STATE OF WISCONSIN | CIRCUIT COURT Branch 10 | DANE COUNTY

Municipal Employees Local 60,

Plaintiff

vs.

Monona Library Board,

Defendant

Case No. 12CV1240

DECISION AND ORDER ON MOTIONS TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Local 60, represents employees of the Monona Library, which is governed by the defendant, the Monona Library Board. The complaint asks that the court (1) find that the Board has engaged in prohibited practices under Wis. Stat. §§111.70(3)(a)1 and 5[1] by refusing to agree to arbitrate a dispute under a collective bargaining agreement, (2) declare that the parties' 2012-2013 collective bargaining agreement is valid and enforceable in all respects, (3) order the Board to recognize Local 60 as the representative of the employees of the bargaining unit and arbitrate the pending grievance and (4) award statutory attorney fees and costs.

The answer responds that (1) the amendments made to Wis Stat. §111.70 by 2011 WI Acts 10 and 32 (collectively "the Acts") apply to the labor relationship between the parties, (2) the Acts prohibit the Board from performing certain provisions of the 2012-13 agreement, (3) the action did not comply with the notice of claim statute, Wis. Stat. §893.80 and (4) the complaint should be dismissed or deferred to the Wisconsin Employment Relations Commission.

The Board has moved for dismissal or deferral to the Wisconsin Employment Relations Commission and Local 60 has moved for judgment on the pleadings. Both have alternatively moved for summary judgment in their favor, and submitted affidavits outside the pleadings. The facts are undisputed and

[1] All statutory references are to the 2009-2010 Statutes, as amended through 2011 Wis. Act 286, unless otherwise stated.

the court will treat the competing motions as motions for summary judgment.

The undisputed facts are that on May 13, 2010 the parties signed a document containing two collective bargaining agreements. Comp. Exh. 1. One, termed "the first Agreement," was effective from January 1, 2010 "until and including December 31, 2011." *Id.* §29.01. The other, termed "the second Agreement," was to "become effective January 1, 2012" and be "in effect until and including December 31, 2013." *Id.* (These are referred to throughout this decision as 'the First Agreement" and "the Second Agreement"). It is also undisputed that the Board refused to honor certain provisions of the second agreement because it concluded they were barred from doing so by the changes made by the Acts.

I. Notice of Claim Statute

For the reasons that follow, the court concludes that this action is not exempt from the notice of claim statute, but that notice was given and that even if the notice given technically deficient, the Board had sufficient actual notice of the claims.

A. Applicability of Section 893.80.

Wisconsin Stat. §893.80 contains the requirements for notices of claims before actions can be brought against units of government or their employees acting in their official capacities. The Board contends that Local 60 sought only one remedy and one method of relief from the Board: arbitration of a grievance under the collective bargaining agreement. It maintains there was no notice to the Board of the additional relief now sought in the complaint and as a result Section 893.80 was not complied with and the action ought to be dismissed. Plaintiffs argue that §893.80 does not apply, but that even if it does the grievance filed on December 30, 2011 was sufficient notice and in any event, the Board had actual notice and suffered no prejudice.

Section 893.80 does not apply to all statutory actions. *E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶21-23, 335 Wis. 2d 720, 800 N.W.2d 421. Three factors determine whether a statute is exempt from §893.80: (1) whether there is a specific statutory scheme for which the plaintiff seeks

exemption; (2) whether enforcement of the notice of claim requirements found in Wis. Stat. § 893.80 would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80 was enacted would be furthered by requiring that a notice of claim be filed. *Id.* at ¶23.

Local 60 does not argue that either of the first two factors apply in this case, but relies solely on the third factor. Local 60 does not argue that the purposes of §893.80 would not be furthered by requiring notice. It argues only that on the facts of this particular case, the purpose of the statute "was completely fulfilled" by the Board's consideration of the grievance. Pltf. Br. in Opposition, p. 10. This is the same as its argument that there was sufficient notice given or that the Board had actual notice. Local 60 has failed to show that the notice of claim statute does not apply to this action. The question is whether its requirements have been satisfied.

B. Sufficiency of Notice

Local 60 points to a December 30, 2011 e-mail grievance as a sufficient notice. The e-mail identifies it as a Union grievance then states:

> The City has announced that it will not honor Section(s) 3.01 and 3.02 of the 2012-2013 CBA, related to due [*sic]* deduction for members of the Library collective bargaining unit. The Union grieves this announced intention to breach the labor agreement, and includes in this grievance all other City refusals to honor the 2012-2013 CBA.
>
> The remedy that the Union seeks is to honor the 2012-2013 collective bargaining agreement including continued dues deduction.

