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July 26, 2012

OML 2012 – 66

Robert G. Fraser, Esq.
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99 High Street
Boston, MA 02110

RE: Open Meeting Law Complaint

Dear Attorney Fraser:

This office received two complaints alleging that the Lexington School Committee (the "Committee") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. In the first complaint, dated August 23, 2011, Eric Eid-Reiner alleges the following: 1) the Committee improperly voted to extend the Lexington Public Schools Superintendent's contract in executive session; and 2) the Committee discussed the Superintendent's professional competence in executive session.[1] This complaint was originally filed with the Committee on or about June 10, 2011, and the Committee responded by letter dated June 27, 2011. The second complaint was filed by Dawn McKenna, dated September 2, 2011, and echoes the complaint filed by Mr. Eid-Reiner. This complaint additionally alleges: 1) the Committee failed to give proper notice of the topics to be discussed at multiple meetings; 2) the Committee failed to state that holding an open meeting would have a detrimental effect on its bargaining position before entering executive session; and 3) the Committee failed to provide full access to its June 7, 2011 open session meeting. This complaint was originally filed with the Committee on or about June 15, 2011, and the Committee responded by letter dated June 27, 2011.

In evaluating this matter, we reviewed the June 10, 2011 and June 15, 2011 complaints filed with the Committee; the Committee's June 27, 2011 responses; and the August 23, 2011 and September 2, 2011 complaints filed with our office. We reviewed the open and executive session minutes for the Committee's April 26, 2011 meeting, as well as the open and executive session minutes for the May 16, 2011; May 25, 2011; June 1, 2011; June 7, 2011; and June 15, 2011 meetings. We reviewed the agenda and the video recording of the Committee's June 7, 2011 meeting. We reviewed email communications between Committee members, as well as email communications between the Committee Chair and members of the public. Finally, we

[1] The complainant withdrew additional allegations following the Committee's June 27, 2011 response.

reviewed letters from community members supporting the complaints filed by Mr. Eid-Reiner and Ms. McKenna.

Following our review, we find that the Committee violated the Open Meeting Law by voting to extend the Superintendent's contract in executive session at its June 1, 2011 meeting. Furthermore, we find that the Committee failed to state in its meeting notices the name of the person whose contract it planned to discuss. We do not find that the Committee inappropriately discussed professional competence in executive session, nor do we find that the Committee was required to state that an open meeting would have a detrimental effect on their bargaining position before entering executive session. We also find that the Committee provided adequate access to its June 7, 2011 open session meeting.

FACTS

Based upon our review of the materials listed above, the facts are as follows.

In April 2011, following an annual evaluation, the Superintendent of Schools, Dr. Paul Ash, approached the Chair of the Committee regarding a possible amendment to his employment contract. During an open session meeting on April 26, 2011, the Committee voted "to go into executive session for the purpose of contract negotiations with non-union personnel, to return to the public session only for the purpose of adjourning." The executive session minutes state that "[m]embers of the Committee discussed a request for a contract extension from Superintendent, Dr. Paul Ash. Terms proposed by Dr. Ash called for 2 additional years at 3% per year plus the addition of 10 vacation days. Committee members discussed the Superintendent's proposal and agreed to reconvene another Executive Session on May 16, 2011 to develop a counter-proposal. No action was taken."[2]

Two additional meetings took place, on May 16, 2011 and May 25, 2011. The minutes reflect that during the May 16, 2011 executive session, the "[m]embers of the Committee met to consider the Superintendent's proposal to extend his contract to June 30, 2015. Committee members authorized the Chair to offer a counter-proposal to Dr. Ash." Similarly, during the May 25, 2011 executive meeting, the Committee "discussed their reaction to the Superintendent's rationale to his positions as summarized by the Chair and formulated a second proposal that involved salary adjustment and consulting and vacation days."

On May 26, 2011, the Committee filed a notice with the Lexington Town Clerk that the Committee planned to enter into executive session on June 1, 2011 for the purpose of "contract negotiations with nonunion personnel." The executive session minutes from the June 1, 2011 meeting state that the "members of the committee continued a discussion regarding the Superintendent's contract extension." At the conclusion of the executive session, a motion was made "to offer to extend the Superintendent's contract to June 30, 2015 at an annual salary

[2] In both June 27, 2011 responses, the Chair indicates that negotiations concluded on June 1, 2011, when the Committee voted "to offer to extend the Superintendent's contract to June 30, 2015 at an annual salary increase of 3% plus 10 additional vacation days, striking Sections 6-1.1 through 6-1.3 and replacing the language in Section 2-2.1." The response letters also state that "[t]he minutes of the open and executive sessions held on April 26th (Ex. 1 & 2) May 16th (Ex. 3 & 4), May 25th (Ex. 5 & 6) and June 1st, 2011 (Ex. 7 & 8) have all been approved and released by the school Committee."

increase of 3% plus 10 additional vacation days." The members of the Committee unanimously voted to grant the motion. Subsequently, the Chair extended the Committee's offer to the Superintendent. The Superintendent accepted the terms of the proposed contract extension.

