STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 10

Madison Teachers, Inc., et al.
Plaintiff,

v. Case No. 11CV3774

Scott Walker, et al.
Defendants

DECISION AND ORDER DENYING MOTION FOR STAY PENDING APPEAL

SUMMARY

The defendants have moved for a stay of the court's September 14, 2012 decision and order ruling certain statutes unconstitutional while they appeal it. The plaintiffs oppose a stay. The court has considered the briefs and affidavits filed by the parties. A party seeking a stay must show that the weight of the four factors a court considers when deciding such a motion favors a stay.

Defendants have shown they are likely to succeed on appeal, because the Supreme Court has held that an appeal of a ruling that a statute is unconstitutional must always be found likely to succeed, without consideration of the strength of the arguments on constitutionality or of the decision being appealed. However, likelihood of success is only one of the four factors and it is weighed with the other three. Defendants have failed to show that they will suffer irreparable harm if the stay is not granted and that a stay will not harm other interested parties or the public interest, the other three factors. Thus, the court denies the motion for the reasons detailed below.

DECISION

Whether to grant a stay is an exercise of judicial discretion. *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (Wis. 1995). There are four interrelated considerations that must be balanced together; more of one excuses less of another. *Id.* The four factors are 1) likelihood of success on the merits of the appeal, 2) that there will be irreparable harm to the moving party if the stay is not granted, 3) that there will be no substantial harm to another interested party from a stay and 4) that a stay will not harm the public interest. *Id.* at 440. The

burden of showing each factor is on the moving party. *Id.* at 440. "[T]he movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)

I. Likelihood of Success on Appeal

The Supreme Court has held that, as a matter of law, an appeal of a decision finding a statute unconstitutional must be found likely to succeed, without considering the merits of the trial court's decision or the strength of the case for or against constitutionality. *Gudenschwager*, 191 Wis. 2d 431 at 441, 529 N.W.2d 225. This is because the appellate court will review the constitutionality of a statute *de novo*; i.e., it begins anew, without deference to the trial court. *Larson v. Burmaster*, 2006 WI App 142, ¶24, 295 Wis. 2d 333, 720 N.W.2d 134. Thus the Court of Appeals will begin (as did this court) with the presumption that the challenged statutes are constitutional. That presumption alone is enough to require a finding that the appeal is likely to succeed. *Gudenschwager*, 191 Wis. 2d 431 at 441, 529 N.W.2d 225.

Plaintiffs argue that the presumption does not apply because the trial court found that the statutes infringed on fundamental constitutional rights, shifting the burden to the defenders of the statutes. Pltf. Br. at pp.4-5. The court understands this argument to be that a finding of an infringement of fundamental constitutional rights is a factual finding entitled to great deference on appeal. Wis. Stat. §805.17(2).

Whether a statute infringes upon fundamental constitutional rights appears to be a question of "constitutional fact." A constitutional fact is one which is decisive of constitutional rights and the determination of which requires the application of constitutional principles to evidentiary facts. *State v. Martwick*, 2000 WI 5, 231 Wis. 2d 801, 810-11, 604 N.W.2d 552, 556. Appellate courts apply "a two-step standard of review" to findings of constitutional fact. *Id. T*he appellate court gives great deference to the court's findings of evidentiary or historical facts, which here are undisputed, but applies a *de novo* standard to the application of constitutional principles to those facts. *State v. Phillips*, 218 Wis. 2d 180, ¶¶13-15, 577 N.W.2d 794 (Ct. App. 1998). The Court of Appeals in this case will determine anew, without deference to the trial court, whether the statutes infringe upon fundamental constitutional rights, based upon the undisputed evidentiary facts. Thus, the finding of an infringement by the trial court does not nullify the presumption of constitutionality of the statute before the Court of Appeals.

Gudenschwager controls and compels a finding that defendants' appeal is likely to succeed, which weighs in favor of a stay.

II. Irreparable Harm To The Defendants If There Is No Stay

The irreparable harm to the parties "must be evaluated in terms of its substantiality, the likelihood of its occurrence, *and the proof provided by the movant*. [emphasis added]." *Gudenschwager*, 191 Wis. 2d 431 at 441. "[T]he key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.[emphasis in original]." *Griepentrog*, 945 F.2d 150, 154, (quoting *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937 (1974)).

