

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Louise Andrus, *et al.*

v.

Merrimack Valley School District School Board, *et al.*

Docket No. 217-2016-CV-30

ORDER

Plaintiffs, Louise Andrus and Ken Ross-Raymond, filed a complaint against Defendants, Merrimack Valley School District School Board (“Board”) and SAU 46, alleging violations of RSA chapter 91-A.¹ The Court held a hearing on the merits on July 6, 2016, at which Board Chair Mark Hutchins and Plaintiff Andrus testified. After consideration of the parties’ pleadings and arguments and the applicable law, the Court finds and rules as follows.

Factual Background

The Court finds the following facts based on the evidence presented at the July 6, 2016 hearing, which focused on the events that occurred during six Board meetings held on the following dates: May 10, 2004, March 11, 2013, August 11, 2014, July 13, 2015, December 14, 2015, and January 11, 2016. On May 10, 2004, the Board voted to appoint an individual to a vacant Board position during a nonpublic session. Based

¹ Plaintiffs also alleged violations of RSA chapter 659, which the Court dismissed in its Order dated May 10, 2016.

on the meeting minutes² for the nonpublic session, the Board also accepted resignation letters and nominations and discussed negotiations regarding support staff.

On March 11, 2013, the Board voted by secret ballot to appoint an individual to a vacant Board position. Hutchins testified that this was the last time the Board used a secret ballot to fill a vacant position.

On August 11, 2014, the Board cited RSA 91-A:3, II(a)–(d) to enter a nonpublic session. During the nonpublic session, the Board reviewed teacher nominations, a request for medical leave, and letters of resignation. The Board also deliberated about who to appoint to a vacant Board position during the nonpublic session.

On July 13, 2015, the Board voted to enter a nonpublic session, citing RSA 91-A:3, II(c), to discuss the candidates for a vacant Board position and then voted during a public session. Hutchins testified that they went into the nonpublic session to discuss a conflict of interest regarding a candidate. Hutchins further acknowledged that the conflict should have been discussed during the public session, but he did not know this at the time. The Board also went into a nonpublic session, citing RSA 91-A:3, II(b)–(c), to review a staff resignation letter and parent requests.

Additionally, at the July 13 meeting, which was held in a library, Plaintiff Andrus complained that she had trouble hearing the Board members when they were speaking. A noisy computer fan was then turned off to help with the sound issues. Although Plaintiff Andrus claims she still could not hear even after the computer was turned off, she did not make her inability to hear known to the Board members again. Plaintiff

² The Board records the minutes of both its public and nonpublic sessions and then approves the minutes in a subsequent meeting. At the July 6, 2016 hearing, Plaintiffs provided as exhibits the meeting minutes for all six Board meetings at issue.

Andrus testified that some members of the Board speak softly and she has difficulty hearing them when meetings are held in the library.

On December 14, 2015, the Board cited RSA 91-A:3, II(b) to enter a nonpublic session. During the nonpublic session, the Board reviewed letters from staff members who intended to retire. On January 11, 2016, the Board again cited RSA 91-A:3, II(b) to enter a nonpublic session, during which it reviewed a letter of resignation and a summary of proposed negotiation agreements with the Merrimack Valley Support Staff Association and Merrimack Valley Administrators Association.

Analysis

Plaintiffs allege Defendants have deprived them of access to information and proceedings guaranteed by RSA chapter 91-A, New Hampshire's Right-to-Know Law. In particular, Plaintiffs claim the Board has violated RSA chapter 91-A by failing to appoint individuals to vacant Board positions fully in public, deliberating and voting in nonpublic sessions regarding vacant Board positions, appointing individuals to vacant Board positions through secret ballots, failing to make their public meetings audible for those in attendance, failing to properly record the names of individuals appearing before it during nonpublic sessions, and reviewing employee letters of resignation during nonpublic sessions.

