MAR 2014

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO, EX REL., JACK CHRISMAN	:	**CASE NO. 11CV80194**
Plaintiff,	:	
VS.	:	**TRIAL DECISION**
CLEARCREEK TOWNSHIP, WARREN CO., OHIO, et al.	:	
Defendants,	:	

This matter came on for trial January 30, 2014 and January 31, 2014 on the relators request for a statutory injunction to prohibit the defendants from future violations of the Ohio "Open Meetings Act" ("OMA"), §121.22 et seq. of the O.R.C, based on their alleged previous violations. Many of the pertinent facts were not disputed herein. The Court finds without dispute that the Township Trustees made a regular practice of two or all three trustees meeting in the office of the Township Administrator, Dennis Pickett, approximately 30 minutes prior to the scheduled public meeting at 6:30 p.m. During these gatherings, which the Court finds fit the definition of "meetings" as defined in §121.22 of the O.R.C., the Court also finds that "deliberations" did take place on occasion. The gathering of the majority of the trustees, while not illegal per se, invites the specter that decisions are being made in a back room such that the OMA, known in the vernacular as

the "Sunshine Law", is in danger of being violated whenever such a gathering of the majority takes place.

The defendants, who are now limited to the Township and the current Trustees with an agreement that no damages or attorneys fees will be sought from any individual trustee but rather from the respondent Clearcreek Township solely, violated the Opening Meetings Act in the following:

First, the discussion about Scott Smith's pay raise as the Township maintenance superintendent certainly led to discussions wherein Trustee Lamb made clear that he was dissatisfied with the administrator's recommendation to award only a 3% raise and that he believed a 5% raise was merited. There is no question in the Court's mind that the matter was discussed and even though no formal agreement was reached, it is obvious from the testimony that the trustees individually decided that they would accept a 4% raise when the matter came before the public. This matter, since it was it is a personnel matter, could have been conducted in executive session, but the trustees did not opt to follow that procedure. As with all of the following mentioned violations, the Court finds that no minutes were kept of the meeting whether it is called pre-meeting or whatever other label is attached to it. As with the below stated violations, the Court finds that a decision was reached whether or not formally expressed since there was absolutely no public discussion of a basis for the decision to arrive at a 4% raise in the scheduled public Township meeting. The Township would have the Court believe that without any input from the Trustees, the administrator simply raised the amount recommended to

4%. The Court does not believe that that is a reasonable interpretation of the evidence nor a reasonable conclusion, which follow from the evidence.

Second, the lawn care contract for Patricia Allyn Park involved multiple violations of the Sunshine Law. Trustees Anspach and Lamb specifically met with the park director and discussed reasons why the contract should be awarded to the company that had done a fine job of fertilizing the grass and other lawn care matters. While the Court, in none of this decision attempts to second guess or fault any of the decisions made by the Trustees, it is the process by which they arrived at the decisions that the Court finds fault with. As with certain other topics discussed below, the Court finds that removing an item from the agenda is in fact a "decision". Any competitive bidder or even a nosy member of the public who read the agenda would come expecting the Trustees to discuss and deliberate on the contract for lawn care at the meeting set for May 12, May 26, and June 9, of 2010. The decision to remove the items from the agenda likely was made by the administrator, but only after discussion and input from the Trustees who indicated they wanted additional information. Therefore, the public is deprived of knowing why the matter is being removed from the agenda when it is done so not in the open meeting, but rather at the "pre-meeting" meeting.

Third, relator alleges that the decision to waive health insurance by the Trustees also was a violation. The Court disagrees. The only evidence supports the finding that the Trustees truly were interested in being provided with information and it was obvious that they could not accept increased insurance benefits as this would be an improper increase in compensation during their term, which is prohibited by the Ohio

Constitution. Therefore, the Court finds that no decisions were made in violation of the Sunshine Law and therefore that matter is not one in which the Court relies upon in granting a statutory injunction here.

