

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

**Citizens for Sunshine, Inc.,
Plaintiff,**

v.

**Case No. 2010CA4387NC
Division A**

**City of Sarasota,
a/k/a Civil Service Board,
Defendant.**

_____ /

FINAL JUDGMENT GRANTING DECLARATORY RELIEF

THIS CAUSE came on for non-jury trial February 24, 2012 upon plaintiff's complaint for declaratory judgment. Upon the stipulation of facts, review of transcripts, depositions, matters judicially noticed, and argument of counsel the court **FINDS** as follows:

I. Background

This action was commenced April 22, 2010, upon the filing of a two count complaint by Citizens for Sunshine, Inc., alleging violations of section 286.011, Florida Statutes, also known as the Sunshine Law. The complaint is for declaratory and injunctive relief, and it asserts that two members of the municipality's Civil Service Board (CSB), Dan Major and Frederic Bigio, had engaged in activities violative of the statute. The City and the two board members were joined as defendants.

The CSB had been convened on April 20, 2010, two days before suit was filed, to review the City's decision to terminate the employment of Christopher Childers, a police officer whom the City had terminated for alleged improper treatment of an arrestee. The CSB is an administrative panel composed of private citizens. Its members and proceedings are subject to the Sunshine Law and it was acting in a quasi-judicial capacity pursuant to the provisions of sections 24-6 and 24-7 of the City of Sarasota Code.

After the Board convened but before any evidence was presented, during recess, private discussions occurred between two members of the panel. Major, a former city policeman, said to Bigio "I think we have seen enough to decide this case," and offered that he would have done the same thing as Childers. Bigio replied that "the guy (Childers) was just too lazy to put his gloves on." These remarks were within earshot of a city employee, April Bryan, who conscientiously reported them to the Board, where the chair asked her to repeat them on the record. This caused the chair to remove Major from sitting on the panel. Bigio was allowed to remain and he was part of the three member panel that later proceeded to take evidence.¹

¹ The CSB is a five member board. Before the meeting, one member recused himself. After Major was dismissed, three remained to hear the case.

Major and Bigio were given an opportunity to share all of their off-the-record discussions with the CSB, whereupon the remarks discussed above were disclosed. However, another comment by Major relating to a maneuver used by Childers to subdue the suspect was omitted from their recitation. This is discussed below.

There were four disciplinary infractions facing the employee at the start of the hearing:

1. Use of excessive or unnecessary force;
2. Damaging the reputation or bringing disrepute on the City;
3. Failure to maintain control of a subject;
4. Improperly completed use-of-force reports.

After the presentation of the City's evidence, on the first two charges, considered to be the most serious, the Board ruled in favor of the employee. The CSB adjourned with the remaining infractions to be adjudicated on April 22. However, on that day and before the Board reconvened, plaintiff filed suit and with the City's consent obtained an injunction prohibiting further action.

In May of 2010, Officer Childers and the Southwest Florida Police Benevolent Association, Inc. (PBA) moved to intervene. On August 20, 2010, after argument and brief testimony, the Honorable Rick DeFuria granted the intervenors' request. Thereafter, they filed a cross-claim against the City of Sarasota seeking declaratory judgment and injunctive relief demanding Childers' reinstatement.

Due to uncertainty regarding the intervenors' status, on the City's motion, this court entered an order limiting their participation in the litigation pending between plaintiff and the City, and subordinated their cross-claim against the municipality to the Sunshine Law controversy underway in the main action.

Based on *Silver Express Co. v. District Board of Trustees of Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997) the court held that actions to hold government entities accountable under the Sunshine Law are to vindicate the public's right to open meetings, and are not properly used to secure private rights. Thus, if, in the process of administrative review of Mr. Childers' employment status, a governmental body subject to the proscriptions of the Sunshine Law violated its provisions, the employee does not acquire a personal right of action as a result. The court determined that while Mr. Childers may have other claims by statute or common law, they are not properly litigable in an action brought by a member of the public to enforce the provisions of section 286.011.

Intervenors were granted leave to pursue an independent action duplicating the allegations of their cross-claim, in the event they found themselves prejudiced by the subordination. This option was not pursued.

