



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG-01-22

The Honorable Tony Evers
Governor
State of Wisconsin
115 East, State Capitol
Madison, WI 53702

Dear Governor Evers:

¶ 1. You have requested an opinion regarding the power of the University of Wisconsin Hospitals and Clinics Authority (the “Authority”) to voluntarily engage in collective bargaining with an organization chosen by a majority of nurses it employs. Your request notes that the Authority is not mentioned in chapter 111 of the Wisconsin Statutes, which governs employment relations and collective bargaining. If that lack of express reference means that the Authority is not covered by chapter 111’s collective bargaining provisions, you posit that the Authority is not prohibited from voluntarily engaging in bargaining, as state law would neither require nor prohibit it.

¶ 2. Before addressing your question about voluntary bargaining, I discuss a threshold issue of whether chapter 111’s mandatory collective bargaining provisions apply to the Authority, meaning it would be required to bargain. Although this opinion does not reach a conclusion on this issue, it appears that the Authority would be covered by the plain language of chapter 111’s subchapter known as the Peace Act. As to the direct question you pose, even assuming the Authority is not covered by the Peace Act—and, thus, is not required to collectively bargain—then it would still have the power to voluntarily bargain. The Authority has broad powers to contract with its employees and set their terms of employment, and it could choose to do so via a voluntary collective bargaining process.

¶ 3. Your request involves statutory interpretation, which applies the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common,

ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* The statutory language is “interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* ¶ 46. If this textual analysis “yields a plain, clear statutory meaning, then there is no ambiguity,” and the statute should be applied according to that plain meaning. *Id.* Courts may not “disregard the plain, clear words of the statute.” *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)). Similarly, a court cannot “read into the statute words the legislature did not see fit to write.” *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

Applicability of the Peace Act

¶ 4. In determining what power or obligation the Authority has under Wisconsin law to engage in collective bargaining, the threshold question is whether the Authority is covered by the Peace Act. This issue was not the central focus of the submissions that have been made regarding this matter, and this opinion does not reach a formal conclusion on this issue. Nevertheless, because a court would begin its analysis with this issue and it could render moot the question whether the Authority may voluntarily engage in collective bargaining, this opinion preliminarily analyzes whether the Authority is covered by the Peace Act.

¶ 5. The Peace Act grants employees statutory rights “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining.” Wis. Stat. § 111.04(1). In turn, it provides processes for “collective bargaining,” which is defined as “the negotiation by an employer and a majority of the employer’s employees in a collective bargaining unit . . . concerning representation or terms and conditions of employment.” Wis. Stat. § 111.02(2).

¶ 6. The Peace Act’s coverage of employers and employees is broad. An “[e]mployee” means “any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise.” Wis. Stat. § 111.02(6)(a). Its coverage of employers is equally broad: “[e]mployer” means “a person who engages the services of an employee.” Wis. Stat. § 111.02(7)(a).

¶ 7. There are only two exceptions in the Peace Act’s definition of “employer”: (1) for the “state or any political subdivision thereof” and (2) for a “labor organization.” Wis. Stat. § 111.02(7)(b). The exceptions for the state and political subdivisions exist because different subchapters specifically address state employees and employers (subchapter V, the State Employment Labor Relations Act, commonly known as SELRA) and municipal employees and employers (subchapter IV, the Municipal Employment Relations Act, commonly known as MERA). SELRA covers, with certain exceptions, “[a]ny state employee in the classified service of the state” and other listed state employees, and it binds “the state of Wisconsin” as an “employer.” Wis. Stat. § 111.81(7), (8). MERA defines its coverage of employers as including “any city, county, village, town . . . or any other political subdivision of the state.” Wis. Stat. § 111.70(1)(j).

¶ 8. Where a statute provides a “specific exception,” courts will not read additional ones into it. Courts presume “that the legislature intended to exclude other exceptions.” *Town of Clayton v. Cardinal Constr. Co.*, 2009 WI App 54, ¶ 16, 317 Wis. 2d 424, 767 N.W.2d 605 (citation omitted). Restated, “if [a] statute specifies one exception to a general rule . . . , other exceptions or effects are excluded.” *Georgina G. v. Terry M.*, 184 Wis. 2d 492, 512, 516 N.W.2d 678 (1994) (first alteration in original) (citation omitted).

¶ 9. Given that the Authority is not a labor organization, to determine the Peace Act’s coverage, a court would examine whether the Authority fits into the specific employer exceptions for the “state” or “a political subdivision thereof.” Otherwise, the statute’s coverage would apply by default, as it does for all other employers.

