FILED
05-25-2021
CIRCUIT COURT
DANE COUNTY, WI
2019CV003418

BY THE COURT:

DATE SIGNED: May 25, 2021

Electronically signed by Jacob B. Frost
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 9** **DANE COUNTY**

COUNTY OF DANE et al,

Plaintiff,

v. 2019CV3418

PUBLIC SERVICE COMMISSION OF WISCONSIN et al,

Defendant.

DECISION AND ORDER

At the oral argument on January 21, 2021, I held that Petitioners presented enough information to allow discovery regarding whether Commissioner Huebsch acted impartially or whether facts show that his involvement in the decision at issue creates an appearance of partiality. If Petitioners prove he was partial or that his involvement creates an improper appearance of partiality, Comm. Huebsch's actions denied Petitioners and the public due process.

I requested further briefing on the sole issue whether a finding that Comm. Huebsch should have recused himself taints the entire proceeding and requires that I vacate the PSC's decision regardless of the fact that the other two impartial commissioners voted to approve the CPCN. Though no case law addresses this exact question in the context of the Wisconsin PSC, I agree with Petitioners. The right to an impartial decision maker is fundamental to due process. Violation of that right would taint the entire proceeding and require I vacate the PSC decision and remand for further proceedings conducted in accordance with due process.

It is important to remember that I make this decision preemptively. I do not yet know whether Petitioners will prove that Comm. Huebsch should have recused himself. If Petitioners cannot do so, my task returns to reviewing the PSC record

and applying the relevant law on judicial review of agency decisions. I am deciding this issue at the outset because had I ruled otherwise, if Comm. Huebsch alleged improper participation did not require that I vacate the PSC decision, then allowing discovery and reviewing this issue at all would have been an exercise in futility. Based on my decision on this preliminary issue, though, discovery shall proceed. After I explain why I reached this decision, I end by setting initial guidance on and deadlines for discovery.

DUE PROCESS REQUIRED THE PSC COMMISSIONERS TO ACT IMPARTIALLY. IF COMMISSIONER HUEBSCH VIOLATED THAT DUTY, HE DEPRIVED PETITIONERS OF THEIR DUE PROCESS RIGHTS AND THAT STRUCTURAL ERROR TAINTS THE ENTIRE PROCEEDING.

I. Due Process Requires an Impartial Decision Maker and Violation of this Right is a Structural Error Not Subject to Harmless Error Review.

The importance of a fair and impartial decision maker must not be understated. Petitioners fairly summarized the many comments courts made to this effect:

> The Wisconsin Supreme Court has characterized the need to safeguard public confidence in judicial integrity as a "vital state interest." *State v. Herrmann*, 2015 WI 84, ¶39, 364 Wis. 2d 336, 353, 867 N.W.2d 772, 781 (quoting *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 1666 (2015)). Impartial justice is so important that even the appearance of bias is constitutionally unacceptable if it poses a serious risk of actual bias. *Id.*, ¶46; *Guthrie v. Wisconsin Employment Relations Comm'n*, 107 Wis. 2d 306, 314, 320 N.W.2d 213, 218 (Ct. App. 1982) ("Guthrie I"), *aff'd*, 111 Wis. 2d 447, 331 N.W.2d 331 (1983) ("Guthrie II"); *State v. Gudgeon*, 2006 WI App 143, ¶21, ¶24, 720 N.W.2d 114, 121. Judges "must be perceived as beyond price." *Herrmann*, 2015 WI 84, ¶40. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *see Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶64, 382 Wis. 2d 496, 552, 914 N.W.2d 21, 49 (explaining that "a minimal rudiment of due process is a fair and impartial decisionmaker").

Dkt. 249 at 2-3.

Petitioners also appropriately summarize that violation of the right to an impartial decision maker is a structural error that undermines the entire proceeding:

> "Most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999). However, there is a "limited class of fundamental constitutional errors that 'defy analysis by 'harmless error' standards.'" *Id.*

