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TO: Chairman Theodore Lipscomb
Milwaukee County Board

FROM: Attorney Susan M. Crawford

DATE: May 23, 2017

RE: Summary of Decision in Milwaukee County Board v. Abele, 16-CV-2888

As requested, following is a summary of the Circuit Court's decision in *Milwaukee County Board of Supervisors v. Abele* (Milwaukee Co., No. 16-CV-2888) and recommendations as to the steps that should be undertaken to implement the decision.

I. Scope and Legal Effect of the Court's Decision

The Milwaukee County Board of Supervisors and Theodore Lipscomb, Sr., as Chairman of the Board, filed a declaratory judgment against County Executive Christopher Abele in the Milwaukee County Circuit Court seeking rulings to clarify the following issues: (1) the scope of the Board's authority "to provide, fix or change" the compensation of county employees under Wis. Stat. § 59.22(2); and (2) the scope of the Board's authority under Wis. Stat. § 59.794(3)(b) to require the County Executive to attend Board meetings when necessary to provide information and answer questions.

County Executive Abele brought counterclaims seeking a declaration that the Board has exceeded its authority in seeking to control: (1) the reclassification of employees and positions under MCO § 17.05(2)(c)(7); (2) the reallocation of employees and positions under MCO § 17.055(1); (3) the advancement within pay ranges for individual employees under MCO § 17.10(4); and (4) the verification of the County's payroll under MCO § 34.06.

In a decision issued on April 26, 2017, the circuit court largely resolved these issues in favor of the Board. The circuit court's decision, a declaratory judgment pursuant to Wis. Stat. § 806.04, was a final decision and order for purposes of appeal. As a final decision, it is legally binding and effective immediately upon issuance, unless the

circuit court or the court of appeals grants a stay of the execution or enforcement of the judgment. *See* Wis. Stat. § 808.07.

A party seeking the stay of a judgment pending appeal must meet a high legal threshold before a stay will be granted. A stay pending appeal will be granted only if the moving party: (1) makes a strong showing that it is likely to prevail on the appeal; (2) shows that unless the stay is granted it will suffer irreparable harm; (3) shows that there will be no substantial harm to the other parties; and (4) shows that there will be no harm to the public interest if the stay is granted. *State v. Gudenschwager*, 191 Wis. 2d 432, 529 N.W.2d 225 (1995).

To date, no party has filed a motion for a stay pending appeal. Thus, the decision is not stayed; it is in effect and has the force of law. The County Board, County Executive, and other county officials and employees should act in accordance with the decision.

A notice of appeal, if any, must be filed by June 12, 2017. The filing of a notice of appeal does not stay the execution or enforcement of the judgment or order appealed from, unless a stay is ordered. Wis. Stat. § 808.07.

II. Summary of the court's ruling

The issues raised by the parties in the action generally fall into two broad categories: (a) the respective authority of the County Board and the County Executive to control the compensation of county employees; and (b) the scope of the County Board's authority to require county officers and employees to attend board meetings to provide information and answer questions. The Court's analysis and resolution of these issues are discussed below.

A. The Court's rulings on issues related to compensation

1. Act 14 did not eliminate the County Board's authority to provide, fix, or change the compensation of county employees under Wis. Stat. § 59.22(2).

The Court ruled that 2013 Wisconsin Act 14, in limiting the Board's exercise of day-to-day control of any county department or subunit of a department, did *not* eliminate the Board's authority to provide, fix or change the compensation of county employees under Wis. Stat. § 59.22(2). The Court concluded, after reviewing the language of Act 14 and the legislative history: "What is apparent...is that the legislature intended to limit the Board's authority to 'administer, supervise and direct' the departments. It is this day-to-day control that the legislature intended to eliminate;

not the authority of the Board to provide, fix or change the compensation of county employees. For these reasons, the Court finds that 2013 Wisconsin Act 14 did not eliminate the Board's authority to provide, fix or change the compensation of county employees."

2. The County Board's "executive pay provision" enacted in the 2014 county budget was a proper exercise of its statutory authority.

Based on its finding that the Board retained its authority to provide, fix, and change the compensation of county employees, the court concluded that the Board had statutory authority to adopt the "executive pay provision" enacted as part of the 2014 county budget.

This provision adjusted the pay range for certain high-level unclassified employees assigned to executive pay grade 903E and reallocated other employees to a different pay grade. The court concluded that setting the pay maximum for these positions was not "day to day control" of the county departments or subunits and that the Board was authorized to set the pay range for these employees under Wis. Stat. § 59.22(2).

3. The Board lacks statutory authority to reverse reclassifications of county employees as allowed by MCO 17.05(2)(7)(c).