Acting under the belief that the Committee had merely voted to extend an offer and not finalized an agreement during the June 1, 2011 executive session, on June 5, 2011, Committee member Jessie Steigerwald ("Steigerwald") asked the Chair by email to delay the vote for the Superintendent's contract. In her email response, the Chair stated that "the executive session was legal and binding. Our vote last Wednesday counts and the contract is valid. As such, we have a School Committee contract agreement with Paul and he intends to sign it in public this Tuesday."

Notice for the June 7, 2011 Committee Meeting

Four notices, including agendas, were posted at the Lexington Town Clerk's office and on the Committee's website in advance of the Committee's June 7, 2011 meeting. The first notice, received by the Clerk at 9:35 a.m. on June 3, 2011, did not list a topic related to the Superintendent's contract extension. On the same day, at or around 3:36 p.m., the Clerk posted a second notice that listed "Superintendent's employment contract" as topic number 8 under "Action Items." On June 6, 2011, at or around 5:43 p.m., a third agenda was posted that listed "Vote to Approve Superintendent's Employment Contract (20 minutes)" as item number 1 under "Action Items." Finally, on June 7, 2011, at or around 1:19 p.m., the agenda was posted a fourth time. The topic "Vote to Approve Superintendent's Employment Contract (20 minutes)" was removed under "Action Items" and "Superintendent's Employment Contract (60 minutes)" was added under "Discussion Items."

The Committee's June 7, 2011 Open Meeting

On June 7, 2011, the Committee met in open session to discuss, among other items, the Superintendent's employment contract. The public quickly filled the meeting room. The Chair indicated that the meeting room was the largest space available at that time, and suggested that the meeting be suspended and moved to a larger location once an alternate space became available. However, the meeting progressed and no such action was taken. To accommodate those members of the public who were in attendance but outside the meeting room, the Committee provided access to live video and sound feed, and equal access to the microphone during all public comment periods. The complaint alleges, however, that many people who were standing in the hallway could not see or hear the discussion or the TV monitors.

At the beginning of the discussion the Chair stated:

> [S]o on June 1st at the Executive Session, we reached a decision about the Superintendent's contract, and we, a motion was made…that we would extend Dr. Ash a contract for…two additional years…we took a voice roll-call vote…and with that came a legally binding extension of the contract for two more years. So it has already happened and we have already extended the contract under those terms.

Throughout the meeting, members of the public voiced their opinions and concerns regarding the Superintendent's contract extension. The Chair repeatedly confirmed that the vote

to extend the contract had been taken during the June 1, 2011 executive session and that it was legally binding. During the meeting, Steigerwald stated that "[m]y understanding was that we voted the terms of the contract in private and that…we were going to ratify it in public…none of us intended to do something that was…not transparent…so I'm asking our lawyer to answer for the public…because I didn't quite have the same understanding when I walked in here. I thought if not tonight, next week we would potentially do something in public." Counsel for the Committee responded by stating:

> What happened with the vote in the executive session was in my opinion the creation of a defacto contract…as I understand it a vote to accept the last position of the Superintendent which was on the table after there had been several interchanges back and forth…If you are asking me if it is appropriate for the school committee to take another vote publicly I think that could be done in two ways…it could be done as a vote with regard to the terms of the contract or because I think that there is in fact a legal contract in place it can be a vote to authorize the Chair person to sign on the behalf of the committee, in any event the result is the same. .. If you feel…it would be a more transparent process to vote in public at this point you're certainly free to do that as a committee but do it with the understanding that you are in effect formalizing or ceremonially approving a contract that has already been approved by the committee.

Subsequently, the Committee unanimously voted in open session to "formalize the contract in public and authorize the Chair to sign" for Committee members' convenience.

DISCUSSION

I. The Committee Failed to Post Meeting Notices that were Sufficiently Specific to Reasonably Inform the Public of the Issues to be Discussed at the Meeting

The Open Meeting Law states, in relevant part, that "[e]xcept in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays, and legal holidays…Notice shall be printed in a legible, easily understandable format and shall contain the date, time, place of such meeting and a listing of topics that the chair reasonable anticipates will be discussing at the meeting." G.L. c. 30A, § 20(b). Public bodies are required to list topics in a meeting notice with "sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting." 940 CMR 29.03. We generally consider a topic to include sufficient specificity when a reasonable member of the public could read the topic and understand the anticipated nature of the public body's discussion. See OML 2012-10.[3] Furthermore, for an executive session notice, the chair must "state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called." G.L. c. 30A, § 21(b)(3); District Attorney for Northern Dist. v. School Committee of Wayland, 455 Mass. 561, 567 (Mass. 2009) ("[a] precise statement of the reason for

