COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO EX REL. CHRISTOPHER HICKS	:	
	:	**CASE NO. 2018 CVH 00058**
Relator	:	**Judge Jerry R. McBride**
vs.	:	**DECISION/ENTRY**
CLERMONT COUNTY BOARD OF COMMISSIONERS	:	
Respondent	:	

Matt Miller-Novak, 708 Walnut Street, Suite 600, Cincinnati, Ohio 45202, and Jennifer M. Kinsley, P.O. Box 19478, Cincinnati, Ohio 45219, counsel for the relator State of Ohio ex rel. Christopher Hicks

G. Ernie Ramos, Jr., and Jeannette E. Nichols, assistant prosecuting attorneys and counsel for the respondent Clermont County Board of Commissioners, 101 East Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of (1) the motion for summary judgment filed by the respondent Clermont County Board of Commissioners on April 12, 2019, and (2) the motion for summary judgment filed by the relator State of Ohio ex rel. Christopher Hicks on April 15, 2019.

The court scheduled and heard oral arguments as to the motions on June 14, 2019. At the conclusion of the oral arguments, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

PROCEDURAL BACKGROUND

The relator State of Ohio ex rel. Christopher Hicks filed his complaint on January 11, 2018. In his complaint, the relator alleges that the respondent Clermont County Board of Commissioners failed to comply with R.C. 121.22 in several ways. He alleges that the respondent failed to maintain accurate meeting minutes for the Board of Commissioners meetings. The alleged failures include failing to include the relator's comments that he made at the respondent's Board meetings, failing to include a summary of the relator's statements, failing to include a commissioner's admission to owning shares in a hotel, and failing to post some of the relator's written statements. The relator further alleges that the respondent violated the Open Meetings Act by holding private quorums, privately discussing and reviewing public comments, and entering into executive sessions without informing the public of its reason for doing so. The relator alleges in his complaint that the respondent entered into executive session improperly in 2017 at least 15 times. He also identifies certain dates on which these alleged violations occurred, including January 1, 2017; February 22, 2017; February 27, 2017; March 1, 2017; March 22, 2017; March 27, 2017; April 19, 2017; June 7, 2017; June 28, 2017; July 12, 2017; July 26, 2017; August 2, 2017; August 9, 2017; August 16, 2017; September 13, 2017; October 4, 2017; November 8, 2017; and November 11, 2017.

The respondent filed a motion for summary judgment on April 12, 2019. The relator filed a motion for summary judgment on April 15th. The relator filed a response in opposition to the respondent's motion for summary judgment on April 18th. The respondent filed its reply in support of its motion on April 30th, as well as its response in opposition to the relator's motion for summary judgment. The relator filed his reply in support of his motion on May 7th. The court held oral argument on the motions on June 14th, after which it took the motions under advisement.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."[1]

The court must view the evidence in a light most favorable to the nonmoving party.[2] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[3]

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[1] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).
[2] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[3] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[4]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[5] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[6]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[7] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[9]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a "triable issue of fact" remains.[10] The duty of the nonmoving party is more than that of resisting the motion's allegations.[11] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the

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[4] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).
[5] Id. at 251-52.
[6] Id. at 250.
[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[8] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[9] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[10] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[11] *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 25 (12th Dist.).

nonmoving] party bears the burden of production at trial."[12] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[13] It may not rely on the pleadings or unsupported allegations.[14]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[15] The trial court maintains the sound discretion to admit or exclude relevant evidence.[16] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[17]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[18] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is

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[12] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

[13] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[14] Id.

[15] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").

[16] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

[17] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist. 1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist. 1986).

[18] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

original and does not depend on information or hearsay."[19] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[20] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[21]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[22] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[23]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."[24] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[25]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be

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[19] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[20] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[21] Id.
[22] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[23] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).
[24] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[25] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

resolved in favor of the nonmoving party.[26] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[27]

UNDISPUTED FACTS

The Relator is Christopher Hicks, a Clermont County resident, who lives at 444 Woodwick Court, Cincinnati, Ohio 45255.[28]

The Respondent Clermont County Board of County Commissioners (hereinafter referred to as "the Board") is composed of three elected commissioners, and at the time of the events in the present case, the commissioners were Edwin Humphrey, David Uible, and David Painter.[29]

In 2017, David Uible was the president of the board of county commissioners.[30] Since there are three commissioners, two commissioners constitute a quorum.[31] Among the many duties of the board of county commissioners, the board makes decisions regarding Clermont County employees, including hiring, firing, compensation, etc.[32]

From 2012 to August of 2017, Uible was also on the Convention and Visitors Bureau Board (the "CVB"), which is a private not for profit business that uses money

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[26] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[27] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[28] C. Hicks Dep., pg. 9; Pls. Answer to Defs. Interrogs. No. 1.
[29] E. Humphrey Dep., pgs. 7-8; D. Uible, pgs. 8-9.
[30] D. Uible Dep., pg. 13.
[31] D. Uible Dep., pg. 14.
[32] D. Uible Dep., pgs. 14-16.

generated from bed taxes for economic development.[33] The bed tax in Clermont County is currently a 6% tax on all transient guests in hotels and motels in the county.[34]

One of the responsibilities of the board of county commissioners is to appropriate money from the bed tax for the CVB.[35] Presently, 3% of the collected tax goes to the CVB and 3% goes to the hotel or motel entity.[36] At the time of the issues involved in this case, the CVB was looking at increasing the bed tax as a means for attracting professional soccer team FC Cincinnati to Clermont County.[37]

During meetings of the board of county commissioners, a couple of county employees take meeting minutes, and then the commissioners vote to approve the minutes at the end of the meeting or the following week upon reviewing them.[38] The public can access the meeting minutes online or through the administrative office.[39] No one takes minutes during executive sessions.[40]

The board of county commissioners goes into executive session to discuss Clermont County employees when the administrator, who at some of the times pertinent to this case was Steve Rabolt, and who was then succeeded by Thomas Eigel, makes a recommendation.[41] The clerk of the board of county commissioners, Judith Kocica, then sets the agenda, with input from the administrator.[42]

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[33] D. Uible Dep., pgs. 21, 26; D. Painter Dep., pg. 62.
[34] D. Painter Dep., pg. 10.
[35] D. Uible Dep., pgs. 93-94.
[36] D. Painter Dep., pgs. 10-11.
[37] D. Uible Dep., pg. 94.
[38] D. Uible Dep., pgs. 51-52, 59.
[39] D. Uible Dep., pgs. 53-54.
[40] D. Uible Dep., pg. 61.
[41] E. Humphrey Dep., pgs. 57, 74-75; T. Eigel Dep., pgs. 8-9.
[42] E. Humphrey Dep., pgs. 57-58; D. Uible Dep., pg. 29; D. Painter Dep., pg. 38; J. Kocica Dep., pgs.10-11, 14.

