STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**
BRANCH 9

STATE OF WISCONSIN,
EX REL. MARKLEY D. WAHL and
PATRICE O'CONNOR WAHL,
Plaintiffs,

DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

vs.

Case No. 04 CV 1920
Case Code: 30701

STATE OF WISCONSIN JOINT COMMITTEE ON LEGISLATIVE ORGANIZATION,
SENATE PRESIDENT ALAN LASEE,
ASSEMBLY SPEAKER JOHN GARD,
SENATOR MARY PANZER, and
REPRESENTATIVE JAMES KREUSER,
Defendants.

INTRODUCTION

This lawsuit arose after plaintiffs Markley D. Wahl and Patrice O'Connor Wahl were terminated from their employment with the State of Wisconsin Legislative Technology Service Bureau (LTSB), which is a legislative service agency under the supervision and control of defendant State of Wisconsin Joint Committee on Legislative Organization (JCLO). Plaintiffs claim that the JCLO and its members, including individual defendants Senate President Alan Lasee, Assembly Speaker John Gard, State Senator Mary Panzer, and State Representative James Kreuser, violated the Wisconsin open meetings law repeatedly in the process which led to and included their termination. Additionally, plaintiff O'Connor Wahl contends that the JCLO exceeded its authority in terminating her. Plaintiffs seek an order from this court voiding their terminations and declaring that, with respect to the termination of O'Connor Wahl, defendants acted *ultra vires*. As remedies, they request reinstatement to their former positions, compensatory damages, forfeitures against all members of the JCLO, and the actual and necessary costs of this lawsuit, including reasonable attorney's fees.

Defendants deny that they acted either in violation of the open meetings law or *ultra vires* and further assert that the suit against the JCLO is barred by sovereign immunity.

Cross-motions for summary judgment have been filed by all parties, which have been fully briefed and argued. Accordingly, the matter is ripe for a decision.

Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Section 802.08(2), Stats. When both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues. *Millen v. Thomas*, 201 Wis.2d 675, 682-83, 550 N.W.2d 134 (Ct.App. 1996) citing *Friendship Village, Inc. v. City of Milwaukee*, 181 Wis.2d 207, 219, 511 N.W.2d 345, 350 (Ct.App. 1993). However, summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. Id. At 682–83 and n.2, 550 N.W.2d at 137.

UNDISPUTED MATERIAL FACTS

The material facts here (including those established by law) are undisputed, and for the most part have been expressly stipulated[1]. They are:

The Joint Committee on Legislative Organization ("JCLO") & Legislative Technology Services Bureau ("LTSB")

1. The Joint Committee on Legislative Organization is a joint committee of the Wisconsin State Legislature, and is a governmental body.

2. The JCLO membership consists of the speaker of the assembly, the president of the senate, the majority and minority leaders of each house and the assistant majority and minority leader of each house; *i.e.*, ten members. Joint Rule 23(1). By statute, joint legislative committees are co-chaired jointly by a senator and a representative. Wis. Stat. § 13.45(4m).

3. The assembly speaker and the senate president serve as co-chairs of the JCLO.

4. At all times relevant to this action, or between February 1-September 23, 2003, the co-chairs of the JCLO were Defendants Senator Alan Lasee ("Lasee") and Representative John Gard ("Gard").

5. At all times relevant to this action, other members of the JCLO were Senate Majority Leader and Defendant Mary Panzer ("Panzer"), Assembly Minority Leader and Defendant James Kreuser ("Kreuser"), Senator Dave Zien, Senator John Erpenbach, Senator Dave Hansen, Representative Steve Foti, Representative Jean Hundertmark, and Representative Jon Richards, for a total of ten members.

6. At all times relevant to this action, Terry A. Anderson was the Director of the Legislative Council and, as such, staffed the JCLO and managed its operations.

