

THEODORE LIPSCOMB, SR.,
Chairman, Milwaukee County Board of Supervisors,
In his official capacity,
Milwaukee County Courthouse
901 N. 9th Street, Room 201
Milwaukee, Wisconsin, 53233,

Plaintiff,

v.

Case No. _____
Case Code: 30701, Declaratory
Judgment

CHRISTOPHER ABELE,
Milwaukee County Executive,
In his official capacity,
Milwaukee County Courthouse
901 N. 9th Street, Room 308
Milwaukee, Wisconsin, 53233,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Theodore Lipscomb, Sr. ("Lipscomb"), by Cullen Weston Pines & Bach LLP, his attorneys, as a complaint for declaratory relief against the Defendant, Christopher Abele ("Abele" or "County Executive"), alleges as follows:

INTRODUCTION

1. This is an action seeking declaratory and injunctive relief under Wis. Stat. §§ 806.04(1),(2), (8), and 813.01, and the equitable powers of the court.

2. In this action, Lipscomb, in his official capacity as chairman of the Milwaukee County Board of Supervisors ("Board"), seeks to have questions of statutory

construction and declarations of the respective powers, rights, and status of the Board and the Milwaukee County Executive (“County Executive”) determined under Wis. Stat. ch. 59, as amended by 2013 Wis. Act 14 (“Act 14”).

3. As set forth below, the Board has broad powers under the Wisconsin Statutes to provide, fix, or change the compensation of county employees under Wis. Stat. § 59.22(2). Act 14 did not limit the Board’s otherwise comprehensive authority over county employee compensation except as expressly described in Wis. Stat. § 59.794(3).

4. As set forth below, notwithstanding Wis. Stat. § 59.22(2), the County Executive, since the enactment of Act 14, has refused to implement compensation policies enacted and directed by the Board.

5. As further set forth below, the County Executive, since the enactment of Act 14, has taken actions with respect to the compensation of certain Milwaukee County employees that conflict with Board policies and has failed to attend Board meetings when his attendance has been deemed required by the Board.

6. A declaratory judgment from this Court is therefore sought to clarify the scope of the Board’s and the County Executive’s statutory authority over matters related to the compensation of county employees under Wis. Stats. ch. 59, as amended by Act 14, and the Board’s authority to require the County Executive to attend Board meetings when necessary pursuant to Wis. Stat. § 59.794(3)(b).

PARTIES

7. Plaintiff Lipscomb, whose business address is Milwaukee County

Courthouse, 901 N. 9th Street, Room 201, Milwaukee, Wisconsin 53233, is an elected supervisor on the Board and serves as its chairman. He brings this complaint in his official capacity.

8. Defendant Abele, whose business address is Milwaukee County Courthouse, 901 N. 9th Street, Room 308, Milwaukee, Wisconsin, 53233, is the elected county executive of Milwaukee County. He is sued in his official capacity.

**FACTS AND IDENTIFICATION OF STATUTORY PROVISIONS
SOUGHT TO BE CONSTRUED**

9. On November 12, 2013, the Board of Supervisors approved its 2014 Budget for Milwaukee County which, among other things, adjusted the pay range for executive pay grade 903E (hereafter “executive pay grade policy” or “pay provision”).

10. The executive pay grade policy provided an adjusted pay range of \$98,720 to \$120,613 for executive pay grade 903E.

11. The pay policy also required the positions of Airport Director, Zoological Director, Chief Information Officer, Parks Director and Corporation Counsel to be reallocated from pay grade 903E to pay grade 904E.

12. The pay policy further required that the pay for any position in pay grade 903E that exceeded the adjusted maximum for the pay range be reduced to fall within the adjusted maximum.

13. Through the exercise of his powers under Wis. Const. Art. IV, § 23A, the County Executive vetoed the executive pay grade policy. The Board of Supervisors thereafter, pursuant to Wis. Const. Art. IV, § 23A, overrode the veto on November 21,

2013. The Budget, including the executive pay grade policy, became effective on January 1, 2014.

14. The Board has not repealed, amended, or superseded the policy providing for adjusted pay ranges for pay grade 903E and the reallocation of certain positions from pay grade 903E to 904E, as enacted in the 2014 Budget. Thus, the policies continue to be in effect.

