

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

STATE OF WISCONSIN *ex rel.*
ISMAEL R. OZANNE

Plaintiff,

vs.

Case No: 11CV1244

JEFF FITZGERALD,
SCOTT FITZGERALD,
MICHAEL ELLIS,
SCOTT SUDER,
MARK MILLER,
PETER BARCA,
DOUGLAS LA FOLLETTE,
JOINT COMMITTEE OF CONFERENCE,
WISCONSIN STATE SENATE and
WISCONSIN STATE ASSEMBLY,

Defendants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT**

Upon the testimony heard and exhibits received on March 29 and April 1, 2011, the court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At the request of Governor Scott Walker, January 2011 Special Session Assembly Bill 11 ("AB 11") was introduced in the Wisconsin Assembly on February 15, 2011 (Exhibit 7).

2. The Assembly passed AB 11 on February 25, 2011, and messaged it to the Wisconsin Senate (*Id.*).

3. On that same day, the Senate read AB 11 a first time, referred it to the Senate Committee on Organization, withdrew it from that committee, and read it a second and third time (*Id.*).

4. Bob Lang, Director of the Legislative Fiscal Bureau, testified that on March 7, 2011, he was contacted and asked to remove all of the fiscal items from AB 11. He then contacted staff in both the Legislative Reference Bureau and Legislative Council offices and requested the formation of a team to perform this task.

5. The Senate convened in regular session on March 9, 2011, at 11:15 a.m., conducted the first reading of newly introduced legislation, read one bill a second and third time, voted on it and then adjourned at 11:19 a.m. until March 10, 2011 (Senate Journal, Regular Session, March 9, 2011).

6. The Senate convened in special session on March 9, 2011, at 11:08 a.m., considered motions, resolutions and joint resolutions not requiring a third reading, voted and then recessed at 11:14 a.m. that day (Exhibit 6 at 3-4).

7. On March 9, 2011, at 2:02 p.m., the Assembly convened in special session. The Assembly received a message from Senate Chief Clerk Robert Marchant that, pursuant to Joint Rule 3, the Senate requested a Committee of Conference on AB 11 and that the Senate's conferees consisted of Senator Scott

Fitzgerald, Senator Michael Ellis and Senator Mark Miller (Assembly Journal Special Session March 9, 2011 at 1).

8. Speaker Jeff Fitzgerald corresponded with the Assembly Chief Clerk, Patrick Fuller, and advised that he appointed himself, Representative Scott Suder and Representative Peter Barca as the Assembly conferees (Assembly Journal Special Session March 9, 2011 at 1-2).

9. The Assembly adjourned at 2:30 p.m. on March 9, 2011, until 10:01 a.m. on Thursday, March 10, 2011.

10. On March 9, 2011, at 2:14 p.m., the Senate reconvened in special session. Senator Scott Fitzgerald requested that the special session of the Senate adjourn until 11:00 a.m. on March 10, 2011. At 2:15 p.m., the Senate adjourned (Exhibit 6 at 4).

11. At or about 2:30 p.m. on March 9, 2011, Bob Lang was summoned from a meeting he was attending with the Assembly Republican Caucus and told that a Joint Committee of Conference meeting would take place at 6:00 p.m. that day.

12. Throughout the day on March 9, 2011, the Capitol, both inside and on the Square, was peaceful with far fewer protestors and other citizens on the grounds or inside the building than days before, including the previous weekend. Citizens could gain access to the Capitol through two doors.

13. At or about 3:00 p.m., Deputy Capitol Police Chief Dan Blackdeer decided to release many of the officers then on duty because it "had been a very slow day" (Transcript of April 1, 2011 hearing at page 124).

14. At or about 3:30 p.m., on March 9, 2011, Senate Chief Clerk Robert Marchant directed Jeff Renk, a staff person with the Senate Chief Clerk's office, to prepare a notice of a meeting for a Joint Committee of Conference to take place at 6:00 p.m. that day.

