STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE OF WISCONSIN ex rel.
JOSEPH A. RICE

Plaintiff,

vs. Case No. 11CV009399

MILWAUKEE COUNTY BOARD OF
SUPERVISORS and

LEE HOLLOWAY

Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The purpose of the Open Meetings Law is to give the public the most complete information regarding the affairs of government that is compatible with the conduct of the government's business. Wis. Stat. s. 19.81(1). If the court applies the law to the facts of this case with that principle in mind, rather than as a political tool to be employed by an individual county supervisor, this is, as plaintiff Rice states in his brief, an easy case. It should be dismissed.

The public was fully informed about the tentative redistricting plan and about the fact that the Milwaukee County Board of Supervisors would take up that plan at its meeting on April 21, 2011. Because of the statutory time-line that governs the redistricting process, a delay in adoption of the tentative plan would have been incompatible for with timely conduct of governmental business.

The Milwaukee County Board of Supervisors adopted a tentative redistricting plan on April 21, 2011, in broad daylight with open doors at a regularly scheduled meeting in its regular meeting room, accessible to all and sufficient to accommodate any interested citizen. The contents of the tentative plan had been disclosed, discussed and subjected to public comment and criticism at public meetings. The fact that the Board would take up a tentative redistricting plan was widely publicized. Jorgensen Affidavit, Exh. 9. As soon as specific information about the recommendation of the Board's Special Committee on Redistricting (which met earlier that morning) was available, the Board's meeting notice was amended to include that information.

To claim, as plaintiff Rice does, that interested members of the public were misled or dissuaded from attending the April 21 County Board meeting by a lack of specificity in the Board's meeting notice as it was originally posted is arrant nonsense. Rice is asking the court to believe that someone who read on-line or in the newspaper, or who heard on the radio, or who was informed at a meeting of the County Board's own special redistricting committee, that the Board would consider a tentative redistricting plan on April 21 would then consult the agenda and decide to stay home because the agenda, as originally posted, did not specifically reference the report of Special Committee on Redistricting.

Although it appears that the state legislature is not constrained by the letter or the spirit of the Open Meetings Law, *State ex rel. Ozanne v. Fitzgerald,* 334 Wis. 2d 70, 798 N.W.2d 435 (2011), it is worth noting that the conduct of the County Board in adopting the tentative redistricting plan compares favorably in every respect with the conduct of the legislature on March 9, 2011, when its joint conference committee met at 6:00 p.m.

on less than 2 hours notice in the Senate parlor in a locked Capitol Building to approve what became 2011 Wis. Act 10.

FACTS

By a letter dated March 21, 2011, the leaders of Wisconsin Legislature informed Milwaukee County Clerk Joseph Czarnecki that the results of the 2010 decennial census were available and that the 60-day period during which a Wisconsin county must adopt a tentative redistricting plan had commenced. Jorgensen affidavit, Exh. 1. Based on that information, the Milwaukee County Board of Supervisors was required to complete action on the tentative plan no later than May 20.[1]

The Board's Special Committee on Redistricting held properly noticed public meetings on the tentative redistricting plan on April 6, April 15 and finally at 8:00 a.m. on April 21, 2011, Jorgensen Aff. Exhibits 2, 3, and 4. The plan was available, discussed and subject to public comment at the latter two meetings.

It is fair to say that the tentative plan was criticized, although not, as Rice alleges, by an "extraordinary collection" of individuals and organizations. It was criticized by the usual collection of individual and organizations. As occurs with every redistricting effort, representatives of minority voters expressed concern about potential voter dilution. Business interests and some editorialists wanted a drastic reduction in the number of supervisors, a move that representatives of the minority voters would not approve. Individual county supervisors proposed a range of alternative plans. A variety of opinions regarding the number and configuration of the proposed supervisory districts were presented and debated at public meetings of the Redistricting Committee and at the County Board meeting. Regardless of how long the Board delayed action on a tentative

[1] Rather than July 1, as Rice's brief assumes.

plan, it would not have been possible to accommodate the irreconcilable desires of all those individuals and interest groups.

The Board adopted a tentative redistricting plan at its April 21, 2011, meeting in the afternoon. The contents and timing of the relevant meeting notices are described and documented in Rice's affidavit and not in material dispute, but the chronology reported in Rice's brief is somewhat misleading. According to Rice's brief, he "took to the floor" to inform his colleagues that they could not proceed on the tentative redistricting because the notice required by statute had not been provided, and *then* "what can only be described as an arrogant bit of legerdemain *followed*", namely the publication of the amendment to the meeting notice. That did not happen. When the redistricting item first came up, in the morning, there was a request from the chair of the Special Committee on Redistricting to lay that matter over until later in the meeting. Jorgensen Affidavit, Exh. 5. No one (including Rice) interposed any objection, and that matter was laid over, to be taken up again after the lunch break. When the item came up again in the afternoon, Rice raised the issue of compliance with the Open Meetings Law in a motion to refer to Corporation Counsel for a legal opinion, which motion failed. The amendment to the meeting notice had been published hours before that.

