PB phillipsborowski, s.c.
...relationship focused

March 7, 2014

Judge Daniel Noonan
Milwaukee County Courthouse
901 N. Ninth Street
Milwaukee, WI 53233

Re: *State of Wisconsin ex rel., Joseph A. Rice v. Marina Dimitrijevic, Willie Johnson Jr., David Cullen, and Milwaukee County Board of Supervisors*
Case No. 13-CV-4222

Dear Judge Noonan:

Enclosed for filing please find the original and one copy of our Reply in Support of Motion for Judgment on the Pleadings. At your earliest convenience, please file the original and return the file stamped copy to our awaiting messenger. By copy of this correspondence, I certify that counsel of record has received copies via electronic mail and first class mail.

If you have any questions, please do not hesitate to contact our office. Thank you for you attention to this matter.

Very truly yours,

PHILLIPS BOROWSKI, S.C.

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JJC/sle
Enclosures

cc. Thomas C. Kamenick (w/enclosures) via electronic mail and first class mail

STATE OF WISCONSIN | CIRCUIT COURT Branch 31 | MILWAUKEE COUNTY

STATE OF WISCONSIN *ex rel.* JOSEPH A. RICE,

Plaintiff,

v.

Case No. 13-CV-4222
Case Code 30703

MARINA DIMITRIJEVIC, WILLIE JOHNSON JR., DAVID CULLEN, AND MILWAUKEE COUNTY BOARD OF SUPERVISORS,

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff dedicates much of his response to Defendants' motion for judgment on the pleadings attempting to persuade the Court that this is an Act 10 case. It is not. This case is about application of well-settled principles interpreting and applying Wisconsin's Open Meetings Law to a situation involving a governmental body's discussion, with counsel, relating to "deliberation, negotiation or renegotiation of collective bargaining agreements." Plaintiff's Complaint does not allege that the FPAC entered into an illegal contract, nor does it allege that the FPAC ever took action on any alleged "illegal contract." Instead, Plaintiff complains that the FPAC took the very action contemplated in the meeting notice. As a matter of law, Plaintiff's claims related to defective notice of the closed session must be dismissed.

Plaintiff's second claim attempts to turn any gathering of public officials, even those where no official action could possibly occur, into a "meeting" under the Open Meetings Law. Defendants do not quarrel with the notion that the entire County Board had a personal interest in Act 14. But that fact does not operate to modify the long-standing rules by which governmental

bodies must conduct themselves in relation to Wisconsin's Open Meetings Law. Wisconsin law is clear that a "meeting" of a "governmental body" occurs only when there is a gathering of a quorum of the body and only when the body convenes ***for a governmental purpose.*** The County Board, as a matter of law, could not have convened for a governmental purpose in relation to a legislative hearing on Assembly Bill 85 because it has no official ability to have any impact whatsoever on the Wisconsin Legislature. For this reason, Plaintiff's claim relating to the alleged "illegal" meeting in Madison must be dismissed as a matter of law.

The Complaint, on its face, fails to establish a violation of the Open Meetings Law. The Court should reject Plaintiff's attempt to expand the Open Meetings Law's notice requirements beyond its intended boundaries. Because it is quite clear that under no circumstances can Plaintiff recover, this Court should grant Defendants' Motion and dismiss the Complaint with prejudice.

I. THE MARCH 14, 2013 FPAC AGENDA SUFFICIENTLY APPRISED THE PUBLIC OF THE MATTERS TO BE ADDRESSED.

Plaintiff has inappropriately framed this issue as whether the Board provided sufficient notice to apprise the public that it was "[e]ntering into Collective Bargaining in Violation of Act 10." (Pl. Br. 4.) That is not the question confronting the Court, nor is it an appropriate analysis of the requirements under the Open Meetings Law. Meeting notices are not required to anticipate what action might possibly be taken at a meeting. Instead, the well-established standard is whether the notice is "'reasonably likely to apprise members of the public' of the ***subject matter*** of the meeting" and in particular, what is "reasonable ***under the circumstances***." (*Id.* (*quoting Buswell*, 2007 WI 71, ¶ 22) (emphasis added).)

Despite Plaintiff's claim that it was not possible for the notice to apprise the public of the matters to be addressed by FPAC, he clearly admits in his response that "[a]t most, that portion of the notice informed the public that FPAC would **receive a report** from a county employee on

collective bargaining and **receive advice** from counsel on the legality of such collective bargaining." (Pl. Br. 6) (emphasis in original.) Nothing more was required from FPAC. Based on his own admission, Plaintiff was able to reasonably understand the matters to be addressed by FPAC. What is more, Plaintiff's admission fails to account for the additional notice provided in agenda 34, indicating that the collective bargaining agreements being reported on related to their deliberation, negotiation or renegotiation.

