STATE OF WISCONSIN | CIRCUIT COURT Branch 10 | DANE COUNTY

Madison Teachers, Inc. et al.

Plaintiffs,

v.

Case No. 11CV3774

Scott Walker, et al.

Defendants

DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

This lawsuit challenges the constitutionality of statutory changes made by 2011 Wisconsin Acts 10 and 32 (together "the Acts") to collective bargaining, payroll deduction of dues and contributions to pension benefits with respect to municipal employees (including employees of local governments, school districts and special governmental districts. Wis. Stat. § 111.70(1)(i) and (j)) .[1] The plaintiffs have moved for summary judgment and the defendants have moved for judgment on the pleadings. Each opposes the other's motion.

The plaintiffs are Madison Teachers, Inc., a labor union representing employees of the Madison Metropolitan School District, and one of its members, Peggy Coyne, and Public Employees Local 61, a labor union representing employees of the City of Milwaukee, and one of its members, John Weigman. The defendants are Governor Scott Walker and the three commissioners of the Wisconsin Employment Relations Commission ("WERC"), James R. Scott (chair of the WERC), Judith Neumann and Rodney Pasch. All four defendants are sued in their

[1] All statutory references are to the 2009-10 statutes as affected by 2011 Acts 10 and 32, as found on the Revisor of Statutes web site.

official capacities. Amicus briefs were also filed on behalf of the City of Madison and Elijah Grajkowski and considered by the court in reaching its decision.

The amended complaint seeks a declaratory judgment and injunctive relief, alleging:

1) Act 10 was enacted in violation of Wis. Const. Art. IV, sec. 11, which limits the scope of special sessions of the legislature

2) various statutes enacted or amended by the Acts violate plaintiffs' rights of free speech and association under Wis. Const. Art I, §§ 3 & 4 and rights to equal protection under Wis. Const. Art I, § 1. Those statutes are §§ 66.0506 (requiring a referendum for wage increases above the cost of living for represented municipal employees), 118.245 (the same, but for school district employees), 111.70(1)(f) (limiting "fair share" dues agreements to public safety and transit unions), 111.70 (3g) (prohibiting payroll deduction of dues for general employee unions), 111.70 (4)(mb) (prohibiting municipal employers from collectively bargaining with general employee unions on anything but wages) and 111.70 (4)(d)3 (imposing certain certification and recertification requirements on general employee unions),

4) Section 62.623, enacted by the Acts and prohibiting the City of Milwaukee from making the employee's share of pension fund contributions violates the City of Milwaukee's home rule authority granted by Art. XI, sec. 3(1) of the Wisconsin Constitution, is an impairment of contracts in violation of Wis. Const. Art I, sec. 12 and deprives plaintiffs

of property without due process contrary to Wis. Const. Art. I, sec. 1.

Defendants deny that the acts violate any constitutional provisions, assert a number of affirmative defenses and seek dismissal and an award of attorney fees and costs of defending the action. For the reasons stated below, the court finds that:

1) the enactment of Act 10 did not violate the special session limiting clause of the Wisconsin Constitution,

2) Sections 66.0506, 118.245, 111.70(1)(f) and (3)(g) and (4)(d)3 and (4)(mb), violate the plaintiffs' rights of free speech, association and equal protection,

3) § 62.623 as it applies to the City of Milwaukee Employee Retirement System violates the Wisconsin Constitution's Home Rule Amendment and the constitutional prohibition against impairment of contracts, and

4) § 62.623 does not violate the constitutional prohibition against taking a property interest without due process.

Those sections found to be unconstitutional are void and without effect.

METHODOLOGY

In deciding a motion for summary judgment the court first "examines the pleadings to determine whether claims have been stated and a material factual issue is presented." *Preloznik v. City of Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). The court then examines the evidentiary filings to determine whether the moving party has shown a *prima facie* case for summary judgment. *Id.* A defendant moving for dismissal must show a defense that would defeat the claim. *Id.* If a *prima facie* case is shown, the court examines the opposing party's submissions to determine whether there is either a genuine dispute about an issue of

material fact or competing inferences that can be drawn from undisputed facts. *Id.* If either is the case, the motion for summary judgment must be denied. *Id.* If the pleadings are insufficient or a *prima facie* case is not shown the motion must be denied and the court need not proceed further in the analysis. *Myron Soik & Sons, Inc. v. Stokely USA, Inc.*, 175 Wis. 2d 456, 462, 498 N.W.2d 897 (Ct. App. 1993).

"A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents. We first examine the complaint to determine whether a claim has been stated. If so, we then look to the responsive pleading to ascertain whether a material factual issue exists." *Jares v. Ullrich,* 2003 WI App 156, ¶ 8, 266 Wis.2d 322, 667 N.W.2d 843. "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Wis. Stat. § 802.06(3).

Plaintiffs have the burden of proving the unconstitutionality of a statute beyond a reasonable doubt.