II. Findings as to Sunshine Law Violations

From the beginning of this litigation the City has confessed error by the two board members and it does not contest plaintiff's contention that a Sunshine Law violation occurred. A stipulation of facts, attached as Exhibit A and incorporated herein by reference, was submitted to the court prior to trial. It is signed by attorneys for plaintiff and defendant, and it includes the following:

23. By failing to provide the public with reasonable notice of the discussion and comments of two or more Board members, the Board violated the Sunshine Law.

24. Plaintiff and the public have been irreparably harmed by the failure of the Board, Mr. Bigio and Mr. Major to provide reasonable notice of the discussions and comments between two or more Board members that occurred on April 20, 2010.

One set of agreed facts is not specifically referenced in the complaint, and intervenors object to it being part of the stipulation – namely, a conversation that occurred outside the public hearing during a lunch recess between Bigio and Major.

Referring to a video of the incident widely circulated in the public domain, Bigio asked Major to explain a kick used by Childers to subdue the arrestee. Major responded that this was a “take down” maneuver. This discussion was never disclosed to the public, although the Board provided an opportunity for them to do so before it adjourned. In any event, its absence in the pleading is immaterial as the complaint stated a claim for violation of the Sunshine Law, and the parties in the main action are free to agree to whatever facts they believe would be proven at a trial, even if they are not mentioned in the complaint.

Because the parties to the main action have entered an agreement establishing a violation, it is improper for the court to reach a different conclusion. *Palm Beach Cmty. Coll. v. State, Dept. of Admin., Div. of Ret.*, 579 So. 2d 300, 302 (Fla. 4th DCA 1991), (when the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.)² For those interested in determining the City's impetus for conceding the operative facts, the answer may be found in the ample legal authority cited by plaintiff in its pretrial memorandum.

Consequently, based on the stipulation of facts the court finds that a violation of the Sunshine Law occurred on April 20, 2010, and that plaintiff is entitled to relief.

III. Remedies

The critical issue remaining is the question of what relief should be granted. The intervenors, who were permitted to argue their position, contend the court should affirm the CSB's prior

² The stipulation of facts conceding irreparable harm to plaintiff and the public, and the failure to disclose to the Board the take-down kick remark, forecloses debate as argued by intervenors as to whether the Sunshine Law violation was cured by actions of the CSB during the hearing on April 20.

adjudication of the two charges, and allow the pair of remaining infractions to be heard by the Board. Plaintiff argues that the nature of the violations here require a *de novo* hearing, with all four charges to be determined. The City is officially neutral on the subject.

In determining the appropriate remedy, the court has reviewed the extensive case law submitted by counsel. The following Supreme Court opinions are illuminating.

In *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971), city council members attempted to meet informally in a closed door session. Referring to the Sunshine Law, the court said:

It is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly. In this area of regulating, the statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance. *Id.* p 41.

In *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974), a zoning ordinance adopted by the Town Council was voided because of the non-public activity of a citizen's advisory planning committee which the Council used to help formulate the zoning plan. The court noted that unintended violations of the Sunshine Law negate action taken by the public body, and quoting from section 286.011(1), Florida Statutes, stated that the law "specifically provides '**no resolution, rule, regulation or formal action shall be considered binding**' where the government in the sunshine law is violated." *Id.* pp. 477 - 478. [Emphasis added.]

In voiding the Town's action the court added:

One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken.

The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State. . . **Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury so that the ordinance is void ab initio.** *Times Publishing Co. v. Williams*, 222 So.2d 470 (Fla. 2d DCA 1969). *Id.* p. 477 [Emphasis added.]

In light of this long standing precedent, the force of which has not been diminished in four decades, the court has no option but to invalidate the decisions of the Civil Service Board at issue in this case.

The violations of the Sunshine Law in this case were far from trivial. At issue was the official conduct, career and livelihood of a member of the police force. The private comments made by Mr. Major to Mr. Bigio amounted to prejudging the case before evidence was presented and, having been made to one who remained a voting member, taints the integrity of the process, making the outcome suspect regardless of how Bigio ultimately voted.

The decision of the Board to exonerate the officer or find him culpable is impeachable when discussions occur between the supposedly neutral fact finders in private and off the record. The failure to have the discussion regarding the take-down maneuver on the record and subject to public observation or later disclosure and potential cure is an affront to both the language and spirit of section 286.011.