Kocica does not know the identity of the Clermont County employees to be discussed when she sets the agenda.[43] The meeting attendees do not take official minutes of the executive sessions.[44]

In terms of meeting attendance for executive sessions, participants typically include the commissioners, the county administrator, the assistant county administrator, the head of whichever department has an issue for the commissioners to discuss, and someone from the prosecutor's office.[45] Sometimes an HR employee who works in the Department of Job and Family Services will attend if the department head cannot attend.[46]

When the executive session regards a public employee, the commissioners do not know which specific employee will be discussed prior to entering into the executive session.[47] Uible testified that the commissioners do not discuss business outside of board sessions or executive sessions.[48]

R.C. 121.22(G)(1), which will be discussed hereinafter, contains a list of various types of employee actions which may be considered when a board of county commissioners is considering an employee matter. There were at least several occasions in 2017 during which the Board entered executive session under R.C. 121.22(G)(1) for less than all of the reasons provided for in (G)(1) (e.g., to only consider discipline of a public employee, to only consider the dismissal of a public employee, to only consider the compensation of a public employee, etc.).[49]

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[43] J. Kocica Dep., pg. 19.
[44] D. Painter Dep., pgs. 42-43.
[45] T. Eigel Dep., pg. 14.
[46] T. Eigel Dep., pg. 16.
[47] D. Painter Dep., pg. 12.
[48] D. Uible Dep., pg. 34.
[49] T. Eigel Aff., ¶ 3.

Commissioner Humphrey testified that, in general, when the Board goes into executive session and lists one or more reasons for doing so, it is because the commissioners "could have" discussed a number of employees in that executive session.[50]

Likewise, Commissioner Painter testified that in a single executive session, the Board may discuss three or four employees, so it is possible to discuss the hiring and firing of multiple individuals during one executive session.[51] In Painter's experience, "almost every time" the board enters into an executive session, the board discusses promotions, demotions, hiring, and firing because "never just one employee" is involved.[52] The reason for this is that, if one person is discussed, another person is mentioned since, as a practical matter, one employee cannot be moved from a location, terminated, or promoted without also discussing another employee.[53]

Commissioner Uible testified that when dismissal, discipline, promotion, and demotion are all discussed in one executive session, he assumes that the commissioners are discussing more than one employee, because they would not simultaneously promote and dismiss an individual employee.[54] If only one employee is discussed, the board might list dismissal, discipline, demotion, and sometimes compensation.[55] This is so because the individual employee might be required to take time off without pay.[56] On the other hand, when only one employee is discussed, it would be conceptually unlikely to discuss

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[50] E. Humphrey Dep., pg. 57.
[51] D. Painter Dep., pgs. 33-34.
[52] D. Painter Dep., pgs. 34-35.
[53] D. Painter Dep., pg. 35.
[54] D. Uible Dep., pg. 62.
[55] D. Uible Dep., pg. 63.
[56] D. Uible Dep., pg. 63.

both promoting and demoting the same individual.[57] According to Commissioner Uible, when all of the reasons under R.C. 121.22(G)(1) are listed, it is generally because they are relevant to the employees being reviewed.[58]

Commissioner Humphrey takes notes during Board meetings, and sometimes in executive sessions.[59] His notes on executive sessions are not thorough but rather are topical.[60] He records his notes in a notebook as a personal reference aid, and not as a public record.[61]

Hicks does not know what transpires during the Board's executive sessions.[62]

Hicks claims that, at various Board meetings in 2017, he made comments that were not included in the meeting minutes; however, the Board did not take any action upon the comments that Hicks made.[63]

Below are undisputed facts regarding specific meetings that are at issue in this case.[64]

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[57] D. Uible Dep., pg. 64.
[58] D. Uible Dep., pgs. 62-63.
[59] E. Humphrey Dep., pg. 46; Ex. 18 to D. Uible, D. Painter, and E. Humphrey Deps.
[60] E. Humphrey Dep., pg. 46.
[61] E. Humphrey Dep., pg. 47.
[62] C. Hicks Dep., pgs. 122, 142.
[63] C. Hicks Dep., pgs. 102-103. Of note, in his Answers to Interrogatory No. 7, Hicks objected to specifying which statements he made during Board meetings that were omitted from the record, in part on the basis that he would supply complete answers in his deposition. However, during his deposition, the only date on which he specifically recalled having his statements omitted was July 26, 2017, which is detailed further below.
[64] A number of meeting dates are mentioned in the relator's complaint as dates wherein Open Meetings Act violations occurred but they are not mentioned or expounded upon in the relator's motion for summary judgment. In reviewing the record, the court notes that this is likely because on two of the dates there were no meetings. As to the other dates, the record indicated that the Board was able to recollect information about who was discussed at certain executive sessions. When asked in the Respondent's Interrogatories, in No. 10, which dates the Board entered into executive session unlawfully, the relator answered by referencing his complaint and stated that the basis would "be further developed through briefing by Relator's Counsel." Given that that has not happened for certain dates in the relator's motion for summary judgment, the court is construing the dates missing from the relator's motion to mean that the relator has narrowed the

February 22, 2017: The Board had a meeting on February 22nd, during which they entered into executive session "pursuant to Section 121.22(G)(1) and (G)(3) of the Revised Code to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of one or more public employees and (2) to confer with the Prosecuting Attorney regarding pending or imminent litigation."[65] However, it is unknown who was discussed during the executive session.[66]

Commissioner Uible testified that he does not know which Clermont County employees were discussed in the executive session.[67] He assumes that they discussed more than one, but he specifically stated that he was not testifying that they "discussed every single one of these things [listed in R.C. 121.22(G)(1)] in the executive session.[68] He also could not recall what the commissioners discussed in relation to pending or imminent litigation, and he assumes, but does not know, that the prosecuting attorney was present in the meeting.[69] He could not recall any of the information that was discussed during the executive session.[70]

Commissioner Painter also did not recall which Clermont County employee or employees were discussed during the executive session.[71] Nor could Painter recall if there were any threats of litigation or pending suits at that time.[72] Eigel also did not know

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meetings with which he takes issue. Therefore, this decision only deals with the dates that the relator or respondent specifically discussed in summary judgment motions.

