22CA2054 O'Connell v Woodland Park 12-07-2023

COLORADO COURT OF APPEALS

DATE FILED: December 7, 2023
CASE NUMBER: 2022CA2054

Court of Appeals No. 22CA2054
Teller County District Court No. 22CV30023
Honorable Scott Sells, Judge

Erin O'Connell,

Plaintiff-Appellant,

v.

Woodland Park School District; Woodland Park School District Board of Education; and Chris Austin, in his official capacity as Board Member, Gary Brovetto, in his official capacity as Board Member, David Illingworth, II, in his official capacity as Board Member, Suzanne Patterson, in her official capacity as Board Member, and David Rusterholtz, in his official capacity as Board Member,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division VII
Opinion by JUSTICE MARTINEZ*
Tow and Brown, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 7, 2023

Eric Maxfield Law, Eric Maxfield, Boulder, Colorado, for Plaintiff-Appellant

Miller Farmer Carlson Law, Bryce Carlson, Colorado Springs, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Plaintiff, Erin O'Connell, alleges several violations of section 24-6-402, C.R.S. 2023, Colorado's Open Meetings Law (the OML), by the Woodland Park School District Board of Education (the Board). Specifically, she argues that the Board's approval of a memorandum of understanding (MOU), allowing for the chartering of a school called Merit Academy, took place at an improperly noticed meeting and that the Board rubber stamped its decision at two subsequent meetings. The district court initially sided with O'Connell and issued a preliminary injunction, enjoining the Board to comply with the OML in all matters related to Merit Academy. However, in its order for summary judgment, the court found that, under *Colorado Off-Highway Vehicle Coalition v. Colorado Board of Parks & Outdoor Recreation*, 2012 COA 146 (*COHVC*), the Board cured its prior violation at a subsequent complying meeting that did not constitute a mere rubber stamping of its previous decision. Because the court found in favor of the Board, it did not award O'Connell costs and attorney fees. O'Connell now appeals the court's order. We affirm.

I. Background

¶ 2 In November 2021, four new directors were elected to the Board. The new members — David Rusterholtz; David Illingworth, II; Suzanne Patterson; and Gary Brovetto — joined incumbent director Chris Austin in comprising the five-member Board. At the new Board's first regular meeting on December 8, Rusterholtz was elected president, Illingworth was elected vice president, and Austin was elected secretary.

¶ 3 A centerpiece of many of the new directors' campaigns was the admission of Merit Academy into the Woodland Park School District as a charter school. In September 2020, Merit Academy had unsuccessfully applied to become chartered in the district. The following year, it opened as a contract school through the Education reEnvisioned Board of Cooperative Education Services, but it still sought admission into the district as a charter school.

¶ 4 At a special meeting on December 15, the Board tasked district superintendent Dr. Mathew Neal with finding a way to streamline Merit Academy's admission into the district as a charter school. With the advice of the district's counsel, Brad Miller, Dr. Neal proposed executing a MOU between the district and Merit

Academy that would relieve the latter of submitting a new application for admission and instead allow both parties to move directly to the contracting phase. Because Merit Academy had recently applied to become chartered and was already operating as a contract school, so their reasoning went, beginning the application process from scratch would be redundant.

¶ 5 Before the Board convened on January 26, 2022, Rusterholtz met with Dr. Neal and Miller to set the agenda for that meeting. Because Miller had several topics he wished to discuss with the Board, he came up with an agenda item broadly titled "Board Housekeeping." Neither this agenda item nor any other part of the agenda made mention of the MOU or Merit Academy. However, a draft of the MOU was circulated on January 24 along with the agenda for the upcoming meeting. Rusterholtz also had a call with Austin a day before the meeting indicating that the MOU could be a possible topic of discussion.

¶ 6 At the beginning of the meeting on January 26, Austin indicated that he was uncomfortable approving the agenda because he did not know what "Board Housekeeping" encompassed. While Miller explained that it was not an "absolute necessity to provide

granularity to the public," Austin emphasized that it was imperative for the Board to be transparent so that it could work to rebuild trust with the community. The Board approved the agenda on a 4-1 vote, with Austin voting in the negative. When the Board eventually got to that agenda item, Miller introduced the MOU. Both Dr. Neal and Miller explained the purpose of the MOU and responded to the Board's inquiries. After making an amendment to the original draft, the Board approved the MOU on a 5-0 vote.

