COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1059 **Cir. Ct. No. 2008CV785**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN EX REL. PATRICIA M. WANNINGER,

PLAINTIFF-APPELLANT,

V.

CITY OF MANITOWOC PUBLIC LIBRARY BOARD,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Manitowoc County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 BROWN, C.J. In this appeal, the former Manitowoc librarian, Patricia M. Wanninger, argues that summary judgment against her was inappropriate because a genuine issue of material fact exists as to whether she was terminated in an open or closed session meeting of the City of Manitowoc Public

Library Board. We disagree—Wanninger's only evidence that the vote was in closed session is a letter and an e-mail from the city attorney, who did not attend the meeting, stating that the entire meeting was in closed session. The trial court found that both the letter and the e-mail were inadmissible hearsay evidence. We affirm, but on slightly different grounds. We find that, in context, the city attorney's statements lack probative value as to the issue of whether the Board terminated Wanninger in open or closed session. We also reject Wanninger's other arguments.[1] Therefore, we affirm.

¶2 Wanninger began working as Manitowoc Library Director on February 11, 2008. She was hired as an "at-will" employee and led a staff of about sixty people who filled about thirty full-time-equivalent positions. After receiving co mplaints from library staff, the Board held a meeting on May 8, 2008, where it informed Wanninger of the complaints against her and asked her to create a plan to address those concerns. In response, Wanninger sent a letter to the Board on June 3, 2008, addressing its concerns.

¶3 The subject of this appeal is a meeting the Board scheduled for June 12, 2008, to discuss Wanninger's letter and how it wanted to proceed. Notice

[1] We note up front that it appears that there is at least a question of whether the courts have competency to decide this case because all of Wanninger's claims are brought under the open meetings law, the enforcement of which is governed by WIS. STAT. § 19.97 (2009-10). Section 19.97 requires enforcement actions to be brought by the attorney general, the district attorney in the district where the violation occurred or, under some circumstances, by individuals in the State's name. When it is not followed, this court has held that the trial court lacks competency to proceed. *See* ***Fabyan v. Achtenhagen***, 2002 WI App 214, ¶¶8, 13, 257 Wis. 2d 310, 652 N.W.2d 649. However, the potential competency issue was not addressed in the parties' briefs and does not appear to have been raised to the trial court. It may be that the circumstances under which an individual may proceed were met in this case. We simply do not know for sure.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

of the meeting was posted on the bulletin boards at the library, the city clerk's office, the city attorney's office, and the mayor's office, and it was provided to local publications. The notice stated that a meeting would be held in closed session to discuss "the role, duties, and responsibilities of the Library Director and evaluation of job performance and possible action."

¶4 Wanninger saw the meeting notice but chose not to attend the meeting. Board members who attended the meeting testified generally that the meeting went into closed session almost immediately after it began. During the closed session portion of the meeting, which lasted approximately one hour and twenty minutes, the Board discussed Wanninger's job performance and came to a consensus that Wanninger needed to resign or be terminated. Then, it went into open session long enough to vote to terminate its relationship with Wanninger.

¶5 On June 19, 2008, Wanninger's attorney made a written open records request to Board member Dolly Stokes for notes of the June 12, 2008 meeting. The city attorney, Julianna Ruenzel,[2] responded on Stokes' behalf in a July 25, 2008 letter that there were no notes because the "entire session was in closed session with the recording secretary absent from the meeting." Then, on July 28, 2008, Wanninger's counsel sent an e-mail to the city attorney's office asking for clarification of the city attorney's earlier statement that the entire meeting was in closed session. The city attorney again confirmed, this time via e-mail, that there were no notes from the meeting, this time explaining that

[2] The trial court referred to Juliana Ruenzel as the "assistant" city attorney. But Ruenzel signed her letter and e-mail as the city attorney. And the briefs of both parties refer to her as either the city attorney or the acting city attorney. So, we will refer to her by the title of city attorney.