15. Senate Chief Clerk Marchant advised Senator Scott Fitzgerald that no advance notice of the Joint Committee of Conference was required because the Senate and Assembly were in special session. Marchant relied on Senate Rule 93(2), which provides that, when in special session, "notice of a committee meeting is not required other than posting on the legislative bulletin board[.]" (Exhibit 14).

16. Marchant testified that no "good cause" existed justifying a two-hour notice pursuant to § 19.84(3) (April 1, 2011 Tr., pages 43-44, 101-102).

17. The Joint Rules of the Legislature provide for the creation of a committee of conference whenever the Senate and Assembly disagree on amendments adopted by either House. Joint Rule 3 establishes the make-up of the committee of conference, the manner of proceeding, the transactions to take place when the committee of conference has reached agreement as well as the procedure in the event the committee of conference fails to agree (Exhibit 16).

18. The Joint Rules were amended by 2011 Senate Joint Resolution 2 on January 4, 2011. Among other changes, Resolution 2 repealed and recreated Rule 75 to provide as follows:

Schedule of committee activities. The chief clerk of each house shall publish, on a daily basis on the legislature's committee Internet Web site, a committee schedule containing the name of each committee, its chairperson, the room number or place, and the time and date of each meeting scheduled; and, if applicable, shall designate each proposal, appointment, or administrative rule to be heard by number or name, author, and topic.

(Exhibit 17 at 19)

19. No Joint Rule in effect on March 9, 2011, conflicts with the requirements of the Open Meetings Law that a public notice of every meeting of a governmental body must set forth the time, date, place and subject matter of the meeting, in a form reasonably likely to inform members of the public and news media, and that the notice shall be given at least 24 hours before the meeting.

20. At or about 3:30 p.m. on March 9, 2011, Senate Chief Clerk Marchant contacted Senate Sergeant at Arms Ted Blazel to inform him of the Joint Committee of Conference meeting to be held at 6:00 p.m. Sergeant at Arms Blazel was directed to prepare the Senate Parlor for the meeting and to keep the Capitol building open.

21. Sergeant at Arms Blazel set up the room to accommodate legislative staff, and more media than usual, which left only 20 seats available for members of the public.

22. To the best of Sergeant at Arms Blazel's knowledge, no one considered or discussed whether to conduct the Joint Conference of Committee meeting in any of the other available, and larger, rooms within the Capitol (April 1, 2011 Tr., pages 112-114).

23. One such room that was available and which had been used to conduct public hearings in the past is located in Room 412 East, which is the room where the Legislature's Joint Finance Committee meets. Seating capacity is between 100 and 120 people.

24. Previously, the Joint Committee of Conference hearings have been held in 412 East, 411 South, as well as the Senate and Assembly Chambers.

25. At or about 3:45 p.m., Jeff Renk completed the draft of the notice for the Joint Committee of Conference meeting and delivered it to Senate Chief Clerk Marchant, who was at the front desk within the Senate Chambers (*see* Exhibit 12).

26. At approximately 4:00 p.m. on March 9, 2011, Deputy Chief Dan Blackdeer received a call from Capitol Police Chief Charles Tubbs informing him that "something would be happening in the Senate that night and not to release any more people" (April 1, 2011 Tr., page 124).

27. At approximately 4:00 p.m., Senate Chief Clerk Marchant handed the draft notice to Rachael Veum, another member of the Senate Chief Clerk staff, and instructed her to obtain the signatures of Senator Scott Fitzgerald and

Speaker Jeff Fitzgerald, as the presiding officers for the Joint Committee of Conference meeting, and then to post the notice as signed (*see* Exhibit 12).

28. Rachel Veum obtained Senator Scott Fitzgerald's signature on the floor of the Senate just before the Senate reconvened in special session (*see* Exhibit 13).