[1] As the parties acknowledged at oral argument, there are substantial disagreements over facts which are not material to the summary judgment motions, such as the accuracy of the findings and conclusions in former state auditor Dale Cattanach's report. These disputed immaterial facts are ignored as are all immaterial facts which are undisputed.

7. The JCLO is authorized to meet as necessary to carry out its policy-making duties, and is expressly authorized to "provide a method of procuring decisions by mail." Wis. Stat. § 13.90(1)(c).

8. It is also authorized to employ an outside staff of professional consultants for the purpose of studying ways to improve legislative services and organization. Wis. Stat. § 13.90(1)(f).

9. The Legislative Technology Services Bureau ("LTSB") is a legislative service agency which provides and coordinates information technology support and services to the legislative branch.

10. The JCLO oversees and makes policy for the legislative service bureaus, including the LTSB. It is also empowered to inquire into misconduct by member and employees of the legislature.

11. The JCLO selects the head of each legislative service agency, including the LTSB. Wis. Stat. § 13.90(1m)(b).

12. The JCLO also designates an employee of each legislative service agency to exercise the powers and authority of each legislative service agency, including the LTSB, in case of absence or disability of the appointed agency head. Wis. Stat. § 13.90(1m)(b).

13. All employment positions in the LTSB, including the director and the person designated to exercise the directors responsibilities in case of absence or disability, are assigned to the unclassified service. Wis. Stat. § 230.08(2)(fp).

Markley Wahl & Patrice O'Connor Wahl

14. The JCLO is responsible for appointing a director of the LTSB. The director's duties include directing, employing, training, and supervising the personnel assigned to him or her; supervising the LTSB's expenditures; overseeing the execution and completion of contracts for equipment, software or services, and planning and executing electronic information programs and services as are needed in the legislative branch.

15. In March 1998, the JCLO appointed plaintiff Markley Wahl ("Wahl") as Director of the LTSB after a national search. Prior to his appointment as LTSB director, Wahl had been employed in State of Wisconsin service since 1993.

16. Plaintiff Patrice O'Connor Wahl ("O'Connor Wahl") began her employment with the LTSB in 1987.

17. In September 2001, Wahl and O'Connor Wahl began a personal relationship.

18. The Employee Manual directs that staff disclose close personal relationships to the LTSB Business Manager, and Wahl and O'Connor Wahl did so.

19. At the time of her termination, O'Connor Wahl was one of nine Team Leaders at the LTSB. She was also the employee designated by the JCLO to exercise the powers and authority of the LTSB director in case of his absence or disability. O'Connor Wahl received this designation on April 16, 2001.

The JCLO's Use of Mail Ballots.

20. The JCLO rarely meets in person or convenes physical meetings with a quorum of its members.

21. In the three years prior to Wahl and O'Connor-Wahl's termination in September 2003, the JCLO held only one publicly noticed meeting: a meeting held on April 1, 2003, to consider matters related to State of Wisconsin gaming compacts.

22. In order to conduct its business, the JCLO traditionally obtains its members' votes through the mail, using paper ballots containing motions that were not made at a prior meeting of the body.

23. The JCLO has exercised its powers at least 54 times between April 3, 1996, and April 1, 2003, through the use of a "mail ballot."

24. During the times relevant, JCLO co-chairs Lasee and Gard, with the advice and assistance of Terry A. Anderson, typically decided whether and when to send out mail ballots.

25. There are no public notices of votes that will be taken by mail ballot.

The Wahl and O'Connor Wahl Terminations.

26. Various members of the JCLO had received complaints or otherwise developed concerns regarding the management of the LTSB in or prior to January of 2003. Legislative Audit Bureau Chief Janice Mueller, in an informal communication, declined to perform an audit because the LTSB was a peer agency.

27. Defendants Gard, Panzer, and Lasee, through informal discussions, decided to retain Dale Cattanach, former director of the Legislative Audit Bureau, to audit the management of the LTSB. They also discussed the parameters of the report with him and arranged to receive updates.