[65] D. Uible Dep., pgs. 59-60; Ex. 3 to D. Uible, D. Painter, and E. Humphrey Deps.
[66] Defs. Answers to Pls. Interrog. No. 13.
[67] D. Uible Dep., pg. 56.
[68] D. Uible Dep., pg. 62.
[69] D. Uible Dep., pgs. 60-61.
[70] D. Uible Dep., pg. 65.
[71] D. Painter Dep., pg. 46.
[72] D. Painter Dep., pg. 46.

which employee or employees were discussed during the executive session, and he is not certain as to whether he attended that session or not.[73]

February 27, 2017: The Board held a meeting on February 27th, during which it entered into executive session to consider the "appointment, employment, dismissal, discipline, promotion, demotion, or compensation of one or more employees."[74] It is unknown who was discussed during the executive session.[75] Uible has no recollection of what employees were discussed during the executive session,[76] and neither does Painter[77] or Eigel.[78]

March 1, 2017: The Board held a meeting on March 1st, during which it entered into executive session[79] for the consideration of the "appointment, employment, dismissal, discipline, promotion, demotion, or compensations of one or more public employees" and to "confer with the prosecuting attorney regarding pending or imminent litigation."[80] During the executive session, the commissioners discussed Clermont County employee Debra Riley.[81] However, Uible does not recall what was being discussed in relation to her.[82] He does not believe that they could have been discussing both promoting and demoting her.[83] He does not recall any other employees who were discussed during this executive session.[84]

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[73] T. Eigel Dep., pgs. 36-37.
[74] D. Uible Dep., pg. 66; Ex. 4 to D. Uible, D. Painter, and E. Humphrey Deps.
[75] Defs. Answers to Pls. Interrog. No.14.
[76] D. Uible Dep., pg. 67.
[77] D. Painter Dep., pg. 48.
[78] T. Eigel Dep., pg. 38.
[79] Defs. Answers to Pls. Interrog. No. 15.
[80] Ex. 4 to J. Kocica and T. Eigel Deps.
[81] D. Uible Dep., pg. 72; D. Painter Dep., pg. 31; Defs. Answers to Pls. Interrog. No. 15.
[82] D. Uible Dep., pg. 72.
[83] D. Uible Dep., pg. 72.
[84] D. Uible Dep., pg. 73.

Commissioner Painter also does not recall what decision was made regarding Debra Riley or whether any other employees were discussed as well.[85] He believes promotion and demotion could have both been discussed if Riley was being moved into a different position and some other Clermont County employee would then be promoted or demoted to take her position.[86] However, he is not sure if the Board was discussing, promoting, demoting, terminating, or hiring Riley.[87]

Humphrey also noted the name "Deborah Riley" in his notes, along with fitness for duty.[88] He does not recall what the commissioners spoke about with respect to Riley, but Humphrey believes fitness for duty would likely concern a demotion.[89] He also noted "conveyance fees" during the executive session, which related to ongoing litigation.[90]

Eigel does not know what discussions took place during the executive session or if those discussions involved Riley.[91]

March 22, 2017: The Board held a meeting on March 22nd, during which it entered into executive session to discuss, among other things, "the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of one or more public employees."[92] It is unknown who or what was discussed during the executive session.[93]

March 27, 2017: The Board held a meeting on March 27th, at which it entered into executive session.[94] It entered into executive session to discuss "the appointment,

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[85] D. Painter Dep., pg. 31.
[86] D. Painter Dep., pg. 31.
[87] D. Painter Dep., pgs. 32-33.
[88] E. Humphrey Dep., pg. 49.
[89] E. Humphrey Dep., pgs. 49-50.
[90] E. Humphrey Dep., pg. 50.
[91] T. Eigel Dep., pgs. 38-39.
[92] Ex. 5 to J. Kocica and T. Eigel Deps.
[93] Defs. Answers to Pls. Interrog. No. 27.
[94] Defs. Answers to Pls. Interrog. No. 16.

employment, dismissal, discipline, promotion, demotion, or compensation of one or more public employees."[95] However, it is unknown which employee or employees were discussed during the executive session.[96] Eigel is unaware of who was discussed or why.[97]

April 19, 2017: The Board held a meeting on April 19th, during which it entered into executive session to discuss "the appointment, employment, dismissal, discipline, promotion, demotion, and/or compensation of one or more public employees."[98] It is unknown who was discussed during the executive session.[99] Eigel does not know what was discussed at this meeting.[100]

June 7, 2017: On June 7th, the Board held a meeting, at the end of which it entered into executive session.[101] The Board entered into executive session to discuss the "appointment, employment, dismissal, discipline, promotion, demotion, and/or compensation of one or more public employees."[102] It is unknown who was discussed during the executive session.[103] Painter does not recall which employee or employees were discussed during the meeting,[104] nor does Eigel recall who or what was discussed.[105]

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[95] Ex. 6 to J. Kocica and T. Eigel Deps.
[96] Defs. Answers to Pls. Interrog. No. 16; D. Painter Dep., pg. 42.
[97] T. Eigel Dep., pg. 39.
[98] Ex. 18 to J. Kocica and T. Eigel Deps.
[99] Defs. Answers to Pls. Interrog. No. 17.
[100] T. Eigel Dep., pg. 40.
[101] Ex. 10 to D. Uible, D. Painter, and E. Humphrey Deps.
[102] Ex. 10 to D. Uible, D. Painter, and E. Humphrey Deps.
[103] Defs. Answers to Pls. Interrog. No. 18.
[104] D. Painter Dep., pg. 49.
[105] T. Eigel Dep., pg. 40.

On the same page that the executive session is noted in Humphrey's notes, he included a list of twelve hotels in Clermont County.[106] Humphrey does not recall if they were discussed during the executive session and believes he may have written the hotels down after the meeting.[107] At or around this time, there had been public criticisms of the idea of a bed tax in Clermont County, particularly concerning the transparency of the issue.[108] Humphrey testified he does not know any way of finding out what was discussed during the meeting.[109]

June 28, 2017: The Board held a meeting on June 28, 2017, during which Hicks submitted a written statement and made oral remarks.[110] Neither his commentary nor a summary thereof were included in the meeting minutes.[111] The Board did not take any action based on Hicks' remarks during the meeting.[112]

July 12, 2017: The Board held a meeting on July 12, 2017.[113] Painter read a letter during the meeting about the bed tax, which is included as an attachment to the meeting minutes.[114]

August 2, 2017: The Board held a meeting on August 2, 2017.[115] Humphrey prepared a note for the meeting on the bed tax, which would increase the tax from 6% to 7%.[116]

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[106] Ex. 18 to D. Uible, D. Painter, and E. Humphrey Deps.
[107] E. Humphrey Dep., pg. 52.
[108] E. Humphrey Dep., pgs. 39-40.
[109] E. Humphrey Dep., pg. 57.
[110] C. Hicks Dep., pg. 96.
[111] C. Hicks Dep., pgs. 96-97; Ex. 12 to D. Uible, D. Painter, and E. Humphrey Deps.
[112] C. Hicks Dep., pgs. 97-98.
[113] Ex. 14 to D. Uible, D. Painter, and E. Humphrey Deps.
[114] D. Painter Dep., pg. 86.
[115] Ex. 12 to J. Kocica and T. Eigel Deps.
[116] E. Humphrey Dep., pg. 80; Ex. 19 to D. Uible, D. Painter, and E. Humphrey Deps.

