

ORIGINAL

IN THE SUPREME COURT OF OHIO

ADAM J. WHITE

Plaintiff-Appellant,

vs.

DAVID E. KING, *et al.*,

Defendants-Appellees.

No.

14-1796

On Appeal from the Delaware  
County Court of Appeals,  
Fifth Appellate District

App. Case No. 14CAE-02-0010

MEMORANDUM IN SUPPORT OF JURISDICTION  
BY APPELLANT ADAM J. WHITE

Phillip L. Harmon, Esq. (OSCR #0033371)  
Counsel of Record  
6649 N. High Street, Suite 105  
Worthington, Ohio 43085  
Phone: (614) 433-9502  
Fax: (614) 433-9503  
e-mail: philharmon@msn.com

John C. Albert, Esq. (OSCR #0024164)  
Counsel of Record  
CRABBE, BROWN & JAMES, LLP  
500 S. Front Street, Suite 1200  
Columbus, OH 43215  
Phone: (614) 229-4528  
Fax: (614) 229-4559  
E-mail: jalbert@cbjlawyers.com

COUNSEL FOR APPELLANT  
ADAM J. WHITE

COUNSEL FOR APPELLEE  
OLENTANGY LOCAL SCHOOL DISTRICT  
BOARD OF EDUCATION

FILED  
OCT 16 2014  
CLERK OF COURT  
SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST .....1

STATEMENT OF THE CASE AND FACTS .....3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....5

**Proposition Of Law Number I:**  
Under the Ohio Open Meetings Statute, Ohio Rev. Code §121.22, liberally  
construed, private deliberations concerning official business are prohibited,  
whether such deliberations are conducted in person at an actual face-to-face  
meeting or by way of a virtual meeting using any other form of  
electronic communication such as telephone, e-mail, voicemail, or  
text messages.....5

**Proposition Of Law Number II:**  
Under the Ohio Open Meetings Statute, Ohio Rev. Code §121.22,  
when a board of education formally votes to ratify a prior action,  
the ratified prior action constitutes "official business" under the Statute.....8

CONCLUSION.....9

CERTIFICATE OF SERVICE .....9

APPENDIX:

Judgment Entry Granting Defendant's Second Motion for  
Judgment on the Pleadings (January 16, 2014) .....10

Opinion and Judgment Entry of the Delaware County Court of Appeals,  
Fifth App. Dist. (September 5, 2014) .....17

**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The primary issue in this case is whether electronic private deliberations upon official business between members of a public agency are prohibited under the Ohio Open Meetings Statute, also known as the Ohio Sunshine Law, Ohio Rev. Code §121.22.

This is a case of public or great general interest because the Order of this Court will clarify existing law and establish the proper lawful standard by which all public agencies throughout the State of Ohio must deliberate over official business.

The operative section of Ohio Rev. Code §121.22(A), reads as follows:

This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

Despite such clear and unequivocal language, the court below ruled to the contrary that private deliberations upon official business *via* electronic communications are permitted under the Statute. That decision ignored the plain meaning of the Statute.

Specifically, the Fifth District Court of Appeals ruled, "... we conclude that if the General Assembly had intended to include sporadic e-mails in the statutory definition of "meeting" it would have said so. As an appellate court, we ordinarily must assume the legislature means what it says". Appellant White submits that such a ruling incorrectly construes the plain meaning of the Statute and allows for governmental conduct which is expressly prohibited by Statute.

That Decision below sets a dangerous precedent which allows all public agencies in the State to avoid the Sunshine Law simply by deliberating electronically, rather than in person.

To preserve Ohio governmental integrity, it is incumbent upon this Court to reverse the Decision below and find that private deliberations upon official business, whether in person or by electronic means, are equally offensive to the Statute.

If the Decision below is upheld, it would undermine the confidence of all Ohio citizens that its government officials are conducting official business in an open, public, and transparent manner. The implications for governmental abuse and corruption are significant if public officials can deliberate privately upon official business via e-mail, video conference, and myriad other forms of electronic communication.

This case also presents the question of what constitutes "official business" under the Statute. In this case, the Court of Appeals ruled that a letter to the editor of a newspaper from the Board of Education did not constitute "official business" despite the fact the Board itself voted to officially ratify that letter at a subsequent public Board meeting.

The question of what constitutes "official business" is thus also of public or great general interest because it is only deliberations upon "official business" that are covered by the Statute.

Appellant submits that whenever a public agency votes to ratify a prior non-public action as in this case, the prior action is *per se* "official business". Otherwise, public agencies could deliberate and agree to act in private, and later ratify their private actions in public, without any restraints from the Sunshine Law. Once again, the implications for governmental abuse and corruption increase if the Decision below is allowed to stand on the issue of "official business".

In the Court of Appeals, a Joint Brief in support of Appellant White's legal position was filed by two prominent statewide groups, Common Cause Ohio and the League Of Women Voters Of Ohio.

Those two groups made the essential point in their Joint Brief that:

"... this case is a case of great public interest because if the Judgment Entry below is affirmed, *all* public bodies throughout the State of Ohio will be allowed to conduct *all* public business in private provided they later ratify such private deliberations at a public meeting. That outcome would eviscerate the clear language and legislative intent of the statute".