In this case the complaint is sufficient, the answer joins issue and as discussed below, the material facts concerning the legislative enactments and their effects are not in dispute.

DISCUSSION

I. THE ATTORNEY GENERAL WAS TIMELY SERVED AND THE COURT HAS JURISDICTION.

Defendants contend the case must be dismissed because the plaintiffs did not serve a copy of the proceeding on the Attorney General as required by Wis. Stat. § 806.04(11). The Attorney General was served on February 15, 2012, after the defendants' brief was filed. The Attorney General need not be named as a party and the statutory deadlines for service upon parties do not

apply. *Town of Walworth v. Village of Fontana-on-Geneva Lake*, 85 Wis. 2d 432, 437, 270 N.W.2d 442 (1978). All that is required is that the Attorney General be served "in time to be heard prior to any determination on the merits of the constitutional claim." *Id.* That requirement was satisfied, since those constitutional claims have not been determined until this decision, there has been ample time for the Attorney General to ask to be heard in his own right and he has not done so. If a defect existed when defendants' brief was filed, it was cured by the subsequent service. The court has jurisdiction and competency to proceed.

II. ARTICLE IV, SECTION 11: SCOPE OF THE SPECIAL SESSION

Article IV, Section 11 of the Wisconsin Constitution authorizes the governor to convene the legislature in special session. A limiting clause states that "when so convened no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened." Act 10 was enacted during a special session. The plaintiffs contend its enactment violated the limiting clause because it was not necessary to the special purposes for which the special session was convened. Defendants argue that whether or not the limiting clause was violated is a non-justiciable question, i.e. inappropriate for judicial consideration and to be decided exclusively by the legislature and the governor. They also argue that Act 10 did not violate the limiting clause.

Justiciability

In general, Wisconsin courts may consider whether the Legislature passed a law conforming with constitutional procedural requirements. *Milwaukee Journal Sentinel v. Wisconsin Dept. of Admin.* 2009 WI 79, ¶ 19, 319 Wis.2d 439, 768 N.W.2d 700; *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 367, 338 N.W.2d 684 (1983); *State ex rel. Ozanne v.*

Fitzgerald, 2011 WI 43, ¶¶ 13,15, 334 Wis.2d 70, 798 N.W.2d 436. Defendants argue that this procedural limitation is different, because the governor defines the scope of the special session and can veto legislation that exceeds the scope of the call. When he does not veto special session legislation, he is thus expressing his conclusion that the legislation was properly enacted. In this view, the limitation on the subject of legislation is solely a protection of the governor's prerogative to define the business to be transacted and he alone can adjudicate and enforce compliance with it.

Twenty-three other states and the Commonwealth of Puerto Rico have constitutional provisions substantially similar to the limiting clause in Article IV, sec. 11.[2] The purpose of these provisions is "to give notice to the public of the subjects to be considered, in order that persons interested may be present if they desire, and also it is a check upon legislative action, that no matters outside the proclamation shall be acted on." *Richmond v. Lay*, 261 Ky. 138, 87 S.W.2d 134, 135-36 (1935), 1 Statutes and Statutory Construction § 5.4 (Norman J. Singer and J.D. Shambie Singer, Thomson Reuters, 7th ed. 2010). Defendants do not cite any case (and the court has not found any) in any state holding that compliance with such a limiting clause is not a justiciable question. In contrast, there are a number of cases in various states, including Wisconsin, in which courts have decided whether particular legislation complied with a state's limiting clause.

Defendants rely on the political question doctrine as stated in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691. (1962). In that case the United States Supreme Court rejected a claim that the constitutionality of legislative reapportionment was nonjusticiable. It reviewed cases involving the "political question doctrine" and extracted from them the following elements, one or more of

[2] AL, AK, AZ, AR, CA, CO, FL, GA, ID, IL, LA, MI, MS, MO, NV, NM, NY, OH, OK, PA, PR, SD, TX, UT

which must be present to deem an issue a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

The court also stated the following caution:

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence...The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.

Id..

The two elements of a nonjusticiable question that defendants argue are present are a "textually demonstrable constitutional commitment of the issue to a coordinate political department" and "a lack of judicially discoverable and manageable standards for resolving it."

Defendants find the constitutional commitment of the issue to the legislative and executive branches of government in the general power of the governor to veto any legislation, including special session legislation. This is unpersuasive.

First, the power to veto is a general one, not one granted specifically to address violations of the special session limiting clause. The governor may veto any bill, special session or not, for any reason or for no reason at all. The general veto power is not a "textually demonstrable constitutional commitment" to the governor of the power to determine violations of the special

session limiting clause.

Second, this argument treats the limiting clause as existing solely to protect gubernatorial privilege and ignores the public interest served by the clause. The clause is a restraint on the power of the legislature to act in special session, enacted for the public interest by the people of Wisconsin in their constitution. That the people gave to the governor authority to define the scope of the special session does not mean that they also committed to him the exclusive authority to determine compliance with it, when there is no language saying so or from which that intent could be inferred.

