IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MARK EDWARD DIETRICH,

Plaintiff,

v.

FRANK FERGUSON, Individually and in his capacity as former Mayor of the City of Rice Lake, Wisconsin, DAVID DISHNO, (In his individual and official capacities), and the CITY OF RICE LAKE, WISCONSIN,

Defendants.

OPINION AND ORDER

00-C-0671-C

- -

In this civil action brought pursuant to 42 U.S.C. § 1983, plaintiff Mark Edward Dietrich contends that defendants Frank Ferguson, David Dishno and the City of Rice Lake, Wisconsin violated his constitutional rights. Specifically, he contends that defendants (1) violated his First Amendment rights to free speech and to petition the government for redress of grievances by removing him from a city council meeting; (2) retaliated against him for his speech by prosecuting him for failure to license his rental properties and by ordering his licenses revoked and properties vacated; (3) interfered with his property rights

unreasonably and without due process of law in violation of the Fourth and Fifth Amendments by ordering the revocation of his rental licenses and the vacation of his properties; and (4) violated his Fourteenth Amendment right to equal protection by singling him out from other landlords for prosecution. In addition to these federal claims, plaintiff alleges state law claims under the Wisconsin Constitution. Subject matter jurisdiction is present under 28 U.S.C. § 1331.

Presently before the court is defendants' motion for summary judgment. I conclude that no reasonable jury could find that defendants violated plaintiff's First Amendment right of freedom of speech or to petition the government, his Fourth or Fifth Amendment rights to due process or his Fourteenth Amendment right to equal protection or that defendants retaliated against plaintiff. Therefore, I will grant defendants' motion for summary judgment. Because I am granting summary judgment on all of plaintiff's constitutional claims, I decline to exercise supplemental jurisdiction over his state law claims.

Also before the court is defendants' motion to amend one of their responses to plaintiff's Request to Admit. The admission that defendants want to amend is immaterial to the disposition of the motion for summary judgment. Their motion will be denied as moot.

Several comments are in order before I set out the undisputed facts. Both in proposing facts and in responding to the findings of fact proposed by defendants, plaintiff

failed to comply with this court's "Procedures to be Followed on Motions for Summary Judgment" in certain respects. First, plaintiff failed to contest defendants' proposed findings of facts with proposed facts of his own that are based on record evidence. The procedures state: "Unless the nonmovant party properly places a factual proposition in dispute, the court will conclude that there is no genuine issue as to the finding of fact initially proposed by the movant." II.C.1. In many instances, plaintiff simply noted those findings proposed by defendants with which he disagreed, without saying why he disagreed, other than stating that defendants' proposed facts were longer than a sentence, in violation of the court's procedures, or he responded with proposed facts that did not put defendants' proposed facts in dispute. Second, in his responses to defendants' proposed findings, plaintiff failed to cite admissible evidence in support of many of the propositions he was advancing, in violation of II.C.3: "The court will not consider any factual propositions contained in the response to proposed findings of fact not supported properly and sufficiently by admissible evidence." In determining the undisputed facts, I have disregarded assertions made by plaintiff in his response to defendants' proposed findings of fact that are not supported by citations to admissible evidence in the record.

For the purpose of deciding defendants' motion for summary judgment, I find from the findings of fact proposed by the parties that there is no genuine dispute about the following material facts.

UNDISPUTED FACTS

A. Parties

Plaintiff Mark Edward Dietrich owned various rental properties in the City of Rice Lake, Wisconsin from 1993 through at least 1998. Defendant Frank Ferguson served as mayor of Rice Lake from April 1994 through July 1997. As mayor, he presided over the Rice Lake Common Council, but had no vote except in the event of a tie. Defendant David Dishno served as the building inspector of Rice Lake at all times relevant to this case. Defendant City of Rice Lake, Wisconsin is a municipal corporation of the state of Wisconsin.

