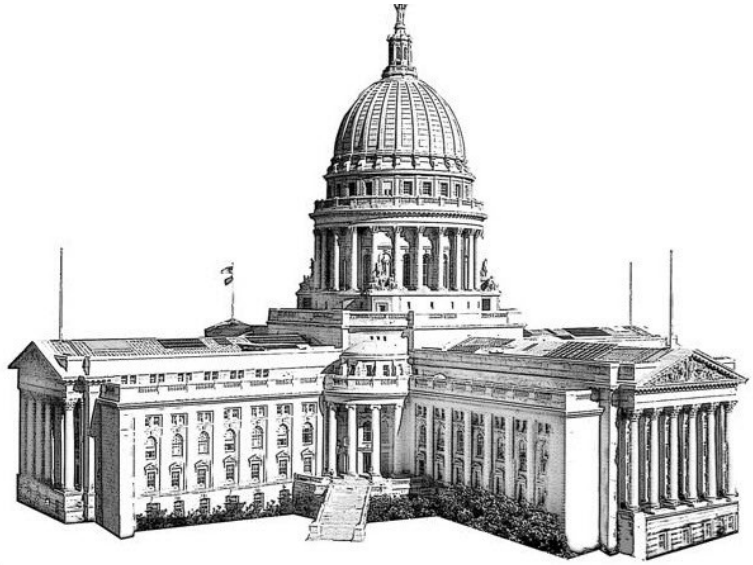

ACE Newsletter

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The Continuing Erosion of Wisconsin State Government

Over the past decade, a consistent pattern of legislative actions have undermined the efficiency and effectiveness of Wisconsin's state government. For years, Wisconsin was known as a model of good government. That reputation has now been damaged to the point where our state has garnered national media attention as an example of government dysfunction.

This newsletter explores moves by the Wisconsin Legislature since 2011 to infringe upon the policy-making processes of the Executive Branch that have been integral to efficient and effective government in our state. It provides examples that illustrate this pattern of destruction, some of which are well known and others which are not. These include:

1. Exerting legislative control over administrative rule making.
2. Intrusion into executive agency policies.
3. Weakening civil service merit provisions and protections for state employees.
4. Refusal to confirm the governor's cabinet appointments.
5. Detailed Re-writing of the Compensation Plan (Comp Plan).
6. Direct Attacks on the Governor's and Attorney General's Authority.
7. Attempt to control funding during the CoVid Pandemic.
8. Overriding emergency orders from an executive agency.

During the Walker administration these moves were made with the concurrence of the Governor. Since then, it has been an all-out fight between Republican legislative leaders in the state Assembly and Senate and our Democratic the Governor.

The following points highlight a sampling of legislative actions taken in this struggle.

1. Exerting legislative control over administrative rule making.
The 2011 Wisconsin Act 21 changed the authority of state agencies to create rules, interpret the language in a statute they are charged with administering, and enforce related requirements. The Act also created a more complex rule-making process including legislative review of proposed rules and allow plaintiffs to cherry pick which circuit court would consider legal cases that either ask for judicial review of an administrative rule or have the State as the sole defendant.

All of this is hostile to the state's interest in having a responsible agency play a central role in developing administrative rules and effectively enforcing the statutes.

2. Intrusion into executive agency policies.
The Department of Natural Resources (DNR) regulations have always been political footballs, even when the policy-setting process was transparent. The Conservation Congress was created in 1934 to provide citizen input to DNR policy-making. Since then, policy matters such as fees, seasons, bag limits and related regulations were initiated by the Congress and put into administrative code by the Conservation Commission (now, the DNR Board). The role of the Conservation Congress was formalized by statute in 1972.

During the Walker administration, politics overruled professional knowledge of DNR staff and the Conservation Congress, as the Legislature exerted its influence in the policy arena. This included eliminating the Science Services Bureau, changing regulations of hunting firearms, prohibiting the DNR from establishing "earn-a-buck" restrictions on hunting antlered deer, regulating the establishment of fall open seasons for hunting deer with firearms, and limiting DNR's ability to control deer baiting and feeding, all of which hamper the efforts to control the deer population and chronic wasting disease (CWD).

