STATE OF WISCONSIN | **CIRCUIT COURT BRANCH 31** | **MILWAUKEE COUNTY**

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

Plaintiff,

v. Case No. 13 CV 4222

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

Defendants.

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DECISION & ORDER

The above-referenced matter having come before this Court on the 24th day of March, 2014, on Defendants' Motion for Judgment on the Pleadings, Plaintiff Joseph A. Rice having appeared by counsel Wisconsin Institute for Law & Liberty, by Attorneys Thomas C. Kamenick and Michael D. Fischer, and Defendants, Marina Dimitrijevic, Willie Johnson, Jr., David Cullen, and Milwaukee County Board of Supervisors, having appeared by counsel Phillips Borowski, S.C., by Attorneys Andrew T. Phillips and Jacob J. Curtis, and the Court, having reviewed the moving papers of respective counsel, and having heard the arguments of counsel, and being fully apprised in the premises, does herein and hereby render the following decision and order:

BACKGROUND

Since the facts pleaded by Plaintiff are accepted as true for the purposes of this motion, the following is a summary of the facts alleged in the Complaint.

I. March 14, 2013 Meeting

On March 14, 2013, the Finance, Personnel, and Audit Committee ("FPAC") of the Milwaukee County Board of Supervisors ("Board") convened in a meeting. Defendants, Cullen and Johnson, as well as six other supervisors were in attendance. Prior to the meeting, on or about March 8, 2013, FPAC posted notice of the March 14, 2013 meeting, which indicated, *inter alia*, that FPAC may adjourn into closed session. The notice included language directly from Wis. Stat. § 19.85 as well as a list of three items to be discussed in closed session. (*See* Compl. Ex. A, at 8-9.) The minutes from the March 14th meeting indicate that FPAC did adjourn into a closed session without returning to open session.

Plaintiff alleges that during this closed session FPAC authorized and instructed the county labor relations director, Fred Bau, to enter into contract negotiations with five labor unions, one of which had failed to recertify as required by 2011 Wis. Acts 10 and 32. Also, Plaintiff avers that the agenda for this meeting contained no notice that FPAC would consider and vote on giving Mr. Bau authorization to enter into negotiations with a decertified union or negotiate terms prohibited by 2011 Wis. Acts. 10 and 32.

II. April 10, 2013 Meeting

On April 10, 2013, ten Board members, including seven out of nine FPAC members, attended a legislative hearing for 2013 Assembly Bill 85 ("AB 85") at the Capitol building in Madison, Wisconsin. AB 85 related to "changing the compensation structure by which a Milwaukee County supervisor may be paid, changing the term length of a Milwaukee County supervisor . . . limiting authority of Milwaukee County to enter into certain intergovernmental agreements, removing and clarifying some authority

of the Milwaukee County board, [and] increasing and clarifying the authority of the Milwaukee County executive . . . ." (Compl. ¶ 27.) The majority of the supervisors in attendance spoke publicly in regard to said bill.

Plaintiff claims that this was a "meeting" as that term is defined in Wis. Stat. § 19.82(2), and that the Board gave no notice to the public that it would be attending this meeting or speaking at it.

III. Causes of Action

Plaintiff alleges the following causes of action: (1) Violation of Wis. Stat. § 19.83(1) – Failure to Give Notice for April 10, 2013 Meeting; (2) Violation of Wis. Stat. § 19.84(2) – Insufficient Notice of March 14, 2013 Meeting; (3) Violation of Wis. Stat. § 19.85(1) – Improper Procedure to Close Session at March 14, 2013 Meeting; and (4) Violation of Wis. Stat. § 19.83(1) – Improper Action in Closed Session at March 14, 2013 Meeting.

Also, 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 Defendants in violation of Wisconsin's open meetings law; (3) a forfeiture assessed against Defendants Dimitrijevic, Cullen, and Johnson in the amount of $300.00, payable to the State of Wisconsin; and (4) costs and attorney fees.

Defendants filed an Amended Answer on September 26, 2013. Defendants admit to many of the facts set forth in the Complaint, but deny that the notice given for the March 14, 2013 meeting was insufficient and deny any alleged violations of the open meetings law. Additionally, Defendants deny that their attendance at the April 10, 2013 legislative committee hearing was a "meeting" under Wis. Stat. § 19.82(2).