B. Rice Lake Housing Code

In June 1993, defendant Rice Lake passed a rental housing code that applies to single and double unit residential rental properties and requires inspections of residential rental properties "not less than once every three years" after the first inspection. Under the code, no one may offer for rent or lease a single or double unit residential dwelling without a rental license issued by the Rice Lake Common Council. Eligibility for a rental license requires the following: (1) payment of a license fee for each building for each calendar year; (2) absence of outstanding orders or notices of violations; and (3) an inspection within the past three

years. Any person who violates any provision of the code "shall be automatically subject" to penalties and forfeitures. When the Superintendent of Inspections determines that the same violations are being repeated or are continuing without regard to orders, the code requires referral of the landlord to the common council for revocation of the license. If the council revokes a license, the dwelling unit must be vacated within thirty days.

C. Plaintiff's Properties

Plaintiff owned nine residential rental properties in Rice Lake that were subject to the housing code. Starting in 1993, defendant Rice Lake had problems with plaintiff's maintenance of his rental properties. For instance, in the fall of 1993, plaintiff failed to arrange for the inspection or licensing of his properties despite past notices. In 1994, plaintiff was issued several orders for correction of code violations at some of his properties. He did not comply with the orders for over a year. He did not pay his rental license fees for 1994. In December 1994, defendant Rice Lake served plaintiff with notices of ordinance violations of the code for eight of his properties.

On February 6, 1995, the Rice Lake Common Council held a working session to consider the code compliance of a number of properties, including those owned by plaintiff. At its regular meeting on March 14, 1995, the common council voted unanimously to issue a citation to plaintiff for each of his rental properties that was not in compliance with the

code as of March 17, 1995. The municipal court found plaintiff guilty of renting seven of his eight properties without a license and entered a forfeiture of $37.20 for each property, subject to suspension if plaintiff permitted access to his properties for inspection by June 7, 1995. Following the court order, all nine properties were inspected. All of the properties had some deficiencies but several properties passed the 1995 inspection by the time the common council voted on licensing. At its regular meeting on June 27, 1995, the common council approved rental housing licenses for four of plaintiff's properties. Four properties required reinspection.

On July 15, 1996, defendant Rice Lake's Director of Inspections sent letters to all rental property owners in Rice Lake, including plaintiff, requiring reinspection of all rental housing units that had not been inspected that year. In the letter to plaintiff, the director reminded him that he had rental properties that were not currently licensed, in violation of the ordinance.

D. First Amendment: Free Speech

On May 12, 1996, one of plaintiff's properties was destroyed by fire. On June 4, 1996, plaintiff asked the city to discontinue his refuse service and billing for the property. The city denied the request because plaintiff was delinquent in paying his refuse account. Plaintiff asked for and was granted an opportunity to discuss the issue at the August 27, 1996 meeting of the common council.

At the meeting, plaintiff spoke in support of his request when his agenda item was announced. The council deliberated before approving the requested discontinuation of refuse service, contingent upon plaintiff's satisfying the delinquent principal and interest balance for refuse service on both units within 30 days of the August 27, 1996 meeting. After the council's vote on plaintiff's agenda item, plaintiff began to speak about the city's contract for refuse collection in general, whereupon defendant Ferguson either told him to sit down or had him forcibly removed from the meeting.

On or about June 30, 1997, plaintiff filed a civil action against the Rice Lake chief of police, various police officers and municipal judge Heathman, accusing them of harassing him and of lacking oaths of office. After plaintiff filed the lawsuit, Judge Heathman recused himself from trying plaintiff's citations for housing code violations. Plaintiff's action was dismissed by the circuit court and the dismissal was affirmed on appeal.

E. Retaliation

Defendant Ferguson did not ask or direct any city officials to take any enforcement action against plaintiff's rental properties as a result of plaintiff's comments at the August 27, 1996 common council meeting.

On February 14, 1997, defendant Dishno sent a letter to plaintiff stating that the Inspection Department had learned that he was renting property without a license and asking that plaintiff set up an appointment to have the property inspected. Plaintiff

responded by stating that the city would have to pay an access fee to inspect his properties. On May 30, 1997, defendant Rice Lake issued plaintiff several citations for his failure to license nine of his rental properties.

