Washington State Court of Appeals, Division III

EUGSTER, Appellant, v. CITY OF SPOKANE, et al., Respondents

110 Wash.App. 212, 39 P.3d 380 (2002)
No. 20078-7-III
February 5, 2002
Reconsideration Denied March 18, 2002

BROWN, A.C.J.

Stephen K. Eugster appeals the dismissal of his complaint against the City of Spokane, Spokane City Council, and four Council Members over the selection process proposed to fill a vacant Council position. Mr. Eugster alleged violations of the Open Public Meetings Act, (OPMA) chapter 42.30 RCW, entitling him to attorney fees, equitable relief and declaratory judgment. . . . Because genuine issues of material fact exist as to whether a "meeting" took place in violation of the OPMA, we affirm in part, reverse in part and remand for fact-finding and consideration of attorney fees.

FACTS

In late 2000, a Spokane City Council (Council) position was vacated. The Spokane City Charter, section 8(b), provided vacancies were to be filled by a majority vote of the remaining Council Members, but did not detail an exact process.

On January 2, 2001, the Council discussed the vacancy during its regularly scheduled legislative session. Council President, Rob Higgins, suggested each Council Member submit five names from among the applicants. A committee of three Council members would then reduce the recommended applicants to five finalists who would be interviewed by the Council. In response, Council Member Stephen Eugster opined that if the Council chose to follow this recommendation, the Council would need to adopt an interim rule. A motion to adopt President Higgins's suggestion passed by a majority vote (3-2), but was continued to the next meeting because it did not receive the necessary four votes to pass. Council Member Phyllis Holmes was not present at this meeting. The matter was continued to January 8.

On January 8 at the Council's briefing session, President Higgins brought up a January 5 Memo to the Council suggesting a revised selection process and stating: "I think we've resolved the differences with the majority of the Council." Clerks Papers (CP) at 75. The memo indicated President Higgins formulated the suggestion in a meeting with Council Members Roberta Greene and Steve Corker. Mr. Eugster refers to the process described in the January 5 Memo as the "Procedure" in his later filed complaint and in the briefing here.

Mr. Eugster asked if President Higgins was making the Procedure a new rule. President Higgins indicated the resolution was not a rule and explained: "This is a process that we're adopting for the interviews." CP at 75. Then, President Higgins elaborated: "And I believe, I've talked to each Council Member, the majority is in agreement that this is a process that we'll use for this selection process." CP at 75-76. Mr. Eugster immediately objected:

> First of all, you violated the Open Meetings Act because the process is a public, or a governmental action and you have to take that action in a public meeting. You can't go out and gather up your votes and then announce to the constituents or the electors of this City that you've reached a resolution. Secondly, a resolution, or your proposal, has to be adopted at a Council meeting as a rule, and you can only do that by properly submitting the matter as a legislative agenda item under our Council rules.

CP at 76.

President Higgins bypassed Mr. Eugster's concerns, stating:

> Anything else? Okay. Any other comments? Okay. Thank you for your input. We'll go ahead and follow that process and hopefully come to some agreement on a Council position.

CP at 76. When pressed by Mr. Eugster, President Higgins explained he had "ruled that this is a legitimate process" and when pressed again, President Higgins ruled Mr. Eugster "out of order" and cut off discussion. CP at 77.

At the later legislative session on January 8, Mr. Eugster again voiced his concerns. In response, President Higgins indicated the January 5 memo contained an error. The Council did not intend to "select" a final Council member in executive session. CP at 80. Later at the same session, responding to Council Member Greene's request to explain the final process and the January 5 Memo, President Higgins granted that Mr. Eugster, "is correct when he-because the Memo was incorrect if it stated that we are going into Executive Session." CP at 82. Then, President Higgins related his understanding of the process, basically a reiteration of the January 5 Memo except for the stated correction. Instead of the Procedure, in the amended process the Council would "discuss" the finalists at executive session, then publicly vote at the January 29 regularly scheduled council meeting. CP at 82. For clarity we refer to this understanding as the "amended process."

The Council Action Memorandum of the January 8 events detailed President Higgins's briefing session remarks related to the Procedure: "He [President Higgins] noted that a majority of the Council Members is in agreement with this process." CP at 33. The Memorandum detailed the amended process as discussed in the later legislative session.

On January 9, Chief Administrative Assistant Reagan Oliver sent an e-mail to Mr. Eugster, explaining she had drafted the January 5 Memo in error. The memo should have read that the Council would "discuss" the final interviews in executive session with the actual selection to be made during a regular Council meeting. CP at 110.

On January 10, Mr. Eugster filed suit against the City, the City Council, President Higgins, and Council Members Corker, Greene and Holmes (Defendants). The complaint claimed: the Procedure was a final action violating the OPMA (Count 1) [and] the Defendants conducted a meeting where action was taken with knowledge the meeting violated the OPMA (Count 2) . . . .

On January 29, pursuant to motion by Mr. Eugster, the trial court entered an order for the Defendants to show cause why, on February 13, the relief sought in Mr. Eugster's complaint, including equitable relief, civil penalties and attorney fees, should not be granted. . . . .