29. At 4:03 p.m. on March 9, 2011, the Senate reconvened in special session. Senate President Michael Ellis announced that the convening of the special session was changed from March 10, 2011, at 11:00 a.m. to March 9, 2011, at 4:00 p.m. (Exhibit 6 at 4-5).

30. At this meeting of the Senate, Senator Scott Fitzgerald stated the following:

Mr. President, with unanimous consent, I would like to provide some remarks for the Journal. The Assembly passed January 2011 Special Session Assembly Bill 11, as amended by Assembly Amendments 1 and 105 on February 22, 2011. The Senate received January 2011 Special Session Assembly Bill 11 on February 25, 2011 and advanced the bill without further amendment to the question of concurrence. The Senate similarly advanced January 2011 Special Session Senate Bill 11 to the question of passage, except that the Senate Bill was not amended to be identical to the Assembly Bill, in that the Senate Bill lacks the equivalent of Assembly Amendment 105. The two houses have different positions. However, the Senate is prevented from further establishing its position due to the lack of the special quorum required under Article 8, Section 8 of the Wisconsin Constitution. It is time to move this process forward.

(Exhibit 6 at 5).

31. Senate President Michael Ellis then requested a committee of conference on AB 11 and appointed himself, Senator Scott Fitzgerald and Senator Mark Miller as the Senate's conferees (Exhibit 6 at 5).

32. Senator Scott Fitzgerald then requested that the Senate's actions on the appointments to the committee of conference be "immediately messaged" to the Assembly (Exhibit 6 at 5).

33. At 4:06 p.m., the Senate recessed pending the call of the Chair (Exhibit 6 at 5).

34. Meanwhile, Rachel Veum tried to locate Speaker Jeff Fitzgerald. She first went to his Capitol office, but he was absent. She then proceeded to Senator Scott Fitzgerald's Capitol office, found Speaker Fitzgerald and obtained his signature (*see* Exhibit 13).

35. Rachel Veum made copies of the notice and then posted the copies at three locations, in the following order: first, on the Senate bulletin board on the wall outside of the Senate Chambers; second, on a board resting on an easel located at the top of the steps outside of the vestibule to the Senate Chambers; and third, on the Assembly bulletin board on the wall outside of the Assembly Chambers (*see* Exhibit 13).

36. At 4:18 p.m. on March 9, 2011, Jeff Renk sent a courtesy email to a pre-established distribution list, attaching an unsigned copy of the Joint Committee of Conference meeting notice. Among the individuals on the

distribution list were "Legislative All Senate" and "Legislative All Assembly" (Exhibit 4).

37. At 4:24 p.m. on March 9, 2011, and in response to a request, Rachel Veum emailed a scanned copy of the Joint Committee of Conference meeting notice to Dick Wheeler, who Veum knows publishes the on-line "The Wheeler Report" (Exhibit 11). Veum sent this email some minutes after she finished posting the notice.

38. Shortly after 5:00 p.m. on March 9, 2011, Jeff Renk published the Joint Committee of Conference notice on the web-page for the Capitol. This web-page automatically posts new information sent to it at 9:00 a.m., 1:00 p.m., and 5:00 p.m. At approximately 5:15 p.m., Renk called the technical department to make sure that this information would be updated before the 6:00 p.m. Joint Committee of Conference meeting.

39. At approximately 5:00 p.m. on March 9, 2011, the Senate Sergeant at Arms Ted Blazel requested Deputy Chief Dan Blackdeer to send officers to the Senate Chambers and Senate Parlor. As a result, and due to the lack of a sufficient number of officers available, the decision was made to close one of the two entrances into the Capitol. Only the King Street entrance remained open prior to the Joint Committee of Conference meeting (April 1, 2011 Tr., pages 125-126).

40. Brian Gleason is an adult resident of Wisconsin who was meeting with staff of Representative Terese Berceau, who is Gleason's representative in

the Wisconsin Assembly. At approximately 5:15 p.m., Gleason was told by Representative Berceau's staff that a meeting of the Joint Committee of Conference would occur with a meeting of the Senate to follow. Gleason was directed to contact the Sergeant at Arms to get access to this meeting.