In August 1997, defendant Rice Lake prosecuted plaintiff for failure to license rental properties. On August 26, 1997, plaintiff was found guilty and a judgment was entered on each of the citations for failure to license rental property. Among other things, the judgment required plaintiff to obtain inspections of the properties by August 31, 1997, to bring the properties into compliance with the code and to have them licensed by September 30, 1997.

Plaintiff did not have his properties inspected and did not license them by September 30, 1997. During October and November 1997, defendant Dishno inspected a number of plaintiff's rental properties and issued plaintiff written inspection reports for the properties.

On several occasions, plaintiff found himself met by Rice Lake police officers upon showing up at city hall. Plaintiff believes that defendant Ferguson had a warning buzzer installed in city hall after the August 27, 1996 council meeting; plaintiff does not know when the alarm was installed or whether it was installed at the direction of defendant Ferguson. In the spring of 1995, a number of city officials decided to install the alarm system to improve security in the building. Pressing buttons installed in various places within the city hall relays a signal to the police department.

Plaintiff had no personal, social or business relationships with either defendant Ferguson or defendant Dishno. Plaintiff had no contact with defendant Ferguson other than

at several city council meetings. Plaintiff believes that defendant Ferguson had a grudge against him because of what plaintiff recalls about his appearance at city council meetings and because of contacts plaintiff had with the police while defendant Ferguson was mayor. Plaintiff had no contact with defendant Dishno except in Dishno's capacity as building inspector. Plaintiff believes that defendant Dishno bore animosity toward him. Plaintiff does not believe that any current or former officials or employees of Rice Lake had any animosity toward him.

F. Fourth and Fifth Amendments: Due Process

On or about November 18, 1997, after receiving defendant Dishno's inspection reports, plaintiff requested a hearing before the common council in regard to two of his properties. In a letter dated November 25, 1997, the city attorney, Herman Friess, gave plaintiff thirty days from the receipt of the letter in which to comply with the inspection reports.

On December 5, 1997, Friess wrote to plaintiff, informing him that the common council, sitting as the Board of Health, would meet on December 9, 1997, and hear plaintiff's appeal on the two properties he had identified and any other properties he wished to appeal. The letter also informed plaintiff that the common council would conduct a special session later that same evening to consider whether any rental housing licenses he held should not be revoked and, in the event he had no licenses, why the properties should

not be ordered vacated. Friess enclosed a copy of the relevant housing code provisions with the letter. The December 5, 1997 letter was plaintiff's first notice about what was to occur at the December 9, 1997 meetings.

In a memo dated December 5, 1997, written in preparation for the December 9 meeting, Friess recommended that the council revoke all of plaintiff's rental licenses and order the vacation of his residential rental dwellings by January 31, 1998, notwithstanding orders allowing plaintiff to comply with the building inspector's orders by December 26, 1997.

On December 9, 1997, a municipal court hearing was held to determine whether plaintiff was capable of paying the forfeiture. Plaintiff appeared at the hearing. The court ordered plaintiff to serve 90 days in jail and set a bond of $6,200. Plaintiff was jailed December 23, 1997, and was released on work release privileges on February 5, 1998.

On the evening of December 9, 1997, the common council met in special session. It declared plaintiff's rental licenses of plaintiff revoked (noting that he apparently had none) and ordered his rental properties to be vacated by January 31, 1998. The order to vacate the properties was never served on plaintiff's tenants because Friess and William Wagner, a building inspector, decided not to evict the tenants in winter and they knew that utilities could not be disconnected during the winter months. In a letter to plaintiff dated November 5, 1998, Friess stated:

> “Please be advised that the City opted to take the route that they did because they felt if we would insist on the fine, it would be beyond your means to pay it and in order to pay any part thereof, all of your property would have to be confiscated and sold and the mortgages paid off any balance applied toward the fine.
>
> The City only wanted you to comply with the law and they did not wish to cause what would be a very devastating effect.

G. Fourteenth Amendment: Equal Protection

Between three and four hundred rental units in the City of Rice Lake are subject to the housing code. Landlords who are due for inspections are issued several notices before any enforcement action is brought against them. Since January 1998, plaintiff has been cooperative in arranging for inspections of his properties. Before that date, plaintiff stood out among landlords for his refusal to allow inspections, his attempts to charge the city for inspections, his refusal to comply with repair orders and his ongoing refusal to pay license fees even after court orders were issued.

