

MILWAUKEE COUNTY BOARD OF  
SUPERVISORS and  
THEODORE LIPSCOMB, SR.,

Plaintiffs/Counter Defendants,

Case No. 16-CV-2888

v.

CHRISTOPHER ABELE,

Defendant/Counterclaimant.

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**DECISION AND ORDER**

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The Milwaukee County Board of Supervisors and Theodore Lipscomb, Sr., in his official capacity as Chairman of the Board<sup>1</sup> seek a declaratory judgment to clarify: (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 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.

The County Executive brought counterclaims for a declaratory judgment 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 . The County

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<sup>1</sup> The Court will collectively refer to the plaintiffs as “the Board.”

Executive also seeks a declaration that the Board cannot compel him to attend Board meetings, and that County employees can only be compelled to attend meetings pursuant to Wis. Stat. § 59.794(3) if their attendance is necessary and is directly related to a duty or power of the Board.

Both parties seek Declaratory Judgments under Wis. Stat. § 806.04 via their cross motions for summary judgment under Wis. Stat. § 802.08. For the reasons stated below, the parties' motions are granted in part and denied in part.

## **LEGAL PRINCIPLES**

### **1. Declaratory Judgment a. Statutory Provision**

Wis. Stat. § 806.04(2) provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contractor franchise and obtain a declaration of rights, status or other legal relations thereunder.

### **b. Case Law**

To obtain a Declaratory Judgment, a justiciable controversy must exist. For a justiciable controversy to exist, four elements must be present:

- 1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
- 2) The controversy is between persons whose interests are adverse.
- 3) The party seeking Declaratory Judgment has a legal interest in the controversy, and
- 4) The controversy is ripe for judicial determination.

See *Shovers v. Shovers*, 292 Wis.2d 531, 543 (Ct. App. 2006); *Coyne v. Walker*, 368 Wis.2d 444, 467-468 (2016).

The Court is satisfied that the conditions precedent for seeking a Declaratory Judgment are present.

**2. Summary Judgment**  
**a. Statutory Provision**

Wis. Stat. § 802.08 provides:

- (1) A party may ... move for summary judgment on any claim, counterclaim, cross claim, or 3<sup>rd</sup> party claim which is asserted by or against the party.
- (2) The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

**b. Case Law**

Summary judgment is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Brenner v. Amerisure Mutual Insurance Co.*, 2017 WI 38, \_\_\_ Wis.2d \_\_\_; See Wis. Stat. § 802.08(2).

When cross motions for summary judgment are brought and neither party argues that factual disputes bar the other's motion, the practical effect is that the facts are stipulated and only issues of law are before the court. See *Katzman v. State Ethics Board*, 228 Wis.2d 282, 291 (Ct. App. 1999).

In this case, the Court is satisfied that the conditions precedent for seeking summary judgment are present because there are no genuine issues of material fact. The court is being asked to interpret statutes and ordinances and their interrelationships which are questions of law appropriate for summary judgment and for the declaratory judgments being sought by the parties.

## **DISCUSSION:**

### **1. 2013 Wisconsin Act 14 did not eliminate the Board's authority to provide, fix or change the compensation of county employees.**

The parties dispute whether 2013 Wisconsin Act 14, which prohibits the Board from exercising "day-to-day control of any county department or subunit of a department," prevents the Board from "providing, fixing or changing" the compensation of county employees. Several statutes are applicable.

Wis. Stat. § 59.03(2) provides as follows:

Subject to s. 59.794(2) and (3) and except as elsewhere specifically provided in these statutes, the board of any county is vested with all powers of a local, legislative and administrative character, including without limitation because of enumeration, the subject matter of water, sewers, streets and highways, fire, police, and health, and to carry out these powers in districts which it may create for different purposes, or throughout the county, and for such purposes to levy county taxes, to issue bonds, assessment certificates and improvement bonds, or any other evidence of indebtedness.

Wis. Stat. § 59.51(1) sets forth the Board's "organizational or administrative powers" as follows:

The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

Wis. Stat. § 59.22(2)(a) provides as follows:

[S]ubject to 59.794(3), the board has the powers set forth in this subsection, sub. (3) and s. 59.03(1) as to any office, department, board, commission, committee, position or employee in county service created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

Wis. Stat. § 59.22(2)(c)(1)a. provides as follows:

[T]he board may do any of the following:

- a. Provide, fix or change the salary or compensation of any office, board, commission, committee, position, employee or deputies to elective officers that is subject to sub. (1) without regard to the tenure of the incumbent.