The defendants allege only two irreparable harms: harm to the members of the Wisconsin Employment Relations Commissions (WERC) and harm to the state that is inherent when a statute is enjoined. Def. Br. at 27-28.[1]

Harm to WERC

Defendants assert that the members of WERC "face the prospect of a multitude of prohibited practice complaints" if "local municipal employers and the unions that represent their employees disagree as to the proper interpretation of MERA" as affected by the court's decision, and that "will result in the unnecessary expenditure of significant resources by "WERC, local governments and the unions." Def. Br. at 28. Defendants do not develop any argument that any of these harms are irreparable.

In addition, defendants offered no proof at all of the alleged harm. Statements and arguments of counsel in briefs are not evidence or proof. Because the defendants have not offered any proof of harm to WERC, or any argument that if there is harm it is irreparable, there is no basis on which to find that there is such harm, let alone that it is irreparable, substantial or likely to occur.

Irreparable Harm to the State

Defendants argue that a state always suffers irreparable harm when a statute is enjoined, relying entirely on *New Motor Vehicle Board v. Orrin W. Fox,* 434 U.S. 1345, 98 S.Ct. 359. In that case Chief Justice Rehnquist, acting as Circuit Justice for the 9th Circuit, stayed a federal

[1] Defendants argue in their principal brief and in their reply brief that a denial of the stay will result in confusion and budgeting problems for municipal employers. Except for one conclusory statement on p. 22 of their principal brief, they do not argue in either brief that this is *irreparable* harm. Instead they frame that argument in terms of the public interest factor. Def. Br. pp. 20-26, Reply Br. pp. 7-14. It is discussed below in that context.

court order that enjoined a California automobile franchise law, pending a decision by the Supreme Court whether to grant certiorari. Chief Justice Rehnquist found irreparable harm in the injunction's effect on the state's ability to regulate motor vehicle dealers, and then added "It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Id.* at 1351.

This is a statement of a single justice sitting as a Circuit Justice. It is not a holding of the Supreme Court, so it has persuasive value, but is not precedent. *Territorial Court of Virgin Islands v. Richards*, 674 F. Supp. 180, 181 n.2, (D.V.I. 1987). Its persuasive value is lessened because it is a conclusory statement not supported by any analysis or citation to authority, and is arguably *dicta*, not being essential to the holding of the decision. It has been cited with approval by several Circuit Courts of Appeal, giving it some weight. It has been cited with approval by Chief Justice Roberts, also sitting as a Circuit Justice. *Maryland v. King*, 81 USLW 3045, 81 USLW 3060, 2012 WL 3064878 (U.S. July 30, 2012) (staying a judgment holding that collection of DNA of a person charged but not yet convicted violated the Fourth Amendment). In granting the stay Chief Justice Roberts also relied almost entirely on the "ongoing and concrete harm to Maryland's law enforcement and public safety interests." *Id.* at p. 2 and not on any inherent, irreparable harm.

In this case the defendants make no claim that there is any irreparable harm to the state or municipal employers, other than the abstract or intangible harm inherent in a statute being enjoined. Def. Br. at 27-28. Defendants do not discuss the substantiality of that alleged harm (in fact, they do not address at all the three factors that *Gudenschwager* says a trial court must consider when evaluating irreparable harm). The cursory treatment defendants give this harm implies that it is not very substantial, or at least not very important to their argument for a stay. The court sees no reason to give it greater weight than did the defendants, that is, very little.

Defendants have failed to show that there is an irreparable harm to them that favors a stay.

III. Lack of Substantial Harm To Other Parties

The party asking for a stay must show "that no substantial harm will come to other interested parties." *Gudenschwager* 191 Wis. 2d 431 at 440. This does not mean that a stay can only be granted if the moving party has shown that there is no such harm, because "[t]hese factors are not prerequisites but rather are interrelated considerations." *Id.* at 440, *Scullion* 237

Wis. 2d 498 at ¶29. The failure of a moving party to show that a stay will not harm others does not preclude a stay, but does weigh against it.

Defendants present two arguments to show that a stay will not cause substantial harm to other interested parties.

