



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

April 9, 2019

To:

Hon. Richard G. Niess
Circuit Court Judge
Br. 9, Rm. 5109
215 S. Hamilton St.
Madison, WI 53703

Jeffrey A. Mandell
Kurt Simatic
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Misha Tseytlin
Troutman Sanders LLP
1 N. Wacker Dr., Ste. 2905
Chicago, IL 60606-2882

Tamara Packard
Lester A. Pines
Aaron Dumas
Beauregard William Patterson
Pines Bach LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703-2718

Eric A. Baker
Barry J. Blonien
Boardman & Clark LLP
P.O. Box 927
Madison, WI 53701-0927

Deana K. El-Mallawany
Jessica Marsden
Protect Democracy
2020 Pennsylvania Ave. N.W., #163
Washington, DC 20006-1811

Patrick O. Patterson
Law Office of Patrick O. Patterson, S.C.
7481 N. Beach Dr.
Milwaukee, WI 53217-3663

Lawrence S. Robbins
Carolyn Forstein
Wendy Liu
Robbins Russell LLP
2000 K. Street N.W., 4th Fl.
Washington, DC 20006

Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following order:

2019AP559

The League of Women Voters v. Tony Evers (L.C. # 2019CV84)

Before Stark, P.J., Hruz and Seidl, JJ.

The Wisconsin Legislature (the Legislature) moves to enforce a stay previously issued by this court.

On Thursday, March 21, 2019, the circuit court issued a temporary injunction that (among other things) barred the Legislature and Governor Tony Evers (the Governor) from enforcing the confirmation of any nominee for a state commission, board, or other authority that occurred during an extraordinary legislative session held in December 2018, pending the outcome of a lawsuit challenging the validity of the extraordinary session. The injunction further stated that the associated “appointments are ordered temporarily vacated as a necessary consequence of this temporary injunction.”

On Friday, March 22, 2019, the Legislature sought appellate review of the temporary injunction by filing both a petition for leave to appeal and a notice of appeal and moved for an emergency ex parte stay of the injunction pending appeal. The Governor, the Plaintiffs in the underlying lawsuit, and the Department of Justice all objected to the request for ex parte relief and asked for an opportunity to respond to the stay request before we acted upon it. The Governor and Plaintiffs also objected to the Legislature’s designation of District III as the venue for the appeal. After Judge Stark resolved the venue question while acting in her administrative capacity as Deputy Chief Judge of this court, this court granted the other interested parties an opportunity to respond to the stay request by the following Monday, March 25, 2019. Within minutes after this court issued our order allowing other parties to file expedited responses, the Governor sent to the Senate Chief Clerk a letter purporting to remove from consideration for confirmation the nominations of eighty-two appointees whose nominations had been confirmed in the extraordinary session before the confirmations were enjoined by the circuit court.

On Wednesday, March 27, 2019, after also permitting the Legislature to file a reply, this court issued a stay of the circuit court's temporary injunction, pending the outcome of the Legislature's interlocutory appeal of that injunction.

On Thursday, March 28, 2019, the Governor sent to the Senate Chief Clerk a letter purporting to re-nominate sixty-seven of the eighty-two appointees whose nominations the Governor had withdrawn while the circuit court's stay of their confirmations was in effect. The Governor also refused to allow at least one of the appointees to return to work.

The Legislature now asks this court to use our inherent authority to "enforce our stay" by directing the Governor to allow the appointees to return to work. The motion to enforce the stay is premised on the proposition that our March 27 order "reinstates the appointees" to the positions to which they were confirmed. The Legislature argues this is the only reasonable interpretation of our order because we referred to the confirmations as having been "potentially valid" in our discussion as to whether a stay was warranted.

In response, the Governor asserts that the circuit court's temporary injunction had returned the appointees to the status they occupied prior to the stayed confirmations—that is, persons nominated for state agencies or boards whose nominations may be withdrawn by the Governor at any time prior to confirmation. The Governor argues that our stay affected only the enforcement of the circuit court's injunction going forward, and it did not have any retroactive effect on actions taken pursuant to the circuit court's injunction while it was in effect. Therefore, the Governor contends, his current refusal to allow the appointees to return to work does not violate the stay.

The Governor has presented a more accurate characterization of both the general nature of injunctions and the specific legal effect of this court's March 27, 2019 stay of the circuit court's temporary injunction, given the procedural posture of the case. We agree that the effect of our stay is prospective only. It does not address the validity of the Governor's interim action of withdrawing the nominations, much less require him to reinstate the appointees who were withdrawn prior to our issuing a stay.

First of all, our March 27 order is silent as to the status of the appointees, and it does not explicitly direct the governor to allow them to continue in their positions. Our reference to potentially valid appointments was made in the context of reviewing the circuit court's exercise of its discretion at the time it issued the temporary injunction, which occurred before the nominations had been withdrawn. The withdrawal of the nominations was an event that occurred subsequent to the circuit court denying a request to stay its injunction order. It is that circuit court action which was the subject of our review. Therefore, if our order were to be construed to reinstate the appointees into their positions, it could only do so by operation of law, as an automatic effect of the stay.

The general rule is that an injunction "duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be" subsequently determined to have been in issuing the injunction. *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922). Meanwhile, a stay "operates upon the judicial proceeding itself ... by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 428 (2009) (citations omitted).

The Legislature does not provide any authority holding that an action taken while an injunction was in effect is invalidated by an appellate court's subsequent stay of that injunction order, or otherwise addressing whether the stay of an injunction can have any retroactive effect on actions taken while the injunction was in effect—and we are aware of none. The three cases the Legislature cites all deal generically with the inherent authority of a court to enforce its orders, and they go more to the question of available remedies rather than to whether a violation of the stay has occurred in the first instance. In short, if the Governor had the authority to withdraw the nominations pursuant to the temporary injunction while that injunction was in place, then the withdrawals were valid and are not affected by our subsequent stay of the injunction.

The Legislature complains that allowing the withdrawal of the nominations to stand will allow the Governor and the plaintiffs in this matter to evade judicial review on the still-pending issue of whether the confirmations made during the extraordinary session were valid. We are not persuaded that is the case. We reiterate that the subject of the appeal currently before this court is limited to the temporary injunction issued by the circuit court. The merits of the underlying declaratory judgment action are still pending in the circuit court and remain to be determined. In the event that a court ultimately determines that the original confirmations were made during a properly convened extraordinary session and are thus constitutional, that court will have the power to determine the appropriate remedy, including whether the Governor's withdrawal of the nominations can be declared void.

Therefore,

IT IS ORDERED that the Legislature's April 1, 2019 motion to enforce the stay is denied.

IT IS FURTHER ORDERED that this order will be disseminated solely by email or fax to those parties who have provided such contact information to the court.

Sheila T. Reiff
Clerk of Court of Appeals