STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

VICTORIA MARONE

Plaintiff,

v. Case No. 13-CV-004154

MILWAUKEE AREA TECHNICAL COLLEGE DISTRICT,

Defendant,

AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO,

Intervenor-Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is not moot. The Defendants engaged in illegal collective bargaining in late 2012 and early 2013. They reached an illegal collective bargaining agreement (the "Labor Agreement") in February 2013, which was signed both by Local 212 (the "Union") and by MATC. Neither Defendant said the agreement would not go into effect until the constitutionality of Act 10 was determined. No one said it would be void if Act 10 was not upheld. Indeed, this Court has already held that the agreement was not conditioned in either way.

The illegal agreement was then implemented, although the Defendants – again through illegal collective bargaining – agreed not to implement several of its terms, the balance of the contract, with the exception of provisions on base wages, were illegal and were implemented by the Union and by MATC for the period February 15, 2014 through February 15, 2015. In fact, the Union has publicly stated that the Defendants have *continued* to implement the illegal

contract even after it expired. The Plaintiff's claims that the collective bargaining was illegal and that the Labor Agreement is void are not moot.

A case does not become moot simply because defense counsel has been successful in dragging out the litigation so the court cannot decide the matter during the period of time the illegal contract is being implemented by their clients. That would be a particularly perverse result if it were supported by the law, but it is not. When defendants violate the law, especially public bodies like MATC, it is appropriate for the courts to declare that such a violation occurred. Citizens need to know a violation occurred and the public body involved has been held accountable.

It is understandable that MATC and the Union do not want to admit that they got it wrong when they violated the law and collectively bargained in violation of Act 10 based on the possibility that Act 10 would be found unconstitutional. But they did it get it wrong and have bargained and implemented an unlawful agreement. Plaintiff is entitled to relief.

I. SUMMARY JUDGMENT FOR THE DEFENDANTS IS INAPPROPRIATE AT THIS STAGE OF THE PROCEEDINGS.

Here is our situation. Shortly after the Defendants ratified their illegal agreement, the Plaintiff filed this action. She promptly moved for summary judgment – well before the contract was scheduled to go into effect. This Court decided to stay the Plaintiff's summary judgment motion to permit the Defendants to present their motions to dismiss and the Defendants responded by presenting their motions in series. In October 2014, their first battery of motions was denied with the exception of Plaintiff's claim for attorneys fees against MATC. But Defendants then filed a second round of motions, now arguing the case should be dismissed because the agreements were contingent on the constitutionality of Act 10 (an odd argument to

make about an agreement that was being implemented)[1] and, therefore, was not illegal. Those motions were denied in November of last year. Perhaps now we could get to the merits. Unfortunately that did not happen. Having lost their argument that the illegal agreement was conditional, the Defendants told this Court they would file yet another round of motions to dismiss. This time the argument would be that the case was moot because the summary judgment motion the Plaintiff filed in September of 2013 would not be decided until after the contract expired in February 2015. In response, the Plaintiff objected to the Defendants being allowed to file three sets of dispositive motions *in seriatim* while the Plaintiff's motion for summary judgment, which was filed 18 months earlier, remains stayed. The Court disagreed, preferring that Defendants be heard on purely legal issues before the case gets too far down the road on discovery and summary judgment motions. At the last status conference, the Court asked counsel for MATC the following question and counsel gave the following answer:

> "THE COURT: So you're asking – And you asked the court to file a motion to dismiss on the grounds it would be moot by the time I decided it, correct?
> ATTORNEY NUSSLOCK: Correct, Your Honor."

(Transcript, p. 4)[2]

Plaintiff's counsel, among other things, requested the right to take discovery on issues relating to the new motion if the Defendants submitted materials outside the pleadings. (Tr. p. 7) but based on the discussion with counsel for MATC, the Court again stayed consideration of the Plaintiff's motion for summary judgment and precluded the Plaintiff from taking discovery. The Court said:

> So I am going to overrule the objections of the defendants. I'm going to allow the -- I'm sorry. The objection of the plaintiff and allow the defendants to file a motion for -- to dismiss on the ground of mootness. I'm not going to allow

[1] The facts supporting the conclusion that the Labor Agreement was implemented are set forth in Section II(B)(3), supra.
[2] The transcript is attached as Exhibit 1 to the McGrath Affidavit filed herewith.

> discovery, as I indicated back in chambers also. I think, again, the expense both to the plaintiff and the defendant do not justify discovery until I decide the mootness issue. If I deny it, then you go ahead with their motions for summary judgment. But I don't want to churn this case or just have it go on ad infinitum and at the end nothing much is accomplished.

(Tr. at p. 10.) Plaintiff respectfully disagreed, but, of course, accepted the Court's decision. No motions for summary judgment and no discovery relating to the issues in dispute until the newest mootness defense was decided.

But the Defendants did not file a motion to dismiss. Instead, they have filed a motion for summary judgment with affidavits from two witnesses that were not deposed and have included certain documents that were not previously produced in discovery.[3]

While it may be presumptuous for the Plaintiff to say so, if the Court had been fully informed by the Defendants that they intended to file a motion for summary judgment (as opposed to a motion to dismiss) and to submit affidavits from witnesses who had not been deposed, the Court would have handled the matter differently at the status conference. Not only are Defendants arguing that, having delayed this action by filing waves of dispositive motions, they are now entitled to dismissal because, they say, their illegal actions have run their course, but in addition, having precluded Plaintiff from taking discovery, they now move for summary judgment based upon facts the Plaintiff has no opportunity to test. This is patently unfair.