For the reasons above, this case is of public or great general interest. The Ohio Supreme Court is respectfully requested to hear the matter and reverse the Decision below.

### STATEMENT OF THE CASE AND FACTS

In 2012, Appellant Adam White was one of five members of the Olentangy Local School District Board of Education ("Board").

Mr. White conducted his own investigation into reported financial irregularities in the School District Athletics Department. As a result, one athletic director was forced to resign and reimburse funds to the School District, a second athletic director was also required to reimburse funds to the District.

The Board subsequently passed a resolution to amend its By-Laws to require board members communicate with District employees only through the superintendent or treasurer.

The Columbus Dispatch newspaper then wrote an editorial criticizing the School Board for its action of blocking Mr. White and other board members from having any direct communications with District employees.

On October 11, 2012, Board President Dave King sent an e-mail to Board Members Feasel, Dunbar, and O'Brien (Complaint, Ex. 3-3) advising that a meeting would take place the next day to respond to the Dispatch editorial and to consider action against Mr. White for his involvement in a "Fall Party" which was presumably a violation of the new by-law amendment.

Mr. King indicated in his October 11, 2012 e-mail that the letter to the editor would be submitted to the Dispatch and that appropriate action would be considered against Mr. White unless the other board members objected after they contributed their input to the planned actions. Mr. White was not a recipient of the e-mail.

Mr. King and the other three board members, along with School District employees, then deliberated privately over those issues and authorized Mr. King to submit the letter to the editor on behalf of the Board in his capacity as Board President. The letter to the editor was published by the Dispatch on October 27, 2012, signed by Mr. King as President of the Board.

On April 25, 2013, Mr. White filed suit against Defendants David King, *et al.*, alleging a violation of the Ohio Open Meetings Statute, Rev. Code §121.22.

Later that same day, the School Board met at a regularly scheduled public meeting and voted to ratify the "letter to the editor that 4 Board members submitted to the Columbus Dispatch in response to an October 11, 2012 editorial". Mr. White abstained from that vote.

As detailed in the exhibits attached to Plaintiff White's Complaint, four of the five board members, (i) engaged in deliberations over enforcement of a specific Board policy in a coordinated series of telephone calls and e-mail communications amongst board members and administrative staff, (ii) circulated drafts of a Board policy position statement intended to and actually published in the newspaper, (iii) reached a joint consensus on the content of the Board policy position statement, (iv) authorized signing of the public statement by the President of the School Board in his official capacity as president with the consent of the four named Board member defendants, and later, (v) ratified the published public policy position statement by a formal vote at the board meeting on April 25, 2013.

On January 16, 2014, the trial court issued its Judgment Entry Granting Appellees' Second Motion for Judgment on the Pleadings and thereby dismissed Plaintiff's Complaint. The trial court ruled that there was no pre-arranged meeting, there was no rule or resolution pending before the Board at the time of the discussions, and that there was no public business discussed.

Mr. White appealed the trial court Judgment Entry to the Fifth District Court of Appeals. On September 5, 2014, the Court of Appeals issued its Decision and Entry which affirmed the trial court Entry.

The Court of Appeals ruled that e-mail communications between board members are not prohibited by the Open Meetings Statute, that the Board vote to ratify its letter to the editor did not retroactively create a prearranged discussion of public business, and that mere discussion of an issue of public concern does not mean there were deliberations under the Statute. Mr. White appeals from that Decision and Entry.

### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

#### Proposition Of Law Number I:

**Under the Ohio Open Meetings Statute, Ohio Rev. Code §121.22, liberally construed, private deliberations concerning official business are prohibited, whether such deliberations are conducted in person at an actual face-to-face meeting or by way of a virtual meeting using any other form of electronic communication such as telephone, e-mail, voicemail, or text messages.**

"The elements of the statutory definition of a meeting [under R.C. §121.22] are (1) a prearranged discussion, (2) a discussion of the public business of the public body, and (3) the presence at the discussion of a majority of the members of the public body."

*State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio.St.3d 540, 543, 1996-Ohio-372.

Each of those elements were met in Plaintiff's Amended Complaint and are summarized in order, as follows:

(1) *a prearranged discussion*: The October 11, 2012 e-mail from Board President King to Board Members Feasel, Dunbar, and O'Brien (Complaint, Ex. 3-3) advising them of King's plan to meet the next day constituted a prearranged discussion on October 12, 2012. Mr. King specifically used the word "meeting" in his e-mail to communicate that he had a specific action plan in mind and was seeking majority support for that rule or resolution from the Board.

(2) *a discussion of the public business of the public body*: The official business purpose of the "meeting" on October 12, 2012 was to discuss and respond to the Dispatch editorial, and to consider board action against Mr. White. A school board is a public body or "body politic" under Ohio Rev. Code §121.22(B)(1)(a) and R.C. §3313.17. All of the e-mail messages back in forth in this case, plus the submission of drafts created by board members and School District employees, collectively constituted a "discussion of the public business of the public body".

(3) *the presence at the discussion of a majority of the members of the public body*: Four of five board members actively participated in the deliberations over that public business by e-mails and phone. The majority consented to the decision. As such, a majority of the board was virtually present even though not physically present in the same room at the same time.

