STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

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

Plaintiff,

v.

MILWAUKEE COUNTY BOARD
OF SUPERVISORS, and
LEE HOLLOWAY,
Defendants.

Unclassified
Case Code: 30703
Case No. 11-CV-9399



**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

This is an easy case about an important subject. There is no question, that the defendant Milwaukee County Board of Supervisors and its Chairman, Lee Holloway, violated the Open Meetings Law, Wis. Stat. §§ 19.82, et seq., in adopting a tentative redistricting plan ("the Tentative Plan") on April 21, 2011. As more fully explained below, no colorable interpretation of that law permits a public body to provide notice of a proposed subject to be addressed at a meeting *after* the meeting has begun. Prior notice of the subject matters to be addressed at a meeting must be just what the law says it is – *prior* notice.

Even if we could join the Board behind the Looking Glass and regard notice given after a meeting has begun as the equivalent of notice given before it has begun, the Board had not the slightest justification for failing to provide the requisite notice a full twenty four hours in advance of the meeting. Adoption of the tentative plan was but the first step in a long process that would culminate in drawing the lines for new supervisory districts for the next decade. The

Board was under little time pressure – much less the type of exigent circumstances that would justify the failure to wait just one more day so that proper notice could be provided.

To the contrary, what happened here was a blatant flouting of the Open Meetings Law in an attempt to convert the plan into a *fait accompli* and provide Supervisors with cover under which they might tell critics of the Tentative Plan that it is "too late" to make substantive changes in the number and configuration of county board districts. This type of misconduct cannot go unchecked. Public bodies ought not to think that they may provide prior notice of the subject of a meeting after the meeting has begun. They must be disabused of the notion that they may use the exception in Wis. Stat. § 19.84(3) (permitting shorter notice only when it is "impractical or impossible" to provide the full twenty four notice called for by §c 19.84(2)) whenever they would prefer to act immediately.

That flouting, so casual and thoughtless, is why this easy case about a clear violation is important. To permit local units of government to ignore the clear requirements of the Open Meetings Law this brazenly would be an invitation to ongoing mischief. Only by invalidating the Tentative Plan – and any subsequent action based upon it – can the defendants – and other public bodies who may be tempted by the sleight of hand attempted here – be reminded that the law means what it says.

## THE FACTS

The plaintiff and relator, Joseph A. Rice, is an adult resident of the State of Wisconsin, residing in the Village of Whitefish Bay. (Rice Aff., ¶1.) He is a duly elected member of the Milwaukee County Board of Supervisors (*id.*), but he brings this action in his capacity as private attorney general. Pursuant to sec. 19.97, he brought a complaint to local officials requesting

prosecution of the Open Meetings violation related in the complaint and further described below. (*Id.*, ¶21.) Because the responsible official – in this case, the Acting Corporation Counsel – declined to act (*id.*, ¶22), he is entitled to bring an action in his relation and on behalf of the state, seeking appropriate remedies.

The Defendant Board is the governing body of Milwaukee County, a Wisconsin municipal corporation. The Board is a governmental body within the meaning of sec. 19.82(1) and subject to the various requirements of the Wisconsin Open Meetings Law, secs. 19.82-19.98. The Defendant Lee Holloway is Chairman and presiding officer of the Milwaukee County Board of Supervisors and a member of a governmental body within the meaning of sec. 19.96, Stats., who acted in his official capacity at all times and with respect to all matters material to this case.

On April 14, 2011, the Board's Redistricting Committee released the Tentative Plan – constituting its proposal to redraw supervisory districts based on the 2010 decennial census under sec. 59.10. (Rice Aff., ¶2.) In the short week that it was before the public, the Tentative Plan was subject to criticism from an extraordinary collection of individuals and organizations including but not limited to the NAACP, ACLU, and representatives of the Hispanic community, all of whom were concerned about its impact on minority voters. (*Id.*, ¶13.) It was criticized by, among others, the Milwaukee Journal Sentinel editorial board, the Greater Milwaukee Committee, and representatives of various municipalities within Milwaukee County. (*Id.*)

Many of these critics urged that the Board not "rush into" a redistricting plan and called for further debate and deliberation. (*Id.*)

On April 19, the *Milwaukee Journal Sentinel* reported the call of Nathaniel Holton, chairman of the Milwaukee NAACP Political Action Committee, to delay a vote on the Tentative Plan and to hold a special meeting on redistricting in May. Steve Schultze, NAACP wants county to slow

redistricting, *Milwaukee Journal Sentinel*, April 19, 2011.[1] Just one day before the April 21 meeting, the *Journal Sentinel* reported on calls to "slow down the fast train on redistricting." Steve Shultze, "County Board redistricting push questioned," *Milwaukee Journal Sentinel*, April 20, 2011. Chis Ahmuty, executive director of the American Civil Liberties Union, expressed concern about the "speed and lack of deliberation in the redistricting process." *Id.* On the same day, the paper's editorial board called on the Board to "slow down on its plans for redistricting "Think smaller, bolder," *Milwaukee Journal Sentinel*, April 20, 2011.