A substantial number of Rice Lake residential rental properties were not inspected at least every three years, but are listed in the Rental Housing Records as single family or duplex rental properties as of August 13, 1999. Numerous properties in the rental housing reports show no inspection at all.

Plaintiff continued to rent out various properties after the council’s December 9, 1997 order to vacate. He had already sold one property in late 1997. Plaintiff began selling

other properties in April 1998 and continued selling his properties through 2001.

OPINION

A. Plaintiff's Speech at Common Council Meeting

The First Amendment protects a broad range of speech activities. See Frisby v. Schultz, 487 U.S. 474, 479 (1988). Particularly on matters of public interest, the Supreme Court has noted the importance of "uninhibited, robust, and wide-open" debate. Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Although the First Amendment guarantees the rights to free speech and to petition the government for redress of grievances, such rights are not absolute, Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 647 (1981) and may be restricted in certain circumstances. The Court has articulated a three-part, forum-based test to evaluate claims of unconstitutional restriction of speech. Cornelius, 473 U.S. at 797; Grossbaum v. Indianapolis-Marion County Building Authority, 100 F.3d 1287, 1296 (7th Cir. 1996). A court must determine: (1) whether plaintiff's speech is protected by the First Amendment; (2) the nature of the forum, whether public, designated (or limited) public, or nonpublic; and (3) whether the government's justifications for limiting the individual's speech satisfy the requisite standard. Cornelius, 473 U.S. at 797.

Alleged violations of the right to petition the government for redress of grievances under the First Amendment involve the same type of government action as violations of the free speech clause. When a person attempts to petition for redress of grievances, he or she is exercising the right to free speech. The same First Amendment analysis is appropriate for both claims. "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." McDonald v. Smith, 472 U.S. 479, 482 (1985); Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) (right to free speech and right to petition "are related and generally subject to the same constitutional analysis").

Plaintiff's speech at the common council meeting regarding defendant Rice Lake's refuse service contract was speech on a public issue, see, e.g. Zapach v. Dismuke, 134 F. Supp. 2d 682 (E.D. Pa. 2001) (finding that person who came before Zoning Hearing Board to discuss matters related to zoning ordinances and procedures was speaking on public issues) and subject to First Amendment protection. It was delivered in a place designated by the government as a public forum for a certain time period. Jones v. Heymann, 888 F.2d 1328, 1331 (11th Cir. 1989) (city commission meeting open to public for discussion of agenda items was designated public forum).

Although plaintiff spoke in a public forum, his speech was subject to content-neutral time, place and manner restrictions that were drawn narrowly to achieve a significant

government interest and allow for ample communication through other channels. Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 32, 45-46 (1983); Jones, 888 F.2d at 1331. "Time, place, and manner restrictions are 'reasonable,' that is, do not violate the First Amendment, if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." DiMa Corp. v. Town of Hallie, 185 F.3d 823, 828 (7th Cir. 1999).

The Supreme Court has held that the government's purpose in regulating speech is the "controlling consideration" in determining content neutrality. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Id. The principal inquiry in determining content neutrality is whether the government has adopted a regulation because of disagreement with the message the speech conveys. Id. In Jones, 888 F.2d at 1331, the Court of Appeals for the Eleventh Circuit held that the First Amendment permitted the removal from a meeting of a speaker who strayed from the agenda at a city council meeting. The plaintiff had followed the customary procedure for speaking at the Key West City Commission by signing up on a sheet to speak on a specific agenda item relating to senior citizen discounts for garbage removal. Once recognized to speak, however, he began criticizing the general spending

habits of the commission and refused to stop after the mayor asked him to limit himself to the topic on the agenda. The mayor gave him a warning that he could be removed and then had him removed from the meeting. Id. The court noted that the mayor may have disagreed with the plaintiff's criticisms of the commission, but it found that the plaintiff had not demonstrated that the mayor's actions resulted from disapproval rather than from "the need to continue the orderly progression of an already lengthy commission meeting." Id. at 1332.

