The State of New Hampshire

STRAFFORD, SS. **SUPERIOR COURT**

No. 12-cv-01

David K. Taylor

v.

The Oyster River Cooperative School Board

ORDER

The Oyster River Cooperative School Board is engaged currently in selecting a superintendent of schools. David K. Taylor sues the Board for violations of the state Right-to-Know law (RSA 91-A) and of the Board's own policies relating to meetings held and decisions made during its search process. The court held an evidentiary hearing on February 3, 2012. After a review of the evidence, the parties' arguments, and the applicable law, the court finds the Board violated the Right-to-Know law and its own policies. For the reasons that follow, the court enjoins the board from engaging in the conduct that resulted in violations of the statute, but it declines to invalidate actions taken in the search process to date.

Factual Background

The court finds the following facts for the purposes of this order.

a. Board Policies

Board policy BE (Pl. Ex. 3) defines a special meeting as a meeting to address important matters at times other than regularly scheduled meetings. Id. p. 1. The policy states that there shall be a notice of the special meeting and that "[t]he notice or agenda shall indicate the subject(s) of the meeting and action to be taken." According to the policy "[n]o other business other than that stated in the notice of the meeting shall be transacted." Id.

Policy BE defines a workshop as a meeting to "discuss a particular subject or proposal or to gather input from the staff, community, or other groups." Id. p. 2. While notice is required for "special meetings," no such explicit requirement exists for "workshops." However, the policy provides that "[n]o formal action shall be taken by the Board at a workshop. . . ." Id.

Policy BE requires further that motions to enter non-public session "shall be called and conducted in accordance with state law," with the motion to "indicate the matter(s) to be discussed and the statutory exception allowing the non-public session. Only the matter(s) stated in the motion shall be considered." Id.

b. Board Conduct

On October 13, 2011 the Board held a meeting. The meeting notice describes it as both a "workshop" and a "special meeting" (Pl. Ex. 6), while the agenda labels it a "special meeting." (Pl. Ex. 7). The meeting minutes describe it as a "workshop." (Pl. Ex. 8). The notice for the meeting did not identify the subject of the meeting. (Pl. Ex. 6). However, an "agenda," posted with the notice states that the meeting would consist of

a "[w]ork session with NESDEC[1] (Superintendent Search Firm) [regarding] [1] Superintendent Search Schedule [2] Advertisement [3] Announcement." (Pl. Ex. 7).

During the meeting, the Board reviewed the timeline and dates for the superintendent search process; considered how NESDEC could serve the Board by conducting community forums for building trust; considered the announcement for the superintendent search and delegated to board member O'Quinn the responsibility for compiling suggestions on the announcement; delegated to board member Bolduc the responsibility for adding to the announcement; and delegated to the Communications Committee responsibility for writing to individual constituents for assistance in recruiting members for the steering committee. (Pl. Ex. 8).

On October 25, 2011 the Board held a further meeting. Again, the notice calls it a "special workshop meeting," (Pl. Ex. 10), while the agenda identifies it as a "special meeting." (Board's Objection to *Ex Parte* Motion for Temporary Injunction [hereinafter "Obj."] Ex. A, p. 2). (document no. 4). The notice indicated the Board would "meet with NESDEC for a special superintendent search workshop." (Pl. Ex. 10). The meeting agenda 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, p 2).

At the meeting, the Board modified the announcement for the superintendent search and approved the amended announcement; modified the advertisement for the superintendent search and approved the amended advertisement; considered focus

[1] NESDEC is apparently an entity that provided consulting services to the Board.

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." (Pl. Ex. 11).

On November 14, 2011 the Board held a "Special NESDEC Superintendent Search Work Session." (Pl. Ex. 13). The notice called the meeting a "special NESDEC workshop meeting" and advised that the Board would meet with NESDEC for a special superintendent search work session. (Pl. Ex. 12). According to the notice, there would also be a Screening Committee Discussion concerning "(1) composition, (2) responsibilities, (3) expectations, and (4) schedule." (Pl. Ex. 12). At this meeting, the Board discussed the procedure for selecting a Screening Committee and approved its composition. According to the minutes, "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." (Pl. Ex. 13).

On November 30, 2011 the Board held a meeting that was labeled a "special meeting" in the minutes (Pl. Ex. 15) and a "special workshop meeting" in the notice. (Pl. Ex. 14). The notice stated that the Board would discuss the superintendent search committee selection process and hold a "budget work session with the Advisory Budget Committee." (Pl. Ex. 14). At this meeting, the Board again voted on the composition of the superintendent search Screening Committee and on the method by which Board members would be appointed to the committee. (Pl. Ex. 15, pp. 1-2).