On January 21, 2014, Defendants filed their Motion for Judgment on the Pleadings pursuant to Wis. Stat. § 802.06(3). Defendants assert that even if all the facts alleged in the Complaint were true, Plaintiff has failed to provide the Court with any legal or factual basis supporting a finding that Defendants violated the open meetings law. Accordingly, Defendants argue that the Court should dismiss the Complaint in its entirety.

STANDARD OF REVIEW

"After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings." Wis. Stat. Ann. § 802.06(3) (West 2014). "A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents." *Freedom from Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318, 320 (Ct. App. 1991) (internal quotations omitted). Hence, courts will apply "the first two steps of summary judgment methodology to determine whether judgment on the pleadings is appropriate." *Id.* Accordingly, the Court will "first examine the complaint to determine whether a claim has been stated . . . then turn to the responsive pleadings to ascertain whether a material factual issue exists." *Id.*

When the facts set forth in the pleadings demonstrate that the cause of action is insufficient as a matter of law, judgment on the pleadings is appropriate. *See Buckley v. Park Bldg. Corp.*, 31 Wis. 2d 626, 633, 143 N.W.2d 493, 497 (1966). In other words, "[t]he complaint should be found legally insufficient only if it is quite clear that under no circumstances can the plaintiff recover. *Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159, 161 (1988) (internal quotations omitted). Furthermore, "[i]n determining

the legal sufficiency of the complaint, the facts pleaded by the plaintiff, and all reasonable inferences therefrom, are accepted as true." *Id.* (internal quotations omitted).

DISCUSSION

Wis. Stat. § 19.81 provides in pertinent part:

> (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.
>
> (2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

Wis. Stat. Ann. § 19.81 (West 2014). "The fundamental purpose of the open meeting law is to ensure the right of the public to be fully informed regarding the conduct of governmental business." *State ex rel. Badke v. Vill. Bd. of Vill. of Greendale*, 173 Wis. 2d 553, 570, 494 N.W.2d 408, 414 (1993). "The open meeting law demands that it be liberally construed in favor of open government." *Id.*, 494 N.W.2d at 414.

I. Violation of Wis. Stat. § 19.83(1) – Failure to Give Notice for April 10, 2013 Meeting

In his first cause of action, Mr. Rice alleges that (1) at least half (10 out of 19) of the Board members attended the April 10, 2013 legislative hearing on AB 85, (2) the subject of the legislative hearing dealt directly with the scope of the supervisors' decision-making responsibilities, and (3) the supervisors' attendance was neither social nor by chance. Thus, Mr. Rice claims that the Board members' attendance at the legislative hearing was a meeting in and of itself which required notice under § 19.83(1), and that Defendants violated the statute by failing to give notice.

Defendants argue that the test for determining whether a breach of the open meetings law occurred is not whether the legislative hearing in question impacted the Board, but whether the Board considered information relating to a subject over which it had decision-making responsibility. Further, since the Board had no ability to vote for or against AB 85, and because the Board could not take any official action that would limit or modify the application of the bill if it became a law, Defendants argue that the Board did not conduct a "meeting" by attending the legislative hearing.

Conversely, Plaintiff argues that a quorum of the Board met at the legislative hearing to gather information and to speak about AB 85. Such a gathering is presumed to be a "meeting" for the purposes of Wis. Stat. § 19.82(1) according to Plaintiff, and the Board did so meet to exercise its responsibilities, authority, power, or duties.

"Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session." Wis. Stat. Ann. § 19.83(1) (West 2014). "'Meeting' means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Wis. Stat. Ann. § 19.82 (West 2014).

In *Badke v. Vill. Bd. Vill. of Greendale*, the supreme court agreed with the plaintiff that having a quorum of the village board trustees present at the plan commission meetings created the rebuttable presumption that a governmental body had met for the purposes enumerated in the statute, and such gatherings were village board meetings

which required notification. 173 Wis. 2d at 571, 494 N.W.2d at 414. Also, the court 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." *Id.* at 577, 494 N.W.2d at 417.