In support of his mistaken "what might happen at the meeting" standard for the notice, Plaintiff outright ignores entire provisions in the notice and then wholly misapplies the *Buswell* test. The notice plainly stated that FPAC may proceed in closed session under two distinct exceptions: (1) the exception related to competitive or bargaining reasons; and (2) the exception related to the receipt of advice from legal counsel. Both of these exceptions were applicable, according to the notice, to the agenda item that advised the public of FPAC's intent to discuss the status of the "deliberation, negotiation or renegotiation of collective bargaining agreements."

Under the circumstances which existed at the time of the FPAC meeting, a member of the public would have been reasonably apprised that FPAC would be discussing matters related to collective bargaining, which as Plaintiff admits were in a state of flux following conflicting decisions declaring portions of Act 10 unconstitutional.[1] Plaintiff would have this Court adopt a

[1] At the time FPAC issued the meeting notice, the state of Act 10 was not clear. On March 30, 2012, Judge Conley issued a decision finding several portions of Act 10 unconstitutional. *See WEAC et al. v. Walker et al.*, 3:11-cv-00428-wmc (W.D.Wis. March 20, 2012). Ten months later, the Seventh Circuit upheld Act 10 "in its entirety," overturning Judge Conley's decision. *See WEAC, et al. v. Walker, et al.*, 705 F.3d 640 (7th Cir. Jan. 18, 2013).

During this same time period, Judge Colas issued his decision in *MTI et al. v. Walker et al.*, Case No. 11cv3774 (Dane Cty. Cir. Ct. September 14, 2012), overturning key portions of Act 10, including the provision requiring mandatory annual recertification elections for unions. After the District IV Court of Appeals requested additional briefing regarding the statewide effect of the Colas decision on December 28, 2012, it issued its decision affirming Colas' decision denying the state's request for a stay of the September order during the pendency of the appeal on March 12, 2013. In other words, at the time FPAC issued its notice, the 7th Circuit Court of appeals had upheld Act 10 in its entirety while the District IV Court of Appeals had issued a decision essentially keeping in place Judge Colas' decision.

rule requiring a premonition as to FPAC's direction prior to a meeting even occurring when he argues that FPAC should have notified the public that it was "considering voting on entering into collective bargaining with five unions over terms prohibited by Act 10." (Pl. Br. 5.) Plaintiff does not allege that FPAC had already established a pre-determined course of action prior to the meeting, nor could he. The FPAC, like any other municipal entity responsible for providing policy direction on labor negotiations, considers, deliberates and reaches consensus on matters involving the County's legal and contractual interests.[2] It does so in closed session for a good reason – so the other side is not aware of the strategy.

Plaintiff's application of the criteria as outlined in *Buswell* misses the mark. First, Plaintiff argues that it would not have been burdensome "to add the sentence or two necessary to apprise the public that FPAC was considering entering into collective bargaining negotiations with five unions." (Pl. Br. 7.) Plaintiff is asking the Court to adopt a "predictive model" of what committee members are likely to do in anticipation of a meeting rather than focusing on the general and non-positional notice requirements contemplated under the law. Instead, the burden considered by *Buswell* related to the information "available to the officer noticing the meeting at the time notice [was] provided, and based upon what it would be reasonable for the officer to know." *Id.* at ¶ 32.

The Wisconsin Open Meetings Compliance Guide emphasizes that "[t]he Wisconsin Court of Appeals has noted that 'Wis. Stat. § 19.84(2) does not expressly require that the notice indicate whether a meeting will be purely deliberative or if action will be taken.'" Guide at 13 (*quoting State ex rel. Olson v. City of Baraboo*, 2002 WI App 64, ¶ 15, 252 Wis. 2d 628, 643 N.W.2d 796.) *Buswell* supports this when the court noted "adequate notice … may not require information about

[2] Section 79.02(1) of the Milwaukee County Code of Ordinances ("MCO") provides that the director of labor relations shall be responsible for: "[t]he negotiation of all collective bargaining agreements with certified bargaining representatives of the employes of the county conducted along policy lines established by [FPAC]…."

whether a vote on a subject will occur, so long as the subject matter of the vote is adequately specified." 2007 WI 71, ¶ 37 n.7 (emphasis added).

Plaintiff cannot ignore that the very type of specificity it demands – the individualized listing of bargaining units – was the same specificity rejected in *Buswell*. Here, the officer posting the FPAC meeting notice considered the fact that the Committee would consider "reports" from the Department of Labor Relations "related to deliberation, negotiation or renegotiation of collective bargaining agreements." Assuming for purposes of the Motion that FPAC authorized the labor negotiator to commence negotiations, that is precisely an outcome contemplated in the meeting notice and the public, as a matter of law, was aware of that potential outcome.