For the reasons set forth below, Plaintiff believes the summary judgment should be denied even considering the affidavits and documents filed by the Defendants. But should the Court disagree, this is now a perfect case for the application of Wis. Stat. § 802.08(4) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the

[3] The documents attached as Exhibits A and D to the McColgan Affidavit were previously produced (which the Court can tell from the production numbers stamped on them). The documents attached as Exhibits B and C were not previously produced. (McGrath Aff. ¶4.)

motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."). The Plaintiff has submitted the affidavit of Brian McGrath which sets forth in detail the reasons why the Plaintiff cannot fully respond to the Defendants' summary judgment motion.

In short, the affidavits submitted by the Defendants contain alleged facts about the collective bargaining process between MATC and the Union which have not been tested in discovery. The Plaintiff cannot be expected to contest these "facts" without obtaining discovery to test their veracity. The Plaintiff will provide one example here; there are more details in the McGrath Affidavit.

In her June, 2013 Interrogatories, Plaintiff asked MATC to set forth the complete factual basis for its contention that there is not a justiciable controversy between the parties with respect to the Labor Agreement. (McGrath Aff. ¶ 5, Ex.2.)[4] The Interrogatories explained that:

> To "provide the complete factual basis" for a contention means to set forth the facts supporting that contention in the same fashion that you would in explaining your contention to the Court in this matter. The Plaintiff intends to use the Defendant's answers to these interrogatories in potential dispositive motions and the Plaintiff is entitled to discover the facts that you would present to the Court on these issues.

(*Id*.)

MATC responded in July, 2013 with a paragraph of objections including that the interrogatory was premature. (McGrath Aff.¶ 7, Ex.2.) Subject to those objections, MATC stated only that its defense was based on the fact that the Labor Agreement was allegedly contingent upon an appellate ruling regarding the constitutionality of Act 10. (*Id*.) Other than that general statement, it provided no other facts. MATC did not set forth any of the facts

[4] The defense that the Plaintiff's claim is not "justiciable" is the defense raised by MATC based upon the alleged contingent nature of the Labor Agreement. (*See* MATC's response to Interrogatory No. 1, Defendants' Joint Supplemental Brief in support of Defendants' Respective Motion for Judgment on the Pleadings and Motion to Dismiss dated October 7, 2014.)

contained in the McColgan or the Shansky affidavits that it recently filed. It did not mention the "Proposed Ground Rules" or handwritten notes attached to the McColgan affidavit. It did not provide any of the facts on the negotiations that are described at paragraphs 3-8 of the McColgan affidavit. Nor did MATC provide any of the facts regarding the signature and ratification process described in paragraphs 9-12 of the McColgan affidavit. All of these events had occurred prior to the time MATC answered the interrogatories and all of this information was known to it, but MATC chose not to include any of this information in its interrogatory answer. Nor has MATC amended, supplemented or updated its discovery responses since the time it served them despite its obligation to do so under Wis. Stat. §804.01(5). (McGrath Aff. ¶ 12.) Obviously, the Plaintiff was never able to inquire about these witnesses or facts because MATC did not disclose them in its discovery responses. Yet MATC now asserts that these facts are material and even dispositive. This is not the way summary judgment works.

When the Plaintiff sent written discovery in this case she used the definition of "provide the complete factual basis" set forth above because she did not want to be sandbagged. She wanted MATC to set forth the material facts in the same fashion MATC would explain them to the Court. But MATC ignored the interrogatories and sandbagged her nonetheless. In fact, it did so twice over. It not only submitted new information to the Court that it had not provided in discovery, but it did so after telling the Court it would file a motion to dismiss and based upon that statement the Court precluded discovery.

Should the Court determine that the new affidavits, if true, would be dispositive in the Defendants' favor as to one or more of the issues presented in their motion, the Plaintiff requests that the Court either strike the affidavits submitted by the Defendants as improperly submitted or, alternatively, order a continuance to allow the Plaintiff to obtain discovery from the necessary

witnesses, including the two witnesses who submitted the affidavits, and to request and receive any and all documents that relate to the subject matters set forth in those affidavits.

But that may not be necessary. As set forth in detail below, the Plaintiff believes the Defendants' motion for summary judgment can be denied even if the Court considers the new evidentiary material submitted by the Defendants (and allows no discovery). If the Court determines that the motion should be denied even if the "facts" submitted in the new affidavits are true, the Plaintiff requests that the Court do so. That would be an efficient way to proceed because it would avoid the expense of discovery on these issues. But the Plaintiff should not be forced to take the risk that the Court will find that the facts set forth in those affidavits are dispositive of the issues in dispute and were not rebutted by the Plaintiff. As a result, as an alternative reason for denying the Defendants' motion for summary judgment the Plaintiff has submitted the McGrath Affidavit consistent with Wis. Stats. §802.08(4).

II. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED ON THE MERITS.

