

IN THE JEFFERSON CIRCUIT COURT

STATE OF INDIANA

ROBERT J. WALLER,
Petitioner,

v.

CAUSE NO. 39C01-2102-PL-118

CITY OF MADISON,
Respondent.

FINDINGS OF FACT & CONCLUSIONS OF LAW

On May 10, 2022, Petitioner Robert J. Waller (Mr. Waller) appeared in person and with counsel, Attorneys Merritt K. Alcorn and R. Patrick Magrath. Respondent City of Madison (the City) appeared by counsel, Attorney Joe Jenner. The Parties appeared for a hearing on remand to address Petitioner's Motion for Preliminary Injunction.

The Court heard argument of counsel and took the matter under advisement. Ind. Trial Rule 53.2. And the Court, having considered the evidence and argument of counsel, as well as the Parties' proposed findings of fact and conclusions of law, now orders as follows:

FINDINGS OF FACT

1. Mr. Waller is a member of the City of Madison Board of Zoning Appeals (the MBZA) and the Madison Plan Commission (the MPC). He was appointed to both by Mayor Courtney's immediate predecessor, Mayor Damon Welch.
2. Mr. Waller is not an employee of the City. He is not paid for his work on the MBZA nor the MPC.
3. Mr. Waller is a veteran and worked as a fireman in Orange County, California for 30 years before retiring in Madison, Indiana. He volunteers as a Court Appointed Special Advocate in Child in Need of Services cases.

4. Mr. Waller has been described as a competent, valuable member of the MBZA. He was nominated for chairman by a fellow member, Dr. Nancy Burkhart. Mr. Waller is respectful to applicants and remonstrators, and in the past, has shown sympathy towards them.
5. Mr. Waller also serves on the City's Police Merit Commission, which has been named a "Merit Board" by City Ordinance 2008-1¹.
6. On December 21, 2020, the City's Board of Public Works and Safety (the Board of Public Works) conducted a public hearing on the City's efforts to revise the Madison Police Department's standard operating procedures (SOPs). Mayor Courtney sits on the Board of Public Works as part of his official duties, and serves as President.
7. Mr. Waller attended the December 21, 2020 hearing. He was recognized by Mayor Courtney and afforded an opportunity to address the Board's consideration of the SOP revisions.
8. Mr. Waller appeared and stated he was there, "for the commission," meaning the Police Commission / Merit Board. Mr. Waller attended to "stop a vote" on the revisions to the SOPs.
9. Mr. Waller voiced opposition to the Board of Public Works voting on SOP changes, alleging that the Police Merit Commission / Board was not sufficiently in the loop with the SOP revisions by the Board of Public Works. Mr. Waller believed the revisions were "rushed". He asked that the Board table a vote on the revisions.
10. While Mr. Waller voiced his opposition, an exchange occurred between Mayor Courtney and Mr. Waller that became lengthy and argumentative.
11. On January 10, 2021, Mayor Courtney sent a letter to Mr. Waller notifying Mr. Waller that his appointments to the MPC and the MBZA were rescinded. Mayor Courtney listed the following "causes" giving rise to the rescissions:
 - Making false allegations against the Mayor and the Chief of Police and the Mayor's appointments to the Board of

¹ The Parties dispute the proper nomenclature here. Mr. Waller refers to it as the "Merit Commission" under IC 36-8-3.5-6. Mayor Courtney refers to it as the "Merit Board" under the City Ordinance.

Public Works and Safety and the Police Merit Board regarding their ability to evaluate recommendations independently and professionally to the police standard operation procedures

- Condescending attitude toward the civilian formed Public Safety Steering Committee, which comprised of nine members of the community, including two current members of the police department. Your statement that they are disqualified due to "personal emotions" is unfounded. In fact, this group is racially diversified and bring (sic) a wealth of personal and professional experience to the process. Community safety greatly depends on community participation.
- False allegations that the Mayor possesses a "disdain" for the City of Madison Police Merit Board.
- Lack of involvement and interest in providing meaningful feedback to the process despite multiple opportunities. And,
- Loss of trust that you can competently and fairly carry out your duties to these boards.

