

IN THE SUPREME COURT OF OHIO

ADAM J. WHITE : No. 2014-1796
: :
Appellant, : :
: :
vs. : Jurisdictional Appeal from the
: Delaware County Court of Appeals,
: Fifth Appellate District
DAVID E. KING, et al., : :
: App. Case No. 14CAE-02-0010
Appellees. : :

**REPLY BRIEF OF APPELLANT
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STATEMENT OF FACTS:

Mr. White hereby responds to the disputed Statement of Facts set forth in the Brief of Appellee *Board Of Education, Olentangy Local School District* ("Board"):

1. Board Policy 0148.1: The Board argues Policy 0148.1(C) demonstrates its compliance with Ohio's Sunshine Law, R.C. §121.22, but fails to explain how that policy is relevant in this case. (Appellee Brief, p. 1) The only fact relevant to that Policy is that Policy 0148.1(B) requires all board communications to Staff go through the Superintendent or Treasurer. (Appdx., p. 45-46). That is the policy the Dispatch criticized as seeking to prohibit Mr. White from exercising his fiduciary duty to investigate financial irregularities within the District as he deems fit.

2. Alleged Overzealous Representation of Facts: Appellee contends Mr. White distorted or twisted the evidence and thus misrepresented the facts to this Court. (Appellee Brief, p. 1). Mr. White and his undersigned counsel strongly dispute that assertion and must therefore reply, *seriatim*.

a. Official Board Policy, Instructed to Collaborate: It is a reasonable inference that Mr. King did instruct the other board members to collaborate on the Response, albeit politely in the form of a request. When a supervisor requests a subordinate to do something, it is reasonable for the subordinate to take the request as an instruction. Everyone who received the "request" here obeyed it. The topic of the Response concerned official board policy, not a private matter.

Appellee contends the "public business on this issue had ended and was complete". (Appellee Brief, p. 2). If so, why did the president of the Board feel it necessary to enlist everyone on the Board except Mr. White to explain the matter to the public and to thereby take group board action to enforce and carry out the recently-enacted disputed policy? The public business had clearly not yet ended. It is a reasonable inference that the Response concerned "official business".

b. Mr. King Signed Response as President: The Appellee frivolously states, as fact, that Mr. King did not sign the Response as "President" but simply as "DAVE KING". (Appellee Brief, p. 3). That statement is categorically false and Appellee either knows it to be false or should know it to be false.

First, the entire Response letter to the Dispatch is set forth at p. 85-86 of the Appendix. Appellee apparently only read p. 85 before making its false claim. The first line of p. 86, which is a continuation of the signature line of the Response as published in the Dispatch, says "Olentangy School Board President", the second line says "Powell", both in the same font as "DAVE KING" on p. 85.

The Response was therefore signed by, "DAVE KING, Olentangy School Board President, Powell". (Appdx., p. 85-86).

In addition, Plaintiff White specifically alleged at p. 6 of the *Amended Complaint* at ¶20, that, "The final Response was signed by David King in his capacity as Board President...". In its *Answer to Amended Complaint* at p. 2, ¶8, Defendant Board did not deny that allegation. The proven allegation that Mr. King signed as president must be taken as true by this Court per Civ. Rule 12(C).

c. Ms. Feasel's E-Mail to Dispatch: Appellee queries why Mr. White did not allege violation of the Sunshine Law against Ms. Feasel for her e-mail to the Dispatch. (Appellee Brief, p. 3). For one reason, the Dispatch is not a public official. A discussion between a single board member and a newspaper does not constitute "deliberations upon official business by public officials".

Appellee then denigrates Mr. White's motives by claiming, with no evidence in support, that "[t]he reality is this lawsuit was filed by Appellant because the response letter to The Columbus Dispatch referenced Appellant's failure to ask questions about the five (5) year financial forecast and to attend the audit and finance committee meetings, and his motivation to get his name in the paper". Once again, that argument does not make sense other than to impugn Mr. White.

To clarify any confusion about Appellant's motives in filing this civil action, Mr. White sued his fellow board members to counter their *private deliberations* which resulted in their *joint action* of issuing a *public policy statement by the Board*, signed by its *President*, concerning a matter of *official business*. That's it.

d. Board Members Signed in their Official Capacities: Appellee now seeks to contest Mr. White's factual allegation that the board members signed or agreed to sign the initial Response in their official capacity as board members. (Appellee Brief, p. 4). For the reasons below, Appellee's argument is unfounded.