The clause is not merely a rule or statute adopted by the legislature from which the legislature may exempt itself, nor can it be brushed aside by political accommodation between the governor and the legislature. The clause is mandatory by its language and legislation enacted in violation of such a mandatory clause is void. *See*, e.g. *State v. Pugh*, 31 Ariz. 317, 320, 252 P. 1018, 1019 (1927); *State ex rel. Ach v. Braden*, 125 Ohio St. 307, 314, 181 N.E. 138, 141 (1932); *Jones v. State*, 151 Ga. 502, 107 S.E. 765, 766 (1921).

Finally, the position that the governor's assent to legislation requires courts to sustain its constitutionality has been rejected by courts that have considered it. *Jones v. State*, 151 Ga. 502, 107 S.E. 765, 766-67 (1921); *Trenton Graded Sch. Dist. v. Bd. of Educ. of Todd County*, 278 Ky. 607, 129 S.W.2d 143, 145 (1939); *Wells v. Missouri Pac. Ry. Co.*, 110 Mo. 286, 19 S.W. 530, 532, 15 L.R.A. 847 (1892); *Long v. State*, 58 Tex. Crim. 209, 211, 127 S.W. 208, 209, 21 Am. Ann. Cas. 405 (1910).

The argument that there is "a lack of judicially discoverable and manageable standards for resolving" the question of compliance also fails. The best evidence of this is that there are

numerous cases in several states, including Wisconsin, in which courts have actually applied such standards and resolved such questions.

In deciding whether an act is within the scope of a special legislative session the language of the act and of the special session call are to be "reasonably construed." *Appeal of Van Dyke*, 217 Wis. 528, 541, 259 N.W. 700 (1935). The governor's purpose is to be read "broadly." *Id.* at 542. Other states' courts have also articulated helpful guidance. "In order to interpret the proclamation of the Governor, we are bound to give the words used the same fair and reasonable meaning and intendment which we apply when considering a statute, and the general scope and sufficiency of the proclamation is to be determined by the same well-known rules." *In re Likins*, 223 Pa. 456, 72 A. 858 (1909). "Legislation incidental to or germane to the subjects expressed in the Governor's proclamation must be upheld as within his call. The proclamation must be liberally construed, to the end that the legislation enacted pursuant thereto be operative.[citation omitted]" *Pierson v. Hendricksen*, 98 Mont. 244, 38 P.2d 991, 993 (1934). Germaneness is "determined by an analysis and construction of [the call] as in the case of any other written instrument, and by a like analysis and construction of the legislation drawn in question for the purpose of deciding whether it is embraced within the call, or message. ... the presumption is always in favor of the constitutionality of an act, and that any piece of legislation so under consideration should be held within the call, if it can be done by any reasonable construction." *State v. Woollen*, 128 Tenn. 456, 161 S.W. 1006, 1014-15, 1 Thompson 456, Am. Ann. Cas. 1915C, 465 (1913).

Was Act 10 Properly Enacted In The Special Session?

The material facts concerning the call of the special session are not in dispute. The

special session of the legislature was called by Executive Order 1, issued by Governor Scott Walker on January 3, 2011.[3] The scope of the special session was expanded by Executive Order 4, issued by the governor on January 13, 2011. Act 10 plainly does not fall within the purposes stated in either of these orders, and defendants do not contend that it does.

On February 11, 2011 the governor further amended the call by Executive Order 14, which states in relevant part "In addition to considering the legislation previously specified in Executive Orders #1 and #4, the Legislature shall consider and act upon legislation relating to the Budget Repair Bill." On the same day the Secretary of the Department of Administration sent the legislative leadership and the co-chairs of the Joint Finance Committee a letter on behalf of the governor forwarding "budget adjustment legislation." The summary of the legislation contained in the letter includes changes in state, school district and local government employee compensation and in state, school district and local government collective bargaining. *Pltff. Aff. Exh.* D at pages 2-3. On February 15, 2011 the Assembly Committee on Organization, at the request of the Governor, introduced January 2011 Special Session Assembly Bill 11, which would later become Act 10. The bill's subject matter, according to its relating clause, includes "collective bargaining for public employees, [and] compensation and fringe benefits of public employees." The Legislative Reference Bureau's analysis further describes the changes the bill would make to statutes at issue here.[4]

Plaintiffs argue that the expansion of the special session by Executive Order 14 was limited to the purpose of "budget repair." This reading ignores the fact that the purpose stated in

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[3] The Executive Orders and other documents are contained in appendix to plaintiff's brief. The documents are not certified and the appendix is not accompanied by an affidavit, but the admissibility of the documents in the appendix is not challenged and the court admits them as evidence.

