

**INTEROFFICE COMMUNICATION
COUNTY OF MILWAUKEE**

DATE: June 17, 2013

TO: Marina Dimitrijevic, Chairwoman, County Board of Supervisors

FROM: Mark A. Grady, Deputy Corporation Counsel
James M. Carroll, Principal Assistant Corporation Counsel

SUBJECT: Milwaukee County v. Labor & Industry Review Commission and
Kimberly Carrington-Fields; Milwaukee County v. Labor & Industry
Review Commission and Ellettra Webster.
Milwaukee County Case Nos. 2012CV012833 & 2012CV012834

I request that this matter be referred to the Committee on Judiciary, Safety and General Services for authorization of an appeal to the Wisconsin Court of Appeals pursuant to section 1.28 of the Ordinances.

This appeal relates to two consolidated unemployment compensation matters. Both employees worked for the Sheriff's Office at the time of their suspension pending their hearing before the Personnel Review Board (PRB). However, the issue in this case is not unique to the Sheriff's Office. The Sheriff has asked our office to pursue the legal issue set forth below until we receive an appellate decision. We agree that it is appropriate to do so to resolve this question.

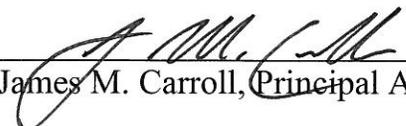
When an appointing authority wants to discharge a civil service employee, the authority must investigate the basis for the discipline, decide whether to request discharge, then file written charges for discharge with the PRB, which then schedules and conducts a hearing to determine whether to affirm the charges and discharge the employee. Most employees are suspended without pay while they await their PRB hearing. Employees have the right to a hearing within three weeks of their suspension, but most employees waive that right to a prompt hearing. In those situations, the hearing is often not scheduled and held by the PRB until six to eight months later.

Unemployment compensation law generally allows unemployment benefits to be denied by an employer for up to three weeks of a suspension. After that period of three weeks, benefits must be paid regardless of the length of the suspension. The basic policy is that unemployment benefits cannot be denied during suspensions

that exceed three weeks. Thus, if an employee is suspended for more than 29 weeks waiting for their PRB hearings, the County argues that it can deny the first three weeks of the suspension, but admits it is responsible thereafter for up to 26 weeks of UC benefits. The issue in these cases is whether the County can deny unemployment benefits for the first three weeks of suspension pending PRB hearing.

The Labor and Industry Review Commission (LIRC) and the Unemployment Insurance Division of DWD have interpreted the statutory section on denial of benefits during suspensions (Section 108.04(6), Wis. Stats.) to apply only to "disciplinary" suspensions. Further, they have interpreted that section to mean only disciplinary suspensions that constitute the actual punishment or discipline. With respect to the County's process, the State's position is that the suspension pending discharge is not a disciplinary suspension, but is more like a non-disciplinary suspension while an investigation is being conducted, because the PRB has the final decision-making authority to impose discipline. Only if the PRB orders a suspension (exceeding ten days) does the State consider it a disciplinary suspension. The State also rejects the County's argument that because the suspension pending discharge hearing is part of the County's disciplinary process, it constitutes a disciplinary suspension. For these reasons, LIRC holds that the County cannot deny UC benefits at all during the entire period of the suspension pending the PRB hearing—not even during the first three weeks.

For various legal reasons, we have advocated that a contrary interpretation of the statute is required. Because appellate courts defer to statutory interpretations by LIRC, we face an uphill battle on our appeal. Nevertheless, we agree with the Sheriff that it is important to have this issue resolved. The case is being handled by our office and the only costs involved are the \$195.00 filing fee and copying costs. The circuit court decision affirming the LIRC was filed on June 4, 2013. An appeal must be filed by July 19, 2013. We are requesting approval for filing the appeal under the provisions of section 1.28 of the ordinances.


James M. Carroll, Principal Assistant Corporation Counsel

cc: Amber Moreen
Kelly Bablitch
Alexis Gassenhuber
Steve Cady
Raisa Koltun

1 From Corporation Counsel recommending the adoption of a resolution to
2 authorize appeal of two unemployment compensation decisions

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File No. 13-
(Journal,)

A RESOLUTION

10 WHEREAS, on November 8, 2012, the Wisconsin Labor and Industry Review
11 Commission issued two decisions upholding the award of unemployment
12 benefits to two Sheriff's Office employees, Kimberly Carrington-Fields and Ellettra
13 Webster, throughout their suspensions pending Personnel Review Board hearing;
14 and

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WHEREAS, as a result of said decisions, on November 28, 2012, Corporation
Counsel petitioned for judicial review of the two decisions, which were
consolidated before Milwaukee County Circuit Court Judge William S. Pocan
because they addressed identical issues; and

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WHEREAS, on June 4, 2013, Judge Pocan issued a decision affirming the
decisions of the Labor and Industry Review Commission; and

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WHEREAS, resolving the legal questions raised by these unemployment
cases is of importance to all Milwaukee County departments; and

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WHEREAS the Office of Corporation Counsel recommends appealing
these cases to the Wisconsin Court of Appeals; and

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WHEREAS the Committee on Judiciary, Safety and General Services
authorized this appeal at its meeting on June 20, 2013 by a vote of ____;

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NOW, THEREFORE, BE IT RESOLVED, that pursuant to section 1.28 of the
Ordinances the Milwaukee County Board of Supervisors authorizes Corporation
Counsel to appeal the above-referenced unemployment compensation
decisions to the Wisconsin Court of Appeals.

MILWAUKEE COUNTY FISCAL NOTE FORM

DATE: June 17, 2013

Original Fiscal Note

Substitute Fiscal Note

SUBJECT: A resolution authorizing an appeal to the Wisconsin Court of Appeals in the cases of Milwaukee County v. Labor & Industry Review Commission and Kimberly Carrington-Fields, Case No. 12-CV-12833, and Milwaukee County v. Labor & Industry Review Commission and Ellettra Webster, Case No. 12-CV-12834.

FISCAL EFFECT:

- | | |
|--|--|
| <input type="checkbox"/> No Direct County Fiscal Impact
<input type="checkbox"/> Existing Staff Time Required
<input checked="" type="checkbox"/> Increase Operating Expenditures
(If checked, check one of two boxes below)
<input checked="" type="checkbox"/> Absorbed Within Agency's Budget
<input type="checkbox"/> Not Absorbed Within Agency's Budget
<input type="checkbox"/> Decrease Operating Expenditures
<input type="checkbox"/> Increase Operating Revenues
<input type="checkbox"/> Decrease Operating Revenues | <input type="checkbox"/> Increase Capital Expenditures
<input type="checkbox"/> Decrease Capital Expenditures
<input type="checkbox"/> Increase Capital Revenues
<input type="checkbox"/> Decrease Capital Revenues
<input type="checkbox"/> Use of contingent funds |
|--|--|

Indicate below the dollar change from budget for any submission that is projected to result in increased/decreased expenditures or revenues in the current year.

	Expenditure or Revenue Category	Current Year	Subsequent Year
Operating Budget	Expenditure	195.00	
	Revenue		
	Net Cost	195.00	
Capital Improvement Budget	Expenditure		
	Revenue		
	Net Cost		

DESCRIPTION OF FISCAL EFFECT

In the space below, you must provide the following information. Attach additional pages if necessary.

