

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS

SUPERIOR COURT

No. 219-2012-CV-000001

DAVID K. TAYLOR

v.

THE OYSTER RIVER COOPERATIVE SCHOOL BOARD

PETITIONER'S PRETRIAL MEMORANDUM

NOW COMES David K. Taylor, ("Taylor"), Petitioner in the above captioned matter, and submits the within Pretrial Memorandum.

INTRODUCTION

On January 3, 2012 the Petitioner filed a "Petition for Injunctive Relief Pursuant to RSA 91-A:7" against the Oyster River Cooperative School Board ("the Board"). The petition seeks to enjoin the Board from future violations of RSA 91-A and to invalidate the superintendent search. On the same date, the Petitioner also filed an "*Ex Parte* Motion for Temporary Injunction" seeking an immediate injunction to stop all progress in the superintendent search.

On January 17, 2012 the Court issued a Order on Motion for Temporary Injunction in this case. This order denied the temporary injunction. However, this order found that

“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 Berlinquette 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.”

#### FACTS

Beginning on October 13, 2011 the Board conducted a series of meetings variously called some form of “Special Workshop Meeting.” Additional such meetings were on October 25, 2011, November 14, 2011, November 30, 2011 and December 5, 2011. At these meetings the Board discussed and decided on the steps of the search for a permanent superintendent to replace Interim Superintendent Leon Levesque. These steps included an advertisement, an announcement, focus groups, and the make up and selection of members for a screening committee.

On December 21, 2011 the Board decided on the members of the screening committee. By a secret ballot, and by a procedure that differed from that voted on by the Board at the prior special workshop meeting, the Board completed the selection of 2 community members for the screening committee. Prior to this meeting at least 6 members of the Board had individually made a selection of community member and

placed it in a sealed, unmarked envelope. At the December 21, 2011 meeting 2 of those envelopes were picked to select the community members.

## ARGUMENT

### *a. Violation of Board's Policies*

Administrative agencies unquestionably must follow their own rules. In re Town of Bethlehem, 154 N.H. 314, 327 (2006).

ORCSD Policy BBAA - Individual Members provides "Individual board members may not exercise their authority over district affairs. The board may, by majority vote, take action at a legal meeting of the board. In other instances an individual board member, including the chairperson, has power only when the board by vote has delegated authority to him or her. No legal action can be taken except at a duly posted meeting of the board and by a quorum acting as a unit."

By communications outside a meeting and making decisions about the process of selecting community members as well as the actual selection of those community members, the Board violated policy BBAA because these actions did not take place at a duly posted meeting.

As described below, the several meetings prior to December 21, 2011 were not properly posted. By taking actions at these improperly posted "Special Workshop Meetings" the Board violated policy BBAA because these actions did not take place at a duly posted meeting.

ORCSD Policy BE - School Board Meetings provides “A special meeting of the Board is a meeting that is held to address important matters that arise between regular meetings and/or require Board action before the time set for the next regular meeting, or to consider a single subject in one session.... The notice or agenda [for a special meeting] shall indicate the subject(s) of the meeting and action to be taken. No business other than that stated in the notice of the meeting shall be transacted.”

Policy BE defines special meetings in contrast to regular meetings. Regular meetings are published annually in a schedule so that citizens have ample notice of when they will occur. They are also individually noticed. However, since special meetings are those that do not follow the regular schedule, Policy BE requires additional requirements for their notice. In particular, Policy BE requires that the notice indicate the subject or business as well as any actions to be taken. This allows citizens to determine whether to attend the meeting based on whether the subject or actions are of interest to them. Posting a meeting as a special meeting and then discussing additional subjects not stated in the notice violates the right to know of those citizens.

ORCSD Policy BE - School Board Meetings further provides “The Board, at its discretion or if required by law, may schedule workshops and other meetings to discuss a particular subject or proposal or to gather input from staff, community, or other groups.... No formal action shall be taken by the Board at a workshop or informational meeting.”

