

**COUNTY OF MILWAUKEE**  
INTEROFFICE COMMUNICATION

DATE: February 22, 2012

TO: Judiciary, Safety and General Services Committee

FROM: Kimberly Walker, Corporation Counsel *KW*  
Mark A. Grady, Deputy Corporation Counsel, *MAG*

SUBJECT: File No. 12-162; Chapter 1 amendments

The Committee of the Whole directed that this office provide an opinion and guidance to the Committee on Judiciary, Safety and General Services on several matters related to the above item.

Amendment No. 2

This amendment would require approval by the Judiciary Committee, subject to Board review and approval, of all matters pertaining to initiating or answering suits or claims by or against the county. We perceive legal and practical concerns with this amendment as currently drafted.

Milwaukee County Circuit Court Judge Carroll recently ruled that the County Executive has the authority, and, at times, the responsibility, to initiate lawsuits against others without prior County Board approval. A copy of a portion of the transcript setting forth that ruling is attached, as well as a copy of the order reciting that ruling. Thus, the authority to initiate lawsuits against others does not reside solely within the control of the County Board. In our opinion, an ordinance that purported to restrict this authority of the County Executive is contrary to the court's ruling and, whether or not it were agreeable to the current County Executive, would not bind any future County Executive.

However, we believe that an ordinance provision can be written to address the concerns of the Board as fully as possible without invading the County Executive's authority recognized by the circuit court. Language could be adopted that recognizes the County Executive's exercise of authority, but that requires an immediate report to the Chair of the Committee when that authority is intended to be exercised. The Chair can then take any action deemed appropriate by the Committee Chair.

The ordinance would continue to preserve the County Board's exclusive authority to resolve claims or suits against the county.

On a related matter, Corporation Counsel has traditionally pursued the collection of debts owed to the county, generally smaller matters, without approval of the County Board. Presumably this has occurred because of the practical problem that would be created if Committee approval were required for every small collection action. Assuming the County Board wishes to continue this past practice, language could be included in the ordinances to explicitly authorize the Corporation Counsel to initiate small claim suits (under \$10,000.00) against other persons in order to facilitate collection of smaller debts, without further approval of the Board.

In addition, there was discussion of the statutory authority that exists for Corporation Counsel to be authorized to settle claims against the county up to \$500.00. Sec. 59.52(12)(b) of the statutes provides that the board may

(b) Delegate its power in regard to any claim, demand or cause of action not exceeding \$500 to the corporation counsel. If the corporation counsel finds that payment of the claim to a claimant is justified, the corporation counsel may order the claim paid. The claim shall be paid upon certification of the corporation counsel and shall be annually reported to the board.

Corporation Counsel has always exercised this authority. However, it is recommended that this delegation of authority be recited in the ordinances.

To address all of these matters, the following is a possible draft for consideration:

2. Except for labor relations negotiation or arbitration matters subject to the authority of the Committee on Personnel, the Committee shall review and approve of all matters pertaining to suits or claims by or against the county, including those for personal injury and property damage. The committee has the authority to approve the payment of claims against the county in an amount not to exceed \$10,000 and to recommend to the board approval or denial of claims or settlements in excess of \$10,000.00. Except when authorized by the County Executive, the Committee shall review and approve of all matters pertaining to suits or claims by the county against other persons or entities where the amount claimed exceeds \$10,000.00 or where the rights sought to be declared have a potential fiscal effect on the county in excess of \$10,000.00. In the event Corporation Counsel is authorized by the County Executive to assert or file a claim or suit, Corporation Counsel shall provide a report to the Chair of the Committee immediately upon receiving the County Executive's authorization of such action. Corporation Counsel is delegated authority to approve the payment of claims against the county where the payment is no more than \$500.00, pursuant to §59.52(12)(b) of the statutes. Corporation Counsel is authorized to initiate claims or suits by the county against other persons or entities where the amount claimed is \$10,000.00 or less. The Committee shall be afforded confidential access to privileged attorney-client communications and to attorney work product in any matter where Milwaukee County or

a Milwaukee County officer or employee is named as a party in an action or proceeding arising from the commission of official duties.

