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Date: March 26, 2015

To: Honorable Members of the
Committee on Judiciary, Safety and General Services

cc: All other Supervisors
Alexis Gassenhuber
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From: Paul Bargren 
Corporation Counsel

Re: Committee Referral re BHD

At its meeting on March 12, 2015, the Committee asked several questions related to the Mental Health Board (MHB) and Behavioral Health Division (BHD). As we understood them, the questions are:

- Does the County of Milwaukee retain legal liability for tort claims against employees of BHD¹?
- Does the County of Milwaukee retain legal liability for contract claims for contracts held by MHB and BHD?
- Can the County of Milwaukee transfer legal liability for workers compensation claims and similar claims to MHB and BHD?
- Can the County of Milwaukee transfer the administration of workers compensation claims and similar claims to MHB and BHD?

Our responses to these questions are very similar. Generally speaking, the legal liabilities of the County of Milwaukee were not changed by Act 203 and the County retains all such liabilities.

Tort Liability

Our office issued a memo on May 16, 2014 that addressed many issues related to Act 203. One section of that memo (p. 6) addressed issues of tort liability. It provided:

¹ The reference to BHD is a simplification that is intended to include any department or division which is covered by Act 203.

§895.46 [of the Wisconsin Statutes] provides that a judgment entered against a public official or government employee because of acts committed while acting within the scope of his or her employment must be paid by the official's or employee's employer, i.e., Milwaukee County. This provision was not amended by Act 203 to account for MHB. Thus any such judgments will remain a general obligation of the County, as now.

Because employees under the jurisdiction of the MHB continue to be employees of the County, they continue to be covered by this statute.

Furthermore, §59.52(12) provides that the County Board may "examine and settle all accounts of the county and all claims, demands or causes of action against the county and issue county orders therefor." This statute was not changed by Act 203. As with §895.46, it also demonstrates the county board's continued involvement in all claims against the county.

However, it should be noted that the question of whether the County of Milwaukee remains legally liable for tort claims against BHD employees does not prevent consideration of how that legal liability should or can be budgeted.

Contract liability

The answer to this question is essentially the same as the prior question. The May 16, 2014 memo also addressed some contract questions (p. 9). As noted in that memo, §51.41(10), Stats., provides: "Any contract related to mental health with a value of at least \$100,000, to which Milwaukee County is a party may take effect only if the Milwaukee County mental health board votes to approve, or does not vote to reject, the contract within 28 days after the contract is signed or countersigned by the county executive." Despite that contract approval process being transferred to the MHB, the contracts, as explicitly noted in the statute, continue to be contracts "to which Milwaukee County is a party." Thus, these mental health contracts continue to be County of Milwaukee contracts.

Thus, because these contracts continue to be county contracts, the County of Milwaukee continues to retain liabilities associated with those contracts. However, contractual liabilities are typically budgeted or addressed in the budget of the department or division responsible for the contract.

Workers Compensation Liability

As with contractual approval authority, authority to determine employee salaries and other compensation for BHD employees has been transferred to the MHB, but the legal liability for workers compensation benefits remains with the County of Milwaukee, as the employer of BHD employees. Section 102.04(1)(a) defines all counties as an "employer" for workers compensation. Section 102.07(1)(a) defines an "employee" as "every person . . . in the service of . . . any municipality." "Municipality" is defined in §102.01(2)(d) to include counties. Thus, the county is liable for the workers compensation benefits of all employees of the county. As we have noted in other memos, BHD employees continue to be county employees who remain subject to the county civil service system.

Workers Compensation Administration

Our May 16, 2014 memo touched on this subject in a broader context. The following is from that memo:

Under § 46.21(6), “Disbursements shall be made in the manner that the ... Milwaukee County mental health Board... adopts.” The methods of disbursements adopted by MHB must be “consistent with sound accounting and auditing procedure and with applicable federal statutes and regulations, state statutes and rules and requirements of the county auditor and county department of administration,” but need not necessarily be controlled by those entities. § 46.21(6).

MHB may place “administrative and executive powers and duties of managing, operating, maintaining and improving institutions and departments,” including “functions related to the central service departments,” under the jurisdiction of other county entities. § 46.21(3r).

This allows but does not require MHB to use other county services or departments if desired (facilities, IMSD, HR, financial and purchasing services, comptroller, etc.). While MHB can seek services from County departments, the intent of the legislation should be seen as preventing MHB from requiring County departments to make changes in operations at MHB’s request. A provision to that effect was introduced but then eliminated by amendment. See Sen. Am. 1 to Sen. Sub. Am. 1, § 15.

County departments will cross-charge MHB for services, as they do now. MHB is not required to use these County “vendors” (unless there are statutory requirements, such as using the Comptroller for certain funds or HR for civil service processing). MHB could seek outside services if it felt cross-charges were too high. There do not appear to be limitations on MHB’s ability to outsource services or personnel.

Thus, the MHB could determine that it wished to administer workers compensation claims separately from the county. It could likely make that same determination for other matters, such as FMLA requests. However, as noted, these types of separate administration of employee-related functions is still subject to other statutory limitations, such as the role of the director of personnel (human resources) with respect to civil service (§59.17(2)(bm)(1)d and §63.02(2)) and the role of the comptroller acting as the “administrator of the county’s financial affairs.” §59.255(2)(a).