The public interest in transparent public hearings is embodied in Article I, Section 24(b) of the state constitution and as implemented by general law. Citizens must have confidence that decisions by a body subject to the Sunshine Law, especially those acting in a quasi-judicial capacity, are reached in compliance with the constitution and applicable statutes.

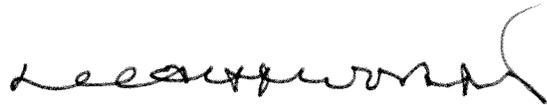
The public's right to open meetings cannot be vindicated if a court were to ratify the votes taken by the Board under the circumstances in this case. A *de novo* hearing is the only acceptable remedy mandated by long standing case law.

NOW, THEREFORE, the court enters declaratory judgment on behalf of plaintiff and against the City as follows:

1. For the reasons stated, the court finds a violation of the Sunshine Law, section 286.011, Florida Statutes, occurred on April 20, 2010, in the administrative proceedings before the City of Sarasota Civil Service Board in regard to employment termination action initiated against Christopher Childers by the City, and that plaintiff is entitled to relief.
2. The findings and decisions of the CSB on April 20, 2010 are hereby declared null and void and the City is enjoined from acting on the decisions made that day by the CSB.
3. The City of Sarasota shall re-convene the Civil Service Board as soon as practicable in accordance with the provisions of the City Code.
4. CSB shall consider evidence *de novo* concerning the four administrative charges brought against Christopher Childers.
5. The court reserves jurisdiction to enforce this judgment and to determine plaintiff's attorney fees and costs. This final judgment determines the issues between the Citizens for

Sunshine, Inc. and the City of Sarasota on plaintiff's complaint. Intervenor's cross-claim against the City remains pending.

**DONE AND ORDERED THIS 27th DAY OF FEBRUARY, 2012, IN SARASOTA,
SARASOTA COUNTY, FLORIDA.**

A handwritten signature in black ink, appearing to read "Lee E. Haworth", written over a horizontal line.

LEE E. HAWORTH, CIRCUIT JUDGE

cc:

Andrea F. Mogensen, Esq.
Attorney for Plaintiff

Whitney C. Coyne, Esq.
Attorney for the City of Sarasota

Nevin A. Weiner, Esq.
Attorney for Intervenor

EXHIBIT A

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY FLORIDA

**CITIZENS FOR SUNSHINE, a Florida
not-for-profit corporation,**

Plaintiff,

v.

CASE NO: 2010-CA-4387-NC

**CITY OF SARASOTA CIVIL SERVICE BOARD
a/k/a CIVIL SERVICE BOARD, DAN MAJOR
and FREDERIC BIGIO,**

Defendants.

STIPULATED FACTS

The parties,¹ through their undersigned counsel, stipulate to the following undisputed facts:

Parties/Entities

1. Christopher Childers ("Childers") is a resident of Sarasota County, Florida. He was employed by the Sarasota Police Department ("SPD") as a sworn police officer from September 6, 2000 until November 20, 2009. At all material times he was a member of the SPD bargaining unit.
2. The City of Sarasota ("the City") is a municipality organized under the laws of Florida.
3. The City's Civil Service Board ("CSA Board") is created by the City pursuant to Sections 24-6 and 24-7 of the City of Sarasota Code and is a board within the meaning of Fla. Const. Art. 1 §24(b) and Fla. Stat. §268.011.
4. Citizens for Sunshine, Inc., is a Florida not-for-profit corporation with its principal office in Sarasota County, Florida.

¹ Although numerous efforts were made to stipulate to facts with counsel for the Intervenor, the parties were unable to reach an agreement on same.

5. The CSA Board is comprised of five citizens who apply, are screened and approved by the City to serve one or multi-year terms.

April 20, 2010 CSA Hearing/Sunshine Law Violation

6. Childers' April 20, 2010 CSA hearing was duly noticed to be held in the City's chamber room.

7. The CSA Board members initially convened to hear Childers' CSA appeal were Fred Bigio, Paul Caragiulo, Daniel Major and Matthew Peters. The fifth CSA Board member, Trevor Harvey, recused himself before the hearing began.

8. A conversation occurred between Mr. Bigio and Mr. Major inside the City Chamber room where the hearing was being held when Mr. Bigio, Mr. Major and Ms. Bryan were seated at the Commission table.

