

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

13CV004222

STATE OF WISCONSIN *ex rel.*
JOSEPH A. RICE
1005 East Circle Drive
Whitefish Bay, Wisconsin 53217,
Plaintiff,

v.

MARINA DIMITRIJEVIC
Milwaukee County Courthouse, Room 201
901 N. Ninth Street
Milwaukee, WI 53233,

WILLIE JOHNSON, JR.
Milwaukee County Courthouse, Room 201
901 N. Ninth Street
Milwaukee, WI 53233,

DAVID CULLEN
Milwaukee County Courthouse, Room 201
901 N. Ninth Street
Milwaukee, WI 53233,

and

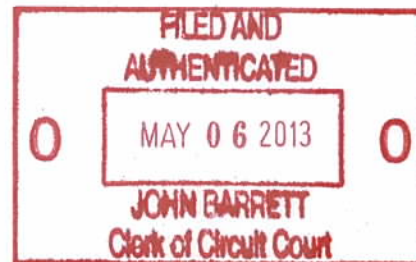
MILWAUKEE COUNTY BOARD OF SUPERVISORS,
Milwaukee County Courthouse, Room 201
901 N. Ninth Street
Milwaukee, WI 53233,
Defendants.

Unclassified

Case Code: 30703

Case No. 13-CV-

HON. DANIEL NOONAN, BR. 31
CIVIL J



SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiff named above has filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or

disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Milwaukee County Courthouse, 901 N. 9th Street, Milwaukee, WI 53233**, and to Wisconsin Institute for Law & Liberty, Inc., plaintiff's attorney, whose address is: 1139 E. Knapp St., Milwaukee, WI 53202.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff

Date: 5/3/13


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COMPLAINT

NOW COMES the Plaintiff, State of Wisconsin, by its relator, Joseph A. Rice, pursuant to Wis. Stat. § 19.97(4), and alleges to the Court as follows:

1. The Plaintiff, Joseph A. Rice, is an adult resident of the State of Wisconsin, residing in the Village of Whitefish Bay. He brings this action by his relation and in the name of the State of Wisconsin pursuant to Wis. Stat. § 19.97(4).

2. Defendant Marina Dimitrijevic is Chairwoman of the Milwaukee County Board of Supervisors who acted in her official capacity at all times and with respect to all matters alleged herein. Dimitrijevic maintains her business address at Milwaukee County Courthouse, Room 201, 901 N. Ninth Street, Milwaukee, Wisconsin 53233.

3. As Chairwoman, Dimitrijevic is responsible for, among other things, creating agendas and ensuring that notice is properly given for Board meetings.

4. Defendant Willie Johnson, Jr. is Co-Chair of the Finance, Personnel, and Audit Committee of the Milwaukee County Board of Supervisors (“FPAC”) who acted in his official capacity at all times and with respect to all matters alleged herein. Johnson maintains his business address at Milwaukee County Courthouse, Room 201, 901 N. Ninth Street, Milwaukee, Wisconsin 53233.

5. Defendant David Cullen is Co-Chair of the Finance, Personnel, and Audit Committee of the Milwaukee County Board of Supervisors who acted in his official capacity at all times and with respect to all matters alleged herein. Cullen maintains his business address at Milwaukee County Courthouse, Room 201, 901 N. Ninth Street, Milwaukee, Wisconsin 53233.

6. As Co-Chairs, Johnson and Cullen are responsible for, among other things, creating agendas and ensuring that notice is properly given for FPAC meetings.

7. Defendant Milwaukee County Board of Supervisors (“Board”) is the governing body of Milwaukee County, maintaining its place of business at Milwaukee County Courthouse, Room 201, 901 N. Ninth Street, Milwaukee, Wisconsin 53233.

8. The Board is a governmental body within the meaning of § 19.82(1) and is subject to the various requirements of the Wisconsin Open Meetings Law, §§ 19.82-19.98.

9. The FPAC is a governmental body within the meaning of § 19.82(1) and is subject to the various requirements of the Wisconsin Open Meetings Law, §§ 19.82-19.98.

10. Among other duties, the FPAC is charged with “all matters arising under ch. 111, Wis. Stats.,” Milw. County Ord. 80.01, “all proceedings . . . relative to the election, certification and decertification of collective bargaining units,” Milw. County Ord. 80.02, “[c]ollective bargaining with certified bargaining units,” Milw. County Ord. 80.03 (emphasis added), and forwarding “positive or negative recommendation[s] to the county board” on proposed agreements reached through the process of collective bargaining, Milw. County Ord. 80.04(1).

