File No. 19-12

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DATE: May 7, 2019

TO: Milwaukee County Board
Interested Stakeholders

FROM: Corporation Counsel Margaret C. Daun
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SUBJECT: Interpretative Guidance regarding *Milwaukee District Council 48 v. Milwaukee County*, 2019 WI 24, 385 Wis. 2d 748, 924 N.W.2d 153

On March 20, 2019, Chairman Theodore Lipscomb, Sr. requested that the Office of Corporation Counsel (the "OCC") provide interpretive guidance related to the above-noted case. This memorandum is responsive to that request and may be attached to File No. 19-12.

Background

On March 19, 2019, the Wisconsin Supreme Court issued a decision in *Milwaukee District Council 48 v. Milwaukee County*, 2019 WI 24, 385 Wis. 2d 748, 924 N.W.2d 153. This case involved whether employees formerly represented by Milwaukee District Council 48 of the American Federation of State, County and Municipal Employees ("DC 48") prior to the State's adoption of 2011 Wis. Act 10 ("Act 10"), *see also* Wis. Stat. § 111.70(1)(a) (2011-12), were eligible to retire early with a full pension under the County's "Rule of 75." Under the Rule of 75, an employee is eligible to receive a full pension when her age plus years of County service total 75.

In the wake of Act 10, the County enacted or amended several ordinances aimed at preserving certain benefits for formerly unionized employees or trying to equalize benefits between formerly

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[1] This opinion was authored by Corporation Counsel Daun, Deputy Corporation Counsel Kearney and Assistant Corporation Counsel Lawrence. None of these attorneys are represented by Milwaukee District Council 48 or were employed by the County on September 29, 2011. Therefore, this opinion has no impact on their pension benefits or rights.

represented and new employees. At issue in this case was one such provision, specifically Milwaukee County General Ordinance ("MCGO") § 201.24(4.1).

Specifically, subsection (2)(a) of the ordinance provides that an employee who "on September 29, 2011, is employed and is not covered by the terms of a collective bargaining agreement, and whose initial membership in the retirement … began *prior to January 1, 2006*," is eligible for the Rule of 75.

In contrast, under subsection (2)(b), an employee who, "on September 29, 2011, is employed and is covered by the terms of a collective bargaining agreement … with [DC 48] … and whose membership date is *prior to January 1, 1994*," is eligible for the Rule of 75.

The difference in cutoff date led to the lawsuit between DC 48 and the County because employees not covered by the terms of a Collective Bargaining Agreement ("CBA") have a much later cutoff date-of-hire that determines Rule of 75 eligibility, which in turn, greatly expands the pool of employees that qualify for early retirement (and, for those DC 48 members to whom this applies, results in additional costs to the County of approximately $6.8 million[2]).

Summary of the Wisconsin Supreme Court's Ruling

Based on a lengthy analysis of the cannons of statutory construction as applied to the particular ordinance provision in question (MCGO § 201.24(4.1)(2)), the Wisconsin Supreme Court ruled that employees formerly represented by DC 48 prior to Act 10 were eligible for the Rule of 75 if they were hired prior to January 1, 2006 because there was no unexpired, currently in-effect and valid CBA for DC 48 on September 29, 2011 (the employee must have been employed on September 29, 2011 to qualify).

In reaching this conclusion, the Court did not meaningfully address the so-called "status quo ordinances," *see* MCGO §§ 17.013-17.018, which kept the terms of CBAs in effect for formerly represented employees regardless of whether their union recertified. *See* 2019 WI 24, ¶ 16.

Implications of the Ruling

As noted above, the Wisconsin Supreme Court's ruling expands the availability of early retirement under the Rule of 75 to a larger group of individual employees. Based upon the Court's ruling, any former member of DC 48 who was (a) still employed with the County on September 29, 2011,

[2] Please note that the original fiscal analysis, which was conducted consistently with the original scope of the litigation (*i.e.*, restricted to former DC 48 members who would have qualified for a full pension retirement under the Rule of 75 with a cutoff date of January 1, 2006 versus January 1, 1994) did not consider the potential additional financial impacts following from this interpretative guidance. The County or RPS may deem it appropriate for the Comptroller's Office to prepare a fiscal analysis to review the implications of the Court's ruling and all its potentially corresponding costs.

and (b) began pension-qualifying County employment before January 1, 2006, may retire under the Rule of 75.

With respect to the DC 48 employees only, the OCC recommends that RPS follow the below additional interpretive guidance regarding the Wisconsin Supreme Court's decision:

- If an employee retired before September 29, 2011, the Court's ruling has no effect.