Pursuant to statutory procedure, the adopted tentative plan was provided to the County's constituent municipalities, which were required to adjust their ward lines to conform to that plan. The Redistricting Committee then held additional public meetings on July 13 and July 19, 2011 regarding a final redistricting plan. At the July 19, meeting, amendments to the plan were offered and approved by the committee. Jorgensen Affidavit, Exh. 6. Representatives of Hispanic voters and the NAACP

appeared and spoke at the committee meeting and indicated that the redistricting plan as amended was satisfactory. Jorgensen Affidavit, par. 8. The Committee voted to recommend adoption of the redistricting plan as amended.

On July 28, 2011, the County Board voted to adopt the final redistricting plan, including the amendments approved by the Redistricting Committee. Rice participated in the debate preceding that vote and introduced his own proposed redistricting plan as a substitute amendment. The Board declined to adopt that amendment, which, like the tentative plan and the final plans ultimately adopted by the Board, called for 18 supervisory districts. Jorgensen Affidavit, Exh. 8.

I. THE DEFENDANTS DID NOT VIOLATE THE OPEN MEETINGS LAW

With the possible exception of the item for "reports and resolutions/ordinances by special committees", the notice for the April 21, 2011, County Board meeting comfortably exceeded any Open Meetings Law requirements with regard to both timeliness and specificity. At the time that notice was prepared and required to be published, it was impossible to know whether the Special Committee on Redistricting, which held its final meeting on a tentative plan immediately before the April 21 County Board meeting, would recommend a redistricting plan and, if so, what that plan would be. Therefore, it was "impossible or impractical", within the meaning of Wis. Stat. s. 19.84(3), to include a detailed item describing the action, if any, that the full County Board might take on that subject.

As it turned out, the Redistricting Committee did recommend a redistricting plan for adoption. As soon as practicable, and more than two hours before that item was taken up by the full County Board, an appropriate amendment to the notice was published,

specifically indicating that the Board would consider the report of the Special Committee on Redistricting.

Rice's brief emphasizes that the statute by its terms requires a minimum of two hours' notice "in advance of the meeting". However, in a case such as this, where the only arguable defect in an otherwise sufficient and timely notice is a want of specificity as to a single item, there is no reason in law or logic that the defect cannot be remedied by a timely amendment to the notice, published as soon as practicable and not less than the two hours before the board conducts business with respect to that item. No reported case holds that such an amendment is forbidden or ineffective.

On the contrary, the case law requires an examination of the real world facts and circumstances of a particular case to determine whether, under those facts and circumstances, notice of a meeting is reasonable. *State ex rel. Buswell v. Tomah Area School District*, 301 Wis. 2d 178, 732 N.W.2d 804 (2007).

Under *Buswell*, the court should consider the burden of providing more detailed notice, consistent with the statutory mandate that the Open Meetings Law be interpreted and applied in manner "compatible with the conduct of governmental business". Requiring the Board to wait until its next meeting to take up the recommendation of the Redistricting Committee would have burdened the conduct of governmental business, which in this case was both adopting a tentative plan before May 20 *and* holding as many public meetings of the Redistricting Committee as reasonably possible in the short time available to maximize opportunities for public information and for citizen and interest group input. To those ends, the Committee met one last time on the tentative plan immediately before the regularly scheduled County Board meeting on April 21.

It was important for the full County Board to act on the recommendation of the Redistricting Committee in their April 21 meeting in order the ensure that a tentative redistricting plan would be adopted before the statutory deadline. The very real possibility that the County Executive would veto the plan[2] compelled the County Board to allow sufficient time to develop and adopt an alternate plan. If the County Board had deferred action on a redistricting plan until its next meeting or for any significant period of time, it would have been impossible to complete action on an alternative plan within the time allowed. In that event, the County's elected representatives would have violated the statute and defaulted on their responsibility to adopt a redistricting plan. It is clear that the duties assigned to the county under the statutory redistricting scheme are not mere suggestions. "Counties have an absolute duty to establish supervisory districts as directed by the legislature. That [now, Wis. Stat. s. 59.10(2) and (3)] imposes mandatory action on the county in the first and third stages of the formation of supervisory districts [that is, adoption of the temporary plan and the final plan] is not questioned." *City of Janesville v. County of Rock*, 107 Wis. 2d 187, 197, 319 N.W.2d 891 (Ct. App. 1982)

Buswell arose from a challenge to the specificity of the notice for a school board meeting at which the board intended to consider ratification of a collective bargaining agreement with teachers. The court, quite reasonably, considered ratification of the teachers' contract to be a matter of significant public interest and also a matter that would not be expected to appear on the school board's agenda on a routine basis. In that case, those factors militated in favor of requiring greater specificity.