At least initially, it appeared that the Board had heeded this call. Although the Shultze article reported that the redistricting plans were expected to be reviewed at the April 21 Meeting, notice of the meeting seemed to indicate that the Board would take more time to consider the decennial redistricting. Holloway and the Board caused public notice of the April 21 Board Meeting to be posted on April 19, 2011 at 2:57 pm. (Rice Aff., Exh. A.) That notice was required by Wis. Stat. § 19.84(2) and, by law, had to set forth the time, date, place *and subject matter* of the meeting. That notice included a twenty three page agenda constituting a detailed recitation of the subjects to be covered at the meeting. But it contained no mention – explicit, implicit or elliptical - of *any* proposed discussion or action concerning the decennial redistricting of the Milwaukee County Supervisory districts.

Thus, prior to the commencement of the April 21 Board Meeting, the defendants provided no public notice that decennial redistricting would be acted upon, or discussed, or in any other way be a subject matter of the April 21 Board Meeting. The public and critics of the Tentative Plan – of which there are legion – should have been safe in their belief that the Board would not "rush" and adopt the Tentative Plan on April 21. *Nevertheless, the Board took up decennial*

[1] All undisputed facts relevant to this action are set forth in the attached Affidavit and Exhibits. References to media reports in this brief are not offered to prove the truth of the matter asserted, but rather to provide context to the undisputed facts provided.

*redistricting at the April 21 Board Meeting.* When Rice took to the floor and informed his colleagues that they were not free to do so because they had not provided the notice required by Wis. Stat. § 19.84(2) (Rice Aff., ¶9), what can only be described as an arrogant bit of legerdemain followed. Rather than refrain from acting on a subject matter that had not been properly noticed and wait to act until a subsequent and properly noticed meeting, the defendants caused an "emergency" "notice" to be issued by e-mail at approximately 10:17 am – *after the April 21 Board Meeting had commenced and while it was underway.* (Rice Aff., Exh. B). Over two hours later, the Board passed the Tentative Plan.

After adoption of the Tentative Plan, municipalities were forced to draw ward and precinct lines in accordance with the Tentative Plan, *see* § 59.10(2)(a), (3)(b)1., 2., but the Board made no apparent effort to solicit or even consider modifications to it. Although the Redistricting Committee held a hearing on the Tentative Plan on July 13, 2011, and ten of the eleven public witnesses testifying at that hearing opposed the Tentative Plan, no member of the Redistricting Committee made any substantive comment at the hearing. (Rice Aff. ¶18.) After conclusion of the July 13 hearing, Supervisor Michael Mayo Sr., chair of the Redistricting Committee, said that "current law" "anticipates" only minor changes in the Tentative Plan. (*Id.*) Although state law requires the Board to "solicit suggestions from municipalities concerning the development of an appropriate plan," Wis. Stat § 59.10(3)(b)1., it did not do so. A number of the municipalities in Milwaukee County – as well as the Intergovernmental Cooperation Council - have passed resolutions stating that their input has not been sought – either before or after the passage of the Tentative Plan. (Rice Aff., Exhibits E-N)

After conclusion of the July 13 hearing, the Board cited the passage of the Tentative Plan as a reason not to seriously consider criticism of the Plan or make changes to it. Following the

July 23 meeting, the Journal Sentinel reported the unwillingness of the Redistricting Committee to make significant changes, citing adoption of the Tentative Plan as an excuse:

> Only minor tweaks likely will be made to the Milwaukee County Board's preliminary redistricting plan, the chairman of the board's redistricting panel said Wednesday.
> Supervisor Michael Mayo Sr. said the current law anticipates only minor changes made after cities and villages complete their aldermanic and village board remaps.

Steve Schulze, "Redistricting plan won't be changed much, Mayo says," July 13, 2011.