¶ 10. Multiple sources support that the Authority is not the “state.” Rather, it is a “public body corporate and politic,” also known as a “political corporation,” and it has characteristics in common with an “independent going concern.” Wis. Stat. § 233.02(1); *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 31, 302 Wis. 2d 358, 735 N.W.2d 30; *Mayhugh v. State*, 2015 WI 77, ¶ 13, 364 Wis. 2d 208, 867 N.W.2d 754. In ruling that the Authority is a “political corporation,” the Wisconsin Supreme Court has explained that the Authority has “[s]ome features . . . shared with private entities”: for example, it does not receive general purpose revenue from the state; it can sue and be sued; and it can buy and sell real estate. *Rouse*, 302 Wis. 2d 358, ¶ 32.

¶ 11. The court has further explained that an entity with those kinds of characteristics is an “independent going concern”—an entity that is not an arm of the state because it is “an entity independent from the state.” *Mayhugh*, 364 Wis. 2d 208, ¶ 13. Like the Authority, such entities have powers to independently buy and sell real estate, sue and be sued, and take on debt, and they are not funded through general purpose revenue; such entities’ liabilities thus are not the state’s liabilities. *See id.* ¶¶ 15–16; Wis. Stat. § 233.03(11)–(16). For example, the Wisconsin Supreme Court held that the State Armory Board—which, like the Authority, is a “body politic and corporate”—was an independent going concern, as it can convey real estate, hold and disburse its own funds, and issue bonds. *Mayhugh*, 364 Wis. 2d 208, ¶ 18 (citation omitted); *see* Wis. Stat. § 233.02(1) (designating the Authority as “a public body corporate and politic”). The “designation of the Board as a body politic and corporate, combined with the Board’s broad proprietary powers, rendered it an independent going concern,” and not an arm of the state. *Mayhugh*, 364 Wis. 2d 208, ¶ 18. In a further example, the court explained that the State Housing Finance Authority was an independent going concern because it was “a public body corporate and politic” with all “necessary or convenient” powers including the power to sue and be sued, incur debt, issue bonds, enter leases, and acquire property. *Id.* ¶ 19–20 (citations omitted); *see also id.* ¶¶ 21–22 (providing a similar explanation as to the State Investment Board). Again, those key features are all true of the Authority. *See* Wis. Stat. § 233.02(1) (stating it is a “public body corporate and politic”); Wis. Stat. § 233.03 (vesting all powers “necessary or convenient”); Wis. Stat. § 233.03(2) (stating that the Authority can “[s]ue and be sued” and can “negotiate and enter leases”); Wis. Stat. § 233.03(11)–(16) (setting out the Authority’s powers to issue bonds, acquire and construct facilities, and buy, sell, and lease real estate).

¶ 12. Consistent with the supreme court’s explanations, the statutes treat “political corporations” as separate from the “state.” For example, one statute governs notices of legal claims against “state employees” and state agents, Wis. Stat. § 893.82, whereas a separate statute, Wis. Stat. § 893.80, governs claims against a “political corporation” or other non-state entities, like governmental subdivisions. Likewise, the Seventh Circuit has denied the Authority the ability to invoke Wisconsin’s sovereign immunity, which protects an “arm of the state.” In doing so, that court observed that the Authority has the nature of an “independent, nonprofit entity,” which “Wisconsin’s own courts would classify . . . as private” because of its “financial autonomy and the authority to sue and be sued in its own name.” *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005).

¶ 13. The Authority also is not a political subdivision of the state. Although not defined in the Peace Act, the statutes elsewhere use the term “political subdivision” to refer to a “city, village, town, or county” or another municipal entity, consistent with MERA’s coverage. *See* Wis. Stat. § 66.0628(1)(a) (defining “political subdivision”); *see also* Wis. Stat. §§ 66.0505(1)(b), 85.064(1)(b), 86.312(1)(c), 91.01(24), 196.5045(1), 299.50(1)(d), 229.821(11), 700.28(1). Because the Authority is none of those things, that exception would not apply.

¶ 14. Thus, the cases support that the Authority is neither the “state” nor a “political subdivision,” and so it does not appear to be exempt from the Peace Act’s express coverage. The Peace Act has no exception for a “public body corporate and politic,” a “political corporation,” or an “independent going concern.” And the Peace Act provides that where it is not “clearly indicate[d] otherwise,” its coverage “shall not be limited to the employees of a particular employer.” Wis. Stat. § 111.02(6)(a).

¶ 15. While a Wisconsin Legislative Council memorandum states that the Authority is not covered by the Peace Act, Wis. Legis. Council, Memo, *Union Negotiations with University of Wisconsin Hospitals and Clinics Authority* (Oct. 4, 2021),¹ that memorandum does not look to the statutory text but instead relies on assumptions about statutory history and legislative history. That approach overlooks the key task in statutory interpretation: reading the text of the statute.

