

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JOHN CUNNINGHAM,

Petitioner,

vs.

CITY OF SIOUX FALLS CITY
COUNCIL,

Respondent.

49CIV20-2926

MEMORANDUM OPINION
GRANTING RESPONDENT'S
MOTION FOR SUMMARY
JUDGMENT

This matter came before the Court on October 22, 2021, for hearing on Respondent City of Sioux Falls City Council's Motion for Summary Judgment. Attorney R. Shawn Tornow appeared on behalf and with Petitioner, John Cunningham. Attorney Melissa Jelen appeared on behalf of the Respondent City of Sioux Falls City Council. After considering the parties' written submission as well as reviewing the applicable authorities and the record, the Motion for Summary Judgment is GRANTED and the proceedings below AFFIRMED.

FACTUAL BACKGROUND

On May 13, 2020, John Cunningham ("Petitioner") completed a "City of Sioux Falls Board of Ethics Complaint Form" alleging that City Council member, "Greg Neitzert, accepted a gift of travel from an organization specifically intended to directly and/or indirectly influence an officer (Councilor Neitzert) in the performance of his official duties." This complaint was filed with the City on May 18, 2020, requesting review of this alleged behavior, and the City of Sioux Falls Board of Ethics identified it as "Complaint 20-B."

The Board of Ethics issued a report to the City Council Members on August 11, 2020. Ultimately, the Board recommended no sanctions be imposed upon the accused but recommended that City Council adopt policies regarding travel and attendance of seminars, conventions, and similar events that are funded by third parties.

The City of Sioux Falls City Council (“Respondent”) held a public hearing on September 10, 2020, to act on the Sioux Falls Board of Ethics Complaint 20-B. At this hearing, Petitioner was called to testify as the complainant. He answered questions from the attorney for the Board of Ethics and the attorney for the accused, Council Member Neitzert. He also answered questions from the City Council Members that participated in the hearing. Petitioner introduced an exhibit, testified about that exhibit, and was provided with two separate opportunities at the Public Hearing to provide unsolicited testimony. At the end of his testimony, Petitioner was given the opportunity to present any other additional information to the City Council, but he indicated that he did not have any more information to share.

Petitioner’s attorney was present at the Public Hearing and was allowed to confer in sidebars with Petitioner throughout Petitioner’s testimony at the Public Hearing. Mayor Paul TenHaken presided over the hearing. After reviewing the evidence presented, the City Council adopted a Resolution adopting Findings of Fact, Conclusions of Law and a Final Order dismissing Ethics Complaint 20-B dated September 28, 2020.

Petitioner then filed with this Court on October 15, 2020, an Affidavit and Verified Petition and then on October 28, 2020, an Amended and Corrected Verified Petition for Writ of Certiorari pursuant to SDCL § 21-31-1. Petitioner asserted that his rights were violated at the September 10, 2020 hearing, alleging that he was not allowed to present evidence nor be represented by his attorney. Petitioner alleged that Respondent failed to comply with City Ordinance § 35.058(f)(6), and in doing so, illegally deprived Petitioner of his rights. City Ordinance § 35.058(f)(6), provides:

§ 35.058 COMPLAINT PROCEDURE.

(f) All hearings of the city council under this subchapter shall be conducted as follows:

(6) The city council shall receive evidence from the city council member alleged to have committed wrongdoing, and from the person making a complaint against the official or employee of unethical conduct or behavior, or any other person as the city council deems necessary[.]

A hearing was held on June 14, 2021 and the Writ of Certiorari was granted by this Court. An order Granting Writ of Certiorari was entered on July 9, 2021. Thereafter, on July 19, 2021, Respondent filed a Motion for Summary Judgment, seeking judgment in its favor and affirming the proceedings below. In opposition to this motion, Petitioner filed his

responsive pleadings, but also an Affidavit of John F. Cunningham and an attached Exhibit 2. Respondent objected and moved to strike this affidavit from the record.

DECISION

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. SDCL § 15-6-56(c). “A motion under SDCL 15–6–56 (Rule 56) is designed ‘to isolate and dispose of factually unsupported claims or defenses.’” *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401 (citing *Chem–Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765). The Court views “all reasonable inferences drawn from the facts in the light most favorable to the non-moving party.” *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 31, 942 N.W.2d 249, 258 (quoting *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, ¶ 8, 907 N.W.2d 795, 798). However, when facing a motion for summary judgment, the nonmoving party “must ‘be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment.’” *Citibank South Dakota, N.A. v. Schmidt*, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832 (citations omitted).