"[n]othing was handled in Open Session as there was only one item on the agenda which was the closed session matter. The Board called the meeting to order and then went immediately into closed session, had [its] discussion and reconvened into open session and adjourned." Both the letter and the e-mail from the city attorney were erroneous, at least as to the existence of notes from the meeting. Minutes from the meeting are in the record.

¶6 As part of this case, Wanninger filed interrogatory questions to be answered by the city attorney. Two questions asked from whom the city attorney obtained information before writing the July 25, 2008 letter and the follow-up e-mail. The city attorney listed two names: Dolly Stokes and Gloria Wallace. Only Dolly Stokes was present at the meeting, and her deposition testimony reflects that while nearly the entire meeting was in closed session, the vote to terminate Wanninger occurred in open session.

¶7 The trial court granted summary judgment to the Board, in part based on a finding that the only evidence the meeting was in closed session was the letter and e-mail from the city attorney, which were both inadmissible hearsay evidence. It clarified:

> Ms. Wanninger relies on e-mails from the [] City Attorney to support the claim that the vote was in closed session. However, she was not present. I'm not aware of the source of her information. Those e-mails would be hearsay and not admissible. So again, I'll find that the vote did occur in open session.

Wanninger now appeals, arguing primarily that there is a genuine issue of material fact as to whether the vote to terminate her took place in open or closed session. She also makes additional arguments as to why the Board was not entitled to summary judgment in its favor—that notice of the June 12 meeting was

insufficient, that the Board took up matters outside the scope of the notice in the closed session meeting, and that the Board violated the open meetings law when it failed to record the tally of the vote to terminate Wanninger. We will address each of her arguments in turn.

¶8 We review summary judgments de novo, using the same well-known methodology as the trial court. ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶9 Although our review of summary judgments is de novo, some decisions within summary judgment are left to the trial court's discretion. *See* ***id.***, ¶32. For example, the decision whether a submission meets the requirements of WIS. STAT. § 802.08(3) that affidavits be made on personal knowledge and "shall set forth evidentiary facts as would be admissible in evidence" sometimes involves discretionary evidentiary rulings. ***Gross***, 259 Wis. 2d 181, ¶32. That is the case here, where the judge decided that the letter and e-mail from the city attorney's office were inadmissible and therefore did not consider them. We therefore afford the trial court appropriate deference on that issue.

¶10 On summary judgment, the burden for admissibility of evidence is not the same as at trial. A party relying on evidence need not demonstrate its admissibility conclusively; rather, it need only make a prima facie showing that the evidence would be admissible. ***Id.***, ¶31. Then, the burden shifts to the opposing party to show that the evidence is inadmissible. ***Id.*** In general, we will uphold a trial court's evidentiary ruling if we find that it "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and

reached a conclusion that a reasonable judge could reach." ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. Even if the trial court fails to develop its reasoning, we will search the record to see if there is a proper legal analysis that supports the trial court's conclusion. *See* ***id.***

¶11 Wanninger argues that the trial court erred in ruling that the city attorney's statements were hearsay. She argues that they fall into the category of admissions by a party opponent based on the city attorney's status as an agent when the statements were made. *See* WIS. STAT. § 908.01(4)(b)4. We will assume, without deciding, that Wanninger is correct in asserting that the city attorney was an agent. We also will accept her claim that the city attorney made some "admissions." However, the question remains: admissions as to what? In order to be admissible, the city attorney's statements must be relevant—that is to say, they must have a tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Clearly, whether the vote to terminate Wanninger took place in open or closed session is of consequence, so the question becomes whether the city attorney's statements make it any more probable that the *vote* took place in closed session. *See* ***State v. Marinez***, 2011 WI 12, ¶19 n.14, 331 Wis. 2d 568, 797 N.W.2d 399. Based on the record before us, we hold that they do not.