12. On February 9, 2021, Mr. Waller filed his Complaint and Motion for Preliminary Injunction, alleging his removal from the MBZA and the MPC was contrary to law. A hearing was held on Mr. Waller's Motion for Preliminary Injunction March 17, 2021. The Court took the matter under advisement and directed the Parties to submit proposed findings and conclusions by April 9, 2021. Ind. Trial Rule 53.2.

13. On May 13, 2021, this Court denied Mr. Waller's petition. Mr. Waller appealed. In a 2-1 split decision, the Indiana Court of Appeals reversed and remanded. Waller v. City of Madison, 183 N.E.3d 324 (Ind. Ct. App. 2022).

14. On remand, the Court of Appeals instructed this Court to "apply the proper definition of 'for cause'" and to, "apply *Pickering* in determining whether Waller's free speech claims entitle him to injunctive relief." Waller v. City of Madison, 183 N.E.3d at 334.

LAW AND ANALYSIS

15. Motions for preliminary injunctions are governed by Ind. Trial Rule 65(A), which requires only notice and an opportunity to be heard prior to the issuance of a preliminary injunction.
16. To obtain a preliminary injunction, a party has the burden of showing by a preponderance of the evidence that: (1) a remedy at law is inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) there is at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) the threatened injury outweighs the potential harm that would result from the granting of an injunction; and (4) the public interest would not be disserved by the granting of a preliminary injunction. Bowling v. Nicholson, 51 N.E.3d 439, 443 (Ind. Ct. App. 2016) *trans. denied*.
17. If the action to be enjoined clearly violates a statute, the public interest is so great that the injunction should issue regardless of whether a party establishes "irreparable harm" or "greater injury". State v. Econ. Freedom Fund, 959 N.E.2d 794, 804 (Ind. 2011). This is known as the "per se" injunction standard. Id.
18. Because Mr. Waller seeks relief pursuant to the per se injunction standard, the Court must determine whether Mr. Waller's removal from the MBZA and the MPC was contrary to law.

Mr. Waller's Removal "For Cause"

19. At the time Mayor Courtney removed Mr. Waller from the MBZA and the MPC, "for cause" was not defined by our General Assembly; nor had it been addressed in this context by our appellate courts.
20. The law in Indiana defining "for cause" now reads: An appointee removable "for cause" may be removed only for acts or omissions that diminish the appointee's ability or fitness to perform the duties of the appointment. Waller, 183 N.E.3d at 332.
21. The record is uncontradicted that Mr. Waller is a competent, valuable member of the MBZA. He was nominated for chairman by a fellow member, Dr. Nancy Burkhart. Mr.

Waller is respectful to applicants and remonstrators, and in the past, has shown sympathy towards them. The record is silent as to Mr. Waller's performance as a member of the MPC.

22. The reasons cited by Mayor Courtney in his January 20, 2021 letter for Mr. Waller's removal from the MPC and MBZA are based solely on Mr. Waller's conduct at the December 21, 2020 Board of Public Works and Safety meeting. Mr. Waller appeared, ostensibly in his capacity as a member of the Merit Commission / Board, and publicly voiced his opposition to that Board's course of action related to the police department's standard operating procedures. It was Mr. Waller's opinion that Board failed to sufficiently include the Merit Commission / Board in the process. An exchange with Mayor Courtney ensued that quickly became argumentative.

23. But nothing from that exchange can lead the Court to conclude that cause, as now defined by the Court of Appeals, exists for Mr. Waller's removal from either the MBZA or the MPC. Mr. Waller's conduct at the December 21, 2020 Board of Public Works and Safety meeting does not constitute acts or omissions that diminish his abilities or fitness to perform his duties as a member of the MBZA or MPC. Waller, at Id.

24. The Court must therefore conclude that Mr. Waller's removal from his positions at the MBZA and the MPC was contrary to law. Mr. Waller has met the per se injunction standard set forth in State v. Econ. Freedom Fund, 959 N.E.2d 794, 804 (Ind. 2011). Because of this, Mr. Waller is not required to demonstrate "irreparable harm" or "greater injury" in seeking a preliminary injunction. Econ. Freedom Fund, 959 N.E.2d at 804.