Initially, the Court was convinced that the procedural posture of this case prevented judgment on the pleadings because Defendants were unable to rebut the statutory presumption, as they cannot present evidence outside the pleadings for the purposes of rebuttal. However, the facts alleged in the Complaint belie the presumption that the subject matter of the April 10, 2013 legislative hearing was a subject over which the Board had decision-making responsibility. While it is true that the information gathered at the hearing by the Board members could cause the Board to initiate some action, as Plaintiff suggests, ultimately the Board had no decision-making responsibility with respect to AB 85 itself.

To expand the definition of "meeting" to circumstances in which Board members attend the meeting of the Legislature, where the Board has no authority to make the ultimate decision on the subject matter, is not contemplated by the case law or the statute and could lead to absurd results if so interpreted. In *Badke*, the defendants were a majority of the village board who had attended meetings of their own plan commission to gather information about a proposed housing project. *Badke*, 173 Wis. 2d at 560, 494 N.W.2d at 410. The court found that the village board did have the ultimate decision-making responsibility on the proposed housing project, and accordingly determined the

gathering in that case was a "meeting." *Id.* at 577, 494 N.W.2d at 417. In contrast, here Defendants had no decision-making authority in regard to AB 85, nor are the Board and the Legislature interconnected parts of the same governmental body.

Similarly, in *Newspapers, Inc. v. Showers*, the supreme court held that whenever commissioners of the Milwaukee Metropolitan Sewerage Commission ("Commission") meet to engage in government business, be it discussion, decision or information gathering, the open meetings law applies if the number of commissioners present is sufficient to *determine the parent body's course of action regarding the proposal discussed at the meeting*. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 80, 398 N.W.2d 154, 156 (1987) (emphasis added). In *Showers*, the purpose of the meeting was to engage in government business, *i.e.* the discussion of the capital and operating budgets, and the number of commissioners at the meeting was sufficient in number to block any proposed budgets, thus the open meetings law applied. *Id.*, 398 N.W.2d at 156. Here, the Board had no such ability to block or affirm any legislative action. Moreover, in *Showers*, the proposal discussed at the "meeting" was before the parent body, whereas here the proposal was before the Legislature not the parent body, *i.e.* the Board.

Since the Board had no decision-making responsibility concerning AB 85, Plaintiff's cause of action is insufficient as a matter of law. Therefore, judgment on the pleadings is appropriate with respect to this cause of action.

II. Violation of Wis. Stat. § 19.84(2) – Insufficient Notice of March 14, 2013 Meeting

Next, in his second cause of action, Mr. Rice advances that Defendants violated Wis. Stat. § 19.84(2) by failing to give sufficient notice that FPAC would discuss opening negotiations with a decertified union and with four certified unions over

allegedly unlawful topics at the closed session of the March 14, 2013 meeting. Mr. Rice contends that the notice that was given merely quoted verbatim the statutory exemption from the open meetings law found in Wis. Stat. § 19.85(1)(e), and that such notice is not reasonably likely to apprise members of the public and the news media of the subject matter intended for consideration at the closed session. Furthermore, Plaintiff claims that under the three-factor test set forth in *Buswell v. Tomah Area School District*, the notice given by Defendants was not reasonably specific under the circumstances.

Defendants argue that the agenda notifying the public that FPAC was considering entering into closed session complied with the open meetings law and that the body of the Complaint completely mischaracterizes the March 14, 2013 meeting agenda. Further, Defendants assert that FPAC was not a "governmental body" when it was meeting to discuss issues related to collective bargaining agreements pursuant to § 19.82(1). Thus, the notice requirements of § 19.84(2) did not apply in this instance. Additionally, Defendants claim to have satisfied the *Buswell* test.

In response, Plaintiff argues that the second section of the March 8th notice, which refers to collective bargaining, was not reasonably likely to apprise the public that FPAC would discuss and vote on entering into collective bargaining in violation of Act 10. According to Plaintiff, that portion of the notice indicated that FPAC would only receive a report from a county employee on collective bargaining and receive advice from counsel on the legality of such collective bargaining. Also, Plaintiff claims that the exception to the open meetings law for bodies engaged in collective bargaining, under § 19.82(1), does not apply to deliberating and voting on whether to engage in collective bargaining.