The trial court and the court of appeals both took the position that deliberations by e-mail cannot constitute a "meeting" under the Statute. In reaching that conclusion, however, neither court considered the argument that a series of discreet e-mail communications between a majority of members is no different, substantively, than holding several identical back-to-back face-to-face sessions attended by fewer than a majority of its members which, liberally construed, constitutes two parts of the same meeting. *State ex rel. Schuette v. Liberty Twp. Bd. of Trustees*, Delaware App. No. 03-CAH-11064, 2004-Ohio-4431, ¶35; *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio.St.3d 543-544, 1996-Ohio-372.

In the *Cincinnati Post* case, this Courts did not require there ever be an actual face-to-face meeting of a majority of the board so long as it is shown that a majority of the board did in fact communicate on the subject matter, *albeit* incrementally, and thus did deliberate on the subject matter as a group in a non-public manner. That case provides current legal authority in support of Proposition of Law #1 herein.

Likewise, in the case of *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990), the Mayor of Pickerington, Ohio attended a closed meeting at which certain annexation issues were discussed. No specific proposals were made and no official action was taken at that time, although certain annexation matters did take place later. Mayor Ricketts issued a press release after the meeting which describing the discussions held on that day as "concerning the future development of Violet Township." *Id.*, at p. 98.

In the *Fairfield Leader* case, this Court held that, "... regular and special meetings are the only alternatives under the charter for a majority of the council to assemble to discuss public business, and we reject the theory that the January 28 meeting was neither of these. Indeed, like the unannounced council meeting with the mayor in *State, ex rel. Plain Dealer Publishing Co., v. Barnes* (1988), 38 Ohio St.3d 165, 167, 527 N.E.2d 807, 810, the January 28 meeting here was within the ambit of the special meeting category of the Pickerington Charter".

Appellant White submits that the e-mail deliberations in this case are equivalent in substance to both the incremental meetings found to violate the Statue in *Cincinnati Post* and *Schuette*, and the generic private meeting held to discuss public business which was also found to violate the Statute in *Fairfield Leader*.

This Court is therefore requested to hold that private electronic deliberations upon official business are prohibited under the Statute.

**Proposition Of Law Number II:**

**Under the Ohio Open Meetings Statute, Ohio Rev. Code §121.22, when a board of education formally votes to ratify a prior action, the ratified prior action constitutes "public business" under the Statute.**

The trial court and the court of appeals both ruled that the Board's ratification of its October 27, 2012 letter to the editor at the Board meeting on April 25, 2013, six months later, did not retroactively convert that letter into public business.

In the case of *Covert v. Ohio Auditor of State*, 2006-Ohio-2896, 05CA3044 (OHCA8), however, the Eighth District Court of Appeals ruled that a delay of seven months between the termination of an employee by the ADAMH Executive Director and ratification of such termination by the ADAMH Board did not render the prior termination ineffective and that such termination was effective, as a matter of law, on the earlier date.

Likewise, the act of "Ratification" is defined by Black's Law Dictionary, Sixth Ed., 1990, p. 1261-1262, in relevant part, as follows:

"It [ratification] is equivalent to a previous authorization and relates back in time when act ratified was done..."

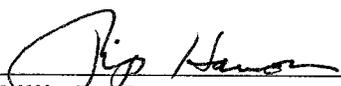
When the Board ratified its October 27, 2012 letter to the editor as the official policy of the Board, it also ratified the private deliberations that preceded the issuance of that policy statement. So, by voting to ratify their previous deliberations and published policy statement on April 25, 2013, the Board itself certified that its actions in October, 2012 were deliberations upon official public business at that time. The finding to the contrary by the trial court and the court of appeals was erroneous as a matter of law and contrary to the plain meaning and intent of the Statute and should be reversed.

CONCLUSION

This case involves matters of public and great general interest. Private deliberations upon public business are prohibited under Ohio law. It should not matter whether those deliberations took place in a face-to-face meeting of a majority of the Board, or whether such deliberations took place *via* electronic media.

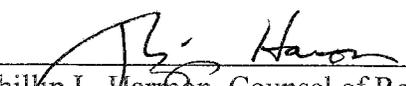
The appellant requests this court accept jurisdiction in this case so that it might issue its Order to close the loophole in the law by which ubiquitous electronic technology is being used to circumvent the plain meaning and clear intent of the Statute. The Court is further urged to take up this case so that multiple organizations throughout the state with an interest have an opportunity to submit their legal arguments in favor of or against reversal of the Decision below.

Respectfully submitted,

  
\_\_\_\_\_  
Phillip L. Harmon, Counsel of Record (0033371)  
Counsel For Appellant ADAM J. WHITE

Certificate Of Service

The undersigned attorney hereby certifies that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to Counsel for Appellee *Olentangy Local School District Board Of Education*, John C. Albert, Esq., CRABBE, BROWN & JAMES, LLP, 500 S. Front Street, Ste. 1200, Columbus, OH 43215 on October 17, 2014.

  
\_\_\_\_\_  
Phillip L. Harmon, Counsel of Record (0033371)  
Counsel For Appellant ADAM J. WHITE

48

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

ADAM J WHITE,

Plaintiff,

VS.

DAVID E KING, et al.,

Defendants.