- A. Briefly describe the nature of the action that is being requested or proposed, and the new or changed conditions that would occur if the request or proposal were adopted.
- B. State the direct costs, savings or anticipated revenues associated with the requested or proposed action in the current budget year and how those were calculated.¹ If annualized or subsequent year fiscal impacts are substantially different from current year impacts, then those shall be stated as well. In addition, cite any one-time costs associated with the action, the source of any new or additional revenues (e.g. State, Federal, user fee or private donation), the use of contingent funds, and/or the use of budgeted appropriations due to surpluses or change in purpose required to fund the requested action.
- C. Discuss the budgetary impacts associated with the proposed action in the current year. A statement that sufficient funds are budgeted should be justified with information regarding the amount of budgeted appropriations in the relevant account and whether that amount is sufficient to offset the cost of the requested action. If relevant, discussion of budgetary impacts in subsequent years also shall be discussed. Subsequent year fiscal impacts shall be noted for the entire period in which the requested or proposed action would be implemented when it is reasonable to do so (i.e. a five-year lease agreement shall specify the costs/savings for each of the five years in question). Otherwise, impacts associated with the existing and subsequent budget years should be cited.
- D. Describe any assumptions or interpretations that were utilized to provide the information on this form.

The adoption of this resolution would authorize the filing of an appeal in the Wisconsin Court of Appeals of two cases involving unemployment compensation benefits. A successful appeal will result in the County's ability to seek the denial of unemployment benefits for employees who are suspended pending discharge during the first three weeks of their suspension. Benefits are currently a maximum of \$363 per week or \$1089 for three weeks for each such employee. Staff time from the Office of Corporation Counsel will be required to handle the appeal. A filing fee of \$195 will be incurred and absorbed within the budget of the Office of Corporation Counsel.

Department/Prepared By James M. Carroll, Principal Assistant Corporation Counsel

Authorized Signature



Did DAS-Fiscal Staff Review? Yes No

Did CBDP Review?² Yes No Not Required

¹ If it is assumed that there is no fiscal impact associated with the requested action, then an explanatory statement that justifies that conclusion shall be provided. If precise impacts cannot be calculated, then an estimate or range should be provided.

² Community Business Development Partners' review is required on all professional service and public work construction contracts.

**INTEROFFICE COMMUNICATION
COUNTY OF MILWAUKEE**

DATE: June 18, 2013

TO: Marina Dimitrijevic, Chairwoman, County Board of Supervisors

FROM: Mark A. Grady, Deputy Corporation Counsel *MAG*
Colleen Foley, Principal Assistant Corporation Counsel

SUBJECT: Appeal of decision related to payment of sick allowance at retirement for employees who change from union to non-union positions
Judith Pasko v. Milwaukee County, Case No. 11-CV-2577
Robert Porth v. Milwaukee County, Case No. 11-CV-4908
Bruce Koehn v. Milwaukee County, Case No. 12-CV-1402
Marchewka v. Milwaukee County, Case No. 13-CV-969

Pursuant to section 1.28 of the Ordinances, please refer this matter to the Committee on Judiciary, Safety and General Services.

Summary of Policy Issue

These cases involve the payment at retirement of unused sick allowance and the appropriate formula that applies to that payment. The circuit court issued a ruling contrary to the County's position. The County Board adopted a resolution at its meeting of September 27, 2012 (File No. 12-645) authorizing an appeal to the Court of Appeals, but declined to pre-authorize the filing of a petition for review with the Wisconsin Supreme Court in the event of an adverse decision in the Court of Appeals. The Court of Appeals has now issued a decision on June 18, 2013 affirming the circuit court decision (copy attached). Our outside counsel requests approval to file a petition for review with the Wisconsin Supreme Court. We join in the request. The petition must be filed within 30 days of the Court of Appeals' decision. The Supreme Court has discretion whether or not to grant the petition and hear the case.

Fiscal Cost

The current judgments in the Pasko and Porth cases total approximately \$93,000.00, including attorneys' fees awarded for their attorneys. A review by the Comptroller indicates that the principle of this decision could apply to the advantage of approximately fifty (50) other employees at a potential additional sick allowance payment cost of \$325,000.00. The County's legal fees for outside counsel to continue to handle this case are covered by the County's insurance policy. Interest costs accruing during the appeal are minimal. If a further appeal is unsuccessful, the court may award additional attorneys' fees to the plaintiffs. It is difficult to predict that amount, but it could be an

additional \$10,000.00 – 20,000.00, and a larger amount if the appeal proceeds to the Supreme Court and is unsuccessful.

Detailed Issue

The courts have ruled that two employees (Pasko and Porth) who were promoted from union to non-union positions are entitled to use the union formula for payment of unused sick allowance that existed at the time that the sick allowance accrued rather than use the ordinance formula that applies based on their non-union status at retirement. Thus, according to this decision, these employees, who were originally in FNHP and AFSCME and then were promoted towards the end of their County careers to non-represented positions, are entitled when they retire to utilize the formula in the FNHP and AFSCME agreements for payment at retirement of sick allowance that accrued while they were in FNHP and AFSCME and the formula in the ordinance for non-represented employees for payment at retirement of sick allowance that accrued while they were non-represented. The County's practice and interpretation has been to utilize the formula that applies based solely on the employee's status at retirement. Among other things, the union formula is more favorable than the non-union formula because approximately five (5) more years of unused sick allowance that accrued from 2002 to 2007 is 100% paid at retirement (because the union did not agree to eliminate this benefit until about five years after the County eliminated it for non-represented employees). The courts also applied, to one employee's advantage, the LIFO (last in, first out) formula from the AFSCME union agreement rather than the FIFO (first in, first out) formula that exists in the ordinance. The circuit court awarded attorneys' fees to the plaintiffs under the wage claim statute, Chapter 109, but declined to award any wage claim penalty against the County. The current judgments in the Pasko and Porth cases total approximately \$93,000.00, including attorneys' fees for their attorneys. By agreement, the Koehn and Marchewka cases were held in abeyance while the parties complete the appeal process in the Pasko and Porth case.

Pursuant to §1.31, M.C.G.O., the Judiciary Committee is delegated the responsibility of making a recommendation to the County Board for all appeals.

Attachments

cc(w/att.): Scott Manske
Amber Moreen
Kelly Bablitch
Alexis Gassenhuber
Steve Cady
Raisa Koltun

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4 From the Office of Corporation Counsel, a resolution authorizing an appeal in the
5 cases of *Judith Pasko v. Milwaukee County*, Case No. 11-CV-2577, *Robert Porth*
6 *v. Milwaukee County*, Case No. 11-CV-4908, by adopting the following.
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8 **A RESOLUTION**
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10 WHEREAS, Judith Pasko (Pasko) and Robert Porth (Porth) were previously
11 members of a collective bargaining unit of the Federation of Nurses and Health
12 Professionals (FNHP) and American Federation of State, County and Municipal
13 Employees (AFSCME) as part of their county employment and were each
14 subsequently promoted to a county position that is not represented by a collective
15 bargaining unit and each subsequently retired; and
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17 WHEREAS, Pasko and Porth allege that they are entitled to the payment at
18 retirement under the provisions of the FNHP and AFSCME contracts of unused
19 sick allowance accrued by each of them prior to the time of their promotion to non-
20 represented positions and that only sick allowance accrued by them after their
21 change to non-represented status is governed by the provisions in the ordinances
22 for non-represented employees; that is, that their union status at the time their sick
23 allowance was accrued, and not their status at the time of their retirement, governs
24 the formula for payment of unused sick allowance; and
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26 WHEREAS, the cases filed by Pasko and Porth were consolidated before
27 Circuit Court Judge William Pocan, and
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29 WHEREAS, Judge Pocan ruled in the Pasko and Porth cases that they had
30 a vested contract right to be paid under the provisions of the applicable union
31 contract for their unused sick allowance that accrued while they were covered by
32 the union contract and that Pasko and Porth did not intentionally, knowingly and
33 voluntarily waive the provisions of the union contract by accepting their
34 promotions; and
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36 WHEREAS, Judge Pocan ruled that Pasko is entitled to judgment for
37 additional sick allowance payment at retirement in the amount of \$21,779.63 with
38 interest at five percent (5%) per year from March 6, 2008 until judgment is entered
39 in August of 2012 and that Porth is entitled to judgment for additional sick
40 allowance payment at retirement in the amount of \$30,174.18 with interest at five
41 percent (5%) per year from July 6, 2010 until judgment is entered in August of
42 2012, and
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44 WHEREAS, Judge Pocan ruled that Pasko and Porth are entitled to recover
45 reasonable attorneys' fees under Chapter 109 of the state statutes in the amount