Once the moving party has established its burden, the nonmoving party must “present specific facts showing that a genuine, material issue for trial exists” to evade the grant of summary judgment. *Johnson v. Hayman & Associates, Inc.*, 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701 (internal citations and quotations omitted). These specific facts must be more than “mere speculation, conjecture, or fantasy.” *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398. “Unsupported conclusions and speculative statements do not raise a genuine issue of fact.” *Dakota Indus., Inc. v. Cabela’s.Com, Inc.*, 2009 S.D. 39, ¶ 20, 766 N.W.2d 510,516. When the material facts are undisputed, a Court may resolve questions of law by summary judgment. *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268; *see also Estate of Williams ex rel. Williams v. Vandenberg*, 2000 SD 155, ¶7, 620 N.W.2d 187, 189.

Pursuant to SDCL § 21-31-8:

The review upon writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board, or officer, has regularly pursued the authority of such court, tribunal, board, or officer.

The South Dakota Supreme Court has “interpreted this statute to limit certiorari review ‘to whether the [City Council] had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it.’” *Dunham v. Lake Cty. Comm’n*, 2020 SD 23, ¶ 10, 943 N.W.2d 330, 333 (quoting *Wedel v. Beadle Cty. Comm’n*, 2016 SD 59, ¶ 11, 884 N.W.2d 755, 758). “Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding.” *Id.* at ¶ 11, 943 N.W.2d at 334. Instead, the Court “will sustain the lower tribunal’s decision ‘unless it did some act forbidden by law or neglected to do some act required by law.’” *Id.* (quoting *Armstrong v. Turner Cty. Bd. of Adjustment*, 2009 SD 81, ¶ 12, 772 N.W.2d 643, 648).

Petitioner does not assert that the Council lacked jurisdiction over the matter and jurisdiction is, therefore, not at issue. Thus, the scope of review is limited to determining if a genuine issue of material fact exists as to whether the City Council did some act forbidden, or neglected to some act required, by law. In reviewing a writ of certiorari, a court generally “will not consider matters outside the record.” *Save Centennial Valley Ass’n, Inc. v. Schultz*, 284 N.W.2d 452, 454 (S.D. 1979). SDCL 21-31-7 permits the circuit court to “hear the parties” and give judgment. Because this is a motion for summary judgment, this Court will review Petitioner’s Affidavit submitted in opposition to summary judgment in conjunction with the record to determine if any genuine dispute of material fact exists that would preclude the Court from granting summary judgment.

Petitioner makes two arguments in his Petition for Writ of Certiorari. First, Petitioner asserts that he “could not produce evidence at the hearing and could only participate as a witness answering only the questions asked by the Board or the defendant or his counsel.” Second, Petitioner states he was not “afforded the right to be assisted by counsel at the hearing.” The Court will address these arguments in turn.

1. Whether Respondent violated the Ordinance by allowing Petitioner to participate solely as a witness.

The material facts are not in dispute. The Board of Ethics, through its designee, Attorney Alan Peterson, presented evidence and examined witnesses in support of the board’s report. *See* 32.058(f)(3). Peterson called the Petitioner as a witness and asked him questions. Petitioner was not allowed to call his own witnesses, nor was his attorney allowed to ask Petitioner or any other witness questions.¹

¹ The return of writ of certiorari reflects that during the City Council meeting on September 8, 2020, a motion was made by a city council member to allow the Petitioner [“the client of R. Shawn Tornow”] to examine witnesses. That

The City Ordinance does not require that the Petitioner be allowed to present evidence, call his own witnesses, or have legal representation appear on his behalf and question Petitioner or other witnesses. Rather 35.058(f)(6) only requires that “The city council shall **receive evidence** . . . from the person making a complaint against the official or employee of unethical conduct or behavior[.]” In contrast, the Complaint Procedure clearly provides that the “city council member against whom a complaint has been filed may elect to be **represented by outside legal counsel** of his or her own choosing and at their own expense. The city council member(s) has the right to a full and complete hearing with the opportunity **to call witnesses** and **present evidence**.” (Emphasis supplied). After reviewing the hearing transcript and viewing it in the light most favorable to the non-moving party, it is apparent that the Council received evidence from Petitioner as required by City Ordinance. Mayor Paul TenHaken acknowledged at the beginning of the hearing certain procedures must take place during this hearing:

“Pursuant to Ordinance 35.058(f) all hearings of the City Council are to proceed as follows: . . . The City Council shall receive evidence from Mr. Neitzert and the complainant in this matter, Mr. John Cunningham, as well as any other witnesses the council deems necessary.”