28. On or about February 17, 2003, the JCLO co-chairs Lasee and Gard contracted with Cattanach to review the performance of the LTSB management. No public notice was given of the discussion where this decision was made, and no minutes were taken.

29. A letter they sent to Mr. Cattanach that day stated, in relevant part:

> This is to certify that as Co-Chairs of the Joint Committee on Legislative Organization, we are contracting for your services to review personnel management

> practices within the Legislative Technology Services Bureau. A report of your findings shall be submitted to us as Co-Chairs, upon conclusion of your inquiry.

30. Plaintiffs became aware of Dale Cattanach's investigation of the LTSB shortly after he was hired in February 2003.

31. Mr. Cattanach drafted a report, dated June 23, 2003, which criticized various aspects of LTSB management.

32. Defendants Lasee, Panzer, and Gard read and received the June 2003 Cattanach report, and had informal discussions among themselves and with others about it. Defendant Kreuser did not read the report, but discussed its findings with Mr. Cattanach, Mr. Anderson, and others. These discussions were not noticed to the public or Wahl and O'Connor Wahl, and no minutes were recorded.

33. Sometime during the week of September 15, 2003, defendants Lasee, Panzer, and Gard, along with members of their respective staffs, met with Director of the Legislative Council and JCLO staffer Terry Anderson to inform him that they wished to terminate Wahl and O'Connor Wahl. They also asked Mr. Anderson to serve as interim director of the LTSB.

34. The public, Wahl, and O'Connor Wahl were not provided with public notice of the meeting the week of September 15, 2003, and no minutes of the meeting were recorded.

35. The JCLO did not meet to discuss the terminations of Wahl and O'Connor. Instead, on the morning of September 23, 2003, Anderson drafted a ballot terminating Wahl and O'Connor.

36. The Mail Ballot contained the heading "Action by Joint Committee on Legislative Organization" and the sub-heading "Motion." The text of the "Motion" reads:

> I vote ____ YES ____NO that Mr. Mark Wahl and Ms. Pat O'Connor are removed from employment with the Legislative Technology Services Bureau. These terminations are effective immediately. Each employee will be granted salary and benefits for the next 60 days.
>
> The search for a new director of the Legislative Technology Services Bureau is to begin immediately. Legislative Council Director Terry C. Anderson is appointed interim director of the Legislative Technology Services Bureau. Mr. Anderson is directed to facilitate the director search for the Joint Committee on Legislative Organization and is to serve as interim director until the new director is appointed.

37. No member of the JCLO made or seconded the motion to terminate Wahl and O'Connor Wahl.

38. The ballot was approved by the defendants Speaker Gard and Senator Panzer.

39. Anderson delivered the Mail Ballot to members of the JCLO prior to 9:00 AM on September 23, 2003.

40. The JCLO did not notify the public, Wahl, or O'Connor Wahl, of the motion contained in the Mail Ballot prior to its distribution on September 23, 2003.

41. Each member of the JCLO then stopped into the Speaker's or Senate President's office to vote, where Anderson retrieved the completed ballots.

42. Anderson and his assistant tabulated the votes, and informed Gard and Lasee that the unanimous vote was to terminate Wahl and O'Connor.

43. The Mail Ballot motion is summarized on the JCLO's roll call sheet as: "Mark Wahl and Pat O'Connor are removed from employment w/LTSB, eff. immediately…"

44. At approximately 9:00 a.m. on September 23, 2003, Wahl and O'Connor Wahl were separately summoned to Senate President's conference room off the Senate chambers. Waiting there were Lasee, Panzer, Senator Erpenbach, and Gard.

