Appeal No. 2007AP1160

Cir. Ct. No. 2005CV3569
2005CV3923

WISCONSIN COURT OF APPEALS
DISTRICT IV

MILWAUKEE JOURNAL SENTINEL AND PATRICK MARLEY,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF ADMINISTRATION AND STEPHEN E. BABLITCH,

DEFENDANTS,

AMERICAN FEDERATION OF STATE, MUNICIPAL AND COUNTY EMPLOYEES, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION,

INTERVENOR-APPELLANT.

LAKELAND TIMES AND GREGG WALKER,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES AND DEBRA MARTINELLI,

DEFENDANTS,

AMERICAN FEDERATION OF STATE, MUNICIPAL AND COUNTY MPLOYEES, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION,

INTERVENOR-APPELLANT,

WISCONSIN SCIENCE PROFESSIONALS, AFT LOCAL 3272 AND WISCONSIN PROFESSIONAL EMPLOYEES COUNCIL, LOCAL 4848, AFT-WISCONSIN, AFT, AFL-CIO,

INTERVENORS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hoover, P.J., Peterson and Brunner, JJ.

We certify this appeal to the Wisconsin Supreme Court to determine: (1) whether courts have jurisdiction to review the process the legislature used to amend the open records law by ratifying a collective bargaining agreement; and (2) if so, whether the process used was effective to bring about a change in the law.

BACKGROUND

The Milwaukee Journal Sentinel and the Lakeland Times (the Newspapers) sought information regarding certain state employees under the open records law, WIS. STAT. § 19.35.[1] The state agencies provided the requested documents, but redacted the names of specific employees pursuant to a collective bargaining agreement which provides:

> Notwithstanding the provisions of § 19.31-19.36 and 230.13 Wis. Stats. and any applicable federal laws, the Employer will not release any information relating to the names, addresses, classifications, social security numbers, home addresses or home telephone numbers of employees covered by this Agreement to labor unions, labor organizations, local unions or the press except for

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> Council 24 and the local union treasurer for the purpose of local membership list unless required to do so by the Wisconsin Employment Relations Commission or a court of law.

This contractual provision was ratified by legislation. The text of the bill did not contain any of the changes to the open records act or state that the changes would be included in the contract. The bill, as signed into law and published in the Laws of Wisconsin, ratifies the contract of over three hundred pages without identifying any specific provision or any modification to an existing statute. The legislature did not pass any companion legislation to modify the open records law.

The Newspapers brought these consolidated actions to compel compliance with the open records law. The Wisconsin State Employees Union (the Union) intervened to protect the provisions of the contract. The Office of State Employment Relations filed a nonparty brief supporting the Union's arguments.

The Newspapers contend any change to the open records law had to be specifically identified in the ratifying bill or a companion bill. When the legislature ratified the contract without passing bills specifically identifying changes in the law as required by WIS. STAT. § 111.92, it violated WIS. CONST. art. IV, § 17. Section 111.92 provides that the joint committee on employment relations "shall introduce in a bill or companion bills… that portion of the tentative agreement which requires legislative action for implementation, such as … any proposed amendments, deletions or additions to existing law." Article IV, § 17 provides, "No law shall be enacted except by bill. No law shall be in force until published."

The Newspapers further contend the change to the open records law contained in the contract is not a "clear statutory exception to the open records law." *See* ***Hathaway v. Joint School Dist.***, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984). They further argue WIS. STAT. § 111.93, which provides that ratified contract provisions relating to conditions of employment supercede other laws, is inapplicable because denying other unions and the press access to employees' names is not a condition of employment.[2]

The Union argues the legislature created an additional exception to the open records law when it ratified the contract. It contends the legislature's compliance with WIS. STAT. § 111.92 is not reviewable by courts because the statute constitutes a mere "rule of proceeding." The Union further argues that the legislature satisfied the provisions of § 111.92 by passing a bill to ratify the contract. Citing the first clause of WIS. STAT. § 19.35(1)(a), "except as otherwise provided by law," the Union contends the ratified contract constitutes a law that creates an exception to the open records act. The Union also argues that, for security reasons, withholding employees' names from other unions and the press implicates a condition of employment, and therefore supersedes the open records law pursuant to WIS. STAT. § 111.93.

