

**ADMINISTRATIVE DETERMINATION REVIEW COMMITTEE
MILWAUKEE COUNTY**

**WISCONSIN COMMUNITY
SERVICES, INC.,**

Appellants,

v.

**MILWAUKEE COUNTY
DEPARTMENT OF HEALTH
AND HUMAN SERVICES,**

Appellees.

**APPELLANT WISCONSIN COMMUNITY SERVICES, INC.' S EXPEDITED
COMBINED MOTION FOR EXTENSION OF BRIEFING DEADLINE, MOTION FOR
EVIDENTIARY HEARING AND MOTION FOR CHANGE IN COMPOSITION OF
ADMINISTRATIVE DETERMINATION REVIEW COMMITTEE**

Appellant, Wisconsin Community Services, Inc. (WCS), through its attorneys, MWH Law Group LLP, hereby requests that it be granted an extension to file a brief in support of Appellant's April 13, 2021, appeal regarding contract number DHHS-POS-2102, Program #H-012 ("Appeal").

The bases for this motion are as follows:

1. The initial due date for WCS to file its brief is July 4, 2021. WCS requires additional time to prepare and file its brief in support of the above-referenced appeal for the reasons set forth below:

- a. On April 12, 2021, WCS submitted an Open Records Request to the Milwaukee County Department of Health and Human Services (DHHS) requesting materials used by the County to reach its ultimate decision to award the contract in question

to Sirona Recovery. WCS' attorneys have been informed the request is being completed in two separate batches.

i. On June 2, 2021, WCS's attorneys received the first batch of materials requested. *All* the information requested, however, is pertinent to WCS' appeal; WCS cannot effectively argue its appeal without a complete file detailing why and how the Appellees reached their RFP decision, which is the basis for the appeal.

b. WCS asks that the Administrative Determination Review Committee allow WCS to conduct discovery, including depositions, in relation to its appeal regarding contract number DHHS-POS-2102, Program #H-012. Discovery is necessary in this case to ensure that Appellant is able to gather all information and documents pertinent to its appeal for presentation to this Review Committee.

c. WCS's attorneys are currently preparing for an upcoming trial and cannot devote the time and attention necessary to prepare and submit WCS's brief within the current briefing schedule established in relation to its appeal.

2. WCS asks that the Administrative Determination Review Committee schedule this Appeal for an evidentiary hearing pursuant to Milwaukee County Administrative Code Section 110.08 which allows for the presentation of evidence and witness testimony/cross examination. Both Parties and the Review Committee are tasked with analyzing issues that require exacting scrutiny given the quantitative assessment of all proposals submitted for the RFP.

a. The issues cannot be logically analyzed without a presentation of evidence and without assessing decisionmakers' credibility when explaining how they reached their final decision. *Sw. Airlines Co. v. Transp. Sec. Admin.*, 384 U.S. App. D.C.

325, 335, 554 F.3d 1065, 1075 (2009) (noting that “[w]here *factual issues involving . . . credibility . . . are at stake,*” an oral hearing may be more appropriate) (internal citations omitted).

- b. Due process considerations require that WCS be afforded the opportunity to present evidence that refutes the County’s proffered reasons for denial of the proposal. *See Wright v. Labor & Indus. Review Comm’n.*, 210 Wis. 2d 289, 296, 291, 565 N.W.2d 221, 222, 2224 (Ct. App 1997) (finding that “due process and considerations of fundamental fairness” require hearings on untried issues and “entitle [appellants] to an opportunity to present evidence”).
- c. Reviewing courts can overturn administrative agency action where the findings are “unsupported by substantial evidence[.]” so a more robust administrative record would reduce the likelihood that a reviewing court overturns the decision of the Review Committee. *Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992) (citations omitted) (reviewing a Board of Contract Appeals’ administrative decision to deny a bid protest).

3. WCS seeks to preserve the integrity and impartiality of the Administrative Determination Review Committee appointed for the purposes of hearing this Appeal. Therefore, WCS asks that the composition of the Administrative Determination Review Committee be modified to remove Emile Banks, Timothy Posnanski, and any other Review Committee Member who currently performs legal work for Milwaukee County or is actively seeking to do so. Significantly, based upon information and belief, the Administrative Determination Review Committee’s counsel in this matter, Deputy Corporation Counsel Scott Brown, is the head of litigation for the Corporation Counsel’s Office and, in that capacity, the person to whom Messrs.