Case No. 13 CV H 04 0352

445  
247-253

EVERETT H. KRUEGER, JUDGE

JAN ASTON PLOS  
CLERK

2014 JAN 16 AM 7:33

COMMON PLEAS COURT  
DELAWARE COUNTY, OHIO  
FILED

**JUDGMENT ENTRY GRANTING DEFENDANTS' SECOND MOTION FOR JUDGMENT  
ON THE PLEADINGS  
AND  
JUDGMENT ENTRY DENYING DEFENDANTS' SECOND MOTION TO AMEND CASE  
SCHEDULE**

This matter is before the Court on Defendants Olentangy Local School District Board of Education, David E. King, Julie Feasel, Kevin O'Brien and Stacy Dunbar's ("Defendants") Second Motion for Judgment on the Pleadings filed on October 7, 2013. Defendants have moved for judgment on the pleadings and dismissal of Plaintiff's Amended Complaint on all counts. Plaintiff Adam J. White ("Plaintiff") filed a Memorandum in Opposition on October 18, 2013. Defendants filed a reply thereto on October 23, 2013.

This matter is also before the Court on Defendants Second Motion to Amend Case Schedule filed on December 23, 2013.

For the reasons stated below, the Court GRANTS Defendants' Second Motion for Judgment on the Pleadings and DENIES Defendants' Second Motion to Amend Case Schedule.

**I. Standard of Review**

The Court must dispose of the instant Motion for Judgment on the Pleadings within the confines of Rule 12(C) of the Ohio Rules of Civil Procedure. Civil Rule 12(C) motions are specifically for resolving questions of law. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75

10



13 CV H 04  
0352  
00083020571  
JDEN

18

Ohio St.3d 565, 569, 1996—Ohio—459, 664 N.E.2d 931 (1996). “[E]ntry of judgment pursuant to Civ.R. 12(C) is only appropriate ‘where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that entitle him to relief.’” *Hester v. Dwivedi*, 89 Ohio St.3d 575, 577-578, 733 N.E.2d 1161 (2000) (quoting *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996)); see, also, *Whaley v. Franklin Cty. Bd. Of Commrs.*, 92 Ohio St.3d 574, 581, 752 N.E.2d 267 (2001); *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113 (1973). In ruling on a motion for judgment on the pleadings, the court may only consider statements contained in the pleadings, and may not consider any evidentiary material. *Burnside v. Leimbach*, 71 Ohio App.3d 399, 594 N.E.2d 60 (1991).

**II. Facts Alleged in First Amended Complaint for Declaratory Judgment and Other Relief**

Plaintiff Adam J. White and Defendants David E. King, Julie Feasel, Kevin O'Brien, and Stacy Dunbar are members of the Olentangy Local School District Board of Education. (Amend. Compl. ¶3). During March 2012, in response to a report of audit issued by the State of Ohio Auditor's Office, Plaintiff White conducted an independent investigation into an alleged improper expenditure of funds by two athletic directors employed by Olentangy Local School District. *Id.* at ¶4. Plaintiff White made a public filing of facts with the Delaware County Sheriff's Office. *Id.* at ¶5. Plaintiff White's investigation resulted in one of the athletic directors resigning and both being required to reimburse the District for improper expenditures. *Id.*

On September 25, 2012, the Board voted to tighten Board Policy No. 0148.1(B) to require that all future communications between Board members and staff must first pass through the District Superintendent or Treasurer. *Id.* at ¶6. Plaintiff White voted against Board Policy No. 0148.1(B). *Id.* at ¶7. On October 11, 2012, the Columbus Dispatch published an

editorial praising Plaintiff White for voting against this policy and implicitly criticizing the other members of the Board for adopting the more restrictive policy. *Id.* at ¶8. Board President David E. King called upon the other Board members, Defendants King, Feasel, O'Brien, and Dunbar, to publically respond to the Dispatch editorial. *Id.* at ¶10. A series of emails between Board Members King, Feasel, O'Brien, Dunbar and school district employees resulted in a response that was submitted to the Dispatch. *Id.* at ¶11-13. A first draft of the response letter was signed by Defendants King, Dunbar, Feasel and O'Brien in their official capacities as Board members. *Id.* at ¶19. The final response, issued on October 13, 2012 and published on October 27, 2012, was signed only by Board President David King, but had the consent of Defendants Feasel, O'Brien, and Dunbar. *Id.* at ¶19-20. Plaintiff White was not consulted about the response before it was issued or published. *Id.* at ¶21.

On April 25, 2013, Plaintiff White filed the civil action against Defendants King, Feasel, O'Brien, and Dunbar alleging violations of Ohio's Open Meeting statute, R.C. 121.22. *Id.* at ¶23. A Board meeting was also held on April 25, 2013 in which the Board voted to ratify the response letter to the editor submitted to the Columbus Dispatch in response to the October 11, 2012 editorial. *Id.* at ¶24.

On July 10, 2013, Plaintiff White filed his First Amended Complaint against Defendants King, Feasel, O'Brien and Dunbar in both their official and individual capacities and against the Board of Education seeking a declaratory judgment for a violation of Revised Code 121.22.

### III. Analysis

Defendants argue that they are entitled to judgment on the pleadings because a suit against a state official in their official capacity is not a suit against the official but rather a suit against the state entity. The Fifth District Court of Appeals has recognized that suits against state officials in their official capacity are treated as an action against the entity. *Duff v. Coshocton County*, 5<sup>th</sup> Dist. No. 03-CA-019, 2004-Ohio-3713, 2004 WL 1563404, ¶18.

