The State of New Hampshire

STRAFFORD COUNTY SUPERIOR COURT

David K. Taylor

v.

The Oyster River Cooperative School Board
and Henry Brackett, Chairman

Docket No.: 2012-CV-001

ORDER ON MOTION FOR TEMPORARY INJUNCTION

Plaintiff, David K. Taylor, sues Defendant, the Oyster River Cooperative School Board ("ORCSB" or "Board") under RSA 91-A:7 for both a Temporary Injunction via the filing of an *Ex Parte* Motion for Temporary Injunction ("TRO") Pursuant to RSA 91-A:7 and for Permanent injunctive relief. Defendant objects to the *Ex Parte* Motion for Temporary Injunction Pursuant to RSA 91-A:7. After a review of the evidence, the parties' arguments, and the applicable law, the Court DENIES Plaintiff's request for a TRO and finds and rules as follows.

Facts

The Court finds the following facts for the purposes of this order. The current case arises from the Board's procedures for hiring a superintendent to replace interim superintendent, Leon Levesque, and Plaintiff's claim that the Board's actions violate both the Board's policies and RSA chapter 91-A. Preliminarily, even though Plaintiff captioned his pleading as a complaint under RSA 91-A, the court finds that Plaintiff's allegations are sufficient to allege a violation of the Board's policies. See Morgenroth & Associates, Inc. v. Town of Tilton, 121 N.H. 511, 516 (1981) (noting that when a "plaintiff's pleadings are not masterful, [] that fact should not necessarily defeat [his] claim"); see also Berlinguette v. Stanton, 120 N.H. 760, 762 (1980) ("Pleadings are treated liberally. [E]mphasis will be placed on the simple merits of the controversy rather

than the form of the pleadings in which they may be presented."). Thus, the Court finds that Plaintiff alleges a cognizable claim under the Board's policies.

On October 13, 2011 the Board held a "Workshop Special Meeting." (Pet. ¶ 16.) The notice for this meeting did not state the subject of the meeting. (Id. ¶ 18.) However, a separate document, titled "agenda," that was posted contemporaneously with the notice stated that the meeting would consist of a "[w]ork session with NESDEC (Superintendent Search Firm) [regarding] [1] Superintendent Search Schedule [2] Advertisement [3] Announcement." (Obj. Ex. A.) At the meeting, the Board reviewed the timeline and dates for the superintendent search process; considered how NESDEC can serve the Board by conducting community forums for building trust; considered the announcement for the Superintendent search; delegated to member O'Quinn the responsibility to compile the suggestions on the announcement; delegated to member Bolduc responsibility to add to the announcement; and delegated to the Communications Committee responsibility to send out letters to the individual constituents asking them to recruit members for the steering committee. (Pet. ¶¶ 19–21.)

On October 25, 2011 the Board held a "Special Workshop Meeting." (Id. ¶ 22.) The notice indicated the Board would "meet with NESDEC for a special superintendent search workshop." (Id. ¶ 23.) The agenda for this meeting, posted in a separate document contemporaneously with the notice, stated that the Board would finalize the advertisement and announcement; address focus group categories; and take action to approve the advertisement and announcement. (Obj. Ex. A.) At the meeting, the Board modified the announcement for the superintendent search and approved the announcement; modified the advertisement for the superintendent search and approved the advertisement; considered focus groups for the superintendent search and formed seven focus groups; and delegated to the Communications Committee the responsibility to "draft the focus group letters and press release." (Pet. ¶¶ 27–30.)

On November 14, 2011 the Board held a "Special NESDEC Workshop Meeting." (Id. ¶ 32.) The notice provided that the Board would meet with NESDEC for a special superintendent search work session. (Id. ¶ 33.) The Notice further provided that there

would be a Screening Committee Discussion concerning "(1) composition, (2) responsibilities, (3) expectations, and (4) schedule." (Obj. Ex. A.) At this meeting, the Board discussed the procedure to select a Screening Committee and approved the composition of the Screening Committee. "Jim Kach made a motion [for the committee] to be 2 parents, 2 community members, 1 student, 3 teachers, 1 administrator, 2 School Board . . . [t]he motion passed with a vote of 5-2." (Pet. ¶ 36.)