While § 19.82(1)[1] excludes a body formed exclusively for the purpose of collective bargaining from the open meetings law, "[a] body formed for other purposes, in addition to collective bargaining, is not subject to the open meetings law *when conducting collective bargaining*." *Wisconsin Open Meetings Law: A Compliance Guide*, Dep't of Justice 5 (August 2010) (emphasis added). In this case, the exemption under § 19.82(1) is inapplicable because it is undisputed that FPAC was not formed exclusively for the purpose of collective bargaining, nor was it conducting collective bargaining at the March 14, 2013 meeting.

Since the § 19.82(1) exclusion does not apply here, the Court will examine the applicability of Wis. Stat. §§ 19.84(2) and 19.85(1)(e). "Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." Wis. Stat. Ann. § 19.84(2) (West 2014). "A closed session may be held for any of the following purposes . . . (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." Wis. Stat. Ann. § 19.85(1)(e) (West 2014).

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[1] "'Governmental body' means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order . . . or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining." § 19.82(1).

In pertinent part, the notice for the March 14, 2013 meeting provided:

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)**

Attachments: JANUARY REPORT
Audio FPA 01/31/13
MARCH REPORT

36 12-1011 — From the President & CEO of the Marcus Center for the Performing Arts, providing a verbal update on the Status of Negotiations between Milwaukee County and the Marcus Center for the Performing Arts for the proposed new parking structure project and other building developments at the Marcus Center for the Performing Arts. **(INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)**

Attachments: Audio PARKS 12/11/12

Adjournment

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Whether notice is sufficiently specific will depend upon what is reasonable under the circumstances. *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 22, 301 Wis. 2d 178, 732 N.W.2d 804. In *Buswell*, applying a reasonableness standard, the court delineated three factors it would weigh to determine whether notice was sufficient: (1) the burden of providing more detailed notice; (2) whether the subject is of particular public interest; and (3) whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* at ¶ 28.

The first factor "balances the policy of providing greater information with the requirement that providing such information be compatible with the conduct of governmental affairs." *Id.* at ¶ 29 (internal quotations omitted). "The crucial point is that the demands of specificity should not thwart the efficient administration of governmental business." *Id.*

In this case, the first factor weighs against requiring that the notice for the March 14 meeting contain more specificity. The notice provided: "From the Department of Labor Relations reports related to deliberation, negotiation or renegotiation of collective bargaining agreements." Plaintiff admits that "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.'s Br. 6.) Plaintiff would have the Court determine that Defendants were required to give notice that FPAC would specifically discuss and vote on entering into collective bargaining in violation of Act 10. Notwithstanding Plaintiff's legal conclusion that Defendants' were in violation of Act 10, his argument requires FPAC to have anticipated the action they allegedly took before receiving the report from the labor relations

department. In this Court's opinion, requiring FPAC to anticipate all possible courses of action would likely consume a disproportionate amount of their time and would be an unnecessary burden. "[T]he demands of specificity should not thwart the efficient administration of governmental business." *Buswell*, 2007 WI 71, ¶ 29.

The *Buswell* court ruled on two separate notices. The first notice provided: "Contemplated closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. § 19.85(1)(c)." *Buswell*, 2007 WI 71, ¶ 36. The court found this description vague, for it could cover negotiations with any group of district personnel or with any individual employee within the district. *Id.* Also, the court found that this notice was misleading because it cited to the incorrect subsection, *i.e.* § 19.85(1)(c) versus § 19.85(1)(e). *Id.* at ¶ 37. Because the notice was vague and misleading, it was not "reasonably likely to apprise members of the public" of the subject matter of the meeting. *Id.*

The second notice provided, "New business – Consideration and/or Action on the Following . . . TEA Employee Contract Approval." *Id.* at ¶ 8. The court held that this notice was sufficient because a member of the public could determine that the TEA master contract would be discussed by reading the notice. *Id.* at ¶ 45.

