

No. 19AP559

In The Wisconsin Court of Appeals

DISTRICT III

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN; DISABILITY RIGHTS
WISCONSIN INC.; BLACK LEADERS ORGANIZING FOR COMMUNITIES;
GUILLERMO ACEVES; MICHAEL J. CAIN; JOHN S. GREENE; AND MICHAEL
DOYLE,

PLAINTIFFS-RESPONDENTS,

v.

TONY EVERS,

DEFENDANT,

and

THE WISCONSIN LEGISLATURE,

INTERVENING DEFENDANT-PETITIONER

On Appeal from the Dane County Circuit Court,
The Honorable Richard G. Niess, Presiding,
Case No. 2019CV000084

INTERVENING DEFENDANT-PETITIONER WISCONSIN LEGISLATURE'S EXPEDITED MOTION TO ENFORCE THE STAY

INTRODUCTION

In its decision to stay the Circuit Court's order, this Court explained two equitable benefits that would flow from the issuance of its stay, contrary to the Circuit Court's actions in denying a stay: "the irreparable injury that could result in the absence of staying a temporary injunction that prohibits enforcement of potentially

valid legislation *and appointments.*” March 27, 2019 Order (“Order”), at 9 (emphasis added). Yet, the very next day after this Court issued its order, the Governor decided to violate the stay, refusing to allow Commissioner Ellen Nowak of the Public Service Commission (“PSC”) to return to work, *see* Nowak. Supl. Aff. ¶ 8, while taking several additional actions in plain violation of the Order’s protection of these appointees. The Governor’s actions are a two-fold affront to the courts of this State: he is violating an explicit court order, and he is seeking to nullify appellate review over a significant portion of the Circuit Court’s decision. If actions of this character had been taken by a private litigant, the typical response would be an order to show cause as to why coercive sanctions should not issue. But given the unique situation here—the Governor of this State violating a court order, while claiming the right to be able to evade appellate review over a decision of great public importance—the Legislature simply files this motion to enforce, requesting that this Court use its inherent authority to bring the Governor into compliance with the rule of law.

The Legislature further notes that the public interest favors expedited treatment of this motion. As Commissioner Nowak explains in her supplemental affidavit, the work of the PSC—and this state’s energy sector in general—will continue be negatively affected absent this Court’s intervention. *See* Nowak. Supl. Aff. ¶ 11. The PSC typically meets weekly in open session to consider proceedings related to the state’s approximately 1,100 utilities, and having only two Commissioners at the helm could cause considerable uncertainty to the entities regulated by, and consumers affected by, the PSC’s decisions. *Id.* If there is a tie

vote on an issue before the PSC, that question will not be resolved. *Id.* For utilities, this means that projects may be stalled, which, in turn, threatens development, job creation, and the public’s needs for reliable energy. *Id.* Similar disruptions can be expected at the other impacted bodies, such as the Labor & Industry Review Commission (“LIRC”) and the University of Wisconsin Board of Regents, where the Governor’s unlawful actions are causing needless uncertainty and confusion. And, of course, several people’s lives and careers are in unnecessary flux.

BACKGROUND

On December 4, 2018, the Legislature confirmed 82 appointments to various State agencies and boards, including the PSC, LIRC, and the University of Wisconsin Board of Regents. *See* S. Journal, Dec. 2017-18 Legis. Sess., 2018 Extra. Sess. (Dec. 4, 2018).

On March 21, 2019, the Circuit Court granted Plaintiffs’ motion for a temporary injunction. *See* Doc. 150, at 13–14. As relevant to the issues in the present Motion, the Circuit Court explained: “Defendants are further enjoined from enforcing the confirmation of the 82 nominees/appointees to the various State authorities, boards, councils, and commissions that occurred during the December 2018 ‘Extraordinary Session.’ *The appointments are ordered temporarily vacated as a necessary consequence of this temporary injunction.*” *Id.* at 14 (emphasis added).