46 of \$40,953.00, but that they are not entitled to recover penalties under that statute;
47 and

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49 WHEREAS, the County Board adopted a resolution on September 27, 2012
50 (File No. 12-645) authorizing the filing of an appeal in the Wisconsin Court of
51 Appeals, and

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53 WHEREAS, the Court of Appeals issued a decision on June 18, 2013
54 affirming the decision of Judge Pohan, and

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56 WHEREAS, the judgment in favor of Pasko and Porth will have interest
57 applied at the rate of four and one quarter percent (4.25%) per year from the date
58 of judgment in August of 2012 until paid and may result in an award of additional
59 attorneys' fees to the plaintiffs; and

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61 WHEREAS, the principle of the ruling in the Pasko and Porth cases could
62 apply to other county employees who were formerly represented by various
63 unions, but who have since changed employment to positions that are not
64 represented by a union; and

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66 WHEREAS, the Comptroller estimates that the number of such individuals
67 that could potentially be financially advantaged by this ruling is approximately fifty
68 (50) individuals at a potential cost to the county for payment of additional sick
69 allowance at retirement in the approximate amount of \$325,000.00; and

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71 WHEREAS, legal fees for retained counsel to prosecute an appeal in the
72 Court of Appeals are covered by the Wisconsin County Mutual Insurance
73 Corporation policy; and

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75 WHEREAS, a petition for review must be filed with the Wisconsin
76 Supreme Court within 30 days of the decision by the Court of Appeals; and

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78 WHEREAS, outside counsel retained for Milwaukee County and the Office
79 of Corporation Counsel recommend the filing of a petition for review with the
80 Supreme Court; and

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82 WHEREAS, the Committee on Judiciary, Safety and General Services is
83 responsible to review requests for appellate court filings under section 1.28 of the
84 General Ordinances and the Committee considered this matter at its meeting on
85 June 20, 2013 and voted XX – XX on the filing of such a petition;

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87 NOW, THEREFORE, BE IT RESOLVED that Milwaukee County approves
88 the filing of a petition for review with the Wisconsin Supreme Court in the *Pasko*
89 and *Porth* cases.

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MILWAUKEE COUNTY FISCAL NOTE FORM

DATE: June 18, 2013

Original Fiscal Note

Substitute Fiscal Note

SUBJECT: Appeal of decision related to sick allowance payments for employees who transferred from union to non-union positions prior to retirement.

FISCAL EFFECT:

- X No Direct County Fiscal Impact
 - Existing Staff Time Required
 - Increase Operating Expenditures
(If checked, check one of two boxes below)
 - Absorbed Within Agency's Budget
 - Not Absorbed Within Agency's Budget
 - Decrease Operating Expenditures
 - Increase Operating Revenues
 - Decrease Operating Revenues
- Increase Capital Expenditures
- Decrease Capital Expenditures
- Increase Capital Revenues
- Decrease Capital Revenues
- Use of contingent funds

Indicate below the dollar change from budget for any submission that is projected to result in increased/decreased expenditures or revenues in the current year.

	Expenditure or Revenue Category	Current Year	Subsequent Year
Operating Budget	Expenditure	0	0
	Revenue	0	0
	Net Cost	0	0
Capital Improvement Budget	Expenditure		
	Revenue		
	Net Cost		

DESCRIPTION OF FISCAL EFFECT

In the space below, you must provide the following information. Attach additional pages if necessary.

- A. Briefly describe the nature of the action that is being requested or proposed, and the new or changed conditions that would occur if the request or proposal were adopted.
- B. State the direct costs, savings or anticipated revenues associated with the requested or proposed action in the current budget year and how those were calculated.¹ If annualized or subsequent year fiscal impacts are substantially different from current year impacts, then those shall be stated as well. In addition, cite any one-time costs associated with the action, the source of any new or additional revenues (e.g. State, Federal, user fee or private donation), the use of contingent funds, and/or the use of budgeted appropriations due to surpluses or change in purpose required to fund the requested action.
- C. Discuss the budgetary impacts associated with the proposed action in the current year. A statement that sufficient funds are budgeted should be justified with information regarding the amount of budgeted appropriations in the relevant account and whether that amount is sufficient to offset the cost of the requested action. If relevant, discussion of budgetary impacts in subsequent years also shall be discussed. Subsequent year fiscal impacts shall be noted for the entire period in which the requested or proposed action would be implemented when it is reasonable to do so (i.e. a five-year lease agreement shall specify the costs/savings for each of the five years in question). Otherwise, impacts associated with the existing and subsequent budget years should be cited.
- D. Describe any assumptions or interpretations that were utilized to provide the information on this form.

Approval of this Resolution will result in an appeal in the Court of Appeals and Supreme Court and the payment of attorney fees for retained counsel. This payment for attorney fees will be made by the Wisconsin County Mutual Insurance Corporation and applied to the County's deductible. Interest costs of approximately \$4000.00 per year will accrue during the appeal. If appeal is unsuccessful, court may award additional attorneys' fees to plaintiffs for the appeal.

Department/Prepared By Corporation Counsel

Authorized Signature *Mark A. Boyd*

Did DAS-Fiscal Staff Review? Yes No

Did CDBP Review?² Yes No Not Required

¹ If it is assumed that there is no fiscal impact associated with the requested action, then an explanatory statement that justifies that conclusion shall be provided. If precise impacts cannot be calculated, then an estimate or range should be provided.

² Community Business Development Partners' review is required on all professional service and public work construction contracts.

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2012AP2256
2012AP2257

Cir. Ct. Nos. 2011CV2577
2011CV4908

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

JUDITH PASKO,

PLAINTIFF-RESPONDENT,

v.

MILWAUKEE COUNTY,

DEFENDANT-APPELLANT.

ROBERT B. PORTH,

PLAINTIFF-RESPONDENT,

v.

MILWAUKEE COUNTY,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. This is a sick-leave-benefits case similar to the one we decided in *Champine v. Milwaukee County*, 2005 WI App 75, 280 Wis. 2d 603, 696 N.W.2d 245. Indeed, as the circuit court recognized, *Champine* is dispositive of the core issue.