* * * * *

At the February 13 show cause hearing, the trial court reasoned that to violate the OPMA, a "meeting" had to occur, with an "action" taken. CP at 226. Noting the conjunctive and before the words "final action" in the definition of "action," the trial court interpreted the definition of "action" to require a "final action." CP at 227. Further, a meeting required the contemporaneous presence, whether in person or by telephone, of a majority of the Council. The court noted Council Member Holmes was not present at any meeting at which any "action" took place. At most, three of six Council Members engaged in discussions resulting in a permissible discussion draft, the Procedure. The trial court likened the discussions to lobbying or "running ideas up the flagpole." CP at 229-30. Thus, it reasoned the Procedure was merely a discussion draft.

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. . . . The court entered a final order dismissing Mr. Eugster's complaint. Mr. Eugster appealed.

ANALYSIS

A. OPMA

The broad issue is whether the trial court erred in dismissing Mr. Eugster's complaint as a matter of law based upon no evidence of an OPMA violation.

The trial court dismissed Mr. Eugster's complaint as a matter of law, after reviewing evidence consisting entirely of affidavits. Thus, review is analogous to a summary judgment. *Brinkerhoff v. Campbell*, 99 Wash.App. 692, 696 (2000). We review de novo to determine if the evidence, viewed in a light most favorable to the nonmoving party, is sufficient to present a genuine issue of material fact so as to preclude judgment as a matter of law. CR 56(c); *Wood v. Battle Ground Sch. Dist.*, 107 Wash.App. 550, 557 (2001). Where the parties ask this court to interpret and construe the OPMA, appellate review is de novo. *Id.* at 558.

The OPMA contains a powerful public policy statement. "The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly." RCW 42.30.010. The purpose of the OPMA is to permit the public to observe all steps in the making of governmental decisions. *Cathcart v. Andersen*, 85 Wash.2d 102 (1975). We must give the OPMA a liberal construction to further its policies and purpose. RCW 42.30.910.

To defeat summary dismissal of an OPMA claim, the plaintiff must submit evidence showing "(1) that a 'member' of a governing body (2) attended a 'meeting' of that body (3) where 'action' was taken in violation of the OPMA, and (4) that the member had 'knowledge' that the meeting violated the OPMA." *Wood*, 107 Wash.App. at 558. Because no dispute exists about the Council Members being members of a governing body, we focus on the last three elements.

1. Meeting

With certain exceptions, the OPMA dictates that "[a]ll meetings of the governing body of a public agency shall be open and public." RCW 42.30.030. A "meeting" takes place when a majority of the governing body meets and takes "action." RCW 42.30.020(4); *Wood*, 107 Wash.App. at 564.

Here, the Defendants argue no evidence of a "meeting" exists because the meeting with President Higgins and Council Members Corker and Greene did not constitute a majority. Council Member Holmes denies meeting in private with the other three Council Member Defendants. Nevertheless, the record contains competing inferences raising factual issues as to whether a meeting took place.

First, at the January 8 briefing session, President Higgins announced, "I think we've resolved the differences with the majority of the Council." CP at 75. While this alone may express speculation or conjecture, the January 5 Memo indicated the agreement of Council Members Greene and Corker in a meeting with President Higgins. Without motion, President Higgins declared, "This is a process that we're adopting for the interviews." CP at 75. President Higgins "ruled that this is a legitimate process." CP at 77. President Higgins related: "And I believe, I've talked to each Council Member, the majority is in agreement that this is a process that we'll use for this selection process." CP at 75-76. The Council Action Memorandum reported regarding the January 8 briefing session: "He [President Higgins] noted that a majority of the Council Members is in agreement with this process." CP at 33.

Second, at the later legislative session on January 8, Council Member Eugster, citing the OPMA, again raised the issue of the Procedure, stating, "the Council President announced that he had polled the members of the City Council and had gotten the consent of a majority of the members of the

City Council with regard to a Council appointment process that he has included in a memorandum to us dated January 5, 2001." CP at 79.

President Higgins responded in essence that the amended process was what had been intended with the selection of a council member to be made in a public, not an executive session, but did not respond to the polling charge.

Third, Council Member Greene, regarding the "final process" discussed at the briefing session, addressed President Higgins: "Once and for all, can we just go through the memo that you have provided and say that we're moving on." CP at 82. President Higgins, after granting that Mr. Eugster was "correct" because the memo was incorrect, then reiterated the amended process and concluded by saying, "that's the process that we agreed to this afternoon." CP at 82.

Fourth, Mr. Eugster points to Council Member Holmes's exchange of e-mail while on vacation. The *Wood* court held that the strong public policy and mandate for liberal construction dictated a broad definition of "meeting" that encompassed discussions via e-mail. *Wood,* 107 Wash.App. at 564. The *Wood* court differentiated between the passive receipt of information by e-mail, and the active discussion of issues by exchanging e-mails. *Id.* Under *Wood,* the OPMA does not require the contemporaneous physical presence of the Council Members in order to constitute a meeting. *Id.* at 562-63. Council Member Holmes explained by affidavit that while out of the country e-mail was sent to her from an administrative assistant regarding scheduling of interviews and that she merely replied the next day that the schedules were "fine with me." CP at 102. Even so, under the *Wood* standards and the circumstances here, we cannot say further inquiry is unwarranted.