Accordingly, the suit against the Defendant Board members in their official capacities will be treated as an action against the Board.

Defendants also argue they are entitled to judgment on the pleadings for the claims against them in their individual capacities. Defendants argue that the facts set forth in the Amended Complaint indicate they were acting solely in their official capacity. The Court agrees. The response letter was drafted after Board President David E. King called upon the other three Board members to issue a Board policy statement response to the Columbus Dispatch. (Amend. Compl. ¶¶10-12). The response letter was submitted by Defendant King in his official capacity as President of the School Board. *Id.* at ¶¶13. A first draft of the response letter was also signed by Defendants Dunbar, Feasel and O'Brien in their official capacities. *Id.* at ¶¶19. Furthermore, the response letter was ratified by the Board at their April 25, 2013 meeting. *Id.* at ¶¶25. There are no factual allegations to indicate these board members were acting in their individual capacities.

Plaintiff White argues that paragraphs 28 and 29 of the Amended Complaint provide facts that the Defendants were acting in their individual capacities. These paragraphs indicate that the Defendants engaged in "...ultra vires activities outside the scope of their statutory authority, under color of their official capacities as members of the Board, by purposefully conducting private deliberations..." and they "...acted in bad faith and with malicious purpose, and in a wanton and reckless manner by conducting an electronic private meeting [.]" *Id.* at ¶¶28-29. The facts alleged in the Amended Complaint indicate that the Defendants were taking action to issue a public statement by the Board to defend their revised board policy which cannot be said to be outside the scope of their authority as Board members. Further, there are no facts to support the conclusory statement that the actions of Defendants were in bad faith or were with malicious purpose, or they acted in a wanton and

reckless manner. Accordingly, Defendant Board Members King, Feasel, O'Brien and Dunbar are entitled to judgment and dismissal in their individual capacities.

Defendants argue they are entitled to political subdivision immunity. Revised Code 2744.03(A)(6) provides that an employee is immune from liability except when the employee's acts were manifestly outside the scope of the employee's employment or official responsibilities, the acts were done with malicious purpose, in bad faith, or a wanton or reckless manner or civil liability is imposed by a section of the Revised Code. As determined above, the Amended Complaint does not set forth facts that Defendants actions were outside the scope of their official responsibilities, nor are there facts to indicate the actions were wanton or reckless. Additionally, Revised Code 122.22, Ohio's Open Meeting Statute, does not impose civil liability on the individual. Furthermore, in the case of *Whiting v. Coyne*, the court found that statutory immunity applied to employees pursuant to R.C. 2744.03(A) when there was a violation of R.C. 122.22 for failure to conduct an open meeting. *Whiting v. Coyne*, 8<sup>th</sup> Dist. No. 69410, 1996 WL 492266 (Aug. 29, 1996). Therefore, the Court finds that Defendants are entitled to statutory immunity.

Finally, Defendants argue they have not violated R.C. 121.22, Ohio's Sunshine Law. Revised Code 121.22(C) provides as follows:

All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

Meeting is defined by the statute to mean "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2). Accordingly, a claim for a violation of the Sunshine Law must set forth the following elements: (1) a prearranged (2) discussion (3) of the public business of the public body in question (4) by a majority of its members. *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 2005-Ohio-3489, 995

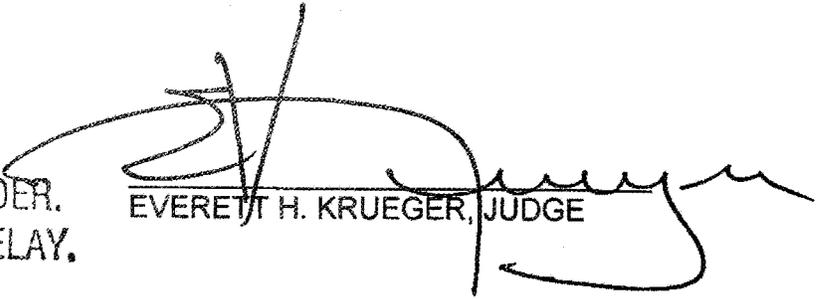
N.E.2d 862, 864 (1st Dist.) The communication between the Defendant Board Members in this case originated with an email from Defendant David King to Defendants Feasel, Dunbar & O'Brien recommending that they issue a response in writing to the Dispatch editorial. The email was unsolicited by Defendants Feasel, Dunbar & O'Brien and, accordingly, was not a prearranged discussion between the Defendants. The case of *Haverkos v. Northwest Local School Dist. Bd. of Edn.* also found that an email sent by one board member to two others suggesting a response to a newspaper article did not constitute a meeting under the Sunshine Law. *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 2005-Ohio-3489, 995 N.E.2d 862, 864 (1st Dist.). The case further held that "[s]ince the legislature chose not to include electronic communication in the statute \* \* \* Ohio's Sunshine Law does not cover emails." *Id.* at 865. As there was no prearranged discussion between the Defendants, there can be no violation of R.C. 121.22.

