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STATE OF WYOMING)	IN THE DISTRICT COURT FOR THE
) ss.	THIRD JUDICIAL DISTRICT
COUNTY OF SWEETWATER)	
ROSE MOSBEY, ISLAND RICHARDS,)	
LEIGHTON WESSEL, HOLLY DABB,)	
and ROCK SPRINGS NEWSPAPERS, INC.,)	
a Wyoming corporation,)	
)	
Plaintiffs,)	
)	
vs.)	Docket No. C-11-29-K
)	
THE BOARD OF COUNTY)	
COMMISSIONERS FOR SWEETWATER)	
COUNTY, and COUNTY OF SWEETWATER,)	
)	
Defendants,)	
)	
vs.)	
)	
DONALD VAN MATRE,)	
)	
Intervenor.)	

MOTION FOR FINAL ORDER

Plaintiffs move the Court to enter a final order declaring that the appointment of Don Van Matre to fill a vacancy on the Sweetwater County Commission in December 2010 was in violation of the Wyoming Public Meetings Act. Plaintiffs no longer seek injunctive relief removing Mr. Van Matre from office. In support of their motion, Plaintiffs state as follows:

STATUS OF THE CASE

Plaintiffs filed on January 11, 2011, a petition for declaratory judgment that the appointment by the Sweetwater County Commission of Donald Van Matre violated the Wyoming Public Meetings Act and seeking a preliminary injunction removing Van Matre from office. The Sweetwater County Commission was named as the defendant and filed an answer on January 26, 2011, admitting the allegations. On February 2, Van Matre moved to intervene and his motion was granted on February 7. An evidentiary hearing was begun on February 18 and continued on March 4. The hearing was expedited as Van Matre was serving on the commission and it was necessary to resolve the issue of his service as soon as possible. No formal discovery was undertaken prior to

the hearing. The Court issued a Decision Letter on March 9, 2011, denying the application for a preliminary injunction. The Court denied the motion because the evidence did “not establish a likelihood that the board took ‘action’ outside a public meeting to appoint Don Van Matre.”

Plaintiffs respectfully disagree with the Court’s determination on both legal and factual grounds, and now ask that the Court issue a final order declaring that the Commission did violate the Public Meetings Act on the basis set forth below.

Plaintiffs have no desire to throw “a monkey wrench” in the administration of Sweetwater County and place a cloud over the decisions made by the Commission in the more than eight months that Van Matre has served on the Commission. The Court’s denial of the preliminary injunction, the passage of time since Van Matre’s appointment, and the fact that Van Matre’s seat will be up for election in just more than a year all militates against his removal as a remedy for the violation of the Public Meetings Act.

Under these circumstances, Van Matre arguably has become “a defacto” member of the Commission, despite the illegality of his appointment. The *de facto* officer doctrine is well-established in the common law and has been recognized by U.S. Supreme Court, as well as state courts. See, e.g., *Waite v. City of Santa Cruz*, 184 U.S. 302, 323-24 (1902); *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 77 (2003) (“The *de facto* officer doctrine ... ‘confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that persons appointment or election to office is deficient.’” (quoting *Ryder v. United States*, 515 U.S. 177, 180 (1995))); *McDowell v. United States*, 159 U.S. 596, 601-02 (1895) (“[T]he rule is well settled that where there is an office to be filled, and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public.”).

The U.S. Supreme Court explained the doctrine as follows:

A de facto officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.

Waite, 184 U.S. at 323.

Courts have five factors for determining whether one is a “*de facto* officer”:

First, there must be a de jure office in order to have a de facto officer. Second, the de facto officer must be in actual possession and control of the office to the exclusion of the de jure officer. In other words, actual and physical possession of the office by one ready to act, as distinguished from the legal or technical possession that the de jure officer is considered to have. The third requisite is that the alleged de facto officer must be discharging his functions under color of authority. 'By color of authority' mean[s] the authority derived from an election or appointment, however irregular or informal, so that the incumbent not be a mere volunteer. The fourth requisite [is] that the *de facto* officer must act under circumstances which normally and reasonably surround the *de jure* officer's functions. Finally, the *de facto* officers must convey an appearance to the public of legitimate title in the official performing governmental duties.

Santos v. Amaro, 923 F.Supp. 300, 303 (D.P.R.1996). *See also, Gutierrez v. Guam Election Com'n*, 2011 WL 768694, (Guam Terr.,2011).

The circumstances set forth above, including the Court's decision denying the preliminary injunction and his service on the Commission for the last eight months, fit the criteria developed by the courts and serve to make Van Matre a "de facto" member of the Commission, regardless of whether his initial appointment was void or not.