On November 30, 2011 the Board held a "Special Workshop Meeting." (Id. ¶ 37.) The notice stated that the Board would discuss the superintendent search committee selection process and discuss the budget with the advisory budget committee. (Id. ¶¶ 38–39.) At this meeting, the Board again voted on the composition of the superintendent search Screening Committee. (Id. ¶ 40.) The Board voted and approved "the composition of the Superintendent Search Committee to consist of 13 individuals, 2 Administrators, 2 School Board members, 3 Teachers, 3 Parents, 1 Student, and 2 Community Members." (Pet. ¶ 40.) The Board members also voted unanimously to have the election of Board members to the committee in a manner "similar to how the Chair and Vice-Chair are nominated." (Id.)

"Prior to December 21, 2011, community members interested in serving on the Superintendent search screening committee submitted letters of interest to the Superintendent's Office." (Pet. ¶ 42.) By communicating outside of a posted public or non-public meeting, the Board decided on the following procedure to select community members for the Screening Committee. (Id. ¶ 44.) Six Board members reviewed the community members' letters of interest and each selected a name as their nomination. (Id. ¶ 43.) They anonymously wrote this name on a piece of paper, which was then sealed in an envelope and submitted to the Board's administrative assistant. (Id.)

On December 21, 2011 the Board held its regularly scheduled meeting. At this meeting, the student member of the Board picked two of the envelopes randomly and read the names. (Id. ¶ 48.) The Board voted and approved the appointment of these two individuals to the superintendent search Screening Committee. (Id. ¶ 49.)

On December 22, 2011 Plaintiff submitted a Right-to-Know request pursuant to RSA chapter 91-A for the contents of the envelopes with the Board members' nominations of community members, including the name of the Board member

connected to each nomination. The contents of the envelopes were provided to Plaintiff; however the identity of the Board member who submitted each nomination was not provided because such information was not recorded.

Legal Standard

An injunction is an "extraordinary remedy," which "should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." N.H. Dept. of Environmental Servs. v. Mottolo, 155 N.H. 57, 63 (2007). A party seeking injunctive relief also must show that it is likely to succeed on the merits. Mottolo, 155 N.H. at 63. Moreover, courts consider the impact on the public interest and the possibility of substantial harm to others. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–14 (1987).

Discussion

Whether Plaintiff is likely to succeed on the merits of his claim depends on whether Plaintiff is likely to prove a violation of RSA chapter 91-A. Plaintiff's action is premised on his allegation that the Board's policies BE and BBAA "require broader public access than the requirements of RSA 91-A and [under] RSA 91-A:2 II, these [policies] take precedence over the requirements of RSA 91-A and a violation of these [policies] is a violation of RSA 91-A." (Pet. ¶¶ 9, 15.) The Court finds that the petitioner is not likely to prevail on the merits of this claim as discussed below.

In Plaintiff's petition for temporary injunctive relief, he seeks an order "compel[ling] the Board to temporarily terminate all aspects of the current Superintendent search pending the outcome of this case." (Pet. ¶B.) In Plaintiff's petition for permanent injunctive relief, he seeks an order (1) enjoining the Board from future violations of the Right-to-Know law, (2) invalidating all actions related to the superintendent search taken in violation of RSA chapter 91-A, and (3) an ex parte order for injunctive relief to immediately stop the superintendent search. The Court Order only addresses the merits of Plaintiff's petition for permanent relief as necessary to rule on his request for temporary relief.

a. Violations of Board's Policies

The Board's policy BBAA provides that individuals may not take action on behalf of the Board unless the Board delegates authority for such action by a vote at a posted

meeting. (Id. ¶ 9.) Policy BE defines a special meeting as a meeting held other than during the regularly scheduled meetings to address important matters. (Id. ¶ 11.) The policy states that notice for special meetings "shall indicate the subject of the meeting and the actions to be taken." (Id. ¶ 12.) No other business other than that stated in the notice of the meeting shall be transacted. (Id.) Policy BE also defines a special workshop meeting as a meeting to discuss a particular subject or proposal and to gather input from the staff, community, or groups. (Id. ¶ 13.) Under the policy, no formal action shall be taken by the Board at a workshop or informational meeting. (Id. ¶ 14.)