Wis. Stat. § 59.17 describes the duties and powers of the County Executive as follows:

**(2) DUTIES AND POWERS.** The county executive shall be the chief executive officer of the county. The county executive shall take care that every county ordinance and state or federal law is observed, enforced and administered within his or her county if the ordinance or law is subject to enforcement by the county executive or any person supervised by the county executive. The duties and powers of the county executive shall be, without limitation because of enumeration, to:

**(a)** Coordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers.

**(b)** In any county with a population of 750,000 or more:

**1.** Appoint and supervise the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers. Notwithstanding any statutory provision that a board or commission or the county board or county board chairperson appoint a department head, except ss. 17.21 and 59.47 (3), the county executive shall appoint and supervise the department head. Except for a statutory provision which specifies that a board or commission or the county board shall supervise the administration of a department, the county executive shall administer, supervise, and direct all county departments, including any person who negotiates on behalf of the county, and the county board, other board, or commission shall perform any advisory or policy-making function authorized by statute. Any appointment by the county executive under this subdivision requires the confirmation of the county board unless the county board, by ordinance, elects to waive confirmation. An appointee of the county executive may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment to the board for confirmation. Any department head appointed by a county executive under this subsection may be removed at the pleasure of the county executive. The county executive shall comply with hiring policies set by the board when making appointments under this paragraph.

**2.** Establish departments in county government, and sections and divisions within those departments, that the county executive believes are necessary for the efficient administration of the county. Any department or subunit of a department that the county executive creates under this subdivision

may not be established unless its creation and funding are approved by a vote of the board. The county executive shall administer, supervise, and direct any department or subunit of a department that is created under this subdivision, and those departments and subunits shall report to the county executive.

Wis. Stat. § 59.794(3), as amended by Act 14, imposes certain limitations on the Board's authority as follows:

(a) Notwithstanding the provisions of s. 59.51, the board may not exercise day-to-day control of any county department or subunit of a department. Such control may be exercised only by the county executive as described in s. 59.17.

(b) A board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions. Except as provided in par. (d), for the purpose of inquiry, or to refer a specific constituent concern, the board and its members may deal with county departments and subunits of departments solely through the county executive, and no supervisor may give instructions or orders to any subordinate of the county executive that would conflict with this section.

(c) The board may not create any county department or subunit of a department, except as provided in s. 59.17(2)(b)2.

(d) The board may use the legal services of the corporation counsel under s. 59.42(2).

(e) The board may not terminate, lower the salary or benefits of, or eliminate the position of, any county employee who works in the office of the county executive unless a similar change is made which affects county employees, on a countywide basis, in all other county departments. This paragraph does not apply after the county board supervisors who are elected in the 2016 spring election take office.

The County Executive argues that the legislature's decision to limit the Board's day-to-day authority is consistent with the power that the legislature granted to county boards, which is primarily policy-making and legislative. According to this argument, the Board cannot make decisions concerning the salary of individual employees because such decisions are administrative in nature and concern the day-to-day control of a county department.

Relying on the statutory separation of powers, our courts and Attorneys General have consistently concluded that a county board's administrative power is limited. The power that the legislature granted to county boards is primarily policy-making and legislative. *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480 (Ct. App. 1996). As summarized by the Attorney General, the

County Executive “takes over the administrative and executive functions of the county board which are presently to a large extent in the hands of standing committees of the county board,” and “the county board thus becomes a purely legislative body.” OAG 32-791979 WL 42016, at \*1 (Wis. A.G. Mar. 16, 1979) The Attorney General clarified that “the role of the county board is primarily policy-making and legislative, and the county executive exercises substantial direct and indirect control over personnel performing administrative and management functions for the various county departments and offices.” *Id.* at \*2. Wis. Stat. § 59. As stated by Attorney General La Follette, the county executive is empowered to “[c]oordinate and direct . . . all administrative and management functions of the county government not otherwise vested by law,” and “the power to supervise personnel on a day-to-day basis would appear to be an administrative and management function.” 72 Wis. Op. Att’y Gen. 161 1983 WL 180895, at \*3 (1983). Selecting or appointing an individual to perform a particular task or function is an organizational or administrative power. OAG-07-13, 2013 WL 6645996, at \*2 (Wis. A.G. Dec. 12, 2013).

Policy has been defined as “a high-level overall plan embracing the general goals and acceptable procedures esp. of a governmental body.” *Schuetz v. Van De Hey*, 205 Wis. 2d 475, 480 (Ct. App. 1996). “Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement.” *Id.* at 480-81. “The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence.” *Id.* at 481. The Attorney General has stated that “the decision to enter into a public works contract, and therefore setting the terms of that contract, is

primarily a legislative or policy decision,” and that the administration of the contract is primarily an administrative or management function. 80 Wis. Op Att’y Gen. 49 (1991).

This Court finds that the decision to set or change employees’ salaries is primarily a policy decision. The Board sets and/or changes the salaries, and the heads of the departments then make hiring and supervisory decisions – and report to the County Executive – to ensure that the employees fulfill their job obligations. While the legislative/administrative distinction is somewhat blurred when the Board makes individual – as opposed to categorical – decisions, the Board is essentially “setting the terms” of the contracts in these instances.