¶ 16. Although statutory history may be considered as part of statutory context, *see State v. Williams*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467, conclusions drawn from statutory history cannot change what the text states. Of particular relevance here, an exclusion cannot be “read into the statute.” *Dawson*, 336 Wis. 2d 318, ¶ 42. But the Legislative Council analysis appears to do just that.

¶ 17. Further, the statutory and legislative history referred to in the Legislative Council memorandum do not clearly support the memorandum’s conclusion.

¶ 18. As to statutory history, the Legislative Council memorandum points to 2011 Wis. Act 10’s removal of the Authority as affirmatively included in the definition of an employer under the Peace Act. The Legislative Council memorandum assumes

¹ Wis. Legis. Council, Memo, *Union Negotiations with University of Wisconsin Hospitals and Clinics Authority* (Oct. 4, 2021), <https://wisconsinexaminer.com/wp-content/uploads/2021/12/Updated-Leg-Council-Memo-RE-UWHCA-Collective-Bargaining.10.4.21pdf.pdf>.

that there is only one explanation for Act 10's removal of the express reference—to exclude the Authority from the Peace Act's coverage. But that is not the only possible explanation.

¶ 19. The Authority was added to the definition of an employer under the Peace Act in 1995, when the Authority split off from the state. At the time the Authority split from the University of Wisconsin, hospital and clinic employees were treated as a mixture of Authority and state employees, 1995 Wis. Act 27, § 9159(4), with the Authority employees covered by the Peace Act and the state employees employed by the Hospital and Clinics Board covered by SELRA. 1995 Wis. Act 27, § 224m (creating Wis. Stat. § 15.96); Wis. Stat. § 111.815 (2009–10) (including the Board under SELRA). That mixture ended with Act 10. 2011 Wis. Act 10, §§ 12 (repealing Wis. Stat. § 15.96), 377 (removing the language in Wis. Stat. § 233.10(1) that limited the Authority's employment powers as previously stated in 1995 Wis. Act 27, § 9159(4)). That meant that language clarifying whether the Authority fell under the Peace Act was no longer needed. If the Legislature meant to do more—for the Authority to be uniquely exempt from coverage under the Peace Act—one would expect the text of the statute to say so.

¶ 20. As to legislative history, the Legislative Council memorandum cites to statements in the legislative history files concluding that 2011 Wis. Act 10 removed bargaining rights for the Authority's employees. However, Act 10 changed many statutory provisions that applied to the Authority, and the comments in the legislative history do not explain which provisions of Act 10 they refer to. For example, the pre-Act 10 statutes included special bargaining rights for Authority employees, beyond the basic terms of the Peace Act. *See* Wis. Stat. § 111.05(5) (2009–10). Act 10 eliminated those special rights. 2011 Wis. Act 10, § 195. Since the comments do not explain which bargaining rights they refer to or provide any analysis, it requires speculation to interpret them.

¶ 21. In any event, the legislative history may not be used “to vary or contradict” statutory text. *Kalal*, 271 Wis. 2d 633, ¶ 51. And, again, it would have been straightforward to expressly exempt the Authority from the Peace Act—just like the “state” and “political subdivisions thereof” are expressly exempted.

¶ 22. In sum, although this opinion does not conclusively opine on the issue, it appears that the Peace Act applies based on the statute's plain language.

Authority to voluntarily bargain

¶ 23. Assuming that the Peace Act would not mandate collective bargaining, the Authority at a minimum has the power to voluntarily bargain.

¶ 24. Chapter 111's bargaining provisions contain both mandates and restrictions for employers covered under the Peace Act, MERA (for municipal employers), or SELRA (for state employers). For example, under MERA, a covered "municipal employer is prohibited from bargaining collectively" on "[a]ny factor or condition of employment except wages." Wis. Stat. § 111.70(4)(mb). SELRA imposes similar restrictions on the state of Wisconsin as employer: "The employer is prohibited from bargaining with a collective bargaining unit containing a general employee with respect to . . . [a]ny factor or condition of employment except wages." Wis. Stat. § 111.91(3).

¶ 25. While chapter 111 contains these specific, explicit restrictions applicable to certain employers, it contains no overarching prohibition on bargaining that would apply to an employer not covered by the restrictions. That is highly significant under the rules of statutory construction. Words cannot be "read into" a statute. *Dawson*, 336 Wis. 2d 318, ¶ 42. That is doubly true where a statute has different, specific exemptions or restrictions. *Town of Clayton*, 317 Wis. 2d 424, ¶ 16. The Legislature knew how to prohibit a bargaining practice—there is express language doing just that for certain employers. It did not provide those prohibitions for employers not covered by SELRA or MERA.

