STATE OF WISCONSIN CIRCUIT COURT GREEN COUNTY

STATE OF WISCONSIN, ex. Rel.
ALAN ECKSTEIN,

Plaintiffs,

vs. Case No.: 14-FO-55

CITY OF MONROE COMMON COUNCIL,
ET AL.

Defendants.

DECISION AND ORDER ON SUMMARY JUDGMENT

All parties brought motions for summary judgment regarding the alleged violation of the Open Meetings Law by Defendants. The Court heard oral argument on summary judgment on September 29, 2015; Plaintiff State of Wisconsin, appeared by its attorney Green County District Attorney Gary Luhman; Plaintiff Alan Eckstein appeared by his attorney Aaron Halstead; Defendants appeared by Attorney Gregg Gunta. Rex Ewald, City Attorney for Monroe also appeared.

Based on all of the submissions of the parties and the arguments presented, the Court makes the following decision and order on summary judgment.

This case involves whether the City of Monroe Common Council and its members (City) violated the open meetings law when its Salary and Personnel Committee met in a closed session on September 10, 2013 and terminated Plaintiff Alan Eckstein (Eckstein). The statutory provisions at issue in this matter are found in Chapter 19 of the Wisconsin Statutes. Section 19.81, Stats. is the declaration of policy regarding the Open Meetings Law. It states:

> 1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.
> (2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.
> (3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.
> (4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

The relevant statutory provision regarding each point related to summary judgment will be discussed below. The purpose of the Open Meetings Law is to protect the public's right to be informed to the fullest extent regarding the affairs of government.

St. ex rel. Badke v. Greendale Village Bd., 173 Wis.2d 553, 566, 494 N.W.2d 408 (1993). The public's interest in enforcing the Open Meetings Law weighs heavily in matters where governmental bodies discuss topics of public controversy and concern behind closed doors.

STANDARD OF REVIEW

Under sec. 802.08(2), Stats., the Court examines the pleadings, affidavits and other proofs to determine whether a genuine issue exists as to any material fact and whether the moving party is entitled to judgment as a matter of law. Doubts as to the existence of a genuine issue of material fact are resolved against the moving party. Grams v. Boss, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473, 477 (1980). On summary judgment, the court does not decide issues of fact; it determines whether there is a genuine issue of fact. State ex rel. Epping v. City of Neillsville Common Council, 218 Wis. 2d 516, 520, 581 N.W.2d 548, 550 (Ct. App. 1998).

Interpretation of the open meetings statutes and the application of those statutes to the facts are questions of law. State ex rel. Herro v. Vill. of McFarland, 2007 WI App 172, ¶ 12, 303 Wis. 2d 749, 755, 737 N.W.2d 55, 58. Where neither party disputes material facts, those facts are effectively stipulated, and only questions of law remain. State ex rel. Citizens for Responsible Dev. v. City of Milton, 2007 WI App 114, ¶ 5, 300 Wis. 2d 649, 654, 731 N.W.2d 640, 642.

UNDISPUTED FACTS

At the heart of this case is a meeting of the City of Monroe's Salary and Personnel Committee (SPC) that occurred on September 10, 2013 regarding Eckstein's employment. Plaintiffs allege that the actions SPC took during that meeting violated the Open Meetings Law, because the notice was legally inadequate, the actions taken by the committee were not on the agenda, and the committee, acting as the Common Council (Council) terminated Eckstein without proper notice. Defendants claim they did not violate the Open Meetings Law in any manner because the SPC had no authority to act, and even if they did violate the law on September 10, any damages flowing from that violation were remedied by a meeting on September 17 of the entire Council. The following facts are undisputed based on the submissions of the parties.

At the time of the September 10 meeting where the alleged violation occurred, Eckstein was employed as the Utilities Director for the City of Monroe. He had held that position since September 4, 2012. According to Eckstein's employee classification under Section 1-6-1(c)(3) of the City Code, Eckstein could only be terminated by a majority vote of the Council. The Council has nine elected alderpersons.

The SPC is a standing committee of the Council, and consists of six alderpersons from the Council. Five are voting members and one is an alternate member. Defendants Brooke Bauman, Reid Stangel, Charles Schuringa and Louis Armstrong are members of both the Council and the SPC. They were all present at the September 10, 2010 meeting.

Alder Christine Beer was also present. It is undisputed that a majority of the Council members were present at the SPC meeting, because they are members of the SPC.