[4] The court takes judicial notice of the text of the bill as found on the Legislature's web site, https://docs.legis.wisconsin.gov/2011/related/proposals/jr1_ab11

Executive Order 14 was "to consider and act upon legislation relating to the Budget Repair *Bill*. [emphasis added]" It is not disputed that "Budget Repair Bill" as used in the Executive Order refers to the proposal submitted to legislative leadership on the same day the order was issued and described in the letter as "the budget adjustment legislation." Liberally construing the special session call, in favor of the constitutionality of the Act, the purposes of the call were those contained in the bill to which it referred. Because the scope of the session was defined by the bill itself, any business germane to the bill would have been germane to the session. All of the provisions of Act 10 that are at issue in this case, or some version of them, were in the original bill and thus of necessity were germane to it and to the special session.

Plaintiffs argue that the scope of the special session cannot be defined by a bill introduced after the proclamation of the special session. The question in evaluating the governor's call is whether it served the purposes of notice to the public and the legislature of the nature of the business to be conducted at the special session. Those purposes were served in this case by the specific reference in the proclamation to the Budget Repair Bill and the concurrent submission of the legislation and a summary of it to the legislative leadership.

Act 10 was within the scope of the governor's special session proclamation.

III. VIOLATION OF RIGHTS OF FREE SPEECH AND ASSOCIATION, WIS. CONST. I, §§3 & 4

Plaintiffs contend that the statutory changes interfere with their associational rights by imposing burdens and penalties upon those employees who are represented by or belong to a union.

The alleged burdens are that the challenged statutes prohibit municipal employers from:

- offering represented employees a base wage increase greater than the cost of living (Wis.

Stat. §111.70(4)(mb)2),

- collectively bargaining with represented employees on any factor or condition of employment other than wages (§111.70(4)(mb)1),
- entering into a "fair share" agreement, i.e. an agreement that all members of a bargaining unit, whether they belong to the unit's union or not, pay a proportionate share of the costs of bargaining and contract administration (§111.70(2),
- deducting membership dues for a labor organization from wages of members of a labor organization (§111.70(3g)),

The prohibitions against offering base wage increases above the cost of living or negotiating on other terms of employment do not apply to employees who are not represented by a union. The absolute prohibition on deducting membership dues from wages applies only to membership dues for general employee labor organizations; another clause permits dues deductions for public safety and transit unions under certain conditions.

Other alleged burdens are imposed through the certification process contained in §111.70(4)(d)3.b[5]:

- The union must undergo an annual recertification election and must pay a fee for each such election.
- The union must petition for the annual election or be automatically decertified
- The union must receive 51% of all employees in the bargaining unit, not just of those voting in the election.
- For 12 months after recertification municipal employees are required to be unrepresented and may not petition for representation.

[5] On March 30, 2012 in WEAC, et. al. v. Scott Walker, et al., 11CV428-wmc, the U.S. District Court for the Western District of Wisconsin declared §111.70(4)(d)3.b. unconstitutional and null and void.

Defendants argue that the statutes burden the economic effectiveness of plaintiffs' associational activities, but do not burden plaintiffs' right to associate. The statutes, they argue, only "limit the panoply of collective bargaining privileges afforded Plaintiffs" and do not impair their right to "associate together in the first instance." The changes do not prohibit public employees from associating for the purpose of collective bargaining, or for other purposes, or from writing letters, holding meetings or petitioning the government.

The Wisconsin Constitution guarantees at least the same freedoms of speech and rights of association as the 1st and 14th Amendments to the United States Constitution. Wis. Const. Article I, §§ 3 and 4, *Lawson v. Housing Authority of City of Milwaukee*, 270 Wis. 269, 274, 70 N.W.2d 605 (1955). "If [a law] violates the 1st Amendment of the U.S. Constitution it follows as a necessary corollary thereby that it also violates either sec. 3 or 4, Art. I of the Wisconsin constitution, or both." *Id.* at 282. "The holding out of a privilege to citizens by an agency of government upon condition of non-membership in certain organizations is a more subtle way of encroaching upon constitutionally protected liberties than a direct criminal statute, but it may be equally violative of the constitution." *Id.* at 275. Persons, even if they have no right to a legislatively conferred benefit, cannot be required as a condition of receiving that benefit, to surrender constitutional rights, "unrelated to the purpose of the benefit" or be required "to comply with unconstitutional requirements." *Id.* at 277-78.

In *Lawson* the issue was a federal law, the Gwinn Amendment, that prohibited members of "subversive organizations" from being tenants in federally subsidized housing. *Id.* at 279. In the case of housing, if the law is to be "upheld against the charge that it invades freedoms guaranteed by the First Amendment it must be upon the basis of combating the threat of danger

to the successful operation of public housing projects which might result from the infiltration of such housing facilities by tenants bent upon the overthrow of the government by force." *Id.* at 284. "Congress may impinge upon the freedoms guaranteed by the First Amendment in order to prevent a substantial evil." *Id.*

The defendants rely primarily on two cases. In *Hanover Twp. Fed'n of Teachers, Local 1954 (AFL-CIO) v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456 (7th Cir. 1972), the court noted that certain union activities, such as promoting membership, advocating organization of the union, and expression of the union's views to its members and to the public, were constitutionally protected. *Id.* at 460. But the court rejected the allegation that tendering contracts to individual teachers while bargaining was under way infringed on the constitutional right of association because all teachers, union and non-union, were offered the same contract. *Id.* at 462.