¶2 Milwaukee County appeals amended judgments in favor of Judith Pasko and Robert B. Porth, former Milwaukee County employees. The circuit court consolidated the matters pursuant to the parties' stipulation. Milwaukee County's notice of appeal in both cases recites that the circuit court erroneously: "[o]rdered the payment of Plaintiff's unused paid sick leave accrued prior to Plaintiff's voluntary promotion to [a] management position which did not offer that benefit[.]" Milwaukee County argues that: (1) until Pasko and Porth retired, it was free to modify the accrual of their sick-leave hours; (2) by accepting their managerial promotions, Pasko and Porth waived their right to some of their accrued sick leave; and (3) the circuit court should have ordered that Pasko's and Porth's use of sick leave be applied on a first-in, first-out basis, irrespective of how much sick leave they actually took during the "first-in" period. We review *de novo* the legal issues decided by the circuit court. See *Loth v. City of Milwaukee*, 2008 WI 129, ¶10, 315 Wis. 2d 35, 39, 758 N.W.2d 766, 768. The circuit court's findings of fact are invulnerable on appeal unless they are "clearly erroneous." WIS. STAT. RULE 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the

trial court to judge the credibility of the witnesses.”). We affirm and commend the circuit court for a well-reasoned and helpful written opinion.

I.

¶3 Pasko started to work for Milwaukee County in July of 1987, and was represented by the Wisconsin Federation of Nurses & Health Professionals Union. In April of 2004, she accepted a management position for which she got a pay raise, and was no longer represented by the union. Pasko retired from her Milwaukee County employment in March of 2008.

¶4 Porth started to work for Milwaukee County in December of 1984, and was represented by the American Federation of State, County and Municipal Employees Local 882. In August of 2006, he accepted a management position for which he got a pay raise, and was no longer represented by the union. Porth retired from his Milwaukee County employment in July of 2010.

¶5 Before 2000, Milwaukee County permitted non-union employees to get paid for unused sick leave but capped the payment accumulation at four-hundred hours, plus sixteen-percent of any unused sick-leave hours exceeding four hundred. *Champine*, 2005 WI App 75, ¶3, 280 Wis. 2d at 609–610, 696 N.W.2d at 248. The four-hundred-hour cap was removed in 2000 by an ordinance that provided, as material, that those non-union members of the “Employes’ [*sic*] Retirement System” whose membership antedated “January 1, 1994,” were to “receive full payment of all accrued sick allowance at the time of retirement (total hour[s] accrued times hourly rate at the time of retirement). Such payment shall be made in a lump sum.” *Id.*, 2005 WI App 75, ¶3 & ¶2 n.4, 280 Wis. 2d at 609–610 & 608 n.4, 696 N.W.2d at 248 & n.4 (parenthetical in original). Effective

March 15, 2002, the cap was restored by a new ordinance. As we explained in *Champine*: “Under the 2002 Ordinance, non-union employees who have accrued sick allowance at the time of their retirement may claim a maximum of only fifty days (four hundred hours), plus sixteen hours for each additional one hundred hours of accrued sick allowance.” *Id.*, 2005 WI App 75, ¶6, 280 Wis. 2d at 610–611, 696 N.W.2d at 249.

¶6 Neither Pasko nor Porth were non-union employees before they accepted their managerial promotions and were thus not covered by the ordinances. Rather, their employment relationship with Milwaukee County was governed by union contracts that had, according to the joint stipulation of the parties to this appeal, “provisions substantially similar to the” 2000 ordinance applicable to non-union employees. The parties’ stipulation agrees that the union contracts affecting both Pasko and Porth provided, as material: “Members of the Employees Retirement System, whose membership began prior to September 27, 1995 shall receive full payment of all accrued sick allowance at the time of retirement. Such payment shall be made in a lump sum.” They also agree that, “[n]one of the union contracts were changed by the 2002 Ordinance.” Nevertheless, Milwaukee County applied the four-hundred-hour/sixteen-percent-coverage cap to all of Pasko’s and Porth’s sick-leave accruals when they retired. The parties stipulated:

- “At the time of retirement from the County, Pasko had accrued 1,426.2 total hours of unused sick leave.”
- “Upon retirement, the County applied the 400-Hour Rule to *all* of Pasko’s accrued sick leave, resulting in a payout for 576 hours of her 1,426.2 hours of accrued unused sick leave.” (Emphasis in original.)

- “At the time of retirement, Porth had accrued 2163.5 total hours of unused sick leave.”
- “Upon retirement, the County applied the 400-Hour Rule to *all* of Porth’s accrued sick leave, resulting in a payout for 688 hours of his 2163.5 hours of accrued unused sick leave.” (Emphasis in original.)

¶7 In granting judgment to Pasko and Porth, the circuit court determined, as material here, that:

- (1) Pasko and Porth had vested rights in the sick-leave hours that they accumulated before they became non-union managerial employees.
- (2) Pasko and Porth did not by accepting their promotions waive their contractual entitlement to the unused sick leave they accumulated before they became non-union managerial employees.
- (3) Milwaukee County could not “assign[] sick leave usage to the earliest accrued hours” in Pasko’s and Porth’s accounts if they did not use the sick leave during that time, because that would “effectively be taking away the benefit that was earned while it accrued and went unused.”

¶8 We address Milwaukee County’s contentions in turn.

II.

A. *Vested rights in accumulated sick-leave hours.*

¶9 The circuit court held that the sick-leave hours that Pasko and Porth accumulated under their unions’ contracts with Milwaukee County vested as they

were earned. Milwaukee County challenges this, arguing in essence that Pasko and Porth should not be able to bank those hours in order to get a cash payout at retirement because sick leave is designed to allow ill persons to stay home rather than go to work where they might not only infect others but also delay their recuperation. Milwaukee County ignores, however, that its contracts with the unions representing Pasko and Porth permitted precisely that. Although, as we have seen, Milwaukee County reinstated for non-union employees the four-hundred-hour/sixteen-percent-coverage cap on the accumulation of sick-leave hours used to calculate the retirement payout, it did not do so in the union contracts under which Pasko and Porth worked before they were promoted to managerial non-union positions. Thus, the circuit court recognized that *Champine* required the conclusion that during their tenure under those union contracts, Pasko's and Porth's sick-leave hours accumulated uncapped and became vested as they were earned.

¶10 *Champine* concerned whether the 2000 Ordinance permitted the non-union employees: “to have all accrued sick [leave] allowance through March 14, 2002, [the day before the effective date of the 2002 ordinance that restored the four-hundred-hour cap] paid out in full at retirement.” *Champine*, 2005 WI App 75, ¶15, 280 Wis. 2d at 614, 696 N.W.2d at 250. We held that it did, and that the employees were: “entitled, upon retirement, to a payout consistent with the terms of the 2000 Ordinance of their sick allowance that had accrued as of March 14, 2002, and is not used prior to retirement.” *Id.*, 2005 WI App 75, ¶15, 280 Wis. 2d at 614, 696 N.W.2d at 250–251. (Footnote omitted.) We further explained:

Although an employee does not automatically have the right to be paid for accrued sick allowance, an employer may provide a payout provision. Where that occurs, as in this case, such a benefit represents a form of deferred

compensation that is earned as the work is performed. The benefit can be changed, but only as it is related to work not yet performed...

... The only issue, then, is whether the ability to be paid for all accrued sick allowance already earned is a benefit that could be taken away on March 15, 2002, after the employees had performed work while the promise was in effect, or whether that benefit attached itself to all hours accrued as of March 14, 2002. Just as the employees were entitled to, and received, pay increases for the work they performed during the time the wage increase was in effect, they are also entitled to retain the benefit of an unlimited payout of sick allowance that accrued prior to the time that the new policy outlined in the 2002 Ordinance became effective. Once work is performed while a contract or unilateral promise is in effect, permitting retroactive revocation of that promise would be unjust and inequitable.

