

KENOSHA EDUCATION ASSOCIATION,

Petitioner,

vs.

CASE NO.: 14-CV-214

CASE CODE: 30607

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

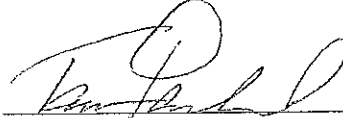
Respondent.

PETITIONER'S MOTION FOR STAY

Petitioner Kenosha Education Association, by its attorneys, Cullen Weston Pines & Bach LLP, respectfully moves this Court for an order pursuant to Wis. Stat. § 227.54 staying the Notice of Consequences, Decision and Order issued by Respondent Wisconsin Employment Relations Commission on February 5, 2014 pending a decision on the Petition for Judicial Review. The grounds for this Motion are provided in the Memorandum filed concurrently herewith.

Dated this 18th day of March, 2014.

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PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION FOR STAY

KEA filed a Petition for Judicial Review on February 12, 2014 seeking review of the WERC Notice of Consequences, Decision, and Order dated February 5, 2014 ("Order"). In its Order, WERC purported to terminate KEA's certification as the collective bargaining representative for employees of the Kenosha Unified School District. WERC's reasoning is that KEA failed to file a petition for election as required by Wis. Stat. 111.70(4)(d)3.b ("the Act 10 Provision") and Wis. Admin. Code § ERC 70.03(7), promulgated by WERC pursuant to the Act 10 Provision.

In a decision dated September 14, 2012, the Dane County Circuit Court issued a declaratory judgment finding that Wis. Stat. § 111.70(4)(d)3.b is facially unconstitutional. The WERC Commissioners, in their official capacities, are parties to that lawsuit, which is currently pending on appeal to the Wisconsin Supreme Court. That judgment has not been overturned by the Wisconsin Court of Appeals or the Wisconsin Supreme

Court, and both of those courts have explicitly denied the Commissioners' motions to stay it.

Despite the binding nature of the Dane County Circuit Court's judgment on the WERC, the WERC has disregarded that judgment, claiming that the Supreme Court's dissolution of a later contempt order gives it license to do so. As shown below, the dissolution of the contempt order had no such effect. The Supreme Court of Wisconsin has left undisturbed the Dane County Circuit Court's declaratory judgment. Absent a stay, KEA and its members will be substantially and irreparably harmed by WERC's action purporting to decertify KEA for purposes of representing employees of the Kenosha Unified School District in collective bargaining.

I. BACKGROUND.

The Act 10 Provision and other portions of 2011 Wis. Act 10 have been the subject of ongoing litigation over the past three years. In a declaratory judgment issued September 14, 2012, the Dane County Circuit Court found the Act 10 Provision to be facially unconstitutional, in violation of the Wisconsin Constitution's guarantees of free speech and association, as well as equal protection under the law. The Wisconsin Court of Appeals and the Supreme Court of Wisconsin each considered whether to stay the Circuit Court's judgment pending appeal and declined to do so. Therefore, the Circuit Court's declaratory judgment finding that the Act 10 Provision is facially unconstitutional remains in effect. Accordingly, WERC issued its Order without any lawful authority.

II. ARGUMENT.

This Court is expressly authorized pursuant to Wis. Stat. § 227.54 to order a stay during the pendency of a judicial review proceeding under Wis. Stat. § 227.52. Wis. Stat. § 227.54 provides, in pertinent part: “The reviewing court may order a stay upon such terms as it deems proper.” A stay is appropriate where the movant:

- (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
- (2) shows that, unless a stay is granted, it will suffer irreparable injury;
- (3) shows that no substantial harm will come to other interested parties; and
- (4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). “These factors are not prerequisites but rather are interrelated considerations that must be balanced together.” *Id.* For the reasons stated below, KEA has satisfied this standard.

A. The WERC Order Purporting To Decertify KEA Is Without Any Basis In Law, Was Issued *Ultra Vires*, And Is Null And Void.

In its Order, WERC unsuccessfully attempts to escape the indisputable fact that the statute upon which its Order is based – Wis. Stat. § 111.70(4)(d)3.b – has been found to be facially unconstitutional, and that determination has not been overturned or altered in any way. WERC states that it was prevented from issuing its Order earlier than it did due to the Dane County Circuit Court’s October 21, 2013 contempt order, but that following the Supreme Court of Wisconsin’s order vacating the contempt order, WERC can now lawfully issue its Order. WERC thus concludes in its Order that “there is no legal impediment to enforcing the notice of consequences requirement.” WERC’s position is flawed and unsupported by law.

The Dane County Circuit Court issued a declaratory judgment on September 14, 2012 declaring certain provisions of 2011 Wis. Act 10 to be facially unconstitutional, null, void, and without effect. The State Defendants in that case, including the WERC Commissioners sued in their official capacity, filed a motion for stay which the Circuit Court denied on October 22, 2012. The Court of Appeals subsequently denied a motion for stay as well, on March 12, 2013. In an order dated September 17, 2013, the Circuit Court unequivocally told the WERC Commissioners that they were “bound by the court’s [September 14, 2012] judgment, even as to non-parties. . .” (KEA was not a party in that lawsuit.) On October 21, 2013, the Circuit Court held WERC Commissioners James R. Scott and Rodney G. Pasch in contempt for their continued enforcement of the unconstitutional portions of Act 10 despite the declaratory judgment. The State Defendants, including the WERC Commissioners, sought a stay of the Circuit Court’s contempt order from the Court of Appeals, which denied that motion on November 4, 2013. They also sought a stay of both the declaratory judgment and the contempt order from the Supreme Court. On November 21, 2013, the Supreme Court denied the motion to stay the declaratory judgment but vacated the Circuit Court’s contempt order on the grounds that such order interfered with its appellate jurisdiction.