9. During a break in the proceedings of the CSA hearing held on April 20, 2010, Mr. Major said to Mr. Bigio, "I think we have seen enough to decide this case" and remarked that he would have "done the same thing." Mr. Bigio responded to Mr. Major, referring to Childers, stating "the guy was just too lazy to put his gloves on."

10. April Bryan overheard the exchange between Mr. Bigio and Mr. Major referenced in paragraph 9.

11. During the lunch recess of the CSA hearing held on April 20, 2010, Mr. Bigio admits that he asked Mr. Major about the kick move that Childers used during the course of the incident that was the subject of the CSA Board proceedings.

12. Dan Major responded and advised Mr. Bigio that the kick move was called a "take-down" maneuver.

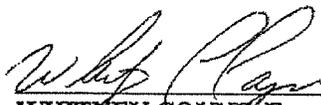
13. None of the above discussions between Mr. Major and Mr. Bigio were noticed to the public.
14. All of the above discussions and comments between Mr. Major and Mr. Bigio occurred outside of the record of the official Board proceedings.
15. At the time of the discussions and comments by defendant Major, neither party to the official Board proceedings had presented any evidence.
16. In the course of the hearing, the City fully presented its evidence and rested its case.
17. After deliberation in public session, the CSA Board voted 2-1 not to sustain the charge of excessive/unnecessary force and not to sustain the charge of damaging the reputation or bringing disrepute to the City.
18. The lateness of the hour prompted the CSA Board to close for the day and continue Childers hearing for April, 22, 2010 for the purpose of entertaining Childers' defenses to the remaining charges of not maintaining control over a subject in custody and not having properly completed use of force reports.
19. The CSA Board is required by law to provide reasonable notice of all discussions, meetings, comments and proceedings between two or more Board members.
20. As members of the Board, Mr. Bigio and Mr. Major were required by law to provide reasonable notice of their discussions and meetings.
21. The Board did not provide reasonable notice to the public of the discussions and comments between two or more Board members held on April 20, 2010, during the breaks in the hearing.
22. Mr. Bigio and Mr. Major did not provide reasonable notice to the public of their discussions and meetings held on April 20, 2010, during the break periods of the meeting.

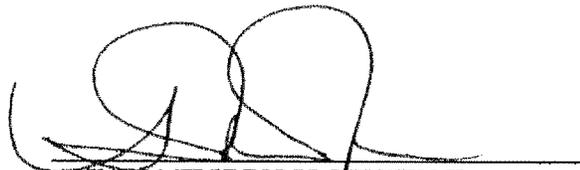
23. By failing to provide the public with reasonable notice of the discussions and comments of two or more Board members, the Board violated the Sunshine Law.

24. Plaintiff and the public have been irreparably harmed by the failure of the Board, Mr. Bigio and Mr. Major to provide reasonable notice of the discussions and comments between two or more Board members that occurred on April 20, 2010.

25. After the lunch recess, it was brought to the Board's attention that there was some discussion off the record by Mr. Major and Mr. Bigio. Mr. Major and Mr. Bigio were then given an opportunity to disclose their discussions to the parties and the other board members. As it relates to the conversation between Mr. Bigio and Mr. Major relating to the kick move and take-down maneuver, neither Mr. Major nor Mr. Bigio included that exchange on the record when he was subsequently asked to do so after the lunch break.

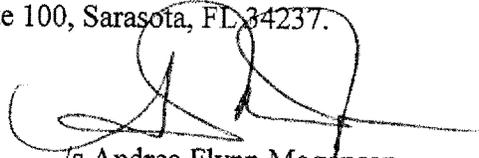
26. Mr. Bigio executed a settlement stipulation on August 17, 2010, and stipulated that he: (1) would not object to the entry of an Order voiding the determination made by the CSA Board on April 20, 2010; and (2) would recuse himself from any further CSA Board proceedings involving Childers.


WHITNEY COYNE, Esq.
Attorney for City of Sarasota


ANDREA FLYNN MOGENSEN, Esq.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Regular U.S. Mail on February 21, 2012, to: Whitney Coyne, Esq., 1 S. School Avenue, Sarasota, FL 34237; and Nevin Weiner, Esq., 100 Wallace Avenue, Suite 100, Sarasota, FL 34237.



/s Andrea Flynn Mogensen

ANDREA FLYNN MOGENSEN, Esquire