

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: March 28, 2011

MEMORANDUM

TO: Mayor David J. Cieslewicz
Dean Brassler, Comptroller
Brad Wirtz, Human Resources Director

FROM: Michael P. May, City Attorney

RE: Effective Date of 2011 Wisconsin Act 10

The Mayor has asked for my opinion as to the effective date of 2011 Wisconsin Act 10, commonly referred to as the Budget Repair Bill (BRB or the Act), in light of the decision of the Legislative Reference Bureau (LRB) to publish the Act late last Friday, March 25, 2011.

As I explain below, the LRB is without authority to establish the date of publication of the Act, and the date of publication determines when the Act is effective. Since the Secretary of State, who does have the authority to establish the date of publication, has not done so due to a temporary restraining order issued against him, there is no date of publication and therefore there is no effective law.

A. Background: Steps to Make an Act Effective.

Once a bill has been passed by both houses of the Legislature and signed by the Governor, there are still steps that must be taken by the LRB and the Secretary of State in order for the bill to become effective. The BRB was approved by the Legislature on March 9 and 10, 2011, and signed by Governor Walker on March 11, 2010.¹

For an act to become effective, it takes the combined actions of the LRB and the Secretary of State. The Secretary of State is to designate a "date of publication" of the act. Sec. 35.095, Wis. Stats., provides in part:

(1) Definitions. In this section:

...

¹ There are several issues regarding whether the BRB was properly passed by the Legislature, including a pending challenge under the Open Meetings Law by the District Attorney for Dane County. Other than references to the District Attorney's challenge, this memo does not address the other legal challenges.

(b) "Date of publication" means the date designated by the secretary of state under sub. (3).

...

(3) Publication. (a) The legislative reference bureau shall publish every act and every portion of an act which is enacted by the legislature over the governor's partial veto within 10 working days after its date of enactment.

(b) The secretary of state shall designate a date of publication for each act and every portion of an act which is enacted by the legislature over the governor's partial veto. The date of publication may not be more than 10 working days after the date of enactment.

Thus, under this provision, the Secretary of State must establish a "date of publication" and the LRB must "publish" the act before it becomes law.

Under sec. 991.11, Stats., an act becomes law one day after the "date of publication as designated under s. 35.095(3)(b)." This is the date established by the Secretary of State.

Thus, the key determination is: what is the "date of publication" as established by the Secretary of State? No other person, except the Secretary of State, may establish the "date of publication."

These statutes demonstrate a key distinction between the "date of publication" established by the Secretary of State, which determines the effective date of the act, and the LRB's duty to "publish" the act.

While some other statutes may have some tangential relevance, these are the key provisions. For example, the Wisconsin Constitution, Art. IV, sec. 17, provides that "No law shall be in force until published," but it does not further define what that means. And sec. 14.38(10)(c), Wis. Stats., requires the Secretary of State to:

Publish in the official state newspaper within 10 days after the date of publication of an act a notice certifying the number of each act, the number of the bill from which it originated, the date of publication and the relating clause. (Emphasis added).

Prior statutes required that the Secretary of State actually publish the law in the official state newspaper for it to be effective. See, for example, the dispute over when an act was actually published in the official state newspaper in the case of *Bradley v. Knutson*, 62 Wis. 2d 432, 215 N.W. 2d 369 (1974). Since that time, the statutes have been modified to make publication a joint effort of the Secretary of State in establishing the "date of publication" and the LRB in actually doing the "publishing".²

What is clear is that, in order to determine if the act is effective, we need to know what "date of publication" has been set by the Secretary of State.

² This memorandum does not address whether actual publication in the official state newspaper is still required in order for an act to be "published" in the Constitutional sense.