The Court concluded that MCO 17.05(2)(7)(c), in authorizing the county board to reverse the reclassification of a county employee, conflicts with the prohibition on "day to day control" in Wis. Stat. § 59.794(3)(a). As the court reasoned: "When the Board is acting pursuant to MCO § 17.05(2)(c)(7), it is essentially engaging in the rehiring process by either approving or disapproving of employee promotions and demotions. When the Board refuses to accept employee reclassifications, the Board is not "providing, fixing or changing" the employees' compensation."

Thus, as a result of the court's decision, the language in MCO § 17.05(2)(c)(7) that authorizes the Board to reverse a reclassification decision is legally void and has no effect.

4. The Board has statutory authority to review and reverse reallocations as authorized under MCO § 17.055(1).

The Court concluded that the Board's authority to approve or deny reallocations pursuant to MCO § 17.055(1) does not conflict with the "day to day control" language in Wis. Stat. § 59.794(3)(a).

Reallocations are decisions to adjust the pay range for a classification. The Court found that "While it is the County Executive's responsibility to recruit and retain employees, it is the Board's responsibility to determine the amount of compensation that it deems necessary for their recruitment and retention. To the extent there is a conflict with the statutory prohibition on interfering with the County Executive's administrative duties on a day-to-day basis, the Board's statutory right to 'fix' salaries pursuant to Wis. Stat. § 59.22 prevails."

The Court expressly found that the Board's authority applies to reallocations of unclassified employees. As noted in a memorandum by corporation counsel quoted in the decision, unclassified employees are typically in "single-incumbent classifications," such that a reallocation of the classification would affect the salary of a sole employee.

5. The Board lacks statutory authority to control the advancement within pay ranges of county employees as provided by MCO § 17.10(4).

The Court ruled that the Board does not have statutory authority to control the advancement of employees within pay ranges, and that the provision in MCO § 17.10(4) authorizing the Board to approve or disapprove an advancement-within-pay-range is therefore unenforceable. The Court analyzed advancement-within-pay-range similarly to its analysis of reclassifications, concluding that the Board is "essentially engaging in the rehiring process by either approving or disapproving promotions" rather than setting compensation.

6. The Court rejected the county executive's claim that the county board has interfered with the comptroller's administration of payroll.

The Court found generally that MCO § 34.06, relating to the administration of the payroll, does not conflict with the "day to day control" language in Wis. Stat. § 59.794(3).

The Court also concluded that the County Executive presented insufficient facts in support of his claim (as characterized by the Court) that the Board had improperly interfered with the County Executive's right to supervise the Comptroller to allow the Court to make a ruling on this claim.

B. The Court generally upheld the county board's authority to require county employees and officers to attend board meetings, but ruled that the board may not require the county executive to attend its meetings.

The court addressed several issues related to the scope of the Board's authority to require the County Executive to attend Board meetings when necessary to provide information and answer questions, as follows.

- 1. The County Board does not have statutory authority to compel the county executive to attend board meetings to provide information or answer questions.**

Wis. Stat. § 59.794(3), which provides that the Board may require any "officer or employee" to attend a Board meeting "to provide information and answer questions," does not allow the Board to compel the County Executive to appear at county board meetings. The Court concluded that the County Executive is not an "officer or employee" under the statute based on its interpretation of the legislative history.

- 2. The Board may require county employees or officers to attend committee meetings.**

The Court rejected Abele's contention that Wis. Stat. § 59.794(3) authorizes the County Board only to require county officers or employees to attend meetings of the full Board. The Court found, in the Board's favor, that the Board may require county employees or officers to attend Board committee meeting and not solely meetings of the entire Board, as the County Executive argued.

- 3. The action of the entire Board is not needed to request the attendance of a county employee or officer.**

The Court rejected Abele's claim that the action of the entire Board is necessary to require a county officer or employee to attend a board meeting. The Court found, in the Board's favor, that the entire Board need not make the request to the employee or officer to attend the meeting, but the Board may delegate the authority to make such requests to a committee.

- 4. The Board is not required to show that its request to an officer or employee to attend a Board meeting is "directly related" to a duty and power of the Board.**

The Court rejected the County Executive's argument that the Board, to an officer or employee to attend a Board meeting, must be necessary AND "directly related" to a duty and power of the Board. The Court found that the county executive had failed to identify the specific types of Board inquiries that it sought to prevent and thus declined to rule further on this issue.

III. Implementation of the Court's Decision

The Court largely upheld the Board's authority to provide, fix, or change the compensation of county employees. The Court ruled that the statutory changes enacted in Act 14 limit the Board's authority over two types of personnel transactions: reclassifications and advancements within pay range. In both instances, the Board has already determined the applicable pay range for the classification. For a reclassification, the issue is whether a current employee is assigned to the classification that reflects the employee's current job duties. The court deemed this to involve day-to-day administration, notwithstanding that reclassification may result in a pay increase. Likewise, the Court deemed advancement-within-pay-range of a current employee to be purely administrative, akin to a hiring decision.

The Court expressly affirmed Board's authority over unclassified employees and, in particular, its authority to set pay ranges for unclassified employees, including department heads.