> at 7 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). These latter and more serious constitutional errors are known as "structural errors" because "the error so permeates the proceeding that it is incapable of producing a constitutionally-sound result." *In re S.M.H.*, 2019 WI 14, ¶16, 385 Wis. 2d 418, 430.…"Errors of this type are so intrinsically harmful as to require automatic reversal … without regard to their effect on the outcome." *Neder*, 527 U.S. at 7.
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> The Wisconsin Supreme Court has adopted the United States Supreme Court's structural error rubric and applies it to cases involving judicial bias. *See In re S.M.H.*, 2019 WI 14, ¶14, 385 Wis. 2d 418, 427 (describing the history and rationale for the structural error doctrine); *In re Paternity of B.J.M.*, 2020 WI 56, ¶16 (applying structural error doctrine in a judicial bias case)….
> The controlling United States Supreme Court and Wisconsin Supreme Court cases make clear that judicial bias, like other structural errors, is "intrinsically harmful" and is "not amenable to harmless error review." *Neder*, 527 U.S. at 7-8; *Williams v. Pennsylvania*, 136 S. Ct. at 1909; *In re Paternity of B.J.M.*, 2020 WI 56, ¶35 (quoting *Williams*); *see also State v. Gudgeon*, 2006 WI App 143, ¶9 (judicial bias is "per se prejudicial"); *Franklin v. McCaughtry*, 398 F.3d 955, 961 (7th Cir. 2005) ("where there is a structural error, such as judicial bias, harmless error analysis is irrelevant"); *Gacho v. Wills*, 986 F.3d 1067, 1075 (7th Cir. 2021) ("Judicial-bias claims are not subject to harmless-error review.").

Dkt. 308 at 6-7.

I agree that the alleged biases of Comm. Huebsch, if proven, constitute a structural error that will require I vacate the PSC decision and remand to the PSC for further proceedings compliant with due process. Respondents' argument that PSC commissioners are not judges and therefore the case law discussing judicial bias does not apply are unpersuasive and miss the point. Case law makes clear that due process rights exist in hearings at which a government agency renders decisions affecting individual property rights. Cases discussing due process in the context of judges are numerous, as courts routinely render such decisions, but the due process rights and requirements are not unique to judges or courts. The Third Circuit Court of Appeals summarized why long ago:

> Nevertheless, if the administration of public affairs by administrative tribunals work of our government it is essential that it proceed, on what may be termed its judicial side, without too violent a departure from what many generations of English speaking people have come to regard as essential to fair play. One of these essentials is the resolution of contested questions by an impartial and disinterested tribunal. These adjectives are not absolute but relative as every thoughtful person knows. Decisions affecting human beings, made by human beings, necessarily are colored by the sum total of

> the thoughts and emotions of those responsible for the decision. The judicial process, or any other human process, cannot operate in a vacuum. The most we can hope for is that persons charged with the responsibility for decisions affecting other people's lives and property will be as objective as humanly possible. Certain rules, of more or less definiteness, have been worked out through judicial decision by judges to regulate their own conduct. The rules disqualifying a judge for bias are illustrations. Other rules have been provided by legislatures to secure fairness in the trier of the facts. Thus prospective jurors may be examined for views which indicate predilections for either party to the controversy. These rules are analogous but not necessarily conclusive here.
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> ….
>
> We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant. If the circumstances alleged are proved Berkshire did not have a hearing before an impartial tribunal, but one in which one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side. This is obviously not like a case where ill-advised extra-judicial statements have been made by a judge, or where a litigant seeks to subject an administrative body to interrogatories to discover the inner workings of the administrator's mind. It goes further and, in our judgment, it goes beyond that which is permissible from the standpoint of either litigants or public.
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> The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

Berkshire Emps. Ass'n of Berkshire Knitting Mills v. N.L.R.B., 121 F.2d 235, 238–39 (3d Cir. 1941). Here the PSC's decision to grant a CPCN directly affects property rights of landowners whose lands the line will cross, as condemnation proceedings may be had forcibly to acquire the necessary lands. That alone surely triggers the right to due process. The PSC must provide due process in its proceedings on a CPCN.

I also find the case law Petitioners rely on, including the decisions involving judicial conduct, more compelling than the law Respondents cite. The public policy reasons requiring both actual impartiality and the appearance of impartiality apply equally to the PSC. At each hearing I have held, and the PSC commissioners at the public meeting each noted the extensive public participation in this PSC proceeding and the judicial review. I received meaningful briefing from private citizens operating pro se. This high level of public participation surely reflects that the PSC's decisions affect us all. Indeed, the PSC's decisions affect the entire state. They directly impact access to reliable electricity, affect property rights, affect the environment, and have direct physical effects on communities and

properties, as things like power plants and power lines are highly visible and alter the natural landscape. With such a meaningful impact on this State, the need for public trust in a fair and impartial process before the PSC cannot be understated. The requirement for impartial decision makers applies at least as strongly here as it does before a circuit court or court of appeals. The need to protect public confidence that the PSC acts impartially is equally a vital state interest.