In *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 465, 99 S. Ct. 1826, 1828 (1979), the court agreed that public employees were entitled to engage in pro-union activities and were protected from discrimination or retaliation for those activities. However, it held that the requirement that all employee grievances, of both union members and non-members, be submitted by the employee (rather than through the union in the case of union members) treated all employees equally and ignored the union, but did not discriminate against its members. *Id.* at 466. In neither case was there evidence of different treatment because of union membership.

It is undisputed that there is no constitutional right to collective bargaining. Similarly, there is no constitutional right to a government-subsidized housing program. Yet the courts have held that once the government elected to offer subsidized housing it could not condition

eligibility for it upon surrender or restriction of a constitutional right unless that surrender or restriction was necessary to prevent a substantial evil that would threaten the operation of the program. *Lawson*, 270 Wis. at 287. In the same way, when the government elects to permit collective bargaining it may not make the surrender or restriction of a constitutional right a condition of that privilege.

Although the statutes do not prohibit speech or associational activities, the statutes do impose burdens on employees' exercise of those rights when they do so for the purpose of recognition of their association as an exclusive bargaining agent. Unlike in *Hanover* and *Smith*, in which all employees were treated the same with respect to the actions at issue, in the statutes at issue, the state has imposed significant and burdensome restrictions on employees who choose to associate in a labor organization. The statutes limit what local governments may offer employees who are represented by a union, solely because of that association. It has prohibited general municipal employees from paying union dues by payroll deduction, solely because the dues go to a labor organization (unlike the restrictions found constitutional in *Ysursa v. Pocatello Educ. Assn.*, 555 U.S. 353, 129 S.Ct. 1093 (2009), which prohibited payroll deduction of dues for any political activities of any organization, regardless of viewpoint, identity or purpose). Employees may associate for the purpose of being the exclusive agent in collective bargaining only if they give up the right to negotiate and receive wage increases greater than the cost of living. Conversely, employees who do not associate for collective bargaining are rewarded by being permitted to negotiate for and receive wage increases without limitation. The prohibition on fair share agreements means that employees in a bargaining unit who join the union that bargains collectively for them are required to bear the full costs of collective bargaining for the entire

bargaining unit, including employees in the unit who do not belong to the union but receive the benefits of the bargaining. Unions are required to be recertified annually, even if there has been no request for recertification and the full costs of the election are borne by the employees in the bargaining unit who are members of the union. Statutes that burden the exercise of a constitutional right for a lawful purpose and reward the abandonment of that right infringe upon the right just as did the prohibition in *Lawson* against members of certain associations residing in public housing.

Sections 66.0506, 118.245, 111.70(1)(f), 111.70 (3g), 111.70 (4)(mb) and 111.70 (4)(d)3 single out and encumber the rights of those employees who choose union membership and representation solely because of that association and therefore infringe upon the rights of free speech and association guaranteed by both the Wisconsin and United States Constitutions.

These are fundamental rights and the infringement having been shown, the burden shifts to the defendants to establish that the harm done to the constitutional right is outweighed by the evil it seeks to prevent. Because defendants contend there is no infringement of the rights of speech and association, they offer no evidence or argument of the substantial evil the government seeks to prevent by the infringing provisions. Without any evidence or argument that the infringement serves to prevent an evil in the operation of the bargaining system created by the statutes, the court must find the infringement to be excessive and to violate the constitutional rights of free speech and association.

IV. VIOLATION OF EQUAL PROTECTION

Put simply, equal protection is the constitutional obligation government has to treat people equally when they are similarly situated, unless it has a reason not to. If a fundamental

right is affected, the reason must be a very good one.

A challenger on equal protection grounds must show that "the statute treats members of a similarly situated class differently." *Professional Police Association v. Lightbourn,* 2001 WI 59, ¶ 221, 243 Wis. 2d 512. The courts will usually uphold a statute challenged on equal protection grounds if "a rational basis supports the legislative classification." *Id.* However, strict scrutiny, a higher standard, applies when the right affected by the classification is a fundamental right. *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90.

Defendants argue that rational basis scrutiny applies because the statute does not infringe on constitutionally protected rights and the mere allegation of infringement is not enough to invoke strict scrutiny. As explained in Section III, the court has determined that in this case there is such an infringement. As noted above, unlike in *Ysursa*, the statutes here single out for special requirements and prohibitions, those employees who choose to belong to certain organizations (and those organizations), solely because of the purposes for which the organizations are formed and the employees choose to associate. Strict scrutiny applies, not because the complaint alleged infringement, but because the court has found infringement.

The question becomes is whether the statutes create distinct classes. They do. The two classes are 1) general municipal employees who are represented by a labor organization in bargaining and 2) general municipal employees who are not. Defendants argue that the statute does not create the classification, but rather employees do so by choosing the class to which they will belong. Defendants offer no authority for that position. The argument ignores the facts that the challenged statutes create the classes, the classes are exclusive, and that municipal employees must be in one or the other.