41. Gleason proceeded to the Senate Chambers. On his way he observed a crowd of between 100 and 150 people.

42. Gleason attempted to gain access to the Senate Gallery in order to observe the proceedings of the Joint Committee of Conference. He was met by an officer, who informed him that only 20 seats were available and that they were already occupied. Based on this information, Gleason left the Capitol.

43. Between approximately 5:40 p.m. and 5:45 p.m., Rich Judge, Representative Peter Barca's chief of staff, heard a recording over the Capitol's speaker system that the Capitol would be closing at 6:00 p.m. and that people should proceed to the exits (April 1, 2011 Tr., page 144).

44. Also at approximately 5:40 p.m., Grant Sovern, an adult resident of Wisconsin, arrived at the Capitol. He went first to the King Street entrance and saw between 100 and 200 people trying to gain entry to the Capitol. After trying unsuccessfully himself to enter at that location, Sovern searched for an open entrance. Finding none, he returned to the King Street entrance.

45. At approximately 5:30 p.m. on March 9, 2011, Tim Gehrke, an adult resident of Wisconsin, and another individual, entered the Capitol at the North Hamilton entrance after passing through the screening checkpoint. They

went there in response to an email informing them that there would be proceedings in the Senate.

46. Gehrke walked up two flights of stairs leading to the South Gallery to the Senate Chamber. At the top were approximately a half dozen police officers. Gehrke again submitted to metal detection screening.

47. At approximately 5:40 p.m., and together with approximately two dozen others, Gehrke was escorted into the Senate Gallery. Twenty-four people were seated in the central gallery. The seats in the side galleries, to the left and the right, were empty. Shortly thereafter, a Capitol staffer announced that the doors to the Gallery would be locked because of a breach of security at the King Street entrance. The doors were locked (April 1, 2011 Tr., page 171.)

48. The Senate convened at approximately 6:15 p.m. Gehrke observed the proceedings, including roll call and the vote.

49. The doors to the Senate Gallery remained locked throughout the time that Gehrke was present, until some time after the Senate had completed its proceedings and adjourned. He estimated that he was in the Gallery for about 40 minutes before leaving.

50. Gehrke exited through the North Hamilton doorway. Upon leaving, he saw very large crowds of people lined up to enter the Capitol.

51. At approximately 6:03 p.m. on March 9, 2011, the Joint Committee of Conference was called to order. Attending were Senator Scott Fitzgerald, Senator Michael Ellis, Representative Jeff Fitzgerald, Representative Scott Suder

and Representative Peter Barca. Senator Scott Fitzgerald presided. He determined that a quorum was present (*See Exhibit 10 at 1*).

52. The members of the Joint Committee of Conference were each provided a copy of a memorandum dated March 9, 2011, from Bob Lang to Senator Scott Fitzgerald and Representative Jeff Fitzgerald that reflected their proposal to modify AB 11. This modified proposal became known as Conference Substitute Amendment 1 (*Exhibit 1; see Exhibit 10 at 1-2*).

53. At approximately 6:05 p.m., Representative Peter Barca began to question the legality of the meeting under the Open Meetings Law and complained that the minimum notice requirements of 24 hours had been violated. He repeated his objections to the meeting taking place (*Exhibit 10 at 3, 5-6, 7*).

54. Representative Barca also repeatedly asked Senator Scott Fitzgerald to identify the specific items that had been removed from AB 11 in Conference Substitute Amendment 1, because Representative Barca had not received or reviewed the Lang memorandum prior to the Joint Committee of Conference meeting (*Exhibit 10 at 3-4*).

55. At 6:06 p.m., Representative Barca began to read from the Open Meetings document produced by the Wisconsin Department of Justice as support for his complaint that the meeting was taking place in violation of the Open Meetings Law (*Exhibit 10 at 5, 6*).