As discussed in the Court's Order dated May 10, 2016, the purpose of New Hampshire's Right-to-Know Law "is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. Recognizing the conflicting interests to ensure the privacy of individuals, security considerations, and "[o]penness in the conduct of public business,"

the Right-to-Know Law prohibits public bodies from meeting in nonpublic sessions, but contains several enumerated exceptions to this general rule. Id.; RSA 91-A:3. Additionally, “[e]xcept for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot.” RSA 91-A:2, II.

“Although the statute does not provide for unrestricted access to public records and proceedings, to best effectuate the statutory and constitutional objective of facilitating access to all public documents and proceedings, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information.” Lambert v. Belknap Cty. Convention, 157 N.H. 375, 379 (2008). “The Right-to-Know Law, if violated, provides for three possible remedies: (1) an award of reasonable costs and attorney’s fees; (2) an order voiding action taken by a public body or agency; and (3) an injunction.” ATV Watch v. N.H. Dep’t of Res. & Econ. Dev., 155 N.H. 434, 437 (2007) (internal citations omitted).

Here, Plaintiffs seek to enjoin the Board from future violations of RSA chapter 91-A. At the hearing on the merits, Defendants agreed, in a proposed but unsigned consent decree, to the following: (1) the Board will not enter nonpublic sessions to deliberate or vote on candidates for a Board position;³ (2) if the Board believes it must discuss matters that, “if discussed in public, would likely affect adversely the reputation of any person” besides the candidate, the Board will “so state prior to entering nonpublic session under RSA 91-A:3, II(c)”; (3) if during a nonpublic session the Board determines an exception to the prohibition of meeting in a nonpublic session does not apply, the Board will cease the nonpublic discussion or vote and, in a public session, will inform

³ Hutchins also testified that the Board has already implemented a permanent change in process whereby it does not discuss candidates to fill Board vacancies in nonpublic sessions.

the individuals still present about the circumstances surrounding the nonpublic session; (4) and the Board will not vote during a nonpublic session or through the use of secret ballots to appoint an individual to a Board vacancy. Although Plaintiffs did not present evidence at the hearing regarding their claim that the Board does not record the names of the administrators with whom it meets during nonpublic Board sessions, Defendants also agree that they will record the names of all individuals that are present for nonpublic sessions.

Although, as noted above, Defendants have agreed to change certain aspects of their Board meetings, they argue Plaintiffs are not entitled to relief for their claim regarding the audibility of Board meetings. Plaintiffs' claim it is difficult to hear during Board meetings because many Board members speak softly and nothing is used to amplify their voices. Under the Right-to-Know Law, meetings required to be open to the public must also be audible or otherwise discernable. See RSA 91-A:2, III.

Here, Plaintiff Andrus testified that she and two other individuals had trouble hearing the Board members while they were speaking during the July 13, 2015 meeting and that she still had difficulty hearing after a computer was turned off to reduce the level of background noise. However, she did not tell anyone she still had trouble hearing even after the computer was turned off. Thus, the Board had no way of knowing she could not hear well. Nor was evidence presented that other audience members have continual difficulties hearing Board members during their meetings. To the contrary, Hutchins testified that there have been complaints only two times about audibility in the 17 years he has been on the Board. As a result, Plaintiffs have failed to establish Defendants violated RSA chapter 91-A with respect to audibility.

Defendants also argue Plaintiffs' complaint regarding the Board's compliance with RSA chapter 91-A in the context of resignations of school district employees is untimely because Plaintiffs did not raise the issue until the July 6, 2016 hearing on the merits. Defendants further argue the evidence demonstrates that no RSA chapter 91-A violation has occurred regarding the review of resignation letters in nonpublic sessions and that Plaintiffs are not entitled to relief for their untimely claim.

Although Plaintiffs' amended complaint does not contain the word "resignation," it alleges that "[d]ue to the Board's failure to honor its obligations under RSA 91-A, the rights of Plaintiffs Andrus and Ross-Raymond have been violated and they have been deprived the access to information and government proceedings guaranteed by RSA 91-A." (Compl. ¶ 20.) As a result, the Court does not find Plaintiffs' argument to be untimely.