Second, Plaintiff's application of the second prong of *Buswell* requires presuppositions that are simply not possible to make. Plaintiff posits that "'predicting and gauging interest' in the largest County in the State's desire to enter into contract negotiations in violation of Act 10 would have required no effort at all." (Pl. Br. 9.) Plaintiff is assuming that the officer tasked with providing notice was considering issues beyond the presentation of the reports from the Department of Labor Relations and the possible involvement of Corporation Counsel in the presentation and consideration of those reports. Plaintiff ignores that the *Buswell* court was not imposing a "per se requirement to predict and gauge public interest on each subject at every meeting." *Id.* at ¶ 35.

Finally, Plaintiff's assertion that FPAC's actions were not routine because it was planning on negotiating "with a decertified union or on topics prohibited by law" again asks this Court to adopt his assumption as to what the officer was considering when preparing the notice. Only by adopting Plaintiff's theory that the Committee was conspiring ***before the meeting ever occurred*** to violate Act 10 would such mundane considerations fall outside the normal routine of FPAC.

II. THE FPAC COMMITTEE FOLLOWED, AND EVEN EXCEEDED, THE REQUIRED PROCEDURE FOR ENTERING CLOSED SESSION.

Plaintiff's concerns regarding the announcement made by FPAC to enter into closed session as well as the recording of the announcement in the minutes ignore the formal steps taken by the Committee and necessarily rely on Plaintiff's flawed interpretation of the information which must be included in a notice. [3]

Plaintiff argues that the minutes contain no indication that the announcement required by Wis. Stat. § 19.85(1) was made. Plaintiff focuses on the motion made by Supervisor Haas[4] but ignores the remaining information highlighted in the minutes. The minutes reference the fact that the Committee proceeded into closed session, citing the "specific exemption[s]" found in "Section 19.85(1)(e), (g)." Moreover, Plaintiff ignores that "[a] motion was made by Supervisor Haas to ENTER INTO CLOSED SESSION regarding Items 34-36 per the stated statutes" (emphasis in original). The minutes explicitly reference the fact that the Committee proceeded to enter closed session for purposes of considering items 34 to 36 on the agenda as well as the specific statutory exemptions. Below the details regarding the motion and vote to enter closed session, the minutes list items 34 through 36, including the individuals who attended the closed session.

Plaintiff's argument that "recording that a motion was made does not record that an announcement was made informing those present of 'the nature of the business to be considered

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[3] Plaintiff's complaint regarding Defendants' citation to the video evidence of the March 14, 2013 FPAC meeting is somewhat disingenuous. (*See* Pl. Br. 12.) First, Plaintiff attached both the agenda and minutes for the FPAC meeting to the Complaint. The video evidence cited by Defendant is simply a live recording of those events already cited to by the Complaint and therefore not new "entries." Second, Defendants' use of the video evidence cannot be considered "discovery." Complete video of the FPAC meeting is available online by visiting the Milwaukee County website. (*See* Defs.' Motion 18 n.8.) Notice was provided in the Motion that video of the committee meeting was available for all to review.

[4] Plaintiff's argument that Supervisor Johnson, as the Presiding Officer of the Committee, was the only official able to participate in the announcement regarding the Committee's entering closed session ignores the flexibility provided by the Compliance Guide. There, it focusses on the chief presiding officer, "**or the officer's designee**," in determining whether a notice properly contains the necessary subject matter. *See* Guide at 13.

at such closed session'" is unsupported by any statutory requirement. The motion to enter closed session regarding the items listed in the minutes and pursuant to the stated statutory exemptions certainly provided sufficient information "to those present at the meeting" the nature of the business the committee wished to consider.

III. THE DISCUSSION WHICH TOOK PLACE IN CLOSED SESSION WAS EXEMPTED FROM THE OPEN MEETINGS REQUIREMENTS.

As a last resort to save his Complaint, Plaintiff resorts to attacking the very discussion which took place in closed session. This claim cannot survive. If the FPAC notice was adequate, if FPAC used the proper procedure to go into closed session, and if FPAC's minutes reflect that the proper procedure was followed, then the discussion which took place in closed session was exempted from the Open Meetings requirements and/or protected by the attorney client privilege.

Plaintiff reveals his real motivations when he complains about the secret "vote" to enter into negotiations and alludes to the alleged desire on the part of FPAC members to avoid having to testify under oath as to what happened at the closed session. (Pl. Br. 14-15.) But the issue before the Court does not center on the proper interpretation or application of the provisions of Act 10 – that is currently before the Wisconsin Supreme Court. Plaintiff's claims relate to the Open Meetings Law and whether FPAC complied with that law in entering closed session.