MARCH 14, 2013, FPAC MEETING

11. On March 14, 2013, at approximately 9:00 a.m., the FPAC convened in a “meeting” as that term is defined in § 19.82(2) in Room 203R at the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233. Defendants Cullen and Johnson, as well as Supervisors James “Luigi” Schmitt, Peggy Romo West, Theodore Lipscomb, Sr., Jason Haas, Deanna Alexander, and Russell W. Stamper II were in attendance.

12. Prior to the meeting, and on or about March 8, 2013, the FPAC posted notice of the March 14 meeting which included the following relevant agenda items:

CLOSED SESSION

The Committee may adjourn into closed session under the provisions of Wisconsin Statutes, Section 19.85(1)(e), (g) for the purpose of the Committee deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session; And for the purpose of the Committee receiving oral or written advice from legal counsel concerning strategy to be adopted with respect to pending or possible litigation with regard to the following matter(s). At the conclusion of the

closed session, the Committee may reconvene in open session to take whatever action(s) it may deem necessary.

34 13-4 From the Department of Labor Relations reports related to deliberation, negotiation or renegotiation of collective bargaining agreements.
1:30 p.m.

35 13-6 From Corporation Counsel, submitting an informational monthly report providing an update on the Status of Pending Litigation. **(To the Committees on Judiciary, Safety and General Services and Finance, Personnel and Audit) (INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)**

(Formatting in original.) A true and accurate copy of the notice is attached as Exhibit A.

13. The minutes for the March 14, 2013 meeting indicate that the members voted unanimously at 1:50 p.m. to go into closed session. A true and accurate copy of those minutes is attached as Exhibit B,

14. The minutes also indicate that the members adjourned from closed session at 4:25 p.m. without going back into open session.

15. Upon information and belief the FPAC authorized and instructed County Labor Relations Director Fred Bau or another person to enter into contract negotiations with AFSCME District Council 48, the labor union that formerly represented a large number of county employees. District Council 48 failed to recertify as required by 2011 Wisconsin Acts 10 and 32.

16. Upon information and belief the FPAC also authorized and instructed County Labor Relations Director Fred Bau or another person to enter into contract negotiations with the Milwaukee Building & Construction Trades Council AFL-CIO, a labor union certified to represent certain Milwaukee County employees.

17. Upon information and belief the FPAC also authorized and instructed County Labor Relations Director Fred Bau or another person to enter into contract negotiations with the

Federation of Nurses and Health Professionals, a labor union certified to represent certain Milwaukee County employees.

18. Upon information and belief the FPAC also authorized and instructed County Labor Relations Director Fred Bau or another person to enter into contract negotiations with the Technicians, Engineers and Architects of Milwaukee County, a labor union certified to represent certain Milwaukee County employees.

19. Upon information and belief the FPAC also authorized and instructed County Labor Relations Director Fred Bau or another person to enter into contract negotiations with the Association of Milwaukee County Attorneys, a labor union certified to represent Milwaukee County attorneys.

20. On April 29, 2013, Fred Bau forwarded four communications to Defendant Dimitrijevic, indicating that tentative agreements had been reached between Milwaukee County and each of the four certified unions referenced in Paragraphs 15-18. The communications requested that approval of the agreements be placed on the next FPAC meeting agenda as action items.

21. Each of the four tentative agreements included a provision that Milwaukee County would “deduct from the paycheck of each employee who has signed a consent form an amount determined by the union for voluntary union membership dues.”

22. Under 2011 Wisconsin Acts 10 and 32, agreements between municipal employers and general employee unions are prohibited.

23. The meeting agenda for the March 14, 2013, FPAC meeting contained no notice that the FPAC would be considering and voting on directing a representative or representatives to enter into contract negotiations with a decertified union.

24. The meeting agenda for the March 14, 2013, FPAC meeting contained no notice that the FPAC would be considering and voting on directing a representative or representatives to enter into contract negotiations with a union over terms prohibited by 2011 Wisconsin Acts 10 and 32.

APRIL 10, 2013 BOARD MEETING

25. On April 10, 2013, the following 10 members (sufficient to constitute a quorum) of the Board jointly attended a legislative hearing for 2013 Assembly Bill 85 at the Capitol building in Madison, Wisconsin: Defendants Dimitrijevic, Johnson, and Cullen, as well as Supervisors Haas, Alexander, Romo West, Lipscomb, Stamper, John F. Weishan, Jr., and David Bowen.

26. Seven of the nine members of the FPAC were in attendance at the April 10, 2013, legislative hearing on Assembly Bill 85.

