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Date: September 11, 2017

To: Scott Manske, Comptroller
ATTORNEY-CLIENT PRIVILEGED

From: Corporation Counsel Margaret Daun 

Re: Circuit Court Clerk's Authority in Compensation Matters

Question: Which county entity has authority to implement advancements within a pay range/grade?

Introduction: You asked for this office's legal opinion regarding the Clerk of Court's ability to make advancements within the pay range for his staff and your role related thereto. The Clerk has demanded that the advancements be made unilaterally, asserting statutory authority and advocating that the *Lipscomb v. Abele*¹ ruling applies to him as an elected constitutional officer.

A threshold question is whether the Office of Corporation Counsel can advise the Comptroller or whether retention of outside counsel is required. In short yes, the OCC can provide non-conflicted guidance on the state of the law at this time, without wading into issues that will be adjudicated in the appeal of *Lipscomb v. Abele*, particularly given the extraordinary cost of outside counsel, and the relatively straightforward nature of the inquiry. However, should any of the impacted parties wish to seek advice beyond this memorandum or wish to pursue legal action, each party should retain outside counsel. Additionally, it has consistently been the advice of this office that all the interested parties meet to discuss possible solutions.

Ultimately what is at issue here is the ability of the Clerk of Court to exercise unilateral payroll authority exclusive of one or more of the other branches of government. This, in turn, raises fundamental separation of power principles.

¹ *Theodore Lipscomb, Sr. and Milwaukee County Board of Supervisors v. Christopher Abele*, Milwaukee County Circuit Court Case Number 2016CV002888 and Wisconsin Court of Appeals Case Number 17AP1023.

Background: There are multiple, disparate accounts of requests made and responses provided between the Clerk's Office and Human Relations, the Department of Administration, and the Comptroller's Office. At this juncture, the most relevant and critical issue is whether the law grants the Clerk of Courts unique authority to set pay directives for his staff, as described in his July 31, 2017 Interoffice Memorandum to Human Relations, without the approval of all of the following units of government: the County Board, the Budget Office, and Human Resources. The answer is that it does not.

Analysis:

County Executive Duties: Pursuant to Wis. Stat. § 59.17(2)(a), the County Executive is the chief executive officer of the county and his duties and powers include to: "Coordinate and direct all administrative and management functions of the county government *not otherwise vested by law in other elected officers.*" (emphasis supplied) An advancement within a pay range is the movement of an individual up one or more steps in a pay grade so long as the steps exist and the top pay grade is not exceeded. It involves promotions for individual employees and is therefore administrative and within the County Executive's purview. In practice, the County Executive delegates the management of such advancements to HR. A critical component of that determination is whether a department has adequate funds to incur promotional costs in current and future budget years. Such advancements therefore also implicate the County Executive's budgetary authority. Annually, the County Executive submits his proposed budget to the County Board pursuant to the provisions of Wis. Stat. § 59.60(6)(b).

County Board Duties: Annually, the County Board amends and then adopts the budget proposed by the Executive per Wis. Stat. § 59.60(7). At this time, it is the understanding of this office that (1) the County Board appropriated approximately \$1.2 million for equity pay adjustments for all County departments in 2017 (including the Clerk of Courts), (2) the Budget Office has thrice submitted to the Board a resolution proposing the allocation of those funds across departments to fund these equity adjustments (including such adjustments for the Clerk of Courts), and (3) thrice the Board has not acted to do so.

Clerk of Circuit Court Duties: The Clerk is an elected constitutional officer. *See* Wis. Const., art. 7, § 12 (amended 1882, April 2005). The Clerk is also a department head per Wis. Stat. § 753.30(3)(d) as to all departmental "personnel, procurement, budget and related matters." The Clerk claims that together, these two legal bases mean that he has unilateral power to compel the implementation of pay range advancements for his staff.

Intersection of these Duties: In short, the Clerk's position is incorrect. This position conflates the Clerk's proper role over personnel, procurement, and budget *for the clerk's office*, with the County Executive's countywide role (subsuming the Clerk's office) to oversee the day-to-day administration of departmental compensation and the countywide budget, as well as the County Board's role in finalizing the countywide budget and appropriating and approving the expenditure of funds not contemplated expressly in a given annual budget. The Clerk cannot usurp the Executive's countywide powers, nor can the Clerk simply "work around" the Executive's authority, nor can the Clerk unilaterally demand the funding of equity adjustments outside of the Board-approved appropriations designated for that purpose in 2017. However, even if the Board were to approve funds specifically for the Clerk's requested

adjustments, the Clerk must still obtain the approval of the relevant Executive branch departments (i.e., Budget and HR).

Furthermore, while it is true that the Clerk's Office does generate revenue and that such revenue (and its fluctuations over a period of time) is certainly a relevant consideration for the Board and the Budget Office to consider, since the Clerk's Office does not operate in its own financial universe, and is instead part of a unified County budget, the particular revenue stream of the Clerk's Office (or any department) cannot support his assertion that he has unilateral legal authority to mandate equity pay adjustments without the consent of the Board and the Budget Office, as well as HR.

City of Sun Prairie v. Davis, 226 Wis. 2d at 749-50, 595 N.W.2d 635, squarely addressed the role of the judicial branch vis-à-vis the executive branch. It held that the judicial branch has inherent authority vested in the courts to: 1) guard against actions that would "unreasonably curtail the powers or materially impair the efficacy of the courts or judicial system; (2) regulate judges and attorneys; and (3) ensure that courts function efficiently and effectively to provide the fair administration of justice." The pay adjustments at issue here do not implicate any of these "inherent powers."