¶12 We begin our analysis by looking closely at the statements made by the city attorney and the context in which they were made. The first letter was written in response to Wanninger's attorney's open records request for all agenda and minutes from meetings of the Board from April 2008 through June 2008. The city attorney responded:

> I have enclosed a copy of the agenda from the Library Board of Trustees' meeting of June 12, 2008, as you requested. The entire session was in closed session with the recording secretary absent from the meeting. The Library has no minutes of the meeting; therefore, I have nothing to send along to you.

Then, Wanninger's attorney followed up with an e-mail asking for clarification of the statement that the "entire session was in closed session." The city attorney clarified:

> As I stated in my July 25 letter, there was no recording secretary at the meeting of June 12, 2008 and no minutes were taken. Nothing was handled in Open Session as there was only one item on the agenda which was the closed session subject matter. *The Board called the meeting to order and then went immediately into closed session, had [its] discussion and reconvened into open session and adjourned.* (Emphasis added.)

¶13 Under the circumstances, the city attorney's statements are not probative of whether the *vote* was in open or closed session. First, it is clear from the record that the city attorney was not at the June 12 meeting and therefore could not have personally observed whether the vote was held in open or closed session. In addition, her initial letter asserting that the "entire session was in closed session" was written in response to an open records request for minutes and agenda, not a question as to whether business was conducted in open or closed session and what occurred in the closed session. When the city attorney was asked specifically about whether the whole meeting was in closed session, she clarified that there was a brief open session, followed by a closed session discussion, followed by another open session before adjourning. That clarification statement is consistent with the note from the meeting and the sworn testimony in the record from those who actually attended the meeting.

¶14 Furthermore, contrary to Wanninger's assertion, the record does not indicate how the city attorney came to the understanding that the entire meeting was in closed session. Although the city attorney did answer an interrogatory question asking who she consulted before responding to the open records request, we do not know *what* information she obtained from them. For example, we have no idea from the record whether either of the people she mentioned explicitly told her the entire meeting was in closed session or if that closed session included a vote. Further, we do not know if the city attorney simply assumed the ultimate fact that the "entire" meeting was closed based on other information they gave her.

¶15 Based on the record before us, we conclude that, even assuming that the city attorney's statements are admissions by a party opponent, Wanninger has not made a prima facie showing in this record that the statements have probative value. And we note that although the trial court framed the issue in terms of hearsay, its reasoning highlights the same concerns we have with relevancy: "Ms. Wanninger relies on e-mails from the [] city attorney to support the claim that the vote was in closed session. However, she was not present. I'm not aware of the source of her information." Because the trial court could properly have excluded the evidence as not relevant, we will uphold the exclusion on other

grounds. *See* ***Hunt***, 263 Wis. 2d 1, ¶34. And without that evidence, there is no genuine issue of material fact.[3]

¶16 We now move to the more technical, legal issues which Wanninger alleges should have prevented summary judgment against her.[4] First, she argues that the notice for the June 12, 2008 meeting was insufficient under WIS. STAT. § 19.84(2), which states that "[e]very public notice of a meeting of a governmental body shall set forth the … subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." This is an issue of statutory interpretation, which we review de novo. ***Kettner v. Wausau Ins. Cos.***, 191 Wis. 2d 723, 732, 530 N.W.2d 399 (Ct. App. 1995).

¶17 Our supreme court has outlined a test for when notice is "reasonably" likely to apprise people of the subject matter of a meeting. *See* ***State ex rel. Buswell v. Tomah Area Sch. Dist.***, 2007 WI 71, ¶¶22, 27-28, 301 Wis. 2d 178, 732 N.W.2d 804. As the ***Buswell*** court explained, whether notice is reasonable is decided on a case-by-case basis. ***Id.***, ¶¶27-28. Factors to be considered include the burden of providing more detailed notice, whether the

[3] Wanninger does argue in her brief that there is an issue of material fact because the trial court failed to consider Stokes' deposition testimony "that the Board had acted in closed session." She then quotes excerpts of Stokes deposition where Stokes explained that the Board came to an agreement in closed session as to the action it wanted to take. We read the deposition in its entirety, however, and Stokes goes on to say that the Board then reconvened in open session to take the actual vote to terminate Wanninger. We see no problem with its discussion of the issue in closed session, *see* WIS. STAT. § 19.85(1)(b) & (c), so long as the vote itself was in open session. And Stokes' deposition testimony does not create a genuine issue of material fact as to whether the Board voted in open or closed session.