Policy BE defines a workshop as a meeting where the Board will discuss subjects or gather input, but where the Board will not take any action. This allows citizens who

are only interested in Board actions to determine whether they want to attend these meetings. Posting a meeting as a workshop and then taking action at those meetings violates the right to know of those citizens.

To properly notice a meeting as required by Policy BE it must be clear what type of meeting it is. It is arguable that Policy BE defined disjoint types of meetings. That is, a meeting cannot be both a special meeting and a workshop. Since the meetings prior to December 21, 2011 were all posted as both special and workshop, they are not posted clearly and violate Policy BE.

It is also arguable that special refers to whether a meeting is on the regular schedule or not, and workshop refers to whether a meeting is informational only. That is, it is possible to have an informational only workshop meeting that is also not on the regular schedule. (Just as it is possible to have an informational only workshop meeting on the regular schedule.) In this case, a meeting that fits both types of meetings, such as a special workshop meeting would need to meet the right to know requirements of both types, namely posting the subject and taking no actions.

However, even with this later interpretation, these meetings violated the policies because they did not properly notice the subject of the meetings as noted below and they took actions at these workshops, therefore violating Policy BE.

Finally, Policy BE distinguishes between the notice and the agenda for a meeting. Policy BE uses both of these terms and they are not used interchangeably. Policy BE places different requirements on the notice than it does on the agenda. Notices are posted separately from agendas, particularly on the district website, and agendas can

often be very large files deterring citizens from downloading them. Therefore the requirement that the notice list all business and that no business can be done except that indicated on the notice is not met by having the separate agenda list the business.

*b. Failure to Notice on Trust Consultant*

The notice for the October 13, 2011 meeting does not indicate any subject, business or actions. The agenda specifically indicates a work session with NESDEC as the superintendent search consultant on 3 items: 1) superintendent search schedule, 2) advertisement, 3) announcement. However, the minutes of the meeting record that the Board also considered "how NESDEC might be able to serve the Board in conducting community forums for building trust." This item relates to an amendment to the annual budget made at the February 8, 2011 district deliberative session "to add \$15,000 ... for the purpose of hiring a contractor ... to investigate the culture of distrust and disrespect in our district leadership and community at large and to report specific recommendations to improve that culture." This item is completely separate from the superintendent search, even if the same consultant is hired for both tasks, and therefore this meeting discussed a subject not properly noticed as required by Policy BE.

In contrast, the agenda for the December 5, 2011 special workshop meeting includes "Begin discussion on possible next steps to address the issue of trust within the district. Deliberative Session Action" The packet of back up material for the December 5, 2011 meeting includes an excerpt from the February 8, 2011 Deliberative Session minutes, clearly indicting the "issue of trust" stems from the \$15,000 amendment to the budget at this session.

*c. Failure to Post Minutes*

The minutes for the December 21, 2011 meeting were not posted on the district website nor made available for public inspection until January 5, 2012. This is 15 days after the meeting which is 3 times longer than the required 5 days by RSA 91-A:2 II and Policy BEDG that also requires that "Minutes will also be posted on the district website."

*d. Failure in Non-Public*

Policy BE requires a broader public access to non-public meetings by requiring the motion to enter non-public session to indicate the matter(s) to be discussed in addition to the specific statutory exception. This provides a broader public access because it makes the purpose of the meeting clear through the use of plain language that the citation of the RSA statutory exemption alone does not.

*e. Precedence Clause*

In addition to violating the Board's own policies, certain violations of policies that require a broader public access than RSA 91-A also constitute violations of RSA 91-A as well.

RSA 91-A:2 II provides "If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter."

The Order on Motion for Temporary Injunction in this case dated January 11, 2012 stated “the general rule of construction [is] that lower bodies generally may establish more protective laws or policies; however, a violation of such policies constitutes a violation of that policy alone, not necessarily a violation of the higher governing-body’s law as well.”