Fourth, painting of the Administration Building involved only the decision to remove the matter from the agenda at the request of Trustee Anspach. Even though no formal role call was taken, the Court nonetheless finds that removing an agenda item with the acquiescence of the Trustees is in effect a decision for the same reasons stated above re: the lawn care contract for Patricia Allyn Park. The public is entitled to hear why an agenda item is being pulled and when it will be re-scheduled. People who are interested in the Township business have the right to expect agenda items to be addressed. While there are many legitimate reasons for postponing a decision, the act of deciding to postpone is one in which the public deserves to know some reason for and therefore such decisions cannot be made where a majority of the Trustees are present.

Fifth, changing electrical power from Duke Energy to Glacial Energy was not proven to the Courts satisfaction to be a violation of the Sunshine Law. The Trustees never made any commitment but merely asked for additional information. While the presence of the majority of the members again as noted above, invites the specter of potential abuse, no actual evidence was produced of a decision being made prior to the public meeting.

Sixth, the Township clearly agreed to change its zoning policy concerning nuisances during a pre-meeting meeting. Mr. Palmer as the Zoning Inspector performed his duty by providing information but it is obvious to the Court that the decision to change policy was made, even if

not overtly, at least consciously by the Trustees, prior to going into the public hearing. There was little or no discussion on such an important topic in the public hearing and it seems clear that the decision had to have been made by the Trustees before entering the public hearing.

The respondents, in their written argument, discuss additional matters not raised by the relator's arguments. Specifically, they discussed disconnection of Farnese Court from Bunnell Hill; acquisition of Gitizinger Land; purchase of insulation; acquisition of Gabbard land; Pickett's new employment contract and portable restrooms at Patricia Allyn Park. The Court declines to rule as to any of these specifically other than to note that the Court agrees with the respondents that no evidence of actual decisions being made concerning any of these topics ever was presented. The retention of Mr. Pickett as the Administrator was contentious. Trustee Lamb advocated for his dismissal. New Trustee Anspach wavered on this topic and ultimately decided to agree with Mr. Wade that this was not justified. Therefore, while discussions undoubtedly took place in private, no evidence of decisions being made was ever presented to the Court.

Having determined that violations of the OMA did occur and are likely to continue to reoccur unless enjoined the Court grants a permanent injunction against Clearcreek Township, the present Trustees and any future Board of Trustees from violating the Open Meetings Act. This Court does not have the authority to prohibit a majority of the Trustees from being present at any given time. The Act does not have such far-reaching implication. However, the Trustees were verbally warned at the conclusion of the evidence and are warned again herein to be very circumspect whenever a majority of the Trustees are present in the same room for

whatever purpose. The majority always has the power to decide legitimate Township business. They, however, cannot do so unless their deliberations are open to the public, scheduled in advance, and proper minutes are recorded of what actions are ultimately taken.

Respondents touch upon the lack of intent by the Trustees to violate the law. The Court agrees that there was absolutely no evidence that any of this behavior was mean spirited or being done to deliberately avoid a cumbersome statute. The Court finds the Trustees legitimately wanted to know more information to be able to do their job to the best of their ability. However, mens rea is not a component of the statute. Rather, it is a strict liability standard. Public bodies are not free to ignore the Sunshine Law no matter how beneficently motivated. The Court does agree that intent can be utilized as a factor in awarding attorney fees, but finds that it has no bearing on the issue of whether or not the statutory injunction lies.

The Court therefore ORDERS the matter now scheduled for a hearing on fees and statutory damages for the violations that the Court has found. The Assignment Commissioner shall schedule a hearing as soon as calendars of the Court and the attorneys allows.

IT IS SO ORDERED.

J. Flannery

JUDGE JAMES L. FLANNERY

c: Christopher Finney, Esq.
Curtis Hartman, Esq.
John Smith, Esq.
Assignment Commissioner