The Board may take action immediately to implement the court's decision. The decision is legally effective and binding on the parties, regardless of whether an appeal is filed by either party. Even if a stay were obtained, action taken by the Board in the interval between the issuance of the decision and the issuance of a stay order would not be affected by the stay (that is, a stay would not operate retroactively to undue Board action).

I recommend that the Board take the following actions to implement the court's decision and to clarify its legal authority to provide, set, and change the compensation of county employees.

i. Action to return employees to authorized salaries.

As a result of the county executive's misinterpretation of his authority under Act 14, the Human Resources Director developed and implemented alternative pay rates for unclassified employees and the county executive granted pay increases to certain unclassified employees that exceeded the lawful pay ranges authorized by the county board. These employees continue to be paid at unauthorized levels.

Accordingly, I recommended that the Board, by resolution, direct the Human Resources Director to reverse the alternative pay rates established for unclassified employees and return unclassified employees to salaries within the ranges authorized by the Board.

To confirm this action, the Board should, by resolution, direct the Human Resources Director to submit a report to the appropriate board committee showing that all unclassified employees are receiving salaries in compliance with County Board policies, as directed.

ii. Clarify intent regarding salary overpayments.

MCO § 17.22(4) provides that "Any payments made to an employee without proper authorization, or money owed to the county by the employee, shall be deducted from subsequent pay or from money otherwise due to the employee from the County." This ordinance would authorize the county to require the unclassified employees who received salaries in excess of the salaries authorized by the Board to return the unauthorized amounts to the county treasury. The Board may, as a matter of policy, decide not to require the employees to return the unauthorized payments to the county treasury.

To provide clarity to the affected employees and the administration, the Board should, by resolution, state whether repayment of the unauthorized payments will be required.

iii. Action on affected ordinances.

The court ruled that certain Milwaukee County Ordinances that grant authority to the Board to reverse reclassifications and advancements within pay range are in conflict with the Wisconsin Statutes. To comply with the court order, the Board should refrain from acting on employee reclassifications and advancements within pay range, unless a stay of the order is granted.

Amending the affected ordinances to remove the language granting the Board authority over reclassifications and advancements within pay range would provide clarity and help ensure that the Board does not exceed its statutory authority (as determined by the court) in the future. However, it is not necessary to amend the ordinances in order to comply with the ruling.

Further, the court's ruling does not affect the Board's ability to require the Human Resources Director to submit reports on reclassifications and advancements within pay range to the Board. The Board may continue to require such reports.

In light of the court's ruling, I recommend certain amendments to the Milwaukee County Ordinances to ensure that the county board is able to fully exercise its statutory authority to provide, set, or change the compensation of unclassified employees, and to prevent the inappropriate use of reclassifications solely to obtain a higher pay range for an unclassified employee.

First, I recommend that MCO § 17.05 be amended to provide that a reclassification shall not be used to provide a higher pay range for certain unclassified employees, i.e, those who are unclassified pursuant to Wis. Stat. §§ 63.03(2)(t), (2)(y), and (3)(a). These categories of unclassified employees include employees in the office of the county executive and county board, certain department heads, and positions moved to the unclassified service by the Personnel Commission.

The court's decision, quoting an opinion of corporation counsel, notes that "most of these non-classified positions are *single-incumbent classifications* within departmental management groups." In other words, the classification is tailored to a single unclassified position occupied by a single unclassified employee.

A reclassification is an action that assigns a *position* to a different classification, due to changes in the duties assigned to the position; it is not an action moving an employee to a different position. See MCO § 17.05. A reclassification may affect the pay of the incumbent employee if the position is moved to a classification with a different pay range.

If an unclassified employee is the sole incumbent in a classification, moving the position into a new classification with a higher pay range is, in effect, a reallocation. A reallocation assigns a classification to a higher pay range. See MCO § 17.055. Reclassifying a position solely to obtain a higher pay range for an employee is inconsistent with the purpose of reclassifications under the ordinance. The purpose of a reclassification is to ensure that a position is properly assigned to the classification that best matches the duties performed by the position.

Thus, eliminating the use of reclassifications for this small group of high-level unclassified employees will help ensure that classifications are used for the policy purposes intended by the Board.

Further, I recommend that the Board amend MCO § 17.11 to provide that funds appropriated in the county budget should not be used to fund a salary increase for certain unclassified employees (again, employees in the office of the county executive and county board, certain department heads, and positions moved to the unclassified

Chairman Theodore Lipscomb
Milwaukee County Board
May 24, 2017
Page 9

Pines Bach LLP

service by the Personnel Commission), unless authorized by the county board. The court's decision affirms the Board's budgetary powers. This proposed ordinance change ensures that the Board can fully exercise its statutory authority to control the county budget and the compensation of employees.

Please let me know if you have any questions regarding the opinions or recommendations expressed in this memorandum.