The tentative redistricting plan is a matter of significant public interest, and redistricting does not occur on a routine basis. However, unlike a collective bargaining

[2]The County Executive did consider a veto, but ultimately returned the resolution unsigned.

agreement, the contents of the tentative redistricting agreement had been disclosed and debated in a series of open meetings. Because of the unique and special nature of decennial redistricting, the entire process, including the fact that the County Board would take up a tentative redistricting plan at its April 21 meeting, was the subject of prior public meetings and extensive media coverage. The defendants do not take the position that newspaper stories are a substitute for meeting notices. However, under the facts and circumstances of *this* case, the fact that the notice for the April 21, 2011 County Board meeting, as originally posted, did not include a detailed entry about the report of the Special Committee on Redistricting (because is was impossible prior to April 21 to know what the report of that committee would be) simply did not deprive the public or the media of notice that the County Board would likely consider adoption of a tentative redistricting plan at that meeting. Rice has not identified any person interested in the redistricting plan who can state that he or she would have attended the April 21 County Board meeting but did not because of the alleged deficiency in the original meeting notice.

Whatever Rice may think about the adequacy of the meeting notice in this case or the effect of the amended meeting notice, no purpose is served by, and no legal or factual basis is offered for, the gratuitous insults and accusations of deliberate illegality that litter his brief.[3] Counsel or this court may disagree with my advice to the Board, but I will

[3] Whether this reflects Rice's disdain for his colleagues or that of his counsel, or both, is unclear. For an example of something that really "drips with contempt" (to quote but one of Mr. Esenberg's vivid calumnies, Rice's brief, p. 12), unhampered by a religious dependence on facts, one need look no further than his description of County officers and employees generally: "Whether by mendacity, gross negligence or misfortune met with fecklessness, county government had – on many occasions – promised its employees medical and pension benefits that it could not hope to afford. County pashas can often look forward to an early retirement spent in a luxury that belies their former status as one functionary among many in the gray lassitude that marks the Milwaukee County courthouse. Secretaries have – literally – become millionaires. . . . To maintain his precarious hold on office, [Walker] was told to take the

defend myself to the extent of denying "contempt for the public", dripping or otherwise, (Rice's brief, p. 12). More to the point, there is no support for the accusation that the Board's reliance on that advice, even if misplaced, was not in good faith. There is, for example, no basis for Rice's accusations that the defendants are guilty of a "deliberate attempt" to "circumvent the law", that the Board's intention was to "stifle public debate" and "act without public scrutiny" (there was plenty of debate and public scrutiny), that the action of County Board staff in amending the notice to reflect the recommendation of the Redistricting Committee was "an arrogant bit of legerdemain", or for any of the other nefarious motives that Rice has imputed to his colleagues. Because the members of the County Board proceeded in good faith reliance on the advice of counsel, forfeitures are inappropriate in this case, *State ex rel. Hodge v. Town of Turtle Lake,* 180 Wis. 2d 62, 80, 508 N.W. 2d 603 (1993).

II. THIS CASE IS MOOT

In any event, issues concerning adoption of the tentative redistricting plan have been rendered moot by the County Board's subsequent adoption of a permanent plan pursuant to Wis. Stat. s. 59.10(2)(a) on July 28, 2011.

A case is moot when a judgment can have no practical legal effect on the existing controversy. *Hahner v. Board of Ed. Wisconsin Rapids,* 89 Wis. 2d 180, 186, 278 N.w.2d 474 (Ct. App. 1979), *State ex rel. Badke v. Vilage of Greendale*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993). *Badke* admits the possibility that a court may have jurisdiction to declare a violation of the Open Meetings Law (as in that case, where the court unsurprisingly declared that a meeting attended by a quorum of the village board

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Milwaukee County kleptocracy as he found it. . . .", etc. Richard Esenberg, "The Walker Way", *Wisconsin Interest, Volume 21, No. 1, March 2011.*

constituted a meeting of the village board) notwithstanding the fact that the substantive matter in which the relator was interested was resolved at a subsequent, properly noticed meeting. But Rice wants much more than a declaration. He wants to undo the entire redistricting process, including not only the tentative plan, based upon which the County's various municipalities have now adjusted their ward lines as required by law, but also the final redistricting plan, which differs from the tentative plan. It is too late for that.

