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DATE: April 25, 2012

TO: Marina Dimitrijevic, County Board Chairwoman

FROM: Molly Zillig, Principal Assistant
Milwaukee County Corporation Counsel

SUBJECT: Roy M. Felber, et al. v. Milwaukee County, et al.
Milwaukee County Circuit Court Case No.: 11CV1296

I request that this matter be referred to the Committee on Judiciary, Safety and General Services to be placed on the agenda for its next meeting to approve the payment of $27,500.00 to MacGillis Wiemer, LLC, for attorneys' fees incurred on behalf of the Milwaukee Deputy Sheriff's Association and Philip H. Wentzel to settle in full their lawsuit against Milwaukee County and Veronica Robinson.

This case arose from the Milwaukee County Personnel Review Board's ("PRB") release of information regarding disciplinary action taken against Philip H. Wentzel ("Wentzel") for his on-duty actions on January 12, 2010. On January 12, 2010, Wentzel, who is a Deputy Sheriff Sergeant with the Milwaukee County Sheriff's Office, received a call from the dispatcher while working at General Mitchell International Airport. The dispatcher informed Wentzel that a vehicle had struck a deer and that the deer carcass was available if he wanted it. Per the PRB Complaint, Wentzel left the airport to obtain the deer carcass. The Sheriff's Office Internal Affairs Division later investigated Wentzel's actions and found him to have violated Milwaukee County Sheriff's Office Rules and Regulations 202.20, Efficiency and Competence, and 202.14, Violation of Policy.

During the course of the Internal Affairs investigation, Wentzel provided a recorded statement during an interview, and on approximately February 22, 2010, Sheriff David A. Clarke ("Sheriff Clarke") submitted a recommendation to the Milwaukee County PRB that it issue Wentzel a 25-day suspension. In early March 2010, Tom Murray, a reporter from WTMJ Channel 4, requested the information and records relating to Wentzel's 25-day suspension, and the PRB released the Notice of Suspension and several attachments. The Notice of Suspension included direct quotes from Wentzel's interview with Internal Affairs, some of which Tom Murray published in a press release and in other news reports on approximately April 8, 2010. Wentzel alleges he did not receive any notice

from the PRB or the Sheriff's Office that the records pertaining to the investigation into his conduct would be released.[1]

Thereafter, Plaintiffs filed an action seeking relief against Milwaukee County, Veronica Robinson (the Executive Director of the PRB) and Sheriff Clarke ("Defendants") for violation of the Wisconsin Open Records Law (Chapter 19) and violation of Wisconsin's privacy law, Wis. Stat. § 895.50(2), based on the release of information regarding the Wentzel investigation to Tom Murray.

The Plaintiffs and the Defendants filed cross-motions for summary judgment. Plaintiffs argued that the Defendants: (1) violated Wis. Stats. § 19.36.(10); (2) violated Wis. Stat. § 19.356; and (3) violated Wisconsin's privacy law, Wis. Stat. § 995.50. Defendants argued that: (1) Plaintiff Roy Felber lacks standing in this matter; (2) the Complaint fails to state a claim against Sheriff Clarke; (3) Wentzel has no claim for violation of Wis. Stat. § 995.50; and (4) Wentzel has no claim under the Wisconsin Public Records laws. The Court granted partial summary judgment and denied partial summary judgment as to each motion. The end result was that the court determined Ms. Robinson violated Wisconsin's open records law when she released the records to the press and also deferred ruling on whether the same actions violated the privacy statute. Sheriff Clarke was dismissed from the case.

The primary focus of the Court's analysis related to the meaning of the phrases "current investigation" and "prior to disposition of the investigation" in Wis. Stat. § 19.36(10)(b). The Wisconsin Court of Appeals previously addressed the meaning of the terms "investigation" and "disposition of the investigation" as used in Wis. Stat. § 19.36(10)(b) in *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶ 10, 277 Wis. 2d 208, 689 N.W.2d 644. In that case, the plaintiffs argued that the requested records at issue were excluded from disclosure because the records were part of an ongoing investigation. *Id.* at ¶ 6. Specifically, the plaintiffs argued that although the sheriff had notified members of the department they were being disciplined as a result of an investigation of their conduct while on duty, *id.* at ¶ 5, the employees "had filed grievances pursuant to their collective bargaining agreement with the county regarding the discipline imposed by the sheriff, [and therefore] the 'investigation' into their alleged misconduct had not been completed." *Id.* at ¶ 6.