The County Executive argues that since the enactment of Act 14, the Board no longer has the authority to provide, fix or change the salary of county employees because Wis. Stat. § 59.794(3) expressly removed the Board’s authority to affect day-to-day control. He argues that he has the exclusive authority to exercise day-to-day control, as he is charged with the responsibility to “coordinate and direct all administrative and management functions of the county,” appoint and supervise the heads of all departments,” and “administer, supervise and direct all county departments.” Wis. Stat. § 59.17(2)(a)-(b). According to the County Executive, the statutes clearly provide that the powers provided for in Wis. Stat. § 59.22 are only preserved in counties that have a population of less than 750,000 people.<sup>2</sup>

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis.2d 633. “Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* It is “well established that

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<sup>2</sup>In counties with a higher population (*i.e.*, Milwaukee County), the authority to set compensation for county employees is vested in the County Executive.



technical words or phrases with a peculiar meaning in the law must be construed according to such meaning.” *Weber v. Town of Saukville*, 209 Wis.2d 214, 224 (1997). A court will not “add words to a statute to give it a certain meaning.” *See Fond Du Lac Cnty. v. Town 286 of Rosendale*, 149 Wis.2d 326, 334 (Ct. App. 1989). A court interprets statutory language in the context in which it is used, in relation to the language of surrounding or closely-related statutes, and reasonably, to avoid absurd or unreasonable results. *Kalal*, ¶ 46. A court may consider the statute's purpose, to the extent it is readily apparent from the statutory text or from the statute's context or structure. *See id.*, ¶ 49. “ ‘If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning.’ ” *Id.*, ¶ 46 (citation omitted). If, however, we determine the statute is ambiguous, we consult extrinsic sources, such as legislative history, to determine the legislature's intent. *See id.*, ¶ 50. While courts generally do not consider legislative history unless a statute is ambiguous, a court may do so to confirm a plain meaning interpretation. *Id.*, ¶¶ 50-51.

A review of the applicable statutes reveals that the Board is vested “with all powers of a local, legislative and administrative character.” Wis. Stat. § 59.03(2)(a). The Board “may exercise any organizational or administrative power . . . without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.” Wis. Stat. § 59.51. The Board also has the authority to “[p]rovide, fix, or change the salary or compensation” of county employees. Wis. Stat. § 59.22(2). “In the event of a conflict between [Section 59.22] and any other statute, [Section 59.22] to the extent of the conflict shall prevail. Wis. Stat. § 59.22(4); *see also Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee County*, 2016 WI App 56, ¶ 16, 370 Wis. 2d 644 (“§ 59.22 (4) makes it clear that if there is a conflict between the provisions of § 59.22 and any other statute, § 59.22 prevails.”)

Wis. Stat. § 59.794(3) does not expressly limit the Board's authority over compensation, except to temporarily limit the Board's power to reduce the compensation of unclassified employees in the County Executive's Office. See Wis. Stat. §59.794(3)(e). While Act 14 clarifies the limits on the Board's administrative power, the Board retains its broad organizational powers. 2013 Wisconsin Act 14 did not eliminate the Board's authority to provide, fix or change the compensation of county employees. The language in Wis. Stat. §59.794(3)(e) which temporarily limited the Board's power regarding lowering compensation of employees in the County Executive's office in essence recognizes that beyond this exception compensation is an organizational power of the Board.

A review of the legislative history confirms this plain meaning interpretation. Act 14 was sponsored by Representative Joe Sanfelippo. Representative Sanfelippo's 2013 Drafting Request states as follows:

**Topic:** Make the Milwaukee County board part-time, reduce the authority of the Milwaukee County board; add certain authority for Milwaukee County executive

**Instructions:** See attached. Combine LRB – 1091/3 and -0840/1, and attached changes. Delete the authority of the Milwaukee County board to do certain things, i.e., items listed in s. 59.79(4) [due to be repealed 4/1/13], (6), (8), (10), (11), (12), and (13); contracts below \$500,000 don't need board approval; county departments report to county exec, not county board. . . .

The attachment to Joe Sanfelippo's 2013 Drafting Request provides, in pertinent part:

This bill will remove outdated/irrelevant statutes that are no longer required by Milwaukee County for day to day operations. For example, state statutes specifically give Milwaukee County authority to issue cat licenses and own a professional baseball team, both of which have not been utilized in decades.

The bill will also seek to more clearly define the roles of both the County Board and the County Executive. The roles of each were never properly defined when the state created the County Executive branch back around 1960. For example, the bill will:

- 1) Clearly establish that the County Executive is responsible for the day to day operations of county government. The County Exec will have the authority to propose policy but can only enact policy that is approved by the board. This holds true for operational policy as well as budget authority.
- 2) Clearly establish that the County Board is responsible for long range strategic and financial planning, approving policy regarding programs and services to be provided by the county (whether originating from the Board or the Executive), holding the County Executive responsible for carrying out the policies approved by the board, and approving the county budget.

