COURT OF APPEALS DECISION DATED AND FILED

March 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3152

Cir. Ct. No. 01-CV-391

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

STATE OF WISCONSIN EX REL. LARRY GATES,

PLAINTIFF-APPELLANT,

V.

MICHAEL DORSHORST, NORMAN WILLS, BEVERLY TRAFFICANTE AND RAYMOND HAMILTON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Larry Gates appeals a judgment of the circuit court in favor of the defendants, Michael Dorshorst, Norman Wills, Beverly Trafficante, and Raymond Hamilton. Dorshorst, Wills, Trafficante, and Hamilton are, respectively, chairperson and members of the Town Board of Dekorra

(collectively, the board members).[1] Gates claims that on September 18, 2001, the board members met and conducted governmental business without public notice and in violation of Wisconsin's open meetings requirements, WIS. STAT. § 19.81 (1999-2000).[2] The circuit court concluded that the board members were not exercising responsibilities, authority, power, or duties delegated to or vested in the town board and, therefore, the open meetings requirements did not apply. We agree with the circuit court and affirm.

Background

¶2 The Town Board of Dekorra has five members: chairperson Michael Dorshorst, and members Randy Crawford, Raymond Hamilton, Beverly Trafficante, and Norman Wills. At a board meeting held prior to September 18, 2001, board member Trafficante requested that the performance of the Dekorra town clerk be added to the October agenda to be discussed in a closed session. The town clerk requested that the discussion of her job performance be held in open session.

¶3 On September 18, 2001, the board members attended a joint meeting with the Poynette Village Board and the Poynette-Dekorra Fire Commission. After this meeting concluded, board member Trafficante approached chairperson Dorshorst and asked that the town clerk item be removed from the agenda.

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[1] For ease of reference, we refer to the four defendants in this case as the "board members." We note, however, that there is a fifth board member, Randy Crawford, who was not present for the discussions that are at the center of this litigation and who is not a party to this suit.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Shortly thereafter, as Dorshorst and Trafficante were walking out, they were joined by board members Hamilton and Wills.

¶4 The circuit court made the following factual findings regarding what occurred while the four members were together:

- Chairperson Dorshorst requested that board member Wills relate information Wills had obtained from the town attorney.
- Wills told the group that the town attorney had suggested getting personnel-related complaints in writing before taking any kind of action.
- Chairperson Dorshorst told the group he was removing the issue of the clerk's performance from the October meeting agenda.
- Chairperson Dorshorst told the group that any complaint regarding the clerk's job performance had to be in writing and submitted to him before he would determine whether the complaint warranted a meeting.
- Chairperson Dorshorst said he would then determine whether the written complaint warranted a meeting.
- No other discussion pertaining to town business occurred.

¶5 The record supplies these additional details. Dorshorst had previously asked Wills to call the town's attorney regarding how the Board should handle personnel concerns. Earlier in the evening on September 18, 2001, Wills told Dorshorst what the town attorney had said. The topic of the town clerk's job performance was not placed on the October agenda.

¶6 The circuit court concluded:

> More than one-half the board members were present at the conclusion of the joint fire commission meeting on September 18, 2001, and thus a rebuttable presumption arises that the meeting was for the purpose of exercising the

> responsibilities, authority, power or duties delegated to or vested in the town board.
>
> … [There was] testimony establishing that the only discussion concerned a change in the agenda for the next Town Board meeting.
>
> … The evidence establishes that the only action was a decision made by the Town chairman on what would be put on the next agenda and requiring that complaints concerning the clerk's performance be put in writing.
>
> The court finds that this discussion was not exercising the responsibilities, authority, power or duties delegated to or vested in the Town Board as provided by 19.82(2) Wis. Stats.

Gates appeals this decision.

Discussion

Standard of Review

¶7 We are asked to apply the open meetings law to undisputed facts. We review the application of the open meetings law statutes to a set of undisputed facts *de novo*. ***State ex rel. Badke v. Greendale Village Bd.***, 173 Wis. 2d 553, 569, 494 N.W.2d 408 (1993).

Applicable Open Meetings Law

¶8 "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. The open meeting law demands that it be liberally construed in favor of open government." ***Id.*** at 570. WISCONSIN STAT. § 19.81 reads, in pertinent part:

> **(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.

….

(4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

WISCONSIN STAT. § 19.82(2) contains the definition of "meeting":

(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. 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. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter, any gathering of the members of a town board for the purpose specified in s. 60.50(6), any gathering of the commissioners of a town sanitary district for the purpose specified in s. 60.77(5)(k) or any gathering of the members of a drainage board created under s. 88.16, 1991 stats., or under s. 88.17, for a purpose specified in s. 88.065(5)(a).

¶9 In ***Paulton v. Volkmann***, 141 Wis. 2d 370, 415 N.W.2d 528 (Ct. App. 1987), we stated:

If a quorum of members of the "governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising responsibilities, authority, power or duties delegated to or vested in the body." Therefore, if the presumption is not rebutted, the provisions of the open meetings law require public notice of such a meeting.

Id. at 375 (citations omitted).

¶10 There is a two-part test for determining whether a gathering of members of a governmental body constitutes a "meeting" within the open meetings law. ***Badke***, 173 Wis. 2d at 572. "'First, there must be a purpose to

engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed.'" ***Id.*** (quoting ***State ex rel. Newspapers, Inc. v. Showers***, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987)).