A. Standard for Mootness

An issue is moot only when its resolution will have no practical effect on the underlying controversy. *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 79 Wis. 2d 161, 171, 255 N.W.2d 917, 924 (1977); *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). "The purpose of a dismissal for mootness is simply to prevent an unnecessary expenditure of time by the court and the parties." *Wisconsin's Envtl. Decade, Inc.*, 79 Wis. 2d at 171.

This action is not moot. There are at least two issues that require resolution to end this controversy: (1) was the collective bargaining which occurred in 2012 and 2013 illegal, and (2) is the Labor Agreement void as a matter of law because it contains illegal terms.

B. The Case is Not Moot Because the Legal Status of the Collective Bargaining Is Still in Dispute

In her Complaint the Plaintiff alleged that the very act of engaging in collective bargaining was unlawful, and sought a declaration to that effect. (Complaint, p. 9, ¶A.) The Defendants have not offered any argument as to why this claim is moot. The arguments advanced by the Defendants all go solely to the Plaintiff's claim for a declaration that the Labor Agreement is void. Neither the Union nor MATC has conceded that the collective bargaining they engaged in was prohibited by state law. In fact, they contend to the contrary. This is a dispute that must be resolved by the Court.

When a defendant, and in particular a public body, is alleged to have violated the law and a plaintiff seeks a declaration as to the illegal conduct, subsequent events do not render such a claim moot. *State ex rel. Badke v. Village Board of Greendale*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993). In that case the plaintiff sought a declaratory judgment that the Village Board had violated the Open Meetings Act because the majority of the Village Board attended meetings of the Village Plan Commission. The dispute involved the Board's decision relating to a certain development project that was discussed at the Plan Commission meetings. The Village Board argued that the claim was moot based on a subsequent event, *i.e.*, the Board held a second meeting in which the Board complied with the provisions of the Open Meetings Act, and the Board approved the permit at the second meeting. The Court of Appeals disagreed that the case was moot and said:

> This case is not moot. As explained earlier, the controversy in this case did not end when the Village Board held its second meeting. **The controversy in this case is the legal status of the acts that preceded the revote, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of the Village Board's acts.** We conclude that the criteria for sustaining a declaratory action have been met, and the controversy continues despite the second, valid meeting of the Village Board. Accordingly, this case is not moot.

Id. at 568. (emphasis added)

In addition the Court of Appeals made the point that the Court's declaration was important to teach the public body how to comply with the law. The Court of Appeals said:

> Succeeding on review will do more for Badke than resolve a difference of opinion. Succeeding will, as Badke suggests, teach the Village Board what to do under the law to avoid future violations.

Id. at 567. This is equally true in this case. If Ms. Marone succeeds on this claim it will teach the MATC Board what to do in the future with respect to Act 10 to avoid future violations. And as a municipal employee entitled to the benefits of Act 10, that is an important victory for Ms. Marone.

The final important point from *Badke* is that the Court of Appeals stated the plaintiff in that case had a right to a decision on the merits "by virtue of the authorization to seek a declaratory judgment in sec. 19.97(4), Stats." *Id*. at 567-568. Again, that is true here. Having made a claim for a declaratory judgment, Ms. Marone is entitled under Wis. Stat. §19.97(4) to have that claim adjudicated.

A second relevant case is *State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304. That case concerned the removal of Catharine Lawton from the Town of Barton Plan Commission. Ms. Lawton alleged that the meetings related to her removal violated Wisconsin's Open Meetings Law. *Id.*, ¶5. The circuit court resolved Ms. Lawton's claim by finding that the town board had no power to remove her. *Id.*, ¶7. The circuit court then determined her open meetings claim was mooted by a subsequent event, *i.e.*, the determination that the board lacked authority. *Id.*, ¶8. The Court of Appeals reversed and held that even though Ms. Lawton had obtained the personal relief she sought by the determination that the board lacked the power to remove her, the open meetings act claim was not moot because Ms. Lawton was entitled to a declaration that the conduct of the board members was unlawful. *Id.*,

¶15. The Court of Appeals held that it could not moot the open meetings claim because doing so would amount to approval of the board's unlawful conduct. *Id.*, ¶19.

Like the holding in *Badke*, that holding applies here. In *Lawton*, the defendants argued that the claim was moot because their action was declared unlawful on other grounds. Here, the Defendants argue that the claim regarding the contract is moot because the contract has expired. The argument is the same in both cases – the plaintiff's claim for a declaratory judgment in both cases was asserted to be moot because it would allegedly have no practical effect on the parties. But the Court of Appeals rejected that argument.

The Court of Appeals concluded that a public body should not be shielded by subsequent events from a declaration that its conduct was illegal and held that to find the declaratory judgment action moot would approve the body's unlawful conduct. If this Court declares MATC violated Act 10 by engaging in illegal conduct, then that decision will have consequences. Any party aggrieved by that conduct can seek relief. The taxpayers the Board of MATC represents will know that MATC broke the law and those that appointed members to the Board pursuant to Wis. Stat. § 38.10 will know that their appointees violated the law. More importantly, the union to which Ms. Marone belongs will know that it cannot try to bargain illegal terms on her behalf and her employer (MATC) will know it cannot subject her to such terms.

