



Wisconsin Court of Appeals Issues Decision on Walking Quorums

School board members and officials recognize the importance of the Wisconsin Open Meetings Law as it relates to conducting school board business. The Open Meetings Law requires that every meeting of school boards and other governmental bodies be held in open session unless an exemption applies. Further, every meeting of a governmental body must be preceded by public notice. As a result, no board business, regardless of whether at the school board or board committee level of consideration, can lawfully be conducted without proper notice or outside of the public's view.

School board members and officials must also be aware of the potential for an Open Meetings Law violation as the result of a "walking quorum." A walking quorum can occur if members of a governmental body participate in a series of meetings among separate groups of members, each with less than a quorum, to discuss business and come to tacit or express consensus over an issue that will come before the entire body. A walking quorum can occur as a result of phone conversations or the exchange of emails, social media, or text messaging.

In a recent case, *State ex rel Zecchino v. Dane County*, 2017AP2 (Wis. Ct. App. Feb. 27, 2018), the Wisconsin Court of Appeals addressed the issue of a walking quorum. This case serves as an important reminder that members of a governmental body must be cautious about communicating about issues with other members, particularly in a way that may show some consensus over an issue that may be addressed by the body at a later date. And, even if board members do not violate the Open Meetings Law with such communications, the public perception that a school board or other governmental body (such as board committees) may be trying to conduct business in secret can be very disruptive and lead to a complaint and litigation.

Background Facts

In *State ex rel Zecchino*, a complaint was brought by Adams Outdoor Advertising Limited Partnership (Adams) against the Dane County Board of Supervisors (County Board) and certain supervisors of the County Board regarding the renewal of a billboard lease. Adams leased three billboards near the Dane County Regional Airport, and the leases were nearing expiration. Prior to expiration, Adams sought to renew the lease. The Airport Commission, the Public Works Committee, and the Personnel and Finance Committee all voted in support of renewing the lease. However, on April 7, 2016, the County Board rejected the lease in an 18-16 vote.

After this vote, Adams brought a complaint alleging that prior to the April 7 vote, a number of County Board supervisors engaged in discussions outside of a properly noticed meeting with the purpose of negatively affecting the vote on the lease. Specifically, the complaint alleged that one supervisor (Paul Rusk) emailed multiple other supervisors prior to the vote and that Mr. Rusk also tried to call another supervisor to discuss her vote. The complaint identified the specific emails at issue, which included emails from Mr. Rusk to constituents and a few other supervisors indicating his opposition to the lease renewal and inquiring about their votes. The emails generated only limited responses. Based on these emails, Adams alleged that Dane County, the County Board, and the supervisors named in the emails violated the Open Meetings Law by engaging in an illegal “walking quorum.”

Decision by the Court of Appeals

The Court of Appeals noted that two elements are necessary to establish an Open Meetings Law violation: (1) there must be a purpose to engage in governmental business through discussion, decision, or information gathering and (2) the number of members present must be sufficient to determine the parent body’s course of action regarding the proposal discussed. Thus, in order for Adams to prove a walking quorum, it had to show (1) the defendants purposefully engaged in discussions regarding the lease renewal vote and (2) the discussions were held between a sufficient number of County Board members so as to affect the vote. The Court concluded that the complaint failed to allege sufficient facts to meet either of these tests.

The Court first concluded that the emails were mostly one-way messages, which generated few responses. None of the emails reflected any sort of “tacit agreement” between the defendants to vote against the lease. Instead, the emails dealt with scheduling matters, were communications with constituents, asked other supervisors for their opinion, or expressed the supervisor’s own opinion. According to the Court, the fact that Mr. Rusk was aware of certain votes or trying to keep track of votes was not indicative of a walking quorum.

The Court of Appeals noted that the Wisconsin Supreme Court had stated in an earlier case that the legislature did not intend to interfere with necessary government business by applying the Open Meetings Law to any deliberate meeting between two or more government officials. The Court of Appeals acknowledged the circuit court’s recognition that good government may require some communication between board members and that some sharing of information between or before meetings may be beneficial. The key takeaway for board members and officials is to make sure members do not attempt to get “agreement” on how another member may act.

Second, the Court concluded that the complaint did not establish that a sufficient number of supervisors engaged in discussions capable of affecting the vote. Although thirty-four supervisors cast votes, Mr. Rusk only reached out to eight supervisors; he did not email or reach out to a majority of the supervisors (eighteen supervisors). Many of the emails were one-way communications. Of the eight supervisors that were contacted, Mr. Rusk only asked one other supervisor if she was ok voting against the renewal and that supervisor responded saying that she preferred not to vote. According to the Court, her one vote was insufficient to support a walking quorum. In the end, the Court concluded that the assertion that the defendants engaged in illegal activity to affect the vote was “purely speculative.”

Of course, school boards or other governmental bodies tend to be much smaller in number than the County Board in this case. School boards range from 3 to 11 members, and board committees are often even smaller. As a result, the danger is much higher of a walking quorum with a smaller body because fewer members are needed to determine the body’s course of action.

Conclusion

This decision again emphasizes the importance of avoiding walking quorums. Although this case did not find a walking quorum, the Wisconsin Attorney General has found a walking quorum to be present in other situations. For example, a walking quorum problem was addressed by the Attorney General regarding e-mail communications between members of the University of Wisconsin-Madison Athletic Board. The situation involved the approval of a contract with Reebok that required Athletic Board review. The chairman of the Athletic Board sent an email to the members of the Board soliciting their opinions regarding a compromise contract. The Board members replied back to the chairman via e-mail with unanimous support for the revised contract. The Board of Regents subsequently approved the contract. This action was challenged, and the Attorney General concluded that the email communications between Board members constituted a walking quorum and that the Athletic Board had violated the Open Meetings Law.

However, the Attorney General has reasoned that an e-mail message retains the characteristics of a letter or memorandum when it is used as a one-way conduit of information from one member of the board to another board member. Sending a letter or memorandum to a quorum of a board is not by itself the convening of a meeting. A single reply letter or memorandum from the recipient back to the sender, even in the form of an e-mail message, does not make the completed communication a meeting. [Note: The Court of Appeals cited to the Attorney General's Open Meetings Compliance Guide in its decision. The Guide is a very useful resource and is frequently cited by courts. That guide was updated in March 2018 and can be found on the doj.state.wi.us website.]

School board members and officials should remain alert to the dangers of walking quorums. This most recent case serves as a good reminder to avoid such problems and seek legal counsel as necessary.

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