Id., 2005 WI App 75, ¶¶16–17, 280 Wis. 2d at 615–616, 696 N.W.2d at 251 (internal citation omitted).

¶11 *Loth* approved *Champine*'s vested-as-earned deferred-compensation analysis, noting that while the 2000 ordinance was in effect, the sick-leave hours earned by employees covered by the ordinance was the *quid pro quo* for their work as it was performed. *Loth*, 2008 WI 129, ¶46, 315 Wis. 2d at 53, 758 N.W.2d at 775 (“An employee accrues sick allowance (and may earn the right to receive payout for the accrued sick allowance) gradually as the employee performs his or her work.”) (parenthetical in original). *Loth* held that the *Champine* situation was thus different from what Albert Loth wanted: enforcement of the City of Milwaukee's post-retirement health-insurance obligation that he said was triggered when he had satisfied the fifteen-year employment eligibility threshold even though the terms of that obligation were later changed before he retired. *Loth*, 2008 WI 129, ¶13, 315 Wis. 2d at 40, 758 N.W.2d at 768.

¶12 *Loth* held, in contrast to *Champine*, where the employees earned their sick leave by their day-by-day work, and, critically, could make use of the sick-leave hours that they had thereby earned, that *Loth* was not entitled to the post-retirement health-insurance benefit until he had actually retired, which was the vesting trigger in that case. *Loth*, 2008 WI 129, ¶28, 315 Wis. 2d at 46, 758 N.W.2d at 771 (“The documents demonstrate that the City’s no-premium-cost health insurance plan for retirees came into effect only when a management employee like *Loth* retired after attaining the age of 60 and having been in City service for at least 15 years.”). Thus, unlike the situation in *Champine* and here, *Loth*’s acceptance of the City’s unilateral offer of post-retirement health-insurance was not his day-to-day work, but rather his retirement, and this permitted the City to alter the terms before that final acceptance. This is akin to the situation in *Champine* and here where Milwaukee County could prospectively change the sick-leave formula that would affect the day-by-day accumulation from the date of that change forward. See *Loth*, 2008 WI 129, ¶39, 315 Wis. 2d at 50, 758 N.W.2d at 773 (“The City is not attempting to modify any contractual obligation to *Loth*. *Loth* did not accept the City’s unilateral promise of no-premium-cost health insurance benefits; he had not fully performed the services entitling him to such benefits when the City amended in [*sic*] policy in 2002 effective in 2004.”); *id.*, 2008 WI 129, ¶45 n.24, 315 Wis. 2d at 53 n.24, 758 N.W.2d at 774 n.24 (*Champine* “did not hold that the retired employees were entitled to receive full payout for any sick allowance that they had accrued after the amended ordinance took effect on March 14, 2002. [*Champine*] stated that ‘[t]he ability to obtain payout for sick allowance accrued after March 14, 2002, may be modified prospectively by the County.’” (citation of quoted source omitted)). That under Milwaukee County ordinances, an employee may forfeit his or her accumulated

sick leave if he or she is either laid off for “in excess of two (2) years and one (1) day or [is no longer employed by the County because of] voluntary or involuntary separation,” Milwaukee County Code of General Ordinances, § 17.18(3), does not mean that the accumulated sick leave is not otherwise vested, as Milwaukee County argues.¹ If Milwaukee County wanted to be able to modify the vesting trigger from a day-by-day accrual, as recognized by *Champine* to something else, and thereby preserve its freedom to make retroactive changes, it could have sought to do so in its contracts with the unions representing Pasko and Porth. It did not.

¶13 The circuit court correctly held that Pasko and Porth were entitled to accumulate uncapped sick-leave hours by virtue of the union contracts that governed their work for Milwaukee County before they accepted promotion to non-union managerial positions, and that those accumulations vested before they took their non-union management positions.

B. *Alleged waiver.*

¶14 Although Milwaukee County could have conditioned the offer of promotions to Pasko and Porth on their acceptance of the four-hundred-hour cap retroactive to the period during which they were entitled to accumulate uncapped sick leave by virtue of the unions’ contracts with Milwaukee County, Milwaukee County did not do so. Now, having let that opportunity slip from its fingers, Milwaukee County seeks to impose waiver to accomplish that result. “[W]aiver,” of course, “is the intentional relinquishment or abandonment of a known right.”

¹ Milwaukee County Code of General Ordinances, § 17.18(3) may be found at: <http://library.municode.com/index.aspx?clientId=12598> (last visited June 10, 2013).

State v. Ndina, 2009 WI 21, ¶29, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620 (quoted source and quotation marks omitted). “Although the waiving party need not intend a waiver, he or she must act intentionally and with knowledge of the material facts.” *Nugent v. Slaght*, 2001 WI App 282, ¶13, 249 Wis. 2d 220, 227–228, 638 N.W.2d 594, 597; *Attoe v. State Farm Mutual Automobile Ins. Co.*, 36 Wis. 2d 539, 545, 153 N.W.2d 575, 579 (1967) (“Waiver has been defined as a voluntary and intentional relinquishment of a known right. However, in establishing waiver, it is not necessary to prove an actual intent to waive. Such waiver may be shown by conduct.”) (footnotes omitted).

¶15 “[D]eterminations of waiver generally present mixed questions of fact and law.” *All Star Rent A Car, Inc. v. Wisconsin Department of Transportation*, 2006 WI 85, ¶15, 292 Wis. 2d 615, 626, 716 N.W.2d 506, 511. As noted earlier, a circuit court’s findings of fact are invulnerable on appeal unless they are “clearly erroneous.” See WIS. STAT. RULE 805.17(2). We review *de novo* whether the circuit court based its findings on a correct legal analysis. See *All Star Rent A Car*, 2006 WI 85, ¶15, 292 Wis. 2d at 626, 716 N.W.2d at 511.

¶16 The circuit court applied the correct intentional-relinquishment-of-a-known-right analysis, and recognized that although “waiver” does not require a specific intent to give up a known right, the act alleged to be a waiver must be intentional and with knowledge. Further, the circuit court also recognized, as it wrote in its opinion, that the “knowledge of facts, which is a necessary element of waiver, may be constructive or actual. *Attoe v. State Farm Mut. Auto. Ins. Co.*, 36 Wis. 2d 539, 546, 153 N.W.2d 575[, 579] (1967). Constructive knowledge ‘is that which one who has the opportunity, by the exercise of ordinary care, to possess.’ *Id.*”

¶17 In rejecting Milwaukee County’s contention that Pasko and Porth waived their rights to the uncapped sick leave to which they were entitled under their unions’ contracts with Milwaukee County, the circuit court found both: (1) that Milwaukee County did not show that either Pasko or Porth intentionally gave up their right to the accumulated non-capped sick leave, and also (2) that they did not have the requisite knowledge, actual or constructive, from which that relinquishment could be found. The circuit court explained:

Just because Ms. Pasko and Mr. Porth may have known about the 400-Hour-Rule [applicable to non-union employees covered by the 2002 Ordinance], the County failed to prove that Ms. Pasko and Mr. Porth knew that if they took promotions, they would waive their rights to the [earned] sick leave that [they] had already accrued and vested with them while they were union employees.

Indeed, to even suggest otherwise, would impose the burden of speculative crystal-ball gazing to divine what others might argue down the road was “waiver.” This is especially true here because Pasko and Porth could reasonably assume that *Champine* governed the earned/vesting issue in connection with uncapped sick-leave accumulations, and that their acceptance of a promotion that *then* bound them to the four-hundred-hour cap, would not put them at risk of having to retroactively give up the vested sick-leave hours that they had already earned.