[4] Wanninger relies on her contention that the Board fired her in closed session to support many of her legal arguments. We do not address that reasoning because we have already concluded that the record does not contain evidence that she was terminated in closed session.

subject is of particular public interest, and whether it involves nonroutine action that the public would be unlikely to anticipate. ***Id.***, ¶28. In coming to its decision, the ***Buswell*** court also noted that "[t]he determination of whether notice is sufficient should be based upon what information is available to the officer noticing the meeting at the time notice is provided, and based upon what it be reasonable for the officer to know." ***Id.***, ¶32.

¶18 In ***Buswell***, the supreme court rejected as vague and misleading a notice stating that there would be a closed session discussion of "consideration and/or action concerning employment/negotiations with District personnel pursuant to WIS. STAT. § 19.85(1)(c)," which deals with the consideration of employment issues pertaining to individual employees. ***Buswell***, 301 Wis. 2d 178, ¶¶6, 37, 41. In reality, the Board in that case used the closed session to tentatively approve a collective bargaining agreement between it and the Tomah Education Association. ***Id.***, ¶7. Prior to the meeting, the Board had received a letter signed by sixteen community members expressing concern over a provision of the proposed contract. ***Id.***, ¶5. The ***Buswell*** court held that under those circumstances, the notice was insufficient and even misleading, since § 19.85(e) would be the correct statute authorizing consideration of collective bargaining contracts in closed session. ***Buswell***, 301 Wis. 2d 178, ¶¶37-38, 41. In its holding, the court emphasized the public's demonstrated interest in the issues discussed, the lack of burden to provide more specific notice, and the vagueness of the notice because it gave no indication whose employment would be under consideration. ***Id.***, ¶¶36-41.

¶19 In this case, the notice provided by the Board for the June 12, 2008 meeting reads in part:

> Notice is hereby given that the above governmental body will adjourn to a closed session during the meeting as authorized by [WIS. STAT. §] 19.85(1)(c) … which authorize[s] the governmental body to convene in closed session for the purpose of considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.
>
> The specific subject matter which will be considered in the closed session is the following:
>
> > **Discussion of the role, duties, and responsibilities of the Library Director and evaluation of job performance and possible action.**

Wanninger contends that this notice must be deemed insufficient under ***Buswell*** "because it was not reasonably specific enough to apprise the public that the Board intended to take up, in closed session, the question whether to terminate or otherwise discipline its public library director." Regarding the first factor, she argues that the Board "would have assumed no additional burden were it to have prepared a notice that informed the public that it intended to discipline Wanninger at the … meeting, including terminating her employment." She points out that the Board easily could have referred to § 19.85(1)(b), which—unlike § 19.85(1)(c)—refers specifically to the consideration of "dismissal, demotion, licensing, or discipline of any public employee." For the second and third factors, she states that because of the number of employees she supervised, the meeting was of particular importance to the public and that termination of Wanninger's employment was certainly not "routine" or likely to be anticipated based on the meeting notice.

¶20 We disagree with Wanninger's analysis of the ***Buswell*** factors. The bottom line is that the notice indicated whose employment would be discussed (the Library Director's) and that the discussion would entail "evaluation of job

performance and possible action." Such a notice was sufficient to inform those who were interested what was up for discussion. And even though in hindsight, WIS. STAT. § 19.85(1)(b) may have been the more descriptive statute for the notice, there was nothing misleading about the reference to § 19.85(1)(c).