The Board entered into executive session to consider, among other things, "the appointment, employment, dismissal, discipline, promotion, demotion or compensation of one or more public employees."[117] It is unknown which employees were discussed during the executive session.[118] Eigel does not know the employee or employees who were discussed during the executive session or what else may have been discussed.[119]

August 9, 2017: The board held a meeting on August 9, 2017.[120] Hicks requested more than five minutes to speak during the public participation portion of the meeting.[121] The administrator spoke to Uible and suggested Hicks receive ten minutes.[122] Based on this recommendation, Uible allotted ten minutes for Hicks to speak.[123] He did not discuss this decision with the other commissioners or vote on the issue.[124] Instead, Uible based his decision to provide ten minutes to Hicks based on his power and discretion as president to run the board meeting.[125]

The board entered into executive session to discuss, among other things, "the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of one or more public employees * * *."[126] It is unknown who was discussed during the executive session.[127] Eigel does not know which employee or employees were discussed, or what was discussed during the executive session.[128] Humphrey made

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[117] Ex. 12 to J. Kocica and T. Eigel Deps.
[118] Defs. Answers to Pls. Interrog. No. 20.
[119] T. Eigel Dep., pg. 42.
[120] D. Uible Dep., pg. 101; Ex. 13 to J. Kocica and T. Eigel Deps.
[121] D. Uible Dep., pg. 101.
[122] D. Uible Dep., pg. 101.
[123] D. Uible Dep., pgs. 101-102.
[124] D. Uible Dep., pg. 101.
[125] D. Uible Dep., pg. 102.
[126] Ex. 13 to J. Kocica and T. Eigel Deps.
[127] Defs. Answers to Pls. Interrog. No. 21.
[128] T. Eigel Dep., pgs. 42-43.

notes regarding a jail inmate's bill that he believes related to a legal matter, although he cannot recall if there was pending or threatened litigation at the time.[129]

August 16, 2017: The Board held a meeting on August 16, 2017.[130] The Board allowed Hicks to speak for 10 minutes instead of five, as would normally be allowed under the Board's rules of procedure.[131] Uible made the decision to allow Hicks to speak for 10 minutes.[132]

DISPUTED FACTS

July 26, 2017: The Board held a meeting on July 26, 2017.[133] Hicks emailed the three commissioners, among other people, at or about 9:00 a.m., requesting to speak at the meeting.[134] The meeting minutes indicate that the commissioners received Hicks' email at or about 9:00 a.m., and based upon the email, there was no further information to bring to the Board's attention.[135] At the end of the July 26th meeting, Hicks requested to speak during the public participation portion.[136]

Uible did not allow Hicks to speak and avers that he made this decision unilaterally as the president of the Board.[137] Under the rules of procedure, Uible decided that Hicks' comments outlined in the email were not relevant or germane to the discussions of the

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[129] E. Humphrey Dep., pg. 59.
[130] Ex. 13 to D. Uible, D. Painter, and E. Humphrey Deps.
[131] Defs. Answers to Pls. Interrog. No. 4.
[132] Defs. Answers to Pls. Interrog. No. 4.
[133] Ex. 6 to D. Uible, D. Painter, and E. Humphrey Deps.
[134] Ex. 17 to D. Uible, D. Painter, and E. Humphrey Deps; E. Humphrey Dep., pgs. 35-37; Ex. 6 to D. Uible, D. Painter, and E. Humphrey Deps.
[135] Ex. 6 to D. Uible, D. Painter, and E. Humphrey Deps.
[136] E. Humphrey Dep., pgs. 33, 38.
[137] D. Uible Dep., pg. 82.

Commissioner's Office.[138] Uible testified he did not discuss his decision with the other commissioners.[139] Uible had a sheriff's deputy remove Hicks from the meeting because, per Uible, Hicks was uncontrollable.[140]

Hicks testified that Uible stated, during the meeting, that the commissioners discussed what Hicks wanted to talk about and decided he would not be allowed to speak.[141]

LEGAL ANALYSIS

I. PRELIMINARY EVIDENTIARY ISSUES

In its response in opposition to the relator's summary judgment motion, the respondent objected to the court's consideration of Relator's Exhibits 16 and 17. The relator attached Exhibits 16 and 17 to his summary judgment motion, but they are not exhibits to depositions in the record nor were they attached to an affidavit. Exhibit 16 is a segment of minutes from a June 6, 2018 Board meeting, and Exhibit 17 is a segment of minutes from a July 11, 2018 Board meeting.

As mentioned above, under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and

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[138] D. Uible Dep., pg. 83; Defs. Answers to Pls. Interrog. No 3.
[139] D. Uible Dep., pg. 83; D. Painter Dep., pg. 50.
[140] D. Uible Dep., pg. 32.
[141] C. Hicks Dep., pgs. 113-114.

written stipulations of fact, if any, timely filed in the action."[142] When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[143]

Several cases from the Twelfth District Court of Appeals are instructive on this issue. In *Lundwigsen v. Lakeside Plaza, L.L.C.*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, the Twelfth District Court of Appeals had to determine whether the trial court erred by failing to consider photographs included in the appellant's responses to motions for summary judgment.[144] The appellees argued below that the trial court should not consider the photographs because they were not introduced as exhibits attached to an affidavit or otherwise authenticated.[145] The trial court nevertheless considered the photographs.[146]

The appellate court noted that Civ.R. 56(C) includes an "* * * exhaustive list of materials * * *" for the trial court to consider.[147] Any evidence that falls outside the enumerated list of evidence in Civ.R. 56(C) "* * * must be incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E)."[148] Typically a party's "failure to authenticate a document submitted on summary judgment renders the document void of