Under RSA 91-A:3, II, the following matters may "be considered or acted upon in nonpublic session":

- (a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
- (b) The hiring of any person as a public employee.
- (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. . . .

None of these exceptions address resignations. Nor does "resignation" fall under the common meaning of "dismissal" in the context of employment. See Carter v. Smith, 366 S.W.3d 414, 421 (Ky. 2012) ("While the statute does not define 'dismissal,' that

term has a clearly recognized, common meaning in the employment context, which is distinct from a 'resignation.'"). Rather, a resignation typically refers to an employee voluntarily relinquishing his or her employment, while dismissal, despite being a general term, tends to connote an employee's removal from employment initiated by an employer. See Webster's Third New International Dictionary 652 (unabridged ed. 2002) (providing a definition of "dismiss" as "to send or remove from employment, enrollment, position, or office"); Webster's Third New International Dictionary 1932 (unabridged ed. 2002) (providing a definition of "resign" as "to give up, relinquish, or forswear one's office, rank, membership, post, or charge esp. formally and definitely").

At the hearing on the merits, Plaintiffs presented evidence that the Board reviewed resignation letters during nonpublic sessions held on May 10, 2004, August 11, 2014, July 13, 2015, December 14, 2015, and January 11, 2016. (Pl.'s Ex. 1, Tabs 1, 3, 5-7.) Hutchins also testified that the Board has a practice of reviewing resignation letters in nonpublic sessions. Based on the meeting minutes, the Board only voted on resignation letters during a nonpublic session at the May 10, 2004 meeting. During the August 11, 2014 and July 13, 2015 meetings, the Board voted during public sessions to accept, with a penalty, the resignation letters discussed during the nonpublic sessions; thus indicating that compensation was discussed during the nonpublic sessions. (Pl.'s Ex. 1, Tabs 3, 5.) However, no evidence has been presented regarding whether or not the Board discussed the compensation of the employees requesting to resign during the nonpublic sessions for the other meetings at issue. Likewise, no specific evidence has been presented regarding whether or not any employees were resigning a position to be hired into a new position with the school district, or whether or not any of the

resignations were occurring in lieu of a non-voluntary dismissal or for another reason that would adversely affect an employee's reputation. Accordingly, the Court finds that the Board has violated RSA chapter 91-A by considering and acting upon resignation letters during nonpublic sessions.

Conclusion

Based on the foregoing, the Court orders as follows:

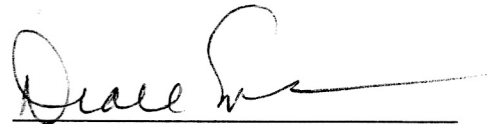
1. The Board is permanently enjoined from entering into nonpublic sessions to discuss, deliberate, or vote on candidates for a vacant Board position unless the Board believes it must discuss matters that, "if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting." RSA 91-A:3, II(c). Under RSA 91-A:3, I(b), any motion to enter a nonpublic session shall state the specific exemption that is relied upon as the basis for entering the nonpublic session. If the Board determines during the nonpublic session that such an exemption does not apply, it shall immediately cease the nonpublic discussion or vote and, in a public session, inform the individuals still present about the circumstances surrounding the nonpublic session.
2. The Board is permanently enjoined from voting during a nonpublic session or through the use of secret ballots to appoint an individual to a vacant Board position.
3. The Board shall record the names of all individuals that are present for nonpublic sessions in the respective meeting minutes.

4. The Board is permanently enjoined from entering into nonpublic sessions to discuss, deliberate, or vote on employee resignation or retirement letters. However, in accordance with RSA 91-A:3, II, the Board may discuss in a nonpublic session the compensation of resigning or retiring employees, the hiring of a resigning employee into a new position with the school district, whether a resignation or retirement is occurring in lieu of a non-voluntary dismissal, or matters regarding the resigning or retiring employee, other than a member of the Board itself, that would adversely affect his or her reputation if discussed in public.

SO ORDERED.

Date: _____

9/2/2016



Diane M. Nicolosi
Presiding Justice