25. Mr. Waller must only establish that there is at least a reasonable likelihood of success at trial by establishing a prima facie case, and that the public interest would not be disserved by granting of a preliminary injunction.

26. Because the Court concludes that Mr. Waller's removal was contrary to law, the Court finds that there is at least a reasonable likelihood of success at trial. And on this record, the Court cannot conclude that Mr. Waller's reinstatement to his positions on the MBZA and MPC would disserve the public interest. The Court finds that Mr.

Waller has met his burden by a preponderance of the evidence sufficient to obtain a preliminary injunction. T.R. 65(A); Bowling, 51 N.E.3d at 443.

Mr. Waller's 1st Amendment Rights

27. Mr. Waller asks this Court to find the City violated Mr. Waller's 1st Amendment right to free speech when Mayor Courtney discharged him from his duties with the MBZA and MPC. The Indiana Court of Appeals directs this Court to apply Pickering v. Board of Education, 391 U.S. 563 (1968) to determine whether Mr. Waller's free speech claims entitle him to injunctive relief. Waller, 183 N.E.3d at 334.
28. Our Supreme Court has previously identified the Pickering analysis to constitute a three-part test: 1) the person must be speaking on a matter of public importance about which free and open debate is vital to the decision making of the community; 2) the interests of the person, as a citizen, in commenting on matters of public concern must be balanced against the State's interest in running an efficient operation; and 3) the person's protected conduct must be a motivating factor in the State's decision to fire him. Ind. Dept. of Highways v. Dixon, 541 N.E.2d 877, 881 (Ind. 1989).
29. First, Mr. Waller was speaking on a matter of public importance about which free and open debate is vital to the decision making of the community, that being the standard operating procedures under which the Madison Police Department operates. It goes without saying that decisions regarding how our police department operates on a day-to-day basis must be subject to free and open debate.
30. Second, Mr. Waller offered his opinions and criticism over how our local government was reviewing and changing those SOPs, again ostensibly in his capacity as a member of the Police Merit Commission / Board. The Court balances this against the City's interest in running an efficient operation both in the context of the Madison Board of Public Works and the MBZA and MPC.
31. In the case of the Board of Public Works, it is noteworthy that not only did the Board offer Mr. Waller the opportunity to speak at the December 21, 2020 meeting, it afforded other people the same opportunity. And while the

exchange between Mr. Waller and Mayor Courtney was at times heated, both remained civil and addressed one another with respect. The exchange itself was not disruptive, nor did Mr. Waller's conduct unduly impede the Board of Public Work's operations that day.

32. As to the MBZA and MPC, the events of December 21, 2020 were wholly unrelated to these entities. There is insufficient nexus between Mr. Waller's conduct at the December 21, 2020 Board of Public Works meeting and the functions and performance of the MBZA and MPC to conclude that the City's interest in running an efficient operation was adversely affected.

33. Third, it is undisputed that Mr. Waller's conduct at the December 21, 2020 Board of Public Works was the motivating factor in the City's decision to remove him from the MBZA and the MPC. This is clearly established by the January 10, 2021 letter notifying Mr. Waller of his removal.

34. The Court finds that, applying Pickering, Mr. Waller's free speech claims entitle him to injunctive relief.

IT IS THEREFORE ORDERED that Mr. Waller's Motion for Preliminary Injunction is GRANTED.

IT IS FURTHER ORDERED that Mr. Waller's removal from the Madison Board of Zoning Appeals and the Madison Planning Commission is hereby STAYED.

IT IS FURTHER ORDERED that Mr. Waller shall be immediately restored as a member of the Madison Board of Zoning Appeals and the Madison Planning Commission in order that he may carry out his duties as a member of those entities in accordance with IC 36-7-4.

SO ORDERED this 15th day of June, 2022.



DONALD J. MOTE, JUDGE
JEFFERSON CIRCUIT COURT

DIST:
ALCORN / MAGRATH
JENNER