¶18 Nevertheless, apparently recognizing that the circuit court’s findings of fact cannot seriously be challenged by virtue of WIS. STAT. RULE 805.17(2), which its briefs do not even cite, Milwaukee argues *implied* waiver: “By accepting their promotions *without saying anything about the sick leave allowance reduction or their retention of the union version*, they waived whatever right they now claim to a larger sick leave allowance.” (Emphasis added.) As we have already noted, however, *if* Milwaukee County wanted to condition Pasko’s and

Porth's promotions on their retroactive acceptance of the four-hundred-hour cap, Milwaukee County could have done so. It did not, and the circuit court did not err in concluding that neither Pasko nor Porth waived their right to the earned and vested sick leave they accumulated while still working for Milwaukee County under their unions' contracts with the County.

C. Apportioning sick leave in calculating the final payout at retirement.

¶19 As we have seen, Pasko and Porth accumulated unused sick leave (1) during their employment by Milwaukee County under the union contracts; and (2) during their employment by Milwaukee County as non-union managerial employees. In assessing how much Milwaukee County owed them at retirement for their unused sick leave, Milwaukee County wanted to deduct their sick-leave starting with their non-managerial employment. As phrased by the circuit court: Milwaukee County sought “application of a ‘First In, First Out’” calculation, which would “assign[] sick leave usage to the earliest accrued hours in the employee’s account.” Again, as phrased by the circuit court, Milwaukee County claimed that this was its “customary practice.” Pasko and Porth, however, argued that they were entitled to, again as phrased by the circuit court, “a damages calculation that takes the amount of sick leave hours that accrued and vested as a union employee, multiplied by the hourly rate, added to the amount of hours accrued as a non-union employee under the 400-Hour rule. Then, the monies already paid would be subtracted from the total.” The differences in the amounts payable were: Pasko—\$21,779.63 under her calculation method versus \$16,136.41 under Milwaukee County’s; Porth—\$30,174.18 under his calculation method versus \$30,046.12 under Milwaukee County’s. The circuit court adopted the calculation method sought by Pasko and Porth.

¶20 As the circuit court recognized, when *Champine* determined that the non-union employees covered by that decision, “who did not retire prior to [March 15, 2002,] [a]re ‘entitled, upon retirement, to a payout consistent with the terms of the 2000 Ordinance of their sick allowance that had accrued as of March 14, 2002, and *is not used* prior to retirement,’” *see id.*, 2005 WI App 75, ¶15, 280 Wis. 2d at 614, 696 N.W.2d at 250–251, *Champine* took no position “as to how post-March 14, 2002, use of accrued sick allowance or accrual of additional sick allowance is to be counted[,]” *see id.*, 2005 WI App 75, ¶15 n.5, 280 Wis. 2d at 614 n.5, 696 N.W.2d at 251 n.5. The circuit court noted, however, that all the plaintiffs in *Champine* were non-union employees subject to the ordinances and thus *Champine* “never [had to] consider[] what pool of accrued sick leave time (union vs. non-union) used days would properly be depleted from.” (Parenthetical in original.)

¶21 The circuit court declined to rule whether the first-in, first-out method “is actually the County’s ‘customary practice,’” as Milwaukee County asserted. Rather, the circuit court concluded that to allow that method to invade the sick leave Pasko and Porth accumulated while they were working under the no-cap provisions of their unions’ contracts with Milwaukee County, which became vested as they earned that sick leave, “would effectively be taking away the benefit that was earned while it accrued and went unused [by Pasko and Porth] as union employees.” The circuit court thus distinguished the situation from where the parties in *Champine*, after remand agreed to a first-in, first-out apportionment, from this case, where the method’s “application across two categories of employment (non-union and union) would essentially divest Plaintiffs of their more valuable union-accrued sick leave, for work they did as

non-union employees.” (Parenthetical in original.) Whether our review is *de novo* or deferential, we agree.

¶22 First, the *Champine* parties’ post-remand settlement is not binding, especially since we do not have a full mosaic of the competing interests that were negotiated. Second, and critically, as the circuit court reasoned, permitting invasion of the sick leave that Pasko and Porth earned by virtue of their unions’ contracts with Milwaukee County for sick-leave hours that they did not take during their tenure as union-represented employees, would undo that vesting. We affirm the circuit court’s resolution of this issue as well.

By the Court.—Judgments affirmed.

Recommended for publication in the official reports.

1 By Supervisor Weishan

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3

A RESOLUTION

4

to retain outside legal counsel to provide guidance on the implementation and legality of 2013
Wisconsin Act 14

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WHEREAS, the Milwaukee County Board of Supervisors was told at its meeting on
April 25, 2013, by the Corporation Counsel that the legislation (now Wisconsin 2013 Wisconsin
Act 14 or "Act 14") presents "*two political entities at odds...it would probably be in the
County's best interest not to have Corporation Counsel involved and so...to alleviate any real or
perceived conflict of interest, that we agreed that outside counsel would be appointed to
represent this body;*" and

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WHEREAS, § 59.42(3), Wis. Stats., entitled "Corporation Counsel; Attorney Designee,"
provides that "[i]n addition to employing a corporation counsel . . . a Board shall designate an
attorney to perform the duties of a corporation counsel as the need arises" such that on May 23,
2013 the Board so authorized and directed the Corporation Counsel to recommend legal firms to
the County Board chairperson to retain legal counsel as such Attorney Designee for issues
related to the implementation and legality of various provisions contained in Act 14; and

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WHEREAS, pursuant to the May 23, 2013 resolution, the Chairperson has decided to
select Hawks Quindel, S.C. to act as such Attorney Designee to advise and represent the Board
with respect to the provisions of Act 14, save for matters related to collective bargaining; and

24

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WHEREAS, Hawks Quindel has disclosed, as set forth in its June 17, 2013 letter to the
Chairperson (hereto attached to this file), that the firm represents certain clients in litigation
adverse to Milwaukee County in several matters which are and appear likely to remain unrelated
to Act 14; and

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WHEREAS, Hawks Quindel has determined that its ethical obligations compel it to
disclose such representation and to acquire the informed consent of its current clients and the
Board permitting concurrent representation of its current clients and the Board; and

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WHEREAS, Hawks Quindel has further advised the Chairperson that the factual and
legal issues related to its representation of those clients adverse to Milwaukee appear to be
unrelated to the work it will do or is likely to do for the Board; that Hawks Quindel shall
continuously monitor all developments to ensure the validity of such assurance; and will
promptly advise the Chair if any such conflict arises and take action to resolve the conflict; now,
therefore,

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40

41 BE IT RESOLVED, that the County Board of Supervisors authorizes the Chairperson to
42 do the following:

- 43
- 44 1. Sign, on behalf of the County Board the Consent to representation that Hawks
45 Quindel has presented to the Chairperson for execution;
 - 46
 - 47 2. Sign on behalf of the County Board a Professional Services Agreement, or legal
48 services retainer agreement, with Hawks Quindel, S.C. to act as Attorney
49 Designee with respect to its legal representation of the Board in connection with
50 the implementation and legality of Act 14;
 - 51
 - 52 3. Act as the County Board's duly-designated representative in communicating
53 with and receiving counsel from Hawks Quindel with respect to issues related to
54 the implementation and legality of Act 14;
 - 55
 - 56 4. Authorize, based on the advice of counsel and with the agreement of the
57 Chairperson of the Committee on Judiciary, Safety and General Services,
58 whether to commence litigation to challenge any or all portions of Act 14.
59