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The end result of the statute changes will lead to a more orderly functioning of county government by establishing a “chain of command” whereby the County Board is clearly the policy making branch and holds the County Executive, the administrative branch, responsible for carrying out that policy by efficiently and effectively operating the day to day business of the departments.

**COUNTY BOARD**

Establish Policy

Long Range Planning

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**COUNTY EXECUTIVE**

↓↑

Administer Policy

Oversee Departments

Report to County Board

↓↑

**COUNTY DEPARTMENTS**

Carryout Programs and Services

Report to the County Executive

The Wisconsin Legislative Council Act Memo states as follows:

**POWERS OF THE MILWAUKEE COUNTY EXECUTIVE AND THE MILWAUKEE COUNTY BOARD**

*The Act* makes various changes to the powers of the Milwaukee County Executive and Milwaukee County Board. In general, the effect of the changes is to add certain new authorities to the Milwaukee County Executive, transfer or remove certain authorities of the Board, and clarify the roles of the two entities in some areas where power is shared.

**Supervision and Day-to-Day Control of County Departments**

*Prior law* required the Milwaukee County Executive to supervise the heads of county departments, but the department heads were responsible for supervising the administration of their departments.

Under *the Act*, unless otherwise specified in the Wisconsin statutes, the Milwaukee County Executive must administer, supervise, and direct all county departments, including any department established by the County Executive and any person who negotiates on behalf of the county. In addition, the Act prohibits the Milwaukee County Board from exercising day-to-day control of any county department or department subunit. . . .

**Additional Authorities of the Milwaukee County Executive**

In addition to authorities under prior law, **the Act** authorizes the Milwaukee County Executive to do all of the following:

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- Subject to approval by the Milwaukee County Board of the Milwaukee County Executive's department budget, hire and supervise the number of employees that the County Executive believes are necessary to carry out the duties of the County Executive.

\* \* \*

**Temporary Limitation on Termination and Salary Reductions for County Executive Employees**

*The Act* places a restriction on terminations and salary reductions, to be in effect until new Milwaukee County Board Supervisors take office following the 2016 Spring Election. Specifically, until that time, the Act prohibits the Milwaukee County Board from terminating, lowering the salary or benefits of, or eliminating the position of, any

county employee who works in the Office of the Milwaukee County Executive, unless a similar change is made that affects all county employees.

The “Analysis by the Legislative Reference Bureau,” in 2013 Assembly Bill 85, provides as follows:

Generally under current law, a county executive has the authority to direct all administrative and management functions of a county government that are not vested by law in other elected officers. The Milwaukee County executive is further authorized to appoint and supervise the heads of all departments, unless otherwise provided by law, and the department heads are generally authorized to supervise the administration of their departments. Current law also generally authorizes a county board to exercise any organizational or administrative power that is not given to a county executive or administrator, or such person’s subordinate. The bill makes a number of changes which clarify or increase the authority of the Milwaukee County executive and limits and clarifies certain authority of the Milwaukee County board.

With regard to the powers of the Milwaukee County executive and board, the bill does the following:

1. Except for a specific statutory provision which states otherwise, authorizes the county executive, exclusively, to administer, supervise, and direct all county departments, including any person who lobbies for, or negotiates on behalf of, the county.
2. Authorizes the county executive to establish departments and subunits of the departments, subject to the approval of the board, that the executive believes are necessary for the efficient administration of the county. This authority is subject to board approval of the county executive department budget.
3. . . .
4. . . .
5. The county board is prohibited from creating a county department or subunit of a department, and may not exercise day-to-day control of any county department. Such control may be exercised only by the county executive.
6. Except for making an inquiry, referring a specific constituent concern, or using legal services of the corporation counsel, the supervisors may deal with county departments solely through the county executive, although the board may require any county employee or officer to attend a board meeting to provide information and answer questions.
7. Although the board may generally set the salary and compensation level of county employees, the bill prohibits the board from lowering the salary,

terminating or eliminating the position of any county employee who works in the office of the county executive, unless such changes affect all county employees in all county departments. This prohibition does not apply after the supervisors who are elected in the spring 2016 election take office.

Assembly Amendment 2 modified Assembly Bill 85 as follows:

The amendment removes the term “exclusively” from a provision under the bill that specifies that the Milwaukee County Executive, exclusively, shall administer, supervise, and direct all county departments . . . .

Wisconsin Legislative Council Amendment Memo (published on April 22, 2013).

