STATE OF WISCONSIN CIRCUIT COURT BRANCH 7 DANE COUNTY

American Federation of State, Municipal, and County Employees, AFL-CIO International Union, et al.,

Petitioners,

vs.

Wisconsin Law Enforcement Association, et al.

Respondents.

MEMORANDUM DECISION AND ORDER
Case No. 05CV2662

Background

The main plaintiff, American Federation of State, Municipal, and County Employees, ("AFSCME") is an International Union. Plaintiff Wisconsin State Employees Union ("WSEU") is a labor organization (as defined by Wis. Stat. §111.81(2) and as used throughout the State Employment Labor Relations Act (SELRA). The main defendant, Wisconsin Law Enforcement Association,(WLEA) is a labor organization (as defined by Wis. Stat. §111.81(2) and as used throughout SELRA).

AFSCME, asserts three claims against the defendant, WLEA. First, that WLEA committed a breach of contract by retaining Local funds, rather than turning them over to AFSCME as required by the forfeiture clause in the AFSCME Constitution. Second, that WLEA breached its fiduciary duty to their members by retaining the funds. Third, that WLEA committed an illegal conversion of the funds by retaining them.

Defendants counter that the forfeiture clause is void as a matter of public policy under Wells v. Waukesha County Marine Bank. Wells v. Waukesha County Marine Bank, 135 Wis. 2d 519, 401 N.W.2d 18 (Ct. App. 1986). Defendants lodge two

counterclaims. First, that AFSCME breached its fiduciary duty to its members by assuming Local 1195's funds and by failing to cash a check issued by Local 55. Second, that AFSCME was unjustly enriched by assuming Local 1195's funds.

Undisputed Material Facts

The Law Enforcement Unit is a bargaining unit of state employees, which was created by Wis. Stat. § 111.825. WSEU represented the Law Enforcement Unit (LEU). On February 25, 2005 an election was held by the Wisconsin Employment Relations Commission (WERC) to determine whether WSEU would continue to represent the LEU or WLEA would take over. WLEA was victorious. On March 10, 2005, WLEA was certified by WERC as the exclusive bargaining agent for the LEU.

When the LEU was represented by WSEU, several local AFSCME unions represented the LEU, including Locals 55 and 1195. At issue is the handling of Local 55 and 1195's funds when union representation changed. The primary source of these funds is the members' dues payments. For example, in 2004, Local Union 55 received $200,551 in dues from its members. $101,348 of this went to WSEU and $62,471 to AFSCME. This left a Local balance of $36,732.

The affairs of AFSCME and its affiliates are governed by an International Constitution (AFSCME Constitution). Article IX, Section 35 of the AFSCME Constitution is a forfeiture clause. It states:

> When any such subordinate body secedes or discontinues its affiliation, all monies, books ... of such subordinate body and other properties shall be transmitted to the International Secretary-Treasurer and assigned to the International Union. If such subordinate body is reorganized within a period of two years following transmission of its assets to the International Secretary-Treasurer, then an amount of funds equal to the value of such assets shall be provided to such reorganized body by the International Union. No property of any subordinate body and no property in the possession, custody or control of any

such subordinate body or any of its officers or employees, and no property held in trust, express or implied, which was created or established by any such subordinate body and whose primary purpose is to provide benefits for the members of such subordinate body or their beneficiaries, shall be given, contributed, assigned, donated or result to, or be given to the control of, either directly or indirectly, any seceding, dual or antagonistic labor organization or group to any subordinate body which is in violation of the International Constitution, but any such property shall remain in the custody or control of the subordinate body as indicated above, regardless of whether a majority of the membership may have secede or disaffiliated.

The language of the forfeiture clause requires both Locals 55 and 1195 to turn over their funds if union representation changes. It is also clear that if the Locals returned to AFSCME within two years, their funds would be returned to them. Locals 55 and 1195 dealt with this situation very differently.

All of Local 1195's members belonged to the LEU. When requested, Local 1195 transferred its assets to AFSCME. Since Local 1195 complied with the AFSCME Constitution, it was not placed under an administratorship. (Weaver Decl. p. 4.)

Local 55 held a meeting on February 7, 2005 without any WSEU representatives present and decided not to hand over its funds. At this meeting, President Greg Jones received unanimous consent to transfer Local 55's assets to another account if WLEA won the election. (Jones Dep. ¶ 28-31.) This decision is not reflected in the meeting minutes. (Id.)