3. Weakening civil service merit provisions and protections for state employees.
The changes to Civil Service found in Act 150 in July 2016 are another example of the Legislature taking control of what had been administrative policy or just supervisory discretion. The Act severely curtailed the ability of agency heads to reassign career executives from job to job, required resumes for all job applications regardless of the suitability of such for a given job, compressed timelines for employees to contest adverse employment decisions, and required that supervisors review personnel files for any state employee recommended for hiring. The last item sounds innocent enough, but since all recruitments are open to the public this step slows down the hiring process for applicants who are state employees and puts them at a disadvantage relative to other applicants.

4. Refusal to confirm cabinet members.
The Legislature has taken an unusual approach to attempting to control the actions of state agencies by refusing to confirm six of the seventeen cabinet members appointed by Governor Evers. Those members that have been confirmed have had to wait up to thirteen months for full Senate action. While waiting

for confirmation, the secretary-designees are subject to threats of being 'fired' by the Legislature due to policy disagreements which has to affect their effectiveness.

After a favorable, bipartisan legislative committee recommendation, the confirmation of Brad Pfaff to head the Department of Agriculture, Trade and Consumer Protection was defeated in an unprecedented move by the legislature. This action left the Governor in the position of needing continuity of leadership but no way to assure it through normal appointments. In response, the Governor Evers left the Secretary position vacant and instead appointed a deputy to serve in the absence of the Secretary.

5. Detailed Re-writing of the Compensation Plan (Comp Plan).

The State of Wisconsin compensation plan provides the broad framework of pay ranges and pay schedules that apply to all of the covered employees. In addition, the Comp Plan includes provisions for supplemental pay adjustments and many other detailed items to fine-tune the general provisions. These typically involve identification of specific problems that require supplemental compensation beyond the basic pay rates. This includes special types of pay progression, performance awards and other compensation provisions specific to individual classifications or class series.

The civil service law states that the Comp Plan should be based on recruiting experience, pay equity, comparable pay in other public jurisdictions or private organizations, recommendations from agencies and any other special studies that the Division of Personnel Management (DPM) may conduct. In order to develop the Comp Plan, DPM typically spends at least a year gathering information through studies and agency input. This results in detailed provisions that are meant to solve very specific problems in accordance with the statutes.

The compensation plan is developed along with the state budget and covers the same biennium. Normally the Comp Plan is in place by the time the first fiscal year of the budget begins. In 2019 the situation was anything but normal. The budget was signed on July 3, 2019. DPM delayed submitting the Comp Plan to the Joint Committee on Employment Relations (JCOER) due to reluctance of the Committee to consider it.

ACE President Sally Drew and I met with DPM Administrator Malika Evanco in September 2019 to express concern that the plan was not progressing. Later we also met with DPM staff to go over the detailed provisions of the proposed Comp Plan. We were pleased to see that the plan was designed to resolve various equity issues and many specific recruiting problems that agencies were experiencing. This included a gradual raising of the lowest salaries to $15.00 during the biennium. It also provided a 2% across the board raise in each of the fiscal years. Although state employees have lost approximately 20% of their purchasing power from 2009 to 2017 due to inflation and a lack of raises, this was at least a couple of steps in the right direction.

As is customary, DPM waited for JCOER to request the plan be submitted to them, which JCOER did on November 8, 2019. JCOER delayed further and finally met on December 12th with a minimal amount of notice. ACE President Sally Drew and I attended the hearing on that day to support the proposal and were dismayed that the Committee, with no public notice, substituted its own proposal instead of the

one that DPM had submitted. With no copy of the new language available, President Drew testified in favor of the various provisions in the original proposal that ACE supported without being able to identify what had been removed by the Committee. The substitute proposal was immediately approved by the Committee, almost two quarters into the fiscal year. No further legislative action is required for the Comp Plan.

During the hearing, we found the version that JCOER approved was substantially different from what DPM proposed. The Committee cut the $15 minimum wage provision and eliminated many of the changes designed to cure equity and recruitment problems in the civil service. Some of the jobs whose proposed adjustments were cut included:

- Entry level IS (information systems) job classes,
- DMV customer service,
- Dept. of Revenue agents & economists,
- Building inspectors (for required new credentials),
- Public utility auditors and analysts,
- DNR technical job classes,
- Discretionary add-ons to State Patrol supervisors doing special assignments,
- Reimbursement for special clothing purchased by employees as required for special assignments,
- Updating the annual leave accrual rates for Fire/Crash employees to reflect the standard schedule of 112 hours per pay period instead of 80, and
- Parity for nonrepresented DOT employees related to new State Patrol labor agreements.

