



Christopher Katucki v. Town of Norwich, its Selectboard

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Christopher Katucki brings this suit against the Town of Norwich, alleging that the Town violated various requirements of the Open Meeting Law, 1 V.S.A. § 310, et seq. By order dated February 2, 2022, the court dismissed four of seven counts of the amended complaint. The remaining counts—Counts III, V, and VI—allege that the Diversity, Equity, and Inclusion Group (DEI Group), the Town Budget Work Group, the School Budget Work Group, and the Finance Office Subgroup violated Open Meeting Laws by failing to comply with public access requirements of “public bodies” in 1 V.S.A. § 312. Both parties move for summary judgment. They disagree as to whether these groups are “public bodies,” while agreeing that any of the groups that is a “public body” violated the Open Meeting Law’s public access requirements. The court grants Mr. Katucki’s motion in part and denies the Town’s.

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g., Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g., Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass’n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g., Burgess v. Lamoille Housing P’Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(6); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 (“Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts.”). The court must give the non-moving party the benefit of all reasonable doubts

and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Thus, “[i]n determining the existence of genuine issues of material fact, courts must accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.” *Gates v. Mack Molding Co.*, 2022 VT 24, ¶ 13, ___ Vt. ___ (quotation omitted).

With these standards in mind, the following facts emerge as undisputed. The Town is a municipal corporation, operating under the town manager form of government. Herb Durfee was the Town Manager at all relevant times. During the relevant time period, the four different “groups” were formed; none now exists. The groups were formed in different manners and for different purposes.

DEI Group

Mr. Durfee put together a group of individuals with the intent to advance racial equity, independent from political influence. This group was to use its members’ individual and collective expertise to issue findings and recommendations for Mr. Durfee’s use in his official capacity. Mr. Durfee viewed DEI as an independent group. He was not a member of the group but did participate in its meetings as an observer and helper.¹

Town Budget and School Budget

The Town Budget and School Budget Groups were born out of the Finance Committee, which in turn was created by a vote of the Norwich Selectboard on Jun. 13, 2018. The Finance Committee consisted of five members appointed by the Selectboard, with the Town Treasurer serving ex officio. The Committee was tasked with: (1) providing independent advice to the Selectboard on the annual Town Budget prior to submission of the budget to the voters for approval; (2) providing independent advice to the Selectboard from time to time on financial policies; and (3) reviewing and offering insight to the Selectboard on the Treasurer’s Investment Reports and quarterly financial statements provided by Mr. Durfee.

During a hearing held on Oct. 13, 2020, the Finance Committee discussed splitting up the work of reviewing the town and school budgets. One group then formed to work on the town budget, while another formed to work on the school budget.² Neither the Finance Committee nor either of these groups was specifically allocated public funds.

Finance Office Subgroup

¹ This is where the undisputed material facts for DEI end. The parties genuinely dispute whether DEI members were appointed or selected, whether they understood that their participation was voluntary, whether their positions were separate from their town employment, and whether Mr. Durfee could exercise authority over the group by removing them. See Def.’s Reply to Pl’s Opp’n SUMF, ¶¶ 8–30 (filed Dec. 30, 2022).

² There is a genuine dispute whether the conclusion to proceed in this matter was subject to a vote and whether the Finance Committee members volunteered to be in their prospective subgroups. See Def.’s Reply to Pl’s Opp’n SUMF, ¶¶ 42–44.

The Finance Office Subgroup consisted of Mr. Durfee and two members of the Selectboard. At a meeting on Dec. 9, 2020, Mr. Durfee informed the Selectboard that the search for a new Finance Director had failed. He proposed collaborating with two board members to figure out an interim solution. No board member objected to proceeding in this fashion.³

Analysis

As noted above, the issue on these motions is whether any of these three groups is a “public body.” Under the Open Meeting Law, a “public body” is

any board, council or commission of the State or one or more of its political subdivisions, any board, council, or commission of any agency, authority or instrumentality of the State or one or more of its political subdivisions, or any committee of any of the foregoing boards, councils, or commissions, except that public body does not include councils or similar groups established by the Governor for the sole purpose of advising the Governor with respect to policy.

1 V.S.A. § 310(4).

In the closely analogous context of the Public Records Act, the Supreme Court has made clear that analysis begins with “plain text.” *McVeigh v. Vermont School Boards Association*, 2021 VT 86, ¶ 21. Here, at least with respect to the Town Budget and School Budget groups, that is also where the analysis ends. The Town, through the Selectboard, formed the Finance Committee to undertake an advisory role. The parties agree that the Finance Committee is a public body—a tacit acknowledgement that it is a “board, council, or commission” of the Town. The Town Budget and School Budget groups formed to divide the work of the Finance Committee; they were, by any measure, subcommittees of the Committee. As such, they fell squarely within the definition of “public body”: “any committee of any of the foregoing boards, councils, or commissions.” To conclude otherwise would make a mockery of the Open Meeting Law: any public body could avoid the obligations of the law by the simple artifice of dividing itself into subgroups. *Cf. Sprague v. University of Vermont*, 661 F. Supp. 1132, 1139 (D. Vt. 1987) (concluding that allowing the University of Vermont to operate outside of the Open Meeting Law by convening a non-standing committee with the specific purpose of advising the University President was enabling “the University to take round-about steps to avoid its public duty”).

With respect to the DEI Group and the Finance Office Subgroup, plain text alone does not answer the “public body” question. Neither is a “board, council, or commission” of the Town in any traditional sense of those words. Arguably, the DEI Group could be seen to function as a form of

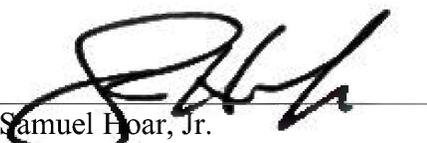
³ The parties dispute whether this occurred by vote, consensus, or informal vote. See Def.’s Reply to Pl’s Opp’n SUMF, ¶¶ 59–62.

advisory council to Mr. Durfee, who could be said to be an agency or authority of the Town. Similarly, the Finance Office Subgroup could be characterized as providing advice or even acting on behalf of the Selectboard, which is clearly a board of the Town. Unfortunately, however, at this stage of the litigation, the parties' genuine disputes as to matters of material fact frustrate any inquiry into these questions. For example, the parties heavily dispute the relationship between the Town, Mr. Durfee, the Selectboard, and these subgroups. *Cf. McVeigh*, 2021 VT 86, ¶ 23 (determination whether an entity is an "instrumentality" of the government "must be made on a case-by-case basis, looking at the facts surrounding the government's relationship with that entity"). The parties credibly dispute whether DEI Group members understood that their participation was voluntary, whether their positions were separate from their town employment, and whether Mr. Durfee could exercise authority over the group by removing them. See Def.'s Reply to Pl's Opp'n SUMF, ¶¶ 8–30 (filed Dec. 30, 2022). Similarly, the parties credibly dispute the composition, responsibilities, and formation of the Finance Office Subgroup. *Id.* ¶¶ 56–64. Thus, the court cannot grant summary judgment for either party with respect to the DEI Group or the Finance Office Group.

ORDER

The court denies the Town's motion for summary judgment; it grants Mr. Katucki's motion in part and denies it in part. The Town Budget and School Budget groups are public bodies, subject to the provisions of the Open Meeting Law. Whether either the DEI Group or the Finance Office Group is also a public body is a question for trial. The clerk will set a pretrial conference.

Electronically signed pursuant to V.R.E.F. 9(d): 5/2/2023 12:37 PM



Samuel Hoar, Jr.
Superior Court Judge

Vermont Superior Court
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Windsor Unit