On July 19, 2011, the Redistricting Committee adopted the Tentative Plan with only minor changes, shifting some predominantly Hispanic wards from one district to another. While this created a second "voting age majority" Hispanic district (but almost certainly not an effectively majority Hispanic district), the Tentative Plan remained largely intact. There were, in other words, "only minor changes." It is expected that the Tentative Plan, as amended, will be adopted at the Board's meeting on July 28, 2011.

## ARGUMENT

Summary judgment methodology is well established and need not be extensively rehearsed here. *See Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶ 20-24, 241 Wis.2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. Id., ¶ 24.

### I. The Tentative Plan Was Adopted in Violation of the Open Meetings Law

#### A. No Notice of Redistricting As a Subject Matter Was Provided.

Wis. Stat. § 19.84(2) provides that "[e]very 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." That notice is to be

provided "at least 24 hours prior to the commencement of such meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 2 hours in advance of the meeting." § 19.84(3).

This requirement was not met. The undisputed facts show that no notice that redistricting might be a topic at the April 21 Board Meeting was provided 24 hours prior to the commencement of the meeting. Furthermore, no notice that redistricting might be a topic at the April 21 Board Meeting was provided even two hours prior to the commencement of the meeting. "Finally, the 2-hour exception to the 24-hour rule is not even applicable here, because it was neither "impossible nor impractical" to provide 24-hour notice that the Board intended to discuss redistricting."

While the Wisconsin Supreme Court has adopted a "reasonableness" standard for assessing the sufficiency of whatever notice has been provided, *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, 301 Wis.2d 178, 732 N.W.2d 804. There is no need to linger over that analysis here. There was no notice at all![2]

Although sec. 19.84(3) provides for a shorter notice period when the normal 24 hour period is, for good cause shown, impractical or impossible to comply with, the law expressly provides that even such notice must be provided no less than two hours "in advance of the meeting."

"Prior to" or "in advance" of a meeting cannot be rendered synonymous with "during" a meeting without doing violence to the English language and Newtonian time (i.e., time as we

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[2] *Buswell* considered, among other things, whether notice stating that a school board meeting included a "[c]ontemplated closed session for consideration and/or action concerning employment/negotiations with District personnel" was sufficient to apprise the public that board might consider its master contract with the local teachers' union, concluding that it was not. 2007 WI 71, ¶ 38. The Court held that § 19.84(2) required greater specificity. Of course, not even the sort of vague notice that was provided in *Buswell* was present here.

experience it) in which events occur in sequence.[3] The defendants would apparently argue that the statute can be judicially rewritten so that "prior to the commencement of" and "in advance of" the "meeting" means "prior to the commencement of" or "in advance of" the consideration of a particular agenda item. But that is not what the law says. A "meeting" is distinct from agenda items within the meeting. *See* Wis. Stat. §19.82(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.").

To hold otherwise would violate both the spirit as well as the letter of the law. As the Wisconsin Supreme Court recently observed, "the notice requirement gives the public information about the business to be conducted that will alert them to the importance of the meeting, so that they can make an informed decision whether to attend." *Buswell*, 2007 WI 71, ¶ 26, citing *State ex rel. Badke v. Vill. Bd. of the Vill. of Greendale*, 173 Wis.2d 553, 573-574, 577-578 494 N.W.2d 408 (1993). To allow public bodies to hide the ball in this way – revealing topics of discussion only at the last moment when citizens have already decided whether or not to attend – would make that informed decision impossible.

Even if "prior to" or "in advance of" could be understood as synonymous with "during," there was no justification for departing from the normally required twenty four hour notice period on April 21st. In a letter to Rice dated May 20, 2011, Acting Corporation Counsel John Jorgensen offered two reasons to do so. The first was that the County Board could not have known that redistricting would be a subject of the April 21 meeting because it could not have known that the Redistricting Committee would approve the Tentative Plan prior to the meeting of the full Board.

[3] Science fiction writer Ray Cummings famously wrote that "time … is what keeps everything from happening at once." RAY CUMMINGS, GIRL IN THE GOLDEN ATOM 46 (U. Nebr. 1922). Thus, "prior to" and "during" cannot be the same. Relative time is different but there is no indication that our legislature had the quantum world in mind when enacting Wis. Stat. § 19.84(3).

Putting aside the incredulity of such a suggestion,[4] that would not make noticing the subject of redistricting "impractical or impossible." If the Board contemplated taking up redistricting based upon the action of the Redistricting Committee, it could have noticed the topic as a tentative or potential subject. Public bodies do this all the time and, under *Buswell*'s rule of reasonableness, it would not have been necessary to include the details of the Tentative Plan in the notice – as, indeed, the Board's "after the fact" notice did not do.