However, Plaintiffs believe it vital to the public interest and the future conduct of public boards that the Court declare that the past County Commission violated the Public Meetings Act by entering into a "collective commitment," despite the fact that they may not have taken a vote per se. Plaintiffs are concerned that future officials in Sweetwater County and elsewhere understand that making a commitment to take action outside a properly noticed and legal meeting violates the law.

Counsel for some governmental entities have read the Court's opinion on the preliminary injunction to require at least an informal vote for "action" to be taken under the Act. Plaintiffs seek to clarify this legal issue through this motion to the Court, as well as to bring new evidence to the Court's attention.

In the interest of judicial economy, Plaintiffs have provided affidavits instead of asking for an additional hearing to take live testimony. Of course, Plaintiffs would not oppose an additional hearing if the Court or other parties so desire.

DISCUSSION

As pointed out above, the Plaintiffs disagree with the Court's initial determination that the past Commission did not take "action" outside a public meeting on both factual and legal bases.

I. NEW FACTS ESTABLISH VIOLATION OF ACT

Plaintiffs must prove in regard to the declaratory judgment action that it was more likely than not that a violation of the Public Meetings Act occurred. Regarding the factual basis supporting a

violation, Plaintiffs contend that there is sufficient evidence, including that discovered since the proceedings on the preliminary injunction, to show that it was more likely than not that Commissioners Debby Dellai Boese and Randy Walker took “action” in violation of the Public Records Act. Though they may not have taken a “vote,” the evidence shows that there was at least a “collective commitment” made outside a properly noticed, public meeting.

Subsequent to the hearing on the preliminary injunction, the Plaintiffs undertook limited discovery. Two additional pieces of evidence relevant to the question of whether a “collective commitment” was made by Walker and Boese were uncovered in that discovery. First, Commission Chairwoman Debbie Dellai Boese and Van Matre spoke by telephone for 44 minutes on December 29, 2011, the day before Van Matre was appointed in a surprise announcement. Boese called Van Matre’s cell phone from her home phone. The records show no other phone calls between the two in December of 2010. *Exhibit A: Phone Records Provided by Intervenor in Response to Requests for Production.*

Brett Johnson, Sweetwater County Attorney, testified that Commissioner Randy Walker told him in a telephone conversations on December 29 that the Commission was going to appoint Van Matre the next day. When Johnson asked whether the decision to appoint Van Matre would violate the Public Meetings Act, Walker responded that the commissioners had not voted on the appointment. The phone records confirm the testimony of reporter David Martin that Dellai Boese told him that she had contacted Van Matre about the appointment the day before. *Exhibit C: Tr. of Proceedings, Vol. II, March 4, 2011, pp. 27-28.* Reporters also testified that Van Matre stated that the appointment was dropped on him overnight. *Id. at 29, 44; See also Exhibit D: Recorded Interview of Van Matre attached to the Affidavit of Tim Boulware.* Van Matre also told reporters that he was honored that Paula Wonnacott had enough confidence and trust in him to want him to finish out his term. Van Matre had independent knowledge that Wonnacott wanted him to succeed her on the Commission, as this fact was not revealed during the December 30th meeting. The telephone conversation between Dellai Boese and Van Matre, along with the statements to reporters, supports Brett Johnson’s testimony and the position that the Commission had decided to appoint Van Matre at least the day before the official action was taken.

Second, and more importantly, a search of the computers in the commissioner’s offices by an information technology specialist employed by Sweetwater County revealed that the computers

had no file containing Ms. Boese's "farewell remarks." *Exhibit E: Affidavit of Mike Cooke*. In her remarks, as the Court noted in its previous decision, Boese states that the "commission has made an excellent choice to fill the vacancy held by former Commissioner Wonnacott."

The result of the computer search contradicts Boese's testimony that she began writing in long hand the farewell remarks on the morning of December 30 on her way into the office and then completed them over the lunch hour. *Exhibit B: Transcript of Proceedings, Feb. 18, 2011, pp. 25-26*. She testified that she then gave the hand-written remarks to Belinda Bridewell, then a secretary in the commissioner's office, to type into the computer. *Exhibit B: Tr. of Proceedings, Feb. 18, 2011, p. 82*. She instructed Bridewell not to give the text of the remarks to the county clerk's office for inclusion in the minutes until after she delivered the remarks at the commission meeting. *Exhibit B: Tr. of Proceedings, Feb. 18, 2011, p. 30*.