It is important at this juncture to provide context for the September 10 meeting. On January 31, 2013, Defendant Brook Bauman and Mayor William Ross asked to meet with Eckstein to address rumors that he was having an inappropriate relationship with the City Comptroller, Bridget Schuchart. When Eckstein was made aware of this rumor, he verbally complained to City Administrator Phillip Rath on February 4, 2013. On June 28, 2013, Eckstein filed a formal complaint for harassment/discrimination. He requested that the City of Monroe investigate his complaint regarding the rumor. Rath then conducted an investigation, and learned that City Clerk Carol Stamm (Stamm) had heard the rumor from another employee in the Wastewater Department, but would not disclose the name of the person. Rath completed his investigation, and found the rumor to be unfounded. Notwithstanding, Eckstein demanded that the investigation be reopened to require Stamm to provide the name of the person from the Wastewater Department, or he would file a complaint with the Wisconsin Equal Rights Division. City Attorney Rex Ewald advised Eckstein that the investigation was closed and would not be reopened.

A closed session SPC meeting was scheduled on August 27, 2013. The agenda for that meeting indicated that a discussion of "Preliminary Consideration of Employee Issues Addressed by the Utilities Director" would occur. Prior to the meeting, Eckstein sent an email to Rath regarding his complaint and his desire to settle issues related to the complaint.

Defendants Bauman, Schuringa, Armstrong and Stangel, as well as Alder Christine Beer were present at the August 27 meeting. Eckstein and other city officials were also present. During the meeting, the SPC told Eckstein to put his concerns in writing before they would consider them. Eckstein told the SPC that he would present them with a proposed agreement at its next meeting scheduled for September 10, 2013. The SPC deferred further action until the September 10 meeting.

The September 10 meeting agenda stated again that it would discuss "Preliminary Consideration of Employee Issues Addressed by the Utilities Director." This was the same agenda item as on the August 27, 2013 meeting notice. Defendants Bauman, Schuringa, Armstrong and Stangel were all present when the closed session began. Alder Christine Beer and Eckstein were also present.

Eckstein presented a "draft agreement" to the City to resolve his harassment complaint. He also presented a number of other materials, including a letter from his attorney, Aaron Halstead, stating that Eckstein would hold the proposed settlement in the draft agreement open for the City's consideration until September 20. If no agreement was reached, Eckstein intended to file a complaint with the WERD. The parties dispute whether this draft agreement was a "severance agreement." After Eckstein presented the documents, he was asked to leave the meeting.

During that meeting, a motion was made to offer Eckstein a resignation package to include 90 days salary and health benefits. If he did not accept the package, he would be

terminated. The motion passed unanimously. It is undisputed that during the closed session of the meeting, the SPC discussed the documents presented by Eckstein. It is also undisputed that the SPC passed a motion that directed that Eckstein would be terminated if he did not agree to the terms of the SPC's resignation package.

The following day, on September 11, Rath and City of Monroe Police Chief Frederick Kelly went to Eckstein's office and presented him with a letter signed by Rath, which included the terms of the resignation/proposed severance agreement. The letter stated that if Eckstein did not sign the severance agreement by 8 a.m. on September 13, Eckstein would be terminated with no additional benefits. The letter stated that Eckstein should leave the premises immediately, and not return the following day. Rath told Eckstein to leave after the letter was delivered. Eckstein did not accept the proposed agreement, and his employment was terminated. Rath reported on September 12 to the City's managers that Eckstein was not employed with the City as of September 11, and Rath contacted media on September 13 regarding Eckstein's termination.

On September 17, 2013, the full Council met for a regularly scheduled meeting. The notice for that hearing indicated that a closed session would be held to "discuss circumstances surrounding terminatin (sic) of Utility Director and confer with legal counsel regarding possible litigation that may result from termination of utility director and counsel's recommended strategy." An open session item was placed on the agenda which stated "action related to decsion (sic) of salary and personnel committee to terminate employment of utility director." No information is known about the

discussions in the closed session, as Defendants have asserted attorney-client privilege, and this issue is not before the Court. It is undisputed that Defendant Armstrong moved "to ratify the decision of Salary & Personnel Committee to terminate Alan Eckstein." By a 5 – 4 vote, the motion to ratify passed. Alder Beer voted against the motion.

ANALYSIS AND DECISION

Under Wis. Stat. § 19.81(2), "all meetings of all state and local governmental bodies shall be publicly held ... unless otherwise expressly provided by law." Section 19.81(1) states the public policy of Wisconsin's Open Meetings Law as follows:

> In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

The statute expressly mandates liberal construction to achieve its purposes. See sec. 19.81(4), Stats. The legislature has made the policy choice that, despite the efficiency advantages of secret government, a transparent process is favored. State ex rel. Citizens for Responsible Dev. v. City of Milton, 2007 WI App 114, ¶ 6, 300 Wis. 2d 649, 654-55, 731 N.W.2d 640, 642-43.

The parties do not dispute that the SPC and the Council are subject to the Open Meetings Law. The question is whether a violation occurred.