II. A Structural Error Taints the Entire PSC Proceeding and Requires Remand.

Petitioners' argument that one tainted member taints an entire proceeding is persuasive. Indeed, arguably this is the controlling law in Wisconsin and in the majority of courts to have addressed the issue. The Wisconsin Supreme Court seemed to resolve this issue in *Marris v. City of Cedarburg*. 176 Wis. 2d 14, 498 N.W.2d 842 (1993). There plaintiff challenged a local zoning board decision because one member of the Board held an improper bias against plaintiff. The Supreme Court held that the right to a fair and impartial decision maker applied to a local zoning board:

> The parties agree that Marris was entitled to a fair and impartial hearing under these common law concepts of due process and fair play, which include the right to have matters decided by an impartial board.[6] The parties further agree that due process and fair play can be violated "when there is bias or unfairness in fact[, or when] ... the risk of bias is impermissibly high."[7] The parties disagree whether Marris received a fair and impartial hearing.
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> In determining whether Marris was afforded due process and fair play, we recognize that zoning decisions implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land. Furthermore, zoning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area, and the adjudicative, legislative and political nature of the zoning process.[8] Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process.[9]

Id. at 24–26.

The same concerns and considerations apply equally, if not more, to the importance of fair and impartial PSC commissioners whose decisions also "implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land." *Id.*

Footnote 6 of the Supreme Court's decision makes clear that due process applies to the PSC's decision here. The Court said:

> Although the parties characterize the Board's hearing as adjudicative, we need not label these proceedings quasi-legislative or quasi-judicial to determine whether the decision-maker must be impartial. We need look only to the characteristics of the proceedings to determine whether the decision-maker must be impartial. In this case the Board must make factual determinations about an individual property owner and then apply those facts to the ordinance. We conclude that common law notions of fairness require an impartial decision-maker under these circumstances.

Id. at 25.

So, too, the PSC made factual determinations about the specific proposed project and applied those facts to the law. *See Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶146, 282 Wis. 2d 250, 700 N.W.2d 768 (Noting the PSC must make findings of fact and conclusions of law.) Due process requirements apply to PSC proceedings.

In *Marris*, evidence showed that the chairperson of the zoning board prejudged the issue before the board. His failure to recuse after doing so violated plaintiff's right to common law due process. The Supreme Court vacated the board's decision and sent the matter back to the board for a new hearing with the chairperson removed. In other words, the chairperson's involvement tainted the entire proceeding and panel. *Marris* did not discuss whether that chairperson was the deciding vote, implying, as I read it, that it was irrelevant if he was, as his participation tainted the decision regardless.

Even if I am reading too much into *Marris*, my decision also rests on the holdings from the vast majority of federal courts to address this issue. A decision from Judge Adelman in the Eastern District of Wisconsin further confirms that a member of a panel being partial requires the panel's decision be vacated regardless whether the impermissible vote was the deciding vote. Judge Adelman explained:

> A multi-member panel's decision must be vacated if the deciding vote is cast by a member who is disqualified due to a lack of impartiality. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (8–0). The vote in the present case was very close—9 to 7—but Richmond's vote was not the deciding vote. *Aetna* expressly did not discuss what remedy due process requires when a disqualified person participates but does not cast the decisive vote. *Id.* at 827 n. 4, 106 S.Ct. 1580.
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> Three of the eight justices in *Aetna* wrote or joined concurrences stating that any decision issued by a multi-member panel must be vacated if a biased

> member participated in the decision. *Id.* at 831, 106 S.Ct. 1580 (Brennan, J., concurring) ("while the influence of any single participant in this [deliberative] process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition"); *id.* at 833, 106 S.Ct. 1580 (Blackman, J., concurring, joined by Marshall, J.) (because "the collegial decisionmaking process that is the hallmark of multimember courts ... occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case").
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> In addition, five of the six circuits to address this question have held that the panel decision must be vacated. "Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Berkshire Employees Ass'n of Berkshire Knitting Mills v. N.L.R.B.,* 121 F.2d 235, 239 (3rd Cir.1941). *See also Cinderella Career & Finishing Schs., Inc. v. Fed. Trade Comm'n,* 425 F.2d 583, 592 (D.C.Cir.1970) (vacating and remanding agency decision "despite the fact that former Chairman Dixon's vote was not necessary for a majority"); *Am. Cyanamid Co. v. Fed. Trade Comm'n,* 363 F.2d 757, 767–98 (6th Cir.1966) (agency decision must be vacated and remanded for de novo review; result "is not altered by the fact that [the biased panel member's] vote was not necessary for a majority"); *Antoniu v. Sec. Exch. Comm'n,* 877 F.2d 721, 726 (8th Cir.1989) (vacating commission decision and remanding for de novo reconsideration, even though biased commissioner belatedly recused himself and did not vote on final decision); *Stivers v. Pierce,* 71 F.3d 732, 748 (9th Cir.1995) (vacating unanimous decision because of bias of one panel member; "plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings.").
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> Based upon the reasoning of these decisions, and on the record presently before me, the decision of the Coaches' Council could not be sustained.[5]

Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1116–17 (E.D. Wis. 2001). Each of the circuit courts of appeals decisions Judge Adelman refers to involved review of a commission or agency decision, not a judicial decision. As Judge Adelman noted, five of the six circuits to address this issue held that one biased member tainted the entire decision.

I agree. If Commissioner Huebsch should have recused himself, his failure to do so taints the entire proceeding and I must vacate the PSC decision and remand for proceedings before the PSC that are compliant with the parties' due process rights. Respondents' argument that I should find differently here because of the nature of the PSC's process does not persuade me. That the commissioners do

not speak to each other privately about the CPCN and that each came to the first public meeting with an idea how he or she intended to decide the application does not change my calculus. Though each of course comes to the public meetings with his or her initial thoughts and preliminary decision on an application, surely any of the commissioners can change her or his mind because of the public discussion with the other commissioners. If this were not true, why have the public discussion at all?

The commissioners confirmed they see value in the public meeting. Respondents quote various comments of the commissioners at the public hearing indicating excitement at finally being able to hear from each other and discuss the matter before them. Those comments confirm that these public discussions impact the process and, potentially, the ultimate decision. As the PSC noted, Comm. Nowak 'began her comments stating "[w]e have been waiting to talk to each other for quite a while about this proceeding, so it is good that the day is finally here."' Dkt. 290 at 5. Commissioner Nowak also explained at a different public meeting:

> If you all understood how seriously we take our jobs and how seriously we adhere to the law—and it's frustrating that we can't talk to each other before a meeting, and we don't—but don't go out and say we're violating the law, or attack the integrity of this body or these commissioners without any evidence.

Dkt. 290 at 6 (emphasis added). If hearing from her fellow commissioners had no impact on her, why does Comm. Nowak find it frustrating to have to wait to discuss the application?

Further, in her opening remarks, Comm. Valcq stated:

> As Commissioner Huebsch is our delegated Commissioner for MISO and OMS [I]t makes sense for him to lead the discussion since the project before us is due to MISO's MVP process. Thank you Commissioner Huebsch for leading the discussion today and for your efforts with OMS and MISO.

Dkt. 309 at 3. Commissioner Valcq referred to the meeting as a discussion, not a consecutive reading of pre-made decisions. Surely her colleagues' voices could impact her. That she chose Comm. Huebsch to lead the discussion due to his role with OMS and MISO also confirms this was a discussion and the other two commissioners apparently wanted to specifically hear from and have Comm. Huebsch lead the meeting based on his specific knowledge and experience.

At the very least, these comments imply or create the appearance that Comm. Huebsch's comments and insights carried some importance to the other two commissioners. Appearances matter. Any neutral observer who heard these comments from Comms. Valcq and Nowak surely believed that the commissioners wanted to hear from Comm. Huebsch to consider his comments when reaching

their decisions. We know that many active public participants in the PSC proceedings heard these comments first hand. They surely considered these comments why Comm. Huebsch led the discussion as showing the other commissioners' interest to hear from him. Because of this, even if no actual harm occurred by virtue of Comm. Huebsch's alleged bias, meaning that the other commissioners would still have reached the same decision regardless of his comments, there is still a real harm by the proceedings forever appearing tainted due to his involvement. Allowing a decision rendered in violation of the parties' due process rights to stand damages the public's ability to trust the PSC process and the integrity of its decisions.

People often dislike decisions, whether made by judges, local tribunals make or the PSC. That is the natural and unavoidable consequence of our system, as generally someone "loses". Knowing this, it is essential to our democratic system, to our design of government, that we maintain the process as fair in appearance and in practice. At least then the disappointment of the losing party is in having lost, not in being cheated by an unfair process or decision maker. Disappointment is acceptable. Distrust is dangerous.