Plaintiffs argue that the employees in the two classes are "similarly situated," i.e. other than the class they belong to under the statute, there is no difference between a represented employee and an unrepresented employee. Defendants contend that the employees are not similar situated because "there is a critical difference between represented and non-represented employees with respect to the budgetary impacts of wage increases." In other words, when negotiating with individual employees an employer can manage its budget more easily because it can offset wage increases for some employees by lower or no increases for others. This is a difference in effect on the employer, not a difference among classes of employees or their jobs. It is perhaps a reason for creating the classes, but not a difference between members of the classes. Defendants offer no other differences between the employees in the two classes, and it is plain that they are similarly situated.

Defendant next argues that §111.70(3g) does not create classifications with respect to payroll deduction for dues because it simply prohibits deductions to one kind of organization, but does not authorize deductions for other organizations. This argument ignores that with respect to payroll deductions, the statutes create three classes of organizations (and employees): general employee labor organizations, public safety and transit labor organizations and all other organizations. The statutes prohibit payroll deduction for dues of general employee labor organizations, allow deductions for dues of public safety and transit labor organizations, and do not regulate payroll deduction of dues for any other kind of organization. These classes are similarly situated and unequally treated.

Because defendants rest on their argument that only rational basis scrutiny applies, they offer no defense of the statute that would survive strict scrutiny, thus conceding that the disparate

treatment is unconstitutional when subjected to strict scrutiny.

V. VIOLATION OF MILWAUKEE HOME RULE

The Acts also created Wis. Stat. § 62.623, which prohibits the City of Milwaukee from paying the employee share of contributions to the City of Milwaukee Employee Retirement System ("Milwaukee ERS"). That amount is 5.5% of the employee's qualifying compensation. Plaintiffs argue that this violates the Wisconsin Constitution's Home Rule Amendment because Sec. 36-08-07-a-1 of the City of Milwaukee's Charter Ordinances includes a provision that the city shall make the employee's share of contributions for employees hired before January 1, 2010.

The Home Rule Amendment, Article XI, sec. 3(1) of the Wisconsin Constitution, grants municipalities the right to "determine their local affairs and government subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or village."

The Milwaukee ERS was created by Ch. 396, Laws of 1937. It was modified by Sec. 31, Ch. 441, Laws of 1947, which created a provision stating:

> For the purpose of giving to cities of the first class the largest measure of self-government with respect to pension annuity and retirement systems compatible with the constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this act are matters of local affair and government and shall not be construed as an enactment of statewide concern.[6]

Defendants argue that the Home Rule amendment permits legislative regulation of matters that are local affairs, as long as the legislation affects with uniformity every city and village. In support they cite *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25 (1936).

In *Van Gilder*, the issue was whether the Home Rule Amendment entitled the City of

[6] Milwaukee is currently the only city of the first class under state statutes..

Madison to adopt a charter ordinance electing not to be bound by Wis. Stat. § 62.13(7), which limited decreases in salaries of police officers. Van Gilder was a deceased police officer. His estate sought to invalidate the "opt-out" ordinance and thus void a salary reduction that exceeded the limits of § 62.13(7) and recover for the estate the back pay to which the decedent would have been entitled.

The Home Rule Amendment is a constitutional limitation on the power of the Legislature. It both directly grants legislative power to municipalities and limits the legislature's exercise of its legislative power. *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526, 253 N.W.2d 505 (1977). When a power is conferred by the home rule amendment, it is within the protection of the constitution and cannot be withdrawn by legislative act. *Van Gilder*, 267 N.W.. at 30. The term "'local affairs' is subject to a liberal interpretation in the interest of self-government. [citations omitted]." *Id.* at 30. Furthermore, "[t]he legislature's determination of whether a matter is of 'state wide concern' is not absolutely controlling, but is entitled to great weight." *Id.* at 31.

The Supreme Court, in *Michalek*, held there were three kinds of legislative enactments for purposes of the Home Rule Amendment: "(1) Those that are exclusively of statewide concern, (2) those that "may be fairly classified as entirely of local character;" and (3) those which "it is not possible to fit exclusively into one or the other of these two categories. 77 Wis. 2d at 527.

To those in the mixed category, the court applies a paramountcy test, i.e. is the matter primarily a local affair or one of statewide concern? *Id.* at 528. "As to an area solely or paramountly in the constitutionally protected area of 'local affairs and government...[the legislature's] pre-emption or ban on local legislative action would be unconstitutional." *Id.* at

529.

