[Cite as *Kanter v. Cleveland Hts.*, 2021-Ohio-4318.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

GARRY KANTER, :

Plaintiff-Appellant, :

No. 110524

v. :

CITY OF CLEVELAND HEIGHTS AND CITY COUNCIL, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 9, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-944014

Appearances:

Garry Kanter, *pro se*.

William R. Hanna, Cleveland Heights Director of Law; and Walter | Haverfield LLP, Lisa A. Mack, *for appellees*.

JAMES A. BROGAN, J.:*

{¶ 1} Plaintiff-appellant Garry Kanter ("Kanter") appeals from the trial court's May 5, 2021 judgment granting the motion to dismiss of defendants-

appellees, the city of Cleveland Heights and its council members.[1] After careful review of the law and record, we affirm.

Procedural and Factual History

{¶ 2} In February 2021, Kanter filed the within action against the city and its council members alleging that the city and council members violated Ohio's open meetings law under R.C. 121.22. *See generally* complaint. Specifically, at issue in this case is the city's resolution No. 120-2020 that created a Racial Justice Task Force ("RJTF"). *Id.* at ¶ 6. Under the resolution, the RJTF was to be composed of 25 members and it was to be responsible, in part, for preparing "a report that summarizes the Task Force's efforts * * * and includes recommendations on whether the City should establish a Commission or Commissions to serve purposes similar to the Task Force's purposes on an ongoing basis." *Id.* The resolution also stated that "[m]eetings of the Task Force shall be open to the public and shall be held according to a schedule to be determined by the Task Force, but in no event less frequently than monthly." *See* resolution No. 120-2020, appendix A to plaintiff's brief in opposition to motion to dismiss.

{¶ 3} According to the complaint, in January 2021, the Council Committee of the Whole held a meeting, and the agenda for the meeting included the following two items: (1) "Racial Justice Task Force discussion on how to proceed with

[1] The council members were Jason Stein, Kahlil Seren, Mary Dunbar, Melody Joy Hart, Davida Russell, and Michael N. Ungar, collectively referred to as "council members."

appointments" and (2) "Executive session to discuss the appointment of a public official." Complaint at ¶ 7. The complaint further alleged that,

> Prior to entering executive session, the City's Law Director was asked his opinion regarding the use of executive session to appoint members to the RJTF, and responded that the discussion by Council members as to prospective appointees was the proper subject of an executive session and then Council proceeded into executive session to discuss the applicants and/or their appointment.

Id. at ¶ 8.

{¶ 4} Kanter alleged that the members of the RJTF were not public employees or officials and, therefore, the city and council members violated R.C. 121.22 by entering into executive session to discuss the appointments rather than doing so in an open public meeting. *Id.* at ¶ 9. Kanter further alleged that the defendants failed to keep minutes in violation of R.C. 121.22(C). *Id.* at ¶ 10-11.

{¶ 5} In light of his allegations, Kanter sought an injunction prohibiting the council members "from going into executive session in the future to discuss applicants for and/or appointment to any task force, commission or committee where the members are not 'a public employee or official' and that the Defendants pay him a civil forfeiture of $500, court costs and attorney's fees." *Id.* at ¶ 12.

{¶ 6} In lieu of an answer, the defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted under Civ.R. 12(B)(6). In their motion, the defendants contended that the members of the RJTF were public officials under R.C. 149.011, and city council was permitted to discuss appointments to the task force in executive session under R.C. 121.22. The defendants further contended that the city was not required to keep minutes of its Committee of the

Whole meetings under Cleveland Heights Codified Ordinances 107.04. The city cited a case from this court brought by Kanter on that very issue that was decided in favor of the city. *See Kanter v. Cleveland Hts.*, 2017-Ohio-1038, 86 N.E.3d 1022 (8th Dist.), *appeal not accepted*, 151 Ohio St.3d 1502, 2018-Ohio-365, 90 N.E.3d 946 ("*Kanter I*").

{¶ 7} Kanter filed a brief in opposition to the defendants' motion to dismiss. In his opposition, he maintained that the task force members were not public employees or officials. He cited then-recent legislative actions taken by the city voting on the salaries of the city's officer and employees that did not include the RJTF members, in support of his contention that the task force members were not city employees or officials. Kanter contended that, under R.C. 102.01(C)(3),[2] the RJTF's purpose was solely for cultural, educational, historical, humanitarian, advisory, or research and, therefore, its members could not be public officials. Kanter's brief in opposition did not address the issue regarding lack of minutes.

