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STATE OF WISCONSIN
COURT OF APPEALS
District IV
Appeal No. 2013AP416

PEGGY Z. COYNE, MARY BELL,
MARK W. TAYLOR, COREY OTIS,
MARIE K, STANGEL, JANE WEIDNER
AND KRISTIN A. VOSS,
Plaintiffs-Respondents,

v.

SCOTT WALKER AND MICHAEL HUEBSCH,
Defendants-Appellants,

and

ANTHONY EVERS,
Defendant-Respondent.

Appeal from the Circuit Court of Dane County
Honorable Amy R. Smith Presiding
Case No. 11-CV-4573

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INTRODUCTION

Interest of Amicus

The Wisconsin Institute for Law & Liberty ("WILL") is a non-profit, public interest law firm dedicated to promoting the public interest in free markets, limited government, individual liberty, and a robust civil society. In late 2012, WILL announced the launching of an education reform initiative, aiming to advance the public interest by ensuring that all children have access to high-quality schools and empowering parents to make decisions over their child's education. In particular, the WILL education initiative seeks to address the regulatory obstacles to reform created by entrenched bureaucracies. WILL believes that the circuit court's decision unduly privileges the authority of the Superintendent of Public Instruction and improperly burdens the ability of the legislature to define and appropriately limit whatever policy-making authority that the legislature may choose to give him.

Jason Fields is a former Democratic member of the State Assembly. He represented most of the north side of Milwaukee from 2005 – 2012. Today, he works in the private sector in Milwaukee and is a prominent and

engaged civic leader, deeply concerned about the quality of education in the City of Milwaukee and throughout our state.

Scott Jensen is a former Republican member of the State Assembly. He represented parts of Waukesha County, including Brookfield, from 1992 – 2006 while serving as Speaker of the Assembly from 1995-2002. Today, he remains actively involved in state government and is a leader in the education reform movement, both in Wisconsin and nationally.

Messrs. Jensen and Fields have a vested interest in protecting the legislature's constitutional authority to reform the regulatory process, including in the critical area of K-12 education. They believe that the legislature should be the body to determine if, when, and how state agencies will be permitted to make rules and that the Superintendent has no constitutional right to make rules or policy. In addition, as experienced legislators, they understand that effective control of agency rule-making process requires the involvement of the executive branch.

ARGUMENT

There appears to be no dispute that the Superintendent has no constitutionally "vested" or "protected" policy making authority.[1] It is agreed that he may "make" policy – as opposed to supervise the implementation of policy – *only* as the legislature may direct and permit. The historical record is clear that, except for a few isolated and very specific legislative grants of authority,[2] the Superintendent never had rule-making power until after the adoption of the Administrative Procedure Act in 1943. Today, he does not have rule-making authority other than when – and to the extent – the legislature gives it to him.

In fact, provisions of 2011 Wisconsin Act 21 that were not invalidated by the decision below make it clear that the Superintendent has no "implied" rule-making authority, *i.e.*, he may make only those rules that the legislature expressly tells him that he may make. No one argues that the legislature is prohibited from taking away whatever rule-making authority it has conferred.[3]

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[1] According to the circuit court, "the Superintendent has no inherent power to promulgate rules on his or her own." *Coyne v. Walker*, Dane County Circuit Court Decision, 11.
[2] *See* Part II., *infra*.
[3] According to the Plaintiffs' summary judgment brief to the Dane County Circuit Court, "the plaintiffs do not challenge the scope of the legislature's authority to delegate rule-making authority to the DPI or its reserved authority to review proposed rules." Pg. 11.

Yet, the circuit court held that the legislature may not limit the rule-making power even though it could completely take it away; at least not if that limitation is accomplished through requiring the review and approval of another executive officer. Its reasoning is not clear, ranging from suggestions that the Superintendent has some "vested" authority that may not be disturbed to a more limited (and formalist) argument that whatever power the legislature might give the Superintendent cannot be constrained in any manner that implicates the acquiescence of any other executive branch official.