Delay in Seeking Relief

Defendants argue that plaintiffs waited until "months after the effective dates of Act 10 and Act 32's amendments to MERA" to file their suit and this shows any harm to them is not substantial. This exaggerates the delay. The effectiveness of Act 10 was in doubt until the Supreme Court decision on June 14, 2011 in *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, 334 Wis. 2d 70, 798 N.W.2d 436. Act 10 was republished on June 28, 2011 and Act 32 was published 2 days later. The law suit was filed 7 weeks later on August 18, 2011.

That delay is not long enough to warrant an inference that plaintiffs were unconcerned about the alleged harms to them or that they do not believe those harms are substantial. Plaintiffs' decision not to seek injunctive relief from the outset also does support such an inference. There are many factors that affect a party's decision whether to seek a preliminary injunction. Defendants have failed to show that the court should take the delay and the failure to seek a preliminary injunction as a concession by plaintiffs that the challenged statutes have not caused them substantial harm and that a stay would not cause them substantial harm.

Absence of Harm To MTI From A Stay

The second argument is that Madison Teachers, Inc. (MTI) will not suffer any substantial harm because they have a contract with the school district through 2013.[2] MTI points out that negotiations for a successor contract begin months before the expiration date and if a stay is granted the school district will be prohibited from offering anything more than a cost of living wage increase (unless the wage increase is submitted to public referendum) and also barred from negotiating any other terms relating to wages, benefits, hours or other conditions of employment. It is certain that a stay would have these effects. Indeed, in defendants' view these are among the principal purposes and benefits of the challenged statutes. Defendants have not shown that there will be no economic harm to the plaintiffs or other interested parties from a stay.

In addition, as discussed below, if the stay is granted and statute is found unconstitutional

[2] Affidavits filed by plaintiffs in sur-reply indicate that while this motion was pending the contract was extended until June 30, 2014.

on appeal, the plaintiffs (and tens of thousands of municipal employees) will have suffered irreparable harm in the form of the continued violation of their fundamental constitutional rights by their government. Finally, plaintiffs have also offered an affidavit attesting to the financial harm to members of Local 61 that has resulted from the challenged statutes and that would continue if the stay were granted. Defendants made no attempt to show that there is no substantial harm to Local 61.

Thus, defendants have failed to show that there will be no substantial harm to other interested parties and this weighs against a stay.

IV. Lack of Harm to The Public Interest

Rather than arguing that there will be no harm if the stay is granted, defendants argue the converse, that the public interest will be harmed if the stay is denied. They make three arguments. First, that there is and will be widespread confusion as thousands of non-party municipal employers across Wisconsin, each with unique circumstances face "a shifting and confusing legal landscape." [3] Def. Br. pp.20-21. Second, that union demands for new negotiations may result in prohibited practice claims being brought before WERC, with resulting expense. Def. Br. p. 20. Third, that local governments will face a fiscal crisis as they give in to union demands for wages and benefits that were not provided for in state and local government budgets "while Act 10 was in effect." Def. Br. pp.22-23.

Defendants did not offer any evidence to support these claims with their principal brief, but the court has accepted affidavits improperly filed with defendants' reply brief. The affidavits are from county officials in Brown, Calumet, Douglas, Grant and Oneida Counties and from the superintendents of the Waukesha, Waterford and Menomonee Falls school districts. The language of the county official affidavits is practically identical, except for variations in dollar amounts and the identities of union locals that have demanded negotiations. The affidavits express 1) uncertainty about whether an employer must return to the terms of prior collective bargaining agreements that expired before the effective dates of Acts 10 and 32, 2) concern that the savings resulting from Act 10 will be lost and the counties will be in deficit if the county is required to make employees whole for back wages and 3) concern that counties will have

[3] This seems to conflict with defendants' emphatic and unequivocal position in their reply brief that "This court's order has no binding legal effect on non-parties" including even the governmental units that employ plaintiffs' members. Def. Rep. Br. pp.7-8. If that position is correct it would seem defendants' arguments of public harm and affidavits supporting them, none of which come from plaintiffs' employers, are irrelevant.

difficulty managing their budgets because of uncertainty during the appeal.