On December 5, 2011 the Board held a "special workshop meeting" according to the notice (Pl. Ex. 16), a "special meeting" according to the agenda (Pl. Ex. 17), and by

the account of the meeting minutes a "special workshop meeting – superintendent search workshop with NESDEC." (Pl. Ex. 19). The notice stated that the Board would "meet with NESDEC for a special Superintendent Search workshop." (Pl. Ex. 16). The agenda for this meeting provided that the Board would "[r]eview focus group report; [r]eview sample letter for screening committee invitations; . . . [f]ormulate press release on search committee composition, selection process, [etc]; [b]egin discussion on possible next steps to address issue of trust within the district . . . ." (Pl. Ex. 17).

At this meeting, the Board voted on a procedure by which it would select community members for the Screening Committee: "community members would submit letters of interest, upon receipt of those letters, "[the] board [would] review [the] list and discuss qualifications, and address inadequacies in terms of representation on the committee; then, following conversation, each board member selects a name, puts into a hat and" a student would select the names. (Pl. Ex. 19, ¶ 4, p. 3).

On December 13, 2011, the school district's Interim Superintendent, Leon Levesque, sent an email to board members "to design a process for the screening of community representatives." (Pl. Ex. 20.) He indicated that he would "place [the community members' letters of interest] in a three ring binder for Board Member review," that Board members should review the letters at his office on December 19, 2011, and "write the name of a selected individual [on paper], place the name in a sealed envelope, [] return it to either [the administrative assistant or superintendent Levesque]," so that "[t]wo different names [would] be chosen at the December 21st 2011 School Board Meeting." (Id.)

On December 19, 2011, in accordance with Superintendent Levesque's email, six Board members separately reviewed the community members' letters of interest in Levesque's office at different times throughout the day. Five Board members testified at the evidentiary hearing to selecting a name, writing the name on a piece of paper, placing it in its own sealed envelope, and leaving the envelope with the superintendent's assistant. According to their testimony, there was no discussion of the applicants' qualifications with other board members and no record to indicate which board member selected which applicant for inclusion in the final pool.

The Board held a regular meeting on December 21, 2011. At the meeting, the student member of the Board picked at random two of the envelopes submitted by Board members and read the names written on the paper inside. (Pl. Ex. 23, p. 7). The Board voted to approve the appointment of these two individuals to the superintendent search Screening Committee. (Pl. Ex. 23, p. 7). Superintendent Levesque acknowledged at the evidentiary hearing that the minutes of the December 21, 2011 public meeting were not posted on the district website or made available to the public until January 5, 2012, due to various spelling and grammatical errors and the need to have the notes reviewed by the person who ordinarily kept the minutes.

Also on December 21, 2011, the Board voted to enter nonpublic session, citing "RSA 91-A:3 II, 1." (Pl. Ex. 22.) During the nonpublic session, the Board reviewed the status of negotiated agreements, nominated two individuals for the Distinguished Service Award, and discussed procedures for administering the awards, among other topics.

On December 22, 2011, David Taylor 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. (Pl. Ex. 24, p.3; Pl. Ex. 25). The contents of the envelopes were disclosed to Taylor, but the identity of the board member who submitted the specific nomination was not provided because such information was not recorded. (Pl. Ex. 24, pp. 1-2; Pl. Ex. 25, p. 1).

Discussion

Taylor seeks an order (1) enjoining the Board from future violations of the Right-to-Know law and (2) invalidating all actions related to the superintendent search taken in violation of RSA chapter 91-A.[2]

a. Whether a Violation of a Board Policy Violates RSA chapter 91-A

Taylor argues as an initial matter that a violation of a Board policy ought to be treated as a violation of the Right-to-Know law. He relies on RSA 91-A:2, II, which provides that "[i]f the . . . guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such . . . guidelines or rules of order shall take precedence over the requirements of this chapter." RSA 91-A:2, II (2011 supp.). Taylor argues that the Board's policies "take[] precedence over the requirements of [the Right-to-Know law]" because they require broader public notice than RSA chapter 91-A and the words "take precedence over"

[2] Taylor's further request for an *ex parte* order halting the Board's superintendent search process was denied in an order dated January 11, 2012 (Wageling, J.). (document no. 5).

means the school board's policy becomes part of RSA chapter 91-A. Whether RSA 91-A:2, II requires the court to enforce the school board's policy as part of the Right-to-Know law is a matter of statutory construction.