More fundamentally, departure from the 24 hour rule would have been justified only if it had been "impractical or impossible" for the Board to act more than 24 hours after the action of the Redistricting Committee. But it was not. In his May 20 letter, the second reason for departing from the 24-hour rule that Jorgenson gave Rice was that the Board was under time pressure because it was required to adopt a tentative plan within sixty days of the availability of census data.[5] That is almost correct. Wis. Stat. §59.10(2)(a) requires the adoption of a preliminary plan within sixty days of the availability of census date "but in no event later than July 1." Mr. Jorgensen did not say when census data became available, but a reasonable argument could be made that the Board had until July 1 to adopt a tentative plan and, even if that were not so, there is no reason why it could not have scheduled another meeting a day or two later. That the Board may not have had a "regularly scheduled" meeting for some period of time after April 21 hardly makes waiting "impractical or impossible." Certainly the requirements of the Open Meetings Law trump the personal calendar and convenience of county supervisors.

[4] The members of the Redistricting Committee are, of course, also members of the Board. (Rice Aff., ¶2.) Furthermore, that committee had, only one week prior to the April 21 meeting, released its proposed redistricting plan for public comment before it voted to recommend it to the Board for adoption as the Tentative Plan. (*Id.*)

[5] Jorgenson's second argument belies his first. If the Board was aware that it had to act quickly to meet some deadline (if such a deadline was even approaching), than it certainly should have been aware that the Redistricting Committee would be presenting a proposed redistricting plan in advance of that deadline.

The Board blatantly violated the Open Meetings Law. It did not provide the statutorily-required notice that it would be considering the decennial redistricting at its April 21 Meeting. Its last-minute attempt to provide some sort of notice was neither justified nor effective. It was not justified because it was not "impractical or impossible" to provide 24 hour notice. It was not effective anyway, because it was not provided at least 2 hours "in advance" of the meeting.

## II. Adoption of the Tentative Plan Should Be Invalidated.

At minimum, this Court should declare that the adoption of the Tentative Plan was in violation of the Open Meetings Law, assess a forfeiture against the defendants under Wis. Stat. § 19.96 and award the reasonable costs of this action under Wis. Stat. § 19.97(4). Public bodies ought not to be given the impression that what happened here is legal.

But that would not be enough. Wis. Stat. §19.97(3) provides that a court may void an action taken in violation of the Open Meetings Law where 'under the particular circumstances of the particular case … the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken." This requires a "balancing" of competing interests. *State ex rel. Herro v. Village of McFarland*, 2007 WI App 172, ¶ 25, 303 Wis.2d 749.In juxtaposing the validity of an action taken in violation of the Open Meetings Law with enforcement of the law, it necessarily implies that enforcement, standing alone, requires invalidation. Only if competing considerations (i.e, the public interest in sustaining the validity of the law)outweigh the need to enforce the law (through invalidation), may a court permit an action taken in violation of the law to stand.

There is no law further explaining how that balancing of interests is to be conducted. Recently, the Circuit Court for Dane County used the three part test for assessing the sufficiency of notice under §19.84(2) that was announced in *Buswell* to evaluate whether an action should be

invalidated. *See, e.g., State ex rel. Ozanne v. Fitzgerald.*, Case No. 11CV1244 (May 26, 2011), vacated on other grounds, 2011 WI 43, 798 N.W.2d 436 (June 14, 2011). It is not clear that this approach is correct or fully incorporates the various interests at stake, but it may be instructive on the extent to which a violation may be "excused" and to assess the gravity of a violation. Used in this way, it is apparent that the defendants' violation is inexcusable and that its disregard of the law was quite grave.

In assessing the sufficiency of notice, *Buswell* called for the consideration of factors such as "the burden of providing more detailed notice, whether the subject is of particular public interest and whether it involves non-routine action that the public would be unlikely to anticipate." *Buswell*, 2007 WI 71, ¶ 28. Here, of course, no notice was provided at all – much less "more detailed" notice – and the burden of doing so would have been minimal. It would have been a small matter indeed to include – somewhere in the twenty three page agenda for the April 21 meeting – a statement that redistricting might be taken up pending action of the Redistricting Committee. The matter was of intense public interest (and, as we have seen, widespread public opposition) and redistricting - an action that is required only every ten years – is certainly non-routine. Indeed, given the intense public interest and the unique, one-off nature of the topic, the public could have had no expectation that the Board would have the audacity to act without public notice.