Either way, the decision below cannot mean what it says and be right. If the Superintendent possesses the unconstrained constitutional right to make rules, then the legislature's exclusive constitutional authority over policy-making will have been violated. If whatever policy-making authority the legislature gives him can never be constrained by the executive, then the circuit court's decision is in conflict with the Governor's right to veto such grants of authority and a long history of legislative actions giving certain powers related to public education to others.

The circuit court relied on *Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996). But under *Thompson*, it is only the Superintendent's power to supervise education that may not be given to others. Article X, section 1 does not limit the "duties" that may be "prescribed" by the legislature to be performed by the Superintendent in addition to his constitutionally vested role of "supervision." The legislature has, in fact, delegated other duties to the Superintendent and, in specific instances, has granted non-supervisory policy-making authority to the Superintendent.

The circuit court assumed – without citing any authority and without any legal analysis – that the Superintendent's current rulemaking authority was within his constitutionally "vested" duty to supervise public instruction. That was legal error. Rulemaking has never been part of the Superintendent's duty to supervise public instruction. Rulemaking, which is delegated by the legislature, falls under the Superintendent's other "duties" which may be "prescribed by law" under Article X, section 1. As a result, the legislature is free to limit the Superintendent's rulemaking abilities in any way it chooses without violating Article X of the Wisconsin Constitution.

I. THE SUPERINTENDENT'S DUTY TO SUPERVISE PUBLIC INSTRUCTION IS LIMITED AND DOES NOT EXTEND TO THE MAKING OF POLICY AND RULE-MAKING

The circuit court struggled to apply *Thompson*, a very different case than this one. In *Thompson*, the legislation at issue made the Superintendent subordinate to other executive officers in everything that he might do, including the exercise of supervisory authority. 199 Wis. 2d at 679. *Thompson* did not involve, as this case does, an effort by the legislature to balance the needs of a complex administrative state with a recognition that grants of "quasi-legislative" rule-making authority require additional measures to ensure accountability.

Act 21 represents a step by legislators "to jealously guard their constitutional policy-making authority." Ronald Sklansky,[4] *Changing the Rules on Rulemaking*, WISCONSIN LAWYER, August 2011. As Attorney Sklansky notes, "[t]his goal [of guarding the legislature's policy-making authority] underlies the Act's provisions that . . . give the governor the power to withhold approval of a scope statement, . . . [and] impose an

[4] Sklansky is a retired senior staff attorney for the Wisconsin Legislative Council, the nonpartisan service agency of the Wisconsin Legislature.

expanded economic-impact analysis on all state agencies so that the need for any given rule is proved to the Legislature . . . ." *Id.*

Agency rule-making is a "quasi-legislative" function, permitting agencies to promulgate legal rules entitled to varying degrees of judicial deference.[5] Act 21 is simply an effort to impose procedural checks and balances on agencies when they promulgate rules that have the force and effect of law. The legislature quite reasonably decided that, if it is to delegate a portion of authority to agencies, requiring both houses to act in order to limit the exercise of that authority is insufficient. It decided that when an agency acts as a delegate of the legislature in a law-making role, the agency ought to be subject to a gubernatorial veto, similar to the legislature itself.

To say that this may not occur because the Superintendent has some vested constitutional responsibility would call into question the legislature's ability to limit the rule-making authority of other constitutional officers,

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[5] A "rule" is defined as a "regulation, standard, statement of policy or general order of general application which has the *effect of law* and which is issued by an agency to implement, interpret or make specific *legislation enforced or administered* by the agency." Wis. Stat. § 227.01(13) (emphasis added). Administrative rule-making is very much like legislating, although administrative rules are accorded varying degrees of deference by courts, depending on the agency's expertise in the subject. *See, e.g.*, *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660-661, 539 N.W.2d 98, 102 (1995).

such as the Attorney General or Secretary of State – each of whom presumably has some core constitutional authority.