Further explaining the powers vested in the courts versus the executive branch in terms of personnel matters, is the case of *Winnebago County v. Winnebago County Courthouse*, 196 Wis. 2d 733, 520 N.W.2d 204 (Ct. App. 1995). There, the court's powers were explicitly limited in favor of the power of the county (through its executive) in a personnel matter. Specifically, the court considered whether the clerk of courts' termination of one of its employees in disregard of the grievance process established by the County could stand. The Court found that the clerk of courts must conform to the grievance process established by the County because requiring the clerk to do so did not infringe upon the inherent powers of the court: "The power to terminate Felker's employment without just cause or without adhering to the grievance procedure is not essential to the existence or orderly functioning of a circuit court, nor is it necessary to maintain the circuit court's dignity, transact its business or accomplish the purposes of its existence." *Id.* at 741-742, 520 N.W.2d at 207. *See also* 14 Am. Jur., Courts, p. 371, sec. 171, Inherent Powers of Courts, 1963 Supp., p. 77 (general control of the judicial business before it is essential to the court if it is to function). So too here: just as the clerk in *Winnebago County* must adhere to the grievance process established by HR, the Milwaukee County Clerk of Courts must adhere to the equity pay policies and budget determinations made by HR and the Budget Office (and the Board).

The case of *Barland v. Eau Claire County*, 216 Wis.2d 560, 566, 575 N.W.2d 691, 693 (1998), addressed the role of the judicial branch as contrasted with the legislative branch. The case addresses the core separation of power principles also at issue here. In *Barland*, the Wisconsin Supreme Court discussed powers regarding removal of a judicial assistant under the terms of a collective bargaining agreement (CBA) and described exclusive areas of judicial authority as follows:

For more than a century, this court has been called upon to resist attempts by other branches of government to exercise authority in an exclusively judicial area. These have included an attempt to remove and replace a court employee, *In re Janitor*, 35 Wis. 410 (1874); an attempt to dictate the physical facilities in which a court was to exercise its judicial functions, *In re Courtroom*, 148 Wis. 109, 134 N.W. 490 (1912); an attempt to legislate

what constitutes the legal sufficiency of evidence, *Thoe v. Chicago M. & St. P.R. Co.*, 181 Wis. 456, 195 N.W. 407 (1923); an attempt to regulate trials in the conduct of court business, *Rules of Court Case*, 204 Wis. 501, 236 N.W. 717 (1931); bar admission and regulation of attorneys, *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932), *Integration of Bar Cases*, 244 Wis. 8, 11 N.W.2d 604 (1943), 249 Wis. 523, 25 N.W.2d 500 (1946), 273 Wis. 281, 77 N.W.2d 602 (1956).

Id. at 575, 575 N.W.2d at 697. The court continued that counties, as delegated by the legislature, regulate employment in terms of *compensation*, holidays, vacation, leaves, etc. *Id.* at 575, 575 N.W.2d at 698. (emphasis added). The court emphasized the distinction between the power to establish the regulations of employment, such as broad compensation adjustments (mutually exercised powers of the executive and legislative branches), and the authority to make the ultimate decision to remove a judicial assistant (a power reserved to the clerk of courts), particularly because of the unique relationship between judges and their immediate assistants. *Id.* at 704, 575 N.W.2d at 592. Ultimately, the court summarized as follows:

[W]e conclude that the power to remove a judicial assistant falls not within an area of shared powers, but within an area that historically has belonged exclusively to the judiciary. The legislature has set limits on employee hours and wages, set compensation levels, and has even established a posting procedure for appointment to judicial assistant positions, but once a county employee has been appointed to the position of judicial assistant, the legislature has, until now, never enjoyed the power to remove that assistant without the judge's permission. To the contrary, history illustrates that judicial assistants have traditionally been subject to the judiciary's exclusive authority once appointed. The history of the statutes upon which the County and AFSCME rely suggests that the legislature has historically had only the limited power to set the number and salaries of assistants, along with other secondary powers to regulate employment. The power to remove such assistants appeared to rest in the hands of the judge alone, so that once again, the legislature could *regulate* employment, but not *control* the employment decision altogether.

Id. at 703, 575 N.W.2d at 589.

Applied here, these cases require that the countywide processes for administering promotions and ensuring appropriate budget availability, as established through HR and the Budget Office under the Executive's authority, which must conform to the parameters established by both the Board-approved annual budget and pay policies, must govern advancements within the pay range sought by the Clerk. Put differently, the compensation power the Clerk is attempting to exert unilaterally is not, according to the above-noted cases, one of the inherent powers of the court under these facts. The Clerk's lack of power to unilaterally compel increased compensation for certain of his employees does not inhibit or prevent the court's ability to maintain its dignity or transact business, impair the efficacy of the courts or judicial system, the regulation of judges and attorneys, or the efficient and effective administration of justice.

Conclusion: The Clerk alone is an elected department head. Regardless, empowering any department head to make independent compensation decisions creates equity issues for the county workforce and threatens financial stability countywide. It is not sustainable long-term though a department may experience excess funds in a particular year. More importantly, under the facts at issue here, the Clerk's expansive interpretation of his statutory role is in direct conflict with the above-noted case law. If allowed to stand, it would impermissibly usurp the legislative and executive branches' shared powers over compensation and budgeting, particularly the executive's statutory authority to administer day-to-day matters countywide.