B. There is no “date of publication” established by the Secretary of State.

Following passage of the BRB, several citizen complaints were filed with the Dane County District Attorney alleging the Act was passed in violation of the Open Meetings Law, sec. 19.81-19.98, Wis. Stats. The District Attorney filed a complaint in Dane County Circuit Court pursuant to sec. 19.97, Wis. Stats., and on March 18, 2011, Circuit Court Judge Maryann Sumi issued a temporary restraining order (TRO) enjoining further implementation of the act. The Court stated:

I do, therefore, restrain and enjoin the further implementation of 2011 Wisconsin Act 10. The next step in implementation of that law would be the publication of that law by the Secretary of State. He is restrained and enjoined from such publication until further order of this court.

Prior to this court order, the Secretary of State had set March 25, 2011 as the “date of publication.” But on March 18, 2011, following the issuance of the TRO, the Secretary of State rescinded any date of publication. A copy of the letter of the Secretary of State is attached to this memorandum.

While I suppose one might argue that a date of publication, once established by the Secretary of State, cannot be changed, such an argument ignores the TRO issued by Judge Sumi. The Secretary of State was ordered to halt “further implementation” of the Act. This required the Secretary of State to rescind the prior date of publication. If he failed to do so, he would be in violation of the court order.

Thus, responding to a valid court order, the Secretary of State has determined that there is no “date of publication” of the BRB. Without a date of publication, there can be no effective date of the law.

C. The Mistakes Made by the LRB.

The analysis above leads one to ask why the LRB went ahead and “published” the law.

Because the LRB is not the body in charge with or having the authority to make the Act effective, the LRB’s determination that sec. 35.095(3)(a), Stats., required it to do something called “publishing” the law on March 25, 2011, is without legal consequence as to the effective date of the Act.

The LRB acted beyond its legal authority, however, since it could not insert into any published law a “date of publication” except as authorized by the Secretary of State. The LRB did this, using the date of March 25, 2011, with a curious footnote. The footnote reads:

Pursuant to section 35.095(3)(b), Wis. Stats., the secretary of state designated March 25, 2011, as the date of publication for this act. On March 18, 2011, the Dane County Circuit Court enjoined the secretary of state from publishing 2011 Wisconsin Act 10 until further order of the court. Section 35.095(3)(a), Wis.

Stats., requires the Legislative Reference Bureau to publish every act within 10 working days after its enactment.

This footnote is incomplete at best and a direct misrepresentation at worst. The LRB fails to mention that the Secretary of State had rescinded the prior publication date. Thus, the first sentence is false. There is no "date of publication" as set by the Secretary of State.

It is difficult to determine why the non-partisan LRB took this step beyond its authority, late on a Friday afternoon, with no notice to any person, and apparently at the urging of the Senate Majority Leader.³

If the LRB felt compelled to "publish" the act on March 25, 2011, the LRB should have left the "date of publication" blank. The footnote should have explained that the LRB cannot determine that date and only the Secretary of State may do so, and there is no such date of publication from the Secretary of State. Failure to do so is a breach of the LRB's legal obligations. I urge the LRB to immediately issue an errata notice to clarify that there is no date of publication.

It is even more curious that the LRB Director and its attorneys do not think the law is effective, according to an email received by Rep. Peter Barca. If that is the case, the LRB ought to issue the errata referenced above (a copy is attached to this memo).

D. Court Hearings.

A hearing on the District Attorney's open meetings case is set for Judge Sumi's court tomorrow, March 29, 2011. There is pending before the Wisconsin Supreme Court a certification from the Court of Appeals on a requested appeal of Judge Sumi's TRO. The Supreme Court has yet to act on the Certification.

As a practical matter, one or the other of these proceedings will determine whether the Act is in effect. If it is in effect, then there is nothing for Judge Sumi to consider tomorrow, since the hearing is on whether to make the TRO into a preliminary injunction. If the Act is in effect, there is no reason to continue to enjoin the Secretary of State. The case would have to be amended to add state officials and seek to enjoin implementation of the Act. The same question – whether there is an Act in effect – could moot the Supreme Court's consideration of any certification.


E. Conclusion.

The publication of an act, in order to make it effective, requires the joint efforts of the Secretary of State and the LRB. Only the Wisconsin Secretary of State may establish the "date of publication" of an act, which by law determines when the act is effective.