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[2] WIS. STAT. § 111.93(3) provides in relevant part:

> If a collective bargaining agreement exists between the employer and a labor organization representing employees in a collective bargaining unit, the provisions of that agreement shall supersede the provisions of civil service and other applicable statutes, as well as rules and policies of the board of regents of the University of Wisconsin System, related to wages, fringe benefits, hours, and conditions of employment whether or not the matters contained in those statutes, rules, and policies are set forth in the collective bargaining agreement.

The trial court granted summary judgment to the Newspapers. Based on ***Board of Regents v. Wisconsin Personnel Commission***, 103 Wis. 2d 545, 309 N.W.2d 366 (Ct. App. 1981), it concluded courts have jurisdiction to review the legislature's compliance with WIS. STAT. § 111.92, and the legislature's failure to comply with the requirements set out in ***Board of Regents*** invalidated the attempt to modify the open records law in manner employed. The invalid legislative procedure did not create a new law that would constitute an exception to the open records law under WIS. STAT. § 19.35(1)(a). The court also concluded the provisions at issue did not implicate conditions of employment under WIS. STAT. § 111.93, and therefore did not supercede the open records act. Applying the balancing test identified in ***Hempel v. City of Baraboo***, 2005 WI 120, ¶63, 284 Wis. 2d 162, 699 N.W.2d 551, the court concluded this was not an "exceptional case" where public interest in nondisclosure would outweigh public interest in disclosure.

DISCUSSION

The threshold issue is whether courts have jurisdiction to review the legislature's compliance with WIS. STAT. § 111.92 when it authorized an additional exception to the open records law by ratifying the collective bargaining agreement. WISCONSIN CONST. art. IV, § 8 provides that "each house may determine the rules of its own proceedings." Based on separation of powers, that provision has long been interpreted as barring judicial review of the legislature's rules of proceeding. ***State ex rel. LaFollette v. Stitt***, 114 Wis. 2d 358, 367-68, 338 N.W.2d 684 (1983). Courts have no power to invalidate a procedurally flawed action of the legislature, even if the rule of proceeding is embodied in a statute. ***Id.*** The rationale for this judicial reluctance is that a legislative failure to follow its own procedural rules is equivalent to an ad hoc repeal of such rules, which the

legislature is free to do at any time. ***Custodian of Records v. State***, 2004 WI 65, ¶28, 272 Wis. 2d 208, 680 N.W.2d 792.

An exception exists, however, when constitutionally mandated procedures are implicated. ***LaFollette***, 114 Wis. 2d at 367-68. Therefore, the initial question is: If the legislature failed to comply with WIS. STAT. § 111.92, does that failure implicate WIS. CONST. art. IV, § 17, or is § 111.92 merely an unreviewable rule of proceedings? No case law or legislative history resolves whether § 111.92 codifies the requirements of art. IV, § 17, such that violating the statute constitutes a constitutional defect.

In ***Board of Regents***, 103 Wis. 2d at 557, we assumed authority to invalidate portions of a collective bargaining agreement that were inconsistent with other statutes when the enacting legislation did not adequately identify the changes in law contained in the contract. This court sua sponte raised the issue and it was decided by a split court after the issue was inadequately briefed. The Union urges this court to overrule ***Board of Regents*** because we reviewed legislative compliance with WIS. STAT. § 111.92 without addressing the separation of powers issue. This court lacks the authority to overrule published precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

We submit that it is appropriate for the Wisconsin Supreme Court to decide whether courts have jurisdiction to review legislative compliance with WIS. STAT. § 111.92. The issue is fundamental to the relationship between the judicial branch and the other branches of government. The legislature has repeatedly passed bills that ratify contracts without identifying any changes to the statutes and without introducing separate legislation to accomplish that goal. By reading the published Laws of Wisconsin, one would not be aware that additional changes to

the open records law had been passed. We submit that the Wisconsin Supreme Court should determine whether courts have jurisdiction to review the legislature's compliance with § 111.92 because it implicates WIS. CONST. art. IV, § 17 or whether, under WIS. CONST. art. IV, § 8, courts are prohibited from reviewing compliance with § 111.92 under the separation of powers doctrine.

