

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

Appeal No. 2012AP2067

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MADISON TEACHERS, INC., et al.,

Plaintiffs-Respondents,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

**FILED**

NOV 20 2012

CLERK OF COURT OF APPEALS  
OF WISCONSIN

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REVIEW OF A DECISION BY THE DANE COUNTY  
CIRCUIT COURT, THE HONORABLE JUAN COLAS  
PRESIDING (BRANCH 10), TRIAL COURT CASE NO. 2011-CV-3774

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**CITY OF MILWAUKEE'S PETITION TO INTERVENE**

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The City of Milwaukee ("City") petitions the Court of Appeals, District IV, pursuant to Wis. Stat. §§ 809.13 and 803.09, for an order permitting the City to intervene in this appeal as a Respondent in accordance with the standards specified in Wis. Stat. §§ 803.09(1) and (2), solely with respect to Issue (3) listed on the docketing statement filed by the Defendants-Appellants with the Court dated September 18, 2012.

Specifically, the City seeks to intervene as a respondent in this appeal with respect to the following issues:

(1) Whether Wis. Stat. § 62.623, as enacted and amended by 2011 Wisconsin Acts 10 and 32 is unconstitutional as violative of the City's constitutional home rule powers guaranteed by Art. XI, Sec. 3(1) of the Wisconsin Constitution, particularly with respect to the establishment, administration, and funding of the Milwaukee Employees' Retirement System ("MERS"); and

(2) Whether Wis. Stat. § 62.623, as enacted and amended by 2011 Wisconsin Acts 10 and 32, is violative of the provisions of the United States and Wisconsin Constitutions prohibiting the enactment of laws "impairing the obligation of contracts" (United States Constitution Art. I, Sec. 10; Wisconsin Constitution Art. I, Sec. 12) in that it substantially and impermissibly impairs the vested and contractual rights of City employees who are members of MERS as established by the terms of ch. 396, Laws of 1937, and ch. 441, Laws of 1947, the state-enabling legislation creating MERS, and by ch. 36 of the Milwaukee City Charter, MERS' governing law.

The City seeks to intervene in the above-captioned appeal as a matter of right pursuant to Wis. Stat. § 803.09(1) or, alternatively, as a matter of discretion pursuant to Wis. Stat. § 803.09(2). It did not seek to intervene in the Circuit Court proceedings because a Circuit Court determination, while a published decision from the Court of Appeals would, as to both aspects.

Further grounds for this petition are set forth in the accompanying Memorandum of Law, which is incorporated herein by reference.

Dated and signed at Milwaukee, Wisconsin this 15<sup>th</sup> day of November, 2012.

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**MEMORANDUM OF LAW IN SUPPORT OF  
CITY OF MILWAUKEE'S PETITION TO INTERVENE**

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The City of Milwaukee ("City") seeks an order from the Court permitting it to intervene as a respondent in this appeal with respect to those issues arising in the above-captioned proceeding that specifically affect the City and its pension system. Specifically these issues are included within Parts V and VI at pp. 19-26 of the Circuit Court's decision dated September 14, 2012, and Issue No. 3 raised on the docketing statement filed on September 18, 2012 by the defendants-appellants, pertaining to the constitutionality of Wis. Stat. § 62.623.

This new statute, adopted pursuant to 2011 Act 10 and amended by 2011 Act 32 prohibits a first-class city in its capacity as employer from paying any of the employee's share of required pension contributions on behalf of its employees, and requires the employees to pay all such contributions themselves. This provision uniquely and directly affects the City, the only first-class city located within the State of Wisconsin. The City funds and governs the City's pension system, underscoring the wisdom of permitting the City to intervene as a respondent, either on a mandatory or on a discretionary basis.<sup>1</sup>

The City contends, and the Circuit Court found, that Wis. Stat. § 62.623 violates: (1) the City's home rule powers, which are specified in Art. XI § 3(1) of the Wisconsin Constitution and expressed in both the state-enabling legislation authorizing the establishment of the pension system (ch. 396, L. 1937; ch. 441, L. 1947) and ch. 36 of the Milwaukee City Charter, the law governing the City's pension system; and (2) the clauses contained in the United States and Wisconsin Constitutions prohibiting the passage of laws "impairing the obligation of contracts." (U.S. Constitution Art. I § 10; Wisconsin Constitution Art. I § 12). Indeed, the City has received three written opinions to this effect, from its City Attorney and from two private law firms with respect to these issues, and has acted in accordance with those opinions. These opinions reached conclusions consistent with those reached by the Circuit Court.