15. Since the 2014 Budget was adopted, the Board has not authorized or allowed by passive review, as provided under Milwaukee County Ordinance 17.055, any unclassified employees assigned to pay range 903E to be reallocated to a new or different pay range except for the five employees reallocated to pay range 904E as required by the 2014 Budget.

16. The Board has not authorized or allowed, by passive review, as required by MCO 17.05, 17.055, 17.27, and 17.28, the creation of new classifications for any unclassified employees assigned to pay range 903E.

17. The County Executive has not caused the salaries of unclassified employees to be adjusted to comply with the policy enacted by the Board in the 2014 Budget.

18. The County Executive has caused changes in the compensation of certain unclassified employees that conflict with the policies established by the Board in the 2014 Budget.

19. Under the direction of the County Executive, the County's Human Resources Director has developed alternative pay rates for unclassified County

employees that conflict with the policies authorized by the Board in the 2014 Budget.

20. The County Executive has taken the position that the alternative pay grades for unclassified County employees developed by the Human Resources Director may be implemented without the Board's approval.

21. On September 24, 2015, the Board adopted a resolution prohibiting the establishment of alternative pay rates for unclassified County employees except as authorized by the Board and requiring the Human Resources Director to report to the Committee on Finance, Personnel, and Audit no later than October 15, 2015, about the steps taken to carry out the Board's directives regarding the salaries of unclassified employees and to report the current salaries and pay grades of all unclassified County employees. *See* Exh. A (File No. 15-635).

22. The County Executive returned the resolution in File No. 15-635 unsigned to the Board on September 29, 2015.

23. On October 15, 2015, the Director of Human Resources submitted a report to the Committee on Finance, Personnel and Audit, describing a "new comprehensive set of County-wide, market-based salary ranges" developed by the Department of Human Resources. *See* Exh. B. The Director of Human Resources also provided the Board with a list of the current salaries of all unclassified County employees. *Id.*

24. The report shows that the Department of Human Resources, under the direction of the County Executive and without first obtaining the Board's authorization and approval, has unilaterally implemented a new compensation model and adjusted the compensation ranges for unclassified employees in conflict with the policies

established in the 2014 Budget and other Board policies. For example, the compensation of Hector Colon, the Director of Health and Human Services, was reported to be \$177,625 as of October 15, 2015. Colon's position is assigned to pay grade 903E under the policies approved by the Board, for which the current maximum salary is \$122,422.20 (including a 1.5% cost of living adjustment approved by the Board in July 2015). The compensation of Jeremy Theis, the Director of Facilities Management, was reported to be \$121,800 as of October 15, 2015. Theis' position is assigned to pay grade 902E under the policies approved by the Board, for which the current maximum salary is \$119,302.86 (including the Board-approved 1.5% cost of living adjustment). The compensation of Marian Ninneman, Director of Retirement Plan Services, was reported to be \$103,530 as of October 15, 2015. Ninneman's position is assigned to pay grade 901E under the policies approved by the Board, for which the current maximum salary is \$92,542.34 (including the Board-approved 1.5% cost of living adjustment).

25. The County Executive has failed to attend Board meetings when his attendance has been deemed necessary by the Board, including the meetings of the Committee on Finance, Personnel, and Audit held on Tuesday, October 13, 2015 and Friday, October 16, 2015; and a joint meeting of the Committee on Finance, Personnel, and Audit and the Committee of the Whole held on October 21, 2015, at which his attendance was required in each case to provide information and answer questions from the Board on the 2016 Recommended Budget.

26. Wis. Stat. § 59.51(1) confers broad organizational and administrative powers to county boards, providing as follows:

The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

27. Wis. Stat. § 59.574(3), as amended by Act 14, imposes certain limitations on the Milwaukee County Board's powers under § 59.51, as follows:

(3) LIMITATIONS ON BOARD AUTHORITY.