It is uncertain whether the term “exclusively” was removed because it was redundant, or because the Legislature intended cooperation in the administration of county departments. What is apparent, however, 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 Board had statutory authority to adopt the executive pay provision.**

The County Executive maintains that the Board has improperly usurped its role in “provid[ing], fix[ing] or chang[ing]” the compensation of employees when it approved its 2014 Budget. Among other things, the Board adjusted the pay range for employees assigned to executive pay grade 903E (the “executive pay provision”) and authorized the immediate reallocation of five positions from pay grade 903E to pay grade 904E, which provides for a higher pay range.<sup>3</sup> According to the County Executive, the executive pay provision illustrates the problems that arise when the Board attempts to control the day-to-day operation of

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<sup>3</sup> The County Executive vetoed these changes, and the Board overrode the veto. To date, the County Executive has not adjusted the salaries of these unclassified employees to comply with the Board’s reallocation and executive pay provision.

Milwaukee County. He argues that elected officials have no background in human resources or in compensating public employees, and that the Human Resources Department, as an extension of the executive branch, has the requisite experience to make better, more informed decisions.

Contrary to the County Executive’s assertions, at issue is not whether the HR Department is better suited than the Board to make compensation determinations. Rather, the issue is whether the adoption of the executive pay provision constitutes the exercise of “day-to-day control over employees. The Court is not convinced that the adoption of the executive pay provision constitutes “administering,” “supervision, or “direction of the departments. Nor is the Court convinced that the adoption of this provision is an example of control on a *day-to-day* basis. While the Board may no longer supervise the department heads, the Board still has the statutory authority to set the salary and compensation of county employees pursuant to Wis. Stat. § 59.22(2).

**3. The Board exceeded its authority in its attempt to determine reclassifications pursuant to MCO § 17.05(2)(c)(7).**

The County Executive argues that the Board exceeded its authority in its attempt to determine reclassifications pursuant to MCO § 17.05(2)(c)(7).<sup>4</sup> The parties agree that

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<sup>4</sup> This provision states as follows:

Monthly while a reclassification is pending, the director of human resources shall provide a report to the committee on personnel which lists all position reclassifications which the director intends to approve, along with a fiscal note for each. This report shall be distributed to all county supervisors and placed on the committee agenda for informational purposes. If a county supervisor objects to the decision of the director within seven (7) working days of receiving this report the reclassification shall be held in abeyance until resolved by the county board, upon recommendation of the committee, and subsequent county executive action. . . .

MCO § 17.05(2)(c)(7) (emphasis added).

reclassifications place employees with new or changed duties into a more appropriate job classification. A reclassification usually involves an individual employee or a small group of employees. The HR Director initiates reclassifications or processes departmental requests for reclassifications, and the Board is involved if at least one supervisor objects.

For informational purposes, the Milwaukee County Corporation Counsel concluded that a reclassification is an administrative function, not a policy decision, and therefore is within the “day-to-day control of any county department or subunit.” This Court agrees. 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. Rather, the Board is actually *refusing to change* their compensation, based on individual assessments of job duties. Such meddling and second-guessing is impermissible in light of Wis. Stat. § 59.794(3)(a). For these reasons, the Court declares that the Board exceeded its statutory authority with respect to reclassifications that were made pursuant to MCO § 17.05(2)(c)(7).

**4. The Board did not exceed its authority in its attempts to determine reallocation pursuant to MCO § 17.055(1).**

The County Executive argues that the Board exceeded its authority by interjecting itself in the process of reallocating existing county employees and positions. The parties agree that a reallocation refers to adjusting compensation for an existing job category based on market conditions. The applicable ordinance, MCO § 17.055(1), provides as follows:

Whenever labor market conditions or other factors indicate that compensation for existing classifications is not sufficient to recruit and retain qualified employees a



department head or appointing authority may request the director of human resources to review the compensation provided for the classification:

(1) The director of human resources shall review the request and inform the requestor of his/her findings. All recommendations of the director to reallocate a nonrepresented classification shall be included in a report distributed to all county board supervisors. In the event the requestor does not concur with the director's recommendation it may be appealed to the committee on personnel within thirty (30) days of receipt of such notice. The decision of the county board on the committee recommendation, subject to review by the county executive, shall be final. . . .

For informational purposes, the Milwaukee County Corporation Counsel has opined as follows:

In our view, this provision remains effective as to the county's classified service employees, i.e., those employees identified under § 63.03, Stats. As part of the civil service system, approving an annual "standardized scale of wages and salaries for all county offices and positions in the classified service" is a statutory power and obligation of the Board (although apparently has been overlooked). See § 63.11, Stats. Since the Board is charged with approving the scale, the Board necessarily has the authority to determine what changes to the scale will be made, and has chosen to do so through 17.055. Act 14 specifically provides powers to the County Executive related to other statutes, but not this one, so MCO 17.055, which derives from 63.11 of the statutes, remains in effect as to the classified employees.

