

April 22, 2022

Via Electronic Submission

Attorney General Joshua L. Kaul
Wisconsin Department of Justice
P.O. Box 7857
Madison, Wis. 53707-7857

Re: *Request for Formal Opinion: Whether state law prohibits the UW Hospitals and Clinics Authority from voluntarily recognizing an organization chosen by a majority of UWHCA nurses and voluntarily engaging in collective bargaining.*

Dear Attorney General Kaul,

Thank you for your consideration of this comment regarding the Governor's request for a formal opinion.

Law Forward is a nonprofit law firm and advocacy organization dedicated to preserving fundamental democratic principles, reviving Wisconsin's traditional commitment to open government, and promoting a progressive vision for the future. Wisconsin's proud tradition of responsive governance is evident in its history of public sector union organizing. Wisconsin carries a long and storied history with labor, dating back to the mid-19th century.¹ Wisconsin was the first state to recognize the right of public sector unions to bargain collectively², with significant additional legal development during the 1970's.³ The labor movement here in Wisconsin triggered monumental shifts in working conditions and benefits programs, advancements that shaped working life across the United States. Even the study of labor history itself began at the University of Wisconsin around the turn of the twentieth century.⁴

That history should inform the question presented by the Governor in his request for a formal opinion. With that in mind, this comment will address why the University of Wisconsin Hospitals & Clinics Authority ("UWHCA") is permitted under Wisconsin law to voluntarily recognize a collective bargaining unit chosen by a majority of UWHCA nurses.

¹ Wisconsin Historical Society, *The Early Labor Movement in Wisconsin*, available at <https://www.wisconsinhistory.org/Records/Article/CS1709> (last visited April 21, 2022).

² See Steven Greenhouse, *Wisconsin's Legacy for Unions*, New York Times (Feb. 22, 2014), available at <https://www.nytimes.com/2014/02/23/business/wisconsins-legacy-for-unions.html> (last visited April 21, 2022).

³ These changes including adding a fair-share arrangement in 1973 and the arbitration-mediation provisions in 1977. *Interview with John Lawton*, Wisconsin Historical Society (Feb. 18, 1985), available at <https://content.wisconsinhistory.org/digital/collection/p15932coll11/id/373> (last visited April 22, 2022).

⁴ Wisconsin Historical Society, *The Early Labor Movement in Wisconsin*, available at <https://www.wisconsinhistory.org/Records/Article/CS1709> (last visited April 21, 2022).

I. UWHCA Employees, Including Nurses, Are Not Prohibited from Most Collective Bargaining Under 2011 Act 10,

“Wisconsin has two principal labor laws, the Municipal Employment Relations Act (“MERA”), Wis. Stat. § 111.70 *et seq.*, and the State Employee Labor Relations Act (“SELRA”), Wis. Stat. § 111.80 *et seq.*, which govern employment relations and collective bargaining for public employees and labor organizations.” *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 6, 358 Wis. 2d 1, 851 N.W.2d 337. Prior to 1996, all employees of the University of Wisconsin Hospitals & Clinics were state employees and subject to the normal laws governing state employment. In 1996, the Legislature created UWHCA, and made certain categories of employees (including nurses) employees of UWHCA. 1995 Act 150, § 9159(4)(a). Act 10 completed this process, defining all employees of the hospitals and clinics as employees of UWHCA. 2011 Act 10, §377.

Wisconsin law distinguishes between the general category of public officials and employees, and employees of UWHCA, a “public body corporate and politic.” See Wis. Stat. § 20.921 (“such groups consist of state officers and employees *or* employees of the [UWHCA]”); see also Wis. Stat. § 19.45(11) (“all state public officials and employees *and* all employees of the [UWHCA]”). The definition of “employee” for purposes of SELRA, which contains 10 subsections, does not extend to UWHCA employees. Wis. Stat. §111.81(7); *Waity v. LeMahieu*, 2022 WI 6, ¶18, 400 Wis.2d 356, 969 N.W.2d 263 (*quoting State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.”)).

II. UWHCA is No Longer Subject to the Peace Act.

UWHCA’s transition from state-run institution⁵ to a separate political corporation⁵, outside the scope of SELRA, is also reflected in how it is categorized as an employer. From 1997 to June 28, 2011, UWHCA was an employer within the scope of the Wisconsin Employment Peace Act (“WEPA”), Wisconsin’s “body of law enacted for the purpose of insuring a degree of stability in labor-management relations.” Wis. Stat. §§ 111.02 (7)(a)2 (2010-11); Justin C. Smith, *Select Aspects of the Wisconsin Employment Peace Act*, 45 Marq. L. Rev. 338, 340 (1962). WEPA embodies a series of policy compromises including, on the one hand, a duty on the part of the employer to engage in collective bargaining and, on the other, restrictions on certain types of labor actions. Wis. Stat. §§ 111.06(1)(c), (2); 111.115; *Smith*. WEPA also created a series of mechanisms to resolve labor disputes. Wis. Stat. §§111.10 (arbitration), 111.11 (mediation).