Plaintiff's claim fails in similar fashion. It is undisputed that defendant Ferguson told plaintiff that discussion on his agenda item had ended when plaintiff attempted to speak after a vote had been taken on his agenda item. Plaintiff has not provided any evidence to demonstrate that defendant Ferguson took this step because he disagreed with the message plaintiff wanted to convey rather than because he was trying to keep the meeting running according to the agenda. In the absence of any such evidence, no reasonable jury could find that defendant Ferguson's restriction on plaintiff's speech was not content neutral.

Defendant Ferguson's restriction was narrowly tailored to promote the significant government interest in running efficient, orderly meetings. City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167, 176 n.8 (1976) ("[p]lainly, public bodies may confine their meetings to specified subject matter"); White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990) ("in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the

subject at hand"); Scroggins v. City of Topeka, Kan., 2 F. Supp. 2d 1362, 1372-73 (D. Kan. 1998) (describing numerous cases upholding government interest in running orderly meetings).

In the present case, plaintiff was allowed to speak on one agenda item. His remarks on another topic may well be of public interest, but the topic was not on the agenda for that meeting. Defendant Ferguson could have allowed plaintiff's speech, but his decision to restrict plaintiff to his agenda topic was narrowly tailored to the goal of keeping the meeting on track.

Moreover, plaintiff had ample alternative channels of communication. He asked for and was granted permission to speak at council meetings on numerous occasions and he took advantage of other means of communicating with public officials, such as writing letters. Defendants have demonstrated that their prohibition on plaintiff's speech was a content-neutral time, place and manner restriction. I conclude that no reasonable jury could find that defendants violated plaintiff's First Amendment rights. Defendants' motion for summary judgment will be granted as to this claim.

I note that the parties dispute whether plaintiff was removed from the August 27, 1996 meeting or was merely told to sit down. In fact, defendants have moved to amend their responses to plaintiff's Request for Admissions to clarify this point. The motion is moot because the dispute is immaterial. Even if it was necessary to remove plaintiff from the meeting in order to keep him from speaking on a new issue, such an action was

permissible under the First Amendment as a reasonable time, place and manner restriction.

B. Retaliation

Although plaintiff has not articulated the factual bases of his claim clearly, it appears that he is alleging that defendants retaliated against him for exercising his rights to free speech and to petition the government for redress of grievances and for bringing a lawsuit against various officials of defendant Rice Lake. Plaintiff alleges that defendants' retaliatory acts include prosecuting him for his failure to license his rental properties and ordering his properties vacated and any licenses he held revoked. Retaliation by government officials for the exercise of a constitutionally protected First Amendment right is actionable under § 1983. Rakovich v. Wade, 850 F.2d 1180, 1189 (7th Cir. 1987); Venetian Casino Resort, L.L.C. v. Cortez, 96 F. Supp. 2d 1102, 1108 (D. Nev. 2000).

In their initial brief, defendants argued that Heck v. Humphrey, 512 U.S. 477 (1994), barred plaintiff from attacking the August 26, 1997 order finding him guilty of failure to license his rental properties. They dropped the argument in their reply brief, apparently because they believed that plaintiff had conceded the legitimacy of the prosecution. It is almost impossible to determine from plaintiff's brief in response to defendants' motion for summary judgment what issue he is pursuing or why, but I am not as sure as defendants that plaintiff is making any concession about his conviction. If it is still an issue, it is not clear whether Heck would apply. In dictum in concurring and