While this is indeed the general rule of construction and applies to RSA chapter 91-A and ORCSD policies as the lower-body’s rules, it does not consider the explicit provision of RSA 91-A:2 II. Since the higher-body’s rule in this very specific case expressly states that the lower-body’s rules “shall take precedence over the requirements of this chapter,” it is the higher-body’s rule that is extending its authority to include the lower-body’s rules within the jurisdiction of that lower body.

In this case, Policy BE - School Board Meetings, requires a broader public access by requiring a longer notice period in certain cases, requiring the business, subject and actions to be indicated in the notice in certain cases, and requiring that no additional business shall be transacted in certain cases. These are all aspects covered by the RSA chapter 91-A requirements for notice and these local policies require a broader public access, and therefore the precedence clause of RSA chapter 91-A makes violating them a violation of RSA chapter 91-A itself.

That some of these requirements for a broader public access are limited to certain cases, and those cases are not defined by RSA chapter 91-A, does not make them not require a broader public access. If Policy BE required all meetings to have a 72 hour notice, then that would clearly require a broader public access since the public had more



time to become aware of and make arrangements to attend all meetings. That Policy BE only requires a 72 hour notice for meeting defined by that Policy as “special” meetings is still broader than RSA 91-A, if not as broad as the hypothetical case of all meetings. Therefore, the designation of a special meeting is relevant to RSA 91-A only in that certain requirements of a broader public access are applied to those special meetings.

Similarly, Policy BEDG - Board Meeting Minutes, requires a broader public access by requiring minutes to be posted on the district website. RSA 91-A:2, II places requirements on making the minutes available for public inspection and also includes publishing notices on websites as fulfilling a requirement. So, this aspect of Policy BEDG requires a broader public access than RSA chapter 91-A and therefore the precedence clause of RSA chapter 91-A makes violating this a violation of RSA chapter 91-A itself.

*f. Secret Ballot*

RSA 91-A:2 II provides “Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot.”

A vote is “a decision by one or more persons on a proposal, resolution, bill, etc., or a choice between candidates for office, expressed by written ballot, voice, show of hands, etc.” Webster’s New Universal Unabridged Dictionary, 2nd ed., 1983, Dorset & Baber, New York. p. 2050.

The process prior to and during the December 21, 2011 meeting to select the 2 community members for the screening committee is a vote taken by secret ballot. It is a

vote because it was a decision taken by the Board to narrow a larger pool of candidates down to 2. Each member of a quorum of the Board participated in this process by individually casting a written ballot with the name of a single selected community member. Just this part of the process narrowed the pool of candidates to 4 names. Then 2 of the envelopes were picked at random, further narrowing the pool to the 2 selected candidates. The fact that the final step involved a random pick from an already narrowed pool does not mean this process as a whole is not a vote since it resulted in a decision by the Board.

The process is by secret ballot because there is no accountability. There is no record of, and none of the citizens who observed the public meeting where the 2 envelopes were picked know, which Board member selected which community member to place in the narrower pool.

*g. Communications Outside a Meeting*

RSA 91-A:2-a provides "I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III. II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1."

Besides being a vote taken by secret ballot, the process to select community members for the screening committee involved communications outside a meeting.

First, prior to the December 21, 2011 meeting, the last time the Board deliberated about the process to select the community members at a meeting was at the December 5, 2011 meeting. At the December 5, 2011 meeting “Ann Lane made a motion upon the receipt of letters of interest, board reviews list and discusses qualifications, and addresses inadequacies in terms of representation on the committee; then, following conversation, each board member selects a name, puts into a hat and either [Superintendent] Lee [Levesque] or [Student member] Cody [Jacobsen] select name.” This process was approved 6 to 1.

Note that the process approved on December 5, 2011 is for the Board to “discuss qualifications” and then “following conversation, each board member selects a name” that is then picked at random. Clearly, the process involves discussion and conversation and hence must occur at a meeting. That is, the approved process was to all occur during a meeting. Instead, prior to the December 21, 2011 meeting the Board communicated outside of a meeting and decided to not discuss qualifications but to review the list and make selections prior to the meeting. That is, the process was changed by communication outside of a meeting and violated the spirit of RSA chapter 91-A. A citizen observing the December 5, 2011 meeting expected to see the approved process occur at another duly posted meeting, but instead at the next meeting half the process was complete.