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[142] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[143] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist. 1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist. 1986).
[144] *Lundwigsen v. Lakeside Plaza, L.L.C.*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, ¶ 23.
[145] Id.
[146] Id.
[147] Id. at ¶ 24 citing *Wells Fargo*, 2013-Ohio-855 at ¶ 15.
[148] *Ludwigsen*, 2014-Ohio-5493 at ¶ 24, citing *State ex rel. Anderson v. Obetz*, 10th Dist. Franklin No. 06AP-1030, 2008-Ohio-4064, ¶ 30.

evidentiary value."[149] The court concluded that the photographs should not be considered as summary judgment evidence because they were not incorporated by reference into a properly framed affidavit.[150] However, the court acknowledged that case law exists suggesting the court "may, in its discretion, consider documents other than those enumerated in Civ.R. 56(C) if there is no objection."[151] Even so, the appellate court found that this exception did not apply because the appellees had "raised the issue" with the trial court before it ruled on the motions for summary judgment.[152]

The case that the *Ludwigsen* Court referenced as suggesting that a trial court may, in certain circumstances, consider evidence not listed in Civ.R. 56(C) in deciding summary judgement was *Johnson v. Sears Roebuck & Co.*, 12th Dist. Clermont No. CA2000-03-017, 2000 WL 1145481 (Aug. 14, 2000). In *Johnson*, the trial court refused to consider records that were attached to the appellant's response in opposition to summary judgment.[153] The Twelfth District Court of Appeals observed that other appellate courts had held "that a court may, in its discretion, consider other documents other than those enumerated in Civ.R. 56(C), if there is no objection."[154] The court also acknowledged that courts do not "commit reversible error by considering documents not in accordance with Civ.R. 56(C) or (E) where there is no suggestion that the documents

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[149] *Ludwigsen*, 2014-Ohio-5493 at ¶ 24, citing *Shampton v. Springboro*, 12th Dist. Warren No. CA98-02-014, 1999 WL 8361, *5 (Jan. 11, 1999).
[150] *Ludwigsen*, 2014-Ohio-5493 at ¶ 25.
[151] (Emphasis added.) *Ludwigsen*, 2014-Ohio-5493 at ¶ 25, fn. 1, citing *Johnson v. Sears Roebuck & Co.*, 12th Dist. Clermont No. CA2000-03-017, 2000 WL 1145481, *2 (Aug. 14, 2000).
[152] *Ludwigsen*, 2014-Ohio-5493 at ¶ 25, fn. 1.
[153] *Johnson*, 2000 WL 1145481 at *1.
[154] Id. at *2, citing *Lytle v. Columbus*, 70 Ohio App.3d 99, 104, 590 N.E.2d 421 (10th Dist. 1990).

are not authentic or that the result would be different if the documents were properly authenticated."[155]

The only objection the appellee had made to the trial court regarding the evidence was in a parenthetical statement contained in its reply memorandum.[156] The appellee objected to the court considering the records on the basis that they have not been authenticated by affidavit or another form of authentication.[157] The records had been produced by the appellee in its answers to interrogatories.[158] Upon considering the circumstances, the Twelfth District Court of Appeals held that, despite the appellant's technical mistake by failing to identify the documents as answers to interrogatories, the trial court erred in failing to consider the records.[159]

The court finds that the instant matter is more akin to *Lundwigsen* and therefore excludes from its consideration Relator's Exhibits 16 and 17, which the relator submitted in support of his motion for summary judgment. First, the respondent objected to the court's consideration of these documents before the court reached its decision on summary judgment.[160] The respondent raised an objection in its response to the relator's summary judgment motion. As such, the court cannot exercise its discretion to consider documents not enumerated in Civ.R. 56(C) when the opposing party objects.[161]

Furthermore, the case at bar differs in significant respects from *Johnson*. The relator has not asserted that the documents were produced as answers to interrogatories,

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[155] *Johnson*, 2000 WL 1145481 at *2, citing *Internl. Bhd. of Elec. Workers v. Smith*, 76 Ohio App.3d 652, 660, 602 N.E.2d 782 (6th Dist. 1992).
[156] *Johnson*, 2000 WL 1145481 at *2.
[157] Id.
[158] Id.at *3.
[159] Id.at *3.
[160] *Ludwigsen*, 2014-Ohio-5493 at ¶ 25, fn. 1.
[161] *Johnson*, 2000 WL 1145481 at *2.

which was the case in *Johnson*. The *Johnson* Court found that the appellant made a "technical mistake" by failing to "identify" the attached documents as answers to interrogatories.[162] Civ.R. 56(C) specifically allows the court to consider answers to interrogatories in deciding summary judgment.

Civ.R. 56(C) does not, however, specifically state that the court may consider documents produced from other sources. As discussed, documents from another source should be incorporated by reference into a properly framed affidavit. As such, the court cannot conclude that the relator made the same mere technical mistake that was involved in *Johnson* by failing to identify the documents as produced in answers to interrogatories. Therefore, the court will not consider Relator's Exhibits 16 or 17 for the purposes of summary judgment.

II. MOTIONS FOR SUMMARY JUDGMENT

A. EXECUTIVE SESSIONS

The Open Meetings Act ("OMA"), as set forth in R.C. 121.22, and often referred to as the Sunshine Law, "seeks to prevent public bodies from engaging in secret deliberations on public issues with no accountability to the public."[163] In doing so, the OMA acts to "assure accountability of elected officials."[164]

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[162] Id.at *3.
[163] *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 14 (12th Dist.), citing *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, ¶ 9 (1st Dist.).
[164] *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 11th Dist. Portage No. 2016-P-0057, 2017-Ohio-4237, ¶ 18.