The first step is to determine into which of the three categories § 62.623 fits: solely local, solely statewide, or mixed. The starting point is the explicit expression of the legislature in Ch. 441, which must be given great weight. Defendants argue that its force is diminished by the language "compatible with the constitution and the general law." It is not clear what is meant by "the general law." First it is unclear whether "the general law" refers to the general body of law, or to "general laws" as the Wisconsin Constitution uses that term. Laws applying solely to cities of the first class, i.e. Milwaukee, as does § 62.623 have been held to be general laws, rather than special laws. *Fed. Paving Corp. v. Prudisch*, 235 Wis. 527, 293 N.W. 156, 159 (1940)

However, giving that meaning to "the general law" in this context would make the entire section meaningless. The section would then grant Milwaukee home rule with respect to state legislation except when there was state legislation affecting Milwaukee. In order to avoid an absurd result and preserve the meaning of the § 31 of Ch. 441, "the general law" can only mean those laws, or that body of law, not solely affecting the Milwaukee ERS.

Defendants argue that the holding in *Van Gilder* and the legislative intent implied by the original creation of the Milwaukee ERS in Ch. 396, Laws of 1937 and the enactment of § 62.623 weigh against the specific legislative statement in Ch. 441 that the Milwaukee ERS is a local affair.

Defendants read *Van Gilder* as holding that compensation of municipal employees is a matter of statewide concern, but that overstates the holding. *Van Gilder* found "the preservation of order, the enforcement of law, the protection of life and property and the suppression of crime are matters of statewide concern." 267 N.W. at 32. As a result, it held "the matter of the

compensation of the police officers of the city is a part of a matter of state-wide concern" and therefore the City of Madison could not elect to withdraw from the application of § 62.13. *Id.* at 35. At most, *Van Gilder* stands for the proposition that compensation of law enforcement officers, and perhaps other public safety employees, is a matter of statewide concern. The plaintiffs here do not fall into those categories and *Van Gilder* is no counterweight to the language in Ch. 441.

Defendants argue that legislative intent that the Milwaukee ERS is a matter of statewide concern can be inferred from the enactment of the original law creating the system and the enactment of § 62.623. Ch. 396, Laws of 1937 contained no declaration of intent. Any legislative intent that might be inferred from the fact of its enactment was superseded by the later enactment of Ch. 441 with its explicit statement. Moreover, Section 62.623 does not contain any statement of legislative intent with respect to the Home Rule Amendment. If mere enactment expresses a legislative finding that a matter is of statewide concern, then the enactment of any legislation would be such an expression. The enactment of legislation without an explicit legislative finding that the matter addressed is of statewide concern is of little weight against an explicit finding to the contrary by the legislature.

Defendants do not offer any other evidence to counter the great weight to be given to Ch. 441's explicit statement. Consequently, the court finds that the allocation of responsibility for contributions to the Milwaukee ERS between the City and its employees is a "local affair" for purposes of the Home Rule Amendment under *Michalek*. A statute that alters it is an unconstitutional intrusion into a matter reserved to the City of Milwaukee.

VI. IMPAIRMENT OF CONTRACT

Charter Ordinance § 36-13-3-g states that every participant in the ERS has a "vested and contractual right to the benefits in the amount and on the terms and conditions as provided in law on the date the combined fund is created." Plaintiffs argue that among the benefits, terms and conditions provided by Ch. 36 of the Charter Ordinance is the obligation that the city pays the employee's share of retirement contributions. Thus, § 63.623 alters that contractual right by prohibiting the City of Milwaukee from making those contributions.

Article I, sec. 10 of the United States Constitution and Article I, sec. 12, of the Wisconsin Constitution both bar impairment of contracts. The bar on impairment of contracts is based on the principle that the government may not alter the terms that parties have agreed to in a contract by subsequent legislation unless there is a weighty justification. There is a three-part test to determine whether legislation violates the bar against impairment of contracts. First, the legislation must impair an existing obligation. Second, the impairment must be substantial. Third, the purpose of the legislation must be examined to determine whether the impairment is justified. *Reserve Life Insurance Company v. LaFollette*, 108 Wis. 2d 637, 644, 323 N.W.2d 173 (Ct. App. 1982)..

Defendants argue that changing who is obliged to make retirement contributions is not an impairment because the relevant section of the charter ordinance does not create a contractual right to employer "contributions." They further argue that the ordinance's phrase "terms and conditions," which is in the ordinance, cannot include "contributions" because § 36-13-2-d states that contributions "shall not in any manner whatsoever affect, alter or impair any member's rights, benefits or allowances" thus creating a clear distinction between "contributions" and

"rights, benefits [and] allowances." In addition, it is argued that "benefits" means benefits as defined in § 36-05, which does not include contributions.

Section 36-05 does not define the terms "benefit" or "benefits," but describes various kinds of benefits payable under the contract, the formulas governing them, and the qualifications for receiving them. When a statutory term is not defined, it is given its common and ordinary meaning. The amount one contributes to a retirement or pension fund is plainly one of the "terms and conditions" of participating in the fund, and increasing the amount the employee is required to contribute diminishes the value of the benefit for which the employee has contracted.

