY
City Attorney
s/ Stuart S. Mukamal
RUDOLPH M. KONRAD
Deputy City Attorney (SB #01015041)
STUART S. MUKAMAL
Assistant City Attorney (SB #01016992)
DONALD L. SCHRIEFER
Assistant City Attorney (SB #01010693)
Attorney for *Amicus Curiae* City of Milwaukee

CERTIFICATE OF MAILING

Laura M. Bergner herein certifies that she is employed by the City of Milwaukee, assigned to duty in the office of the City Attorney, which is located at 841 North Broadway, Suite 716, Milwaukee, Wisconsin 53202; that on the 1st day of February, 2013, she filed ten copies of the Brief of *Amicus Curiae* City of Milwaukee, in the above-entitled case, addressed to: Ms. Diane M. Fremgen, Clerk of the Wisconsin Court of Appeals, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

Steven C. Kilpatrick
Joseph L. Olson
Michael P. Schrenock
Office of the Attorney General
PO Box 7857
Madison, WI 53707-7857

Lester A. Pines
Tamara Packard
Susan M. Crawford
Cullen, Weston, Pines & Bach, LLP
122 West Washington Avenue
Suite 900
Madison, WI 53703

M. Nicol Padway
Padway & Padway, Ltd.
633 West Wisconsin Avenue
Suite 1900
Milwaukee, WI 53203-1918

Richard M. Esenberg
Wisconsin Institute for Law & Liberty, Inc.
1139 E. Knapp Street
Milwaukee, WI 53202

Michael P. May
Office of the Madison City Attorney
210 Martin Luther King Jr. Blvd
County Building, #401
Madison, WI 53703-3345

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

Daniel J. Borowski
Andrew T. Phillips
Phillips, Borowski, SC
10140 N. Pt. Washington Rd.
Mequon, WI 53092

Steven P. Means
Kevin M. St. John
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707

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

Milton L. Chappell
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, #600
Springfield, VA 22160

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

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

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

Marianne G. Robbins
Previant, Goldberg, Uelman, Gratz, Miller
1555 N. Rivercenter Drive, #303
Milwaukee, WI 53212

John W. Strange, Jr.
Assistant City Attorney
210 Martin Luther King, Jr. Blvd, #401
Madison, WI 53703-3345

s/Laura M. Bergner

1081-2012-2317:188659