dissenting opinions in Spencer v. Kemna, 523 U.S. 1, 18-25 (1998), a majority of the Court discusses Heck's prohibition against using 42 U.S.C. § 1983 to seek money damages arising out of a criminal conviction until and unless the conviction has been overturned and suggests that it would not apply to a person who no longer has any means of attacking his conviction. On the other hand, the Court of Appeals for the Seventh Circuit has held explicitly that Heck 'sholding prevents both incarcerated and unincarcerated persons from seeking damages under § 1983 if their state court convictions have not been invalidated or expunged, whether or not they still have available to them any means of attacking those convictions. Anderson v. County of Montgomery, 111 F.3d 494, 499 (7th Cir. 1997). See discussion in Carr v. O'Leary, 167 F.3d 1124, 1127 (7th Cir. 1999). It is not necessary to decide in this case whether, because a decision in plaintiff's favor would cast doubt on the legitimacy of his conviction, Heck would bar plaintiff from seeking damages for defendants' alleged retaliation against him in the form of a criminal prosecution for failure to pay his license fees; even if it did not, plaintiff cannot show the requisite causation to sustain a claim of retaliation.

To establish retaliation, a plaintiff must prove that adverse action was taken against him for the exercise of his constitutionally protected First Amendment rights and that such action was sufficiently adverse to "present an actual or potential danger that the speech . . . will be chilled." DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 191 (7th Cir. 1999). In Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the Supreme Court held that a plaintiff alleging retaliation for constitutionally protected conduct must

show that the conduct was a "substantial factor" or "motivating factor" in the defendant's act or decision. If the plaintiff succeeds in demonstrating the motivating factor, the court must then determine whether the same act would have been taken or decision made in absence of the protected conduct. Rakovich, 850 F.2d at 1189 (citing Mt. Healthy, 429 U.S. at 187).

Plaintiff's claims of retaliation relate to his August 27, 1996 common council speech and a lawsuit he brought against various Rice Lake officials in 1997, claiming harassment and challenging their authority because they had not signed oaths of office. There can be no doubt that both activities are constitutionally protected. However, the undisputed facts of this case do not support plaintiff's allegations of retaliation because plaintiff has failed to adduce any evidence that when the common council prosecuted him for failing to license his rental properties and later ordered his properties vacated, the motivating factor was retaliation for either his lawsuit or speech. The undisputed facts show that the common council had another reason for prosecuting him: his long history of noncompliance with the housing code.

Although there are situations in which a factfinder could infer retaliation from the mere closeness in time between the protected conduct and the retaliatory act, this is not one of them. Plaintiff did not file his lawsuit against the Rice Lake officials until June 1997, *after* the allegedly retaliatory citations had been issued to him. In addition, plaintiff has adduced no evidence to show that the people named in the June 1997 lawsuit (police officers and

Judge Heathman) played any part in the decision to prosecute him or that they participated in any way in the decision made by the common council to revoke plaintiff's licenses and order the vacation of his properties.

As to plaintiff's August 27, 1996 speech, the time gap between that speech and the action taken by the common council on December 9, 1997, is too long to support any inference that the one caused the other. As defendants note, the Court of Appeals for the Seventh Circuit has consistently found that lengthy time gaps weaken the inference of a causal link between adverse actions and constitutionally protected activity. In Sweeney v. West, 149 F.3d 550, 557 (7th Cir. 1998), for example, the court found that in determining causation, the "obvious place to start is the temporal sequence between the two." Id. at 557. The court noted that a day or a week might be "telling," but beyond that, causation becomes less clear. Id. at 557. In Horwitz v. Board of Education of Avoca School District No. 37, 260 F.3d 602 (7th Cir. 2001), the court held that a gap of six months between the filing of plaintiff's lawsuit and her subsequent termination was too long to support an inference of retaliation.

In this case, the temporal link is much weaker. More than a year passed between the time plaintiff spoke out at the city council meeting and the common council's decision to order the vacation of his properties. With a gap of this length, a jury could not rely on chronology to infer that the prosecution was undertaken in retaliation for plaintiff's protected activity.

Plaintiff asserts that part of the retaliatory activity against him includes the use of the "Dietrich buzzer" to summon the police every time he went to city hall. However, the undisputed facts show that this buzzer system was installed before any of plaintiff's protected activity. Plaintiff has not provided a factual basis for his allegation that this system was installed to harass him. Even if the system was known as the "Dietrich buzzer," plaintiff has not shown any link between his protected activity and the installation of the system.