27. Assembly Bill 85 relates to “changing the compensation structure by which a Milwaukee County supervisor may be paid, changing the term length of a Milwaukee County supervisor, affecting the right of an annuitant under the Milwaukee County Employee's Retirement System to be rehired by Milwaukee County, limiting the authority of Milwaukee County to enter into certain intergovernmental agreements, removing and clarifying some authority of the Milwaukee County board, increasing and clarifying the authority of the Milwaukee County executive, deleting obsolete statutory references, and requiring a referendum.”

28. The legislative hearing was a “meeting” of the Assembly Committee on Government Operations and State Licensing as that term is defined in § 19.82(2).

29. The Assembly Committee on Government Operations and State Licensing is a “governmental body” as that term is defined in § 19.82(1).

30. The following supervisors spoke publicly regarding Assembly Bill 85 at that meeting: Alexander, Dimitrijevic, Weishan, Romo West, Cullen, Stamper, Bowen, Lipscomb, and Johnson.

31. The gathering of Milwaukee County Board Supervisors at the legislative hearing was a "meeting" of the Board as that term is defined in § 19.82(2).

32. Upon information and belief, the Board provided no notice to the public that it would be attending this meeting or speaking at it, nor did the Assembly Committee's notice indicate it was a meeting held jointly with the Board.

33. On April 16, 2013, and pursuant to § 19.97(1), Stats., Plaintiff Rice filed a verified complaint with the Attorney General of the State of Wisconsin, the District Attorney of Milwaukee County, and the Corporation Counsel of Milwaukee County, requesting the commencement of a timely action "under Wis. Stat. § 19.97(1) seeking the forfeitures provided in § 19.96 individually and without recompense against the above named Board members and such other legal or equitable relief as appropriate, including voiding any improper action taken by the Board at the March 14, 2013, meeting, as provided in § 19.97(3)."

34. By letter dated April 17, 2013, Rice was informed by the Milwaukee County District Attorney's office that it would not act on the verified complaint, pursuant to Wis. Stat. § 59.42(2)(b)4., which transfers certain duties of the Milwaukee County District Attorney to the Corporation Counsel. A true and accurate copy of this letter is attached as Exhibit C.

35. By letter dated April 19, 2013, Rice was informed by the Milwaukee County Corporation Counsel's office that it would not act on the verified complaint because "given that the Corporation Counsel serves as legal adviser to the County Board, we will not take any action in this matter." A true and accurate copy of this letter is attached as Exhibit D.

36. Thus, by operation of § 19.97(4), Rice is entitled to bring an action in his relation and on behalf of the state, seeking those remedies available under §§ 19.96 and 19.97.

ALLEGATIONS

First Cause of Action; Violation of Wis. Stat. § 19.83(1) Failure to Give Notice for April 10, 2013, Meeting

37. The preceding paragraphs are realleged as if fully set forth herein.

38. Under § 19.83(1), "Every meeting of a governmental body shall be preceded by public notice."

39. When "one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a "meeting" within the meaning of the open meeting law, unless the gathering is social or chance." *Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 561, 494 N.W.2d 408 (1993); *see also* Attorney General J.B. Van Hollen, *Wisconsin Open Meetings Law: A Compliance Guide*, August 2010, 9.

40. At least one half of the members of the Board attended the April 10, 2013, legislative hearing on Assembly Bill 85.

41. The subject of the legislative hearing dealt directly with the scope of Board members' decisionmaking responsibilities.

42. The Board members' attendance was neither social nor by chance.

43. Therefore, the Board members' attendance at the April 10, 2013, meeting of the Assembly Committee on Government Operations and State Licensing was itself a "meeting of a governmental body" required to be noticed under § 19.83(1), and the Board violated that statute by failing to give notice.

**Second Cause of Action; Violation of Wis. Stat. § 19.84(2)
Insufficient Notice of March 14, 2013, Meeting**

44. The preceding paragraphs are realleged as if fully set forth herein.

45. Under § 19.84(2), “Every public notice of a meeting of a governmental body shall set forth the . . . subject matter of the meeting, including that intended for consideration at any closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.”

46. The notice of closed session for the March 14, 2013, meeting merely quoted verbatim the statutory exemption from the requirement of open meetings found in § 19.85(1)(e): “Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.”

47. Such notice is not “reasonably likely to apprise members of the public and the news media” of the “subject matter . . . intended for consideration at any contemplated closed session” under § 19.84(2).