(a) Notwithstanding the provisions of s. 59.51, the board may not exercise day-to-day control of any county department or subunit of a department. Such control may be exercised only by the county executive as described in s. 59.17.

(b) A board may require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions. Except as provided in par. (d), for the purpose of inquiry, or to refer a specific constituent concern, the board and its members may deal with county departments and subunits of departments solely through the county executive, and no supervisor may give instructions or orders to any subordinate of the county executive that would conflict with this section.

(c) The board may not create any county department or subunit of a department, except as provided in s. 59.17 (2) (b) 2.

(d) The board may use the legal services of the corporation counsel under s. 59.42 (2).

(e) The board may not terminate, lower the salary or benefits of, or eliminate the position of, any county employee who works in the office of the county executive unless a similar change is made which affects county employees, on a countywide basis, in all other county departments. This paragraph does not apply after the county board supervisors who are elected in the 2016 spring election take office.

28. Likewise, Wis. Stat. § 59.17(2), as amended by Act 14, defines the duties and powers of the County Executive and clarifies the County Executive's authority to

appoint and supervise department heads and to administer, supervise, and direct county departments:

(2) DUTIES AND POWERS. The county executive shall be the chief executive officer of the county. The county executive shall take care that every county ordinance and state or federal law is observed, enforced and administered within his or her county if the ordinance or law is subject to enforcement by the county executive or any person supervised by the county executive. The duties and powers of the county executive shall be, without limitation because of enumeration, to:

...

(b) In any county with a population of 750,000 or more:

1. Appoint and supervise the heads of all departments except where the statutes provide that the appointment shall be made by a board or commission or by other elected officers. Notwithstanding any statutory provision that a board or commission or the county board or county board chairperson appoint a department head, except ss. 17.21 and 59.47 (3), the county executive shall appoint and supervise the department head. Except for a statutory provision which specifies that a board or commission or the county board shall supervise the administration of a department, the county executive shall administer, supervise, and direct all county departments, including any person who negotiates on behalf of the county, and the county board, other board, or commission shall perform any advisory or policy-making function authorized by statute. Any appointment by the county executive under this subdivision requires the confirmation of the county board unless the county board, by ordinance, elects to waive confirmation. An appointee of the county executive may assume his or her duties immediately, pending board action which shall take place within 60 days after the county executive submits the appointment to the board for confirmation. Any department head appointed by a county executive under this subsection may be removed at the pleasure of the county executive. The county executive shall comply with hiring policies set by the board when making appointments under this paragraph.

29. Wis. Stat. § 59.22(2) expressly grants broad authority to the Board to

“provide, fix, or change the salary or compensation” of county employees:

(2) APPOINTIVE OFFICIALS; DEPUTY OFFICERS; AND EMPLOYEES.

(a) Except for elective offices included under sub. (1), supervisors and circuit judges, and subject to s. 59.794 (3), the board has the powers set forth in this subsection, sub. (3) and s. 59.03 (1) as to any office, department, board, commission, committee, position or employee in county service created under any statute, the salary or compensation for which is paid in whole or in part by the county, and the jurisdiction and duties of which lie within the county or any portion thereof and the

powers conferred by this section shall be in addition to all other grants of power and shall be limited only by express language.

(c)

1. Except as provided in subd. 2. and par. (d), the board may do any of the following:

- a. Provide, fix or change the salary or compensation of any office, board, commission, committee, position, employee or deputies to elective officers that is subject to sub. (1) without regard to the tenure of the incumbent.
- b. Establish the number of employees in any department or office including deputies to elective officers.
- c. Establish regulations of employment for any person paid from the county treasury.

2. No action of the board may be contrary to or in derogation of the rules of the department of children and families under s. 49.78 (4) to (7) relating to employees administering old-age assistance, aid to families with dependent children, aid to the blind, or aid to totally and permanently disabled persons or ss. 63.01 to 63.17.

