STATE OF NEW HAMPSHIRE

STRAFFORD, SS SUPERIOR COURT

Docket No. 219-2012-CV-000001

David K. Taylor

v.

The Oyster River Cooperative School Board

TRIAL MEMORANDUM

NOW COMES the defendant, Oyster River Cooperative School Board, by its attorney, Dennis T. Ducharme, and submits the following trial memorandum:

INTRODUCTION

This case was commenced by petitioner, David Taylor, on January 3, 2012. On that date, he filed both a Petition For Injunctive Relief, and an Ex Parte Motion For Temporary Injunction, alleging misconduct by the Respondent School Board concerning the manner in which they had conducted a Superintendent search process. In addition to allegations focused on the propriety of meeting notices, the Petitioner's pleadings focus primarily on an allegation that the Board used an impermissible "secret" selection process to choose community members for a search committee created to conduct the search.

The Court issued an order on January 11, 2012, indicating preliminarily that it was not likely to find violations of RSA 91-A with regard to the Board's posting practices. The

Board submits that the Court's analysis on that issue was correct, and that the Board's practice of posting both a meeting notice and a detailed agenda contemporaneously met the requirements of RSA 91-A and fully advised the public of its expected business at the various meetings at issue. Any continued attack on posting issues by the Petioner illustrates his desire to elevate form over substance and criticize this Board for virtually every step it takes, in an effort to derail the Superintendent search process.

THE MECHANISM USED TO SELECT COMMUNITY MEMBERS FOR THE SEARCH COMMITTEE WAS APPROPRIATE

The Court's order also signaled an inclination to find an RSA 91-A violation, based on its preliminary conclusion that the Board had acted inappropriately by holding meetings, deliberating, and reaching decisions about the selection process outside of posted meetings. The court described these actions as "furtive" actions taken secretly contrary to the mandates of RSA 91-A. The Court's conclusion, is understandable based on the ex parte pleadings filed by the Petitioner, but is, in the ultimate analysis, incorrect because of the incomplete information provided to the Court in those pleadings.

The ex parte pleadings were filed at 8:00 am on the first business day following the Oyster River School District's holiday vacation, January 3, 2012. This was also the first business day of the week for the Court, which was closed on January 2, 2012. Notably, the Petitioner gave his first notice of intending to bring this action by email to the interim superintendent on December 30, 2011. It was not a pleading thrown together by the

Petitioner in haste. It chronicled, meeting by meeting, and notice by notice, the activities of the Board from a meeting held on October 13, 2011 through a meeting held on November 30, 2011. It then jumped forward and described the process utilized by the Board to select the members about which Petitioner complains, on December 21, 2011, stating that "Prior to or during the individual nominations, at least a quorum of the Board, through a sequence of communications outside of a meeting, discussed the possible nominations and decided how to coordinate their selections."(Petition, para. 44)

What Petitioner did not include in the description of events offered to the Court was the notices and meeting minutes of a public meeting held on December 5, 2011, at which the Board specifically discussed a selection process almost identical to what was used. The minutes of the December 5, 2011 meeting discuss clearly the selection process, including a motion made, seconded, and passed, to have the Board members use a designation and blind draw process to choose the two public members of the committee. The Court's decision was based on a chronology prepared by Petitioner which contained a gaping omission in the chain of events. Contrary to the fundamental criticism offered by the Petitioner, that "secret" meetings occurred, the process in question was set in motion in an open meeting.

Interim Superintendent Levesque has now testified that subsequent to that meeting, he offered a modified process that would use the designation and blind draw components of the process agreed to on December 5, 2011, but which would remove any element of consultation among Board members. He has testified that he did so to avoid complaints about favoritism and "cronyism" such as had been made by the Petitioner himself in past

occasions when the chair of the Board had simply designated committee members from a pool of interested applicants.

The Board has answered interrogatories from the Petitioner on an expedited basis to keep this proceeding on track, and described this process fully. All of the Board members participated in providing information for those answers. The chair has signed and sworn that all Board Members who participated in this process did so independently. All Board members testifying today have so sworn. In summary, contrary to the essence of the picture painted by Petitioner in his initial pleadings, and preliminarily accepted by the Court, there were no secret meetings or consultations among members. There were no furtive schemes. The process was discussed publicly by the full Board, revised by an administrator (clearly not an action constituting a meeting) and implemented. Petitioner refuses to accept that no secret consultations, meetings or discussions occurred, and argues repeatedly in his Requests For Findings, and Memorandum, that these secret meetings occurred. He is wrong.