One change that especially illustrates the Legislature's distain for public service is that employees who are initially rated as 'unsatisfactory' performers, and who then improve their performance, will not be allowed to receive a delayed general wage adjustment. This deprives supervisors of an important tool to motivate their employees.

Another change prohibits the DPM Administrator from establishing or revising pay progression systems based on classification and/or compensation surveys during the life of the Comp Plan. This change really spotlights legislative dislike of agency expertise and discretion.

6. Direct Attacks on the Governor's and Attorney General's Authority.

Following the election of November 2018, while they still had a sympathetic governor, the Republican Legislature hurried to pass legislation to hamper incoming Governor Evers and Attorney General Kaul from exercising the authority their predecessors had enjoyed. Some of the actions the legislature took at this time included:

- Giving legislators the ability to permanently block administrative rules,
- Allowing legislative committees to control the content of agency guidance documents
- Granting the Legislature the right to intervene in lawsuits using its own attorneys rather than DOJ lawyers,

- Preventing the Attorney General from settling lawsuits without legislative approval,
- Prohibiting withdrawing from lawsuits without the Legislature's permission, and
- Requiring the Attorney General to deposit settlement awards in the state's general fund instead of in state Department of Justice accounts. Since the terms of settlements are determined by courts, this can make accepting settlements impossible.

7. Attempt to control funding during the CoVid Pandemic.

As the dangers of the pandemic became clear this year, the Legislature proposed giving the Joint Committee on Finance (twelve Republicans and four Democrats) the power to cut spending from the state's general fund, roll back tax cuts without the approval of other lawmakers or the Governor, and eliminate the two percent raise for state workers and University of Wisconsin System employees scheduled for January 2020.

While none of these attacks on gubernatorial power made it into the law, the attempt demonstrates the Legislature's intent to shift the balance of power by putting itself above the executive branch.

8. Overriding emergency orders from an executive agency.

Historically Wisconsin has maintained a robust ability to respond to contagious diseases. Going back to 1876, state law recognized the need for statewide controls on public behavior when public health emergencies arise. This was broadly based on the state's inherent 'police powers,' which go far beyond what we commonly think of as criminal prosecution. These powers were critical when the flu pandemic of 1918 appeared. Then, Wisconsin was able to contend with the flu better than other states. It's important to note that the 'police powers' reside at the state and local levels and not within the federal government. Therefore, if any effective action in a pandemic outbreak is to be taken to lessen the spread of disease, it is most likely to happen within each state. Indeed, Wisconsin and every other state to varying degrees, took measures to restrict their citizens' movements that might increase the contagion.

After Governor Evers extended the emergency provisions via the Department of Health Services' Emergency Order 28 on April 16 , 2020, the Legislature requested the Wisconsin Supreme Court to defeat the state's pandemic efforts with a claim that such orders should be handled as administrative rules. As the Court then determined, the Legislature will control the process of creating emergency orders and can draw out or abort the process altogether. It also will allow the Legislature to substitute its own judgment in place of the experts in the Department of Health Services. Those experts considered the rate of spread of COVID-19 in Wisconsin; the health care system's capacity to meet the needs of the state; the testing, contact tracing, and isolation capacity in the state; the availability of personal protective equipment for healthcare workers, first responders, and other public servants that are required to perform face-to-face services; and the economic needs of Wisconsin and Wisconsinites. The Legislature and the Court didn't take any of that into consideration.

The majority's opinion appears to be very confused as they ignored the clear meaning of the statutes. Among other issues, they seemed to invalidate the 'Stay at Home' order entirely because they objected

to the way it was created (by emergency order instead of administrative rule) but allowed the part of the order that closed schools to remain effective. Bizarrely, although only three of the seven justices were opposed to giving the Legislature the time it requested to work with the Governor before the decision took effect, the decision was effective immediately.

IN SUMMARY

Over the last decade, Wisconsin has witnessed a consistent power grab by the Legislature, supported by the Wisconsin Supreme Court, to the detriment of state government functionality and to the public health and welfare of its citizens. Depending on the mood of the Court, we can expect this issue to continue as long as the current political power structure remains in control. How that unfolds may depend in large part on where the state goes with the legislative redistricting that is constitutionally required after the 2020 Census.

WHAT ACE IS DOING

ACE will be watching for important events as they come up and will let you know of opportunities to influence your representatives. We are always alert to chances to formally support or oppose actions that affect our government and our members.

Please let us know of any issues that you feel that we should address. Send your thoughts to ACE@Wiscow.com.