MILWAUKEE COUNTY FISCAL NOTE FORM

DATE: June 18, 2013

Original Fiscal Note

Substitute Fiscal Note

SUBJECT: A resolution to retain outside legal counsel to provide guidance on the implementation and legality of 2013 Wisconsin Act 14

FISCAL EFFECT:

- | | |
|---|--|
| <input type="checkbox"/> No Direct County Fiscal Impact
<input checked="" type="checkbox"/> Existing Staff Time Required
<input checked="" type="checkbox"/> Increase Operating Expenditures
(If checked, check one of two boxes below)
<input type="checkbox"/> Absorbed Within Agency's Budget
<input checked="" type="checkbox"/> Not Absorbed Within Agency's Budget
<input type="checkbox"/> Decrease Operating Expenditures
<input type="checkbox"/> Increase Operating Revenues
<input type="checkbox"/> Decrease Operating Revenues | <input type="checkbox"/> Increase Capital Expenditures
<input type="checkbox"/> Decrease Capital Expenditures
<input type="checkbox"/> Increase Capital Revenues
<input type="checkbox"/> Decrease Capital Revenues
<input type="checkbox"/> Use of contingent funds |
|---|--|

Indicate below the dollar change from budget for any submission that is projected to result in increased/decreased expenditures or revenues in the current year.

	Expenditure or Revenue Category	Current Year	Subsequent Year
Operating Budget	Expenditure	\$25,000	0
	Revenue	0	0
	Net Cost	\$25,000	0
Capital Improvement Budget	Expenditure		
	Revenue		
	Net Cost		

DESCRIPTION OF FISCAL EFFECT

In the space below, you must provide the following information. Attach additional pages if necessary.

- A. Briefly describe the nature of the action that is being requested or proposed, and the new or changed conditions that would occur if the request or proposal were adopted.
- B. State the direct costs, savings or anticipated revenues associated with the requested or proposed action in the current budget year and how those were calculated.¹ If annualized or subsequent year fiscal impacts are substantially different from current year impacts, then those shall be stated as well. In addition, cite any one-time costs associated with the action, the source of any new or additional revenues (e.g. State, Federal, user fee or private donation), the use of contingent funds, and/or the use of budgeted appropriations due to surpluses or change in purpose required to fund the requested action.
- C. Discuss the budgetary impacts associated with the proposed action in the current year. A statement that sufficient funds are budgeted should be justified with information regarding the amount of budgeted appropriations in the relevant account and whether that amount is sufficient to offset the cost of the requested action. If relevant, discussion of budgetary impacts in subsequent years also shall be discussed. Subsequent year fiscal impacts shall be noted for the entire period in which the requested or proposed action would be implemented when it is reasonable to do so (i.e. a five-year lease agreement shall specify the costs/savings for each of the five years in question). Otherwise, impacts associated with the existing and subsequent budget years should be cited.
- D. Describe any assumptions or interpretations that were utilized to provide the information on this form.

Approval of this resolution will authorize the Milwaukee County Board Chairperson to:

1. Sign, on behalf of the County Board the Consent to representation that Hawks Quindel has presented to the Chairperson for execution;
2. Sign on behalf of the County Board a Professional Services Agreement, or legal services retainer agreement, with Hawks Quindel, S.C. to act as Attorney Designee with respect to its legal representation of the Board in connection with the implementation and legality of Act 14;
3. Act as the County Board's duly-designated representative in communicating with and receiving counsel from Hawks Quindel with respect to issues related to the implementation and legality of Act 14;
4. Authorize, based on the advice of counsel and with the agreement of the Chairperson of the Committee on Judiciary, Safety and General Services, whether to commence litigation to challenge any or all portions of Act 14.

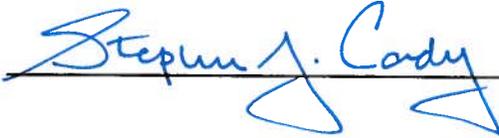
It is unclear as to the complexity of the legal services that may be required since the outside legal review has not yet been done. Based on past experience with the retention of outside counsel, this fiscal note assumes that an expenditure of approximately \$25,000 may be necessary to carry out the directive. The costs are likely to be higher if any or all portions of Act 14 are challenged through litigation.

¹ If it is assumed that there is no fiscal impact associated with the requested action, then an explanatory statement that justifies that conclusion shall be provided. If precise impacts cannot be calculated, then an estimate or range should be provided.

² Community Business Development Partners' review is required on all professional service and public work construction contracts.

An appropriation transfer from Org. Unit 1961 – Litigation Reserve would most likely be required to pay for services rendered. The 2013 Adopted Budget includes an appropriation of \$350,000 for the Litigation Reserve. The County Board (Org. 1000) 2013 Adopted Budget also includes an appropriation of \$50,000 for legal services to access outside legal opinions.

Department/Prepared By Stephen Cady, Fiscal and Budget Analyst, County Board

Authorized Signature 

Did DAS-Fiscal Staff Review? Yes No

Did CBDP Review?² Yes No Not Required

ATTORNEYS AT LAW

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Howard N. Myers
Vicki Schaut
Jeffrey P. Sweetland

June 17, 2013

VIA EMAIL (marina.dimitrijevic@milwcnty.com) & Reg. Mail

Marina Dimitrijevic, Chairperson
Milwaukee County Board of Supervisors
Milwaukee County Courthouse
901 North 9th Street, RM 201
Milwaukee, WI 53233

RE: Disclosure and Consent to Proposed Representation

Dear Chairperson Dimitrijevic,

Our law firm has been asked by the Milwaukee County Board to undertake its representation in opposition to the recently-enacted 2013 Wisconsin Act 14, which vests greater power in the Milwaukee County Executive, Chris Abele, and restricts the power and budget of the Milwaukee County Board of Supervisors. This representation, for now, shall include advising the Board of: a) the potential merits of a legal challenge to the validity of Act 14, either in total or in part; and b) to address various issues that almost certainly will arise as to the interpretation and implementation of Act 14 regarding the respective duties and powers of the Board and County Executive (excluding advice related to labor relations issues).

As you know, our firm currently represents a number of clients who are adverse to Milwaukee County in a number of different matters, including: a) four workers compensation claims against Milwaukee County in connection with work-related injury while in the employ of the County; b) a sexual harassment suit by an employee against Milwaukee County with respect to the conduct of the former County Board Chairperson; c) collective bargaining matters on behalf of two unions, the Wisconsin Federation of Nurses and Health Professionals and the

Milwaukee County Attorneys Association; and d) three separate lawsuits involving the pension rights of current or former employees. Insofar as we can presently determine, the factual and legal issues likely to arise in the work that you have asked us to do in connection with Act 14 appears to be unrelated to the work we are currently doing or likely to do for the County Board.

Under the ethical rules governing the conduct of lawyers, our firm may not oppose a current client, even on an unrelated matter and without full disclosure and consent. However, our ethics lawyer has advised us that there may be no such conflict since the County Board of Supervisors, as the legislative branch of the County, is a distinct entity from Milwaukee County and from the office of the Milwaukee County Executive who will likely be the adverse party in our firm's challenge of Act 14. Our firm's work will be on behalf of the Board of Supervisors only and limited to the issues arising from Act 14. A copy of the legal ethics opinion is attached hereto for your review.