45. At the meeting with Wahl, a prepared statement was read to him which stated as follows:

> We have asked you here today because all of us have observed that the Legislature has developed a loss of confidence in the management of the Legislative Technology Services Bureau. This bureau touches every aspect of the legislative process and we are no longer confident in your leadership of this service bureau.
>
> All of us believe it is critical that we seek new management for the Legislative Technology Services Bureau; therefore, we are terminating your employment effective immediately. Sixty days' salary and benefits will be granted as severance. Your personal items will be delivered to you at your home address. You are not to return to the LTSB office. Please leave with Ellen all keys, identification, cell phone, paper and other office items you have with you.

46. O'Connor Wahl met with the group in Senator Lasee's office next, and although a statement had been prepared in order to explain her termination, that paper was not read to her.

47. The public, Wahl, and O'Connor Wahl were not given notice that the JCLO was going to carry out its decision to terminate their employment at the meeting on the morning of September 23, 2003, and no minutes were taken of this meeting.

48. The terminations of Wahl and O'Connor were of interest to the general public.

49. Prior to the termination of Wahl and O'Connor Wahl, and during the tenures of Defendants on the JCLO, no other legislative service organization employee had been terminated by the JCLO.

Procedural History

50. On January 20, 2004, O'Connor Wahl filed a Notice of Claim with the Attorney General which alleged, *inter alia*, that the JCLO lacked authority to terminate her employment with the LTSB.

51. O'Connor Wahl did not receive a specific denial from the Attorney General.

52. Wahl and O'Connor Wahl filed a Verified Open Meetings Complaint with the Dane County District Attorney Brian Blanchard on May 4, 2004, which alleged, inter alia, that the meetings leading up to their termination, and the Mail Ballot, violated the Wisconsin open meetings law.

53. District Attorney Blanchard declined to commence an action to enforce Wis. Stat. §§ 19.81 *et seq.* within twenty days after receiving the Verified Complaint.

54. Plaintiffs-Relators filed this action on June 22, 2004.

DECISION AND ORDER

I. The JCLO is entitled to summary judgment on sovereign immunity grounds.

The JCLO raised sovereign immunity as an affirmative defense in its answer in this case (Answer at 9, "Affirmative Defenses," ¶ 3). Wisconsin Const. art. IV, § 27 provides:

> "Suits against state. Section 27. The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

As explained in *Kallembach v. State*, 129 Wis. 2d 402, 408 (1986) (citations omitted; emphasis in original):

> "A procedural immunity rule that the state cannot be sued without its consent has developed from this constitutional provision. . . . This constitutional provision is not self-executing, and has been repeatedly construed to mean that the legislature has the exclusive right to consent to a suit against the state. . . . "[T]here must exist express legislative authorization in order for the state to be sued."
>
> "A state agency is considered an arm of the state and is protected by sovereign immunity . . . ." *Miller v. Mauston School Dist.*, 222 Wis. 2d 540, 550, 588 N.W.2d 305 (Ct. App. 1998). "An action against a state agency is an action against the state." *Lindas v. Cady*, 142 Wis. 2d 857, 861, 419 N.W.2d 345 (Ct. App. 1987).

Plaintiffs argue that the Legislature's consent to subject itself and its legislative committees to suit can be found in the language of Wis. Stat. § 19.87, which provides that the open meetings

law applies to "all meetings of the senate and assembly and the committees, subcommittees and other subunits thereof," subject to various exceptions (Plaintiffs' Response Brief at 8).

The flaw in the plaintiffs' reasoning is that the legislature's creation of an obligation or liability is not the same as a consent to suit. As stated in *Kallembach*, 129 Wis. 2d at 408-09:

> No statutory authorization exists for a suit based on sec. 86.05, Stats., nor has the state consented to suit by enacting sec. 86.05. Granted, by adopting sec. 86.05 the legislature imposed a statutory duty on the state, and the duty is toothless if the state cannot be held to this duty. The mere creation of liability against the state, however, does not constitute the state's consent to an action against it. Forseth v. Sweet, 38 Wis.2d 676, 683-84, 158 N.W.2d 370, 373 (1968). Nor does the creation of such liability imply a consent to suit. That the state undertakes a duty "does not in any way imply that the legislature has waived its immunity from suit or given legislative consent for an action against the state." Id. at 684, 158 N.W.2d at 374. Compare Holzworth v. State, 238 Wis. 63, 67-68, 298 N.W. 163, 165 (1941) (subjecting state to duties of an owner under safe place statute does not constitute state's consent to suit).