I. WAS THE NOTICE PROVIDED FOR THE SEPTEMBER 10 MEETING DEFICIENT UNDER THE OPEN MEETINGS LAW?

Section 19.84(2), Stats. directs how notice should be given under the Open Meetings Law:

> (2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

It is undisputed that the closed session portion of the September 10 agenda stated:

> Preliminary Consideration of Employee Issues Addressed by Utilities Director

(emphasis supplied). Application of a set of facts to a statute is a question of law. See Brown v. Labor & Indus. Review Comm'n, 2003 WI 142, ¶ 11, 267 Wis. 2d 31, 41, 671 N.W.2d 279, 284. The question for this Court is whether the language of the notice regarding the closed session is "reasonably likely to apprise members of the public and the news media thereof" of the subject matter of the meeting.

In State ex rel. Buswell v. Tomah Area Sch. Dist., 2007 WI 71, ¶ 34, 301 Wis. 2d 178, 200, 732 N.W.2d 804, 815, the court adopted a "reasonableness standard" for the notice requirement. Under a reasonableness standard, meeting participants would be free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably

related to it. The meeting still cannot address topics unrelated to the information in the notice. Id.

The Court finds as a matter of law that the notice was not sufficient under the Open Meetings Law to reasonably apprise members of the public and news media regarding the subject matter of the meeting. The only reasonable inference to be drawn from the language of the notice is that the SPC was going to discuss preliminary matters regarding Eckstein's employment, and not take final action. Use of the word "preliminary" in no way informs the public that the SPC would vote to terminate Eckstein if he did not accept a severance package. Use of the preposition "by" informs the public that the SPC would be considering issues that Eckstein raised—not offensive action by the SPC. This is further buttressed by the uncontroverted testimony of Rath and Michael Boyce, president of the Council, that they were unaware that the SPC would be discussing discipline or termination of Eckstein. Termination of Eckstein was not within the subject matter scope of the notice provided. The notice was deficient under sec. 19.84(2), Stats., and constitutes a violation of the Open Meetings Law.

II. DID THE MEMBERS OF THE SPC IN THE SEPTEMBER 10 MEETING HAVE AUTHORITY TO TERMINATE ECKSTEIN?

Defendants assert that the SPC did not have authority to terminate Eckstein at the September 10 meeting, and that any actions taken by the City Administrator, Philip Rath, after that meeting were outside his and the SPC's authority. They argue that because no authority to terminate existed, there could not have been a violation of the Open Meetings Law.

The question for the Court is whether the Court can find, as a matter of law, that the members of the SPC, which contained a majority of the Council members, were acting as the City Council when they made a counteroffer on the severance agreement and stated that Eckstein would be terminated if he did not accept the terms of the severance agreement. This is a question of law.

This Court is guided by the decision in State ex rel.Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 398 N.W.2d 154 (1987). In Showers, the Court discussed the meaning of sec. 19.82 regarding what constitutes a "meeting:"

> "(2) 'Meeting' means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.

Id. at 86-87. In Showers, the Court held that when members of a meeting have the potential to determine the outcome of a proposal, the Open Meetings Law is triggered. Furthermore, when the group is meeting to transact the business of the body, and the members had the potential to determine the outcome of any proposal regarding the business of the body, the meeting is subject to the Open Meetings Law. Id. at 103.

Showers informs the Court on the key issue of whether the alders at the SPC meeting had the authority to terminate Eckstein. While Defendant argues that the City Code does not give the SPC that authority, the make-up of the SPC, which included a majority of the Council, did have the authority to terminate Eckstein, and that is precisely what they authorized at the SPC Meeting. Specifically, the alders at the SPC meeting were conducting the business of the Council, not the SPC, when they voted to terminate Eckstein if he did not accept the severance agreement. As a matter of law, the SPC not only had the authority to terminate Eckstein given the make-up of the Committee, it in fact did authorize his termination.

Simply claiming that Rath acted independently without authority, and the SPC acted without authority, does not relieve the Defendants of liability under the Open Meetings Law. It would be against public policy to state that no violation of Open Meetings occurred because the matters acted upon were outside the scope of authority of the committee, especially when, as in this case, the effect was Eckstein's actual termination. Given the public policy behind the Open Meetings Law, allowing the Defendants a "pass" because they allege in hindsight they were acting outside their authority undermines the whole public policy behind the law. Defendants cannot argue that the Plaintiffs have no remedy because the SPC was not authorized to act. The Open Meetings Law intends to provide a remedy when the government acts secretly, which is what occurred here. To hold otherwise would hold that the government can meet secretly, take action, and later disclaim liability for those acts. The undisputed fact is that

Eckstein was terminated as a result of directives from the SPC meeting on September 10, and the only reasonable inference is that the alder members of the SPC were doing the business of the Council when they acted.