Plaintiff claims that the Board violated policy BE by failing to list the subjects of special meetings and the actions to be taken. The Board replies that the subjects and actions to be taken at each meeting were posted contemporaneously with each notice in a separate document titled "agenda." Courts apply the "plain meaning" of language in agency policies. See Appeal of Union Tel. Co., 160 N.H. 309, 317 (2010); see also In re Keelin B., 162 N.H. 38 (2011). The Court finds that it is likely that the Court will find that posting the subject of a special meeting in a separate document that is posted contemporaneously with the notice does not violate policy BE. While it would be prudent if the Board expressly referred the public to the agenda document in the body of the notice; this does not appear to be mandated under the policy. The purpose of policy BE is to require the Board to provide the public with both (1) notice of a meeting and (2) information concerning the subject of the special meeting. Posting the agenda contemporaneously with the notice appears to accomplish this objective.

Furthermore, the Court finds that it is likely that the Court will find that that the notices and agendas provided by the Board for the October 13, 2011, October 25, 2011, November 14, 2011, November 30, 2011, and December 21, 2011 meetings sufficiently described the topics addressed and actions taken at each meeting. It appears that the Board did not address any issues at these meetings without providing the public with proper notice. For example, the Court finds that the agenda for the October 13, 2011, which stated that the Board would "work with NESDEC [a consulting firm hired to help with the superintendent search] [regarding the] superintendent search schedule, advertisement, and announcement" adequately notified the public of the Board's actions at that meeting: i.e. reviewing the timeline and dates for the superintendent search

process; considering how NESDEC can serve the Board; considering the announcement for the superintendent search; delegating the responsibility to compile the suggestions on the announcement; delegating the responsibility to add to the announcement; and delegating the responsibility to send out letters to the individual constituents asking them to recruit members for the screening committee. (Pet. ¶¶ 19–21.)

Plaintiff next claims that the Board violated policy BBAA by noticing meetings as "workshop special meetings." Thus, Plaintiff argues that meetings titled "workshop special meetings" are both workshop meetings and special meetings. Under the policy, no formal action can be taken at a workshop meeting; however, formal actions can be taken at special meetings. Any formal actions taken at these meetings, Plaintiff argues, violated policy BBAA, which, as noted, proscribes formal actions at workshop meetings.

Given the conflicting definitions of these meetings, the Court finds that it is likely that the Court will find that a meeting cannot be both a workshop meeting and special meeting at the same time. The Court finds that it is likely that the Court will find that The Board violated policy BBAA when it titled meetings as "special workshop meetings." To comply with policy BBAA, meeting notices must clearly specify the type of meeting that will be held. If the Board plans to hold a workshop first and a special meeting second, the notice should make this clear and the meeting minutes should specify when each meeting commences and adjourns.

Plaintiff next argues that the Board's policies "take[] precedence over the requirements of [the Right-to-Know law]" because they require broader public access than RSA chapter 91-A. Plaintiff further asserts that violations of these more protective ORCSB policies constitutes a violation of RSA chapter 91-A. (Id.) The Court finds that it is unlikely that Plaintiff will succeed in this argument. Although administrative agencies unquestionably must follow their own rules, In re Town of Bethlehem, 154 N.H. 314, 327 (2006), an agency's failure to follow its own rules does not constitute a per se violation of RSA chapter 91-A. See State v. Denoncourt, 149 N.H. 308, 309 (2003) (setting forth the general rule of construction that lower bodies generally may establish more protective laws or policies; however, a violation of such policy constitutes a violation of that policy alone, not necessarily a violation of the higher governing-body's law as well);

see also In re Town of Nottingham, 153 N.H. 539 (2006) ("[A]gency regulations which contradict the terms of a governing statute exceed the agency's authority.").