(Transcript at 7-9). Petitioner was one of the two witnesses who was called to testify at the Public Hearing. Petitioner was questioned by Mr. Peterson (attorney for the Board of Ethics), Mr. McCaulley (attorney for Councilor Neitzert), and by six City Council members. Petitioner testified at length during questioning from all eight of these individuals. Furthermore, the Board introduced Exhibit 1, which contained the documents submitted to the Board of Ethics by Petitioner in support of his Complaint. (Transcript at 28-29). It is apparent that the entire file of the proceedings in front of the Board of Ethics, which contained Petitioner’s responses to Neitzert’s arguments, Petitioner’s responses to letters from Neitzert’s attorney, and Petitioner’s summary of his arguments, were submitted to the council. (Transcript at 61-63).

Motion failed 4-2. [Bate Stamp City Record 0015, Item 33. ESTABLISH PROTOCOLS FOR THE PUBLIC HEARING ON REPORT OF BOARD OF ETHICS HELD PURSUANT TO SECTION 35.058 OF THE CODE OF ORDINANCES]. A record was also made about Petitioner’s request at the beginning of the September 10, 2021 hearing. [Transcript at 14-15] and again with an objection by Petitioner’s attorney at the beginning of Petitioner’s testimony. [Transcript at 24-27].

During his testimony, Petitioner was afforded the opportunity to freely speak and provide additional testimony and evidence to the City Council. During Mr. Peterson's re-direct examination of Petitioner, Mr. Peterson stated "at this time I would invite Mr. Cunningham to address any other issues that he wishes to address to the board if the board is comfortable with me making that invitation[,]” to which Mayor Paul TenHaken responded, "Go ahead, Mr. Cunningham." (Transcript at 63). Petitioner then spoke uninterrupted for approximately five and a half pages of the transcript. (Transcript at 63-69).

At that point, Petitioner was interrupted by his attorney for a sidebar conversation, which was permitted by the City Council. (Transcript at 69). Mayor TenHaken then allowed Petitioner to continue his comments, and Petitioner stated: "I think I'm – I'm finished. I would need to present some evidence if I was going to do anything, and you've cut that off. So I'll say that in answer to your question." *Id.* Petitioner argues this statement creates a genuine issue of material fact as to whether he was allowed to present evidence. However, it is undisputed that he did not get to "present evidence" in the manner and method which he desired.

Petitioner also points to the fact that Mr. McCaulley never introduced "Exhibit 3" into evidence at the hearing and argues that the Council never received that evidence. However, the record is clear that Exhibit 3 was introduced into evidence, as demonstrated by the following exchange:

Mayor TenHaken: Excuse me. While they're making their way up here, can you please mark that policy you provided, Mr. Cunningham, as Exhibit 3 and provide it to the – to the reporter.

The Witness [Petitioner Cunningham]: I've provided a copy to each of the attorneys.

Mayor TenHaken: Right, but for the Court. The Court will need a copy of that. So that one right there. And, again, as a Sioux Falls City Council procedure document, I don't know, public procedure document for the City Council. And that will be marked as Exhibit 3.

(Exhibit Number 3 marked for identification.)

(Transcript at 61) (emphasis added). Exhibit 3 is provided in the return of certiorari at Bates Stamp City Record 211-232. Moreover,

the substance of Exhibit 3 is discussed by Council Member Erickson during her questioning of Petitioner. (Transcript at 87-90).

The record is also clear that Petitioner was afforded another opportunity to present additional evidence. At the end of Petitioner's testimony, Council Member Jensen gave Petitioner the opportunity to provide any other information to the Council that Petitioner felt needed to be presented. Petitioner stated that "the evidence you've received is overwhelming and there's – I don't think I have anything to add." Petitioner was then asked, "So there is no more information?" Petitioner responded, "I don't think so." (Transcript at 97-98).

There is no dispute that Petitioner was prohibited from calling his own witnesses, having his lawyer present his evidence on his behalf or having his lawyer question other witnesses or parties. However, based upon the record there is no genuine issue of material fact that exists as to whether the Council received evidence from Petitioner. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Petitioner was afforded that opportunity when he testified at length, introduced an exhibit into evidence, and was given more than one opportunity to testify to the Council on matters he felt needed to be presented.