2. Action

Defendants next argue a "meeting" did not occur because no action took place. "Action" is defined as "the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." RCW 42.30.020(3). "'Final action' means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance." *Id.* Stressing the conjunctive "and" before final action the trial court interpreted the definition of an action to require a final action. "There has to be also 'and final action.' ... It is only when deliberations, discussions, et cetera, are combined with final action that a violation can be found to have occurred." CP at 227. We disagree with this interpretation.

The clear language of the statute defines action as "the transaction of the official business of a public agency by a governing body." RCW 42.30.020(3). The statute then goes on to give a nonexclusive list of examples, including final action. Action does not require final action. In addition to final actions, the list of examples includes discussions, deliberations, consideration, and review. The governing body members need merely "communicate about issues that may or will come before the Board for a vote." *Wood,* 107 Wash.App. at 565. The trial court's interpretation is overly narrow, not liberal. The case law is more inclusive.

In *Organization to Preserve Agr. Lands v. Adams County,* 128 Wash.2d 869, 883 n. 2 (1996), the court noted the plain language of the OPMA does not distinguish between "action" and discussions short of action because the definition of action includes "discussion." In *Miller v. City of Tacoma,* 138 Wash.2d 318, 326-27 (1999), the court also rejected an argument that action requires final action. Instead, the court held that all actions, including final actions, must be done in a meeting open to the public. *Id.*

Moreover, a "final action" does not always require a formal vote, but also encompasses a collective positive or negative decision. RCW 42.30.020(3); *Miller,* 138 Wash.2d at 330. Thus, a

consensus on a position to be voted on at a later council meeting would qualify as a collective position and a "final action." *Id.* at 330-31. Thus, had a "meeting" occurred, an "action" would have occurred.

3. Knowledge

The final element in an OPMA penalties claim requires evidence supporting an inference the members knew they were meeting in violation of the OPMA. *Wood*, 107 Wash. App. at 566. In *Wood*, some school board members had stated concerns that using e-mails may violate the OPMA. This evidence was sufficient to create a material fact issue as to whether the school board members had actual or constructive knowledge they were meeting in violation of the OPMA. *Id.* at 566-67. While Mr. Eugster clearly voiced his concerns to the Council about his perception of OPMA problems in January, no earlier evidence similar to the type found in *Wood* is present in this record. On this last point, we must reject Mr. Eugster's speculative argument, that somehow the Council's decision to ignore his OPMA objections in January evidences prior knowledge.

On the other hand, President Higgins's announcement that he reached a resolution with the majority, and that the majority was "adopting" the Procedure, provides inferences that at some point before January 8 he gathered a collective position on an issue from a majority of Council Members. As to President Higgins, these declarations indicate knowledge of an agreement likely reached in violation of the OPMA, but it does not necessarily follow that each of the Council Members polled would know that he or she was acting in concert with the others. These issues are best left for fact-finding.

If indeed a majority did reach an agreement outside the OPMA boundaries, it would make no difference whether that agreement did or did not, in its initial form, violate other OPMA provisions proscribing agreements at executive sessions. Thus, it is not decisive that the Procedure was later corrected in the amended process and in the final resolution.

Additionally, while the knowledge element is required to impose the civil penalty, it is not a necessary element for recovering attorney fees. *Miller*, 138 Wash.2d at 331-32. If an improper meeting took place, even without the Council Members' knowledge that the meeting violated the OPMA, then attorney fees are provided by the Act. RCW 42.30.120(2). While the trial court was correct in reasoning the OPMA violation set forth in the January 5 Memo was mooted when the Procedure and the amended process were superceded by Resolution 01-05, it remains an open question whether Mr. Eugster's actions come within the attorney fee provisions of the OPMA.

However, if at fact-finding no improper meeting is found, Mr. Eugster is not entitled to attorney fees or a civil penalty under the OPMA. This is so even if President Higgins's announcement on January 8 may have violated Council procedural rules and, possibly RCW 35.22.288 (requiring a city to give public notice of its preliminary agenda for upcoming meetings). As noted, the focus is whether an improper meeting took place, not if the Procedure would have violated the OPMA had it not been abandoned and superseded before Mr. Eugster filed his lawsuit.

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CONCLUSION

. . . . [C]onsidering the strong public policy statement and goals underlying the OPMA, our mandate to liberally construe its provisions, and our conclusion that the evidence raises material issues of fact as to whether a proscribed meeting took place, we reverse the trial court's dismissal of the alleged OPMA violation claims and remand for proceedings consistent with this opinion . . . .

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

WE CONCUR: SCHULTHEIS, J. and SWEENEY, J.