Rice could have made timely application for a temporary restraining order or a temporary injunction as soon as filed his complaint on June 17 or any time prior to the July 28 County Board. In fact, a news item appeared on the morning of July 28 stating that he had filed a motion on July 27 "seeking an injunction to stop the County Board from giving final approval to a redistricting plan that eliminates Rice's North Shore District". Jorgensen Affidavit, Exh. 7. But he did not do that. On the contrary, he actively participated in the debate over the final redistricting plan at the July 28 meeting and he presented his own substitute amendment, which, like the tentative and final plans ultimately approved by the County Board, called for 18 supervisory districts. Jorgensen Affidavit, Exh. 8. The County Board declined to adopt Rice's substitute amendment. Had Rice's amendment succeeded, would he still be asking the court to invalidate the final plan? Does the legitimacy of the final redistricting plan turn upon a technical issue of compliance with the notice requirements of the Open Meetings Law at a prior meeting, or upon the issue of whose political ox is gored?

City of Janesville v. County of Rock, 107 Wis. 2d 187, 319 N.W.2d 891 (Ct. App. 1982), evinces a strong public policy against reversing or undoing the progress of the

statutory redistricting process. In that decision the court emphasized that the statute mandates a specific three-step redistricting procedure: The county board adopts a tentative plan, the municipalities adjust their ward lines accordingly, and the board then adopts a final plan based on those wards. Consequently, the statute did not permit Rock County to toss out its tentative plan and adopt a new one after the municipalities of that county had adjusted their ward lines. The court held that the county was properly enjoined to adopt a final plan based in its original tentative plan and the resulting municipal ward lines.

The tentative plan was exactly that – a *tentative* plan. It has now been superseded by the final plan. Rice concedes that the notice for the July 28 County Board meeting complied with the Open Meetings Law. While the County Board was required to adopt a final plan based on the tentative plan, and the resulting adjusted ward lines, it was not required to, and did not, adopt the same plan. The final plan is sufficiently different from the tentative plan that representatives of Hispanic and African-American voters withdrew their previous objections. Rice should not be heard to argue that the tentative plan prevented the adoption of a meaningfully different final plan after he introduced his own proposed final plan, which, like the final plan adopted by the County Board, was significantly different from the tentative plan.

CONCLUSION

This case is not about the salutary public interest that the Open Meetings Law is intended to advance, which is the right of the public to be informed about what the government is doing. The relator in this case is not a representative of minority voters,

one of the supposedly aggrieved municipalities, one of the business groups that campaigned for a small county board, or any other entity claiming that it was denied information about or the opportunity to comment upon the tentative redistricting plan.

This case is about an attempt by an individual county supervisor, who believes the redistricting plan is politically disadvantageous to him, to use the Open Meetings Law as a political tool to derail or delay the redistricting process.

The public was amply informed about what County government was doing with respect to a tentative redistricting plan and had ample opportunity for comment and debate. Some individuals and interests groups may have been displeased or disappointed with the outcome, but they were not uninformed. The fact that the original meeting notice for the April 21 County Board meeting included only a general item for reports from special committees rather than a specific item describing the report of the Special Committee on Redistricting is not a violation of the Open Meetings Law sufficient to warrant invalidating the tentative plan or the imposition of forfeitures because that specific information was unavailable when the notice was published (and it was supplied by a timely amendment to the notice as soon as practicable) and because it simply did not operate to deprive any interested party of notice that the Board would likely consider a tentative plan at that meeting. In any case, the plaintiff's objection to the adoption of the tentative plan has been rendered moot by the subsequent, and indisputably lawful, adoption of a significantly different final redistricting plan. No public interest that the Open Meetings law is intended to advance would be served by invalidating the plans and returning to square one – Certainly no public interest sufficient to outweigh the strong

public interest in timely adoption of a redistricting plan by the County's elected representatives in conformity with the process laid out in Wis. Stat. s. 59.10.

For those reasons, the defendant respectfully urges the court to deny the plaintiff's motion for summary judgment and instead to grant summary judgment to the defendants dismissing the plaintiff's complaint, Wis. Stat. s. 802.08(6).

Dated at Milwaukee, Wisconsin, this 1st day of September, 2011

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