If the courts have jurisdiction to review the issue, the question remains whether the legislature succeeded in modifying the open records law when it ratified the contract. In ***Board of Regents***, this court addressed the effect of noncompliance with WIS. STAT. § 111.92; concluding:

> [I]f the legislature has failed to comply with its express approval procedure, one must conclude that the legislature did not intend a change for which it did not expressly provide.
>
> ….
>
> Section 111.92(1), Stats. is a clear and unambiguous prohibitive statute restricting approval of tentatively-negotiated legislative changes in existing law to a particular manner, thereby excluding approval of the changes in any other manner. Fairness and certainty in the law is accomplished by requiring specific legislative changes if such changes are intended.
>
> The manner of approval is prescribed in mandatory, peremptory and exclusive terms. Introduction of legislative bills is imperatively required. No discretion in that respect is imposed in the Joint Committee or the legislature if it is to comply with its self-imposed limitations upon the granted power and authority to engage in collective bargaining and enter into negotiated agreements in derogation of the state's sovereignty….
>
> The legislature has chosen a method for approval of a collective bargaining agreement that assures it will be informed of the intended changes of existing law, with the consequent opportunity to consider the merits of the changes in conjunction with its approval of the agreement. Such a procedure is endowed with the virtue of avoidance of complex judicial and administrative statutory

> construction designed to arrive at legislative intent, and minimizes the prospect of interpretive error. The procedure avoids unfavored implied repeals or amendments, assures that specific legislative acts will control general acts, and also assures statutory harmony.

Id. at 557.

The Union argues that the bill to ratify the contract passed the legislature, was signed by the Governor and was published, satisfying the requirements of WIS. STAT. § 111.92. The terms of the contract were incorporated by reference. It contends that the question of whether the change in law actually appeared in the text of the bill is a "technicality." It also cites WIS. STAT. § 111.93, for the proposition that contract provisions may supercede provisions of other laws when they relate to conditions of employment, and it argues that withholding the employees' names implicates a condition of employment, employee safety.

The Newspapers argue that, because the change in law was not included in the text of the bill, any attempted change was ineffectual. Relying on ***Board of Regents***, the Newspapers argue the bill left the press uncertain of its rights and the circuit court was left to struggle with determining the legislature's intent, precisely the result this court sought to avoid in ***Board of Regents***. The Newspapers argue that, by the Union's reasoning, the public can no longer rely on published statutes, session laws or acts passed by the legislature, but must also read all documents referred to in any bill to be sure that a change has not taken place. They also argue that denying other unions and the press access to employees' names does not implicate employees' safety and is not otherwise a condition of employment.

The attorney general has opined that incorporating other unpublished documents by reference is unconstitutional, stating "since the specific provisions sought to be incorporated are not set out in detail in the proposed legislation and are not published by the state under legislative authority, any legislation resulting therefrom would be invalid as not in compliance with art. IV, § 17." *See* 50 Op. Att'y. Gen. 107, 113 (1961). *See also* 63 Op. Att'y Gen. 346, 349-50 (1974) 10 Op. Att'y Gen. 648, 656-57 (1921).

The Wisconsin Supreme Court should accept this case to resolve whether the legislature has effected changes in the law by ratifying the contract without introducing any specific companion legislation that identifies changes to the statutes. We seek clarification whether the provision in the open records law, "except as otherwise provided by law," includes provisions found in unpublished, ratified contracts.