Nine to ten percent of Local 55 was not part of the LEU unit. The other members were part of other bargaining units (The Blue Collar Unit, the SPS Unit, and the Technical Unit). After the disaffiliation of the LEU, WSEU transferred the remaining members of Local 55 to other WSEU Local Unions. WSEU dissolved Local 55.

AFSCME International President Gerald McEntee advised Local 55 by letter that he was placing the Local under an administratorship pursuant to the AFSCME Constitution (Article IX, Section 36). According to his letter, he suspected Local 55 was going to dissipate its funds contrary to the AFSCME Constitution. Karl Hacker and Jana Weaver were named "Administrators." When the Administrators attempted to remove the funds from the bank, the bank representatives refused them access.

Local 55 President Greg Jones and Treasurer Lewis Judge submitted a letter to the bank stating that the Administrators "have no legal claim to any of the assets contained" in Local 55's accounts. (Kobelt Decl. Plt. Exh. 5.) Then, they transferred the funds to another bank to an account named "WLEA Local Union 1," which was accessible only by Attorney Sally Stix.

The parties have submitted dueling motions for summary judgment.

Standard

Under Wis. Stat. § 802.08(2):

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In a summary judgment motion, the Court views the facts in the light most favorable to the nonmoving party. State Bank of La Crosse v. Elsen, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986). Thus, any doubts as to the existence of a genuine issue of material fact are resolved against the moving party. Hudson Diesel, Inc. v. Kenall, 194 Wis. 2d 531, 546, 535 N.W.2d 65 (Ct. App. 1995).

Decision

In Wells, 135 Wis.2d 519, *supra*, the Court of Appeals determined that a nearly identical forfeiture clause in AFSCME's Constitution was not enforceable. It so held by finding that the provision was void on public policy grounds. In that case, Local 2491 was investigating the possibility of electing a different bargaining representative than AFSCME. When the deputy administrator of AFSCME Local 2491 discovered an election would be held he called a meeting of the Local's executive board. At the meeting, Mr. Lyons "shouted, pounded on the table, and pointed his finger. He threatened that any attempt to divide the treasury ... would be met with embezzlement charges." At a later date, Local officers were reminded that the AFSCME Constitution required forfeiture of the Local Treasury if AFSCME lost the election. Despite all of this, Local 2491 elected a new bargaining representative. AFSCME placed Local 2491 under an administratorship. Local 2491 refused to turn over its funds as called for by the AFSCME Constitution.

As happened here, the International in Wells sued the Local for the funds. The Local countered that the forfeiture clause was subversive of the personal property rights guaranteed under the Rights of Municipal Employees Act (MERA) (Wis. Stat. § 111.70). Under MERA, no person may interfere with the exercise of the rights of self-organization, joining or assisting labor organizations, or to bargain collectively. Wis. Stat. § 111.70(2).

In Wells Court found that a union's constitution constitutes a contract between the International and the Local, finding further that the forfeiture clause's only possible purpose was to discourage Locals from disaffiliating from AFSCME or to punish them

for it. Critical to the decision was the determination that ". . . absent an attempt at disaffiliation by the Local neither AFSCME nor District Council 40 had any claim whatsoever on the treasury of the Local." Id. at 531. The funds in Wells, as here, were accumulated from members' dues.

Citing multiple reasons, Plaintiffs urge that Wells does not apply to this case:

1. Wells is factually distinguishable.
2. Wells is contrary to the weight of authority in other jurisdictions upholding forfeiture clauses.
3. Wells rests upon "a fundamental misunderstanding of elementary principles of state labor law on which its public policy analysis rests." [1]
4. Wells misconstrues federal labor law.

In all, the Plaintiffs insist that this Court is not bound by Wells, because of the factual differences and "the poverty of the court's analysis."

In contrast, Defendants view Wells as applying because it is binding precedent on this lower Court; it is not factually distinguishable from the facts in this case; it does not make a decision contrary to the weight of authority; it does not misconstrue state labor law; and finally, the federal labor law cases cited in a footnote in Wells are irrelevant to the ultimate holding in Wells.

The crux of this case is whether Wells applies, and if it applies, what outcome it dictates. Depending upon the application of Wells, there are either no material factual issues in dispute and the case can be decided as a matter or law or there is one major material factual issue still in dispute and summary judgment must be denied.