{¶ 8} In a May 5, 2021 judgment, the trial court granted the defendants' motion to dismiss. In regard to the city's failure to keep minutes, the trial court noted that this issue had previously been decided in favor of the city in *Kanter I* and,

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[2] R.C. 102.01(C)(3)(a) provides that a public agency does not include the following:

> A department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; that does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated[.]

moreover, that Kanter's failure to respond to the defendants' contention on this issue constituted a waiver of the claim. Trial court's May 5, 2021 memorandum of opinion and order, ¶ 2.

{¶ 9} In regard to Kanter's claim that the appointment of members to the RJTF was improperly done in executive session, the trial court found, "[u]pon review of the parties' briefing, and accompanying statutory and legal authority, * * * that the [RJTF] meets the definition of 'public body' within the meaning of R.C. 121.22(B)(1)." *Id*. at ¶ 4. Thus, the court found that the members of the RJTF were public officials and city council was permitted to enter into executive session to consider appointments to the task force.

{¶ 10} Kanter now appeals, raising the following sole assignment of error for our review:

> The trial court erred in granting the Defendant's [sic] Motion to Dismiss because members of the Cleveland Heights Racial Justice Task Force (RJTF) are not employees or public officials as considered in Ohio Revised Code Section 121.22(G)(1), and therefore, Council did violate Ohio Sunshine Laws by discussing the members' appointment in executive session.

Law and Analysis

Standard of Review

{¶ 11} We review rulings on Civ.R. 12(B)(6) motions to dismiss under a de novo standard. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. * * * Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party."

NorthPoint Props. v. Petticord, 179 Ohio App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶ 11 (8th Dist.). "For a trial court to grant a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [him or] her to relief.'" *Graham v. Lakewood*, 2018-Ohio-1850, 113 N.E.3d 44, ¶ 47 (8th Dist.), quoting *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2018-Ohio-6167, 967 N.E.2d 1249, ¶ 3 (8th Dist.).

R.C. 121.22: Ohio's Open Meetings Act

{¶ 12} R.C. 121.22, Ohio's Open Meetings Act seeks to prevent public bodies from engaging in secret deliberations on public issues with no accountability to the public. *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 14 (12th Dist.). The statute is to be "liberally construed" to require public officials to take official action and conduct deliberations upon official business only in open meetings unless the subject matter is specifically excepted. R.C. 121.22(A). Likewise, R.C. 121.22(C) specifies that "[a]ll meetings of any public body are declared to be public meetings open to the public at all times."

{¶ 13} There are exceptions, however, and public officials may discuss certain sensitive information privately in an executive session. *Hardin* at ¶ 15. An executive session "'is one from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present.'" *Id.*, quoting *Thomas v. Bd. of Trustees of Liberty Twp.*, 5 Ohio App.2d 265, 268, 215 N.E.2d 434 (7th Dist.1966). R.C. 121.22(G) lists the matters that a public body may consider in

executive session. The exceptions to public meetings contained in R.C. 121.22(G) are to be strictly construed. *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 93 (12th Dist.).

{¶ 14} Relevant to this appeal, "public body" is defined as follows:

> Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution.
>
> Any committee or subcommittee of a body described in division of (B)(1)(a) of this section * * *.

R.C. 121.22(B)(1)(a).

{¶ 15} Also relevant to this appeal is the exception to the general open-meeting requirement contained within R.C. 121.22(G)(1). The exception provides, in relevant part, that a public body may convene an executive session:

> To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing.

R.C. 121.22(G)(1).

{¶ 16} This appeal requires us to decide two issues: (1) whether the RJTF was a public body, and (2) whether consideration of members to be appointed to the RJTF was properly conducted in executive session.

Whether the RJTF was a Public Body

{¶ 17} The first issue we must decide in this appeal is whether the RJTF was a public body. In so deciding, we look to resolution No. 120-2020 that created the

RJTF, and that referenced a prior resolution, resolution No. 78-2020, declaring racism to be a public-health crisis. In light of the city's declaration that racism is a public-health crises, the RJTF was created to

> offer advice and recommendations to City Council on methods and opportunities to analyze and understand the impacts of racism including implicit bias, to enhance racial justice and cultural competence in policing, to improve police-community relations, and to advance racial and ethnic equity and fairness in the Cleveland Heights community.