Just as the plaintiffs in *Badk*e and *Lawton* were entitled to a declaration that the defendant's conduct was unlawful, so is the Plaintiff here. A public body cannot make a declaratory judgment claim relating to its unlawful conduct moot by subsequent action. Whether that action is holding a new meeting to clean up what it had done unlawfully at a previous meeting (*Badke*), having its action declared unlawful on other grounds (*Lawton*), or dragging its feet in litigation until the contract at issue expires (this case), the subsequent action does not

make a declaratory judgment action relating to its unlawful action moot. The controversy in this case is the legality of the collective bargaining that occurred in late 2012 and early 2013. The Plaintiff specifically requested a declaration that the collective bargaining was illegal. (Complaint p. 9, ¶A.) The Plaintiff seeks a declaration that the conduct was illegal and the Defendants oppose the requested declaration. Just as in *Badke* and *Lawton*, the request for a declaration is not moot.

C. This Case is Not Moot Because the Status and Legality of the Labor Agreement is Still in Dispute.

In addition to declaring whether the collective bargaining engaged in by MATC and the Union was illegal, the Court must also decide the status and legality of the Labor Agreement. The Defendants offer three reasons why this claim is allegedly moot: (1) the Labor Agreement has expired; (2) the Labor Agreement allegedly never came into effect because it was conditional; and (3) the Labor Agreement was allegedly never finalized. (Defendants' Br. at 2.) But none of the proffered reasons are persuasive.

1. <u>The Defendants' Summary Judgment Motion Based Upon the Expiration of the Contract is Without Merit.</u>

The Plaintiff filed this action on May 2, 2013. That was 9 months before the collective bargaining agreement which is the subject of this action was to come into effect. The Plaintiff moved for summary judgment on the merits of her case on September 30, 2013. That was 5 months before the collective bargaining agreement which is the subject of this action was to come into effect.

The Defendants, by filing a series of dispositive motions, persuaded the Court to repeatedly stay consideration of the Plaintiff's motion for summary judgment for 18 months. The Defendants now contend that because the contract took effect (and expired) during that 18-month period of delay, the case is moot and the Plaintiff is not entitled to have her case heard on

the merits. But the Defendants cite no case that holds that under those circumstances a case is moot, and the law is otherwise.

That an illegal act has been completed does not give the wrongdoers a pass. Mootness does not reduce to "we got away with it." In October of last year, this Court held the Plaintiff had standing to seek a declaration that her labor agreement was illegal. The passage of a few months does not change that – particularly since, as shown below, the Union has stated that the agreement is still being implemented.

In support of their position, the Defendants cite three cases. (Defendants' Br. at 12.) Two of those cases are federal cases. The Plaintiff will discuss the federal cases below, but they are largely irrelevant because the federal law on mootness stems from the "case or controversy" clause in the U.S. Constitution which has no analogue in Wisconsin.

The third case is *Kabes v. Sch. District of River Falls*, 2004 WI App 55, 270 Wis. 2d 502, 677 N.W.2d 667. In that case, the Court of Appeals held that a school district breached an employment contract with two school administrators by reassigning them to a school other than the one listed in their employment contracts. In its decision, the Court of Appeals noted that the contracts had expired during the litigation but the Court of Appeals nevertheless *decided the case on the merits*. The Court of Appeals did so because the "issue presented is of great public importance and is likely to arise again." *Id.*, ¶3, n. 1.

This is precisely true with respect to this case as well. There is a substantial issue of public policy here that needs to be decided – is the Labor Agreement illegal because it violated Act 10? Just as with respect to the declaratory judgment claim related to the collective bargaining, if MATC violated the law by entering into an illegal contract, *Lawton* and *Badke* require that this Court adjudicate that fact.

Moreover, this is also an issue likely to be repeated; in fact, it is an issue that has been repeated. The Kenosha Unified School District did the same thing in November, 2013. *See Lacroix v. Kenosha Unified School District*, Kenosha County Case No. 13-CV-1899. The Madison School District did it in September 2013 and May, 2014. See, *Blaska v. Madison Unified School District*, Dane County Case No. 14-CV-2578.[5] If each school district can stretch out the litigation until the illegally bargained for contract is over, then the issue will never be decided. Moreover, as explained in more detail at p. 22, *infra*, MATC continued to collectively bargain with the Union in late 2014, long after this action was filed. Thus, MATC and Local 212 themselves, have repeated the unlawful conduct.

The two federal cases cited by the Defendants do not help them. *Evers v. Astrue*, 536 F. 3d 651, 662 (7th cir. 2008), is a case about government bidding. In that case, the Court held that a claim by a federal contractor that honest and fair consideration be given to bids that he had submitted was moot where the contracts had expired, and the contractor was no longer qualified to bid on the contracts in issue. That has little or nothing to do with this case which does not involve government bidding.

Campbell Soup Co. v. Martin, 202 F.2d 398 (3d Cir. 1953), likewise, is not relevant to this dispute. In that case the parties had a contract and the defendant breached. The district court issued an injunction and the defendant complied with it. The injunction expired when the contract expired. According to the Court of Appeals, the defendant thereafter sought "legal advice" from the Court of Appeals as to its future relationship with Campbell Soup. The Court of Appeals declined to give such advice finding there was no case or controversy after the expiration of the injunction and the contract. That is not this case. Here, there was no injunction. Plaintiffs' request to have the validity of the contract determined before it even went

[5] Copies of the complaints in these two cases are attached to the McGrath Affidavit filed herewith.

into effect was not addressed. As a result the illegal action was not prevented. It happened. This case requests a declaration that conduct by a public body, MATC, was illegal. Under Wisconsin law, the Plaintiff is entitled to a ruling on that request.