### Seconding of Motions

The County Board has traditionally not required motions to be seconded, but Chapter 1 has not documented this practice. Whether to require motions to be seconded is entirely within the discretion of the County Board. If the Board wishes to maintain its past practice, it is recommended that Chapter 1 be amended to document that decision.

### Abstention from voting

Section 1.04 contains voting rules for the County Board relating to abstentions. The question is whether the Board can adopt a rule that requires a member to state a reason for an abstention in order to be excused from voting.

In our opinion, a member is only answerable to the electorate with respect to voting or failing or declining to vote. The Board cannot censure or remove a member for failing to vote on any matter. Except when attendance is mandated in order to obtain a quorum, in our opinion only the electorate can hold a member accountable for failing to attend meetings, or for failing or declining to vote on any or all matters. It is inconsistent with the notion of elected office that an elected official can be required to act in any manner on any policy matter. Therefore, it is our opinion that a member cannot be required to state a reason for abstaining from voting, in the same manner that a member cannot be required to state a reason for missing any vote.

COPY

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

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MILWAUKEE COUNTY,

Plaintiffs,

Case No. 12-CV-000350

v.

Case Code: 30704 and 30701

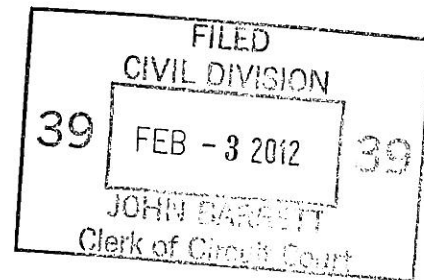
DAVID A. CLARK, JR., in his official capacity as  
Sheriff of Milwaukee County,

Defendant.

v.

MILWAUKEE DEPUTY SHERIFFS'  
ASSOCIATION,

Intervenor-Defendant.



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**ORDER DENYING DEFENDANT DAVID A. CLARKE, JR.'S MOTION TO DISMISS**

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Hearings having been held in the above-entitled matter on January 13, 2012 and January 27, 2012, on Defendant David A. Clarke, Jr.'s Motion to Dismiss, before the Honorable Jane V. Carroll, Circuit Court Judge, with Plaintiff, Milwaukee County, having appeared by Daniel J. Vaccaro and Charles B. Palmer of Michael Best & Friedrich, LLP; Defendant, Sheriff David A. Clarke, Jr., having appeared by Michael A.I. Whitcomb of the Law Offices of Michael A.I. Whitcomb; Intervenor-Defendant, Milwaukee Deputy Sheriffs' Association, having appeared by Christopher J. MacGillis of MacGillis Wiemer, LLC; and the Court having received Defendant Sheriff David A. Clarke, Jr.'s Motion to Dismiss and brief in support thereof, Plaintiff Milwaukee County's Response Brief in opposition and supporting materials, Defendant Sheriff David A. Clarke, Jr.'s Reply Brief and heard oral arguments of the parties; and upon the Court's finding that the County Executive could properly authorize the filing of this lawsuit against the

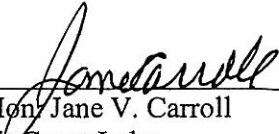
Sheriff of Milwaukee County, and for the other reasons set forth on the record at the January 27, 2012 hearing;

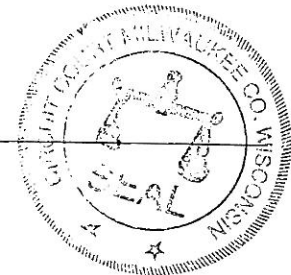
**IT IS HEREBY ORDERED:**

That Defendant David A. Clarke, Jr.'s Motion to Dismiss is hereby DENIED.

Entered at Milwaukee, Wisconsin this 3 day of February, 2012.

BY THE COURT:

  
The Hon. Jane V. Carroll  
Circuit Court Judge



066164-0003\10944753.1

1 STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

2 MILWAUKEE COUNTY

3  
4 Petitioner, Case No. 12-CV-0350  
5 vs.