Banks and Posnanski report in connection with the litigation matters they handle for Milwaukee County.

- a. The current Administrative Determination Review Committee is plainly improper because of the continuing relationship the County, a party to this action, has with both Mr. Banks and Mr. Posnanski.
 - i. Fair play and due process considerations translate to quasi-judicial proceedings, and Messrs. Banks and Posnanski, while individuals of the highest character and integrity, simply cannot be “impartial decision maker[s]” as required by the Constitution and Wis. Admin. Code § 110.07(e). *See Guthrie v. Wis. Emp't Relations Com.*, 111 Wis. 2d 447, 454, 331 N.W.2d 331, 334 (1983).
 - ii. Were this case being brought before a court, a similar conflict of interest would exist and be grounds for judicial recusal if the judge worked for and intends to continue working for one of the parties. *See State v. Herrmann*, 2015 WI 84, ¶ 32, 364 Wis. 2d 336, 867 N.W.2d 772 (“[T]he appearance of bias offends constitutional due process principles whenever a reasonable person . . . concludes that the average judge could not be trusted to ‘hold the balance nice, clear, and true[.]’”) (citing *State v. Gudgeon*, 2006 WI App 143, ¶ 24, 295 Wis. 2d 189, 720 N.W.2d 114). Moreover, a judge would be found to have engaged in judicial misconduct if he or she performed their adjudicative duties with a personal bias or prejudice towards one party’s lawyer. *See Wis. Judicial Comm’n v. Gorski*, 2020 WI 5, 390 Wis. 2d 22, 937 N.W.2d 609.
4. The undersigned has communicated with Deputy Corporation Counsel Scott Brown via email correspondence and sent written communication to him, per his request, proposing dates

for a conference call to discuss the conflict of interest issue with him. (“Exhibit A”) As of the date of this Motion, Mr. Brown was still working to get a conference call scheduled.

The undersigned has also spoken with DHHS counsel Assistant Corporation Counsel David Farwell regarding DHHS’s position on this Combined Motion. As of the date of filing of this Combined Motion, the undersigned has not received a response from Mr. Farwell.

For these reasons, WCS respectfully requests that [1] a new briefing schedule be issued, allowing WCS the appropriate amount of time to conduct discovery; [2] the briefing schedule allow for an evidentiary hearing before the submission of both parties’ briefs and [3] that two new Administrative Determination Review Committee members be appointed to replace Messrs. Banks and Posnanski to ensure a fair and impartial review of the appeal.

Dated this 14th day of June, 2021.

MWH LAW GROUP LLP

s/Emery K. Harlan

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**ATTORNEY FOR WISCONSIN
COMMUNITY SERVICES, INC.**

EXHIBIT A

From: Emery Harlan

Sent: Monday, June 7, 2021 12:31 PM

To: Brown, Scott <Scott.Brown@milwaukeecountywi.gov>; Farwell, David <David.Farwell@milwaukeecountywi.gov>

Cc: Haas, Jason <Jason.Haas@milwaukeecountywi.gov>

Subject: RE: WCS Matter

Many thanks. I'm free tomorrow: 8-10:30;12-1:30 and 2:45-4; Wednesday 2-5; and Thursday (all day).

CERTIFICATE OF SERVICE

The undersigned, certifies that a true and correct copy of the attached Expedited Combined Motion For Extension of Briefing Deadline, Motion For Evidentiary Hearing And Motion For Change In Composition of Administrative Determination Review Committee was served via E-mail and U.S. Mail to the following individuals, properly addressed and proper postage prepaid on June 14, 2021:

Jason Haas

Jason.Haas@milwaukeecountywi.gov

Milwaukee County 14th District Supervisor

Milwaukee County Courthouse

901 North 9th Street, Room 201

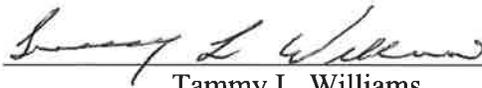
Milwaukee, WI 53233

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David Farwell

David.Farwell@milwaukeecountywi.gov



Tammy L. Williams