Courts apply the plain and ordinary meaning of statutory language. General Insulation Co. v. Eckman Constr., 159 N.H. 601, 605 (2010). When interpreting a statute, the court views the statute as a whole. Atwood v. Owens, 142 N.H. 396, 398 (1997). Moreover, the court will not "consider what the legislature might have said or add words that the legislature did not include." Appeal of Routhier, 143 N.H. 404, 405-06 (1999).

Taking the plain and ordinary meaning of the statute's language in this case, the court finds that a violation of the Board's policy does not constitute a violation of RSA chapter 91-A. The statute does not say that state law is violated where there is a breach of a broader local open meeting requirement. It simply frees local authorities to provide greater access to public meetings than state law requires and establishes that contrary to the general rule, state law does not set a ceiling on the degree to which meetings must be open to the public. See JTR Colebrook, Inc. v. Town of Colebrook, 149 N.H. 767, 771-72 (2003) (legislature may "authorize[] localities to enact more stringent requirements than those provided under State law.").

b. Whether the Board Violated its Policies[3]

Taylor claims the Board violated policy BE by failing repeatedly to list on the notices the subjects and the actions to be taken at special meetings. The Board replies that the subjects and actions were posted contemporaneously with each notice in a separate document titled "agenda." See Obj., ¶ 4.

To the extent the Board's meetings were "special meetings," the Board did not violate policy BE by posting their subjects by means of an agenda. The policy says plainly that notice of a special meeting shall be given to Board members and the media, and that "[t]he notice or agenda shall indicate the subject(s) of the meeting and the action to be taken." (Pl. Ex. 3, p. 1 [emphasis added]). Under the plain meeting of this language, the Board may utilize either a notice or agenda to alert the public of the subject and actions to be taken at a special meeting. The Board issued agendas for the meetings on October 13, 2011 (Pl. Ex. 7), October 25, 2011 (Obj. Ex. A, p. 2), and December 5, 2011 (Pl. Ex. 17). Where the Board met on November 14 and 30, 2011 without issuing an agenda, the subjects of the meeting were disclosed in the notice. (See Pl. Ex. 12, 14). The postings complied with the policy.

Taylor also contends that the Board breached policy BE by deliberating issues and taking actions that were not included in the notice or agenda. The only instance in

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[3] Even though Taylor captioned his pleading as a complaint under RSA chapter 91-A, Taylor also alleges clearly that the Board violated its policies. Thus, the court finds Taylor's allegations sufficient to allege a violation of the Board's policies. See 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."); Robbins v. Seekamp, 122 N.H. 318, 322 (1982) ("[I]f counsel can understand the dispute and the court can decide the controversy on the merits, the pleadings are adequate.").

which the Board's actions did not comport with a meeting agenda occurred on October 13, 2011. The notice advised generally that there would be a special meeting and workshop (Pl. Ex. 6), while the agenda provided that the meeting would consist of a "[w]ork session with NESDEC (Superintendent Search Firm) [regarding] [1] Superintendent Search Schedule [2] Advertisement [3] Announcement." (Pl. Ex. 7). However, at the meeting, the Board also considered how NESDEC could serve the Board by conducting community forums for building trust. (Pl. Ex. 8, p. 3). The latter item was not listed on the agenda. Thus, even reading the meeting notice and agenda together, the Board violated policy BE in that instance by addressing a subject at a special meeting that was not listed on the agenda. After some discussion, one Board member reminded the others that the "trust issue" was not on the agenda. (Id.) The minutes reflect the meeting was then adjourned. (Id.)

Taylor next claims the Board breached policy BE by identifying certain meetings as "special workshop meetings" or variations thereof. He argues that meetings titled "special workshop meetings" seemingly constitute both workshop meetings and special meetings. Policy BE prohibits formal action at a workshop meeting, but allows it at a special meeting. (Pl Ex. 3, pp. 1, 2). Taylor asserts that if formal action occurred at a "workshop," then the Board violated the policy proscribing such actions at a meeting designated a workshop.