If the forfeiture clause is void because its sole purpose was to inhibit the exercise of labor rights and the International had no other claim to the funds, then there are no

material factual issues. However, if these grounds are not enough to find the forfeiture clause unenforceable under Wells and the Defendant must show a pattern of behavior similar to that in Wells, then there may be a material factual dispute. The parties' disagree as to whether the International and its attorney threatened (overtly or impliedly) the lack of funds (due to the forfeiture) if the Local left AFSCME; this could be a material factual issue.

The impact of Wells depends on what the Court of Appeals intended when it declared that the forfeiture clause was void "as applied." Wells at 522. Plaintiffs assert that the forfeiture clause was void "as applied," because of the intimidating actions of Mr. Lyons. To Plaintiffs that means that whether a forfeiture clause is enforceable is dependant on the pre-vote actions of those seeking its benefits. There can be no question that the Appellate Court use of the phrase "as applied" gives pause. But requiring behavior such as exhibited by Mr. Lyons in Wells in order to invoke public policy would make the Wells holding very narrow, indeed.

The Court in Wells emphasizes that the losing union "has no other claim to that property." Id. at 532. After its initial description of Mr. Lyons' reprehensible behavior, the Court does not reference that behavior later in its decision. Instead, the Court addresses the forfeiture clause under a separate section and in this section it does not mention the threatening nature of Mr. Lyons behavior. Id. at 526.

Instead, the Court stresses the fact that the International does not have any claim on the Local funds unless the Local joins a new union.

> We conclude that the public policy of Wisconsin does not allow the enforcement of this contract provision, as applied to require the forfeiture of a local union's property to the international union, *which has no other claim to that property*,

[1] Plt. brief in Support of Summary Judgment Motion at 22.

upon the local members' exercise of their statutory right to discontinue affiliation with the international. Id. at 532 (Emphasis in original.)

It is at this point, the Court of Appeals declares that the only purpose of such a forfeiture clause clearly is deterrence and punishment. The most reasonable interpretation of the "as applied" phrase is that it refers to an International, which has no other claim to the funds, but is relying on the clause as a deterrent to a change in bargaining representation. .[2] Thus, it is immaterial in this case whether the International or its attorney directly threatened or attempted to intimidate Locals 55 and 1195. This conclusion means there are no disputed **material** issues of fact, and the case can be decided as a matter of law.

Despite Defendants' artful assertions to the contrary, Wells is binding precedent in this jurisdiction and must be applied to this case. Attorney General, *ex rel.* Cushing v. Lum, 2 Wis. 507 (1853). Calling the decision "aberrant," challenging the its legal foundation, citing law from other jurisdictions, Plaintiffs seem to think that this Circuit Court is at liberty to substitute its opinion for that of an Appellate Court published decision. Needless to say, there is no authority for such a proposition. One can only wonder if Wells is as faulty as Plaintiffs claim, why has it stood as precedent for over 20 years. No conflicting Wisconsin appellate law could be located. Even if a Circuit Court Judge were convinced of Plaintiffs' opinion of the Wells decision, it is not the prerogative of a lower Court to ignore the existence of this precedent. It may well be that Plaintiffs can convince a different Court of Appeals or the Supreme Court that the

[2] While not comparable to the actions of the intemperate Mr. Lyons, plaintiffs did forcefully remind defendants of the impact of the forfeiture clause. See, defs' Glen Jones declaration, Exhibit 1, point 6 of Kobelt letter.

holdings in Wells must be reversed. Then, this decision will fall, even though its writer was following the dictates demanded by precedent.

Under Wells, the fact that the International had no other claim to the funds and that the clause was being used to inhibit rights guaranteed by MERA, made the clause contrary to public policy. A forfeiture clause can be struck as void for public policy reasons if three things are present: 1) the forfeiture clause is similar (purpose, use, interpretation and language) to the one in Wells; 2) a lack of any other claim to the funds; and 3) the applicable law is similar to MERA in Wells.

First, the forfeiture clause at issue here is almost word for word exactly the same as in Wells. (The only difference is the addition of a two year revert-back provision.) Despite Plaintiffs' paternalistic claim that the purpose of the clause is to keep members from ill-considered, impetuous decisions to leave AFSME, the language and circumstances of the forfeiture clause show that its only true purpose is to chill the rights guaranteed under SELRA. Second, the International did not have any other claim to the funds than the forfeiture clause, just as in Wells.