56. At approximately 6:07 p.m., Bob Lang, who served as clerk of the Joint Committee of Conference, began to call the roll. Senators Scott Fitzgerald and Michael Ellis, together with Representatives Jeff Fitzgerald and Scott Suder all voted to recommend to the Senate and the Assembly the adoption of Conference Substitute Amendment 1 (Exhibit 6 at 6; Exhibit 10 at 6-7).

57. At 6:14 p.m., the Senate reconvened in special session. The question presented was whether to adopt the Joint Committee of Conference report on AB 11—namely, Conference Substitute Amendment 1 (Exhibit 6 at 7).

58. Eighteen senators, including Senators Scott Fitzgerald and Michael Ellis, voted “aye.” Senator Dale Schultz voted “no” (Exhibit 6 at 7).

59. Senator Scott Fitzgerald then requested that the Senate’s action, together with the Assembly Bill, be immediately messaged to the Assembly (Exhibit 6 at 7).

60. The Senate adjourned at 6:22 p.m. (Exhibit 6 at 7).

61. Between the Senate’s adjournment and the convening of the Assembly on March 10, 2011, Bob Lang determined that Conference Substitute Amendment 1, as voted on by the Joint Committee of Conference and then by the Senate, contained fiscal items. He prepared another memorandum dated March 10, 2011, and a new version of Conference Substitute Amendment 1, which were distributed via email sent on March 10, 2011, at 11:50 a.m. (Exhibits 2 and 3).

62. The Assembly took up Conference Substitute Amendment 1, as corrected by Bob Lang, on March 10, 2011, and voted 53-42 to pass it (Exhibit 7 at 14). The Bill was ordered immediately messaged to the Governor (*Id.*).

63. Governor Scott Walker approved the Bill on March 11, 2011. The Bill as approved was denominated 2011 Wisconsin Act 10 (*Id.*; Exhibit 5).

64. In 2008, there were approximately 33,700 Wisconsin state employees represented by a labor organization (Exhibit 19 at 7).

65. All contracts with represented state employees have either expired or were terminated, effective on or about March 13, 2011.

66. There are approximately 165,000 Wisconsin municipal employees represented by a labor organization.

67. Once in effect, 2011 Wisconsin Act 10 applies immediately to all represented state and municipal employees whose contracts have expired or are terminated (Exhibit 5, §§ 9332 and 9355).

68. As applied, 2011 Wisconsin Act 10 would ban almost all collective bargaining by public employers at the state and local levels of government (Exhibit 5, §§ 210, 245 and 314). The only subject on which public employers may bargain is "total base wages," which would be capped at the increase (or decrease) in the consumer price index absent an approved referendum (Exhibit 5, §§ 245, 314 and 327).

69. Subjects on which public employees are entitled to bargain under current law but which would be prohibited subjects of bargaining under 2011

Wisconsin Act 10 include health insurance, pension, vacation, holidays, hours of work, grievance and arbitration procedures and other conditions of employment (Exhibit 5, §§ 210, 245 and 314).

70. Once in effect, 2011 Wisconsin Act 10 would, beginning with the first pay period after March 13, 2011, require public employees to pay one-half of the actuarially required contributions to the Wisconsin Retirement System, whereas now the public employer typically pays most or all of the employee's share (Exhibit 5, §§ 67, 69-76, 166-67, 9115 and 9315).

71. Once in effect, 2011 Wisconsin Act 10 would also require state employees, and local government employees who currently participate in the State's group health insurance program, to pay increased health insurance premiums, effective the first pay period after March 13, 2011, or upon expiration of an existing collective bargaining agreement (Exhibit 5, §§ 77, 81, 88, 89, 9115 and 9315).