2. The Defendants' Summary Judgment Motion Based Upon the Claim That the Labor Agreement was Conditional is Without Merit.

In their brief, the Defendants call their collectively bargained Labor Agreement the "Conditional Successor Agreement." But that is not what they called it when they entered into it. "Conditional Successor Agreement" is not the title of the document. It is merely a rhetorical tool to try to make their ultimate point that the Labor Agreement was allegedly "conditional." Their newly-invented moniker is not supported by the facts. The Defendants' argument depends in large part on a Summary of the Proposed Labor Agreement prepared by MATC for internal purposes, a document that this Court has already considered and ruled to be irrelevant:

> The problem with the Defendants' arguments is that the "Summary of Proposed Labor Agreement" is not a part of the Part-Time Faculty CSA and so cannot constitute terms of the contract and has no effect on its validity. **Additionally, there is no conditional language in the Part-Time Faculty CSA itself.** Defendants' assertion that the Summary was the only document ever approved by the MATC Board is belied by the Board's own resolution… The resolution does not state that the Board approved the Summary; it explicitly states that it approved the agreement reached between the Defendants, and the Summary was not the agreement the Defendants reached – the Part-Time Faculty CSA was. (emphasis added)

There is no reason for the Court to reconsider its previous decision and the Defendants point to none. In particular, the Court's previous statement that the Labor Agreement itself contains no conditional language is dispositive. To try to overcome the Court's previous ruling, the Defendants seek to vary the terms of the Labor Agreement through parole evidence in the form of the Shansky and McColgan affidavits. But such evidence is inadmissible precisely because it is an attempt to vary the terms of a written agreement. *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶ 36, 330 Wis. 2d 340, 357-58, 793 N.W.2d 476, 484-85. Indeed, it

may also be inadmissible because, in response to discovery that called for it, it was withheld by the Defendants.

In any event, this new information does not change the picture and should not cause this Court to reconsider its previous determination that the agreement between the Defendants was not conditional. The Labor Agreement has been signed by the parties with some sections dated February 19, 2013, and some dated February 26, 2013. (September 26, 2013 Kamenick Aff. ¶4, Ex. A, MATC 00032-87.) The contracts for all three bargaining units appear to have been negotiated together, and the references to the Labor Agreement for Part-time Faculty are interspersed throughout the documents produced by MATC. They include but are not necessarily limited to MATC 00044, 00046-47, 00053-55, 00057, 00061, 00062-72. **None of the signed documents stated that the Labor Agreement was conditional.** The Defendants' attempt to change this result through parole evidence should be rejected.

Second, although Mr. McColgan attempts to add weight to the Defendants' argument by saying that he gave a set of Proposed Ground Rules to the Union and discussed them with the Union, the Proposed Ground Rules were never incorporated into the Labor Agreement. In fact, the Proposed Ground Rules have a place on page 2 for signatures to indicate the parties' agreement to them, but the Proposed Ground Rules are not signed.

Third, nothing in the conduct of MATC or the Union contemporaneous with the negotiation and signing of the Labor Agreement would support a conclusion that the Labor Agreement was conditional. In October 2012, the MATC District Board authorized the college's administration to open bargaining with members of Local 212, which represents full- and part-time faculty and paraprofessionals." (September 26, 2013 Kamenick Aff. ¶5, Ex. B, MATC

00028.[6]) At the time of this decision by MATC, Act 10 had been the law of Wisconsin for over a year. *The authorization does not state that the collective bargaining was conditional in any way.*

On December 4, 2012, MATC sent a notice to the public that MATC and Local 212 would "reopen their collective bargaining agreements … and reconvene collective bargaining" on December 5, 2012. (September 26, 2013 Kamenick Aff. ¶5, Ex. B,MATC 00025.) The December 4, 2012, notice informed the public that the parties would be exchanging their initial proposals at the December 5th session and would then go into closed session to commence negotiations. (*Id*.) *The notice does not state that the collective bargaining was conditional*.

On February 22, 2013, Pablo Cardona, MATC's Interim Vice President for Human Resources and Labor Relations, sent an email addressed to the administrative employees of MATC stating, "As you probably know, in October 2012 the MATC District Board authorized the college's administration to open up negotiations with members of AFT Local 212, which represents full and part-time faculty and paraprofessionals. As was announced by Local 212 leaders at MATC Day yesterday, the administration and leaders of the three Local 212 bargaining units have reached a tentative labor contract for the term of February 16, 2014 through February 15, 2015." (September 26, 2013 Kamenick Aff. ¶5, Ex. B, MATC 00026.) *This notice did not state that the new Labor Agreement was conditional.*

On February 26, 2013, the MATC Board approved the new Labor Agreement. (*Id*.) MATC passed three virtually identical Resolutions: one referring to the agreement with full-time employees, one referring to the agreement with part-time employees, and one referring to the