¶ 7 At a work session the very next day, Rusterholtz opened by apologizing for the lack of transparency surrounding the "Board Housekeeping" agenda item. He had received calls from multiple members of the community expressing frustration with how the agenda item was framed, and he admitted that he could have done a better job with being more transparent on what would be covered under that portion of the agenda.

¶ 8 The next time the MOU was publicly discussed was at a work session on February 9. The agenda for this session expressly mentioned the topic with the title "Re-Approval of MOU with Merit Academy." At the meeting, Dr. Neal indicated that even though the MOU had been discussed and approved at the January 26 meeting,

it would be prudent for the Board to reapprove it for purposes of demonstrating transparency. The Board heard public comment, including from O'Connell, but it did not read the MOU into the record or engage in lengthy discussion on the matter. The Board again voted unanimously to approve the MOU.

¶ 9 On March 30, O'Connell filed a verified complaint and an emergency motion for preliminary injunction against the Board, alleging that its members had violated the OML. Specifically, she contended that the agenda for the January 26 meeting was improperly noticed and that the reapproval of the MOU at the February 9 meeting constituted a rubber stamping of a prior invalid decision. Additionally, she argued that, taken together, two one-on-one conversations between several Board members regarding Merit Academy constituted a "walking quorum" in violation of the statute.[1]

[1] According to O'Connell, the two conversations that comprised the walking quorum included (1) an email from Illingworth to Rusterholtz in December 2021 about making Merit Academy an "immediate priority," and (2) the phone call between Rusterholtz and Austin on January 25.

¶ 10 On April 13, the Board held a meeting where the MOU was once again discussed and voted on. As it was for the February 9 meeting, the MOU was listed as an agenda item with the title "Discussion and Reconsideration of Re-Approval of MOU with Merit Academy." Unlike the previous meeting, however, the Board discussed the MOU for approximately one hour, and each Board member was on record with statements pertaining to the issue. The Board also received public comment, and O'Connell again made a statement, expressing her disagreement with the Board's focus on Merit Academy. When the MOU was again put to a vote, it only passed 4-1, with Austin voting in the negative.

¶ 11 Several weeks later, on April 26, the district court held a hearing on O'Connell's request for a preliminary injunction. All five Board members, Dr. Neal, and O'Connell testified at the hearing. Although the court rejected O'Connell's walking quorum theory, it did find that the January 26 meeting was improperly noticed and that the Board rubber stamped approval of the MOU at the February 9 and April 13 meetings. Thus, it issued an injunction against the Board, requiring that it comply with the OML when discussing matters related to Merit Academy.

¶ 12 On June 3, O'Connell filed a motion for contempt against the Board, alleging that its agenda item for a subsequent meeting failed to comply with the court's injunction. The court scheduled a hearing for September 2 and ultimately concluded that the Board did not violate the OML or, by extension, the preliminary injunction.

¶ 13 Both the Board and O'Connell filed cross-motions for summary judgment. The court, partially reversing course from its preliminary injunction order, found that the Board had properly cured its prior invalid action at the April 13 meeting in accordance with this court's ruling in *COHVC*. In addition, because the court determined that O'Connell was not a prevailing party under section 24-6-402(9), it denied her request for attorney fees. O'Connell now appeals that judgment.

II. Analysis

¶ 14 O'Connell essentially raises three arguments on appeal. First, she argues that the division in *COHVC* incorrectly interpreted the OML when it held that a prior invalid decision could be cured through a subsequent complying meeting that did not constitute a mere rubber stamping of the previous action. Next, she contends that, even if *COHVC* was decided correctly, the Board did not cure

its prior violation at the April 13 meeting. Finally, she argues that because the Board violated the OML, she is entitled to costs and attorney fees under the statute. We address and reject each contention in turn.

¶ 15 We review a grant of summary judgment de novo. *COHVC*, ¶ 21. "We will uphold a grant of summary judgment only if the pleadings and supporting documents demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* Furthermore, interpretation of the OML presents a question of law that we review de novo. *Id.* at ¶ 22.