Thus, the legislature's decision to impose the open meetings law on itself and its committees (subject to exceptions) did not thereby authorize suits against those committees. And since there is no express legislative authorization to subject the JCLO to suit under the open meetings law, sovereign immunity bars the plaintiffs' suit against the JCLO.

Plaintiffs' reliance upon *German v. DOT*, 2000 WI 62 ¶ 17 *et seq.* (235 Wis.2d 576, 587 *et seq.*, 612 N.W.2d 50) is unavailing. There, unlike the case at bar, a specific authorization for suit against the Department of Transportation as an "employer" was expressly provided by statute. While §19.97(4), Stats. authorizes private enforcement actions under the Wisconsin open meetings law, this statute falls short of the "express legislative authorization" for suits against the JCLO emphatically required in *Kallembach*, 129 Wis.2d at 408. Whether this state of affairs is or is not "absurd" as plaintiffs argue, is legally irrelevant, and plaintiffs are incorrect in stating that application of sovereign immunity here creates a right without a remedy. Sections 19.96 and 19.97, Stats. authorize suits against the individual members of governmental bodies who violate the open meetings law.

II. As a matter of law the paper ballot procedure terminating plaintiffs' employment violated the open meetings law.

By its terms, the Wisconsin open meetings law is meant to accomplish broad purposes, and thus must be broadly construed. Wis. Stat. § 19.81(3) ("[t]his subchapter shall be liberally construed to achieve the purposes set forth in this section"). Courts have also recognized the remedial purpose of the open meetings law: "The fundamental purpose of the open meeting law is to ensure the right of the public to be fully informed regarding the conduct of governmental business. The open meeting law demands that it be liberally construed in favor of open

government. "State ex rel. Badke v. Village Bd. of the Village of Greendale, 173 Wis. 2d 553, 570, 494 N.W.2d 408, 414 (1993); see also State ex rel Lawton v. Town of Barton, 2005 WI App 16, 278 Wis. 2d 388, 692 N.W.2d 304 (Ct. App. 2004) ("The legislature has issued a clear mandate that we are to vigorously and liberally enforce the policy behind the open meetings law.").

Personnel decisions, such as those at issue here, are not exempt from the open meetings law, although they may be considered in closed session upon notice and motion made in open session under § 19.85(1)(c).

The parties agree that the collective action taken by the JCLO pursuant to a mail ballot fits the definition of a "meeting" under the open meetings law (Plaintiffs' Summary Judgment Brief at 18; Defendants' Response Brief at 6). The parties also agree that the mail ballot procedure used by JCLO in this case conflicts with the public notice provisions of the open meetings law under Wis. Stat. §§ 19.83, 19.84(2) and (3), and 19.85(1)(b), if the open meetings law were to apply to the JCLO's action (Plaintiffs' Response Brief at 18; Defendants' Response Brief at 6). Thus, the question for this Court is whether the mail ballot method used by the JCLO to terminate the plaintiffs' employment was authorized by the Joint Rules, and thus not subject to the open meetings law.

The answer is no.