Additionally, with respect to both notices in *Buswell*, the court found that it was not a violation of § 19.84(2) to have not specified a particular provision of the contract in either of the notices. *Id.* The court reasoned that despite the high level of interest in the subject matter, the burden of specifying particular provisions in a multifaceted contract was too great, thus, the court would not mandate such specificity. *Id.*

The notice in this case falls somewhere in the middle. It is specific enough to let the public know that collective bargaining was a topic of the closed session, but it does not specify which entities or contracts were the subject of the closed session discussions. If the *Buswell* court did not require the defendants to specify each contract provision that was the subject of discussion, regardless of public interest, this Court will not require Defendants to specify each and every union and/or contract that was the subject of collective bargaining discussions. Ultimately, the notice alerted the public that FPAC would contemplate collective bargaining in the closed session. Requiring any further specification increases the burden on Defendants unnecessarily.

In regard to the second factor, significant "public interest in the subject matter of a meeting may require greater specificity in the hearing notice." *Buswell*, 2007 WI 71, ¶ 30. In this instance, taking the facts pled as true, there was significant interest in collective bargaining post Act 10. However, "[t]he level of interest, in and of itself, however, is not dispositive. Rather, it must be balanced with other factors on a case-by-case basis." *Buswell*, 2007 WI 71, ¶ 30.

Turning to the third factor,

> The degree of specificity of notice may depend on whether the subject of the meeting is routine or novel. Where the subject of a meeting recurs regularly, there may be less need for specificity because members of the public are more likely to anticipate that it will be addressed. However, novel issues are more likely to catch the public unaware. Novel issues may therefore require more specific notice.

Buswell, 2007 WI 71, ¶ 31. Here, on the one hand, the issue of collective bargaining itself was not novel. But on the other hand, Plaintiff alleges that in light of the surrounding circumstances and the fact FPAC does not frequently discuss collective bargaining, discussing collective bargaining was not routine.

Applying the reasonableness standard factors in this case reveals that the notice provided was sufficient under § 19.84(2). The notice clearly provided that "reports related to deliberation, negotiation or renegotiation of collective bargaining agreements" were to be discussed in closed session. While there likely was significant interest in the subject matter of the closed meeting, and even though the subject matter may not have been routine considering the recent enactment of Act 10, the burden of including more specific information in the notice, which would address any and all possible actions of the Board in regard to collective bargaining, was great enough that requiring more specific information is unreasonable under the circumstances alleged here. Thus, more specific notice was not required under § 19.84(2). Accordingly, the Court grants Defendants' motion with respect to this cause of action.

III. Violation of Wis. Stat. § 19.85(1) – Improper Procedure to Close Session at March 14, 2013 Meeting

In his third cause of action, Mr. Rice alleges that Defendants violated Wis. Stat. § 19.85(1) by not announcing at the March 14 meeting, the nature of the business to be considered during the closed session and the specific exemption which authorized the closed session. Mr. Rice relies on the fact that the minutes of the FPAC meeting do not reflect that such an announcement was made at all. Alternatively, Mr. Rice argues that if such an announcement was made, it was insufficient because the announcement was merely a recitation of the statutory exemption language in the noticed agenda.

Defendants argue that Supervisor Johnson adequately announced the formal entry into closed session. In support of this argument, Defendants direct this Court to a video of the March 14 FPAC meeting available online at the Milwaukee County website.

However, since this is a motion for judgment on the pleadings, the Court will not consider matters outside the pleadings.

Wis. Stat. § 19.85(1) provides in pertinent part:

> Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion 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. Such announcement shall become part of the record of the meeting.

§ 19.85(1).

The meeting minutes provide that: (1) the Committee went into closed session at 1:50 p.m.; (2) a motion was made by Supervisor Haas to enter into closed session regarding Items 34-36 per the stated statutes; (3) the motion prevailed by a unanimous vote of the members present; and (4) Items 34-36 were discussed in closed session. (Compl. Ex. B, at 13.)

It is clear that the vote to enter into closed session was unanimous and recorded in the minutes. The remaining issue is twofold: (1) whether Supervisor Haas's motion satisfied the requirements of an announcement under § 19.85(1); and (2) if so, whether an announcement was made part of the record of the meeting.