Plaintiff attempts to distinguish the case at hand from *Haverkos* by arguing that no official action resulted from the minimal private communications between the parties in *Haverkos*, while the Board here took official action by voting to ratify the letter sent to the Dispatch. This argument goes to the third element of the claim whether public business was discussed. The court found no public business was discussed in *Haverkos* reasoning that there was no pending rule or resolution before the board and the board took no official action as a result of the letter. *Id.* at 865. Similarly, when Defendants were exchanging emails to develop the response letter, there was no pending rule or resolution before the Board. It was nearly six (6) months after the letter was published when the Board decided to ratify the letter. Accordingly, at the time the emails were exchanged, there was no public business discussed. Therefore, the Defendants are entitled to judgment and dismissal of the Amended Complaint.

As reasoned above, since the Plaintiff can prove no set of facts in support of his claims that would entitle him to relief, the Court hereby GRANTS Defendants Motion for Judgment on the Pleadings. Furthermore, the Court DENIES Defendant's Second Motion to Amend Case Schedule as moot.

*ref*  
Dated: January 16, 2014

THIS IS A FINAL APPEALABLE ORDER.  
THERE IS NO JUST CAUSE FOR DELAY.

  
EVERETT H. KRUEGER, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by  
 Regular Mail,  Mailbox at the Delaware County Courthouse,  Facsimile Transmission

PHILLIP L HARMON, 8649 NORTH HIGH STREET, SUITE 105, WORTHINGTON, OH 43085  
JOHN C ALBERT, 500 SOUTH FRONT ST SUITE 1200, COLUMBUS OHIO 43215

The Clerk is ordered to serve upon all parties not in default to appear, notice of the judgment and date of entry upon the journal within three days of journalization.

This document sent to each attorney/party by:

ordinary mail  
 fax  
 attorney mailbox  
 certified mail

Date: 1/16/14 By: 

(16)

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ADAM J. WHITE

Plaintiff-Appellant

-vs-

DAVID E. KING, et al.

Defendants-Appellees

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 14 CAE 02 0010

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 13 CVH 04 0352

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

PHILLIP L. HARMON  
6649 North High Street  
Suite 105  
Worthington, Ohio 43085

JOHN C. ALBERT  
CRABBE, BROWN & JAMES  
500 South Front Street, Room 1200  
Columbus, Ohio 43215

Amicus Curiae Common Cause Ohio  
and League of Women Voters

NANCY G. BROWN  
17 South High Street, Suite 650  
Columbus, Ohio 432315

JAN ANTONOPILOS  
CLERK

2014 SEP -5 AM 10:16

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FILED

Court of Appeals  
Delaware Co., Ohio  
I hereby certify the within be a true  
copy of the original on file in this office.  
Jan Antonoplos, Clerk of Courts  
By Jan Antonoplos Deputy

17

*Wise, J.*

{¶1}. Plaintiff-Appellant Adam J. White appeals the decision of the Court of Common Pleas, Delaware County, which entered a dismissal on the pleadings regarding appellant's complaint under R.C. 121.22 against his fellow school board members, Appellees herein. The relevant facts leading to this appeal are as follows.

{¶2}. At the times pertinent to the matter, Appellant White and Appellee King were members of the Olentangy Local School District Board of Education ("Board"), as were Appellees Julie Feasel, Kevin O'Brien, and Stacy Dunbar.

{¶3}. In March 2012, Appellant White commenced an independent investigation into certain expenditures by two athletic directors employed by the District. As a result of the information uncovered by Appellant White, one of the athletic directors resigned and both of them were required to reimburse the District for improper spending.

{¶4}. On September 25, 2012, the Board voted four-to-one to amend Board Policy No. 0148.1(B) to require that all future communications between Board members and staff must first pass through the District Superintendent or Treasurer. Appellant White voted against the changes to Board Policy No. 0148.1(B).

{¶5}. On October 11, 2012, the Columbus Dispatch newspaper published an editorial entitled: "Role reversal: School boards, not superintendents, are the boss and should act like it." The editorial essentially criticized policies restricting direct access by school board members to administrators and personnel, and it favorably mentioned Appellant White's decision to vote against the Olentangy Local School District's aforesaid revised policy.

{¶6}. Appellee King, who was serving as Board President, thereupon proposed to the other Board members, Appellees Feasel, O'Brien, and Dunbar, that a public response to the Dispatch editorial should be made. A series of emails between Appellees King, Feasel, O'Brien, Dunbar and certain school district employees resulted in a response that was submitted to the Dispatch. The final response, issued on October 13, 2012 and published on October 27, 2012, was signed only by Appellee David King, based on the newspaper's editorial policy, but said letter had the consent of Appellees Feasel, O'Brien, and Dunbar. Appellant White was not consulted about the response before it was issued or published.

{¶7}. On April 25, 2013, Appellant White filed an action against Appellees King, Feasel, O'Brien, and Dunbar, alleging violations of Ohio's Open Meeting statute, R.C. 121.22. A Board meeting was also held on April 25, 2013 in which the Board voted to "ratify" appellees' response letter to the editor submitted to the Columbus Dispatch.

{¶8}. Appellees filed a timely answer and amended answer.