Boese claimed that she wrote the paragraph about appointing a replacement for outgoing Commissioner Paula Wonnacott at a short break after Wonnacott resigned and left the meeting. She said she wrote it "in anticipation that I would be making a nomination." In earlier testimony, she described the break as "a short going to the restroom, something like that, and then coming back." *Id. at 34*. Boese testified that she did not learn about Wonnacott's resignation until the resignation letter was placed on her desk on the dais of the commission meeting room during the above-referenced short break.¹ *Id. at 38 & 49*.

Boese denied that the paragraph about the appointment of Wonnacott's replacement said "anything about Mr. Van Matre." She asserted she anticipated the nominee would be a man but "not necessarily" Van Matre. *Id. at pp. 36-37*. The Court found in its decision denying the preliminary injunction that Boese's explanation was not credible, but ruled that Boese "anticipated that she and Mr. Walker would appoint Van Matre."

Bridewell testified that she typed the hand-written remarks into a computer in the commissioner's offices – the computers where the county's IT person was unable to find any files containing farewell remarks. The findings of the computer search support, instead, Vicki Eastin, the deputy County Clerk responsible for the commissioners' minutes, who testified that Boese called

¹Wonnacott emailed her resignation letter to Commission secretary Belinda Bridewell at 6:46 a.m. on December 30th. *Exhibit C: Tr. of Proceedings, Vol. II, p. 14*. However, Bridewell could not remember when she opened it, and Walker and Dellai Boese denied seeing the letter until the afternoon break right before Van Matre was appointed.

her the day before the meeting and said she had written farewell remarks to be included in the minutes. Boese told Eastin that Bridewell would supply the remarks to her. Easton asked Bridewell for the remarks after lunch on December 30 so she could get them in the official minutes for approval by the commissioners that day. Bridewell told her that she was instructed not to give her the remarks until after the end of the December 30 meeting, where Van Matre was appointed. Eastin responded: “Cut to the chase. We know what’s going to happen. Would you just get them to me? I am short on time.” She testified that Bridewell then said: “I guess I could trust you guys.” *Exhibit B: Tr. of Proceedings, Feb. 18, 2011, pp. 63-65.* Eastin testified that the remarks were emailed to her by Bridewell prior to the resignation announcement and appointment of Van Matre. *Exhibit B: Tr. of Proceedings, p. 68.* County Clerk Dale Davis testified that Boese told him the day before the meeting that she wanted the minutes of the meeting approved the day of the meeting because “there was going to be a totally new commission” after that meeting. *Exhibit B: Tr. of Proceedings, Feb. 18, 2011, p. 72.*

The lack of any files in the computers in the Commissioners’ office undercuts Boese’s entire story about when and how she drafted the farewell remarks, as well as the contention by both Boese and Walker that the appointment was not predetermined.² The lack of files erodes further her credibility as to whether she included the remarks about Van Matre’s appointment because she and Walker had decided on the appointment in advance of the public meeting – and a decision made at least by December 29 when she spoke with Dale Davis about there being a “totally new commission” coming on in 2011. Boese would not have any reason to make up the story about hand-writing the farewell remarks on December 30 unless she wanted to hide the fact that she and Walker had decided at least by December 29 that Van Matre would be appointed. It was on December 29 that Walker told Johnson that Van Matre was going to be appointed, and that Boese told County Clerk Davis that there was going to be a “totally new commission.”

In summary, the evidence showing a prior commitment to a decision includes the testimony of Johnson about his conversation with Walker on the evening of December 29, Boese’s farewell

² Walker and Boese testified that they did not speak often to each other. However, they did speak about the potential appointment at least twice. Once to ask Clint Boevers of the County Attorney’s Office for an opinion on the appointment process, and then once when they crossed paths in the hallway. *Exhibit B: Tr. of Proceedings, pp. 40-42.* Obviously, this was a topic upon which they found reason to communicate.

remarks, the December 29, 2010 telephone call between Boese and Van Matre, and Van Matre's statements to reporters that the appointment was dropped on him overnight. *Exhibit D: Affidavit of Tim Boulware*. In addition, there are the statements made by Walker to a reporter that he had written the remarks he made about Van Matre and his qualifications prior to the vote on his appointment while listening to Boese read Wonnacott's resignation letter and recite her subsequent statement. *Exhibit C: Tr. of Proceedings, Vol. II, March 4, 2011, p. 37-38*. The videotape of the meeting clearly shows that Walker did not write anything during Boese's reading of the letter or her subsequent statement. Walker testified at the hearing that he did not remember making those statements to reporters and that he had two alternate statements written before the meeting.

II. COLLECTIVE COMMITMENT VIOLATED ACT, EVEN IF NO VOTE TAKEN

The Court appeared to base its denial of the preliminary injunction on the legal conclusion that the commissioners took no "action" because no vote was taken. *Decision Letter, p. 9*. If that is the case, then Plaintiffs respectfully submit that the Court has misread the Public Meetings Act. A vote, informal or otherwise, is not required to establish that a collective commitment to take a certain action was made.