A. The Superintendent's Supervisory Authority Does Not Consist of Any and Every Duty that the Legislature May Prescribe

The critical legal mistake made by the circuit court was its failure to distinguish between the different roles played by the Superintendent in state government. The Superintendent's only specified constitutional duty in Article X is the "supervision of public instruction." It was that limited constitutional duty, the supreme court held in *Thompson*, that the legislature cannot reassign to other officers. 199 Wis. 2d at 698. The Constitution places no similar impediment to the legislature prescribing – meaning both adding to or subtracting from – other duties for the Superintendent. These may be reallocated as the legislature sees fit.

While *Thompson* made clear that the Superintendent's "supervisory and administrative powers" are not merely "exhortatory or directed toward encouraging education," *id*. at 694, it made no further attempt to define either the supervisory or administrative power because it was not necessary to do so. It was not necessary because the legislative withdrawal of authority in that case was extraordinarily broad. It gave all authority over

public education to the newly created Education Commission and Department of Education. *See* 1995 Wis. Act 27. The Superintendent was made subordinate in *everything*.

In contrast, Act 21's withdrawal of authority merely gives the executive a limited, albeit significant, role with respect to a delegated power that the Superintendent can have only if, and when, the legislature says so. Because it is extraordinarily narrow, the precise contours of these supervisory powers need not be delineated here either. This court need only address whether the supervisory power includes rule-making.

The circuit court's conclusion that "supervision" must include rule-making essentially reduces to the tautology that rule-making must be supervisory because the Superintendent currently promulgates rules. But that cannot be reconciled with the contingent nature (only if the legislature says so) and the overriding authority of the legislature over policy-making. To say, as the circuit court did, that the Superintendent often engages in legislatively authorized rule-making and so has a constitutional right to do so in a manner that is as unfettered as his exercise of his "vested" supervisory authority is to confuse "what is" with "what must be."

B. "Supervision" Is a Limited Concept

There is no warrant – in fact, it would be wrong to say – that supervisory power includes the power to make policy through agency rule-making. As noted in *Thompson*, the powers initially conferred on the Superintendent were "supervisory" and "administrative." 199 Wis. 2d at 694-695. It observed that to "superintend" was defined in the mid-nineteenth century as "to have or exercise the charge or oversight of" and "to oversee with power of direction." *Id*. at 683. Particularly in light of the fact – conceded here by all – that the legislature retains the right to set educational policy, supervision and "superintending" is a managerial concept.

Nothing in the laws of 1848 or 1903 suggests otherwise. In 1848, for example, the Superintendent was directed to inspect schools, communicate and recommend various matters and to ascertain and collect information regarding certain things. L. 1848, 128-129. While he could also apportion legislatively appropriated funds and adjudicate certain controversies, he was not empowered to make law.

In 1903, he was tasked with prescribing "regulations for district libraries" and authorized to "revise, codify, and edit the school laws."

Laws of 1903, c. 37, 82. There is nothing in the record to suggest that this conferred the authority to make law or do anything like agency rule-making. In any event, these were express grants of legislative authority that came into existence 55 years after the Constitution gave him the duty to supervise public instruction. The legislature's choice in 1903 to prescribe other duties by granting some policymaking authority in certain areas does not mean that authority is "supervisory."

C. "Supervision" Does Not Include Making Policy Through Rule-Making

Rulemaking is not supervision. It is neither "supervisory" nor "administrative," but a "quasi-legislative" function in which the Superintendent (or other agency) is empowered to engage in what comes very close to law-making. It is policy-making, which is an exclusively legislative function. *See Martinez v. DILHR*, 165 Wis. 2d 687, 697, 478 N.W.2d 582, 585 (1992) (stating that rulemaking authority is derived solely from delegation by the legislature).

The power to make law and policy is granted exclusively to the two chambers of the legislature. Wis. Const. Art. IV, § 1 ("[T]he legislative power shall be fully vested in the senate and assembly."). The legislature

can, subject to certain limits,[6] delegate that authority to agencies, but when it does so it has not conferred or defined the ability to "supervise." Thus, any rulemaking authority granted by the legislature to the Superintendent is separate and apart from his vested constitutional duty.