Certainly, no provision of the open meetings law which conflicts with a joint rule of the legislature applies to a meeting conducted in compliance with such a rule. See § 19.87(2). Equally certain, Joint Rule 23(2) authorizes the JCLO to "take appropriate action" under the provisions of the statutes and joint rules that create its powers. And there is no doubt that, by virtue of §13.90(1)(c), the JCLO was authorized to decide by mail ballot whether to terminate the plaintiffs' employment. Where the defendants' argument fails, however, is the conclusion that the open meetings law "conflicts" with Joint Rule 23(2) *vis à vis* the JCLO's mail ballot procedure employed in this instance. The defense posits:

> "Joint rule 23(2) authorizes the JCLO to take action using the mail ballot method that provides no advance public notice of JCLOs activity. That authorization conflicts with the open meetings law, which does require advance notice." (Defense Reply Brief page 9 emphasis added)

Defendants are wrong. There is nothing in Joint Rule 23(2) or §13.90(1)(c) providing that mail decisions may be procured without regard to the mandate of the open meetings law and there is nothing inherent in the nature of a mail decision that forecloses compliance with the open meetings law.

Section 19.87(2) provides a limited exception to the open meetings law for those proceedings held pursuant to joint rules which conflict with the open meetings law. Exceptions to the open meetings law are to be narrowly construed, consistent with the broad policy favoring "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business" which underpins the statute. Section 19.81(1), Stats.

Moreover, courts are under a duty to construe statutes harmoniously where that can be reasonably done. *State v. Martin*, 162 Wis.2d 883, 912, 470 N.W.2d 900 (1991) (Callow, J., dissenting)

Applying these principles, there is simply no conflict between the rule allowing implementation of the statutory provision for procuring decisions by mail ballot, and the provisions for public notice and open session in the open meetings law. Joint Rule 23(2) authorizing the JCLO to "take appropriate action" to implement a mail ballot procedure cannot be broadly read to permit government officials to side-step open meetings law requirements, because there is nothing "appropriate" about proceeding with a mail ballot hidden from public view. The open meetings law strives for transparency in the conduct of governmental business. Interpreting Joint Rule 23(2) as do defendants directly thwarts this goal, rendering the work of government all but invisible. As a matter of law, defendants' mail ballot procedure employed in the termination of plaintiffs violated the open meetings law, and plaintiffs are entitled to summary judgment on this point.

III. Defendants Lasee, Gard and Panzer violated the open meetings law in meeting on three occasions to determine the JCLOs course of conduct without public notice and other than in open session.

In addition to the mail ballot meeting, members of the JCLO met to discuss and determine the JCLO's course of action with respect to Wahl and O'Connor Wahl. These meetings included the initial decision to hire Dale Cattanach in approximately February, 2003, the meeting during the week of September 15, 2003 where JCLO leadership decided Plaintiffs should be fired, and the meeting on September 23, 2003, where Plaintiffs were fired.

As stated, personnel decisions are not exempt from the open meetings law, See §19.95(1)(c).

A governmental body meets when there is a purpose to engage in governmental business, be it discussion, decision, or information gathering, and when the number of members present is sufficient to determine the parent body's course of action regarding the proposal discussed. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154, 165 (1987); *see also State v. Swanson*, 92 Wis. 2d 310, 284 Wis. 2d 655 (1979) ("The ultimate question is whether the members of a governmental body have convened for the purpose of exercising the duties delegated to or vested in the body . . . and not whether the governmental body is empowered to exercise the final powers of its parent body.") A meeting occurs under these circumstances even if the members do not vote or interact, lest the government body hide the rationale or influence behind its decisions. *Badke*, 173 Wis. 2d at 573, 494 N.W.2d at 415.

For example, in *Showers*, a meeting of four of eleven members of a sewerage district was enough to trigger Wis. Stat. § 19.82(2) on an issue requiring a two-thirds vote, since four votes were sufficient to defeat the proposal. 135 Wis. 2d at 102-03, 398 N.W.2d at 165 (referring to the four votes as a "negative quorum"). The fact that the four members were from two opposite factions was irrelevant: "[t]he open meetings law is concerned with the potential to determine the outcome, not with the likelihood that an alliance may or may not be formed." Id. at 103, 398 N.W.2d at 166.