[6] MATC produced business records of MATC in discovery and bates-stamped the documents as MATC 00025 through MATC 00232). These materials are in the record before this Court because they were filed as an attachment to the Kamenick Affidavit filed with the Plaintiff's summary judgment materials filed in September, 2013.

agreement with paraprofessionals. (September 26, 2013 Kamenick Aff. ¶6, Ex. C.)[7] The Resolution relating to the agreement with the bargaining unit for part-time faculty stated as follows:

> **RESOLUTION TO APPROVE LABOR AGREEMENT BETWEEN MATC AND LOCAL 212, WFT, AFL-CIO (PART-TIME FACULTY) (Resolution BD0017-2-13)**
>
> WHEREAS, the Milwaukee Area Technical College District Board has entered into negotiations with Local 212, WFT, AFL-CIO (hereinafter "Local 212"); and
>
> WHEREAS, the Board representatives have reached a tentative one-year agreement (February 16, 2014- February 15, 2015) with representatives of Local 212; and
>
> WHEREAS, Local 212 (Part-time Faculty) has ratified the tentative labor agreement on February 25, 2013; and
>
> WHEREAS, the Board has reviewed the terms and conditions of said agreement; therefore,
>
> **BE IT RESOLVED, that the Milwaukee Area Technical College District Board hereby accepts and approves the agreement reached by MATC and Local 212 (Part-time Faculty) bargaining unit**, and authorizes signatures representing the MATC District Board and the Administration on the approved agreement, at which time said agreement shall be incorporated by reference to this resolution.

(September 26, 2013 Kamenick Aff. ¶6, Ex. C (emphasis added).) *The Resolution did not state that the new Labor Agreement was conditional.*

After ratification by the Union and MATC, the Union publicly took the position that the Labor Agreement was final. In its Newsletter from March 2013 (immediately after the Labor Agreement was ratified), the Union advised its members that a new labor contract had been reached. *The Newsletter does not suggest in any way that the Labor Agreement was conditional*. (November 6, 2014 McGrath Aff. Ex. A.)

[7] Pursuant to the Court's Order dated October 7, 2014, the Plaintiff's claim is now limited to the Labor Agreement for Part-Time Faculty.

In addition, in its brief filed with the Court on November 15, 2013, MATC advised the Court that the Union had taken the position that the Labor Agreement "will be enforceable regardless of the Wisconsin Supreme Court's decision [on Act 10.]" MATC Br. at p.2, fn 4. Thus, *even after this action was filed, the Union's position was that the Labor Agreement was not conditional*.

Moreover, the Defendants play fast and loose with what is actually said in the Shansky and McColgan Affidavits. In their brief, the Defendants say that "the parties agreed that because the condition precedent to actually implementing the Conditional Successor Agreement did not occur (a finding that Act 10 was unconstitutional by the appellate courts), the Part-Time Conditional Successor Agreement did not come into being." (Defendants' Br. at 13.) But the Defendants provide no factual citation for this statement in their brief and neither Mr. McColgan nor Mr. Shansky says this in their affidavits.

Mr. Shansky's only testimony as to why he thought the Labor Agreement did not become final was that he expected that after ratification by both parties the document would be circulated for one more round of signatures. (Shansky Aff. ¶¶ 18-19.) The merits of this argument are addressed in Section 3 below and it certainly does not support the Defendants' argument in the brief that there was a condition precedent requiring an appellate decision finding Act 10 unconstitutional.

As this Court previously ruled, the Labor Agreement is conditioned on nothing. (November 17, 2014 Decision and Order at p. 4.) There is no evidence that the Summary relied upon was ever incorporated into the Labor Agreement. There is no evidence that the Proposed Ground Rules were ever incorporated into the Labor Agreement.

Even if the Summary Memo or the Proposed Ground Rules somehow could be regarded as part of the Labor Agreement, neither document says that the unconstitutionality of Act 10 is a condition precedent to the agreement itself. The Summary *does not* say that the agreement does not come into being *until* Judge Colas' decision is upheld by an appellate court. Nor does it say that if Act 10 is upheld, the Labor Agreement then becomes void. It simply says "[i]f Judge Colas' decision were to be overturned or invalidated, fully or in part, all obligations to bargain or resulting agreements are to be contingent on relevant Wisconsin appellate courts' ruling and applicable laws." In other words, the summary says nothing more than that the continued validity of the Labor Agreements *might* be affected if Judge Colas' decision was reversed. It says no more than that the impact of the Labor Agreement will be determined by the law in light of subsequent appellate decisions. But that is a simple truism.

The precise same thing is true of the "Proposed Ground Rules." They do not say that the Labor Agreement is not valid until Act 10 is determined to be unconstitutional by an appellate court or that it is valid until Colas is reversed. They only say that if the decision of Judge Colas is reversed there will no longer be an obligation to bargain and that any ratified agreement must comply with all relevant laws and regulations. The statement on bargaining was immaterial because MATC and the Union bargained even though they had no obligation to do so. The remaining statement that the ratified agreement must comply with all laws and regulations is again a truism. Of course, the Labor Agreement must comply with the law. That is what this case is all about. The Plaintiff seeks a declaration that the Labor Agreement is void in light of the law as determined by the Wisconsin Supreme Court.