A. OML Violation Cure

¶ 16 O'Connell first argues that the division in *COHVC* incorrectly interpreted section 24-6-402 when it held that a prior violation could be cured through a subsequent complying meeting so long as the earlier action is not merely rubber stamped. As she asserts, allowing a prior invalid action to be cured in this way would backdate the effective date of those actions to the day of the noncomplying meeting, thereby giving these decisions retroactive effect. As discussed below, we agree with the conclusion reached by

the division in *COHVC* and, therefore, apply its curing mechanism here.

¶ 17 The OML's overarching purpose is to "afford the public access to a broad range of meetings at which public business is considered." *Bd. of Cnty. Comm'rs v. Costilla Cnty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004) (citation omitted). As relevant here, the OML provides, "All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." § 24-6-402(2)(b). The statute prescribes that "[n]o resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section." § 24-6-402(8).

¶ 18 Although the OML expressly provides that no action taken by a local public body is valid if taken at a meeting that fails to conform with the statute's requirements, it is silent as to whether that entity can "cure" a prior violation. *See generally* § 24-6-402. In *COHVC*, a division of this court held that a public entity subject

to the OML could cure a prior violation through a subsequent complying meeting "provided the subsequent meeting is not a mere 'rubber stamping' of an earlier decision made in violation of the OML." *COHVC*, ¶ 33. The court found that existing precedent in Colorado, decisions rendered by courts from other states with similar laws, and the overall purpose of the statute supported this conclusion. *Id.* at ¶¶ 29-31. Notably, it held that "the purpose of the OML is to require open decision-making, not to permanently condemn a decision made in violation of the statute." *Id.* at ¶ 31. To that effect, the division determined that the OML "would permit ratification of a prior invalid action" so long as the aforementioned requirements are satisfied. *Id.*

¶ 19 We find the division's reasoning in *COHVC* persuasive. For that reason, and as we elaborate below, we do not share the same concerns expressed by O'Connell about the division's interpretation of the OML.

¶ 20 O'Connell's main contention with the ruling in *COHVC* is the notion that a public body can give retroactive effect to a prior invalid action by ratifying it at a subsequent complying meeting. She portends that this purported loophole "would allow, if not

encourage, boards to take decisions in secret, knowing the effective date [of an action] could be backdated by a later compliant vote." But we do not see any cause for concern. To begin, the OML was designed precisely to prevent the type of sinister machinations that O'Connell describes from occurring in the first place. *See Costilla Cnty. Conservancy Dist.*, 88 P.3d at 1194 ("[T]he OML prevents . . . a [public] body from fully discussing and debating a measure in a closed meeting and then 'rubber stamping' the same measure in an open session."). And the cure doctrine does nothing to weaken those safeguards. Members of a public body who elect to connive in secret derive no benefit from doing so since any action they take would be invalid until properly cured. *See* § 24-6-402(8). If anything, it would be more cumbersome to try and flout the statute's requirements since any action would eventually have to be ratified at a subsequent complying meeting, and those members might have to explain why they decided to make their decision outside of the public purview.

¶ 21 In addition, without the ability to give retroactive effect to prior invalid actions, the work of public bodies would be stymied. As the *COHVC* division recognized, forcing a public body to go all the way

back to step one on an action could end up being more detrimental than productive for the decision-making process. *COHVC*, ¶ 32 ("Mechanistic vacation of decisions made in nonco[n]formity with the [OML] may do more disservice to the public good than the violation itself." (quoting *Alaska Cmty. Colls.' Fed'n of Tchrs., Local No. 2404 v. Univ. of Alaska*, 677 P.2d 886, 891 (Alaska 1984))). Yet the OML's purpose is not to "permanently condemn a decision made in violation of the statute." *Id.* at ¶ 31. Hence, providing a mechanism through which public bodies can promptly cure prior invalid actions enables them to carry out their duties without undue hindrance. *See id.* at ¶ 32 ("[W]ithout an effective way of curing an OML violation, necessary public action may become gridlocked."); *see also Alaska Cmty. Colls.' Fed'n of Tchrs., Local No. 2404*, 677 P.2d at 891 ("What the [sunshine] statutes envision . . . is that non-conforming procedures be righted as near to the point of derailment as possible, and that the governmental process be allowed to resume from there.").