{¶9}. Appellees filed a motion for judgment on the pleadings on June 20, 2013. Appellant then filed a motion to add a party and for leave to file his first amended complaint. Said leave was granted by the trial court on July 10, 2013, making appellees' first motion for judgment on the pleadings moot. The amended complaint was filed against Appellees King, Feasel, O'Brien and Dunbar in both their official and individual capacities and against the Olentangy Local School District Board of Education seeking a declaratory judgment for a violation of R. C. 121.22.

{¶10}. Appellees filed a timely answer to the amended complaint. Appellees then filed a second motion for judgment on the pleadings on or about October 4, 2013. Appellant responded on October 18, 2013. Appellees filed a reply on October 23, 2013.

{¶11}. On January 16, 2014, the trial court issued a judgment entry granting appellees' second motion for judgment on the pleadings and a judgment entry denying appellees' second motion to amend the case schedule.

{¶12}. On February 13, 2014, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶13}. "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO LIBERALLY CONSTRUE THE CLEAR MEANING OF THE OHIO OPEN MEETINGS STATUTE TO THE FACTS OF THIS CASE."

I.

{¶14}. In his sole Assignment of Error, appellant contends the trial court erred in construing the Open Meetings Statute and thus granting appellees' motion for judgment on the pleadings. We disagree.

{¶15}. Motions for judgment on the pleadings are governed by Civ.R. 12(C), which states: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Pursuant to Civ.R. 12(C), "dismissal is [only] appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570, 664 N.E.2d 931, 936. The

very nature of a Civ.R. 12(C) motion is specifically designed for resolving solely questions of law. See *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 297 N.E.2d 113, 117. Reviewing courts will reverse a judgment on the pleadings if the plaintiffs can prove any set of facts that would entitle them to relief. *Flanagan v. Williams* (1993), 87 Ohio App.3d 768, 772, 623 N.E.2d 185, 188, abrogated on other grounds by *Simmerer v. Dabbas*, 89 Ohio St.3d 586, 733 N.E.2d 1169, 2000-Ohio-232. The review will be done independent of the trial court's analysis to determine whether the moving party was entitled to judgment as a matter of law. *Id.*

{¶16}. As an initial matter, we must set the parameters of the proper review of the record before us. Appellant appears to challenge the trial court's purported reliance on documentation attached to his complaint and amended complaint, such as copies of e-mail correspondence between various school board members. Appellant argues that "[w]hen a trial court relies upon evidence outside [of] the pleadings, the court effectively converts the Civ.R. 12(C) motion to a motion for summary judgment subject to review per the Civ.R. 56(C) standard." Appellant's Brief at 13. However, the "[d]etermination of a motion for judgment on the pleadings is restricted solely to the allegations in the complaint and answer, as well as any material attached as exhibits to those pleadings." *Schmitt v. Educational Serv. Ctr. of Cuyahoga Co.*, 8th Dist. Cuyahoga No. 97605, 970 N.E.2d 1187, 2012-Ohio-2208, ¶ 10. Under the circumstances presented, we will not countenance appellant's challenge to the trial court's utilization of documents that appellant presented to the court as his own complaint attachments. We thus further find on a preliminary basis that there was no requirement that appellees' second motion for

judgment on the pleadings be converted to a summary judgment motion, as appellant suggests.

{¶17}. We also briefly note at this juncture that appellant admittedly is not appealing the trial court's conclusion that appellees have no individual liability and are entitled to statutory immunity. Therefore, we need not address these topics.

{¶18}. Turning to the statute at issue, R.C. 121.22, Ohio's "open meeting" or "sunshine" law, provides in pertinent part as follows:

{¶19}. "(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

{¶20}. "\*\*\*\*

{¶21}. "(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

{¶22}. "\*\*\*\* "

{¶23}. The intent of the "Sunshine Law" is to require governmental bodies to deliberate public issues in public. See *Moraine v. Montgomery County Board of Commissioners* (1981), 67 Ohio St.2d 139, 423 N.E.2d 184. A "meeting" is defined by the statute to mean "any pre-arranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2). Thus, a claim for a violation of the "Sunshine Law" must set forth the existence of the following elements: a (1) pre-arranged (2) discussion (3) of the public business of the public body in question (4) by a

majority of its members. See *State ex rel. Schuette v. Liberty Twp. Board of Trustees*, 5th Dist. Delaware No. 03-CAH-11064, 2004-Ohio-4431, ¶ 29.

{¶24}. The case of *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 1st Dist. Hamilton Nos. C-040578, C-040589, 995 N.E.2d 862, 2005-Ohio-3489, bears a number of similarities to the appeal sub judice. The dispute in *Haverkos* also had its genesis in a newspaper article about a school board's actions, to which four members of said board ultimately responded with a jointly-signed letter. *Id.* at ¶1. Communication via a single e-mail and a few telephone calls about formulating the response letter took place in the meantime between certain board members, and the letter was later read aloud at the board's next public meeting. *Id.* at ¶ 2. Mark Haverkos, eventually the appellant/cross-appellee in the matter, then filed a suit under R.C. 121.22 against the board and four members thereof. *Id.* at ¶ 3.