The December 5, 2011 action was taken by a vote on a motion at a meeting. This action defined a rule for how the Board would conduct the selection process. As such, the Board was bound to follow that rule unless and until it changed that rule by another

vote at a proper meeting. The superintendent does not have authority to change rules established by the Board. By following the suggestion of the superintendent, the Board violated its own rules.

Second, the fact that each Board member cast their ballot by writing a single name in a sealed envelope also constitutes a sequence of communications outside a meeting. That is, each member communicated the name of their selection. This communication happened in sequence as each member not only reviewed the material, but then also cast their ballot outside of a meeting. Had the Board members waited until the December 21, 2011 meeting to write the names on a ballot, then they would have avoided this aspect of communications outside a meeting.

Lastly, this odd process to select 2 community members was designed to facilitate a more insidious form of communication outside a meeting. As is evident from the actual ballots cast, at least 4 members of the Board communicated outside of a meeting about specific names that each would select. Their purpose was to improve the odds that their choices would be the ones picked. In fact, though there were 6 ballots, there were only 4 names. The 2 names that were chosen were on 2 ballots each, while the 2 names not chosen were on only 1 ballot each. This gives the 2 chosen names twice the odds of being picked at random. These better odds proved effective.

#### *h. Enjoin Future Violations*

In the January 17, 2012 Final Order in Taylor v. Oyster River et al. the Court ruled that “[t]he Court DOES NOT ENJOIN the Board from committing any future violations of RSA chapter 91-A described above as the Board has already indicated its willingness

to comply with it.” However, as is evident in this case, in spite of the Board’s indication in that case, it has continued to violate RSA chapter 91-A. It cannot be taken at its word. Therefore, it is appropriate for the Board to be enjoined from committing future violations of RSA chapter 91-A.

### CONCLUSION

From the first meeting of the superintendent search process and each subsequent meeting, the Board has violated the right to know of its citizens enshrined in the New Hampshire Constitution, RSA chapter 91-A as well as the Board’s policies such as BBAA, BE, and BEDG. These meetings are about the selection of the superintendent, one of the most important tasks for the Board, and indeed the community as a whole. “[T]he superintendent plays an important role in the community because he/she will have a direct influence over the education system.” Final Order of January 17, 2012 for David K. Taylor v. The Oyster River Cooperative School Board, et al. The right to know is fundamental to the participation of citizens in the political process including the superintendent search process. A violation of the right to know by the Board throughout the search process for such an important role excludes the citizens from their proper participation in that process. Since the decisions made at meetings that violated both RSA 91-A and Board policies denied the public’s right to know, the subsequent actions that resulted from these decisions are poisoned by these decisions and the entire subsequent process should be invalidated. Since RSA 91-A:8 expressly provides “The court may invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter,” such violations clearly meet the requirements for such a remedy. Therefore it is appropriate to vacate the

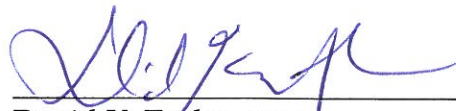
superintendent search process, requiring the Board to restart the process from the initial steps of the advertisement and announcement and to conduct a new search in good faith but with the full participation of the public by obeying their right to know.

Respectfully submitted,

David K. Taylor, *pro se*

Date: February 1, 2012

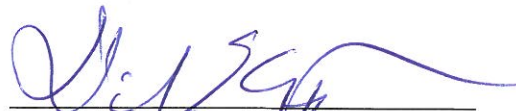
By:



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Findings of Fact and Rulings of Law has been forwarded this 1st day of February, 2012 to Dennis Ducharme, Esquire.

  
David K. Taylor, *pro se*