(d) The board or any board, commission, committee or agency to which the board or statutes has delegated the authority to manage and control any institution or department of the county government may contract for the services of employees, setting up the hours, wages, duties and terms of employment for periods not to exceed 2 years.

30. Wis. Stat. § 59.22(2) provides that the powers granted therein to the Board over employee compensation shall be limited only by express language.

31. As amended by Act 14, Wis. Stat. § 59.22(2)(c) provides that the Board's powers therein are "subject to Wis. Stat. § 59.794(3)."

32. The only express limitation in Wis. Stat. § 59.794(3)(e) on the Board's powers over the compensation of County employees is the provision expressly providing that the Board "may not terminate, lower the salary or benefits of, or eliminate the position of, any county employee who works in the office of the county executive unless a similar change is made which affects county employees, on a countywide basis, in all other county departments." This provision expires after the Board of Supervisors elected in the 2016 spring election take office. Wis. Stat. § 59.794(3)(e).

33. Thus, the Board retains its authority to provide, fix, or change the compensation of County employees as granted by Wis. Stat. § 59.22(c), subject only to the express limitation in Wis. Stat. § 59.794(3)(a) temporarily prohibiting the Board from terminating, lowering the salary or benefits of, or eliminating the position of, any county employee who works in the office of the county executive unless a similar change is made which affects county employees, on a countywide basis, in all other county departments.

34. Wis. Stat. § 59.574(3), as amended by Act 14, grants express authority to the Board to “require, as necessary, the attendance of any county employee or officer at a board meeting to provide information and answer questions.”

CLAIM FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

35. Lipscomb hereby re-alleges and incorporates by reference paragraphs 1 through 34 above.

36. A justiciable controversy exists between Lipscomb and Abele concerning the respective authority of the County Executive and the Board under the Wisconsin Statutes to provide, fix, or change the compensation of unclassified County employees.

37. The Board is authorized to provide, fix, or change the compensation of County employees, including but not limited to unclassified employees, subject only to the express prohibition against terminating, lowering the salary or benefits of, or eliminating the position of, any county employee who works in the office of the county executive unless a similar change is made which affects county employees, on a countywide basis. Wis. Stat. §§ 59.22(2)(c), 59.794(3).

38. The County Executive lacks authority to provide, fix, or change the compensation of County employees, including unclassified employees, in a manner that conflicts with the policies established by the Board.

39. A justiciable controversy exists between Lipscomb and Abele concerning the authority of the Board to require the County Executive, as necessary, to attend meetings of the Board to provide information and answer questions, pursuant to Wis. Stat. § 59.574(3), as amended by Act 14.

40. The Board is authorized to require the County Executive to attend Board meetings to provide information and answer questions, pursuant to Wis. Stat. § 59.574(3), as amended by Act 14.

41. Lipscomb's legal rights, status, and interests as an elected supervisor and chair of the Board of the Board of Supervisors are directly affected by the statutes he seeks to have construed in this action.

42. Lipscomb, in his official capacity, and the public will be irreparably harmed by the County Executives' unauthorized actions in reliance on a misinterpretation of state statutes.

43. Lipscomb has no other adequate remedy at law for injuries caused by the County Executive's unauthorized actions undertaken in reliance on an erroneous construction of state statutes addressing the respective powers of the Board and the County Executive.

REQUESTED RELIEF

WHEREFORE, the Plaintiff requests that the Court:

A. Issue a declaratory judgment pursuant to Wis. Stat. § 806.04(1) & (2) providing a construction of Wis. Stat. §§ 59.22(2), 59.574(3), and 59.794(3) as alleged in Paragraphs 26 through 34 above;

B. Pursuant to Wis. Stats. §§ 806.04(8), 813.01, & 813.02, enjoin and restrain the defendant from providing for, fixing, or changing the compensation of County employees in conflict with the policies established by the Board;

C. Grant such other and further relief as this Court deems just and proper.

Dated this 22nd day of October, 2015.

CULLEN WESTON PINES & BACH LLP

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