The standards for both mandatory and discretionary intervention in this appeal are set forth in Wis. Stat. (Rule) 809.13 and §§ 803.09(1) and (2), which read as follows:

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<sup>1</sup> As indicated in the City's petition, the City did not seek to intervene as a party in the Circuit Court proceedings, because a Circuit Court determination would not be binding or carry precedential effect. A published decision from this Court would do so, as to both aspects.

Wis. Stat. § 809.13:

A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within 11 days after service of the petition. The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09 (1) or (2).

Wis. Stat. § 803.09(1) and (2):

(1) Except as provided in s. 20.931, upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

(2) Except as provided in s. 20.931, upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The City plainly satisfies the requirements for both mandatory and discretionary intervention. As to the former, the applicable standards are well-established:

A movant must satisfy four requirements to intervene as a matter of right under Wis. Stat. § 803.09(1). The movant must show:

- (A) that the movant's motion to intervene is timely;
- (B) that the movant claims an interest sufficient related to the subject of the action;
- (C) that disposition of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and

(D) that the existing parties do not adequately represent the movant's interest.

*Helgeland v. Wisconsin Municipalities*, 2008 WI 9 ¶ 38, 307 Wis. 2d 1, 20, 745 N.W.2d 1, 10 (footnotes omitted). *See also Armanda Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357, 357-360 (1994); *City of Madison v. Wisconsin Employment Relations Commission*, 2000 WI 39 ¶ 11, 234 Wis. 2d 550, 556-557, 610 N.W.2d 94, 97. Given that Wis. Stat. (Rule) 809.13 specifically incorporates the intervention standards of Wis. Stat. §§ 803.09(1) and (2), the foregoing standards are applicable to an evaluation of the City's petition.

As to the first requirement, this petition is timely. Neither Wis. Stat. (Rule) 809.13 nor Wis. Stat. §§ 803.09(1) or (2) set forth any defined time period or deadline within which a petition for intervention in an appeal must be filed by a proposed intervenor. Rule 809.13 provides a deadline only with respect to a response to a petition for intervention (*i.e.*, within 11 days after service of the petition upon that party). Wisconsin Stat. §§ 803.09(1) and (2) simply provides that a motion to intervene must be "timely," without further defining that term. There is ample time for the City as respondent, consistent with the current briefing schedule, to submit its argument and for the remaining parties to this appeal to respond to that argument.

The second requirement for intervention is also satisfied. The City is "sufficiently related to the subject of the action," *i.e.*, the constitutionality of Wis. Stat. § 62.623. Moreover, it is the primary party affected by the disposition of that issue. The City's

pension system is the only system governed by Wis. Stat. § 62.623. Thus, the City is squarely in the crosshairs of these issues.

The same conclusion should be reached with respect to satisfaction of the third requirement for intervention. This Court's disposition of the matter of the constitutionality of Wis. Stat. § 62.623 directly and decisively impacts the ability of the City to: (1) govern the City's pension system; and (2) protect the vested, contractual rights of the retirees and employee-members of the pension system. Specifically, Wis. Stat. § 62.623 directly contradicts the original language of the Legislature, as expressed in the 1937 and 1947 enabling legislation, and as further expressed in ch. 36 of the Milwaukee City Charter, that the City's pension system is a matter of local concern and subject to constitutional home rule.

Both the 1937 and 1947 enabling acts of the Legislature and ch. 36 of the Milwaukee City Charter contain extensive, explicit and detailed provisions spelling out the extent to which the terms and conditions applicable to membership in the City's pension system constitute vested, contractual rights. Those provisions specifically include City payment of required contributions for many employee/members of the system. Because the City is the primary funding source for its pension system, any determination of this Court will have a direct, substantial and immediate impact upon the City's budget.

As to the fourth requirement for intervention, the City has the right to intervene in this appeal as a consequence of its unique position as the only first-class city in the state, and as the primary funding source of the system. The City has a unique interest in advancing and protecting the City's home rule authority over its pension system. This




issue goes to the heart of the City's right to determine how to finance and govern its own pension system.

In the alternative, and for reasons discussed above, the City petitions the Court for a discretionary order issued pursuant to Wis. Stat. § 803.09(2) permitting it to intervene as a respondent. Petitions for intervention under Wis. Stat. § 803.09(2) are addressed to the sound discretion of the Court. *Helgeland v. Wisconsin Municipalities, supra*, 2008 WI 9 ¶¶ 119-120, 307 Wis. 2d at 58, 744 N.W.2d at 29. Who would be better to represent the City's interests with respect to issues that affect primarily the City, than the City itself?

Dated and signed at Milwaukee, Wisconsin this 15<sup>th</sup> day of November, 2012.

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