In the *Amended Complaint*, Mr. White asserted at p. 5, ¶19 that, "On information and belief, the first draft of the Response submitted to the Dispatch was signed by Board Members King, Dunbar, Feasel, and O'Brien in their official capacities as Board Members. (Ex. '3', p. 28, 10-12-2012, 4:31 p.m., p. 31, 10-12-2012, 5:18:59 p.m., p. 33, 10-13-2013, 9:34 a.m.)". (Appdx., p. 78, 81, 83).

In its *Answer to Amended Complaint* at p. 2, ¶8, Appellee Board did not deny that the individual board members signed or agreed to sign the initial Response in their capacity as board members. Appellee Board has not proven beyond a reasonable doubt that Mr. White's allegation is untrue. Pursuant to Civ. R. 12(C), Mr. White's allegation of fact on this topic must be taken as true.

e. NEOLA Footnote: In its *Memorandum Contra Jurisdiction* at p. 2 filed November 14, 2014, Appellee Board improperly attempted to attach and did discuss non-record evidence of pending legislation. Now, again, Appellee Board improperly seeks to discuss a purported NEOLA 2009 Policy to establish a legal standard in this case. (Appellee Brief, p. 4, fn. 1). There is nothing in the record regarding a NEOLA 2009 Policy and there should be no reference to same now.

Pursuant to S.Ct.Prac.R. 15.01, it is axiomatic that the record in this appeal is limited to the pleadings and evidence which were introduced in the proceedings below. Appellant White objects to the repetitive disregard for court rule by Appellee in its Memorandum Contra and again in its Brief.

LEGAL ARGUMENT:

A. Propositions of Law by Appellant White:

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.

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.

B. Propositions of Law by *Amici* Ohio Coalition for Open Government, *et al.*:

Proposition Of Law Number 1:

Ohio law does not authorize members of a public body to engage in concerted, purposeful communications-via email or otherwise—to collectively shape policy except at a public meeting that complies with Ohio's Sunshine Law, R.C. 121.22.

Proposition Of Law Number 2:

If members of a public body are authorized to engage in concerted, purposeful electronic communications collectively to shape policy under the Sunshine Law, R.C. 121.22, they would have to engage in a close facsimile of a “meeting” namely, allowing contemporaneous public access that allows the public to witness the electronic communications as they happen, in real time, followed by public notice that complies with R.C. 121.22.

C. Propositions of Law by Appellee Olentangy School Board:

Proposition Of Law Number 1:

Ohio’s Sunshine Law, R.C. §121.22, does not apply to emails.

Proposition Of Law Number 2:

It is a cardinal rule that a Court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at an end, and the statute must be applied accordingly.

Proposition Of Law Number 3:

A public body’s use of emails between Board members and staff does not constitute a “meeting” as defined in R.C. §121.22(B)(2) when not involving a prearranged discussion of public business, or deliberations upon official business.

Proposition Of Law Number 4:

A Board’s ratification of a six (6) month old opinion letter to a newspaper editor, said ratification done for the purpose of legal defense against a recently filed lawsuit, does not retroactively convert the substance and character of the letter from non-public business to public business.

Appellant White responds below to the four Propositions of Law advanced by the Appellee Board. Mr. White responds to Appellee Board's first two propositions jointly because the propositions are inter-related.

Board's Proposition Of Law Number 1:

Ohio's Sunshine Law, R.C. §121.22, does not apply to emails.

Board's Proposition Of Law Number 2:

It is a cardinal rule that a Court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at an end, and the statute must be applied accordingly.

The Board readily acknowledges in its Brief at p. 6 that, "Email communication has replaced telephone calls, handwritten notes, paper letters, and *personal conversations* as an efficient and flexible form of communication between public servants, and their staff", yet it argues that e-mail communications are expressly exempt from coverage under the Sunshine Law. (emphasis added).

Appellee's strained argument that e-mails are not covered by the Sunshine Law goes to the very heart of this case. It simply does not make sense that a statute intended to prohibit private deliberations over official business would only prohibit face-to-face deliberations, but would allow the exact same deliberations to take place by phone or e-mail. That is an irrational interpretation of the Statute.

The Appellee Board would thus have this Court strictly enforce a law in a way which is not applicable to the modern times.

If this Court rules that face-to-face meetings are covered under the Sunshine Statute but e-mail meetings are not, it would essentially be ruling that the Sunshine Statute is meaningless. It would be saying that the Sunshine Statute only covers a tiny percentage of decisions which are made in private face-to-face meetings but not the vast majority of all decisions made electronically these days.

Appellee Board cites *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 995 N.E.2nd 862, 2005-Ohio-3489 (1st App. Dist.) in support of its position.