¶ 26. As part of the public comment opportunity for the opinion request, the Authority submitted a comment citing two sources that it asserts support that it may not voluntarily bargain. Neither supports that position because each involved specific statutory prohibitions on bargaining. In *LaCroix v. Kenosha Unified School District Board of Education*, No. 13CV1899 (Wis. Cir. Ct. Kenosha Cnty. Mar. 19, 2015), the circuit court ruled that a covered municipal employer could not bargain contrary to the express "prohibit[ion]" in MERA. In the other source, the Supreme Court of New Hampshire ruled that a statute providing that "[i]n no case shall [the entity overseeing bargaining] certify a bargaining unit" of a certain composition prevented an entity from recognizing those uncertified bargaining units. *Pro. Fire Fighters of Wolfeboro, IAFF Loc. 3708 v. Town of Wolfeboro*, 48 A.3d 900, 904 (N.H. 2012) (citation omitted).

¶ 27. Rather than support the Authority’s position that it may not voluntarily bargain, these examples demonstrate what is missing here. The Authority is not a state employer covered by SELRA or a municipal employer covered by MERA, and so any restrictions for employers covered by those subchapters do not apply. There is no prohibition that applies to the Authority or its employees similar to those in the cited cases.

¶ 28. Not only is there no statutory bar to voluntary bargaining, but the statutes governing the Authority’s powers plainly encompass bargaining as a means to contract with its employees. By statute, the “authority shall have all the powers necessary or convenient to carry out the purposes and provisions of [chapter 233].” Wis. Stat. § 233.03. That is consistent with the powers generally vested in corporations in Wisconsin “to do all things necessary or convenient to carry out its business and affairs.” Wis. Stat. § 180.0302. Among other powers, the Authority is broadly authorized to employ an employee and “fix his or her compensation and provide any employee benefits,” Wis. Stat. § 233.03(7), and to implement “employment policies for employees,” Wis. Stat. § 233.04(2). It “shall employ such employees as it may require and shall determine the qualifications and duties of its employees.” Wis. Stat. § 233.10(1). And, as a general matter, the Authority is empowered to “[a]dopt bylaws and policies and procedures for the regulation of its affairs and the conduct of its business” and to “make and execute . . . instruments necessary or convenient to the exercise of [its] powers.” Wis. Stat. § 233.03(1), (2). The term “instrument” means a “written legal document that defines rights, duties, entitlements, or liabilities.” *Instrument*, Black’s Law Dictionary (11th ed. 2019); see *Kalal*, 271 Wis. 2d 633, ¶ 53 (explaining that plain meaning may be “ascertainable by reference to the dictionary definition”). This power to execute a legal document (an “instrument”) defining rights and duties would encompass a collective bargaining agreement.

¶ 29. Thus, the Authority is expressly and broadly empowered to determine the terms of its relationship with its employees and to enter into agreements defining rights or duties it agrees to.² One means of carrying out these broad statutory powers would be to reach terms of employees’ employment through collective bargaining. Of course, that still must happen within the constraints of statutes that do exist. For

² As the Wisconsin Supreme Court has reiterated, even state agencies are empowered to act on these kinds of “explicit but broad” grants of statutory authority. *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 2021 WI 71, ¶ 25, 398 Wis. 2d 386, 961 N.W.2d 346. That is even more true for a “political corporation” or an “independent going concern,” which are vested with broad independent powers beyond what is vested in an arm of the state, as discussed in the text.

example, “[a]ppointments to and promotions in the authority shall be made according to merit and fitness.” Wis. Stat. § 233.10(1). Voluntary bargaining would need to occur within the bounds of that provision and the surrounding statutory framework.

¶ 30. In addition to the statutory text, other authorities support this result, including a previous opinion from this office. In 59 Op. Att’y Gen. 200 (1970), the Attorney General addressed the University of Wisconsin’s voluntary recognition of a teaching assistants’ association. *Id.* at 201. UW-Madison had “voluntarily recognized” the association and “agreed to negotiate and contract . . . as though [chapter 111] were applicable.” *Id.* The opinion concluded that the contract was “legal and binding” under Wisconsin law, citing the broad statutory powers of the Board of Regents, who “clearly have the authority to enter into individual contracts” and, in turn, could enter into an agreement “which establishes the framework and standards of the individual employment contracts” as “an integral part of . . . contracting for personnel.” *Id.* at 202–04. Restated, “collective bargaining is an adjunct to individual employment contracts” and thus was within the Board of Regents’ existing statutory power to contract with employees. *Id.* at 205–06.

