

COMMONWEALTH OF KENTUCKY
CAMPBELL COUNTY CIRCUIT COURT
DIVISION ONE
CASE NO. 21-CI-00762



KEN MOELLMAN, SR., ET AL.

PLAINTIFF

v.

CAMPBELL COUNTY BOARD OF EDUCATION

DEFENDANT

ORDER

Plaintiff Ken Moellman, Sr., filed a Motion for Summary Judgment in this case. Campbell Defendant, the Campbell County Board of Education (the Board) filed a response and requested summary judgment in its favor, and Plaintiffs replied. After careful review of the pleadings, both Plaintiffs' and Defendant's Motions for Summary Judgment are sustained in part and overruled in part.

Facts of the Case

The facts of this case are undisputed. The Plaintiffs, Kenneth Moellman, Sr. and Noah Heim, attempted to attend meetings of the Campbell County Board of Education on August 9, 16, 18, and 30, 2021, and on September 9, and 20, 2021. Mr. Moellman was prohibited from attending the meetings because he refused to wear a mask while in the meeting. Mr. Heim was admitted to the meetings because he temporarily wore a mask, but then later removed the mask once he was in the meeting.

On September 21, 2021, the Plaintiffs wrote to the Board alleging that the Board had violated the Open Meetings Act because the Board required masks be worn at the meetings. Plaintiffs demanded that the Board rescind all actions taken at the meetings, issue an apology, and

discontinue the mask policy for future meetings. The Board responded by email and refused to render the demanded remedy. The Board also stated that masks were required at the meetings on August 9 and September 20 under the Governor's Executive Order 2020-243, issued by the Governor on March 18, 2020. The Board stated that they acted pursuant to 702 K.A.R. 1:195E, an emergency regulation in effect from August 12 to September 17, 2021, to justify the mask mandate at the meetings during that time.

The Plaintiffs filed a complaint with this Court and subsequently a Motion for Summary Judgment. In the Motion for Summary Judgment, the Plaintiffs argues that the Board repeatedly violated the Open Meetings Act by requiring that masks be worn at the Board meetings. The Plaintiffs request declaratory relief, injunctive relief, \$100 statutory penalty for each meeting from which the Plaintiffs were encumbered from attending, and attorneys' fees and costs.

The Defendant responded that 1) the Board lawfully required the use of masks as a means of preserving order at the Board meetings; 2) the Board lawfully relied upon executive orders and administrative regulations of the Kentucky Department of Education when requiring masks at the Board meetings; and that the Board was entitled to rely upon its COVID-19 Operations Plan to require the use of masks at the September 20, 2021 Board meeting. Defendant also argues against Plaintiffs' requested relief.

After due consideration of the briefs and materials presented to the Court, the Court finds the Defendant violated the Open Meetings Act at four of the six meetings in question and lacked statutorily mandated justification for doing so. Therefore, the Plaintiff's Motion for Summary Judgment is sustained as to those four meetings.

Summary Judgment Standard

Summary judgment is appropriate “if the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. The Supreme Court of Kentucky has repeatedly advised that courts should cautiously grant summary judgment. *Steevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). A Court must review a record “in a light most favorable to the party opposing the motion for summary judgment and [resolve] all doubts . . . in [its] favor.” *Id.* Summary judgment will only be used “to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Id.* at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (1985)).

Discussion

The parties do not disagree that the Campbell County School Board meetings that took place on August 9, 16, 18, 30, 2021, and on September 9, and 20, 2021, are subject to KRS § 61.800 et. seq., known as the Open Meetings Act. KRS 61.810 states in relevant part that, “[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times”. KRS § 61.840 states:

No condition other than those required for the maintenance of order shall apply to the attendance of any member of the public at any meeting of a public agency. No person may be required to identify himself in order to attend any such meeting. All agencies shall provide meeting room conditions, including adequate space, seating, and acoustics, which insofar as is feasible allow effective public observation of the public meetings. All agencies shall permit news media coverage, including but not limited to recording and broadcasting.