{¶25}. In ruling in favor of the board members, the First District Court in *Haverkos* first found that there had been no pre-arranged meeting for purposes of the Sunshine Law, and at no time had there been a meeting of the majority of the board. The Court specifically concluded under the facts of the case that "[o]ne-on-one conversations between individual board members [do] not constitute a 'meeting' under the Sunshine Law." *Id.* at ¶ 7, citing *State ex rel. Floyd v. Rockhill Local Bd. of Edn.* (Feb. 10, 1998), 4th Dist. Lawrence No. 1862, 1988 WL 17190. The First District Court also considered the import of an e-mail message as a form of "discussion" Ohio's Sunshine Law. *Id.* at ¶ 9. The Court reviewed corresponding statutes from other states, and noted that although Ohio's statute had been amended as recently as 2002, no language regarding modern electronic communications was to be found: "Since the legislature chose not to

include electronic communication in the statute, we hold Ohio's Sunshine Law does not cover e-mails" *Id.* at ¶ 9. Furthermore, the Court recognized that as far as the claim of public business being discussed privately by board members, the response letter "did not mention any pending rule or resolution before the board." *Id.* at ¶ 10. Finally, the Court noted that "\*\*\*\* the contacts were informal and not pre-arranged." *Id.* at ¶ 11.

{¶26}. We recognize that the case sub judice involves much more expansive use of emails; perhaps several dozen if "copied" recipient formats are counted individually. However, appellant herein never alleged that appellees improperly met in person. As in *Haverkos*, we conclude that if the Generally Assembly had intended to include sporadic emails in the statutory definition of "meeting," it would have said so. As an appellate court, we ordinarily must presume that the legislature means what it says. See *State v. Link*, 155 Ohio App.3d 585, 2003-Ohio-6798, 802 N.E.2d 680, ¶ 17, citing *State v. Virasayachack* (2000), 138 Ohio App.3d 570, 741 N.E.2d 943. Furthermore, at the time the emails were exchanged, there was no pending rule or resolution before the Board. Even if the Board "ratified" the rebuttal letter in April 2013, after appellant filed his civil action in this case, this was six months after said letter was published in the Dispatch. We find no merit in appellant's claim that the Board's action at that time somehow retroactively created a prearranged discussion of public business via e-mails. Moreover, the mere discussion of an issue of public concern does not mean there were deliberations under the statute. See *Haverkos, supra*, at ¶ 10.

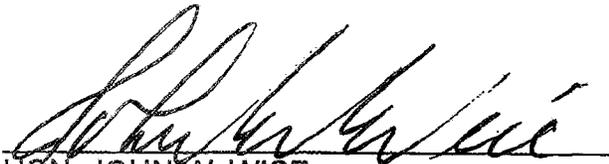
{¶27}. We therefore find no error as a matter of law in the granting of appellees' motion for judgment on the pleadings under the facts and circumstances of this case. Appellant's sole Assignment of Error is overruled.

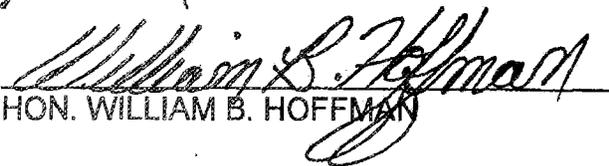
{¶28}. For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

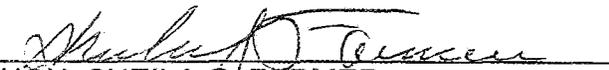
By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

  
HON. JOHN W. WISE

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

JWW/0814

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ADAM J. WHITE

Plaintiff-Appellant

-vs-

DAVID E. KING, et al.

Defendants-Appellees

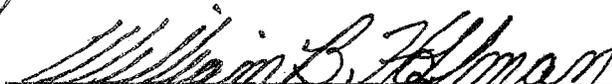
JUDGMENT ENTRY

Case No. 14 CAE 02 0010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

  
HON. JOHN W. WISE

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

JAN ANTONIOPLOS  
CLERK

2014 SEP -5 AM 10:16

COURT OF APPEALS 2<sup>ND</sup>  
DELAWARE COUNTY, OHIO  
FILED

(26)

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

CASE NO: 14 CAE 02 0010

ADAM J WHITE  
PLAINTIFF / APPELLANT

VS

DAVID E KING  
DEFENDANT / APPELLEE

CLERK'S CERTIFICATE OF MAILING BY ORDINARY MAIL  
(RULE 4.6 (D), OHIO CIVIL RULES)

I hereby certify that, pursuant to written instructions received by this Office from the attorney for Plaintiff/Defendant, I complied with said written instructions and mailed the documents requested to be served to the following named person/persons at the address/addresses indicated, by ORDINARY UNITED STATES MAIL on this date: September 5, 2014

Document(s) mailed: **OPINION/JUDGMENT ENTRY FROM 5TH DISTRICT APPEALS COURT**

ATTN: PHILLIP L HARMON  
6649 NORTH HIGH STREET SUITE 105  
WORTHINGTON, OHIO 43085

JOHN C ALBERT  
500 SOUTH FRONT STREET SUITE 1200  
COLUMBUS, OHIO 43215

NANCY G BROWN  
17 SOUTH HIGH STREET SUITE 650  
COLUMBUS, OHIO 43215

DELAWARE COUNTY COMMON PLEAS  
COURT JUDGE (HAND DELIVERED)

JAN ANTONOPLOS  
CLERK

2014 SEP -5 PM 1:55

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FILED

JAN ANTONOPLOS  
DELAWARE COUNTY CLERK

*JMCline* DEPUTY