48. First, the notice language copied from the statute posits three separate subject matters (purchasing property, investing funds, conducting other public business) and two separate justifications (competitive *or* bargaining reasons), but the notice of the March 14, 2013, meeting failed to indicate which of those three subjects were to be discussed and which of the two reasons justified a closed session.

49. Second, under the three-factor test set forth in *Buswell v. Tomah Area School District*, 2007 WI 71, 301 Wis. 2d 178, 732, N.W.2d 804, this notice was not “reasonably specific under the circumstances”, *id.* ¶22, because (1) providing a more detailed notice would impose virtually no burden on the Board; (2) choosing to enter into contract negotiations in violation of the high

profile changes to public collective bargaining law brought about by Acts 10 and 32 would be of particular interest to the public; and (3) negotiating with a decertified union would be a non-routine action the public would be unlikely to anticipate.

50. Finally, under Attorney General opinions, merely identifying or reciting the exemption language verbatim is insufficient to give proper notice. *See* 66 Wis. op. Att’y Gen. 93, 98 (1977) (OAG-26-77); Informal Correspondence from Wis. Att’y Gen. to Mr. Peter Weinschenk, TP Printing Co. (Dec. 29, 2006); Informal Correspondence from Wis Att’y Gen. to Mr. Mark Anderson (Feb. 13, 2007); *Wisconsin Open Meetings Law: A Compliance Guide* 12 (2009).

51. Thus, the Board violated § 19.84(2) by failing to give sufficient notice that the Board would discuss opening negotiations with a decertified union and opening negotiations with four certified unions over unlawful topics in violation of Acts 10 and 32 at the March 14, 2013, meeting.

**Third Cause of Action; Violation of Wis. Stat. § 19.85(1)
Improper Procedure to Close Session at March 14, 2013, Meeting**

52. The preceding paragraphs are realleged as if fully set forth herein.

53. Before going into closed session, § 19.85(1) requires the chief presiding officer of the governmental body to “announce[] to those present at the meeting at which such motion [to go into closed session] is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized.” Furthermore, that announcement “shall become part of the record of the meeting.” Finally, “[n]o business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer’s announcement of the closed session.”

54. The minutes, the “record of the meeting,” do not reflect that such an announcement was made at all.

55. Upon information and belief, to the extent such an announcement was made, it was a recitation of the statutory exemption language contained in the noticed agenda. As noted previously, such practice is insufficient to apprise the public of the nature of the business to be considered in closed session.

56. Thus, the Board violated § 19.85(1) by failing to make an adequate announcement that the closed session would discuss opening negotiations with a decertified union in violation of Acts 10 and 32 and by failing to properly record any announcement that was made as part of the record of the meeting.

**Fourth Cause of Action; Violation of Wis. Stat. § 19.83(1)
Improper Action in Closed Session at March 14, 2013, Meeting**

57. The preceding paragraphs are realleged as if fully set forth herein.

58. Under § 19.83(1), “all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session,” subject to the § 19.85(1) exemptions.

59. The exemption in § 19.85(1)(e) only applies when “competitive or bargaining reasons require a closed session.”

60. While (if the negotiations were lawful in the first place) discussing bargaining tactics with an appointed negotiator is an appropriate “bargaining reason[] requir[ing] a closed session,” there is no valid competitive or bargaining reason that the action of voting to appoint a negotiator to enter into negotiations needs to be secret. The only reason behind the secrecy in this instance appears to have been to hide this act of questionable legality from the public eye. *See State ex rel. Schaeve v. Van Lare*; 125 Wis. 2d 40, 47, 370 N.W.2d 271 (Ct. App. 1985) (holding that no exemption under § 19.85(1) expressly permits any vote to be taken in closed session).

61. Furthermore, the notice of the March 14, 2013, meeting explicitly states that any action on a decision made in closed session will be taken after the meeting is reconvened into open session.

62. Thus, the Board violated § 19.83(1) by not voting to appoint a negotiator to enter into negotiations with a decertified union and four certified unions in open session at the March 14, 2013, meeting.

WHEREFORE, Plaintiff requests the following relief:

1. Judgment against Defendants finding them in violation of Wisconsin's Open Meetings Law;
2. Judgment voiding any actions taken by the Defendants in violation of Wisconsin's Open Meetings Law;
3. A forfeiture assessed against the Defendants Dimitrijevic, Cullen, and Johnson in the amount of \$ 300.00, payable to the State of Wisconsin;
4. For the actual and necessary costs of prosecuting this action, including reasonable attorney fees, to the Plaintiff; and
5. Such other relief as the Court deems proper.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff

Dated: 5/3/13


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