See resolution No. 120-2020, appendix A to plaintiff's brief in opposition to motion to dismiss.

{¶ 18} The resolution further described the task force's purpose and duties as follows:

> The purpose of the Task Force is to analyze racial justice and equity within the City of Cleveland Heights as a community and as a municipal organization, and to recommend processes, policies and action steps to create an inclusive community where the likelihood of success is not based on race or ethnicity, where law enforcement and the justice system operate free from bias, and where diversity is recognized as a hallmark of a strong, resourceful and resilient community. To accomplish this goal, the Task Force will prepare a report that summarizes the Task Force's efforts and aforementioned recommendations, and includes recommendations on whether the City should establish a Commission or Commissions to serve purposes similar to the Task Force's purposes on an ongoing basis. The Task Force shall adjourn and complete its work not later than nine months after its first meeting, unless this period is extended by Council.

Id.

{¶ 19} The resolution further stated that the members would be composed of 20 residents of the city of Cleveland Heights, five nonresident members representing Cleveland Heights businesses, and the members were to select a chairperson, a vice-chairperson, and a secretary. *Id*. The members would serve without compensation. *Id*.

{¶ 20} The defendants contend, and we agree, that the RJTF here is similar to a citizens advisory committee that was the subject of *Thomas v. White*, 85 Ohio App.3d 410, 620 N.E.2d 85 (9th Dist.1992). In *Thomas*, the committee advised the Summit County Children Services Board. The plaintiff contended that that committee was not a public body because it did not engage in decision making. The Ninth Appellate District disagreed, reasoning as follows: "First of all, a strict reading of R.C. 121.22(B)(1) leads us to the conclusion that a committee need not be a decision-making body in order to be a public body. However, even if the committee need be a decision-making body, we hold that the committee is such." *Id*. at 412.

{¶ 21} The Ninth District noted that the committee made recommendations to the children services board, furthered cooperation between the board and other agencies, conducted studies of the effectiveness and need for certain services for children, and advised the board on policies relating to the provision of services to children. "The subject matter of its operations is the public business of [the children services board], and each of its duties involves decisions as to what will be done." *Id*. Moreover, the court noted that one member of the committee was to serve as chairman and an ex officio voting member of the board, which the Ninth District found involved "decision making." *Id*.

{¶ 22} We find the purpose and duties of the committee in *Thomas* to be similar to the purpose and duties of the RJTF here. Specifically, the RJTF was tasked with making recommendations to the city of Cleveland Heights relative to "processes, policies and action steps to create an inclusive community," and

preparing a report detailing its efforts and recommendations, including whether the city should establish a commission or commissions. The RJTF was also required to select a chairperson, vice-chairperson, and secretary. All of this supports that the RJTF was a decision-making body.

{¶ 23} Moreover, as mentioned, it has been held that the legislature "coupled [the definition of 'public body'] with an instruction to construe [the statute] liberally." *Weissfeld v. Akron Pub. School Dist.*, 94 Ohio App.3d 455, 457, 640 N.E.2d 1201 (9th Dist.1994); *Thomas* at *id.* To that end, the Ohio attorney general has opined that decision making has been broadly construed relative to advisory committees "because such committees necessarily make decisions in the process of formulating their advice." 1994 Ohio Atty.Gen.Ops. No. 94-096, 2-476. In 1994 Ohio Atty.Gen.Ops. No. 94-096, the attorney general concluded that a committee of private citizens and various public officers or employees that was established by a board of health of a general health district for the purpose of advising the board on matters pertaining to the administration of a state or federal grant program was a public body subject to the mandates of R.C. 121.22. *Id.* at 2-473.

{¶ 24} In another attorney general opinion, 1992 Ohio Atty.Gen.Ops. No. 92-077, the attorney general opined that an advisory committee legislatively created by a board of county commissioners to make recommendations to the board on matters relating to a proposed county jail was a public body under R.C. 121.22. The attorney general reasoned that because R.C. 121.22 would require the board of county commissioners to deliberate its official business in open meetings, unless

excepted under the statute, the statute would also require "a committee created by the board of county commissioners for the purpose of advising the board about matters which the board itself could discuss only in an open meeting, also to deliberate and formulate its advice about such matters only in public." *Id.* at 2-325. According to the attorney general, "[t]o conclude otherwise would allow a public body to circumvent the requirements of R.C. 121.22 merely by assigning to an advisory body those portions of its deliberations of the public business which it seeks to shield from public scrutiny; such a result would be clearly contrary to the legislative intent expressed in R.C. 121.22(A)." *Id.*