¶ 31. Various courts have agreed with those principles. Indiana’s court of appeals addressed a scenario where a school district adopted a voluntary policy for collective bargaining with employees despite neither state nor federal law requiring it. *Mich. City Area Sch. v. Siddall*, 427 N.E.2d 464 (Ind. Ct. App. 1981). The court agreed that the district was authorized to do so voluntarily under its statutory authority to fix terms of its employees’ employment. *Id.* at 466. The court explained that while the district had “no legal obligation to engage in collective bargaining with the . . . employees,” it “may do so voluntarily, and accordingly could properly declare qualifications or restrictions establishing a basis upon which it would agree to bargain collectively.” *Id.* at 468. As another example, the Eighth Circuit held that a city could contract for additional benefits for employees regardless of the narrower coverage of a particular statutory bargaining law. *Am. Fed’n of State, Cnty. & Mun. Emps. v. City of Benton*, 513 F.3d 874, 881 (8th Cir. 2008). The court recognized that such a contract does not “contract away its right to manage the fiscal matters of the City” but rather is an “exercise[]” of its “functions.” *Id.* Similarly, Utah’s court of appeals held that a school board could choose to collectively bargain under its statutory authority to enter into employment contracts. *Park City Educ. Ass’n v. Bd. of Educ. of Park City Sch. Dist.*, 879 P.2d 267 (Utah Ct. App. 1994). There, too, the bargaining did not delegate its statutory powers but rather was an exercise of them. *Id.* at 269–71 (collecting cases stating the weight of authority); *see also Del. River Port Auth. v. Fraternal Ord. of Police*, 290 F.3d 567, 574 n.11 (3d Cir. 2002) (noting that

where an entity was under no “legal duty” to bargain, it was “free to voluntarily recognize and bargain collectively with” employees (citation omitted).³

¶ 32. As observed in these many court decisions,⁴ collective bargaining is simply a method of carrying out existing statutory authority to enter into employment agreements.

³ For these reasons and additional ones, the present scenario does not involve improperly contracting away public powers, as the Authority posits in its comment letter. Rather, the cases the Authority cites are distinct, addressing municipalities’ contracting away the state’s sovereign powers. *See Adamczyk v. Town of Caledonia*, 52 Wis. 2d 270, 275, 190 N.W.2d 137 (1971) (discussing the distinct scenario where a town purported to contract away the “the state’s sovereign[]” power to remove certain officers without cause); *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 80, 205 N.W.2d 784 (1973) (stating that a municipality may contract away its business or propriety powers but may not contract away its governmental powers). As the authorities in the text make clear, the bargaining discussed here is a method of *exercising* a statutory power—determining and entering into an employment agreement—and does not involve contracting away any powers, much less the state’s sovereign ones.

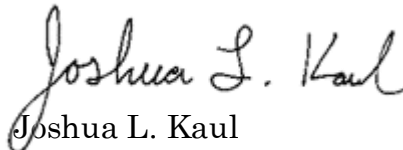
⁴ To the extent that the Authority’s contentions about the practicality of voluntarily engaging in collective bargaining bear on the question of whether the Authority is permitted to collectively bargain, these and other sources demonstrate that employers have indeed successfully implemented voluntary collective bargaining agreements. *See supra* ¶ 31; *see also City of Phoenix v. Phx. Emp. Rels. Bd. ex rel. Am. Fed’n of State, Cnty. & Mun. Emps. Ass’n, Loc. 2384*, 699 P.2d 1323, 1327 (Ariz. Ct. App. 1985) (discussing the establishment of an ordinance modeled after the National Labor Relations Act); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 Cornell J.L. & Pub. Pol’y 735, 752 (2009) (discussing memoranda of agreement with employers); Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 Marq. L. Rev. 623, 641–55 (2012) (discussing various agreements and models).

Governor Tony Evers
June 2, 2022
Page 11

Conclusion

¶ 33. In summary, although this opinion does not reach a conclusion on the issue, it appears that the Peace Act includes the Authority in its coverage based on the statute's plain text. Assuming that the Authority is not covered by the Peace Act, I conclude that it is within the Authority's statutory power to voluntarily engage in collective bargaining.⁵

Sincerely,


Joshua L. Kaul
Attorney General

JLK:ADR:jrs

⁵ Your request does not seek an opinion on, and this opinion does not address, what relevance, if any, federal law may have to the issues discussed here. As this office's guidance has long stated, Attorney General opinion requests generally are not appropriate on questions of federal law. *See* 77 Op. Att'y Gen. Preface (1988).