As a final note, I struggle that the PSC and other Respondents effectively insist and ask me to declare that the PSC's public meetings are meaningless. Do you truly want me to declare that no commissioner is ever open to a true discussion, that no commissioner ever considers his or her fellow commissioner's comments with an open mind? If I so held, shouldn't that defect demand that I vacate and remand the proceedings for the failure of the commissioners to meaningfully participate in these public meetings?

Therefore, if Comm. Huebsch was improperly biased or his participation creates an improper appearance of bias, I must vacate the PSC decision and remand to the PSC for further proceedings. At that point I need not review the merits of the PSC decision and no further proceedings are required on judicial review.

DISCOVERY

I did not find the briefing on discovery particularly helpful. Petitioners effectively ask me to resolve a variety of potential discovery disputes preemptively in their favor. I will not. Respondents focus more on arguing why no discovery is necessary, rehashing arguments I already rejected, than on presenting a discovery plan. Respondents' staged discovery approach, though, offers some value.

I first address whether I can allow requests for production of documents. Wisconsin Statute §227.57(1) specifically allows depositions and written interrogatories as provided in Chapter 804. Chapter 804 envisions depositions accompanied by demands for documents. Having document production occur by a witness bringing numerous documents to a deposition and then having everyone sit around while counsel review those documents ensures wasted time. Having

the documents ahead of time allows for preparation and a more focused, efficient deposition. Further, the documents at times remove the need for the deposition. Forcing counsel to notice up a deposition and wait for the day of the deposition to then learn they no longer want the deposition serves only to waste time and create unnecessary expense. This is surely not what §227.57(1) intends. I also read *Marder v. Bd. of Regents of Univ. of Wisconsin Sys.* as recognizing that I have broad discretion under Wis. Stat. §227.57(1) to allow discovery and entertain flexible approaches to resolve allegations of procedural irregularities. 2004 WI App 177, ¶39, 276 Wis. 2d 186, 687 N.W.2d 832, aff'd, 2005 WI 159, 286 Wis. 2d 252, 706 N.W.2d 110.

It is entirely possible that documents will be critical to show a procedural irregularity occurred. The thought that interrogatories can secure responses identifying the existence and importance of critical documents and that depositions can obtain testimony discussing those documents, but a party could never actually secure the document itself is plainly contrary to the statute's intent. Section §227.57(1) conveys the Legislative intent to allow the Court to authorize discovery, if needed, to resolve claimed procedural irregularities. I conclude that Wis. Stat. §227.57(1) grants this Court broad enough authority to allow requests to produce documents. I exercise my discretion to authorize such requests here.

Therefore, I set the following schedule for discovery.

June 4, 2021 – the parties shall issue any initial written discovery requests to other parties. This can include interrogatories and requests for production of documents. Written responses and any responsive documents not objected to shall be provided within no more than 30 days after service of the discovery requests.

June, July and August 2021 – The parties shall conduct depositions in accordance with Ch. 804.

Discovery shall close **August 31, 2021**.

If a party requires adjustments to this schedule, attempt to secure the agreement of the other parties first. If you cannot, file a written request explaining exactly what adjustment is needed and why. The parties must comply with statute and local rule regarding discovery disputes before filing a motion to compel. Any motion to compel must be accompanied by the relevant discovery requests, the allegedly insufficient responses or objections and a description of the efforts made to resolve the dispute without court assistance.

I will set some initial bounds for discovery. For now, discovery shall be limited to the time period of the date the petition for a CPCN was filed to the present. I already ruled that questions and documents surrounding Comm. Huebsch's post-decision communications with people affiliated with Dairyland and surrounding his application for employment by Dairyland are relevant, as they could create the

appearance of bias. Respondents' argument that a quid pro quo is required ignores that a due process violation can occur by the appearance of impropriety as well as actual bias. Post-decision communications and information are potentially relevant. I am highly skeptical how the details of Comm. Huebsch's current business are relevant, but will not rule on that issue yet. I will not address any other issues raised in the briefs, as I deem them all premature.

I currently have calendar space on September 10, 29 and 30, 2021. **By no later than June 2, 2021**, each party shall file a written statement identifying which of those 3 days he/she/it is available for an evidentiary hearing on the alleged impropriety in the process before the PSC. Also put in that written statement the number of days you believe are needed for the hearing. I will then set trial using those potential dates.

So ordered.

cc: Parties