As to the approximately 300 non-classified (also known as "exempt") County employees, our analysis is different, and while the question is a close one, we have concluded that MCO 17.055 is no longer effective as to reallocations involving non-classified employees. Non-classified employees are those identified by § 63.03(2), Stats., or those so designated by the Civil Service Commission under § 63.03(3). It is our opinion that reallocations involving non-classified employees are day-to-day-administrative matters rather than policy decisions. Because most of the non-classified positions are single-incumbent classifications within departmental management groups, most if not all reallocations of non-classified categories are in fact decisions about specific managers. Decisions about individual employees are matters of day-to-day administration, not matters of county policy. Since the County Board's authorities under § 63.11 does not extend to non-classified employees, § 63.11 does not provide a grant of statutory authority here as it did in relation to classified employees. The County Executive is now authorized by statute to "administer, supervise and direct any department or subunit of a department" and "those departments and subunits shall report to the county executive." § 59.17(2)(b)(2). Non-classified employees (except elected officials) are part of the administrative structure under the County Executive, and are therefore subject to the Executive's "day-to-day control of any county department or subunit of a department" that under Act 14 may be exercised only by the county executive and not by the County

Board. § 59.794(3)(a). The more recent, specific provisions take precedence over older provisions such as § 59.22 aimed at different circumstances.

The Court agrees with Corporation Counsel’s opinion with respect to the county’s classified service employees. However, the Court disagrees with Corporation Counsel’s opinion with respect to non-classified positions. Whenever labor market conditions or other factors indicate that compensation for existing classifications is not sufficient to recruit and retain, the Board is entirely free to provide, fix or change their compensation – even for department heads. 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.

It is important to point out that when the legislature amended Wis. Stat. § 59.794(3) by precluding the “day-to-day” control over employees, the legislature also stated that the Board “may not terminate, lower the salary or benefits or, or eliminate the position of, any county employee who works in the office of the county executive unless a similar change is made which affects county employees, on a countywide basis, in all other county departments.” Wis. Stat. § 59.794(3)(e). Notably, all of the employees in the County Executive’s office are *non-classified employees*. See Wis. Stats. §§ 59.17(3), 63.03(2)(t) (providing that “administrative secretaries” to the County Executive are unclassified). The enactment of Wis. Stat. § 59.794(3)(e) suggests that the legislature acknowledged the Board’s authority to change the salaries of all employees, including the salaries of unclassified employees. For the above reasons, the Court finds that MCO § 17.055(1) is valid and enforceable.

**5. The Board does not have statutory authority to control the advancement of employees within pay ranges, and the provision in MCO § 17.10(4) is therefore unenforceable.**

The County Executive argues that the Board lacks the authority to veto the HR director's decision to advance employees within a pay range. MCO § 17.10(4) provides as follows:

Monthly while any advancements within a pay range requested by departments, pursuant to subsections (3)(a) and (3)(b) are pending, the director of human resources shall provide a report to the committee on personnel which lists all such advancements which the director intends to approve, along with a fiscal note for each. This report shall be distributed to all county supervisors and placed on the committee agenda for informational purposes. If a county supervisor objects to the decision of the director within seven (7) working days of receiving this report the advancement shall be held in abeyance until resolved by the county board, upon recommendation of the committee, and subsequent county executive action. If no county supervisor objects, the advancement shall be implemented the first day of the first pay period following the meeting of the committee. . . .

(emphasis added).

For informational purposes, the Milwaukee County Corporation Counsel opined that “the Board should not be involved in pay decisions concerning individual employees, which are not county policy decisions but are day-to-day administrative decisions as long as they are within departmental budget.” This Court agrees. Pay advancements are made when an employee exhibits exemplary performance or if the department deems it necessary to retain the employee. While pay advancements would necessarily have an effect on the employees' salaries or compensation, the Board is actually making determinations involving individual work performance. The situation is similar to reclassifications, as the Board is essentially engaging in the rehiring process by either approving or disapproving promotions. Such determinations are administrative in nature and constitute day-to-day control that is prohibited by Wis. Stat. § 59.794(3)(b). For these reasons, the Court finds that MCO § 17.10(4) impermissibly infringes on

the administrative functions of the executive branch. Accordingly, the Court declares that MCO § 17.10(4) is invalid and unenforceable as drafted.

**6. MCO § 34.06, on its face, does not conflict with Wis. Stat. § 59.794(3), and the facts are not sufficiently developed for the Court to declare that the Board improperly interfered with the County Executive’s right to supervise the Comptroller.**

MCO § 34.06 requires the comptroller to:

Provide centralized payroll functions, including the computation of required and voluntary deductions, preparation and verification of payrolls, maintenance of payroll records and reports, preparation of various reports for federal and state governmental agencies, and processing of payments to employes and other agencies for which payroll deductions were made.