2. The right to be assisted by counsel.

The City Council also allowed Petitioner to consult with his attorney throughout Petitioner's testimony via sidebar conversations, even though City Ordinance does not require Petitioner to be afforded that opportunity. Council Member Kiley stated to Petitioner's attorney that "if you wish to consult and have sidebars with your client, you're welcome to do so [.]" (Transcript at 26). Petitioner's attorney argued at the hearing that he was concerned that his client did not have the advantage of advice and consent of counsel and advice in presenting evidence, but again Council Member Kiley reiterated that "through sidebars he does."

Based upon the record, Petitioner was allowed to consult with his attorney via sidebar conversations (*see e.g.*, Transcript at 69, 88) and an objection (Transcript at 90) even though City Ordinance did not require it. There is no support for Petitioner's theory that his attorney should be able to question witnesses or parties or call additional witnesses or present evidence on behalf of the Petitioner. As set forth above, a plain reading of the Ordinance does not support this theory. Nowhere in the Ordinance does it say Petitioner should be allowed these requests. Nevertheless, the City

Council permitted Petitioner to consult with his attorney even though the ordinance did not require the Council to do so.

Finally, the Court notes that Petitioner raises a third issue in his affidavit filed in opposition to Respondent’s Motion for Summary Judgment and Petitioner’s Opposition to Respondent’s Statement of Undisputed Material Facts. Petitioner argues that Mayor Paul TenHaken was not an eligible City Council member to participate in the proceedings. However, this issue was not raised in the original or amended Petition, and thus, this Court will not address that argument.² See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (noting that an issue not raised in the petition for writ of certiorari will only be considered in the most exceptional of cases). See also *Huber v. Hanson County Planning Commission*, 2019 SD 64, ¶ 21, 936 N.W.2d 565, 571 (noting that the Rules of Civil Procedure apply to the writ of certiorari proceedings to the extent the two are not inconsistent); SDCL § 15-6-81(a) (“This chapter does not govern . . . proceedings included in . . . Appendix A to this chapter insofar as they are inconsistent or in conflict with this chapter.”); § 15-6-81(A) (listing chapter 21-31 governing writ of certiorari). See also *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 SD 89, ¶ 17, 756 N.W.2d 399, 409 (classifying South Dakota as a notice pleading state); *Hallberg v. South Dakota Board of Regents*, 2019 SD 67, ¶ 28, 937 N.W.2d 568, 577 (stating that the notice pleadings principles require pleadings to put a person on notice of the accusations against them).

² Even if the Court were to consider this issue, Petitioner cannot survive summary judgment. Respondent submitted Exhibit 1, which is the Definitions to be used in the Subchapter 35, which is the subchapter at issue. This Ordinance states:

For the purposes of this subchapter, the following definitions shall apply unless the contest clearly indicates or requires a different meaning.

...

CITY COUNCIL MEMBER. “For purposes of this subchapter, means all members of the city council, ***including the mayor.***”

(Emphasis supplied). In § 35.058 subpart (c) it says, “For purposes of this section, an ELIGIBLE COUNCIL MEMBER means any council member who is not named in the complaint.” There is nothing in the record or Ordinance which clearly indicates or requires a different meaning other than the mayor is “an Eligible Council Member.”

CONCLUSION

When viewing the evidence in the light most favorable to the Petitioner, the affidavits, record, and transcript do not demonstrate any genuine issue of material fact. When the facts are undisputed, the Court may resolve any legal questions by summary judgment. The scope of review on a writ of certiorari is very limited. There is no support in the record that the Council “did some act forbidden by law or neglected to do some act required by law.” *Dunham*, 2020 SD 23, at ¶ 10, 943 N.W.2d at 333. Ordinance, 35.058(f), provides “All hearings of the city council under this subchapter shall be conducted as follows[.]” The procedures set forth in the Ordinances were followed. While the city council member against whom a complaint has been filed may be represented by their own attorney, may call witnesses and may present evidence, there is no requirement that the complainant has the same rights. Instead, the Ordinance requires the city council to “receive evidence” from the person making the ethics complaint. The record is clear that the Council “received evidence” from Petitioner. Petitioner had a right to participate in the process as set forth in the Ordinance. He did not have a right to dictate the procedure contrary to the Ordinance.

Based upon the foregoing, it is hereby ordered that Respondent City of Sioux Falls City Council’s Motion for Summary Judgment is GRANTED and the proceedings of Respondent are AFFIRMED. Respondent is to submit an order Granting its Motion and incorporating this memorandum opinion.

Dated this 23rd day of November, 2021.

BY THE COURT:



Natalie Damgaard
Circuit Court Judge

ATTEST:

Angelia M. Gries, Clerk of Court

By _____, Deputy