The Board's policies do not provide for a "special workshop meeting." Given the policy's different definitions of "workshop meeting" and "special meeting," such meetings cannot be held simultaneously. Therefore, the Board violated policy BE when

it framed the meetings as "special workshop meetings." To comply with the directive in policy BBAA that "members of the board have authority only when acting as a board legally in session" (Pl. Ex. 2), and with the requirement of policy BE that board meetings "be announced publicly," the meeting notice should specify clearly the type of meeting that will be held. If the Board intends to hold a workshop and a special meeting in that order, the notice should make this clear and the meeting minutes should specify when each meeting commenced and was adjourned. Here, the notices made some reference to "special workshop meetings." The designation is confusing and the Board should be more precise about the meeting or meetings it intends to hold. However, the court finds in this case that the labels were sufficient to suggest procedures governing both workshops and special meetings would apply.

c. Violations of RSA chapter 91-A

1. Superintendent Levesque's Email

Taylor challenges the Board's procedures in selecting community members for the superintendent search Screening Committee. First, Taylor argues that the Board deliberated and decided on the method to select committee members outside of a posted meeting.

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." New Hampshire Attorney General Right to Know Memorandum at 6 (July 15,

2009)(citing RSA 91-A:2) (emphasis added).[4] E-mails "to a quorum of [the Board] discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting. Sequential e-mail communications among members . . . similarly should not be used to circumvent the public meeting requirement." Id. at 7.

The Board argues that its members' actions in response to Levesque's December 13, 2011 email did not constitute a meeting because there was no discussion of the email or communication about their nominations outside of a meeting. However, even if the members did not discuss the email or their nominations, the Board's response to the email was improper. A quorum of the Board received an email from Levesque suggesting a particular action. Its members tacitly approved Levesque's proposal by "act[ing] upon a matter . . . over which the public body has supervision." (Id. at 6). Moreover, the process Levesque suggested differed from the one established by a vote at the December 5, 2011 meeting. Even though the Board decided then to discuss the qualifications of those who submitted letters of interest to serve on the committee, it substituted a process that involved no such review. The Board violated the statute when more than a quorum of its members acted upon Levesque's email.

2. Secret Ballot

Taylor maintains that the Board also acted improperly by making the nominations through a secret ballot. RSA 91-A:2, II provides that "no vote while in open session may be taken by secret ballot." Here, the Board selected community

[4] Available at www.doj.nh.gov/civil/documents/right-to-know.pdf

members for the Screening Committee in two steps. First, board members reduced the pool of potential candidates by voting anonymously for a candidate. From the group thus chosen, the Board drew two names randomly at a public meeting and subsequently voted to appoint to the Screening Committee the persons whose names were drawn. The first step narrowed the applicant pool by secret vote. The subsequent vote taken during the open session served to confirm appointments made from a pool of candidates created by the members' secret vote in violation of RSA 91-A:2, II.

The Board argues that its choices for the final pool of applicants were not made during a meeting, so there was no violation of the statute. However, their coordinated action in reducing the field of applicants through what amounted to a secret vote by each member for the candidate of his or her choice, circumvented the spirit of transparency that animates the Right-to-Know Law. See RSA 91-A:1. The law expressly prohibits actions outside of meetings on matters that should properly be discussed at meetings and also expressly bars secret ballots. By acting privately to finalize the applicant pool, the Board effectively sidestepped the requirement of accountability that the Right-to-Know law is intended to promote.

3. December 21, 2011 Non-Public Session

Taylor contends that the Board violated RSA 91-A when it met in non-public session on December 21, 2011. He raised this issue for the first time in his request for findings of fact and rulings of law. Since it was not presented as part of his petition, the Board had no notice that it needed to defend against the petition on this ground. Accordingly, the court will not consider it as a basis for granting the petition.

Nevertheless, it appears from the exhibits that the Board violated RSA 91-A:3 when it addressed subjects other than those covered by RSA 91-A:3, II (a).

The Board was not permitted to "meet in nonpublic session, except for one of the purposes set out in [RSA 91-A:3] paragraph II." The minutes reflect that the Board went into non-public session to consider matters described in RSA 91-A:3, II (1).[5] This section pertains to matters relating to the hiring, dismissal, promotion or compensation of any public employee, and the minutes reflect this subject was discussed. See Pl. Ex. 22. However, the Board also discussed matters beyond those permitted in non-public session. For example, it considered the nomination of two individuals for a Distinguished Service Award and the logistics of administering the award. This action went beyond the scope of action permitted in a nonpublic session.

4. December 21, 2011 Public Meeting

Taylor argues that the Board's December 21, 2011 public meeting minutes violated RSA chapter 91-A in several ways. Under the statute, the "[m]inutes of all such meetings, including names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection not more than 5 business days after the meeting." RSA 91-A:2. The Board violated RSA 91-A:2 by failing to post the public meeting minutes within five business days as required.