¶ 22 Furthermore, we reject O'Connell's assertion that *COHVC* upends years of precedent. She relies on two cases — *Wisdom Works Counseling Servs., P.C. v. Colorado Department of Corrections*,

2015 COA 118, and *Van Alstyne v. Housing Authority of City of Pueblo*, 985 P.2d 97 (Colo. App. 1999) — to further her point. However, *Wisdom Works* dealt with the entirely separate issue of whether an action taken without a meeting violates the OML; it never addressed whether a prior violation of the statute could be cured. *Wisdom Works Counseling Servs., P.C.*, ¶ 25. And the division in *COHVC* extensively discussed why the holding in *Van Alstyne* did not preclude the conclusion that a prior invalid action can be cured. *COHVC*, ¶¶ 26-29.

¶ 23 Based on the foregoing, we conclude that the cure doctrine developed by the division in *COHVC* is applicable here.

B. April 13 Meeting Cure

¶ 24 Next, O'Connell argues that, even if the *COHVC* division correctly interpreted the OML to allow for a prior invalid decision to be cured, the Board did not cure its previous violation at the April 13 meeting. First, she argues that *COHVC* is distinguishable and therefore does not apply here. Second, she contends that even if *COHVC* controls, the Board failed to cure its prior violation. We disagree with both assertions.

¶ 25 O'Connell first argues that *COHVC* is distinguishable and therefore inapplicable. She asserts that the cure found in *COHVC* was based on factors specific to that case, including (1) an unintentional violation of the OML; (2) prompt admission of the violation; (3) change of course prior to the filing of a lawsuit; and (4) the occurrence of a subsequent complying meeting. She suggests that the possibility of a cure is undermined in the absence of one of these purported criteria.

¶ 26 We agree with the Board that the division in *COHVC* did not seek to concoct a multi-part test for the cure doctrine based on these particular factors. To begin, the second and third factors mentioned by O'Connell were discussed exclusively in the context of whether the plaintiffs in that case were prevailing parties under section 24-6-402(9) and therefore entitled to costs and attorney fees; they had no bearing on whether the public entity had in fact cured its prior violations. *See COHVC*, ¶¶ 36-39. In addition, whether the public body in *COHVC* committed an unintentional violation never factored into the division's analysis on whether the entity had cured its prior violations. *See id.* at ¶¶ 33-34. Similarly, in granting summary judgment, the district court did not find that

the Board had intentionally violated the OML, and it concluded that the Board had cured its prior violation. Finally, we agree with O'Connell that whether a subsequent complying meeting occurred is dispositive for determining whether a prior invalid action has been cured, which we will now address.

¶ 27 The division in *COHVC* held that for a prior invalid decision to be properly cured, the decision must be ratified at a subsequent complying meeting and cannot be a mere rubber stamp of that earlier action. *Id.* at ¶ 33. We consider each of these requirements in turn.

¶ 28 A subsequent complying meeting is one that conforms to the requirements laid out in the OML. Here, the parties dispute whether the April 13 meeting was properly noticed. The OML provides in part that "[a]ny meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs . . . shall be held only after full and timely notice to the public." § 24-6-402(2)(c)(I). There is no disagreement on whether notice was timely, but only on whether it was "full."

¶ 29 When determining whether notice is "full," we apply an objective standard, interpreting a notice "in light of the knowledge of

an ordinary member of the community to whom it is directed." *Town of Marble v. Darien*, 181 P.3d 1148, 1152 (Colo. 2008). This standard complements the OML's stated purpose of "provid[ing] fair notice of public meetings to members of the community." *Id.* In addition, we apply this standard flexibly to "take into account the interest in providing access to 'a broad range of meetings at which public business is considered,' as well as the public body's need to conduct its business 'in a reasonable manner.'" *Id.* A notice will be adequate so long as the "items actually considered at the meeting are reasonably related to the subject matter indicated by the notice." *Id.* at 1153.

¶ 30 Here, an ordinary member of the community would have understood what the agenda item labeled "Discussion and Reconsideration of Re-Approval of MOU with Merit Academy" would cover. To begin, Merit Academy's admission into the district had long been a contentious issue and was at the center of many of the Board members' campaigns. Moreover, the April 13 meeting was the third time that the MOU had been presented to the public, and discussions around the matter had been taking place for over three months by that point. At the preliminary injunction hearing, Dr.