But protection against impairment of the City's obligation to pay the employee's share of contributions does not depend upon § 36-13-3-g. Section 36-08-7-a-1 is a contractual obligation for the City to make those contributions and is subject to the limitations on impairments in the Wisconsin and United States Constitutions. Even if the obligation to make those contributions is not within the meaning of the phrase in § 36-13-3-g, it is protected by the contracts clause.

Defendants argue that even if there is an impairment, it is not substantial, considering the lengthy history of heavy regulation of municipal employee pension plans and because the impairment serves a legitimate public purpose.

Defendants rely on *Chrysler v. Kolosso Auto Sales*, 148 F.3d 892 (7th Cir. 1998). Chrysler's contract with Kolosso prohibited Kolosso from moving without consent from Chrysler. Chrysler refused to approve a move and Kolosso challenged the refusal under a state law regulating such provisions that was enacted after the contract. Chrysler sought to enjoin the challenge on grounds that the statute unconstitutionally impaired its contract. *Id.* at 893. The court agreed that the statute changed the contract to Chrysler's disadvantage and would cause

Chrysler added expense. *Id.* at 894.

In the statement relied on by defendants, the court held that "because the contract clause is not applied literally, the fact that the state makes a contract more costly to one party is not enough to establish a violation." *Id.* at 894. But *Kolosso* does not hold that an increase in cost to one party cannot be a violation, only that the analysis does not end with a showing of increased cost.

Foreseeability of the state's action is central to whether the contracts clause has been violated. *Id.* at 984-95. In *Kolosso*, the statute enacted "was in the direct path of the plausible (though of course not inevitable) evolution of Wisconsin's program for regulating automobile dealership contracts ...and constituted only a small and predictable step along that path." *Id.* at 895. "Chrysler should have known [when it made the contract] that it did not have a solid right to prevent a dealer from changing the location of the dealership, that it was operating in a grey area of the dealership law, [and] that the law might some day be amended to regulate disputes over relocation specifically." *Id.* at 897.

An argument based on *Kolosso* fails because the impairment here was not foreseeable for three reasons. First, because of the express language against retroactive impairment found in the ordinance. Second, because the state had not been involved regulating the Milwaukee ERS in the 64 years between Ch. 441 and Act 10. Third, because the Home Rule Amendment and Ch. 441 barred the state from altering the Milwaukee ERS.

A persuasive case is *Abbott v. City of Los Angeles*, 50 C.2d 438, 326 P.2d 484 (1958). The California Supreme Court found unconstitutional 1925 and 1927 ordinance amendments that replaced pension benefits that increased in tandem with salaries of active employees with fixed

benefits and also required members of the system to contribute 4% of their salary to the fund, when the employer had previously made the full contribution. The court found that rising costs to the city, and speculation about future effects on the city and taxpayers, were not enough to excuse the city from its contractual obligations. *Id.* at 455. The city was unable to show the amendments were necessary to "the preservation or protection of the pension program applicable" to the affected employees. *Id.*

In the present case, i.e. the elimination of a benefit equal to 5.5% of an employee's compensation, is a substantial impairment, and the defendants do not meet plaintiffs' *prima facie* case with any evidentiary facts or expressions of legislative intent which would support a finding that the challenged change was necessary for the preservation of the Milwaukee ERS. Therefore, the plaintiffs have established beyond a reasonable doubt that § 63.623 violates the contract clauses and is unconstitutional and null and void.

VII. DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Plaintiffs argue that § 62.623's shifting of the payment of the employee share of contributions from the city to the employee is also deprivation of property without due process of law in violation of the constitution.

The first question is whether the plaintiffs had a property interest in the city paying the employee share and whether that property interest has been taken. "To have a property interest in a benefit a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an

independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* The ordinance here created an entitlement to a certain benefit of employment with the City of Milwaukee: payment by the city of the employee's share of contributions to the pension plan. It is clearly an interest in a benefit to which the employee has a legitimate claim stemming from the ordinance and which is taken from the employee by Wis. Stat. § 62.623.

The second question is whether the adoption of § 62.623 afforded the plaintiffs the required due process. When legislation alters a benefit in which a person has a property interest "[t]he legislative determination provides all the process that is due [citations omitted]" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33, 102 S. Ct. 1148 (1982). Legislation may still violate the due process clause if it is "wholly arbitrary or irrational." *Id.* In this case the plaintiffs have failed to make a *prima facie* case that the legislation was wholly arbitrary or irrational and therefore that the legislative process did not afford due process of law.

ORDER

For the reasons stated above, the court grants summary judgment in favor of the plaintiffs, denies the defendants' motion for judgment on the pleadings and declares that Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70 (3g), 111.70 (4)(mb) and 111.70 (4)(d)3 violate the Wisconsin and United States Constitution, and Wis. Stat. § 62.623 violates the Wisconsin Constitution and all null and void. This is a final order as defined by Wis. Stat. § 808.03(1) for purposes of appeal.

Dated September 14, 2012.

BY THE COURT:

Juan B. Colás
Circuit Court Judge

Copy: Counsel