Because plaintiff has not adduced sufficient evidence to permit a reasonable jury to find that a causal link exists between plaintiff's speech at the August 27, 1996 meeting and his subsequent prosecution by defendants, between his filing of the June 1997 lawsuit and the later prosecution and between his speech to the common council and the order to vacate his properties, I will grant defendants' motion for summary judgment on plaintiff's retaliation claim.

C. Interference with Property Rights

Plaintiff contends that defendants "seized" his rental properties by denying him the right to rent them, in violation of the Fourth and Fifth Amendments to the Constitution, as made applicable to the states through the Fourteenth Amendment. He does not explain how the common council's decision to order his properties vacated might have violated the Fourth Amendment. For Fourth Amendment purposes, I will assume that a "seizure" may

occur any time the state interferes in some meaningful way "with an individual's possessory interests in [his] property," Soldal v. Cook County, 506 U.S. 56, 69 (1992), and that the right to rent out property is a possessory interest. It does not follow, however, that the seizure violates the Fourth Amendment. To go to trial on this claim, plaintiff must adduce evidence to show that the seizure was not reasonable.

Plaintiff has adduced no evidence that would allow a jury to find that the council acted unreasonably in ordering his properties vacated. To the contrary, the council had the evidence of plaintiff's long history of refusal to pay his license fees, to permit inspections and to bring his properties up to code. Even if the applicable standard for judging the reasonableness of the seizure is probable cause, the council had ample information to make that showing.

To prevail under the due process clause of the Fifth Amendment, plaintiff must establish that defendants (1) deprived him of a constitutionally protected property or liberty interest (2) without providing him with appropriate process. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Before taking away plaintiff's ability to rent out his properties, the common council gave him process that was more than adequate to satisfy the demands of the Constitution. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (holding that essentials of due process include notice and opportunity to be heard appropriate to nature of case). One requirement of procedural due process is that there be a fair and impartial decision maker. See Withrow v. Larkin, 421 U.S. 35, 46 (1975).

Government officials are entitled to a strong presumption of honesty and integrity, despite any previous battles with the plaintiff. See id. at 47 (holding that school board members were entitled to strong presumption of "honesty and integrity"). Plaintiff has not adduced any evidence from which a factfinder could infer that any of the council members held any animus or bias against him. (Defendant Ferguson was no longer a member of the council when it made the decision to order the vacation of plaintiff's properties and defendant Dishno was never a member; therefore, nothing that plaintiff has alleged about the motives of these men has any bearing on the motives of the members of the city council.)

The second requirement under the procedural due process analysis is adequate notice. Under Wisconsin law, city councils are required to provide at least twenty-four hours notice for upcoming meetings. Wis. Stat. § 19.83(4). The undisputed facts indicate that the city attorney informed plaintiff about the December 9, 1997 council meeting no later than December 5, 1997. Plaintiff asked for an opportunity to be heard, which was granted. Therefore, notice was adequate. The fact that plaintiff was told that he would be allowed until December 26, 1997, in which to remedy the problems with his rental housing is irrelevant. The notice stated that the council would be considering action under a provision of the housing code that allows the council to take action against anyone in violation of the housing code and lists penalties including forfeitures, revocation and vacation of rental units. Plaintiff was provided a copy of the provision in the notice.

Plaintiff was provided adequate notice and ample opportunity to be heard at the

December 1997 meeting. Therefore, he has no viable claim of a violation of his due process rights. I will grant defendants' motion for summary judgment on plaintiff's Fifth Amendment due process claim, as well as on his Fourth Amendment claim, which he has failed to explain.

D. Equal Protection

The equal protection clause of the Fourteenth Amendment provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The purpose of the equal protection clause is to prevent state actors from treating vulnerable classes of citizens less favorably than the population as a whole. The clause protects classes as small as one. Nixon v. Administrator of General Services, 433 U.S. 425, 472 (1977); Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1996). Plaintiff does not allege that he was treated differently because of his membership in a protected class, such as race or sex. Instead, he raises his claims as a class of one, a single individual who allegedly was treated differently from other landlords. A plaintiff who alleges unequal treatment as a class of one has a hefty burden to establish an equal protection claim. He must show both that he was treated differently from similarly situated parties and that the defendants' justification for the difference in treatment was "irrational and arbitrary." Hedrich v. Board of Regents of the University of Wisconsin System, 274 F.3d 1174, 1183 (7th Cir. 2001); see also Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

I understand plaintiff's contention to be that he received unequal treatment when he was prosecuted for violations of the rental housing code and when the common council ordered the vacation of his rental properties. Both of plaintiff's claims amount to claims of selective prosecution, that is, that he was picked out for punishment when others were allowed to continue violating the law. "It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." Wayte, 470 U.S. at 608.