Plaintiffs argue that the mask mandate at the Board meetings was a condition of attendance that was not required to maintain order. In response, the Defendant states that the masks were necessary to maintain public order. To support that position, Defendant borrows from the Commonwealth's criminal laws prohibiting Disorderly Conduct in the Second Degree.

KRS 525.060 states:

(1) A person is guilty of disorderly conduct in the second degree when in a public place and with intent to cause public inconvenience, annoyance, or alarm, or wantonly creating a risk thereof, he:

- (a) Engages in fighting or in violent, tumultuous, or threatening behavior;
- (b) Makes unreasonable noise;
- (c) Refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency; or
- (d) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

Defendant argues that it was reasonable for the Board to require masks at the meetings to avoid an unmasked attendee creating a hazardous or physically offense condition because the Board did not know how many people would attend or if social distancing could be maintained during the COVID-19 pandemic. Defendant further argues that failing to wear a mask at a school board meeting is analogous to failing to disperse from a fire hazard or other emergency following an official order issued to maintain public safety in dangerous proximity to those conditions.

The Court does not believe that is necessary to prove a violation of KRS 525.060 to determine the orderliness of a meeting. However, if it necessary the Defendant has certainly failed to show that Plaintiffs violated KRS 525.060. To prove a person is guilty of disorderly conduct, there must be evidence that he acted with intent or wanton disregard for the outcome. The Board has not shown the Plaintiffs acted with either. There is no evidence that Mr. Moellman or Mr.

Heim intended to or wantonly caused a physically offensive condition by refusing to wear a mask or that not wearing a mask served no legitimate purpose. The Board has not shown that either Plaintiff was infected with COVID-19 that could cause an offensive condition. Nor has the Board shown that either Plaintiff intentionally or wantonly refused to obey an official order to disperse in order that resulted in disorderly conduct. Especially on August 9, 30, September 9, and 20th, 2021 since there was no official order to follow.

The question before the Court is really whether the wearing of mask was necessary to maintain order. That order can include what is necessary to conduct business, the number and order in which participants should speak, and the manner in which business is heard. There is no evidence before this Court to suggest that masks were necessary. The Board indicated that masks were necessary because they were not sure prior to the meeting how many people would show up and whether social distancing could be maintained. However, there is no evidence that on the day of each meeting that the crowd was large and social distancing was not able to be maintained. There was no evidence that the people in attendance were in danger for failing to wear mask because there was no evidence that anyone who entered the meeting was sick. In fact, Plaintiff, Noah Heim removed his mask at one of the meetings and no disorder ensued.

Next, Defendants point to the Governor's Executive Orders, a Kentucky Department of Education Emergency Regulation, and the Board's COVID-19 operations to justify mask mandates at the meetings. The Board's arguments are not persuasive given the history of the Governor's Executive Orders and other regulations related to COVID-19 and masks in schools.

The Governor of Kentucky, in March 2020, declared a State of Emergency in response to the COVID-19 pandemic and began issuing executive orders for the safety of the people. Included in those Executive Orders was 2020-243, which suspended the Kentucky Open Meetings Act. The

executive orders were challenged in several courts, and the Kentucky Supreme Court, in *Beshear v Acree*, 615 S.W.3d 780, 786 (Ky. 2020), found that the Governor was within his rights to issue the executive orders. The Court found that, while the Governor had acted within his authority, that authority was derived from the legislature, and the legislature was within its power to delegate authority to the Governor “so long as the delegating authority retains the right to revoke the power.” *Id.* at 810. The Supreme Court’s *Acree* decision was not appealed.