Neal testified that close to 700 people had attended the February 9 meeting virtually, which is where the MOU was initially reintroduced for a vote. The Board also noted in its cross-motion for summary judgment that the controversy had attracted significant press coverage. Furthermore, O'Connell herself was likely aware of what the agenda item encompassed given that she gave public comment at both the February 9 and April 13 meetings. She also testified that Merit Academy was the "primary focus of [the Board]" at the meetings. Therefore, there is sufficient evidence in the record to show that an ordinary member of the community would have had full notice of what would be discussed at the April 13 meeting.

¶ 31 The second element required for a proper cure is that the subsequent complying meeting not be a rubber stamp of the public body's previous invalid decision. While the line between when a decision has been merely rubber stamped or subject to substantial reconsideration is somewhat blurry, *COHVC* provides us with some guidance. There, the division held that the subsequent meeting was not a rubber stamping of a previous decision because the entity (1) heard additional comment from several key players; (2) heard

public comment from many interested parties; and (3) engaged in renewed deliberations before announcing its ultimate decision. *COHVC*, ¶ 34. Most of those factors are present in this case. While the transcript of the April 13 meeting was not included in the record, the summary from that meeting provides that the Board discussed the MOU for approximately one hour. Dr. Neal testified at the preliminary injunction hearing that the discussion at the April 13 meeting was "notably" different than at the February 9 meeting, and he stated that there was more discussion between the Board members. Indeed, every Board member was on record as making a statement, and one of the Board members ultimately ended up changing his mind and voting against the MOU. From Dr. Neal's perspective as a superintendent, the Board had a full discussion, despite the lack of decorum that took place. In addition, the Board received public comment, and O'Connell herself made a statement about how the Board was spending too much time on this particular issue. Given the evidence in the record, we determine that the Board did not rubber stamp the MOU at the April 13 meeting.

¶ 32 Based on the foregoing, we determine that the Board cured its prior violation by holding a subsequent complying meeting on April 13 and not rubber stamping the MOU at that meeting.

C. Attorney Fees

¶ 33 Finally, O'Connell claims that because the Board violated the OML, she is entitled to costs and attorney fees under the statute. We disagree.

¶ 34 The OML provides that "[i]n any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees." § 24-6-402(9)(b). Thus, to receive attorney fees under the OML, a plaintiff must show a violation of the statute and that they are a prevailing party. *See Zubeck v. El Paso Cnty. Ret. Plan*, 961 P.2d 597, 601 (Colo. App. 1998) ("[P]laintiffs are entitled to an award of attorney fees upon a finding that the governmental entity has violated any of the provisions of the law."); *COHVC*, ¶ 39 (denying an award of attorney fees to plaintiffs despite finding violations of the OML because public body had cured prior violations before suit was brought).

¶ 35 Here, the district court found in its summary judgment order that, even though the Board had violated the OML at the January 26 meeting, it cured that violation at the April 13 meeting. Because the April 13 meeting effectively cured the prior violation, no outstanding violations of the OML remained. Moreover, even though the court had initially determined in its preliminary injunction order that the violation from the January 26 meeting remained uncured, that order did not adjudicate the merits of the case. *See Anderson v. Pursell*, 244 P.3d 1188, 1196 (Colo. 2010) ("When a trial court grants or denies a preliminary injunction, it is not adjudicating the ultimate rights of the parties."). Thus, contrary to her assertion, O'Connell was not "stripped" of prevailing party status since that determination had not yet been ascertained. *See DeJean v. Grosz*, 2015 COA 74, ¶ 45 (holding that there was no prevailing party on an appeal of a preliminary injunction because there had not yet been a resolution on the merits). Further, because O'Connell was not successful at summary judgment on any issues before the court, she was not the prevailing party.

¶ 36 We recognize that there may be a policy interest in awarding attorney fees when, as was the case here, a cure has been made

after a plaintiff has filed suit against a public body. However, section 24-6-402(9)(b) predates the creation of the cure doctrine, and it is not for us to make a policy prescription in the face of statutory language to the contrary. *See Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465, 469 (Colo. 1998) ("In construing statutory provisions, our obligation is not to make policy decisions but rather to give full effect to the legislative intent.").

III. Disposition

¶ 37 We affirm the judgment.

JUDGE TOW and JUDGE BROWN concur.

Court of Appeals

STATE OF COLORADO
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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