Third, MERA and SELRA are analogous (in purpose and interpretation). The same rights are protected by SELRA as by MERA.

> It is helpful to compare the wording of MERA and SELRA, whereupon we find that the rights guaranteed to employees under these acts are identical. It would be illogical to apply a different test to MERA than SELRA merely because a different group of protected persons are involved (municipal employees versus state employees).

Dep't of Employment Relations v. Wisconsin Employment Relations Com., 122 Wis. 2d 132, 143 (1985).

Furthermore, SELRA includes a declaration of policy that explicitly places the interests of the public, the employer, and the employee as the "3 major interests involved." Wis.

Stat. § 111.80(1). SELRA also states that an employee may, "associate with others in organizing and in bargaining collectively through representatives of the *employee's own choosing without intimidation or coercion from any source*." Id. at (3). (Emphasis added.) Therefore, SELRA even more clearly provides public policy grounds to strike down the forfeiture clause, than MERA did in Wells.

Conclusion

The forfeiture clause is void as a matter of public policy because it violates the rights protected by SELRA. Since the forfeiture clause is void, the Plaintiffs' other claims also fail. The claim of conversion cannot be sustained because the Plaintiffs cannot establish the property rightfully belonged to another [them]. *See,* Heuer v. Wiese, 265 Wis. 6, 8 (1953), *quoting* Adams v. Maxcy, 214 Wis. 240, 245 (1934).

The claim for a breach of fiduciary duty fails, because the forfeiture clause is void and Local 55 did not violate the AFSCME Financial Standard Code as alleged by the Plaintiffs. The Code states that it is the officers' "fiduciary responsibility to see that the union's assets are managed prudently, ensuring that any and all expenditures are for the exclusive benefit of the affiliate and its members." (Compl. Plt. Exh. 3, p. 10.) The Local did not breach its duty inasmuch as it was acting for the benefit of its members in reliance upon Wisconsin law. (Jones Dep. at 37-38.)

Defendants' claim for unjust enrichment is found to meritorious. The International has no other claim on Local 1195's funds other than through the forfeiture clause. An unjust enrichment claim is granted when 1) a benefit was conferred; 2) there was knowledge of the benefit by the recipient; and 3) retention of the benefit would be inequitable. Wells, 137 Wis. 2d at 530, *citing* Puttkammer v. Minth, 83 Wis. 2d 686, 689

(1978). The forfeiture clause is void; therefore, the International does not have a claim to Local 1195's funds (which it knowingly assumed) and it would be inequitable for it to retain them. Since Defendants' prevail on their unjust enrichment claim, it is not necessary to address their claim under breach of fiduciary duty.

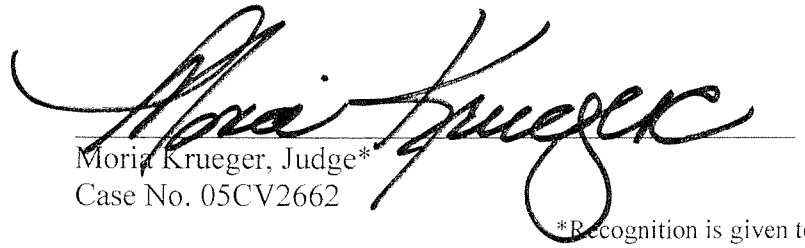
In Wells, the money was ordered to be transferred to "appellants as trustees for the benefit of the local bargaining unit." Id. at 535. The same process should occur here, with every effort being made to determine the new union units for the 9-10% non-LEU members of Local 55 and to send them a proportionate amount.

ORDER

For the reasons stated above, Defendants' motion for Summary Judgment is **GRANTED**, and Plaintiffs' motion is **DENIED**. Counsel for Defendants is to draft a judgment consistent with this decision, providing a copy to Plaintiffs' counsel who has five working days to object as to form.

Dated at Madison, Wisconsin, this 22nd day of January 2007.

BY THE COURT:



Moria Krueger, Judge*
Case No. 05CV2662

*Recognition is given to staff attorney, Michelle Swardenski for her work on this decision.

cc:
Attorney Kurt Kobelt
Attorney Sally Stix