The Court credited both the testimony of Walker and Johnson regarding the conversation on the evening of December 29, 2010. Johnson testified that Walker said he and Boese "were going to put Mr. Van Matre on the County Commission." *Exhibit C: Tr. of Proceedings, Vol. II, March 4, 2011, pp. 52*. Johnson then asked Walker if "the people of the county wanted someone who had just received six percent of the popular vote to be choosing a new County Commissioner." Walker responded that if they didn't choose, "the new people would just pick one of their cronies." *Id. at 52*. Johnson then asked Walker how the appointment would not be "a violation of the Open Meetings Act" *Id. at 53*. Walker, according to Johnson, responded that he and Boese "hadn't discussed it extensively. They hadn't voted on it. Um, and that he wasn't absolutely positive that she was going to resign." *Id.*

Johnson's testimony is directly contrary to Walker's testimony that he was not certain prior to the December 30th meeting whether he would vote to replace Wonnacott, or let the in-coming commission make the appointment. He testified:

Q. (By Mr. Honaker) Did you tell Mr. Johnson at that time that you intended to appoint Mr. Van Matre?

A. I did not.

Q. You did not tell him that. Did you and he have further discussion about Mr. Van Matre?

A. No, I don't believe we did.

* * * *

Q. (By Mr. Moats) Did you have any conversations with Mr. Johnson about possible violation of the Open Meetings Act?

A. It's not my recollection that was brought up, but it is possible Mr. Johnson may have mentioned that.

The Court found that "Mr. Johnson's testimony supports Mr. Walker's" because "Johnson stated that Walker asserted that he and Mrs. Boese had not yet voted on appointing Van Matre, and that they had not even had extensive discussions."

Plaintiffs respectfully argue that for Johnson's testimony to support, rather than contradict, Walker's testimony, the Court came to the legal conclusion that the lack of a vote meant that "action" was not taken. A collective commitment to make a decision does not require a vote, whether informal or formal. Action is defined by the Act as "including a collective decision of a governing body, a collective commitment or promise by a governing body to make a positive or negative decision, or an *actual vote* by a governing body. . . ." The language clearly distinguishes between a vote and a collective commitment.

The Wyoming Supreme Court in a 1979 case found that no "action" was taken during an informal meeting³ of the Rawlins City Council held just prior to the official council meeting. In reaching this conclusion, the court said that there was no evidence "that any explicit or tacit agreement was reached as to what course the council would pursue" and that counsel for the plaintiff had pointed to "nothing showing a collective decision, commitment or promise was made or reached in these informal conversations." *Emery v. Rawlins*, 596 P.2d 675, 679-80 (Wyo. 1979).

The Court did not require a vote, but only a explicit or tacit agreement on a course of action, or what a California court called an "agreement to agree." *Wolfe v. City of Fremont*, 144 Cal. App. 4th 533, 543 (Cal. Ct. App., 1st Dist., Div. 1 2006)("If a quorum of the members of a legislative body so intended to unite in an agreement to agree, a violation of the [open meetings act] would be established." [Citation omitted]).

Though Johnson testified that Walker said he was not absolutely certain that Wonnacott

³ This case came before the Public Meetings Act was amended to define a meeting as not only where action is taken, but also includes the discussion, deliberation and the presentation of information regarding public business.

would resign,⁴ Walker's comments demonstrate that he and Boese had an agreement to agree on appointing Van Matre if she did resign. Such a collective commitment on a course of action, appointing Van Matre upon the resignation of Wonnacott, was "action" as defined by the Act, regardless of whether an actual vote was taken.

Again, other evidence, as outlined above, supports Johnson's testimony and demonstrates that a tacit or explicit agreement was made by Walker and Boese to appoint Van Matre if Wonnacott resigned as expected.

CONCLUSION

Therefore, the facts and the law support a declaration by the Court that the predetermined appointment of Van Matre by the past Sweetwater County Commission violated the Public Meetings Act. The people of Sweetwater County deserve an order from the Court making that clear.

DATED this 1st day of September, 2011.

Rose Mosbey, Island Richards, Leighton
Wessel, Holly Dabb, and Rock Springs
Newspapers, Inc., Plaintiffs

By: _____
Bruce T. Moats (WY Bar No. 6-3077)
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2011, a true and accurate copy of the foregoing **MOTION FOR FINAL DECLARATORY JUDGMENT** was served via U.S. Mail, postage prepaid and correctly addressed to:

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⁴ Johnson testified that Walker said he was 99 percent sure that she would resign.