The OMA specifically provides in R.C. 121.22(A) that: "This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."[165] Furthermore, 121.22(C) likewise requires "[a]ll meetings of any public body * * * to be public meetings open to the public at all times."[166] Thus, the OMA requires public bodies to deliberate public issues in public.[167]

"However, if specific procedures are followed, public officials may discuss certain sensitive information privately in an executive session."[168] An executive session "is one from which the public is excluded and at which only such selected persons as the board may invite are permitted to be present."[169] R.C. 121.22(G) lists seven matters that a public body may consider in executive session.[170] The exceptions contained in R.C. 121.22(G) are to be strictly construed.[171] "The statute requires a public body to specify, in detail, the stated purpose for holding an executive session, although the law does not require that the specific nature of the matter to be considered be disclosed."[172] "As long as an executive session is properly convened for the sole purpose of considering certain specified matters under R.C. 121.22(G), and the deliberations during the executive

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[165] R.C. 121.22(A).
[166] 121.22(C).
[167] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 14.
[168] Id. at ¶ 15, citing *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, 925 N.E.2d 641, ¶ 64 (10th Dist.).
[169] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 15, quoting *Thomas v. Bd. of Trustees*, 5 Ohio App.2d 265, 268, 215 N.E.2d 434 (7th Dist. 1966). *See Keystone Commt. v. Switzerland of Ohio Sch. Dist. Bd. of Edn.*, 7th Dist. No. 15 MO 0011, 2016-Ohio-4663, 67 N.E.3d 1, ¶ 25 ("An executive session is a closed-door conference convened by a public body, after a roll call vote, that is attended by only the members of the public body (and those they invite), that excludes the public.").
[170] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 15.
[171] Id. at ¶ 15, citing *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 93 (12th Dist.).
[172] *In re Removal of Kuehnle*, 2005-Ohio-2373 at ¶ 93.

session are for a purpose specifically authorized under R.C. 121.22(G), there is no violation of OMA."[173]

R.C. 1221.22(G)(1), at issue in the instant case, concerns personnel. "If a public body decides to conduct an executive session for the purpose of considering one or more of the matters listed in R.C. 121.22(G)(1) concerning personnel, the public body must specify in its motion and vote those listed matters that it will discuss in the executive session."[174] A public body may "list one or more" specified purpose from R.C. 121.22(G)(1).[175] R.C. 121.22(G)(1) provides, in relevant part:

> "Except as provided in divisions (G)(8) and (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:
>
> (1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing. * * *"

Furthermore, R.C. 121.22(G)(1) may only be entered into when the public body's "*sole* purpose is the consideration of a *specific* employee's employment, dismissal, etc."[176]

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[173] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 55.
[174] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 59, 748 N.E.2d 58 (2001), citing R.C. 121.22(G)(1) and 1988 Ohio Atty. Gen. Ops. No. 88–029, 2–120 to 2–121, fn. 1.
[175] *State ex rel. Long*, 92 Ohio St.3d at 59. *See In re Removal of Kuehnle*, 2005-Ohio-2373 at ¶ 92, citing R.C. 121.22(G)(1) ("The motion shall state which one or more of the approved purposes is the reason for the executive session.").
[176] (Emphasis original.) *Gannett Satellite Information Network, Inc. v. Chillicothe City School Dist. Bd. of Educ.*, 41 Ohio App.3d 218, 220, 534 N.E.2d 1239 (4th Dist. 1988). *See State ex rel. Patrick Bros., A Gen. Partnership v. Putnam Cty. Bd. of Commrs.*, 3d Dist. Putnam No. 12-13-05,

The OMA defines "public body" to include any "any board, commission, committee, council, or similar decision-making body of * * * any county."[177] R.C. 121.22(C) also states that "[t]he minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section."

In *State ex rel. Hardin v. Clermont County Board of Elections*, 12th Dist. No. CA2011-05-045, 2012-Ohio-2569, 972 N.E.2d 115, the Twelfth District Court of appeals developed a burden-shifting framework for OMA claims. R.C. 121.22(I)(1) provides in relevant part: "Any person may bring an action to enforce this section. * * * Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." In considering R.C. 121.22(I)(1), the appellate court reviewed the distinctions between the burden of persuasion and production, concluding that "the party who files a complaint alleging a violation of OMA has the ultimate burden to prove OMA was violated (or was threatened to be violated) by a public body. That is, the party asserting a violation of OMA has the burden of persuasion by a preponderance of the evidence."[178] Accordingly, the Twelfth District Court of Appeals devised a burden-shifting framework for OMA claims that works as follows:

> "[T]he plaintiff or relator initially carries his or her burden by showing that a meeting of the majority of the members of a public body occurred and that the general public was excluded from that meeting. Once the plaintiff or relator demonstrates the above, the burden then shifts to the public body to produce or go forward with evidence that the challenged meeting fell under one of the exceptions of R.C.

2014-Ohio-2717, ¶ 38 (finding that discussing R.C. 121.22(G)(1) was not satisfied because the public body did not discuss specific employees during the executive session).

[177] R.C. 121.22(B)(1).

[178] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 24, citing *State ex rel. Hardin Cty. Publishing Co. v. Hardin Mem. Hosp.*, 3d Dist. No. 6–02–04, 2002 WL 31323400, *3 (Oct. 18, 2002).

> 121.22(G). After the public body comes forward with such evidence, the burden then shifts to the plaintiff or relator to come forward with evidence that the exception claimed by the public body is not applicable or valid. If the plaintiff or relator cannot show that the exception is inapplicable or invalid, he has failed to prove the public body violated OMA, that is, he has failed to meet his burden of proof. If, on the other hand, the plaintiff or relator can show that the exception is not applicable or not valid, he has met his burden of proof."[179]

In examining the present case, the relator has alleged that the respondent improperly entered into executive session by listing, what he has termed, a "laundry list" of reasons under R.C. 121.22(G)(1), those being "appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee." He believes that these executive sessions were used for the respondent to privately discuss the contested bed tax. In his summary judgment motion, the relator maintains that executive sessions were improperly entered into in this manner on February 22, 2017; February 27, 2017; March 1, 2017; March 22, 2017; March 27, 2017; April 19, 2017; June 7, 2017; August 2, 2017; and August 9, 2017.[180]

The relator initially carries his burden by showing that a meeting of the majority of the Board occurred on these dates and that the general public was excluded from that meeting. Based upon the meeting minutes and deposition testimony submitted and before the court, the court finds that the relator has satisfied this first step in *Hardin*.

Thus, the burden shifts to the respondent to "to produce or go forward with evidence that the challenged meeting fell under one of the exceptions of R.C. 121.22(G)." The respondent has argued that it should receive a "presumption of regularity" that its

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[179] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 25.

[180] The respondent also alleges violations of R.C. 121.22(G)(1) on June 14, 2017. However, this claim was not listed in the complaint, nor was the complaint amended. Therefore the court shall not consider this claim.

executive sessions were legally conducted. The "presumption of regularity applies to official actions pursuant to the official's ordinary duties of office."[181] The presumption must be rebutted with actual evidence, and not bare allegations.[182]

There are only two post-*Hardin* cases, neither of which are from the Twelfth District Court of Appeals, that apply the presumption of regularity to cases in which a relator alleged a public body's noncompliance with R.C. 121.22(G).[183] Notably, neither case applies the three-part burden-shifting framework enunciated in *Hardin*, which is the law of this district, although they cite *Hardin* for the principle that the relator bears the ultimate burden of proving that the public body violated the OMA.

The court concludes that a presumption of regularity should not be applied to allow the respondent to satisfy its burden under the second step of *Hardin*. To do so would mean that the second step of *Hardin* is eliminated, and the test would effectively move from the first step to the third. Thus, the burden would never shift from the relator to the respondent until the relator could show under the third step in *Hardin*, by affirmative evidence, that the claimed exception under R.C. 121.22(G) is inapplicable or invalid. This sort of burden-shifting would eviscerate the holding of *Hardin* and render it virtually meaningless.

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[181] *L.J. Smith, Inc. v. Harrison Cty. Bd. of Revision*, 140 Ohio St.3d 114, 2014-Ohio-2872, 16 N.E.3d 573, ¶ 28. *See In re Application of Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427, ¶ 23, quoting *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590, 113 N.E.2d 14 (1953) ("in the absence of evidence to the contrary, public officers, administrative officers and public boards * * * will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner.").

[182] *In re Application of Am. Transm. Sys., Inc.*, 2010–Ohio–1841 at ¶ 23.

[183] *See Brenneman Bros. v. Allen Cty. Commrs*, 3d Dist. Allen No. 1-14-15, 2015-Ohio-148, ¶¶ 17-19; *State ex rel. Huth v. Village of Bolivar*, 5th Dist. Tuscarawas No. 2018 AP 03 0013, 2018-Ohio-3460, ¶¶ 27-32.

Furthermore, the *Hardin* Court's well-considered and thoughtful discussion of burden shifting and burdens of proof did not include the presumption of regularity. Nor did the *Hardin* Court apply the presumption of regularity when analyzing the facts of that case. This court believes that, had the Twelfth District Court of Appeals intended to incorporate the presumption of regularity into the burden-shifting framework, it would have articulated that intention and applied it. As such, the court shall apply *Hardin* as it was written.

In examining the second step of *Hardin*, the respondent must produce or go forward with evidence that the challenged meetings fell under one of the exceptions of R.C. 121.22(G). However, the respondent has not produced any such evidence for the meetings at issue.

For all meetings listed above, save March 1, 2017, the commissioners and Eigel could not remember who or what was discussed during the course of the executive sessions entered into for the purpose of appointment, employment, dismissal, discipline, promotion, demotion, or compensation of one or more public employees. Instead, the commissioners spoke about what typically, usually, or almost always happens during executive sessions entered into to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of one or more public employees.

However, none of them had recollections of who or what was actually discussed. Even when viewed in a light most favorable to the respondent, these facts cannot be construed as demonstrating that executive sessions on February 22, 2017; February 27, 2017; March 22, 2017; March 27, 2017; April 19, 2017; June 7, 2017; August 2, 2017; and August 9, 2017 complied with R.C. 121.22(G)(1). Although it is permissible to enter

into executive session to discuss more than one topic in (G)(1), as discussed, specific employees must actually be discussed. Here there is simply no evidence that this occurred.

The court understands that it must be difficult to recall who was discussed and what topics were discussed for so many dates from so long ago. Indeed, this case is rather unique in that it involves dates for which no one in the executive sessions recalls portions of the discussions.[184] Even so, step two of *Hardin* requires the respondent to show compliance with R.C. 121.22(G) by producing evidence of such. However, during oral argument even counsel for the respondent admitted that there is no such evidence, stating: "There is no evidence. And there is no evidence that's been presented as to what's went on in those executive sessions."

As to the March 1, 2017 executive session, all three commissioners testified that they discussed Clermont County employee Debra Riley. However, none of them recalled whether they discussed her appointment, employment, dismissal, discipline, promotion, demotion, or compensation. The closest that a commissioner came to recollecting what about Riley was discussed was revealed in Humphrey's personal notes, which indicated "fitness for duty" near Riley's name.

Uible could not recall what was being discussed in relation to Riley.[185] However, he believed it would be "contrary" to be discussing both promoting and demoting her.[186]

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[184] *Cf. State ex rel. Hardin*, 2012-Ohio-2569 (witnesses testified as to specific matters discussed in executive sessions); *In re Removal of Kuehnle*, 2005-Ohio-2373 (record included specific details as to which employees were discussed and what topics were covered in executive sessions); *Keystone Commt.*, 2016-Ohio-4663 (witness testified as to specific discussions that occurred in executive session).
[185] D. Uible Dep., pg. 72.
[186] D. Uible Dep., pg. 72.

He also did not recall any other employees who were discussed during this executive session.[187]

And Painter also did not recall what decision was made regarding Debra Riley or whether any other employees were discussed as well.[188] He believes promotion and demotion could have both been discussed if Riley was being moved into a different position and some other Clermont County employee would then be promoted or demoted to take her position.[189] However, he is not sure if the Board was discussing promoting, demoting, terminating, or hiring Debra Riley.[190]

Thus, even if the evidence can be construed as showing that the commissioners discussed demoting, dismissing, or disciplining Riley, there is still no evidence of whom else they discussed appointing, employing, or promoting to take her position. As mentioned, the exceptions in R.C. 121.22(G) are to be strictly construed.[191] Although the commissioners may have potentially discussed some of the reasons listed in the meeting minutes for March 1, 2017 for entering into executive session, there is simply no evidence that they discussed all of them. Accordingly, the court finds that summary granted should be granted in favor of the relator regarding executive sessions that violated R.C. 121.22(G)(1) entered into on February 22, 2017; February 27, 2017; March 1, 2017; March 22, 2017; March 27, 2017; April 19, 2017; June 7, 2017; August 2, 2017; and August 9, 2017.

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[187] D. Uible Dep., pg. 73.
[188] D. Painter Dep., pg. 31.
[189] D. Painter Dep., pg. 31.
[190] D. Painter Dep., pgs. 32-33.
[191] *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 15, citing *In re Removal of Kuehnle*, 2005-Ohio-2373 at ¶ 93.