If the Defendants agree that the Labor Agreement is void due to the Supreme Court's holding in *Madison Teachers* (as they apparently do), then they need merely stipulate to

judgment. The Court may remember that counsel for the Plaintiff proposed this very result at a previous hearing and opposing counsel refused. The language in the internal MATC memo and the Proposed Ground Rules do not establish a binding condition precedent. Even if that language were in the Labor Agreement, MATC and the Union could still take the position that the agreements were valid.[8] In fact, that leads to a question that is in part rhetorical and in part practical. If the Court denies the Defendants' pending motion for summary judgment what defense, if any, do the Defendants intend to raise on the merits? Apparently none. The Defendants concede that the terms of the Labor Agreement are illegal under Act 10 (without that concession their "condition precedent" argument would have no basis). Given that concession, if the Court denies the Defendants' motion for summary judgment, then the Court can and should grant summary judgment to the Plaintiff under Wis. Stat. § 802.08(6) ("If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.").

The fact that the Labor Agreement is void under Act 10 does not mean that there was an agreed-upon condition precedent; it means that the Defendants' conduct was illegal and they cannot win. That does not make the case moot. It just means that Plaintiff is entitled to judgment.

3. <u>The Defendants' Summary Judgment Motion Based Upon the Claim That a Final Agreement was not Reached Because the Labor Agreement was not signed a Second Time After it was Ratified is Without Merit.</u>

[8] Indeed, the Madison School District, Madison Teachers, Inc., and the Kenosha Education Association are taking precisely that position in two cases involving non-Act 10 compliant collective bargaining agreements negotiated before Judge Colas' decision was reversed. *Blaska v. MMSD*, Dane County Case No. 2014-cv-2578; *Lacroix v. KEA*, Kenosha County Case No. 2013-cv-1899.

The evidence before the Court on this motion does not justify granting summary judgment for the Defendants. MATC and the Union collectively bargained on the terms and conditions of a Labor Agreement between December, 2012 and February, 2013. (McColgan Aff. ¶¶ 3, 6 and 9.) The Labor Agreement was signed and ratified in February, 2013. The McColgan and Shansky Affidavits say that the Labor Agreement was "initialed" but the documents themselves actually show the full signatures of Mr. McColgan and Mr. Shansky. (September 26, 2013 Kamenick Aff. Ex. A.)

The Labor Agreement itself does not say that any further signatures are needed and as pointed out above, the conduct of the parties at the time does not support the conclusion that any further signatures were needed.

The Proposed Ground Rules relied upon by the Defendants in their brief state at Paragraph 8 that "[b]oth bargaining committees shall have authority to make tentative agreements on behalf of College and Local 212 respectively. However, it is understood that the tentative agreements are subject to ratification by College and Local 212." Thus, according to the Proposed Ground Rules, only two things were needed for an agreement: (1) a tentative agreement (the existence of which is undisputed) and (2) ratification by MATC and the Union (the existence of which is also undisputed).

In addition, the parties both acted as if there was a contract by implementing its terms. The Defendants now argue that the Labor Agreement was never implemented (Defendants' Br. at 8-9), but that is a disputed issue of fact. The affidavit of Mr. Shansky states that the Union and MATC met (i.e., collectively bargained) in February 2014 to negotiate as to which terms of the Labor Agreement to implement as of February 15, 2014. (Shansky Aff. ¶21.) Mr. Shansky states under oath that MATC and the Union agreed that certain provisions of the Labor

Agreement need not be implemented. (*Id.*) Mr. McColgan does not deny the existence of an amended agreement. Moreover, it appears from the Shansky and McColgan affidavits that the remaining provisions (all of which were equally illegal) were all implemented and importantly neither Mr. Shansky nor Mr. McCoglan denies that this is so.

The terms of the Labor Agreement are lengthy and it is undisputed that each and every one of them (other than terms setting base wages) is unlawful under Act 10. Act 10 specifically prohibits collective bargaining on any subject except base wages. Wis. Stat. § 111.70(4)(mb). The Labor Agreement has numerous illegal provisions. For example:

1. The Labor Agreement has a provision for dealing with on-line classes taught at MATC. (MATC 00063.) It deals with the class load implications of such work and the compensation for such work.

2. The Labor Agreement has a provision on part-time teaching appointments (MATC 00042-00044) and part-time faculty access to full-time faculty positions (MATC 00067)

3. The Labor Agreement has a provision on Coaching and Performance Evaluation of faculty. (MATC 00064-00065.)

4. The Labor Agreement has a provision as to health coverage available to Part-Time Faculty (MATC 00068.)

5. The Labor Agreement has a provision on Part-Time Faculty Pay. (MATC 00069.)

6. The Labor Agreement has a provision on Sick Leave. (MATC 00053-00055.)

7. The Labor Agreement has a provision on Step Increases (in pay). (MATC 00071.)

In addition, the collective bargaining in late 2012 and early 2013 only dealt with <u>changes</u> to the then-existing 3-year agreement. Thus, the unchanged provisions presumably remained in place. The collectively bargained decision to keep the unchanged provisions is equally illegal.