{¶ 25} The Second Appellate District has also held that a task force was a public body. *Esrati v. Dayton City Comm.*, 2d Dist. Montgomery No. 28062, 2019-Ohio-1021. The task force at issue in *Esrati* was a school facilities task force that was formed to gather financial information and assist the school board in financial decisions. The Second District agreed with the trial court in that case that the task force was a committee or sub-committee of the "decision-making body, the Board of Education and met the definition of a 'public body' under the Open Meetings law." *Id.* at ¶ 10.

{¶ 26} Upon careful consideration of the law and the purpose and duties of the RJTF, we find that RJTF was a public body. The task force was no different than a committee. Its status as a public body remains whether it is deemed as a decision-making body or a committee of a decision-making body, that is, the city of Cleveland Heights.

Whether the Consideration of Potential RJTF Members was Properly Conducted in Executive Session

{¶ 27} The second issue we are called upon to consider in this appeal is whether the consideration of potential members to the RJTF was properly conducted in executive session. As mentioned, there are exceptions to the public-meeting requirement that are contained in R.C. 121.22(G); if one applies, then the matter is properly considered in executive session. The relevant exception for this case is set forth under R.C. 121.22(G)(1) that provides, in pertinent part, that a public body may convene an executive session:

> To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing.

R.C. 121.22(G)(1).

{¶ 28} R.C. 121.22 does not define "public official," but it is defined in R.C. 149.011 that governs governmental documents, records, and reports. R.C. 149.011 defines "public office" to include "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A). "Public official" is defined under the statute to include "all officers, employees, or duly authorized representatives or agents of a public office." R.C. 149.011(D). R.C. 149 has been applied vis-à-vis R.C. 121.22. For example, in 1995 Ohio Atty.Gen.Ops. No. 95-001, the attorney general opined that a passport-administrative agency that was operated by a private not-for-profit agency pursuant

to Ohio Adm.Code 5101:3-31-03(A)(1) is a "public office" as defined at R.C. 149.011(A) for purposes of the public records law and a "public body" as defined at R.C. 121.22 for purposes of the open meetings law. 1995 Ohio Atty.Gen.Ops. No. 95-001, at 2-6.

{¶ 29} Thus, using the definition of public official set forth in R.C. 149.011(D), we find that members of the RJTF were public officials. Specifically, they were "duly authorized representatives or agents of a public office," the public office being the city of Cleveland Heights. Kanter contends that private citizens cannot be considered public officials for the purpose of R.C. 121.22. We are not persuaded. Under the General Assembly's expressed intent that R.C. 121.22 apply to all bodies that are comprised of public officials, a member of a public body — irrespective of whether the member is otherwise an employee or elected or appointed official — is a public official. Moreover, under R.C. 149.011(D), the RJTF members were the "duly authorized representatives or agents" of the city. Finding the members to be "public officials" does not create the "illogical" consequence that Kanter contends — that council can declare private citizens are public officials. The city and council did not broadly and generally declare private citizens as public officials. Rather, the individuals were considered public officials for the specific purpose of serving on the RJTF.

{¶ 30} In another Ohio attorney general opinion, 1980 Ohio Atty.Gen.Ops. No. 1980-083, the attorney general opined that "a county central committee of a political party is a public body and its members are public officials for purposes of

R.C. 121.22." *Id.* at 2-331. The attorney general further opined that such a committee "may discuss the appointment of a person pursuant to its [statutory] duties * * * in executive session." *Id.*

{¶ 31} Upon careful consideration of the pertinent law, we find that the RJTF members were public officials and the city was permitted to discuss potential members to the task force in executive session under the exception to open meetings set forth in R.C. 121.22(G)(1).

Conclusion

{¶ 32} The RJTF was a public body, its members were public officials and, therefore, the city of Cleveland Heights and its council members acted lawfully in discussing the appointment of members to the task force in executive session. As such, Kanter's complaint stated no claim upon which relief could be granted and the trial court properly dismissed it. Kanter's sole assignment of error is overruled.

{¶ 33} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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JAMES A. BROGAN, JUDGE*

MARY J. BOYLE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

*(Sitting by Assignment: Judge James A. Brogan, retired, of the Second District Court of Appeals.)