The County Executive argues that this provision conflicts with Wis. Stat. § 59.794(3) because it improperly interferes with the County Executive’s right and duty to control departments and subunits. As an example, over the past year, there have been approximately 100 employees whose pay increases were approved and processed by HR, only to have the Board compel the Comptroller to manually back out of the amount of each raise for each employee. In response, the Board argues that the facts are not sufficiently developed for a declaratory judgment. *See Miller Brands-Milwaukee v. Case*, 162 Wis. 2d 684, 694 (1991) (facts must be sufficiently developed to avoid courts entangling themselves in abstract disagreements). In reply, the County Executive argues that when the Board vetoes payroll decisions, the Comptroller is compelled to adjust the payroll according to the Board’s actions.

This Court finds that MCO § 34.06 does not, on its face, improperly interfere with the County Executive’s right to supervise the Comptroller because it does not give the Board any authority to enforce the Comptroller’s job responsibilities. The Court also agrees with the Board that the facts are not sufficiently developed for the Court to issue a declaration.

**7. Wis. Stat. § 59.794(3) does not allow the Board to compel the County Executive to appear at county board meetings.**

The Board argues that it may compel the County Executive to appear at county board meetings pursuant to Wis. Stat. § 59.794(3), which authorizes the Board to “require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions.” The Attorney General has opined that the Board may require department heads to report to the Board. The Board submits that the County Executive is Milwaukee County’s “chief executive officer” under Wis. Stat. § 59.17(2). According to the Board, the Wisconsin statutes contemplate a shared governance between the Board and the County Executive, *see, e.g., Barland v. Eau Claire Cty.*, 216 Wis. 2d 560 (1998), and it would be reasonable to conclude that the legislature intended to include the County Executive among those whom may be required to appear at a board meeting to provide information and answer questions. The Board also points out that Wis. Stat. § 59.794(3) grants *the Board* – not the county officer – the authority to determine whether an officer’s attendance is required.

In response, the County Executive argues that he is not encompassed by the phrase “county employee or officer.” He argues that an elected official would not commonly be referred to as an “employee.” *See McGrath v. Gillis*, 44 F.3d 567, 572 (7<sup>th</sup> Cir. 1995) (holding that elected state attorneys who perform their duties within one county are not county employees). He argues that the same conclusion is reached when applying the definition of employee from Wisconsin Public Records Law. Wis. Stat. § 19.32(1bg) (defining “employee” as “any individual who is employed by an authority, other than an individual holding public office or a state public office, or any individual who is employed by an employer other than an authority.”)

This Court agrees with the County Executive. A review of Wisconsin Statutes Chapter 59, Subchapter IV, reveals that the County Executive is not encompassed within the meaning of “county official.” Chapter 59 itself distinguishes between the County Executive and “county officers.” Similarly, Wis. Stat. § 59.20(3) discusses the offices of these “county officers,” enumerating the sheriff, clerk of circuit court, register of deeds, treasurer, comptroller, register of probate, and clerk and county surveyor. Likewise, Wis. Stat. § 59.21 sets forth the requirement that every county officer file an official bond after being elected or appointed, and the statute addresses official oaths and bonds for clerks, treasurers, sheriffs, coroners, clerk of the circuit courts, register of deeds, surveyors, county abstractors, and comptrollers. The term “county officer” cannot be viewed in a vacuum, and it must be viewed within the role of the language in the entire statutory framework.

To the extent the statute is ambiguous, the Court may resort to the legislative history of the statute. The Wisconsin Legislative Council Act Memo states as follows:

The Act authorizes the County Board to require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions. Except for the purpose of inquiry, or to refer a specific constituent concern, the Act specifies that the County Board and its members may deal with county departments and department subunits solely through the County Executive. The Act also specifically prohibits County Board supervisors from giving any instructions or orders to any subordinate of the County Executive that conflict with the relevant provisions in the Act.

In other words, the legislature appears to be referring to employees in departments and subunits that are the County Executive’s subordinates. Moreover, the Drafter’s Note from the Legislative Reference Bureau, dated February 4, 2013, provides, in pertinent part:

Representative Sanfelippo:

Please review this draft carefully to ensure that it meets your intent. As I discussed with Josh and Ray Carey, I did not incorporate into this draft some of the requirements for a county executive that apply to Cuyahoga County because they seem to have no legal effect. . . . Similarly, I did not include the requirement that the county executive attend board meetings and participate in all discussions . . . .

Thus the legislative history appears to indicate that the legislature considered, but rejected, the possibility of requiring the County Executive to attend meetings. For the above reasons, the Court grants the County Executive's request for a declaration that Wis. Stat. § 59.794(3) does not authorize the Board to compel the County Executive to appear at county board meetings.