Therefore, the Court of Appeals and Supreme Court left in effect the Circuit Court’s declaratory judgment finding the Act 10 Provision to be facially unconstitutional, null, void, and without effect. The fact that the Supreme Court vacated the contempt order has no bearing on the continued effectiveness of the Circuit Court’s declaratory judgment. Accordingly, WERC’s reliance on the Act 10 Provision

and associated regulations in issuing its Order is misplaced. WERC does not and cannot cite any other legal authority to support the issuance of the Order.¹

WERC cannot act pursuant to a law that has been declared facially unconstitutional, null, void, and without effect. Essential to our system of justice is adherence to the rule of law by everyone, including governmental officials. A declaratory judgment enjoins a government actor from taking any action pursuant to that law because government actors are bound to adhere to the law as declared by the courts. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n. 8 (D.C. Cir. 1985). A “declaratory judgment is the functional equivalent of an injunction.” *Committee of Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (*vacated on other grounds*, 656 F.3d 253 (4th Cir. 2011)) (“[T]he award of declaratory judgment is sufficient to stay the hand of the executive branch pending appellate review.”).

“If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application.” *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44, n. 9, 309 Wis. 2d 365, 749 N.W.2d 211. (internal citation omitted); *State v. Konrath*, 218 Wis. 2d 290, 304, n. 13, 577 N.W.2d 601 (1998) (internal citation omitted); *Poe v. Gerstein*, 417 U.S. 281, 281-82 (1974). “The orderly and expeditious administration of justice by the courts requires that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties

¹ WERC claims in its Order that the Supreme Court has concluded that the Circuit Court’s “order” “had no impact on non-parties.” Presumably the “order” the WERC refers to is the September 14, 2012 declaratory judgment. Nowhere has the Supreme Court so concluded. This is simply a false and unsupported statement.

until it is reversed by orderly and proper proceedings.” *Maness v. Meyers*, 419 U.S. 449, 458-59 (1975) (internal citation omitted). Indeed, “a legislative act contrary to the constitution is not law . . .” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). A court need not expressly enjoin state officials, all of whom have taken an oath to uphold and defend the Wisconsin Constitution, from enforcing or implementing a legislative act which has been declared unconstitutional. See *PRN Associates v. State DOA*, 2009 WI 53, ¶¶ 53-54, 317 Wis. 2d 656, 766 N.W.2d 559 (declaratory judgment provides remedy which is primarily anticipatory and preventative, similar to injunctive relief). Accordingly, WERC cannot enforce or exercise power pursuant to a statutory provision that has been declared unconstitutional on its face, in violation of constitutional guarantees of free speech, association, and equal protection under the law. Any action WERC has taken pursuant to that unconstitutional provision, including the Order, is null and void.

KEA has thus made a strong showing that it is likely to succeed on the merits in this action. See *Gudenschwager*, 191 Wis. 2d at 440. The sole statute WERC relies on in issuing its Order—the Act 10 Provision—has been found to be facially unconstitutional. WERC can cite no other authority that would allow it to decertify KEA as the representative of employees of the Kenosha Unified School District. Therefore, the WERC Order was issued *ultra vires* and is null and void, and this Court should vacate the Order when it issues its dispositive decision in this proceeding.

B. WERC Continues To Disregard The Circuit Court's Judgment And, Absent A Stay, KEA Will Be Substantially And Irreparably Harmed.

Despite lacking legal authority for its Order, WERC continues to disregard the judgment of the Circuit Court and seeks to prevent KEA from continuing to exercise its rights under Wisconsin law. Therefore, a stay is necessary to prevent WERC from further acting without legal authority to deprive KEA and its members of their constitutional and statutory rights.

Unless a stay is granted, KEA and its members will suffer irreparable injury. See *Gudenschwager*, 191 Wis. 2d at 440. The Circuit Court declared the Act 10 Provision to be facially unconstitutional on September 14, 2012. It found that the Act 10 Provision violated the Wisconsin Constitution's guarantee of free speech, association, and equal protection. Since that time, KEA has acted in reliance on that decision, including by freely associating and disregarding the statute and its associated rule in Wis. Admin. Code § ERC 70.03(7) that purport to require KEA to file a petition for election by August 30, 2013. KEA did not file a petition for election because none is required under existing law. If WERC is allowed to act pursuant to an unconstitutional law and enforce the petition and election requirements, KEA members will be denied representation for purposes of collective bargaining with the Kenosha Unified School District. That would deprive KEA members of their constitutional and statutory rights and make them susceptible to the loss of compensation, benefits, and other terms and conditions of employment. Even a temporary infringement of the fundamental rights of speech and association is an irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. A Stay Will Not Harm Anyone.

A stay will do no substantial harm to other interested parties or the public interest. To the contrary, the public interest will be protected by preventing WERC from acting pursuant to an unconstitutional law. The public must have confidence that its government is acting within the bounds of the constitution. Where the constitutionality of a law is in question, allowing the government to continue to act pursuant to that law and infringe on the constitutional and statutory rights of citizens deprives the public of the very guarantees provided by the constitution.

III. CONCLUSION.

For the reasons stated herein, the Court should grant the Motion for Stay. WERC purports to act pursuant to a statutory provision that has been declared unconstitutional on its face. Therefore, the WERC Order is null and void and must be stayed to prevent irreparable harm to KEA and its members during the pendency of this proceeding.

Dated this 18th day of March, 2014.

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