In Esmail, 53 F.3d at 178, the Court of Appeals for the Seventh Circuit noted that the term "selective prosecution" has two meanings:

> The first is simply failing to prosecute all known lawbreakers, whether because of ineptitude or (more commonly) because of lack of adequate resources. The resulting pattern of nonenforcement may be random, or an effort may be made to get the most bang for the prosecutorial buck by concentrating on the most newsworthy lawbreakers, but in either case the result is that people who are equally guilty of crimes or other violations receive unequal treatment, with some being punished and others getting off scot-free. That form of selective prosecution, although it involves dramatically unequal legal treatment, has no standing in equal protection law.

The second form of selective prosecution, "where the decision to prosecute is made either in retaliation for the exercise of a constitutional right, such as the right to free speech or to the free exercise of religion, or because of membership in a vulnerable group," is the only form actionable under the federal Constitution. Id. at 179.

Plaintiff's allegations in this case match the first type of selective prosecution (failure to prosecute all known lawbreakers) and, therefore, do not constitute an equal protection violation. The undisputed facts show that numerous residential rental properties in Rice

Lake were not inspected every three years and that some were not inspected at all. However, the facts do not show what, if any, enforcement action was taken against these landlords. Plaintiff stood out among landlords because, from the time he began owning rental housing in 1993, he refused to pay license fees, refused to comply with repair orders, refused to allow inspections and even tried to charge the city for inspections. Plaintiff has provided no evidence to suggest that other landlords were similarly situated, that is, that other landlords fought the city continually with combinations of activity like his.

Because there are many legitimate reasons why every person who violates a city ordinance does not receive a citation, a person alleging selective prosecution must demonstrate that the decision to prosecute him was made for an impermissible reason, such as because of his exercise of a constitutional right or his membership in a protected group, Wayte, 470 U.S. at 608, or out of sheer malice, Esmail, 53 F.3d at 179. Law enforcement officials are under no obligation to prosecute everyone that breaks the law; that would be both a fiscal and a physical impossibility. Officials have considerable discretion to decide when to prosecute and when not to. The Rice Lake Common Council's order to revoke plaintiff's nonexistent licenses and vacate his properties was also within the city's discretion. The mere exercise of this discretion in a manner that did not work in petitioner's favor is not a ground for a claim of selective prosecution. Defendants' prosecution of plaintiff was far from irrational and arbitrary; rather, it was the culmination of a long struggle to enforce the

law.

Plaintiff also contends that defendants retaliated against him for the exercise of allegedly protected rights, a claim that would fit the actionable form of selective prosecution. However, because I have already determined that no reasonable jury could find in favor of plaintiff on his retaliation claim, there is no need to rehash that issue in the equal protection context.

Taking the facts in the light most favorable to plaintiff, I find that no reasonable jury could find that defendants violated plaintiff's right to equal protection by selectively prosecuting him. I will grant defendants' motion for summary judgment on plaintiff's equal protection claim.

F. State Law Claims

Plaintiff contends that in addition to defendants' violation of his federal constitutional rights, defendants violated parallel provisions under the Wisconsin constitution. Because I am granting defendants' motion for summary judgment as to all of the federal constitutional claims, I decline to exercise jurisdiction over his state law claims. Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) ("a district court has the discretion to retain or to refuse jurisdiction over state law claims").

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Frank Ferguson, David Dishno and the City of Rice Lake, Wisconsin is GRANTED;

2. Defendants' motion to amend is DENIED as moot; and

3. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 29th day of May, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge