

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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CLERMONT COUNTY, OH

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| STATE OF OHIO, EX REL., | : | |
| LEWIS CARTER | : | CASE NO. 2019 CVH 01134 |
| Relator-Plaintiff | : | Judge Jerry R. McBride |
| vs. | : | <u>DECISION/ENTRY</u> |
| CLERMONT COUNTY REPUBLICAN | : | |
| PARTY, ET AL. | : | |
| Respondents-Defendants | : | |

Vivian L. Poe, counsel for the plaintiff-relator State of Ohio ex rel. Lewis Carter, P.O. Box 150, Bethel, Ohio 45106.

George E. Pattison, counsel for the defendant-respondent Clermont County Republican Central Committee, 285 East Main Street, Suite 5, Batavia, Ohio 45103.

Joseph J. Braun, counsel for the defendants-respondents Dennis R. Cooper and James A. Kidwell, 150 East Fourth Street, Fourth Floor, Cincinnati, Ohio 45202.

This cause is before the court for consideration of (1) the joint motion for summary judgment filed by the defendants-respondents Dennis R. Cooper, James A. Kidwell, and the Clermont County Republican Central Committee on May 29, 2020, and (2) the motion for summary judgment filed by the plaintiff-relator State of Ohio ex rel. Lewis Carter on July 29, 2020. The court heard oral argument as to the motions on September 4, 2020, after which it took the motions under advisement.

Upon consideration of the motions for summary judgment, the record of the proceeding, the evidence submitted, the written and oral arguments of counsel, and the applicable law, the court renders this written decision.

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UNDISPUTED FACTS

The complaint stems from allegations involving violations of the Ohio Sunshine Act at a meeting of the defendant-respondent Clermont County Republican Central Committee (hereinafter referred to as "CCRCC") on August 6, 2019.¹ The individually named defendants-respondents hold various positions in the CCRCC, which are included in the complaint caption as follows: Dennis R. Cooper, CCRCC Committee Chairman and James A. Kidwell, CCRCC Member and Clermont County Executive Committee Member.

On August 6, 2019, CCRCC held a meeting to appoint the Clermont County Engineer, which was a vacant position at that time.² Jeremy Evans was the only qualified resident at the meeting seeking the appointment as Clermont County Engineer.³ Cooper presided over the meeting.⁴ The relator attended the meeting.⁵ He could not hear what was happening at the meeting and does not know what occurred during the meeting.⁶

Attendance at the meeting was recorded by having each CCRCC member present sign his or her name on a pre-printed list of names, and the list also stated which precinct each member had been elected or appointed to represent.⁷ The sign-in sheet was located at the front of the room, and several minutes before the meeting started, it was announced multiple times that members should sign in on the sign-in sheet if they had not already

¹ Am. Compl., ¶¶ 1-10.

² Am. Compl., ¶ 6; Kidwell Cooper Answer to Am. Compl., ¶ 7; CCRCC Answer to Am. Compl., I(6).

³ Am. Compl., ¶ 38; Kidwell Cooper Answer to Am. Compl., ¶ 39; CCRCC Answer to Am. Compl., III(36); Ex. 1 to Mehlman Aff.

⁴ Cooper Aff., ¶ 2.

⁵ Carter Aff., ¶ 3.

⁶ Carter Aff., ¶ 13.

⁷ Mehlman Aff., ¶ 10; Ex. 4 to Mehlman Aff.

done so.⁸ The CCRCC did not perform a verbal roll call of its membership.⁹ It was unclear to the relator which CCRCC members were present.¹⁰

The CCRCC Chairman, respondent Dennis R. Cooper, announced at the outset of the meeting that it was a public, open meeting subject to the Ohio Open Meetings Act.¹¹ During the meeting, respondent and CCRCC member James R. Kidwell made a motion to elect Evans.¹² Specifically, Kidwell made a motion as follows: "Mr. Chairman, in light of Candidate Maly's withdrawal from consideration and endorsement of Candidate Evans, I move to vote immediately on the appointment."¹³ Kidwell had this motion written on a piece of paper,¹⁴ and he read it aloud.¹⁵ After he read the motion aloud, Cooper requested the piece of paper to maintain an accurate record of the meeting, asking "May I have a copy of that?"¹⁶ Kidwell then passed the written motion to Cooper.¹⁷ Cooper thereafter gave the piece of paper with the motion on it to CCRCC Secretary Christopher Mehlman.¹⁸ The relator could not personally see what was written on the piece of paper, and he did not receive a copy of the paper.¹⁹

⁸ Ex. 1 to Am. Compl.

⁹ Carter Aff., ¶ 5.

¹⁰ Carter Aff., ¶ 4.

¹¹ Am. Compl., ¶ 49; Kidwell Cooper Answer to Am. Compl., ¶ 50; CCRCC Answer to Am. Compl., V(49); Ex. 1 to Am. Compl.

¹² Am. Compl., ¶¶ 50-51; Kidwell Cooper Answer to Am. Compl., ¶¶ 51-52; CCRCC Answer to Am. Compl., V(50-51).

¹³ Mehlman Aff., ¶ 8; Cooper Aff., ¶ 5; Ex. 1 to Am. Compl.

¹⁴ Mehlman Aff., ¶ 8; Cooper Aff., ¶ 5; Ex. 3 to Mehlman Aff.

¹⁵ Ex. 1 to Am. Compl.

¹⁶ Mehlman Aff., ¶ 9; Cooper Aff., ¶ 6.

¹⁷ Mehlman Aff., ¶ 9; Cooper Aff., ¶ 6.

¹⁸ Mehlman Aff., ¶ 9; Cooper Aff., ¶ 6.

¹⁹ Carter Aff., ¶¶ 14-15.

The vote was overwhelmingly in favor of appointing Evans.²⁰ There were 55 CCRCC members present at the meeting, and the vote was conducted by having the voting members of the CCRCC stand up and sit down.²¹ Mehlman recorded the votes on the attendance sheet that each CCRCC member signed.²² Additionally, the Teller Committee counted the votes and reconciled them on a written document.²³ Mehlman's count and the Teller Committee's count matched.²⁴ There were no proxy votes.²⁵ However, the relator could not tell how the CCRCC members voted, and it was unclear to him whether there was proxy voting.²⁶

The relator could not tell what the vote total was.²⁷ Cooper verbally announced the results of the vote at the meeting as 52 votes for "yes," two votes for "no," and one vote for "abstain."²⁸ However, Cooper was incorrect because he abstained, as did the Parliamentarian Byron Baxter.²⁹ Cooper clarified this with the Teller Committee after the vote was announced, but before the Teller Committee had issued its reconciled report of the vote.³⁰ As such, two "yes" votes were actually two "abstain" votes.³¹ The meeting notes recorded 50 votes for "yes," two votes for "no," and three votes for "abstain."³²

²⁰ Am. Compl., ¶¶ 77-78; Kidwell Cooper Answer to Am. Compl., ¶¶ 78-79; CCRCC Answer to Am. Compl., V(77-78).

²¹ Mehlman Aff., ¶ 12; Cooper Aff., ¶ 9; Ex. 4 to Mehlman Aff.

²² Ex. 4 to Mehlman Aff; Cooper Aff., ¶ 8.

²³ Mehlman Aff., ¶ 13; Cooper Aff., ¶ 8; Ex. 5 to Mehlman Aff.

²⁴ Mehlman Aff., ¶ 13.

²⁵ Cooper Aff., ¶ 8.

²⁶ Carter Aff., ¶¶ 6-7.

²⁷ Carter Aff., ¶ 10.

²⁸ Mehlman Aff., ¶ 14; Cooper Aff., ¶ 10.

²⁹ Mehlman Aff., ¶ 14; Cooper Aff., ¶ 10.

³⁰ Mehlman Aff., ¶ 14; Cooper Aff., ¶ 10.

³¹ Mehlman Aff., ¶ 14; Cooper Aff., ¶ 10.

³² Am. Compl., ¶ 78; Kidwell Cooper Answer to Am. Compl., ¶ 79; CCRCC Answer to Am. Compl., 78; Ex. 2 to Mehlman Aff.

At the time of the meeting, there were 155 elected or appointed members in the CCRCC.³³ A quorum was 30% of the members, thus 47 members.³⁴ The relator could not ascertain whether there was a quorum at the meeting.³⁵ Joe Dills, a former member of the CCRCC, had moved out of his precinct before the meeting, therefore forfeiting his position and vote for the meeting.³⁶

PROCEDURAL BACKGROUND

The relator-plaintiff State of Ohio ex rel. Lewis Carter filed the complaint in this case on September 11, 2019. The respondents filed a motion to dismiss on October 28th. The relator filed a motion for leave to amend the complaint on November 27th, which the court granted on December 9th. The relator filed an amended complaint on December 16th. The amended complaint includes two causes of action. The first is for injunctive relief under the Ohio Sunshine Act, compelling the respondents to comply with the Act. The second is for declaratory judgment under the Ohio Sunshine Act, R.C. 121.22(H), requesting a determination of the validity of the CCRCC's actions.

The individually named respondents filed a motion to dismiss the amended complaint under Civ.R. 12(B)(6) on January 3, 2020. On February 28th, the CCRCC filed a motion to dismiss. After the parties fully briefed the motions, the court issued a decision on May 1, 2020, which granted the motions in part and denied them in part. The decision disposed of all respondents except the CCRCC, Kidwell, and Cooper. The relator's two

³³ Mehlman Aff., ¶ 5.

³⁴ Mehlman Aff., ¶ 5.

³⁵ Carter Aff., ¶ 11.

³⁶ Mehlman Aff., ¶ 5.

causes of action for injunctive relief and declaratory judgment remained as to only the following of the relator's allegations: (1) that at the August 6, 2019 meeting, note passing between respondents Kidwell and Cooper violated R.C. 121.22, and (2) that at the August, 6, 2019 meeting, the vote to appoint the Clermont County Engineer violated R.C. 121.22.

Kidwell, Cooper, and the CCRCC filed their answers to the amended complaint on May 27, 2020. On May 29th, they filed a joint motion for summary judgment. The relator filed a response in opposition to their motion on June 3, 2020. The respondents filed a reply in support of the motion on June 4th.

The court issued a briefing/hearing scheduling order on June 9, 2020. Per the order, the time for the relator to file opposing affidavits and other Civ.R. 56(C) evidence expired 28 days from the end of the Ohio Supreme Court enacted tolling period (due to the COVID-19 emergency), which was July 30th at the time of the order. The relator filed a reply to the respondents' reply on July 29th, which included newly filed affidavits. The CCRCC filed a reply to those affidavits on August 3rd.

On July 29, 2020, the relator filed a motion for summary judgment. The respondents filed a joint response in opposition to the relator's motion on August 21st. The relator did not file a reply.

The court heard oral arguments as to the cross motions for summary judgment on September 4, 2020, after which the motions were taken 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."³⁷

The court must view the evidence in a light most favorable to the nonmoving party.³⁸ 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.³⁹ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."⁴⁰

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"?⁴¹ 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."⁴²

³⁷ *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).

³⁸ *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).

³⁹ *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).

⁴⁰ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

⁴¹ *Id.* at 251-52.

⁴² *Id.* at 250.

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.⁴³ 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.”⁴⁴ “To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment.”⁴⁵ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.⁴⁶

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 his pleadings, demonstrating that a “triable issue of fact” remains.⁴⁷ The duty of the nonmoving party is more than that of resisting the motion’s allegations.⁴⁸ Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”⁴⁹ The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.⁵⁰ It may not rely on the pleadings or unsupported allegations.⁵¹

⁴³ *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).

⁴⁴ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

⁴⁵ *Heard v. Dayton View Commons Homes*, 2d Dist. No. 27706, 2018-Ohio-606, 106 N.E.3d 327, ¶ 7, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

⁴⁶ *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

⁴⁷ *Dresher*, 75 Ohio St.3d at 293.

⁴⁸ *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

⁴⁹ (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).

⁵⁰ *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).

⁵¹ *Id.*

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.”⁵² The trial court maintains the sound discretion to admit or exclude relevant evidence.⁵³ 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.⁵⁴

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.⁵⁵ “Personal knowledge” is defined as “[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay.”⁵⁶ “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).”⁵⁷ 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.”⁵⁸

⁵² 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.”).

⁵³ *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.

⁵⁴ *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).

⁵⁵ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

⁵⁶ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁵⁷ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

⁵⁸ *Id.*

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.”⁵⁹ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).⁶⁰

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.”⁶¹ 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.”⁶²

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 resolved in favor of the nonmoving party.⁶³ Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.⁶⁴

LEGAL ANALYSIS

⁵⁹ Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

⁶⁰ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).

⁶¹ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

⁶² 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).

⁶³ *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

⁶⁴ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

I. WHETHER THE “NOTE” PASSED AT THE AUGUST 6, 2019 MEETING VIOLATED R.C. 121.22

The respondents argue that the actions taken at the August 6, 2019 meeting complied with R.C. 121.22(A). The amended complaint alleges that R.C. 121.22 was violated when, during the August 6th meeting, “ * * James A. Kidwell passed a note to Dennis Cooper which violates the Ohio Open Meetings Act because members of a public body passing notes during a public meeting violates the Act.”⁶⁵ The respondents maintain that the relator’s allegations are not violations of Open Meetings Act (“OMA”). In particular, the respondents posit that Kidwell’s action of passing his written motion for purposes of having it transcribed into the meeting minutes does not violate the OMA.

The OMA, as set forth in R.C. 121.22, and often referred to as the Ohio Sunshine Law, “seeks to prevent public bodies from engaging in secret deliberations on public issues with no accountability to the public.”⁶⁶ In doing so, the OMA acts to “assure accountability of elected officials.”⁶⁷

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.”⁶⁸ Furthermore, 121.22(C) likewise requires “[a]ll meetings of any public body * * * to be public meetings open to the public at all times.”⁶⁹ And the

⁶⁵ Am. Compl., ¶ 68.

⁶⁶ *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.).

⁶⁷ *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 11th Dist. Portage No. 2016-P-0057, 2017-Ohio-4237, ¶ 18.

⁶⁸ R.C. 121.22(A).

⁶⁹ R.C. 121.22(C).

OMA further provides in R.C. 121.22(H): "A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body."⁷⁰ Thus, the OMA requires public bodies to deliberate public issues in public.⁷¹

The OMA defines "public body" to include:

"(a) Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution; (b) Any committee or subcommittee of a body described in division (B)(1)(a) of this section* * *."⁷²

"Under limited circumstances, R.C. 305.02, 'Filling vacancy in county offices,' confers upon a county central committee of a local political party the power to appoint individuals to fill county office vacancies. Under these circumstances, R.C. 305.02 transmutes the members of a county central committee of a political party to 'public officers.'⁷³

In turning to the present case, the CCRCC voted to fill a vacancy of a county office, that of County Engineer. R.C. 305.02⁷⁴ provided the CCRCC with the power to elect the County Engineer. Thus, in fulfilling this limited governmental function, the respondents were acting as "public officers" per R.C. 121.22(B)(1) during the August 6, 2019 meeting.

⁷⁰ R.C. 121.22(H).

⁷¹ *State ex rel. Hardin*, 2012-Ohio-2569 at ¶ 14.

⁷² R.C. 121.22(B)(1).

⁷³ *Jones v. Geauga Cty. Republican Party Cent. Committee*, 11th Dist. No. 2016-G-0056, 2017-Ohio-2930, 82 N.E.3d 16, ¶ 26, quoting *State ex rel. Hayes v. Jennings*, 173 Ohio St. 370, 373-374, 182 N.E.2d 546 (1962).

⁷⁴ R.C. 305.02(B) provides, in relevant part: "If a vacancy [in the office of county engineer] occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party that nominated the last occupant of the office as a candidate for that office for the current term shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified * * *."

As discussed, under R.C. 121.22(C), "public officials, when meeting to consider official business, conduct those meetings in public."⁷⁵ Thus, R.C. 121.22 requires that members of a public body discuss and deliberate on official business during open meetings. The OMA does not prescribe how a public body may communicate.⁷⁶ However, the Ohio Supreme Court has explained that "* * * certainly, a meeting is not open if the members communicate in whispers, concealing their deliberations from the public. Nor do we think it would be open if the members spoke only in Latin, or placed a screen between themselves and the audience, or took any of numerous other actions that would limit the public's ability to access their deliberations."⁷⁷ There is no requirement that meeting members describe the documents they receive.⁷⁸

The respondents agree that passing notes during the meeting would be an OMA violation. Instead, the undisputed facts show that Kidwell read the motion to appoint Evans as Clermont County Engineer from a piece of paper. Then, Cooper asked Kidwell for a copy of the motion, and Kidwell provided the written motion. The respondents contend that this was not note passing, but instead the chairman of the meeting simply requesting a copy of the motion for purposes of ensuring the meeting minutes' accuracy.

The respondents submitted the same argument in their motion to dismiss. The court denied the motion as to this issue because the document itself was not attached to the complaint, and since the relator alleged that it was a "note," when deriving all reasonable inferences in favor of the relator, the court could not conclude that it was

⁷⁵ *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 58, 748 N.E.2d 58 (2001).

⁷⁶ *State ex rel. More Bratenahl v. Village of Bratenahl*, 157 Ohio St.3d 309, 2019-Ohio-3233, 136 N.E.3d 447, ¶ 16.

⁷⁷ *State ex rel. More Bratenahl*, 2019-Ohio-3233 at ¶ 16, citing *Manogg v. Stickle*, 5th Dist. Licking No. 97 CA 104, 1998 WL 516311, *1 (Apr. 8, 1998).

⁷⁸ *Manogg*, 1998 WL 516311 at *1.

beyond doubt that the relator can prove no set of facts entitling it to relief. In other words, perhaps the document really was a note and not just a written motion.

That is no longer the case, however, because the respondents have submitted undisputed evidence on summary judgment that the “note” was simply a written copy of the motion that had previously been made. At Cooper’s request, Kidwell handed him the written motion, and Cooper then provided it to Mehlman for the notes and record. The relator has not submitted any evidence to create a genuine issue of material fact on this point, except to say he did not read it himself or receive a copy. Stated differently, all of the evidence in the record demonstrates that the “note” was a written motion, which had already been read aloud at the meeting, and nothing more. As there is no requirement that meeting members describe the documents they receive,⁷⁹ the court is unable to draw the conclusion that the respondents violated the OMA because the relator “had no knowledge what [*sic*] was on the piece of paper * * *”.⁸⁰ The relator has failed to cite to any case law or portion of the OMA indicating that this action or similar actions violate the letter or spirit of the OMA. Accordingly, the court finds that reasonable minds can come to but one conclusion: the respondents did not violate the OMA by passing secret notes.

II. WHETHER THE VOTE AT THE AUGUST 6, 2019 MEETING VIOLATED R.C. 121.22

The remaining allegation by the relator is that the respondents violated R.C. 121.22 because CCRCC’s vote count was inaccurate and that CCRCC did not ensure that proxy

⁷⁹ *Manogg*, 1998 WL 516311 at *1.

⁸⁰ Relator’s Resp., pg. 1.

voting did not take place.⁸¹ The court denied the motion to dismiss on this issue because the respondents failed to address this point in their briefing.

R.C. 121.22(C) provides in relevant part that: "(C) * * * A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting." The Ohio Supreme Court has explained: "The act is not satisfied simply because the doors of a council meeting are open to the public. Rather, an open meeting requires that the public have meaningful access to the deliberations that take place among members of the public body, and that includes being able to determine how participants vote."⁸² As such, the OMA prevents voting by way of secret ballot.⁸³

The court notes that R.C. 305.02(C) also requires a committee majority for a vote appointing a county engineer to occur, reading: "A majority of the members of the central committee present at such meeting may make the appointment."

In examining the present case, the vote by the respondents was not via secret ballot, and a majority of the members present voted in favor of Evans for the appointment of County Engineer. The vote was conducted by having members stand up and sit down, which was viewable to all at the meeting. The Teller Committee recorded the votes and reconciled them, and Mehlman recorded how each member voted next to each member's name on the sign-in sheet.

Cooper verbally announced the results of the vote at the meeting as 52 votes for "yes," two votes for "no," and one vote for "abstain." However, Cooper was incorrect

⁸¹ Am. Compl. ¶¶ 74-78, 88-91.

⁸² *State ex rel. More Bratenahl*, 2019-Ohio-3233 at ¶ 19.

⁸³ *Id.* at ¶ 20.

because he abstained, as did Baxter.⁸⁴ Cooper clarified this with the Teller Committee after the vote was announced, but before the Teller Committee issued its reconciled report of the vote. Accordingly, two “yes” votes were actually two “abstain” votes.⁸⁵ The meeting notes recorded 50 votes for “yes,” two votes for “no,” and one vote for “abstain.”⁸⁶ Although the vote count was incorrectly announced, that does not change the fact that the vote that took place was open for the public to view, nor does it change the final result of the vote. While the relator avers he does not know how members voted from attending the meeting,⁸⁷ the vote was open for all present to view and how each member voted was recorded on the attendance sheet. Members could be clearly seen standing up as they cast their votes. In addition to being able to openly view how members voted, the relator could have additionally viewed the attendance sheet with the votes of each member recorded alongside their names.⁸⁸

The relator posits that no member of the public would be able to decipher which members of the public body were voting.⁸⁹ However, video footage of the vote demonstrates that a member of the public viewing the vote would know who was voting “yes” or “no” based on whether they were standing or sitting at the appropriate time.⁹⁰ All

⁸⁴ Mehlman Aff., ¶ 14; Cooper Aff., ¶ 10.

⁸⁵ Mehlman Aff., ¶ 14; Cooper Aff., ¶ 10.

⁸⁶ Am. Compl., ¶ 78; Kidwell Cooper Answer to Am. Compl., ¶ 79; CCRCC Answer to Am. Compl., 78; Ex. 2 to Mehlman Aff.

⁸⁷ Relator’s Resp., pgs. 1-2.

⁸⁸ *Cf. State ex rel. More Bratenahl*, 2019-Ohio-3233 (finding the OMA unsatisfied where council members voted by secret ballot during a meeting open to the public and the *only* way for the attending public to know how each member voted was to review sticky notes that were haphazardly attached to each secret ballot slip identifying who cast each vote and only available through a records request: “the prospect of future access does not make a meeting ‘open to the public at all times.’”).

⁸⁹ Relator’s Mot., pg. 2.

⁹⁰ Ex. 1 to Am. Compl.

those voting "in favor" of the appointment stood while everyone else sat. They stayed standing for one minute and 51 seconds.⁹¹

Then all those "opposed" stood while everyone else sat.⁹² Finally, Cooper asked if there was anyone "wanting to abstain," at which time one member changed her vote from "opposed" to "abstain."⁹³ Again, this was viewable to the public attending the meeting.

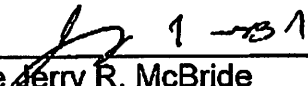
The relator has failed to cite to any case law or portion of the OMA indicating that this vote or similar votes violate the letter or spirit of the OMA. Accordingly, the court finds that reasonable minds can come to but one conclusion: the respondents did not violate the OMA through their voting procedures.

CONCLUSION

For the foregoing reasons, the court finds that the respondents' motion for summary judgment is well-taken and is hereby granted, and the relator's motion for summary judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 9-17-20



Judge Jerry R. McBride


⁹¹ Ex. 1 to Am. Compl.

⁹² Ex. 1 to Compl.

⁹³ Ex. 1 to Compl.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 18th day of September 2020 by e-mail to Vivian Poe, Attorney for the Plaintiff-Relator, at vpoelaw@gmail.com, and to George E. Pattison, Attorney for the Defendant-Respondent Clermont County Republican Central Committee, at george@pattisonlegal.com, and by regular U.S. Mail to Joseph J. Braun, Attorney for the Defendants-Respondents Dennis R. Cooper and James A. Kidwell, 150 East Fourth Street, Fourth Floor, Cincinnati, Ohio 45202.



Judicial Assistant to Judge McBride