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[5] The motion to go into nonpublic session referred to the applicable section as RSA 91-A:3, II (1) rather than II (a). Misquoting the section does not rise to the level of a Right-to-Know violation. See Souhegan Nail, Cotton & Woolen Factory v. McConihe, 7 N.H. 309 (1834) ("mistakes, in matters of form, should not vitiate the proceedings").

Taylor argues further that "[b]y not recording names in motions, these minutes did not completely and accurately record the final actions of the Board in violation of RSA 91-A:2, II." (Pl. Findings of Law ¶ 10.) However, Taylor points to no requirement that the Board record the names of each member and how the member voted on each motion. Under the plain language of the statute, the only matter that must be recorded for each motion is "the subject matter discussed and final decisions." RSA 91-A:2, II (2011 supp.).

d. Remedies

Taylor seeks an injunction of future violations of RSA chapter 91-A and invalidation of all actions related to the superintendent search taken in violation of RSA chapter 91-A.

1. Injunctive Relief

Consistent with the analysis above, the court enjoins the Board from committing future violations of RSA chapter 91-A. The Board is enjoined specifically from voting by secret ballot where prohibited by law and communicating by email so as to circumvent the statute's public meeting requirement.

In determining that injunctive relief is appropriate, the court has weighed heavily the fact that this is not the first time the Board has run afoul of open meeting requirements. In an order issued in January 2012, a judge of this court found the Board violated the Right-to-Know law, but declined to enjoin the board from doing so in the future based on the Board's representation at a hearing in November 2011 that it would abide by the law prospectively. See Order, Taylor v. Oyster River Cooperative School

Board, et al., No. 11-cv-349 (Straff. Sup. Ct., Jan. 17, 2012) at 20–21 (Wageling, J.). In the present case, there are violations by the Board in December 2011 that post-date its assurances to the court.

Also militating in favor of the injunction is the fact that the Board's process for selecting community members to the screening committee was not its only violation of RSA chapter 91-A. It also failed to publish minutes of a public meeting within the time required by law. The court has not enjoined this conduct, as it finds the failure to timely publish the minutes was not intentional, but due to a misjudgment of what constituted grounds for delaying the minutes' publication. As noted earlier, a third violation relating to conduct during a nonpublic session was not presented in the petition as a ground for relief.

2. Invalidation of Board Actions

The court declines to invalidate Board actions taken in violation of the Right-to-Know law. RSA 91-A:8, II. In order to nullify the Board's decisions, the court must find "the circumstances justify such invalidation." Id. The unlawful conduct in this case that would most affect the selection of a superintendent of schools was that pertaining to the appointment of two community members to the search committee. The decision on whom to appoint was not insignificant, but the violations did not occur as part of the direct selection of a superintendent. Instead, the wrongful conduct involved assigning two individuals to a temporary committee of 13 persons that was intended to aid the Board in the selection process. These circumstances distinguish this case from one in

which actions taken in violation of the Right-to-Know law were sufficient to warrant their invalidation.

In Lambert v. Belknap County Convention, 157 N.H. 375 (2008), the state Supreme Court found it appropriate to invalidate action taken by the Belknap County Convention in violation of the Right-to-Know law. In that case, the Convention breached the law by appointing a sheriff through a secret ballot. The Court emphasized that the reasons for requiring a transparent voting process are especially compelling when a public body appoints an individual to fill a position held normally by an elected official. Id. at 381-82. Here, the superintendent is appointed by the board after considering information from the selection committee and other sources.

The court has also considered the nature of the Board's violations of state and local open meeting requirements against the public interest in selecting a superintendent within the next few weeks. The court heard testimony that the district is in competition with other school districts also seeking a superintendent and that the quality or availability of persons to fill the position will diminish if the Board is required to begin the selection process anew. The difficulty in restarting the selection process would not be sufficient by itself to save the Board from an order invalidating its actions, but it is a factor in the court's analysis.

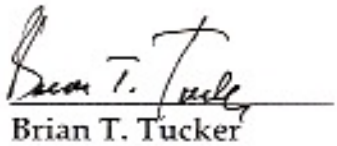
e. Taylor's Requests for Findings of Fact and Rulings of Law

Taylor filed requests for findings of fact and rulings of law. As the order describes the findings and rulings on which the decision is based, the court has not

addressed his request for separate findings and rulings. See Geiss v. Barassa, 140 N.H. 629, 632–33 (1996).

SO ORDERED.

Date: February 22, 2012



Brian T. Tucker
Presiding Justice