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[1] Prior to the publication of Tom Murray's press release, but after the PRB had already released the requested records to Tom Murray, three parties, Martin Ewert, Philip Wentzel and the Milwaukee Deputy Sheriffs' Association, filed a summons and complaint, Milwaukee County Case Number 10-CV-4416, in the Honorable Timothy Dugan's court, against Milwaukee County, the Milwaukee County Sheriff's Department, and Sheriff Clarke. Judge Dugan held a hearing regarding a motion for a temporary restraining order in that case on April 13, 2010, and on May 25, 2010, Judge Dugan issued an order that prevented the defendants from releasing information regarding the investigation of Wentzel's actions until after disposition of the PRB case. The PRB issued its decision in Wentzel's disciplinary action on October 19, 2010. Veronica Robinson and the PRB were not named as defendants in the case before Judge Dugan.

In this case, Judge Carroll concluded that according to the court in *Local 2489*, an "investigation" includes only that conducted by the public authority itself as prelude to possible employee disciplinary action. *Local 2489*, 2004 WI App 210 at ¶ 15. In this case, the Sheriff's Office had investigated the incident in question and Sheriff Clarke had signed and submitted a "Notice of Suspension" stating that Wentzel "has been suspended for twenty-five (25) days, to take effect pending PRB review." However, based on the disciplinary structure in place, Sheriff Clarke's recommendation could not become effective until after the PRB, also an "authority," had reviewed the matter. Consequently, an "investigation" reaches its "disposition" when the authority acts to impose discipline on an employee as a result of the investigation regardless of whether any employee elects to pursue grievance arbitration or another review mechanism that may be available ...." *Local 2489*, 2004 WI App 210 at ¶ 15. According to Judge Carroll, although Sheriff Clarke did, in a sense, act to impose discipline, his recommendation was merely that – a recommendation. Only the PRB could actually impose discipline on Wentzel for his alleged employment-related misconduct.

Having reviewed the relevant statutes, case law, and the parties' argument, Judge Carroll concluded that the investigation into Wentzel's alleged employment-related misconduct had not reached its disposition at the time that the PRB released the records to Tom Murray. As a result, the records at issue were not open to public inspection and that the PRB therefore violated the Open Records Law when it released the subject records to Tom Murray.

Judge Carroll also ruled that the Plaintiffs were entitled to Declaratory Judgment, pursuant to Wis. Stat. § 806.04 and that the Plaintiff was entitled to the costs and reasonable attorneys' fees associated with bringing this action.

Judge Carroll, however, deferred judgment on the Plaintiffs' other claim, invasion of privacy. Wentzel contended that an invasion of his privacy in violation of Wis. Stat. § 995.50(1) occurred upon the release of his disciplinary records to Tom Murray. Wis. Stat. § 995.50(1) provides the following:

> The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief: (a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through public media; (b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and (c) A reasonable amount for attorneys fees.

The Court deferred ruling on the motions for summary judgment as to Plaintiff's privacy claim until after the Court could schedule a hearing to determine whether or not "the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, notwithstanding the strong presumption favoring disclosure."

Kroeplin v. Wisconsin Dept. of Natural Res., 2006 WI App 227 at ¶ 37. At the conclusion of that hearing, the Court would rule as to the motions for summary judgment as to Wentzel's claim for violation of the privacy statute.

SETTLEMENT

The parties agreed to settle this matter for $27,500. That number represents a compromise regarding actual attorneys' fees incurred, $30,000. As part of the settlement, the Plaintiffs agreed to dismiss the pending claim of violation of Wisconsin privacy law, Wis. Stats. § 895.50(2) and any other claims the Plaintiff could have asserted or may still assert that rises out of the above set of facts.

MJZ

Molly J. Zillig
Principal Assistant Corporation Counsel

MJZ/kpe

Cc: Janelle Jensen
Amber Moreen