³ The actions of the LRB and the Senate Majority Leader, a named defendant in the pending action under the Open Meetings Law, raise a number of other legal and policy issues, which are beyond the scope of this memorandum.

The Secretary of State, pursuant to court order, has established that there is no date of publication of 2011 Wisconsin Act 10. Therefore, the BRB is not in effect.

I advise the City of Madison and its officers and employees to take no steps to implement the provisions of 2011 Wisconsin Act 10 until there is a court order or other action that establishes that the law is in effect.



Michael P. May, City Attorney

CC: All Alders

Attachments:

- (1) LaFollette Letter to LRB dated 3/18/11
- (2) Scott Grosz memo to Rep. Barca dated 3/25/11

DOUGLAS LA FOLLETTE



SECRETARY OF STATE
WISCONSIN

March 18, 2011

Mike Barman
Legislative Reference Bureau

RE: March 18, 2011 Restraining Order on Publication of January 2011 Special Session Assembly Bill 11; also known as Wisconsin Act # 10.

Dear Mike,

Per today's ruling by Dane County Circuit Court Judge Maryann Sumi, granting a motion for a temporary restraining order, I hereby rescind my instructions setting March 25th as the publication date for January 2011 Special Session Assembly Bill 11; also known as Wisconsin Act # 10. I further instruct you to remove all reference to March 25, 2011 as the publication date and not to proceed with publication until I contact you with a new publication date.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Doug La Follette".

Doug La Follette

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Sent: Friday, March 25, 2011 7:08 PM
To: Rep.Barca
Subject: LRB Publication of 2011 Wisconsin Act 10

Representative Barca,

You asked me to summarize our conversation regarding the effect of the publication of 2011 Wisconsin Act 10 by the Legislative Reference Bureau (LRB) on Friday, March 25, 2011.

Generally, as we discussed, it is my understanding that the LRB did not intend for its action to independently determine the effectiveness of Wisconsin Act 10, and that further action by the Secretary of State is required in order for Act 10 to take effect. The following is a brief summary of our conversation and the statutory analysis on which I believe the LRB relied in reaching its conclusion.

Following your initial inquiry, our office spoke with LRB Chief Steve Miller. Mr. Miller indicated that the effectiveness of Act 10 is based on publication of the Act by the Secretary of State, rather than publication by the LRB. He indicated that the LRB published the Act in order to satisfy a statutory publication requirement that is separate from the publication duty of the Secretary of State, and that such separate and additional publication by the Secretary of State is required in order for Act 10 to take effect.

In reviewing the relevant statutes, it appears that the LRB reached its conclusion in reliance on the following points. Section 35.095, Stats., specifies obligations of both the LRB and the Secretary of State relating to the publication of acts. Section 35.095 (3) (a), Stats., directs the LRB to publish every act within 10 working days after its date of enactment. Section 35.095 (3) (b), Stats., directs the Secretary of State to designate a date of publication for each act, and specifies that the date of publication may not be more than 10 working days after the date of enactment.

While s. 35.095, Stats., refers to publication-related activities of both the LRB and the Secretary of State, s. 991.11, Stats., makes specific reference to the publication activities of the Secretary of State for purposes of determining the effective date of an act. Section 991.11, Stats., states that every act that does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated under s. 35.095 (3) (b), Stats. As described above, s. 35.095 (3) (b), Stats., refers to the publication activities of the Secretary of State, rather than the publication activities of the LRB. Accordingly, while certain statutory obligations regarding publication of Act 10 have been satisfied by the LRB, the statutory obligation that relates to the effective date of Act 10 has not yet been satisfied by the Secretary of State, and at this time the Secretary's actions remain subject to the temporary restraining order issued in Dane County Circuit Court.

I will work to formalize the above analysis as time permits, and may provide additional information and clarification as the need arises.

If you have any additional questions, please do not hesitate to contact me.

Scott

Scott Grosz

Staff Attorney

Wisconsin Legislative Council