There is no indication in the minutes that the chief presiding officer, Defendant Johnson, made the required announcement himself. However, it is clear that Supervisor Haas did make the motion, that the motion contained the nature of the business considered at the closed session, and that the specific exemption or exemptions by which

the closed session was authorized were also announced. This motion did become part of the record of the meeting, as evidenced in the meeting minutes. (Compl. Ex. B, at 13.) While the alleged failure of the chief presiding officer to make the announcement himself may not have been in strict compliance with the open meetings law, this failure did not rise to the level of a violation. The Court should "construe a statute, not only by its exact words, but also by its apparent general purpose." *State ex rel. Schaeve v. Van Lare*, 125 Wis. 2d 40, 48, 370 N.W.2d 271, 276 (Ct. App. 1985). "Furthermore, the spirit of a statute should govern over the literal or technical meaning of the language used." *Id.*, 370 N.W.2d at 276. Here, Defendants adhered to the spirit and general purpose of the statute by having Supervisor Haas make the public announcement even though Defendant Johnson did not make the announcement himself. As a result, the Court grants Defendants' Motion for Judgment on the Pleadings with respect to Plaintiff's third claim.

IV. Violation of Wis. Stat. § 19.83(1) – Improper Action in Closed Session at March 14, 2013 Meeting

Lastly, in his fourth cause of action, Mr. Rice alleges that Defendants violated Wis. Stat. § 19.83(1) by taking improper action in the closed session, namely, voting to appoint a negotiator to enter into negotiations with a decertified union and four certified unions in closed session as opposed to open session. Defendants argue that the discussion which took place in closed session was exempted from the open meetings requirements.

To begin, Plaintiff is incorrect when he claimed that the meeting notice provided that any action on a decision made in closed session will be taken after the meeting is reconvened into open session. Instead, the notice stated: "At the conclusion of the closed session, the Committee *may reconvene in open session to take whatever action(s)*

it may deem necessary." (Compl. Ex. A at 8) (emphasis added). This does not create any obligation to reconvene and vote in open session.

Notwithstanding, Plaintiff averred in the Complaint that none of the exemptions listed in § 19.85 expressly permit FPAC to vote on any matter in closed session. *See Van Lare*, 125 Wis. 2d at 53, 370 N.W.2d at 278. While none of the exemptions listed in § 19.85 expressly permit voting in closed session, § 19.85(1)(e) does permit "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." § 19.85(1)(e). It may be that voting falls under "conducting other specified public business." Furthermore, Defendants "slippery slope" argument is persuasive inasmuch as denying their motion with respect to this cause of action might expose the legal advice and negotiation strategies discussed in the closed session to discovery.

However, and more importantly, the facts in *Van Lare* are distinguishable from the facts in this case so as to make the rule upon which Plaintiff relies on inapplicable. In *Van Lare*, the governmental body was voting on whether or not to dismiss a public employee. *Van Lare*, 125 Wis. 2d at 53, 370 N.W.2d at 278. This is the type of final decision which would be necessary to conduct in an open session. In this case, FPAC was making a preliminary decision of whether or not to enter into negotiations. If the facts alleged in this case indicated that the Board or FPAC voted in closed session to adopt or ratify a contract that had already been negotiated then the Court might find that there was a § 19.83(1) violation. However, discretion was still required at the time FPAC entered into the closed session because the negotiations had not even begun, let alone

concluded. Plaintiff places too much emphasis on the fact that there may have been a "vote" to enter into negotiations, when the nature of the vote prohibited in *Van Lare* is that of a final decision.

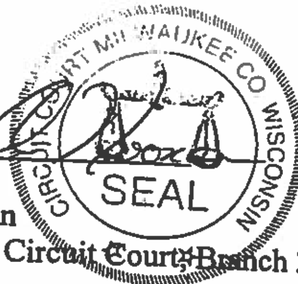
In addition, as provided in the March 8th notice, FPAC also met in closed session to obtain legal advice pursuant to § 19.85(1)(g), which provides that closed session is allowed for "[c]onferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved." § 19.85(1)(g). Plaintiff's legal conclusions aside, the Complaint alleges exactly the type of matters that are permitted in closed session. For those reasons, Plaintiff has failed to state a claim under § 19.83(1).

CONCLUSION

NOW, THEREFORE, the Court hereby ORDERS that Defendants' Motion for Judgment on the Pleadings is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 5th day of May, 2014.

BY THE COURT:



Hon. Daniel Noonan
Milwaukee County Circuit Court, Branch 31

THIS IS A FINAL ORDER OF THE COURT FOR THE PURPOSES OF APPEAL