Marsh Aff. (Attached Unnumbered First Document In Response to Document Production Requests)

A notice must substantially comply with the requirements of the notice of claim statute. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶28, 235 Wis. 2d 610, 612 N.W.2d 59. An e-mail can be sufficient,

if it satisfies the requirements. The e-mail here identified the claimant and an electronic address for the claimant and was addressed to the appropriate officials. The notice must also contain "an itemized statement of the relief sought." §893.80(1)(b). The itemization must be enough to allow the municipality to budget for litigation or settlement. *Thorp* 235 Wis.2d 610 at ¶30.

Here the claimant was not seeking monetary relief but performance of what it viewed as the Board's contractual obligations. The e-mail identified those obligations as the provisions related to dues deduction and "all other City refusals to honor the 2012-2013 CBA" and the remedy sought was compliance with the "collective bargaining agreement including continued dues deduction."

The notice was sufficiently itemized, given the nature of the claim and of this action. It advised that claimant was seeking to enforce the entire 2012-2013 agreement. The recipient of the notice clearly understood the nature of the claim, judging by his response dated January 11, 2011 explaining the reasons that the City had concluded it could not honor the agreement. Marsh Aff. (Attached Unnumbered First Document In Response to Document Production Requests).

Even if the notice were not sufficient, it is clear from all evidentiary documents submitted by both parties that the Board had actual notice of the claims and the Board has not been prejudiced by a lack of formal notice. Evidence of this is that the Board's position in this action is the same as the position taken on its behalf in the January 11, 2011 letter and subsequently, i.e. that the Board was prohibited by law from honoring certain provisions of the agreement and from treating Local 60 as the bargaining representative for the employment unit. It is true that Local 60 is now making some arguments in support of its claims that it may not have made earlier, but that is not the same as saying that it is making different claims such that the Board has been prejudiced in its ability to defend those claims by not having a formal notice of claim.

Finally, the complaint makes no claim that provisions enacted by Acts 10 and 32 are unconstitutional, and such a claim would be beyond the scope of the notice given and of the actual notice the Board had. The issue disputed between the parties was not the constitutionality of the Acts but the applicability of them to the agreement (or agreements) in this case.

II. Deferral to the Wisconsin Employment Relations Commission

There is no benefit to deferring to the Wisconsin Employment Relations Commission on the threshold question of whether the changes made by Acts 10 and 32 apply to this agreement. That is a question of interpretation of the initial applicability provisions of the two acts and their application to this agreement. The Commission has no special expertise in determining that question and there would be no benefit to judicial economy to defer to the question to it.

III. Applicability of Acts 10 and 32 to Agreement

Act 10's relevant provisions first apply to employees who are "covered by" a collective bargaining agreement "on the day on which the agreement expires or is terminated, extended, modified or renewed, whichever occurs first." 2011 WI Act 10, §§ 9315 and 9332. Act 32 has similar initial applicability provisions. 2011 WI Act 32, §§9315(2q) and 9332. The plain language in all four sections refers to employees covered by an agreement on the effective date of the Acts. It is undisputed that both Acts were effective no later than July 1, 2011. There is also no dispute that on that date the employees were "covered by" the "first Agreement" whose provisions applied until December 31, 2011. The question is whether the employees of Local 60 were also "covered by" the second agreement.

The phrase "covered by" is not defined, but ordinary usage in the context of a contract would mean "subject to" or "bound by." The court's conclusion is that on the effective dates of the acts, whether those are July 1, 2011 or earlier in 2011, the employees here were "covered by" both the first agreement and the second agreement. On the effective dates of the Acts, the second agreement was already a complete, signed, enforceable contract binding on both parties. All that remained was performance by both parties, which was to commence on January 1, 2012. The employees were thus "covered by" that agreement on July 1, 2011, even though performance under it would not begin until January 1, 2012. Because the employees were covered by the second agreement on the effective date of the Acts, the Acts do not apply to them until the expiration of the second agreement, December 31, 2013.

Any interpretation of "covered by" which would result in nullification of the Second Agreement would also require the conclusion that the legislature intended an unconstitutional impairment of contract. An interpretation of statutory language that rests on a legislative intent to render the enactment unconstitutional would be an absurd result. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. That purpose would be defeated if, when choosing between alternative interpretations, the court adopted one which would invalidate the statute.

ORDER

For the reasons stated above the defendant's motions to dismiss, for summary judgment and for deferral to the Wisconsin Employment Relations Commission are DENIED. The plaintiff's motion for summary judgment is GRANTED. It is the declaratory judgment of the court that the Second Agreement is valid and enforceable and that the Board has committed prohibited practices in failing to perform its obligations under the Second Agreement. The Board is ordered to recognize Local 60 as the exclusive bargaining representative of the persons employed in the Monona Library bargaining unit and to arbitrate the pending grievance as required by the terms of the Second Agreement. The plaintiff is awarded statutory fees and costs.

This is a final order under Wis. Stat. §808.03(1) for purposes of appeal.

Dated: February 15, 2013

BY THE COURT:

Juan B. Colás
Circuit Court Judge

Copy: Counsel