In his May 20 letter to Rice, Acting Corporation Counsel argues that, given this interest and its non-routine nature, the public "should have" expected that redistricting should be taken up. This argument stands the *Buswell* factors on their head – high levels of public interest and the non-routine nature of the action in question – were factors militating in favor on more detailed notice – not, as Acting Corporation Counsel would apparently have it – no notice at all. Such an

approach is inconsistent with *Buswell* itself in which intense public interest in modifications to the districts' contract with the teachers union and the fact that these contracts are not routinely modified called for greater, not lesser or nonexistent, notice.

The argument, moreover, drips with contempt for the public. It comes hard upon Acting Corporation Counsel's argument that it would have been unduly burdensome to require notice of a redistricting as a subject because the Board could not know what one of its committees was about to do. In other words, says Milwaukee County's top lawyer, the County's governing body could not have known what it was about to do, but the average citizen should have. To state the argument is not only to refute it but to declare it preposterous.

The weakness of the defendants' position suggests a deliberate attempt by the Board to circumvent the Open Meetings Law and supports invalidation of the action they took. Public bodies cannot act as if notice after a meeting is notice prior to a meeting. They cannot hide behind the existence of a contingency (approval of the Redistricting Committee) that they are aware may come to pass and lead to consideration of a subject that they have deliberately chosen not to notice. They cannot avoid the personal inconvenience of an emergency session by ignoring notice requirements. They cannot blatantly ignore the law to avoid further public criticism. They should be discouraged from any and all of these actions—discouraged more than a minimal forfeiture can accomplish.

The defendants may now argue that their violation of the law in April can be cured by their approval of the Tentative Plan as a final plan in July (with proper notice). That might be true in some instances, but not here. Adoption of a tentative plan is a condition precedent for adoption of a final plan. It is the tentative plan – presumed to have been validly enacted in accordance with the Open Meetings Law – that becomes the basis for drawing conforming ward and precinct

lines. Wis. Stat. § 59.10(2)(a), (3)(b). That did not happen here and, because it did not, a final plan cannot be adopted. The statutory mandate of a Tentative Plan would be rendered superfluous if a defect in its adoption could be cured by the simple expedient of adopting a final plan.

While invalidation will require the Board to "start over" – and may result in citizen requests for a judicially approved plan – that fault lies in the defendants' own disregard of the law even in the face of Rice's objection, the refusal of the Acting Corporation Counsel to act on what is a clear violation of the law, and their ongoing failure to act in light of this lawsuit. That a defendant will be burdened by the remedy brought about by its own wrongdoing is not a reason to excuse that wrongdoing and forego a remedy.

While invalidation may require certain municipal ward lines to be redrawn, there are at least two reasons why that possibility should not discourage this court from ordering invalidation. First, once the wards are drawn, there is no reason the Board, in redoing its own redistricting, cannot use most or even all of those changed lines, requiring little or no further line redrawing by the municipalities. Second, municipalities will have to revisit their ward lines anyway to conform to the recently enacted legislative redistricting. On July 26, 2011, Governor Walker signed into law 2011 Act 39, which, among other things, requires municipalities to redraw ward lines to conform to state legislative redistricting. Those new legislative districts have been approved by the legislature, but as of the filing of this brief, the legislation enacting them, SB 148, has not yet been signed by the Governor.

To be sure, this is not an unlimited amount of time. Upon filing of this Motion, the clerk was unable to set a hearing date because the circuit court branches are in the process of rotation. Rice respectfully requests that a hearing be set as soon as possible to permit resolution of this matter

as promptly as possible and allow as much time as possible for renewed consideration of county board redistricting.

## CONCLUSION

The violation is clear and the consequences are serious – both for future enforcement of the Open Meeting law in this state and the public's participation in redistricting the Milwaukee County Board of Supervisors. Plaintiff requests a declaratory judgment against Defendants finding them in violation of Wisconsin's Open Meetings Law and declaring the adoption of the Tentative Plan void pursuant to sec. 19.97(3), Stats. He requests an order enjoining the Board from taking any further action to implement the Tentative Plan and directing it to being the redistricting process anew. He requests a forfeiture assessed against the defendant Holloway in the amount of $ 300.00, plus costs, payable to the State of Wisconsin with the actual and necessary costs of prosecuting this action, including reasonable attorneys' fees.

Dated this 27th day of July, 2011.

Respectfully submitted,
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