In the present case, Defendants Gard, Lasee, and Panzer convened on at least three occasions and determined the JCLO's course of conduct. In the first instance, Gard, Lasee, and Panzer decided, through informal discussions, to hire Mr. Cattanach to review LTSB management in February, 2005. They also set the parameters of his review and arranged to receive updates from him. Mr. Cattanach was eventually retained by the JCLO co-chairs and his report became the basis of the JCLO's decision to terminate Wahl. The Defendants did not give public notice of these discussions or decisions and no minutes were taken. Additionally, these discussions were apparently not open to the public or reasonably accessible to the public.

In the second instance, sometime during the week of September 15, 2003, Defendants Lasee, Panzer, and Gard met with Terry Anderson to inform him they wished to terminate Wahl and O'Connor Wahl. They also asked Anderson to serve as interim director of the LTSB. Subsequently, Anderson drafted the Mail Ballot at issue in this case. The Defendants did not give public notice of this meeting or record any minutes, and it was evidently closed to the public.

In the third instance, Defendants Lasee, Panzer, and Gard, as well as JCLO member Senator Erpenbach, met to carry out Plaintiffs' terminations on September 23, 2003. Plaintiffs were separately summoned to meet with these legislators and were informed of their terminations. While the Mail Ballot itself contained no justification for the terminations, Wahl was told he was being fired because "the Legislature has developed a loss of confidence in the management of the [LTSB]." Similarly, O'Connor Wahl was informed that the JCLO desired a change in direction (though an unread statement prepared for her termination stated that "when a leadership change is warranted, it is important that it be thorough"). Defendants issued no public notice of the September 23, 2003, meeting, and no minutes were taken.

In all of the three above instances, Defendants Panzer, Gard, and Lasee clearly determined the JCLO's course of action regarding retaining Cattanach and terminating Plaintiffs. They further carried out the JCLO's course of conduct in these meetings: as JCLO co-chairs, Gard and Lasee contracted with Cattanach; Gard, Lasee, and Panzer determined that Plaintiffs should be fired; and these same Defendants even terminated Plaintiffs personally. Gard, Panzer, and Lasee were also the contacts on the press release announcing the search ("approved unanimously by the [JLCO]") for a new LTSB director.

Whether the gatherings of the individual defendants challenged by plaintiffs constitute meetings held in violation of the open meetings law requires interpretation of the Supreme Court's decision in *Showers*, supra. In particular, where members of a governmental body convene to discuss the business of that body, but do so in numbers insufficient to constitute a "negative quorum", are they required to comply with the requirements of the open meetings law? Defendants argue that *Showers* provides a bright line "numbers" test such that compliance with the open meetings law is not required in gatherings of less than a "negative quorum". However, *Showers* was not required to address situations where the course of conduct of a governmental body was determined and carried out by members insufficient in number to constitute a "negative quorum", because that case in fact involved a "negative quorum".

While this issue is certainly one to be resolved de novo by the appellate courts, I do not believe that *Showers* is as limited as defendants argue, for a number of reasons.

First, the "triggers" for open meetings law application are not specifically limited to "negative quorums". Rather, after lengthy and scholarly analysis of the legislative history of the open meetings law in response to the Supreme Court's holding in *State ex rel. Linch v. Conta*, 71 Wis.2d 662 (1976), the *Showers* court held:

> "The question remains as to how these conclusions affect determination of the "triggers" of the Open Meeting Law. To sum up, the legislature intended to broaden the scope of the Open Meeting Law from previous law, including *Conta.* In determining the trigger of the Open Meeting Law, the legislature rejected the "numbers" approach. In addition, purpose alone was insufficient to trigger the statute. Further, the legislature intended that under some circumstances the law would apply to gatherings of one-half or less. And last, the legislature's concern was not only with the power to pass proposals but also with the power to defeat them.
>
> It is in escapable, given all the above, that the legislature intended *something* in addition to "purpose" in order to trigger the statute. If purpose alone were sufficient, the statute would apply any time two or more members gathered to discuss government business, a result the legislature clearly did not intend. What is this "something?" It cannot be some other number such as a quorum or one-half: the legislature rejected those approaches. It cannot be, as discussed above, the potential only to *pass* proposals. The only remaining "something" is the potential of a group to determine the outcome***102**of a proposal, whether that potential be the affirmative power to pass, or the negative power to defeat.
>
> From this, we conclude that the trigger is twofold. First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed. 135 Wis.2d at 101-102."