Any alternative finding would obliterate the purpose and intent behind the Wisconsin Open Meetings Law and result in a slippery slope whereby those making any claim relating to "activities" undertaken in closed session would be able to expose the discussions, advice and strategy which *result in* some form of collective bargaining negotiations. By attempting to focus the Court's attention on some alleged violation of Act 10, Plaintiff ignores the standard permitting the development of negotiating strategies. The Wisconsin Attorney General has emphasized that a governmental body may convene in closed session to formulate collective bargaining strategy

but that Wis. Stat. § 19.85(3) requires that deliberations leading to ratification of a tentative agreement with a bargaining unit, as well as the ratification vote, have to be held in open session. 81 Atty. Gen. 139, 139 (1994). This interpretation "permit[ted] a governmental body to convene in closed session to ***formulate strategy*** while engaged in negotiations with a collective bargaining unit." *Id.* at 140 (emphasis added). The *Buswell* court emphasized that once reasonable notice has been given, "meeting participants [are] free to discuss any aspect of the noticed subject matter, as well as issues that are reasonably related to it." 2007 WI 71, ¶ 34.

The only possible "action" which took place during the closed session was the receipt of legal advice from counsel and the development of negotiation strategies, all of which are permitted exemptions to the Open Meetings Law. Plaintiff cannot save his Complaint by assuming various actions took place and ignoring the right of governmental bodies to develop strategies and obtain legal advice in closed session outside the scrutiny of the entity with which the governmental body may, or may not, be negotiating on a particular subject. While Plaintiff may claim that "FPAC had no bargaining interest in keeping secret the fact that FPAC had decided to bargain," (See Pl. Brief 14) the decision as to what County interests had to be protected was not his to make.

IV. THE SUPERVISORS' ATTENDANCE AT THE ASSEMBLY HEARING DID NOT TRIGGER ANY NOTICE REQUIREMENT.

As plead, the Wisconsin Open Meetings Law could not have been triggered by the Board members' attendance at the Assembly Meeting. Because the Board had no superintendent authority over the Assembly committee considering Assembly Bill 85, the gathering of the Board members at that meeting cannot be considered a "meeting" under Wis. Stat. § 19.82(2) and no notice was required.

Section 19.82(2) defines a meeting as "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." (emphasis added) Despite Plaintiff's recognition of this definition, as well as the *Badke* decision, Plaintiff somehow concludes that the Board possessed governmental decision-making ability over AB 85 because, among other things, the members could discuss it and testify against it. (Pl. Br. 17-18.) Plaintiff even argues that *Badke* would have prevented the Board from gathering to watch coverage of the debate over AB 85 online via WisEye. (Pl. Br. 18.)

But Wis. Stat. § 19.82(2) and the *Badke* decision cannot be read so broadly as to allow Plaintiff's claim to survive this Motion. The test for purposes of triggering the Open Meetings Law is not whether a matter impacts a unit of government, but whether the entity has met to discuss or obtain information on a matter over which it has decision-making authority. The *Badke* decision, which Plaintiff emphasizes in his pleading, did not simply focus on a matter's impact. It held that 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 decision-making responsibility***, such a gathering is a 'meeting' within the meaning of the Open Meeting Law, unless the gathering is social or chance." 173 Wis.2d at 561 (emphasis added).

The standard is not whether the Board met to gather information "relevant to the county," but whether it met to gather information about a subject over which they had decision-making responsibility. Put another way, the Open Meetings Law cannot be read so broadly as to include within the definition of a "meeting" *any* occurrence where information is gathered on topics County officials deem interesting. Plaintiff's emphasis on the novel "gathering of information" theory leads to absurd results. Certainly Plaintiff would not agree that each individual member watching WisEye from home triggers any notice requirement, despite the ability of each individual Board member to gather information on any number of topics. Or certainly Plaintiff would not agree that notice would be required for a gathering of Board members to watch the Super Bowl.

While these examples may seem absurd, this would be the result of Plaintiff's position, which essentially asks that the Court ignore the all-important trigger outlined in *Badke* and *Showers*.

Directly incorporating the definition of "meeting" found in Wis. Stat. § 19.82(2), the court in *Showers* established "that whenever members of a governmental body meet to engage in government business, be it discussion, decision or information gathering, the Open Meetings Law applies if the number of members present are sufficient to ***determine the parent body's course of action*** regarding the proposal discussed at the meeting." 135 Wis.2d at 80 (emphasis added). The Open Meetings Law only applies if the members can determine the parent body's course of action regarding the proposal actually being discussed at the meeting in question. To adopt Plaintiff's interpretation, notice would have to be provided whenever a quorum met to discuss matters or gather information, irrespective of whether the Board could have any role in the action.

CONCLUSION

Plaintiff cannot establish a violation of the Open Meetings Law and therefore his Compliant should be dismissed in its entirety and with prejudice.

Dated this 7th day of March, 2014.

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