6 DAVID A. CLARKE JR

7 Defendant.

8 EXCERPT of hearing

9 - Judge's Decision on Motion to Dismiss -

10 Held on January 27, 2012

11 Before THE HONORABLE JANE CARROLL,

12 Circuit Judge presiding in Branch 39

13 Milwaukee County Courthouse Room 206,

14 Milwaukee, Wisconsin.

15  
16 APPEARANCES:

17 ATTORNEY DANIEL J. VACCARO of Michael Best & Friedrich  
18 LLP on behalf of Milwaukee County  
Also present: CHARLES PALMER

19 ATTORNEY MICHAEL A.I. WHITCOMB on behalf of Sheriff  
20 David A. Clark Jr.  
Also present: ATTORNEY MICHAEL J. WHITCOMB  
21 INSPECTORS RICHARD SCHMIDT and EDWARD BAILEY

22 ATTORNEY CHRISTOPHER MACGILLIS on behalf of the  
Milwaukee Deputy Sheriffs' Association  
23 Also present:  
MR. ROY M. FELBER, President, Milwaukee Deputy  
24 Sheriffs' Association  
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TRANSCRIPT OF PROCEEDINGS - EXCERPT

THE COURT: All right. And that last part that you said there about the pending WRC decision may play into whether a temporary injunction is appropriate in this case, and I'm not going to reach the issue of whether the judiciary committee may, on behalf of the county board, authorize a lawsuit, because on further review of the ordinances and statutes, I do believe that the county executive could properly authorize this particular lawsuit for the following reasons:

Wisconsin Statute 59.02(1) provides that the powers of a county as a body corporate can only be exercised by the board, or in pursuance of a resolution or ordinance enacted by the board.

One of the powers of the county as a body corporate is the power to sue, and that is found in 59.01. The role of the county executive is found both in the statutes and in the ordinances.

Wisconsin statute 59.17 addresses the power of the county executive as follows: The county executive shall be the chief executive

1 officer of the county. The county executive  
2 shall take care that every county ordinance and  
3 state or Federal law is observed, enforced, and  
4 administered within his or her county, if the  
5 ordinance or law is subject to enforcement by  
6 the county executive, or any person supervised  
7 by the county executive.

8 County ordinance 1.26, which is  
9 entitled "Directives of the County Board How  
10 Enforced" states in part:

11 It shall be the responsibility of the  
12 county executive to see that all resolutions or  
13 ordinances adopted by the county board are  
14 properly carried out and to inform the county  
15 board should the officer, board, or commission  
16 directed to perform a duty or make a report  
17 fail to do so within a reasonable period of  
18 time.

19 The Milwaukee County general code of  
20 ordinances consists of the ordinances of  
21 Milwaukee County, which were adopted by  
22 Milwaukee County board of supervisors.

23 It appears, then, from reading this  
24 statute and this ordinance that the county  
25 board has not only authorized, but has required



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that the county board -- executive act to enforce the ordinances and resolutions passed by the county board.

In this particular case, the county board passed resolutions adopting the 2012 budget and the collective bargaining agreement between the county and the Milwaukee Deputy Sheriffs' Association; therefore, pursuant to the ordinance and the statute mentioned above, it appears that the county executive is not only authorized, but is, in fact, required to enforce those adopted resolutions.

One of the most -- one of the ways that the county executive can act to enforce those resolutions is via a -- this particular lawsuit.

59.02(1) again states that the powers of a county as a body corporate can only be exercised by the board or -- and this language is important -- in pursuance of a resolution adopted, or an ordinance enacted by the board.

The county's ability to sue may be exercised in carrying out a resolution that the county board adopted in furtherance of a resolution that the county board adopted or

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enacted.

It follows, therefore, that the county executive has authority to initiate a lawsuit in order to enforce one of the county board's adopted or enacted resolutions or ordinance, not only because the county board has required such action, but because the county executive must have some mechanism available to him by which he can enforce the resolutions and ordinances.

It appears that the county board, via Milwaukee County ordinance 1.26(2), has explicitly authorized the county executive to authorize a lawsuit if the purpose of that lawsuit is to enforce a county board or resolution such as the case is here.

By authorizing this present lawsuit, the county executive complied with the county board's requirement via ordinance of the county board -- that the county executive act to enforce the 2012 budget resolution, and the resolution which adopted the collective bargaining agreement; therefore, the motion to dismiss is denied.

What is the county's position--