III. DID THE SEPTEMBER 17 MEETING OF THE FULL COUNCIL EXTINGUISH ANY DAMAGE CLAIMS BEYOND SEPTEMBER 17?

Defendants argue that even if a violation of the Open Meetings Law occurred on September 10, neither Eckstein nor the State incurred damages beyond September 17, 2013, because that meeting was properly noticed, Eckstein was terminated by the full Council, and no allegation has been set forth that the September 17 meeting violated the Open Meetings Law.

This argument is unpersuasive, given the public policy behind Open Meetings Law. A similar argument was advanced in State ex rel. Badke v. Vill. Bd. of Vill. of Greendale, 173 Wis. 2d 553, 568-69, 494 N.W.2d 408, 413 (1993). In Badke, the village board contended that any claim by Badke that Open Meetings Law was violated and that he was entitled to a remedy was extinguished and therefore moot when the board held a "second valid meeting." The Court held:

> Next, relying on the same reasoning as used to explain why this case does not present a justiciable controversy, the Village Board contends that, because the valid second meeting extinguished the controversy, a judgment by this court will not have any practical legal effect upon an existing controversy, and the action is therefore moot. A case is moot when a judgment can have no practical legal effect upon the existing controversy. This case is not moot. As explained earlier, the controversy in this case did not end when the

> Village Board held its second meeting. The controversy in this case is the legal status of the acts that preceded the revote, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of the Village Board's acts. We conclude that the criteria for sustaining a declaratory action have been met, and the controversy continues despite the second, valid meeting of the Village Board. Accordingly, this case is not moot.
>
> We also note that the consequences of accepting the Village Board's argument concerning mootness would be to render the open meeting law meaningless in many future cases. To dismiss enforcement proceedings on the grounds that a revote makes this case moot would invite circumvention of the policy of the open meeting law. Rather than hold open meetings, a governmental body would know it could hold secret meetings to discuss a proposal, wait until someone filed a complaint, and then hold a valid open meeting to vote on the proposal. The complaint would then be dismissed as moot. The public would never know of the information and discussion that took place at the first secret meeting which may have formed the basis for the governmental body's decision or course of action taken at the second meeting. This type of secrecy is exactly what the open meeting law is intended to avoid.

Id. (emphasis supplied) (internal quotations omitted). The Court agrees with the State at oral argument when it said that "but for the fact that Mr. Eckstein chose to decline the severance agreement and instead complain to the State that this was an open meetings violation, the discussion of his conduct would not have seen the light of day." Trans. at 38. A second, valid meeting has no effect on whether the September 10 meeting violated the Open Meetings Law, and it does not in and of itself limit the remedies available to the Plaintiffs.

IV. DID ECKSTEIN WAIVE HIS CLAIMS AGAINST THE CITY RELATING TO OPEN MEETINGS LAW?

Finally, Defendants argue that Eckstein waived any claims against the City regarding this Open Meetings Law violation because of language in an April 24, 2013 email from Eckstein's counsel to the city attorney that stated, in relevant part:

> I write to confirm that Mr. Eckstein waives any right of action against the City related to any further investigation it undertakes into City Clerk Carol Stamm's statement that Mr. Eckstein and Ms. Schuchart allegedly had a romantic or sexual relationship.

Defendants argue that all of the actions that involved Eckstein, including those in the September 10 meeting, arose out of the City's investigation of Eckstein's alleged relationship with a co-worker and the rumor relayed by Stamm, as well as the April 24 email sent five months before the September 10 meeting regarding waiver of Eckstein's claims.

Waiver is defined as a voluntary and intentional relinquishment of a known right. Attoe v. State Farm Mut. Auto. Ins. Co., 36 Wis. 2d 539, 545, 153 N.W.2d 575, 579 (1967). In establishing waiver, it is not necessary to prove an actual intent to waive. Id. Such waiver may be shown by conduct. In this case, the April 24 email was related to claims involving an investigation into the Stamm issue. No reasonable inference could be drawn from the facts that existed at the time of the April 24 email that Eckstein intended to waive a claim for violation of the Open Meetings Law involving his own

termination five months later. No reasonable inference can be drawn that Eckstein intended to waive this claim, and no conduct supports waiver of this claim.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment to dismiss all of Plaintiffs' claims is DENIED.
2. Plaintiffs State of Wisconsin's and Eckstein's Motions for Summary Judgment that Defendants violated the Open Meetings Law on September 10, 2013 is GRANTED.
3. The court trial in this matter will address damages only.

Dated this 9th day of November, 2015.

BY THE COURT:

_____/s/_____
HONORABLE RHONDA L. LANFORD
CIRCUIT JUDGE, BRANCH 16