THE PETITIONER'S SHIFT IN ATTACK SUBSEQUENT TO RECEIPT OF INTERROGATORIES SHOULD BE REJECTED BY THE COURT

After receiving interrogatory answers fully explaining what happened between December 5th 2011 and December 11th 2011, the Petitioner prepared and submitted both Requests for Findings and a Pretrial Memorandum which attempt to shift attention away from the failure to alert the Court to the December 5th meeting in his initial filings, and

offer an alternate and illogical argument for invalidating the search process. His argument should be rejected.

Fundamentally, Petitioner's argument seems based on the flawed position that every step ever taken by a Board member "must" occur in a duly posted meeting. Thus, Petitioner argues that a Board Member reviewing the letters of interest outside a posted meeting is illegal. He argues that the process of consulting with an administrative assistant in the district office to arrange a time to look at materials is a "communication" that somehow violates RSA 91-A. Neither of those propositions has any basis in the statute itself or in any case construing the statute. They are unsupported beliefs the Petitioner has adopted, no more.

Petitioner, having no support for his initial position that "secret meetings" occurred, has switched gears and now argues that the December 5, 2011 vote on a process to follow was a "rule" which the Superintendent had no authority to override by suggesting a modified process. He insists that the "rule" created on December 5, 2011 could be modified only by the Board. As is the case with his belief that everything ever done by an Board member must be in a meeting, his position on this point is unsupported by citation to legal authority because none exists. The Superintendent is paid to assist the Board in the orderly operation of its affairs and Petitioner's attempt to claim a violation of RSA 91-A because the Board followed his advice is baseless.

At their essence, many of Petitioner's positions are based on a fundamental logical fallacy. He starts with the correct premise that individual board members do not have authority to act in a manner that binds the Board. Thus, what a Board member does

individually is not a binding Board action. It does not follow, however, as Petitioner believes, that any and every action taken by a Board Member in furtherance of his or her duties is illegal because it did not happen in a posted quorum setting. Petitioner's position, if taken to its logical conclusion would mean that a Board Member could not, for example, be the guide for a Superintendent candidate during a site visit. It would mean that reference checks on a candidate would need to be made in a posted quorum phone call or meeting, rather than by one Board Member gathering information and reporting back to the Board. Countless examples exist in subject areas not at issue in this case.

In many instances, both in Petitioner's Requests and in Petitioner's Memorandum, it is clear that his focus is not on alleged violations of Board policy or RSA 91-A, but rather on his distaste for a Board which does things differently than he would do them. Such arguments have no place in this case. They should not distract the Board from the issues before it.

NO CONDUCT AT ISSUE IN THIS CASE WARRANTS INVALIDATION OF THE SEARCH PROCESS

To the extent the Court is of the belief the culling process constituted a prohibited secret ballot, the Board respectfully disagrees and asks the Court to reconsider its initial position. RSA 91-A speaks specifically to the prohibition of secret ballots in public meetings. There was no secret "ballot" of any type here. There was simply a process by

which each Board member picked a preferred candidate from those interested and placed that name into a hat for a blind draw. Only when the names were drawn was there a motion, a vote and a designation. All of those steps occurred in public. There is absolutely no case law to support the conclusion that the process was a ballot of any kind.

To the extent the court views the mechanism used for narrowing the list of candidates and specific names picked by Board Members as information which should be shared with the public, the Board has done so in its interrogatory answers. To the extent the Court takes issue with the Board's decision to not disclose that information until this case was brought, it is respectfully submitted that any finding of misconduct on that point alone would not warrant the extreme measure of invalidating the search process. The Board had the right to pick the members of the public it wished to pick. It could have done so in any number of ways which would likely not have satisfied the Petitioner, but perhaps would not have given him a plausible claim of a violation under RSA 91-A.

The Board's decision making as to the process was done partially in public, and partially pursuant to a suggestion of the Interim Superintendent. It acted in good faith against the back drop of constant criticism and challenge from the Petitioner himself. Invalidating an entire search process based only on the manner in which the members designated their preferences for 2 of 11 members of the search committee would far outweigh any wrong the Court might find. While the Court may invalidate an action taken under RSA 91-A:8, II, such a decision is discretionary based on all of the circumstances before the Court. Nothing about the Board's conduct in this case warrants such a remedy.

Respectfully submitted,

The Oyster River Cooperative School Board

By Its Attorneys,
DUCHARME RESOLUTIONS, PLLC

Dated: February 2, 2012

By: _____

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Certification

I hereby certify that a true and correct copy of the foregoing was this date hand delivered to David K. Taylor.

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Dennis T. Ducharme, Esquire