The Court further finds that it will likely find that any violation of policy BE and BBAA set forth above did not amount to a violation of RSA chapter 91-A. See RSA 91-A (which does not provide for a distinction between special meetings and workshop meetings) and New Hampshire Attorney General Right to Know Memorandum ("AG Mem.") at 9 (July 15, 2009) (noting that the Right-to-Know law does not require "that the notice include or be accompanied with a brief list of the planned agenda items").

b) Violations of RSA chapter 91-A

Plaintiff challenges the Board's procedures in selecting community members for the superintendent search Screening Committee. First, Plaintiff argues that the Board deliberated and decided on the method to select these members outside of a posted meeting. The Court finds that it will likely agree with Plaintiff on this issue. These deliberations and decisions, which occurred outside of a posted meeting, likely violated the Right-to-Know law.

RSA chapter 91-A emphasizes open and public meetings. See RSA 91-A:2. The statute mandates that school board meetings "shall be open to the public . . . [and that m]inutes of all such meetings, including . . . a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to the public [] within 144 hours." RSA 91-A:2. "[A] notice of the time and place of each [public or non-public] meeting . . . shall be posted in 2 appropriate places . . . at least 24 hours" before the meeting. Id.

A meeting within the meaning of RSA chapter 91-A occurs when a "quorum of the membership of the public body is convened . . . and [t]he purpose of convening a quorum or a majority of the membership is to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power." AG Mem. at 6 (citing RSA 91-A:2).

In this case, it appears that six members (which constitutes a quorum of the Board) decided to nominate community members by anonymously submitting a name in a sealed envelope. It appears that this process was not discussed or approved at a posted meeting. The Board likely violated the statute when more than a quorum of its

members deliberated and made such decisions without following the proper procedure for a meeting set forth under RSA 91-A:2.

Next, Plaintiff argues that the Board improperly voted on these nominations via secret ballot. The Court will likely agree with Plaintiff on this issue as well. RSA 91-A:2, II provides that "no vote while in open session may be taken by secret ballot." In this case, it appears that the Board selected the community members for the Screening Committee in a two step process: (1) by anonymous nominations submitted in envelopes and (2) by randomly selecting the envelopes at a public meeting and subsequently voting to appoint said selections to the Screening Committee. The first step anonymously narrowed the applicant pool. The second step was a vote taken in open session approving this anonymous process and appointing the two individuals who were randomly selected. If proven, it is likely that the Court will find that this vote taken during the open session was, in part, a vote to narrow the applicant pool by secret ballot, in violation of RSA 91-A:2, II.

In addition, the Board's actions with respect to deliberating outside of posted meetings and voting via secret ballot likely circumvented the spirit of transparency, which animates the Right-to-Know Law. See RSA 91-A:1. As noted above, the Right-to-Know Law expressly prohibits discussing outside of meetings matters which should properly be discussed at meetings and also expressly prohibits secret ballots. RSA 91-A:2; RSA 91-A: 1; RSA 91-A:2-a. Instead of discussing the methods to nominate community members in an open forum, it appears that the Board furtively took actions to narrow the applicant pool. This process effectively, if Plaintiff proves it occurred, eliminated the accountability that the Right-to-Know law was designed to promote. Such conduct—whether driven by convenience or any other motivation—would obviated the spirit and purpose of the Right-to-Know Law, which is designed to promote transparency of, and public participation in, the political process. RSA 91-A:1. These types of communications would be found unlawful under RSA 91-A:2-a, II.

Conclusion

Plaintiff seeks an ex parte order for injunctive relief to immediately stop the superintendent search. The Court finds that Plaintiff has not shown an immediate danger of irreparable harm without an adequate remedy at law. If the Court ultimately

finds that the Board violated RSA chapter 91-A, Plaintiff could obtain relief under RSA 91-A:8, including injunctive relief, attorneys' fees, sanctions, and the invalidation of agency actions. RSA 91-A:8; See AG Mem. at 44.

Therefore, the petitioner's *ex parte* request for preliminary relief is **DENIED**. The Court declines to grant injunctive relief to immediately stop the superintendent search. The search may proceed in compliance with RSA chapter 91-A and the Board's policies.

So Ordered.

January 11, 2012
Date

Hon. Marguerite L. Wageling
Presiding Justice