**8. The scope of Wis. Stat. § 59.794(3) extends to committee meetings.**

The County Executive argues that the Board may only compel an employee or officer's attendance at board meetings, as opposed to committee meetings. In response, the Board points out that the legislature did not specify or limit the types of meetings. According to the Board, the particular meetings at which the Board may require county employees and officers to provide information is best left to the Board's determination, and should not be entertained by the Court. *See generally Mills v. Vilas County Bd. of Adjustments*, 2003 WI App 66, ¶ 17, 261 Wis. 2d 598 (court should not entertain a "political question," one that, based on separation of power concerns, the courts should not entertain because its determination is best left to the other branches of government.)

This Court finds that the scope of Wis. Stat. § 59.794(3) extends to committee meetings. After all, it has been stated that municipal powers of a ministerial, administrative or executive nature may be delegated to a committee, even if the delegation permits the exercise of some discretion or judgment. OAG 44-851985 WL 257982, at \*2 (Wis. A.G. Nov. 8, 1985). Any such delegation must be by resolution and must require that the committee report its actions to the

Board. Wis. Stat. § 59.06(1). There are no explicit statutory limits on the kinds of powers which may be delegated. OAG 44-851985 WL 257982, at \*3 (Wis. A.G. Nov. 8, 1985). Thus the Court rejects the County Executive’s request for a declaration that the Board may only compel an employee or officer’s attendance at board meetings, as opposed to committee meetings.

**9. The County Executive has not established that the attendance of employees must be required by the full Board.**

The County Executive argues that, based on the plain language of the statute, only the full board may require an employee or officer’s attendance. While the Board did not directly respond to this argument, the same logic applies. The full board is authorized to delegate its statutory responsibilities to a committee, and the committee may subsequently compel the attendance of employees. The Court rejects the County Executive’s request for a declaration to the contrary.

**10. The County Executive is not entitled to a declaration that the Board’s request must be necessary AND “directly related” to a duty and power of the Board.**

The County Executive seeks a declaration that for the Board to request the appearance of an employee or officer, the Board must demonstrate that the request is necessary and directly related to a duty and power of the Board.

Wis. Stat. § 59.794(3)(b) provides that the Board “may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions.” The County Executive argues, and this Court agrees, that the Board does not have unfettered discretion to require county employees to attend meetings. The Board is only authorized to require the attendance of employees and officers when it is deemed *necessary*. With that said, the Court is not convinced that it would be proper to insert the terms “*directly*



*related*” into a statute where such terms do not exist. *See Fond Du Lac Cnty. v. Town 286 of Rosendale*, 149 Wis.2d 326, 334 (Ct. App. 1989) (holding that a court will not “add words to a statute to give it a certain meaning.”) The purpose of the Uniform Declaratory Judgments Act is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties, and the County Executive has not identified the specific types of Board inquiries that it is seeking to prevent. The Court finds that the statute speaks for itself, and the County Executive’s request for a declaration on this issue is denied.

### **CONCLUSION:**

**THEREFORE, IT IS HEREBY ORDERED** that:

- The Board’s request for a declaration that it has statutory authority to provide for, fix or change the compensation of unclassified County employees, including department heads, is **GRANTED**.
- The Board’s request for a declaration that it has the authority to require the attendance of the County Executive to attend Board meetings when deemed necessary by the Board to provide information or answer the Board’s questions is **DENIED**.
- The County Executive’s request for a declaration that the Board exceeded its statutory authority with respect to reclassifications that were made pursuant to MCO § 17.05(2)(c)(7) is **GRANTED**.
- The County Executive’s request for a declaration that the Board exceeded its statutory authority with respect to reallocations that were made pursuant to MCO § 17.055(1) is **DENIED**.

- The County Executive’s request for a declaration that the Board exceeded its statutory authority with respect to the advancement of employees within pay ranges pursuant to MCO § 17.10(4) is **GRANTED**.
- The County Executive’s request for a declaration that MCO § 34.06 conflicts with Wis. Stat. § 59.794(3) is **DENIED**.
- The County Executive’s request for a declaration that the Board exceeded its statutory authority with respect to the verification of the County’s payroll is **DENIED**.
- The County Executive’s request for a declaration that Wis. Stat. § 59.794(3) does not allow the Board to command the County Executive to appear at Board meetings is **GRANTED**.
- The County Executive’s request for a declaration that only the full Board may require the attendance of a county employee or officer at a Board meeting is **DENIED**.
- The County Executive’s request for a declaration that employees and officers can only be requested to appear at Board meetings, as opposed to committee meetings, is **DENIED**.
- The County Executive’s request for a declaration that a request may only be made for information or questions that the Board has demonstrated to be necessary and directly related to a duty and power of the Board is **DENIED**.

**THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.**

Dated at Milwaukee, Wisconsin, this 24th day of April, 2017.

BY THE COURT:

Electronically signed by

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Hon. John J. DiMotto  
Milwaukee County Circuit Court, Branch 41