At the same time that Act 10 redefined the balance of UWHCA employees as *not* state employees, it also removed UWHCA from the definition of employer under WEPA and its additional statutory *obligation* to collectively bargain. Wis. Stat. §233.03(7) (2010-11). UWHCA retained its residual authority to manage the

⁵ See *e.g. Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770-71 (7th Cir. 2005) (reviewing UWHCA’s status as a public entity).

relationship with its employees, set compensation and benefits, and “all the powers necessary or convenient to carry out the purposes and provisions of this chapter.” Wis. Stat. §233.03, (7), §233.10.

III. These Developments Indicate that UWHCA May Engage in Voluntary Recognition and Collective Bargaining.

Because (1) UWHCA employees have been gradually removed from the category of general public employees covered by SELRA and (2) UWHCA has been removed from the definition of employer under WEPA, but otherwise retains all of its authority to manage labor relations, it follows that UWHCA has the authority to voluntarily recognize a collective bargaining unit chosen by UWHCA nurses and to engage in collective bargaining on all pertinent subjects.

The Legislature opted to remove both the employer and the employees from (1) the duty of collective bargaining imposed by WEPA and (2) the draconian restrictions on collective bargaining imposed by SELRA after Act 10. It could have done otherwise, either by returning UWHCA employees to their pre-1996 status under SELRA or by making other provisions to define relations between labor and management at UWHCA. The Legislature’s contrary decision—to excise UWHCA *entirely* from SELRA—indicates its intent to avoid imposing Act 10’s restrictions in that relationship. Similarly, the decision to remove UWHCA’s *obligation* to engage in collective bargaining from both Chapter 233 and WEPA, without imposing a corresponding *prohibition* on collective bargaining, indicates the Legislature’s intent to simply remove the affirmative duty while permitting the parties to proceed as they see fit.

This conclusion is also consistent with the fundamental right to organize. The Wisconsin Supreme Court, even while upholding Act 10, acknowledged this right to organize and seek recognition from an employer. It quoted an *amicus* brief saying:

[One definition of] ‘collective bargaining’ is descriptive of a collective effort and refers to an activity where the party that is the object of the advocacy, the employer, has no legal obligation to respond affirmatively to the advocacy, *but may do so voluntarily*.

Madison Teachers, Inc., 2014 WI 99, ¶ 18 (emphasis added). The Supreme Court cited this portion approvingly, including this language: “[This type of ‘collective bargaining’] is a fundamental right that constitutionally is protected.” *Id.* (bracketed language in original).

Finally, this type of voluntary recognition is hardly novel. An affiliate of the Milwaukee Bucks entered voluntary collective bargaining negotiations with a union for customer service, operations, and security



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workers at the Fiserv Forum in 2019.⁶ There have been similar outcomes at Conde Nast⁷ and Wesleyan University.⁸

UWHCA nurses are urgently trying to exercise this fundamental right to address issues not only of interest to them as employees, but of significant concern to the patients they diligently treat. Nothing in Wisconsin law prohibits UWHCA from listening to their concerns through a collective bargaining unit. To the contrary, each statutory development, and Wisconsin's history as a leader in labor organizing, indicates that UWHCA has the full authority to voluntarily recognize such a union. Given the urgency of the issues, we strongly encourage an expedited opinion in this matter.

If Law Forward can provide any additional information or otherwise be of assistance, please contact us.

Sincerely,

LAW FORWARD, INC.

A handwritten signature in black ink, appearing to read "Daniel S. Lenz".

Daniel S. Lenz
Staff Counsel

⁶ Nick Williams, *Labor union begins contract negotiations for arena workers at Fiserv Forum*, Milwaukee Bus. Journal (July 19, 2019), available at <https://www.bizjournals.com/milwaukee/news/2019/07/19/labor-union-begins-contract-negotiations-for-arena.html> (last visited April 21, 2022).

⁷ Katie Robertson, *Conde Nast workers form a companywide union*, The New York Times (Mar. 29, 2022), available at <https://www.nytimes.com/2022/03/29/business/media/conde-nast-union.html> (last visited April 21, 2022).

⁸ Seamus McAvoy, *Wesleyan students form first voluntarily recognized undergraduate union in the country*, Hartford Courant (Mar. 23, 2022), available at <https://www.courant.com/news/connecticut/hc-news-wesleyan-labor-union-20220324-hobmv4rmtnhufbkljpwanghx7a-story.html> (last visited April 21, 2022).