Thus, there can be no dispute that the Labor Agreement as bargained was illegal under Act 10. It has been the law of Wisconsin for over one hundred years that a contract made in violation of the law is void. *Melchoir v. McCarty*, 31 Wis. 252 (1872) ("The general rule of law

is, that all contracts which are . . . contrary to the provisions of a statute, are void . . . ."); *Abbot v. Marker*, 2006 WI App 174, ¶6, 295 Wis. 2d 636, 722 N.W. 2d 162 ("A contract is considered illegal when its *formation* or performance is forbidden by civil or criminal statute . . . .") (emphasis added).

This is as true for labor agreements as it is for other contracts. *Bd. of Ed. of Unified Sch. Dist. No. 1 v. WERC*, 52 Wis. 2d 625, 635, 191 N.W.2d 242, 247 (1971) ("A labor contract term that is violative of public policy or a statute is void as a matter of law."); *Glendale Prof'l Policemen's Ass'n v. City of Glendale*, 83 Wis. 2d 90, 106, 264 N.W.2d 594, 602 (1978) ("When an irreconcilable conflict exists [between law and a labor agreement], we have held that the collective bargaining agreement should not be interpreted to authorize a violation of law.").

Despite the illegality of the contract, the parties appear to have implemented all of the terms except the few that were renegotiated in February, 2014. At a minimum, there are substantial disputes of fact on this issue.

The Defendants may argue that the terms and conditions that were implemented in February, 2014 were unilaterally imposed by MATC, but any such argument is contradicted by Mr. Shansky's affidavit which states that there was an *agreement* between the Union and MATC not to implement certain terms. Moreover, MATC has produced no board resolution or other document showing that the MATC Board took any unilateral action to determine the terms and conditions of employment for MATC employees for the period of time covered by the Labor Agreement. In fact, Mr. McColgan states that MATC took no action to even begin discussing terms and conditions that might replace the Labor Agreement until March, 2014 and did not complete that process until January, 2015. (McColgan Aff. ¶15.)

Mr. McColgan states that MATC worked on an employee handbook in 2014 but the evidence shows that the employee handbook was bargained with the Union. In late 2014 the Union sent a communication to its members that states:

> The college continues to implement the terms of our last contract while **our leadership meets weekly with the MATC administration to draft an employee handbook that …protects your salary, benefits and working conditions.**

(Marone Aff. ¶A (emphasis added).) Discovery is necessary to determine the full meaning and context of this statement but it certainly creates a dispute of fact as to whether the handbook is a unilateral product of MATC. Given that MATC and the Union were meeting on a weekly basis to discuss "salary, benefits and working conditions" there is a question that needs to be pursued as to whether illegal collective bargaining continued throughout 2014.

The parties had some type of understanding in 2014 as to implementing specific terms of the Labor Agreement. A "knowing wink" can be sufficient to establish the existence of an unlawful agreement. *Esco Corp. v. U.S.*, 340 F. 2d 1000, 1007 (9th Cir. 1965). And if one of the parties to such an agreement acts in a way that is consistent with the agreement, that action is evidence that the party is acting pursuant to the agreement even if it claims that it is acting unilaterally. *U.S. v. Foley*, 598 F.2d 1323, 1332 (4th Cir. 1979).

Here, both MATC and the Union acted as if a contract existed and that the contract was what they had collectively bargained in 2012 and 2013 minus the terms that were renegotiated in 2014. A prime example is found in a communication that the Union sent to members in January, 2015. In that communication the Union said:

> As part of our successor contract with the college we negotiated a one-time stipend of $650 payable to any full or part-time faculty member assigned to teach online. This benefit continues to exist for faculty under the new handbook. So, if you taught online for the first time last fall, or will be teaching on-line this spring, AND you are a member of Local 212, please reply to this notice so that we can advocate on your behalf and make sure you are justly compensated.

(Marone Aff. Ex. A, p.2.) The Union and MATC collectively bargained a stipend for certain services. That collectively bargained stipend was implemented in 2014 and has been carried over into the handbook.

MATC was not free to implement the terms of the Labor Agreement on February 15, 2014. The terms and conditions in the Labor Agreement are themselves illegal, because they violate Act 10. As a result, the Labor Agreement should be declared void.

III. THERE ARE STILL ISSUES THAT NEED TO BE RESOLVED IN THIS CASE.

The Court has previously asked what is still to be decided in this case and why it matters. The answer is as follows:

- The Plaintiff's request for a declaratory judgment that the collective bargaining that occurred in 2012 and 2013 was illegal under Act 10 still needs to be decided. As pointed out in *Badke* and *Lawton* such a claim is not rendered moot by subsequent events.
- Further, the declaratory judgment claim is an important issue of public policy and is capable of repetition. The same fact pattern occurred in Kenosha and Madison and even more importantly MATC continues to negotiate with the Union in violation of Act 10. The conduct should not be sanctioned by this Court.
- The Labor Agreement should be declared to be void because it is in violation of Act 10. This matters because many of the terms and conditions of the Labor Agreement continue to be implemented by MATC and apparently are being incorporated into the terms of a collectively-bargained employee handbook. This is a violation of Act 10.

CONCLUSION

For the above reasons, Ms. Marone requests that the Joint Motion for Summary Judgment be denied or alternatively she be given the opportunity to take discovery to further develop the factual record before the Court.

Dated this 20th day of March 2015.

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