The *Showers* court noted that the record in that case was void of any evidence that the commissioners who met had been "delegated any proxy authority" 135 Wis.2d at 84. In the case at bar, while it is true that the record is silent on express proxy authority, defendants Lasee, Gard, and Panzer apparently had tacit proxy authority from the JCLO as a whole because their actions were, in fact, the actions of the JCLO in deciding to retain Dale Cattanach, in deciding to go forward with a ballot to terminate plaintiffs' employment, and in actually carrying out the ballot procedure and termination. In *Conta*, the Supreme Court cautioned:

> "It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule."

71 Wis.2d at 687.

Where, as here, fewer than a "negative quorum" decide on a governmental body's course of conduct and carry it out, with the tacit consent of the other members, the requirements of the open meetings law are triggered. Public notice and open session (at least initially) are required for their meetings. Since defendants Lasee, Gard, and Panzer concede that they did not comply with the provisions of the open meetings law, plaintiffs are entitled to summary judgment on this point as well.

IV. The JCLO had authority to terminate plaintiff O'Connor's employment.

The closest question presented by the cross-motions for summary is whether or not the JCLO had authority to terminate plaintiff O'Connor's employment. It is no criticism of counsel to note that the statutes and authorities cited on both sides of the issue are not expressly controlling or even all that informative. The court's own research into the issue has been less than illuminating. I am left with the not terribly satisfying conclusion that, until the appellate courts address this issue, it is to be decided by resort to common sense. In that regard, I adopt the defendants' position that the JCLO did have terminating authority over Ms. O'Connor Wahl. It seems logical that because the JCLO has plenary authority to hire and fire the at-will director of the LTSB, it necessarily has plenary authority to hire and fire his/her at-will subordinates. This is especially true where, as here, Ms. O'Connor became, in effect, acting director of the LTSB upon Mr. Wahl's termination.

Moreover, it is not entirely clear that plaintiff O'Connor Wahl falls within the meaning of §13.96(2)(b) as "personnel assigned to the director", which is the lynchpin of plaintiffs' argument that only the LTSB director could fire his/her subordinates. The phrase "personnel assigned to the director" is ambiguous. Plaintiff O'Connor Wahl was not merely "assigned to the director" but was an integral functioning employee of the LTSB in its entirety. "Personnel assigned to the director" seems more directed at strictly clerical support for the director, such as typist, etc. Again, definitive resolution of this issue must await another day in another court. In the meantime, defendants' position prevails here, and summary judgment is granted declaring that defendant JCLO had legal authority to terminate plaintiff O'Connor Wahl under these circumstances.

CONCLUSION

For the forgoing reasons, partial summary judgment is granted in favor the plaintiffs declaring a violation of the open meetings law by the individual defendants with respect to the ballot procedure, and against defendants Lasee, Gard, and Panzer with respect to the three meetings where (1) they decided to hire Dale Cattanach, (2) they decided to terminate plaintiffs on September 15, and (3) the terminations occurred on September 23, 2005. Full summary judgment is granted in favor of the JCLO on sovereign immunity grounds, and partially in favor of all defendants declaring that the JCLO had authority to terminate plaintiff O'Connor Wahl. Further proceedings will be promptly scheduled to consider appropriate remedies for the open meeting law violations.

Dated this _____ day of December, 2005.

_____
Richard G. Niess
Circuit Judge

CC: AAG Bruce A. Olson
Atty. Edward R. Garvey