II. THE LEGISLATURE HAS HISTORICALLY EXPANDED, CONTRACTED, AND REASSIGNED THE SUPERINTENDENT'S POLICY-MAKING AUTHORITY AS IT SAW FIT

Because agency rule-making is not supervisory, it can be reallocated by the legislature. In fact, as we have seen, the legislature might reasonably conclude that gubernatorial involvement is the best way to cabin that authority it chooses to delegate to modern administrative agencies such as the Superintendent and Department of Public Instruction.

The circuit court said otherwise, maintaining that whatever power the legislature confers can never be taken and given to – or shared with – another officer. The legislature can give no other officer – not even the Governor – the authority to "stop" the Superintendent from adopting rules and "implementing his policy choices." Circuit Court Decision at 5.

But that cannot be. *Thompson*'s prohibition against any other officer

[6] "[A] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose." *In re Klisurich,* 98 Wis. 2d 274, 280, 296 N.W.2d 742, 745 (1980).

having a potential to block or qualify whatever the Superintendent might do is necessarily limited. Were it to apply to the conferral of policy-making authority, it would limit the legislature's plenary authority in that area by denying it the prerogative to define the extent and nature of the power it chooses to delegate. It would be directly inconsistent with the ability of the Governor to veto the conferral of rule-making authority on the Superintendent in the first place – stopping him from making rules and implementing policy choices.

Policy-making authority related to public education can be given to officers other than the Superintendent. For example, in 1915 the legislature created a State Board of Education, which managed and allocated the finances of the state's public educational activities. L. 1915, c. 497. Today, the Superintendent has that power.

In 1948, the Attorney General was asked to opine on whether legislation creating a new state board of education would violate Article X, Section 1. 37 O.A.G, 82 (1948). In addressing the issue, the Attorney General made the same point made by *amici* here and opined that the Superintendent has two distinct sorts of powers and duties – the constitutional duty to supervise public instruction as well as such other

duties as prescribed by the legislature. He concluded that the 1915 legislation confined the board's powers to the state financing of education, which did not implicate the Superintendent's duty to supervise public instruction. *Id.* at 85. But, while it was constitutionally permissible to take away the Superintendent's duties relating to the state financing of education, that would not justify creating a board of education that would take away the Superintendent's separate constitutional duty to supervise public instruction, as the proposed legislation in 1948 might have done. *Id.* at 87.

In 1848, the legislature gave the town superintendents, not the Superintendent, the exclusive power to license school teachers. L. 1848, 226. Between 1862 and 1868, county and town supervisors shared licensing certification. L. 1862, c. 176; L. 1863, c. 102; L. 1868, c. 169. Seventy-three years later, in 1939, the legislature gave this duty to the Superintendent. L. 1939, c. 53.

Today, the Superintendent is not even the sole officer who can promulgate rules relating to public instruction. For example:

- The Department of Safety and Professional Services writes the rules relating to school building codes. Wis. Admin. Code § SPS 378.

- The Department of Workforce Development writes rules relating to students working at their school during school hours. Wis. Admin. Code § DWD 270.19.

- The Department of Transportation writes rules relating to school buses and the public transportation of students. Wis. Admin. Code § Trans 300.

The circuit court distinguished some of these historic example with the argument that "music education, physical education" and "vocational colleges" are "peripheral to the core task given to the Superintendent: the supervision of public education in grade schools and high schools." Circuit Court Decision at 12-13. Regardless of whether those named activities are "peripheral," the licensing of school teachers, financing of schools, transportation of grade school and high school students, and regulation of the buildings in which they attend schools seem quite central to public education. If these statutes are constitutional, it must be because they do not involve the exercise of the supervisory duty.

CONCLUSION

Here, the legislature has changed the rules for rulemaking across the board for every agency and officer that has been delegated the power to promulgate rules. Act 21 does not affect the Superintendent's duties to supervise public instruction, but limits a policy-making authority that is not

part of those supervisory duties and that the legislature was under no obligation to confer upon the Superintendent. The Superintendent must accept the bitter with the sweet. Act 21 is constitutional.

Dated this 12th day of July, 2013.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this 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 2,980 words.

Dated this 12th day of July, 2013.

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