In response, the Kentucky Legislature passed a series of bills in February and March 2021, including Senate Bill 1, Senate Bill 2, House Bill 1, and House Joint Resolution 77 (hereinafter SB 1, SB 2, HB 1, and HJR 77 respectively and collectively, “the bills”), which limited the scope and duration of the Governor’s executive orders. HJR 77 specifically lifted the suspension of the Open Meeting Act 60 days after HJR 77 was passed on March 30, 2021. In March 2021, the Franklin Circuit Court issued an injunction that prevented the first bills from going into effect and later included HJR 77 after it was passed.

Meanwhile, the Governor continued to issue executive orders. On May 13, 2021, the Governor issued Executive Order 2021-326 which required “[a]ny person in a K-12 educational, preschool, daycare, or other childcare setting, including any student, employee, staff member or visitor, shall wear a face covering.” That Executive Order expired 30 days later. On August 10, 2021, the Governor issued Executive Order 2021-585, which again required all teachers, staff students, and visitors in Kentucky schools to wear masks indoors regardless of vaccination status. Again, this Executive Order was challenged in the courts. On August 19, 2021, the U.S. District Court, Eastern District of Kentucky, temporarily enjoined enforcement of 2021-585, finding that the “Plaintiffs have shown a likelihood of success on the merits of their claim that the Governor’s unilateral issuance of Executive Order 2021-585, without the prior approval of the General

Assembly violates KRS 39A.090(3), which is the product of House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77, all passed by the Kentucky General Assembly in its 2021 session.” *Oswald, et al v. Governor Andy Beshear*, 555 F.Supp.3d 475, 478 (2021). On August 21, 2021, the Kentucky Supreme Court found in *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021), that the injunction issued by the Franklin Circuit Court in March 2021 was issued erroneously. On August 23, 2021, the Governor rescinded Executive Order 2021-585.

At the August 9, 2021 board meeting, no Executive Order was in place requiring masks to be worn in schools. At the August 16 and 18, 2021 board meetings, the Governor’s August 10, 2021 Executive Order requiring masks in school buildings was in place, as was the injunction issued by Franklin Circuit Court preventing the Bills from taking effect and nullifying the mask mandate in the Executive Order. On August 19, 2021, the United States District Court, Eastern District of Kentucky, Northern Division, entered an injunction against the August 10, 2021 Executive Order. Further on August 21, 2021, the Kentucky Supreme Court ordered the Franklin Circuit Court to dissolve the injunction preventing the bills from taking effect. The Governor then rescinded that Executive Order on August 23, 2021. Therefore, there were no Executive Orders in place at the August 30, September 9, and September 20, 2021 meetings that would require that attendees wear masks. Therefore, the Board cannot rely on Executive Orders for requiring masks at the board meetings that took place August 9, September 9, or September 20, 2021 either.

The Board, likewise could not rely upon 702 KAR 1:195E, the Kentucky Department of Education Emergency Regulation to justify barring those without a mask from attending any of the board meetings. That regulation required, “All individuals, including students, school employees, contractors, and visitors, shall cover their nose and mouth with a face covering while inside a school facility.” *Id.* at Section 2. The regulation defined a “school facility” as “a building,

enclosed structure, or vehicle, that is owned, leased, or operated by a school district, and where one or more students are present therein.” Id. at Section 1(3). The Superintendent testified that there were no students in the building during the meetings, and therefore, the building in which the meetings took place was not considered a “school facility” at the time of the meetings. Therefore, masks were not required under the Emergency Regulation because students were not present. Further 2021 Special Session Senate Bill 1, delivered to the Secretary of State on September 9, 2021, rendered 702 KAR 1:195 null and void and declared the regulation unenforceable after September 16, 2021. Therefore, even if students were present in the building, the Board could not rely on 702 KAR 1:195 to justify the mask mandate at the Board meetings after September 16, 2021.

Finally, it was not proper for the Board to rely upon Campbell County School’s COVID-19 Operations Plan to justify the mask mandate at the meetings. The Operations Plan was revised to include a face covering provision while inside all school facilities regardless of vaccination status. However, the Board did not ratify the revised operations plan until the September 20, 2021 board meeting when it appeared on the agenda as School Board Action Item #9. Since the Board had no authority to mandate a mask condition at the September 20, 2021 meeting, all actions taken at the meeting are void including ratification of the COVID-19 Operations Plan.