B. INADEQUATE MEETING MINUTES

R.C. 121.22(C) "requires the preparation, filing, and maintenance of a public body's minutes."[192] Specifically, it provides: "The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. Thus, when "'the members of a public body agree to attend, in their official capacity, a meeting where public business is to be discussed and a majority of the members do attend, R.C. 121.22(C) necessitates that minutes of the meeting be recorded.'"[193] The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section. * * *"[194]

Further, after "these minutes are prepared, Ohio's Public Records Act, R.C. 149.43, requires the public body to permit public access to the minutes upon request."[195] And additionally, R.C. 305.10, also governs the records of proceedings, providing:

> "(A) Except as otherwise provided in division (B) of this section, the clerk of the board of county commissioners shall keep a full written record of the proceedings of the board, and a written general index of those proceedings, entering each motion with the name of the person making it on the record. The clerk shall call and record the yeas and nays on each motion. The clerk shall state fully and clearly in the record any question relating to the powers and duties of the board which is raised for its consideration by any person having an interest therein, together with the decision on such question, and shall call and record the yeas and nays by which the decision is made. When requested by a party interested in the proceedings or by a party's counsel, the clerk shall record any

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[192] *State ex rel. Long*, 92 Ohio St.3d at 56, citing *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 423, 667 N.E.2d 1223 (1996) and R.C. 121.22(C).
[193] *State ex rel. Long*, 92 Ohio St.3d at 59, citing *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543, 668 N.E.2d 903 (1996).
[194] R.C. 121.22(C).
[195] *State ex rel. Long*, 92 Ohio St.3d at 56, citing *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 101, 564 N.E.2d 486 (1990) and R.C. 121.22(C).

> legal proposition decided by the board, the decision thereon, and the votes by which the decision is reached. If either party, in person or by counsel, takes exception to such decision, the clerk shall record the exceptions with the record of the decision."

"R.C. 121.22, 149.43 and 305.10, when read together, impose a duty on all boards of county commissioners to maintain a full and accurate record of their proceedings."[196]

The Ohio Supreme Court has explained that for public records maintained under R.C. 121.22 and 305.10, "[f]ull and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision."[197]

In turning to the instant case, the relator argues that the respondent maintains inadequate meeting minutes. In particular, he maintains that the minutes from meetings on July 12, 2017 and June 28, 2017 are inadequate. Hicks contends that his statements were not included in the minutes. However, the Board did not take any action upon the comments that Hicks made.[198]

As explained above, full and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the Board's decision.[199] However, as the respondent correctly asserts, and as Hicks admitted in his deposition testimony, the Board did not make any decisions based on Hick's statements that were excluded from the meeting minutes, therefore obviating the legal

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[196] *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 667 N.E.2d 1223 (1996), at paragraph one of the syllabus.
[197] *State ex rel. Long*, 92 Ohio St.3d at 56, quoting *White*, 76 Ohio St.3d at 424.
[198] C. Hicks Dep., pgs. 102-103.
[199] *State ex rel. Long*, 92 Ohio St.3d at 56, quoting *White*, 76 Ohio St.3d at 424.

requirement that Hicks' statements be contained in the meeting minutes. As such, summary judgment on this claim shall be granted in favor of the respondent.

C. IMPROPER DELIBERATIONS

As discussed, under R.C. 121.22(C), "public officials, when meeting to consider official business, conduct those meetings in public."[200] The R.C. 121.22(B)(2) definition of "meeting," which is required by R.C. 121.22(A) to be "liberally construed" in favor of open meetings, requires "(1) a prearranged discussion, (2) a discussion of the public business of the public body, and (3) the presence at the discussion of a majority of the members of the public body."[201]

The Board's Rules of Procedure provides in Rule III(1) that: "Each member of the public who appears before the Board shall be limited to a maximum of (5) minutes to make his or her presentation on a particular item."[202] Rule (III)(4) provides, in turn: "In matters of exceptional interest the Board may, by majority vote, modify or suspend the time allocations."[203]

The respondent moved for summary judgment on the relator's claim that it held private meetings and voted on public issues at those meetings. This claim is based on

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[200] *State ex rel. Long*, 92 Ohio St.3d at 58.
[201] Id., citing *State ex rel. Cincinnati Post*, 76 Ohio St.3d at 543. *See Radtke v. Chester Twp.*, 11th Dist. No. 2014-G-3222, 2015-Ohio-4016, 44 N.E.3d 295, ¶ 23 ("In order for the Open Meetings Act to apply, a public body must simultaneously (1) conduct a 'meeting' and (2) 'deliberate' concerning public business."); *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 2005-Ohio-3489, 995 N.E.2d 862, ¶ 6 (1st Dist.) ("In order to prevail on a claimed violation of the Sunshine Law, one must demonstrate that there was (1) a pre-arranged (2) discussion (3) of the public business of the public body in question (4) by a majority of its members.").
[202] Ex. 7 to D. Uible, D. Painter, and E. Humphrey Deps.; Ex. 6 to H. Hicks Dep.
[203] Ex. 7 to D. Uible, D. Painter, and E. Humphrey Deps.; Ex. 6 to H. Hicks Dep.

Hicks' assertion that the Board allowed Hicks to speak for 10 minutes instead of five on some occasions, and that the Board voted to deny him the right to speak on July 26, 2017.

Uible testified that he made the decision not to let Hicks speak on July 26th unilaterally, as the president of the Board.[204] Under the rules of procedure, cited above, Uible decided that Hicks' comments outlined in the email were not relevant or germane to the discussions of the Commissioner's Office.[205] Uible testified he did not discuss his decision with the other commissioners.[206] However, Hicks testifled that Uible stated, during the meeting, that the commissioners discussed what Hicks wanted to talk about and decided he would not be allowed to speak.[207]

Accordingly, there is a genuine issue of material fact on the issue of whether the Board held a meeting, precluding summary judgment.

CONCLUSION

For the foregoing reasons, the court finds that the respondent and relator's cross motions for summary judgment are each granted in part and denied in part.

The respondent's motion for summary judgment is granted as to the relator's claim that the respondent maintained inadequate meeting minutes. It is denied in all other respects.

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[204] D. Uible Dep., pg. 82.
[205] D. Uible Dep., pg. 83; Defs. Answers to Pls. Interrog. No 3.
[206] D. Uible Dep., pg. 83; D. Painter Dep., pg. 50.
[207] C. Hicks Dep., pgs. 113-114.

The relator's motion for summary judgment is granted as to his claim that the respondent violated R.C. 121.22(G)(1). It is denied in all other respects.

IT IS SO ORDERED.

DATED: 9-3-19

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry have been sent on this 3rd day of September 2019 by e-mail to Jennifer M. Kinsley, at kinsleylawoffice@gmail.com, and Matt Miller-Novak, at Matt@godbeylaw.com, Attorneys for the Plaintiff, and G. Ernie Ramos, at eramos@clermontcountyohio.gov, and Jeannette Nichols, at jnichols@clermontcountyohio.gov, Attorneys for the Defendant.

Judicial Assistant to Judge McBride