¶21 Importantly, the standard outlined in ***Buswell*** indicates that sufficiency of the notice will be based on the knowledge of the person posting notice at the time when it is posted. *See* ***Buswell***, 301 Wis. 2d 178, ¶32. So all of Wanninger's arguments presume that the Board knew or should have known that discipline and termination would come up during the meeting at the time notice was given. The record indicates otherwise—Stokes, who signed the meeting notice, testified that before the June 12 meeting, she had conversations with other members of the Board about the need to have a discussion "pertaining to the roll and responsibilities of the library director." She explicitly denied any discussions prior to the meeting about possible termination of Wanninger's employment.[5] Under those circumstances, the description of the meeting in the notice was as specific as we could reasonably expect it to be at the time it was provided.

¶22 In a related argument, Wanninger contends that the Board violated the open meetings statute by taking up matters in closed session that were outside

[5] Wanninger points to later testimony that "[t]here was really nothing more left to discuss when [the Board] went into closed session … because … it was an ongoing discussion that we had with Ms. Wanninger … for the best part of April and May." She argues that this testimony shows that Stokes knew or reasonably should have known that the Board intended to discuss termination or other disciplinary measures at the June 12 meeting. We do not view this so simply. While Stokes clearly knew that the Board had serious concerns about Wanninger's job performance, there is no indication in the record that she knew or should have known that discipline and termination, as opposed to other suggestions for moving forward, would come up. And given Wanninger's status as supervisor of so many library employees, we can understand why Stokes would not choose to include the words "discipline" or "termination" in the notice without knowing for certain that the conversation would move that direction.

the scope of the June 12, 2008 meeting notice. *See* WIS. STAT. § 19.85(1) ("No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session."). Wanninger claims that the Board was prohibited from even discussing her termination based on the notice that was given. Again, we focus on the notice's inclusion of the phrase "evaluation of job performance *and possible action*." (Emphasis added.) Simply put, the reference to "possible action" plainly includes discipline and termination. We see no problem here.

¶23 Finally, Wanninger argues that the trial court erred in granting summary judgment in favor of the Board on the issue of its alleged violation of WIS. STAT. § 19.88(3), which states that "[t]he motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection." The Board conceded a "technical" violation because the minutes from the meeting do not reflect the tally of the vote to terminate Wanninger—but it argues that "public policy dictates supporting the Board's decision to terminate Wanninger's employment" nonetheless. *See* WIS. STAT. § 19.97(3) ("Any action taken at a meeting of a governmental body held in violation of this subchapter is voidable …. However, any judgment declaring such action void shall not be entered unless the court finds, under the facts of the particular case, that the public interest in the enforcement of this subchapter outweighs any public interest which there may be in sustaining the validity of the action taken.").

¶24 In balancing the public interest in enforcing WIS. STAT. § 19.88 with the public interest in sustaining the validity of the Board's action, it is apparent that the Board's action must be sustained. First, the facts of this case simply do not favor enforcement of the statute calling for a recording of the roll call, because despite the lack of this specific information, the public has the written minutes and

deposition testimony from three of the people who attended the meeting, all of whom indicated that the vote was unanimous. Through interrogatories related to this case, there is also a public record of who attended the meeting. Therefore, except for the actual roll call, the public has all the information that § 19.88 requires the Board to make available.

¶25 Second, as the Board points out regarding the public interest in sustaining the Board's action, if Wanninger's termination were to be voided, Wanninger "clearly could and would be terminated at the next Board meeting." And if the Board was required to pay her back pay, as Wanninger has requested, she would be paid for a lengthy period of time in which she did no work for the Board. That remedy would be grossly disproportionate to the Board's "technical" offense. Under the facts of this case, the public interest in punishing the Board for failing to record a "roll call" vote is clearly outweighed by the public interest in sustaining the validity of the Board's action.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.