The following day, Friday, March 22, 2019, the Legislature filed an emergency motion to stay the temporary injunction, while also asking for an immediate administrative stay. Shortly thereafter on the same day, the Governor requested the

opportunity to respond before a stay issued. Minutes after this Court granted his request for more time, the Governor sent a letter to the Senate Chief Clerk “remov[ing] the [eighty-two] appointments from consideration for confirmation by the Wisconsin Senate.” Tseytlin Aff. ¶ 2, Ex. A (Gov. Mar. 22 Ltr.). On the same day, the Governor barred appointees like Commissioner Nowak from their jobs. Nowak. Aff. ¶¶ 9–10. The Legislature responded with a letter to this Court requesting both an administrative stay and clarification that the Governor’s actions were “legally ineffective.” Then, during the ensuing stay briefing, Plaintiffs argued that the Governor’s actions rendered the appointments issue moot. Pls. Stay Resp. Br. 33. In its stay reply brief, the Legislature explained why this was legally wrong, adding that once the Circuit Court’s order was stayed, the individuals would hold these positions by statutory right, as they did starting in December 2018. *See* Leg. Stay Reply Br. 8–9.

On March 27, 2019, this Court granted the Legislature’s stay motion and ordered a stay of the temporary injunction. In relevant part, the order explained that “[t]aking into account the circuit court’s underestimation of the Legislature’s likelihood of success on appeal and the irreparable injury that could result in the absence of staying a temporary injunction that *prohibits enforcement of potentially valid legislation and appointments*, we conclude the court’s balancing of the four *Gudenschwager* factors was inherently flawed. We conclude the first two factors outweigh any potential harms to any parties identified in the third and fourth factors. Therefore, we grant the requested stay.” Order at 8 (emphasis added).

The following day, on March 28, 2019, the Governor refused to allow at least one of the appointees—Commissioner Nowak of the PSC—to return to work. Nowak Supl. Aff. ¶ 8. Counsel for the Legislature promptly informed the Governor’s counsel about the Governor’s violation of this Court’s order, including the “potentially valid . . . appointments” language. Tseytlin Aff. ¶ 3 Ex. B. The Governor still refused to comply with this Court’s order and then sent a letter to the Senate Chief Clerk purporting to re-nominate the same individuals for 67 out of the 82 positions, *id.* ¶ 4, Ex. C, while not mentioning the nominees for the PSC, LIRC, the University of Wisconsin Board of Regents, or several other state bodies. On the same day, the Governor sent appointment paperwork to individuals that he purported to re-nominate, with instructions to accept the nominations, sign the oath of office, and return the executed oaths to the Governor’s office within 5 days. *Id.* ¶¶ 5–6, Exs. D, E.

Meanwhile, the Senate Majority Leader sent a letter informing all 82 appointees that they were already in their positions under this Court’s stay order. *Id.* ¶ 7, Ex. F. The Majority Leader also ordered the Senate Chief Clerk to return the list of 67 re-nominees to the Governor because the Majority Leader had no interest in participating in the Governor’s violation of this Court’s stay. *Id.* ¶ 8, Ex. G.

ARGUMENT

This Court, like all courts of the State of Wisconsin, has the inherent authority to enforce and effectuate its equitable orders. *See In re Attorney Fees in Yu v. Zhang*, 2001 WI App. 267 ¶ 14, 248 Wis. 2d 913, 925, 637 N.W.2d 754 (Ct. App. 2001) (“Courts

must be able to effectively control the cases over which they have jurisdiction, both at the circuit court level and on appeal.”); *Chevron Chemical Co. v. Deloitte & Touche*, 176 Wis.2d 935, 946–47, 501 N.W.2d 15 (1993) (“Courts have . . . inherent authority to impose sanctions for . . . failure to obey court orders.”); *In re Kading*, 70 Wis.2d 508, 513, 238 N.W.2d 63 (1976). In this case, the Governor is violating this Court’s stay order, making the exercise of this Court’s inherent authority necessary.