The affidavit from the Waukesha School District states that the court's decision has caused "serious questions about how we should and can govern our employees, as well as what kind of budget ramifications we might encounter" and that "many other questions and issues are being raised and it is unclear on how these changes will impact how we need to supervise staff, compensate staff and budget for these potential changes." The affidavit from the Waterford School District states that the Waterford Elementary Teachers Association tabled its vote on a tentative agreement with the District following the court's decision, creating labor and fiscal uncertainty. The affidavit from the Menomonee Falls School District states that the decision adds "another layer of complexity" and laments that the "polarization of the parties has created challenges for school planning."

The affidavits do not identify what language in the court's decision will result in the consequences they fear may occur. They do not say whether affiants have read the decision, analyzed the statutes as they stand after the decision, consulted their own legal counsel or the Attorney General's office for advice or taken any other reasonable steps to allay their confusion and uncertainty. The affidavits, from 8 of Wisconsin's 2,348 local units of government, are presumably intended to be representative. [4] However, they do not include affidavits from any cities, villages or towns, and they are contradicted by affidavits from the Mayor of Madison, the County Executive of Dane County and two members of the Madison Board of Education. They also do not include any affidavits from the City of Milwaukee, presumably the state's largest or second-largest municipal employer and the sole employer affected by the court's decision striking Wis. Stat. §62.623.

Contrary to the impression that may be given by the affidavits, and perhaps by defendants' briefs, the decision did not strike all of Act 10, only certain statutes. The decision only requires municipal employers to bargain in good faith. Nothing in it requires employers to agree to any proposals made in collective bargaining. The decision did not restore binding arbitration; employers can impose a compensation plan and other conditions of employment if bargaining does not produce an agreement. The decision does not require employers to offer payroll deduction of union dues where they currently have no such system; it only eliminates the

[4] According to defendants there are at least 2,348 local government employers. Def. Br. p. 21. n. 6

prohibition against local governments doing so. It does not require the City of Milwaukee to contribute the employee share of contributions to the Milwaukee Retirement System, it only eliminates the prohibition against the City making such contributions as its ordinances may provide.

The trial court's decision was narrow and specific. Defendants' principal brief identified an ambiguity that was caused by the omission of Wis. Stat. §111.70(2) from the court's order. Plaintiffs sought a clarifying order from the court to eliminate that ambiguity, which was granted over defendants' objections. Defendants argue that the court's decision leaves unclear the meaning of the term "wages" in the municipal employment relations statutes. As plaintiffs point out, the term is well defined by decades of administrative decisions and case law.

Defendants also complain that the court did not decide the status of bargaining agents that were decertified prior to the court's decision. Def. Rep. Br. at 9-10. That question was not before the court in the original litigation and is not before it now. Defendants have not made any motions asking the court to address that question, nor have they sought any clarification at all from the court. On the whole, the evidence presented does not support the claims that there is well-founded widespread uncertainty or that dire fiscal consequences are likely if a stay is denied.

Finally, in the discussion of public interests defendants do not address any public interest their may be in denying the stay. In particular, they do not discuss the public interest in preventing continued violation of the Wisconsin and United States Constitutions. The Constitutions are the fundamental expressions of the will of the people acting in their sovereign capacity. Even laws enacted by the legislature and governor, though they may manifest the popular will of their time, are subordinate to them. Even a temporary infringement of fundamental rights of speech and association protected by the Constitutions is an irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, (1976). That infringement becomes all the more substantial when multiplied by the tens of thousands of affected municipal employees (assuming defendants' initial argument that thousands of local governments are affected is correct). Granting a stay would allow that substantial harm to that fundamental public interest to continue.

Article XI, sec. 3(1), of the Wisconsin Constitution, the Home Rule Amendment, is also a strong expression of a public interest in in granting to municipalities control over matters that are

purely local affairs and not of statewide concern. That public interest is harmed by the continued intrusion of the state into a matter that by statute has been unequivocally declared to be a local affair and not of statewide concern.

On balance, the harms to the public interest weigh against a stay.

CONCLUSION

As a matter of law, defendants are deemed likely to succeed on appeal, but that probability is outweighed by the defendants' failure to show irreparable harm to them if a stay is denied and by the harm to others and to the public interest if a stay is granted.

ORDER

For the reasons stated above, the motion for a stay pending appeal is denied. This is a final order as defined in Wis. Stat. §808.03(1) for purposes of appeal.

Dated October 22, 2012.

BY THE COURT:
/S/
Juan B. Colás
Circuit Court Judge

Copy: Counsel BY FAX ONLY