In sum, the Board could not rely upon Executive Orders, the Kentucky Board of Education Emergency Regulation, the school’s COVID-19 Operations Plan, or an exception to the Kentucky Open Meetings Act to require masks to be worn at the board meetings that took place on August 9, 20, and September 9, 20, 2021. The Court, therefore, finds that Plaintiff Moellman is entitled to Summary Judgment in his favor as to those dates. Plaintiff Heim is not entitled to summary judgment as he was allowed to enter the meetings and removed his mask while inside. Defendants

were adhering to the Governor's Executive Order requiring masks in schools on August 16 and 18, 2021, and abiding by the Franklin Circuit Court's injunction barring the implementation of the bills on those dates. Therefore, the Defendants are entitled to summary judgment as to those two dates.

Damages

The Court finds that the Campbell County School Board violated the Kentucky Open Meetings Act on August 9, 30, 2021, and on September 9, and 20, 2021, and all actions taken by the Board at those meetings is void pursuant to KRS 61.848(5), which states, "Any rule, resolution, regulation, ordinance, or other formal action of a public agency without substantial compliance with the requirements of KRS 61.810, 61.815, 61.820, and KRS 61.823 shall be voidable by a court of competent jurisdiction."

KRS 61.848(6) of the Kentucky Open Meetings Act states,

Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.805 to 61.850, where the violation is found to be willful, may be awarded costs, including reasonable attorneys' fees, incurred in connection with the legal action. In addition, it shall be within the discretion of the court to award the person an amount not to exceed one hundred dollars (\$100) for each instance in which the court finds a violation. Attorneys' fees, costs, and awards under this subsection shall be paid by the agency responsible for the violation.

(emphasis added)

The Defendants are hereby ordered to pay \$100 to Plaintiff Ken Moellman for each of the four (4) meetings for which there was no justification for the mask mandates at the meetings. As Plaintiff Noah Heim was permitted to attend the meetings despite removing his mask after entry, no fine will be assessed.

The Court finds that the Board violated the Kentucky Open Meetings Act by requiring masks to be worn for entry on the dates discussed herein, and further finds that the Board violated the Act willfully. The Court finds the violation of the Open Meetings Act particularly egregious at the September 20, 2021 meeting, where there were no Executive Orders, Emergency Regulations, or injunctions in place which would require masks, and the Board intended to vote on the Board's COVID-19 plan. The Board, by requiring masks, barred attendance from the very individuals most likely to oppose passage of the COVID-19 Plan at the September 20, 2021 meeting. This encumbrance can only be viewed as intentional. Because the violation was willful, the Court will award reasonable attorneys' fees in this case. The Court will reserve on the amount of fees to be paid until such time as the Plaintiffs provide to the Court a detailed summary of the fees incurred.

WHEREFORE, the Court **SUSTAINS** Plaintiffs' Motion for Summary Judgment in part and orders the Campbell County Board of Education to pay Plaintiff Kenneth Moellman the sum of \$400. The Court further orders the Board to void all actions taken at the August 9 and 20 and September 9 and 20, 2021 meetings. The Court will reserve on the amount of attorneys' fees to be paid by the Defendants to the Plaintiffs until the Court receives a detailed summary of the fees incurred. Plaintiffs will file the summary of fees no later than Monday, June 6, 2022; and

Defendant will file any objection to the attorneys' fees by Monday, June 13, 2022. The Court sustains Defendant's motion for summary judgement as to the meetings on August 16 and 18, 2021.

THIS ORDER SHALL NOT BE FINAL UNTIL THE COURT MAKES A FINAL RULING ON ATTORNEYS' FEES.

DATE: 5.23.22



Judge Julie Reinhardt Ward

cc: All Parties and Counsel of Record