As a threshold matter, the stay order clearly reinstates the appointees, settling the dispute between Plaintiffs’ and the Legislature in the stay briefing. As this Court explained, “[t]aking into account the circuit court’s underestimation of the Legislature’s likelihood of success on appeal and the irreparable injury that could result in the absence of staying a temporary injunction that *prohibits enforcement of potentially valid legislation and appointments*, we conclude the court’s balancing of the four *Gudenschwager* factors was inherently flawed. We conclude the first two factors outweigh any potential harms to any parties identified in the third and fourth factors. Therefore, we grant the requested stay.” Order, at 8 (emphasis added). This language clearly indicates that this Court intended these “potentially valid . . . appointments” to be put back into place. Had this Court agreed with Plaintiffs that the Governor’s actions on March 22 rendered the appointments issue moot, Pls. Br. 33, it surely would not have identified the appointments as one of two equitable benefits that would flow from the issuance of its stay.

Even had this Court not clarified that its stay applied to the appointments, and merely issued a one-line order staying the injunction, that would still have reinstated

the “potentially valid . . . appointments” as a matter of law. Appointment of fixed-term statutory nominees, such as a PSC Commissioner, is a two step-process: the Governor names the nominees, and the Senate confirms them. *See* Wis. Stat. § 15.06(1). When the Senate confirms, the person assumes office and exercises all powers of that office. *See* Wis. Stat. § 17.20(1). Once a fixed-term nominee is confirmed, that individual can only be removed by the Governor “for cause.” Wis. Stat. § 17.07(3); *compare with* Wisc. Stat. § 17.07(4) (those serving “at the pleasure of the governor” may be removed “at any time”); *see generally* *Moses v. Bd. of Veterans Affairs*, 80 Wis. 2d 411, 259 N.W.2d 102 (1977). “Cause” means “inefficiency, neglect of duty, official misconduct, or malfeasance in office.” Wis. Stat. § 17.001.

The Circuit Court’s now-stayed temporary injunction enjoining all defendants from “enforcing the confirmation of the 82 nominees/appointees,” and specifically provided that the appointments were “temporarily *vacated as a necessary consequence of this temporary injunction.*” Doc. 150, at 14 (emphasis added). It was the Circuit Court’s order “vacat[ing]” these appointments that temporarily deprived these individuals of their positions, rendering any further actions by the Governor statutorily irrelevant. Once that order has been stayed, they are, once again, statutorily entitled to positions to which the Senate confirmed them.

Accordingly, the Governor’s actions on March 22 were legally ineffective to undermine the confirmed appointees’ statutory rights. Again, *at the time that the Governor took the action on March 22, the appointments had already been “vacated” by the explicit terms of the Circuit Court’s order.* All the Governor’s hasty actions of

March 22 accomplished was imposing personal hardships and administrative burdens, much the same way that revoking login credentials would disrupt any employee's ability to do that employee's job. The legally effective action was the Circuit Court's order, which had already vacated the appointments before the Governor acted on March 22, and that order has now been stayed by this Court, reversing the Circuit Court's vacatur of the appointments and putting the statutory rights back in place. The appointees are thus all back in their jobs given this Court's stay, which they hold by right because of the Legislature's December 4, 2018 confirmation vote. Since the Governor has not invoked any "cause" to remove the appointees, his actions in preventing them from serving are unlawful.

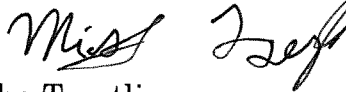
Finally, to the extent that there is any ambiguity in what this Court intended to order in its stay decision, this Court should exercise its broad inherent authority to protect the integrity of the courts and the orderly appellate process. If the Governor's position on the appointments prevails, he will have evaded the appellate process for a significant portion of this case, all because this Court granted the Governor's request to not stay the Circuit Court's order administratively before he had the opportunity to respond on the merits of the stay motion. The Governor never disclosed to this Court that he would use that time to attempt to evade a significant portion of this appeal. It would be simply unthinkable to permit this type of manipulation of the appellate process, especially when the Legislature acted with dispatch in seeking its stay, including asking for an administrative stay.

CONCLUSION

This motion for enforcement of the stay should be granted.

Dated: April 1, 2019

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