- If an employee retired after September 29, 2011, but before March 19, 2019 (the date of the Wisconsin Supreme Court's ruling), and the employee is not receiving a full pension but would have been entitled to a full pension under the Rule of 75 under this ruling, it is the opinion of the OCC that a court is more likely than not to conclude that the employee's pension benefit must be recalculated under the Rule of 75, and the newly-identified underpaid lump sum amount paid out with interest and the employee also paid at the full benefit level going forward.

- If an employee would have been able to qualify for a Rule of 75 early retirement under this ruling at some time prior to March 19, 2019 (the date of the Wisconsin Supreme Court's decision), but kept working until on or after March 19, 2019, this ruling has no effect on the Rule of 75 benefit other than to permit an employee to retire under the Rule of 75 now, if the requirements of the Rule are met.

Based on the OCC's reading of the Court's decision, nothing in this ruling alters a member's qualification for any other benefit enhancement or limitation that may flow from or is required by the election of a member who is now (under the ruling) qualified for the Rule of 75. For example, nothing in this ruling disturbed the longstanding ordinance provision that no one retiring under the Rule of 75 is eligible to retire under MCGO § 201.24(4.5) (deferred vested retirement).

It is the opinion of the OCC, based on the express language in the decision, *see* 2019 WI 24, ¶ 7 n.5 ("the interpretation of [paragraphs (2)(c) through (2)(g)] was not raised by the parties and therefore is not before us"), that this ruling applies only to establish the cutoff date for Rule of 75 eligibility as being January 1, 2006 for former DC 48 members as described above, because DC 48 was the only collectively bargained unit with an expired CBA on September 29, 2011 (and subsequent decertification in 2012) that applied to general (*i.e.*, non-law enforcement and non-fire) employees with language in section 4.1(2) mirroring the language in subsection (b).[3]

[3] The Court did note that subsections (f) and (g), which apply to the Milwaukee County Deputy Sheriffs Association ("MDSA") and the Milwaukee County Firefighters Association (IAFF Local 172) ("Local 172"), use different language to establish Rule of 75 eligibility. Namely, a member of MDSA or Local 172 qualifies for the Rule of 75 if she (1) began pension-qualifying employment with the County before January 1, 1994 and December 2, 1996, respectively; (2) was still employed by the County on September 29, 2011; (3) was "covered by" a CBA that controlled terms and conditions of their employment on September 29, 2011; and (4) was "not represented by" the relevant union at retirement. *See* 2019 WI 24, ¶ 29. The Court emphasized that this final requirement does not apply to DC 48 (or any other union). *Id.* Importantly, the

It is the opinion of the OCC that because other general employee (*i.e.*, non-law enforcement and non-fire) unions had a valid and in-effect CBA on September 29, 2011, it is highly unlikely that a court would conclude that the Wisconsin Supreme Court's decision in *Milwaukee District Council 48 v. Milwaukee County*, also applies to other general employee unions.

In summary, the Wisconsin Supreme Court's ruling sets forth three categories regarding general employees. A general employee must be placed into one of these three categories as to Rule of 75 eligibility:

1. If the general employee was employed on September 29, 2011, and was subject to the terms of a CBA that was a valid and in-effect (*i.e.*, non-expired) CBA on September 29, 2011—then the requirements for the employee's Rule of 75 eligibility are determined under the CBA.

2. If the general employee was employed on September 29, 2011, but was **not** subject to the terms of an unexpired, currently in-effect and valid CBA (either because they were never unionized or because they are subject to the terms of an expired CBA) on September 29, 2011—then the employee is eligible for the Rule of 75 if they were hired prior to January 1, 2006.

3. General employees who began pension-qualifying employment with the County on or after September 30, 2011, are ***not*** eligible for the Rule of 75, regardless of unionized status.

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Court did not discuss or acknowledge that neither the MDSA nor Local 172 had, on September 29, 2011, a valid, unexpired, currently in-effect CBA. Rather, the MDSA and Local 172 ultimately executed CBAs after September 29, 2011 (on April 11, 2012 and March 14, 2012, respectively) that retroactively covered the period dating back to January 1, 2009 (i.e., including September 29, 2011). In contrast, as noted immediately above, DC 48 never executed another CBA and the union decertified in 2012.

In addition, law enforcement and fire personnel are treated differently under Act 10, 2011 Wis. Act. 10, *see also* Wis. Stat. § 111.70(1)(a), than general municipal employees, such as those represented by DC 48. Post-Act 10, law enforcement and fire employees have broader bargaining rights and are not subject to recertification requirements, whereas DC 48 (and other County unions) must recertify.