¶11 For the first part of the analysis, the governmental business may be either formal or informal. ***Badke***, 173 Wis. 2d at 572 (citing ***Showers***, 135 Wis. 2d at 92). Informal governmental action includes such things as discussion, decision, and information gathering. ***Badke***, 173 Wis. 2d at 572. In ***Badke***, the supreme court stated:

> [I]nteraction between members of a governmental body is not necessary for a convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties or responsibilities. Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking. We recognized the importance of exposure to information in ***Lynch v. Conta***, 71 Wis. 2d at 686, and again in ***Showers***, 135 Wis. 2d at 90 (*quoting* ***Conta***):
>
> > Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. *The possibility that a decision could be influenced dictates that compliance with the law be met.*

Id. at 572-73 (emphasis added).

The Board Members Did Not Violate the Open Meetings Law

¶12 We begin by setting forth our understanding of the arguments Gates does and does not make. Gates contends that an open meetings violation occurred when Dorshorst, Trafficante, Hamilton, and Wills met, heard information from the town attorney, communicated through Wills, and "decided how the Board should handle complaints against the Town Clerk." In Gates's view, the board members heard information affecting a matter before them and made a joint decision to adopt a new policy regarding how complaints against the town clerk would be handled.

¶13 Gates does not dispute the proposition that the town chairperson has the sole authority to set the agenda for Dekorra town meetings.[3] Gates does not contend that the initial encounter between board member Trafficante and chairperson Dorshorst, in which Trafficante asked Dorshorst to remove the item relating to the town clerk's performance from the October agenda, violated the open meetings law. He does not argue that, when a board member requests that an item be added or removed from an agenda, such communication is covered by the open meetings law, even if additional board members are present.

¶14 Thus, Gates's argument is premised on the factual assumption that the four board members met, heard information affecting a matter before them,

[3] The board members assert that setting town board meeting agendas is a matter for the town chairperson, not the town board. Gates does not dispute this and in fact conceded before the circuit court that the chairperson has the power to set the meeting agendas. In his appellate brief, Gates says "this case [has] nothing to do with setting or removing an agenda item or the Town Chairman's authority to decide what will be on the agenda."

and made a joint decision. Because a quorum of board members was present, we agree with the circuit court that there is a rebuttable presumption that the meeting was for the "'purpose of exercising responsibilities, authority, power or duties delegated to or vested in the body.'" ***Paulton***, 141 Wis. 2d at 375 (quoting WIS. STAT. § 19.82(2)). However, we also agree that the presumption was rebutted.

¶15 Gates's briefs are filled with characterizations of the encounter as involving a joint decision by those present. However, the circuit court's factual findings and the record do not support these characterizations. The circuit court found that only chairperson Dorshorst made a decision during or prior to the meeting, and Gates does not challenge that finding. Apart from Wills' recitation of the information he received from the town attorney, which Wills had previously related to Dorshorst, there is no indication that Dorshorst received any input from the board members. The factual findings of the circuit court both expressly and implicitly reject Gates's assertions that the "board" sought advice from the town attorney, that the board members discussed the issue, and that the board members decided to adopt the town attorney's advice.

¶16 Gates next argues that, although the town chairperson has the sole authority to put items on and remove items from town meeting agendas, the chairperson does not have sole authority to decide that complaints must be in writing before he will put them on an agenda. According to Gates, this procedural decision is for the full board because, under WIS. STAT. § 60.22(1), all town affairs not committed by law to another body, officer, or town employee are committed to the full board. It follows, according to Gates, that even if chairperson Dorshorst made the decision alone, the meeting was a meeting within the meaning of the open meetings law because board business was discussed and decided. We disagree with this analysis.

¶17 If, as Gates concedes, agenda-setting is not one of the "responsibilities, authority, power or duties delegated to or vested in" the town board, then why is a chairperson's decision to employ a procedure for agenda-setting not also a non-board duty? Gates provides no answer. In our view, the responsibility for setting town meeting agendas carries with it the authority to decide whether a written complaint is needed before an item will be put on the agenda.

¶18 We conclude that the decision by the Dekorra town chairperson to require a written complaint before putting an item on the agenda is not one of the "responsibilities, authority, power or duties delegated to or vested in" the town board. This conclusion disposes of Gates's argument that a "meeting" under the open meetings law occurred because town board business was discussed. The board members heard information and heard the chairperson state his decision. But the members neither heard information on a matter for a board decision nor engaged in decision making. When board member Wills relayed information from the town attorney, he was only a messenger. Whether Wills conveyed this information or whether the town attorney communicated directly with chairperson Dorshorst does not matter. The subject matter of the communication pertained to a duty delegated to Dorshorst, not the full board.

¶19 Gates believes our opinion will foster mischief because it permits board members to meet out of the public eye and decide what will and what will not receive board attention. We disagree. Because the Dekorra town chairperson is vested with the authority to set meeting agendas, it follows that the setting of agendas will, or at least may, frequently occur without public scrutiny. Our decision does not add to or detract from this reality.

¶20 Finally, Gates asserts that in this particular case the four board members conspired to remove an item from the town board agenda because their desire to hear the matter in closed session was thwarted. This argument is not supported by the factual findings of the circuit court, or the record, viewed in a light most favorable to the court's decision. We do not address what the result in this case would be had the board members discussed how to remove the town clerk agenda item and jointly agreed to remove it by requiring a written complaint. Those facts are not present here.

¶21 We conclude that the interaction of the board members was not a "meeting" within the meaning of WIS. STAT. § 19.82(2) because these members did not take up any "responsibilit[y], authority, power or dut[y] delegated to or vested in" the town board.

By the Court.—Judgment affirmed.

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