CONCLUSIONS OF LAW

72. As constituted on March 9, 2011, the Wisconsin Legislature's Joint Committee of Conference was a governmental body within the meaning of the Open Meetings Law. Wis. Stat. § 19.82(2); *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

73. Rule 3(1)(c) of the Joint Rules of the Wisconsin Legislature, as amended by 2011 Senate Joint Resolution 2, states: "Approval of the [joint committee of] conference report by a roll call vote in each house sufficient to

constitute final passage of the proposal is final passage of the bill or final adoption and concurrence in the joint resolution in the form and with the changes proposed by the report.” Valid action by the Committee is, by the Legislature’s joint rule, a necessary precondition to the final passage of the bill.

74. Senators Scott Fitzgerald and Michael Ellis, and Representatives Jeff Fitzgerald and Scott Suder are subject to the requirements of the Open Meetings Law. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).

75. The Open Meetings Law, Wis. Stat. §§ 19.81, *et seq.*, is based upon the constitutional requirement, applicable to the Wisconsin Legislature, that “[t]he doors of each house shall be kept open except when the public welfare shall require secrecy.” Wis. Const. art. IV, § 10.

76. This Court has jurisdiction to determine whether the Legislature followed the requirements of the Open Meetings Law because of the explicit provisions of § 19.97 and Article IV, § 10 of the Wisconsin Constitution. This Court has jurisdiction to interpret the Open Meetings Law and apply it to the legislative action challenged here to determine whether it complies with both the Open Meetings Law and the constitutional mandate. *Milwaukee Journal Sentinel v. Wis. Dep’t of Admin.*, 2009 WI 79, ¶¶ 19-20, 319 Wis. 2d 439, 768 N.W.2d 700.

77. Because the court lacks personal jurisdiction over defendants Scott Fitzgerald, Michael Ellis, Scott Suder and Jeff Fitzgerald, the court holds in

abeyance the § 19.96 forfeiture claims against them until expiration of their legislative immunity.

78. Pursuant to Wis. Stats. § 803.03(3), the court concludes that the four above-named defendants are not indispensable parties, and the § 19.97 enforcement claims may proceed to Judgment.

79. There is no rule adopted by the Legislature, applicable to the March 9, 2011, meeting of the Joint Committee of Conference, that conflicts with any requirement of the Open Meetings Law, within the meaning of Wis. Stat. § 19.87(2).

80. A violation of the Open Meetings Law occurred when the Joint Committee of Conference met on March 9, 2011, because it failed to provide at least 24 hours advance public notice of the meeting, as required by Wis. Stat. § 19.84(3), and failed to provide even the two-hour notice allowed for "good cause" shown.

81. A violation of the Open Meetings law occurred when the Joint Committee of Conference met on March 9, 2011, and failed to provide reasonable public access to the meeting, as required by Wis. Stat. § 19.83(1).

82. Section 19.97(3) authorizes the court to void governmental action taken in violation of the Open Meetings Law. The Court concludes, for reasons set forth in the accompanying Decision, that the public interests in the enforcement of the Open Meetings Law, under the particular facts of this case, outweigh the public interest in sustaining the validity of the action taken.


JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, and under the authority of § 19.97(3), Stats., the Court declares that the action of the Wisconsin Legislature Joint Committee of Conference on March 9, 2011 was and is void. Because the Legislature's own rules make the Committee's action a necessary precondition to subsequent legislative actions with respect to 2011 Wisconsin Act 10, those legislative actions have no force or effect.

This is a final Judgment for purposes of appeal as to the validity of the actions taken on March 9, 2011. This Judgment supersedes previous orders entered in this case. The separate forfeiture claims against Senator Fitzgerald, Senator Ellis, Representative Fitzgerald and Representative Suder, are held in abeyance pending expiration or waiver of their legislative immunity.

Dated this 26th day of May, 2011.

BY THE COURT



Maryann Sumi, Judge
Circuit Court Branch 2

Cc: DA Ismael Ozanne
AAG Maria Lazar
Atty. Roger Sage
Atty. Robert Jambois
Atty. Susan Crawford