PINES BACH

TO: Interested Parties
FROM: Lester Pines
Tamara Packard
DATE: July 1, 2021
RE: University of Wisconsin Hospital & Clinics Authority

We have reviewed Wisconsin law, in particular, 2011 Wisconsin Act 10 ("Act 10"), to determine whether the University of Wisconsin Hospital & Clinics Authority ("UWHCA") is prohibited by state law from engaging in collective bargaining with its employees or negotiating binding memoranda of understanding covering wages, hours and working conditions with them. There is no such prohibition. The UWHCA can voluntarily recognize a representative of its employees and engage with that representative regarding terms and conditions of employment, either through collective bargaining or by entering into binding and enforceable memoranda of understanding.[1]

The UWHCA was established in 1996. Prior to the establishment of the UWHCA, the University of Wisconsin Hospital & Clinics were governed by a board of directors, but the people who worked there were employees of the State of Wisconsin.

In 1996, the state employees who worked at the University of Wisconsin Hospital & Clinics became employees of the UWHCA as have all subsequently hired individuals. At the same time, the legislature amended Wisconsin's "Employment Peace Act" (the Peace Act), Wis. Stat. § 111.02 *et seq.,* to include the UWHCA in its definition of "employer." That definition remained in place until adoption of Act 10. *See* Wis. Stat. § 111.02(7)(a)(2) (2009-2010).

Also adopted in 1996 was Wis. Stat. § 233.03(7) which made reference to the UWHCA's duty to collectively bargain with a certified collective bargaining agent of its employees. Consequently, from 1996 to 2011, the UWHCA was an "employer" under the Peace Act, its employees were protected by it and the parties engaged in collective bargaining as defined by Wis. Stat. § 111.02 (2):

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[1] Our conclusions in this memorandum are consistent with those expressed in *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 Marq. L. Rev. 623 (2012v ("*Life After Act 10*").

> "Collective bargaining" means the negotiation by an employer and a majority of the employer's employees in a collective bargaining unit, or their representatives, concerning representation or terms and conditions of employment of such employees, in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

Through a provision of Act 10, which was passed in 2011, the definition of "employer" in the Peace Act, § 111.02(7)(a)&(b), was amended to read as follows:

> **(a)** "Employer" means a person who engages the services of an employee, and includes a person acting on behalf of an employer within the scope of his or her authority, express or implied.
> **(b)** "Employer" does not include any of the following:
> **1.** The state or any political subdivision thereof.

By removing the UWHCA from the definition of "employer" under the Peace Act, Act 10 deprived UWHCA employees of the Peace Act's protections, which were analogous to the protections found in the NLRA and relieved the UWHCA from the obligation previously imposed by that Act to bargain with its employees.

Likewise, the Wis. Stat. 233.03(7) was repealed thereby deleting the UWHCA's *duty* to engage in collective bargaining. However, Act 10 did not affirmatively prohibit the UWHCA from engaging in collective bargaining with its employees. There is no language in Wis. Stat. § 111.825 (which is part of the State Employment Labor Relations Act and **which does not apply** to the UWHCA and its employees), or in Wis. Stat. §§ 233.03, 233.04 (which describe the powers and duties of the UWHCA), or any other statute, that prohibits the UWHCA from voluntarily recognizing a representative of its employees and bargaining with that representative. Nor is there any statutory language that prohibits the UWHCA from engaging in meet and confer activities or entering into memoranda of understanding ("MOU") governing wages, hours and working conditions for its employees.

Wisconsin law contains no statutory or other provisions penalizing or criminalizing an employer or its management which bargains with employees or their representatives. Thus, if an employer were to collectively bargain with employees who do not explicitly have statutory collective bargaining rights, the agreement would not be enforceable under a statutory scheme, but there would be no penalty or harm to the employer for entering into and complying with such an agreement.

Because Wisconsin law does not prohibit or otherwise regulate collective bargaining for UWHCA and its employees, an appropriate comparison for the potential of bargaining with the UWHCA is the law in a state that is statutorily silent on public employee collective bargaining. Tennessee has no statute expressly prohibiting public employees

from collective bargaining, but its courts have held that, absent express statutory authorization, units of local government lack authority to engage in collective bargaining and enter into CBAs. Nevertheless, the City of Memphis has contracts with 13 unions covering 24 bargaining units, many of which "purport to be negotiated with the union as exclusive bargaining representative of all employees in the designated bargaining unit." *Life After Act 10, p. 642* (citing to an MOU between City of Memphis and AFSCME, Local 1733.)

The MOU between Memphis and AFSCME Local 1733 expressly recognizes the Union as the exclusive representative of all employees in a unit. There are multiple units with identical or very similar exclusive recognition language in Memphis. Those MOUs address almost all terms and conditions of employment and even include payroll deduction of union dues and a no strike agreement, despite them not being legally enforceable. Nonetheless, they provide for enforcement through a grievance procedure culminating in final and binding arbitration as to suspensions and discharges..

In addition to the agreements in Memphis, SEIU Local 205 has negotiated a MOU with local governmental authorities in Nashville and with Davidson County covering a number of public employers. The latter agreement provides for recognition of the union as the exclusive representative of all employees within the Civil Service General Government and "allow[s] the Union to represent all employees who desire to be represented. . .." *Id.,* at 653-54. As also noted in *Life After Act 10*, "These memoranda provide a model that public employers and unions in Wisconsin may adopt to facilitate union representation of employees who desire it." *Id.*, at 653.

Closer to home, the City of Milwaukee requires its Department of Employee Relations to "'[m]eet and confer with employees and employee groups, including current and previously-certified employee groups, for the purpose of communicating, soliciting and exchanging information, views, ideas and interests concerning wages, hours, and other conditions of employment.'" *Id.,* at 654.

In conclusion, UWHCA can voluntarily recognize a representative of its employees and engage with that representative regarding terms and conditions of employment. While Act 10 stripped the workers of the UWHCA of their statutory (Peace Act) collective bargaining rights, there is also no statutory prohibition on collective bargaining with these employees. As stated in *Life After Act 10*, "There would appear to be no legal impediment to the employer voluntarily recognizing a union designated or selected by a majority of employees in one of these groups" of employees who were removed from the statutory scheme allowing for collective bargaining." *Id.*, at 649. Thus, under Wisconsin law, UWHCA could voluntarily recognize a designated representative of its employees and engage with that representative in a meet and confer relationship or even enter into an MOU with that representative over terms and conditions of employment.