The *Haverkos* case was improperly decided, however, because it relied upon *legislative intent* rather than the plain meaning of the Statute itself in determining whether e-mails are covered under the Statute.

As Appellee states in its own words, the requirements of R.C. §121.22 are, "not ambiguous, are clear, unequivocal, and definite as Appellant recognizes". (Appellee Brief, p. 8). Appellant White agrees with that statement of law.

All parties therefore agree that the Court should not engage in any analysis of the legislative intent in passing the Statute but should proceed instead to simply apply the Statute as written pursuant to the rule of law set forth in *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381, which states:

"It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. * * * If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly."

Appellee Board correctly notes that under the Ohio Public Records Act, e-mails can constitute a public record. If an e-mail can constitute a public record, why would an e-mail *decision* amongst a majority of board members not constitute a prohibited deliberation on official business under R.C. §121.22(A) which requires public officials take official action and to conduct all deliberations upon official business only in open meetings?

It is respectfully submitted that this Court should reject the Board's First Proposition that R.C. §121.22 does *not* apply to e-mails, and should instead adopt Mr. White's First Proposition which reads:

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.

If the Court applies the Statute as proposed by Mr. White, the Court would also be urged to reverse or distinguish *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, *Supra*, as an incorrect statement of law.

Board's Proposition Of Law Number 3:

A public body's use of emails between Board members and staff does not constitute a "meeting" as defined in R.C. §121.22(B)(2) when not involving a prearranged discussion of public business, or deliberations upon official business.

a. Pre-Arranged Meeting: Appellee Board argues there was was no pre-arranged meeting in person and cites R.C. §121.22(C) in support. (Appellee Brief, p. 10). R.C. §121.22(C) reads in relevant part 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.

Sub-section "C" simply describes the procedure for declaring a member of a public body present and able to vote at a public meeting and for purposes of determining whether a quorum is present. The Statute does not define the myriad ways members of a public body could collaborate in private to deliberate and decide official business in violation of the Statute.

Appellee Board would have this Court *strictly* interpret the Statute to find a violation only if there were face-to-face meetings pursuant to an agenda to deliberate and decide an issue already pending before the body. Mr. White asks this Court to *liberally* construe the Statute to require public officials take official action and conduct all deliberations upon official business only in open meetings. R.C. §121.22(A). (Appdx., p. 40-44).

- b. No Deliberations:**
- c. No Public Business:**

Appellant White addresses both of Appellee's sub-issues "b" and "c" together because the two issues are interrelated.

First, Appellee Board repeats its false statement that Mr. King signed the Response as an individual and not in his official capacity as "Olentangy School Board President". As noted above, Mr. Kind clearly signed the Response in his official capacity. (Appellee Brief, p. 13; Appdx., p. 86; Also, see Statement of Facts, above, at p. 2). Appellee's premise is flawed.

Next, the public business at issue both in public and in private was whether the Board should maintain the policy which sought to restrain Mr. White from exercising his own fiduciary duties to investigate financial irregularities within the School District, or, whether the Board should bow to the public pressure from the Dispatch editorial which strongly chastised the Board for enacting such a legally questionable and dangerous policy.

This was not a "mere discussion of an issue of public concern", but instead formal deliberations, with staff involvement, based entirely on e-mail correspondence and culminating in a *de facto* private vote in October 2012 to maintain the questioned board policy. The action was conceived and executed in private to protect those board members from harsh public criticism if they reaffirmed their legally flawed policy at an open meeting.

CONCLUSION:

Appellant Adam J. White respectfully urges the Court to reverse the *Judgment Entry Granting [Defendant-Appellees'] Second Motion for Judgment on the Pleadings* issued by the trial court on January 16, 2014 (Appdx., p. 33-39), to reverse the *Opinion and Judgment Entry* issued by the Court of Appeals on September 5, 2014 (Appdx., p. 22-32), and to remand the matter for further proceedings or issue judgment directly in favor of Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certify that a copy of the foregoing Reply Brief of Appellant White was served by e-mail this 10th day of August, 2015 upon Appellees David E. King, Julie Feasel, Kevin O'Brien, Stacy Dunbar, and Board Of Education, Olentangy Local School District, c/o their legal counsel, John C. Albert, Esq. CRABBE, BROWN & JAMES, LLP, 500 S. Front Street, Suite 1200, Columbus, Ohio 43215, and upon legal counsel for *Amici Curiae*, David L. Marburger, Esq., BAKER HOSTETLER, LLP, 1900 E. 9th Street, Ste. 3200, Cleveland, Ohio 44114.

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