Nonetheless, it is possible that some Supervisors and others may not always make such a distinction between the Board of Supervisors and Milwaukee County, or even between the Board of Supervisors and the County Executive. Because such distinction may not be always recognized by certain Supervisors, our firm's representation of the Board with respect to Act 14 while the firm represents certain clients opposing the County in unrelated matters, may not proceed without full disclosure and informed consent to such concurrent representation. This means our firm must explain to our current clients opposing Milwaukee County and to the Board of Supervisors the pros and cons of consenting and that we cannot proceed unless all parties consent.

In deciding whether to consent, the Board must consider how our firm's representation of the clients described above might affect our representation of the Board. For example, clients asked to consent to such representation typically should consider whether there is any material risk that "their" attorney will be less zealous or eager on their behalf due to the conflict. Likewise, clients typically should consider whether there is any material risk that confidences or secrets will be used adversely due to the conflict. In our firm's representation of the County Board opposing Act 14, we do not believe that there is a material risk that our work on behalf of the current clients will diminish our loyalty and zeal on your behalf, or that any confidences to our firm will be compromised in any way by this undertaking. We say this because no material facts should arise in our representation of the County Board which relate to the current pending cases described above. Of course, we will also continuously monitor all developments in these cases to ensure the validity of this assurance. We want to also call your attention to the possibility that the County Board may have to vote at some point in the future on a settlement or appeal in the cases described above, but our firm is confident that our representation in those cases will not affect the zeal or quality of our representation of the Board in the challenge to Act 14.

Notwithstanding our assurances above, these are issues that the Board should consider for itself. Please review this matter seriously. Our firm wants to further afford you the opportunity now to raise and address your questions or concerns. In fact, we recommend that you raise these

issues with independent counsel, but whether you do so is entirely up to you. If you are willing to consent after such review as you believe appropriate, please sign the copy of this letter below.

Sincerely,



HAWKS QUINDEL
Tim Hawks
Richard Saks

I hereby consent to the terms of representation set forth above, and further represent that I am authorized to do by the Board of Supervisors.

Dated: _____ Marina Dimitrijevic

May 31, 2013

VIA EMAIL & MESSENGER
PERSONAL & CONFIDENTIAL

Attorney Timothy E. Hawks
Hawks Quindel, S.C.
222 E. Erie St., Ste 210
Milwaukee, WI 53202-0442

Re: Our File No. 17148

Dear Mr. Hawks:

This follows our office conference with your colleague Mr. Saks and several phone conversations with you in recent days. You have requested a legal ethics opinion concerning an engagement proffered by the Milwaukee County Board. Thank you for thinking of me in connection with your questions. My partners, Christopher Kolb and Jeremy Levinson, both of whom have extensive experience in the field of lawyers' professional responsibility, helped with this opinion.

Circumstance:

The Milwaukee Board has asked your law firm to undertake its representation in opposition to efforts by Milwaukee County Executive Chris Abele to restrict the Board's powers and budget. You represent a number of other clients, including individuals and unions comprised of county employees, in matters opposed to Milwaukee County.

Issue:

Would a conflict of interests result from your work in these several capacities?

Short Answer:

No.

Scott N. Burrus
Richard J. Cayo
Jeffrey A. Cooper
Thomas W. Cunningham
Robert J. Dvovak
Angela C. Foy
Josephine M. Gee
Patricia L. Grove
James F. Guckenberg
Christopher T. Kolb
Jeremy P. Levinson
Daniel J. O'Brien
Mark E. Sanders
Sean M. Sweeney

Of Counsel:
David B. Halling

May 31, 2013

Page 2

Discussion:

Under these unique circumstances you would be working on behalf of the Milwaukee County Board (only) in opposition to the Milwaukee County Executive. You would not, in so doing, be undertaking representation of the County as a whole – notwithstanding that the County Board is a constituent part of that entity whose interests are, under ordinary circumstances, congruent with those of the County as a whole.

The Official ABA Comment to Model Rule 1.7 (Conflicts of Interest) says, in relevant part: “When a lawyer is employed by a government entity, analysis of conflicts depends upon identifying precisely which government entity is the client. “

The Official ABA Comment to Rule 1.13 says:

Identifying Government Client

“Precisely defining the identity of a governmental client can be difficult; as Comment [9] notes, depending on the circumstances, the client may be a specific agency, a branch of government, or “the government as a whole.”

*...
See, e.g., Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp 2d 276 (S.D.N.Y. 2001) (law firm that represented limited number of state agencies on limited number of issues under contract with state department of budget did not represent state government as a whole).*

Wisconsin’s comments to these rules are in accord.

Moreover, ALI, Restatement 3rd, The Law Governing Lawyers, p. 46 says:

c. Identity of a governmental client. No universal definition of the client of a governmental lawyer is possible. For example, it has been asserted that governmental lawyers represent the public, or the public interest. However, determining what individual or individuals personify the government requires reference to the need to sustain political and organizational responsibility of governmental officials, as well as the organizational arrangements structured by law within which governmental lawyers work. Those who speak for the governmental client may differ from one representation to another. The identity of the client may also vary depending on the purpose for which the question of identity is posed.

With respect to the specific service you have been asked to render, the Board’s interests and those of the County as advanced by its Executive Branch diverge, at least insofar as those interests are conceived differently by these respective governmental units.

May 31, 2013

Page 3

There is ample support in the legal ethics rules (SCR 20:1.13 and SCR 20:1.7) for a recognition that individual governmental departments have separate identities, often conflicting powers and prerogatives and are distinct for purposes of analysis of conflicts of interest, notwithstanding that each may ultimately be in service of the same public interest and even though each is part of the same, over-arching governmental body. In *Gray v. Rhode Island Dept. of Children, Youth and Families*, 937 F. Supp. 153 (1996) the court observed:

"... in a situation where government agencies are in conflict, the agency, not the government as a whole, is to be regarded as the client.

... if the governmental entity as a whole is the client, anytime one agency of government sues another an irreconcilable conflict would arise under Rule 1.7. See Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, s. 1.3:107 (Supp. 1996). This scenario demonstrates the absurdity that can result from treating the entire government as the client of an agency lawyer."

[p. 159, 160]

There is likewise support for this principle in the Wisconsin Statutes, its Constitution and the rules of Milwaukee County governance.

None of your work on behalf of the County Board is likely to diminish your loyalty or zeal on behalf of your other clients. Neither will any client confidences be compromised by this undertaking. If your engagement is properly limited to the requests articulated, I see no reason to fear that this work will compromise the interests of your other clients, or vice versa.

Suggestion:

Notwithstanding the absence of a conflict of interests, because these circumstances are unique, we think it would be best practice, though not obligatory, to alert your clients to this situation so that, in the event they have any questions or misgivings, they may raise them at this time, either with you or independent consultants. This notice is likely redundant in the case of the County Board, since I assume its members are all aware of your work on behalf of parties opposed to the County. We recommend it nonetheless and also recommend you make clear that your engagement by the Board is on behalf of the Board alone in this matter only and does not constitute retention by other bodies, individuals or interests. Lastly, we suggest you monitor developments for unforeseen events that might affect this analysis.

Again, thank you for thinking of us for this work. You have requested our opinion on short notice. Notwithstanding, all opinions expressed are to a reasonable degree of certainty in the field within which we profess expertise. A copy of my C.V. relating to my credentials as a legal ethics consultant is enclosed.

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I hope this proves helpful. Kindly let me know if you have other questions, require clarification or want access to any of the material we consulted in preparing this opinion.

Very truly yours,

HALLING & CAYO, S.C.

Richard J. Cayo
ric@hallingcayo.com

Enclosure
RJC:ajw