[3] The Attorney General's Open Meeting Law determinations are available at the Attorney General's website, www.mass.gov/ago/openmeeting.

convening in executive session is necessary under the open meeting law because that is the only notification given to the public that the school committee would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper"). Public bodies are encouraged to update their meeting notices whenever they anticipate discussing an open or executive session topic that arises after posting, but before the meeting convenes.[4]

A. Notice for the May 25, 2011 and June 1, 2011 Executive Sessions

The Committee's notices for the May 25, 2011 and June 1, 2011 meetings were not sufficiently specific to advise the public of the issues the Committee planned to discuss during its executive sessions. Both notices indicated that there would be an executive session "for the purpose of discussing contract negotiations with non-union personnel," but they did not specify that the contract being discussed was that of the Superintendent. These meeting notices therefore fell short of the requirement that the Committee state "all subjects that may be revealed without compromising the purpose for which the executive session" will be called. See G.L. c. 30A, § 21(b)(3). The notices should have specifically stated that the Committee planned to enter executive session to conduct contract negotiations with Dr. Paul Ash. See OML 2011-15; OML 2011-28. Providing the public with this additional information would not have been detrimental to the Committee's negotiation process. It would, however, have put an interested member of the public on notice that there was a specified individual whose contract was being negotiated.

B. Notice for the Committee's June 7, 2011 Open Meeting

Four notices, including agendas, were posted in advance of the June 7, 2011 meeting. Although the first notice, posted June 3, 2011, was posted 48 hours before the June 7, 2011 meeting, it did not include any item related to the Superintendent's contract extension. A revised agenda was posted later that day indicating that the Superintendent's contract would be an "action item." A second revision was posted on June 6, 2011 indicating that the Committee would vote to approve the Superintendent's contract. Finally, on June 7, 2011, at or around 1:19 p.m., a third revision of the agenda was posted listing "Superintendent's Employment Contract" as a "discussion item." Although we commend the Committee for attempting to provide the public with additional notice through revised agendas, the meeting notice ultimately did not provide the public with sufficient detail to understand that the Committee would be discussing a contract it had already reached in executive session and voting to ratify the contract in open session on June 7, 2011. We acknowledge that there was some disagreement amongst the Committee's members about what action the Committee had already taken and what, if any action, it needed to take at this meeting. The Chair's email to Committee member Steigerwald made clear that she believed that the contract had been finalized in executive session, however, and that the execution of the document in public during this meeting was anticipated. The notice should therefore have stated that the Committee would be voting to ratify the Superintendent's contract, the terms of which were agreed to during the Committee's June 1, 2011 executive session. This is what the Chair reasonably anticipated 48 hours before the June 7, 2011 meeting, when an item was added to the notice that merely stated "Superintendent's employment contract."

[4] See Attorney General's Open Meeting Law Guide, at 6, available at www.mass.gov/ago/openmeeting.

II. The Committee was not Required to Demonstrate a Detrimental Effect Before Entering into Executive Session

In her complaint, Ms. McKenna argues that the Committee violated the Open Meeting Law by failing to establish that holding a meeting in open session would have a detrimental effect on its bargaining position. A public body may enter into executive session for any of ten purposes. G.L. c. 30A, § 21(a). Purpose 2 allows a public body to enter into executive session to "conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel." G.L. c. 30A, § 21(a)(2). Purpose 3 provides that a public body may enter into executive session "to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and so the Chair declares." G.L. c. 30A, § 21(a)(3). The minutes reflect that the Committee entered into executive session "for the purpose of contract negotiations with non-union personnel." Because the Committee's discussion of the Superintendent's employment contract was held in executive session pursuant to Purpose 2, the chair was not required to declare that "an open meeting may have a detrimental effect on the bargaining or litigating position of the public body" before entering into executive session.

III. The Final Vote to Approve the Contract Extension Should Not Have Been Taken in Executive Session

The Open Meeting Law was enacted to "eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." See Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). As mentioned above, a public body may enter into executive session to "conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel." G.L. c. 30A, § 21(a)(2). However, the law does not authorize a public body to approve a contract in executive session. See OML 2011-28 (finding that a school committee violated the Open Meeting Law by voting to approve a superintendent's contract addendum in executive session). Although a public body may reach the terms of a contract in executive session, a contract does not become effective until it is publicly ratified. See id. The Committee therefore violated the Open Meeting law by voting to extend the Superintendent's employment contract in executive session. See OML 2011-28. Although negotiation of the Superintendent's contract was an appropriate subject for executive session, once the negotiations concluded, the Committee was obligated to return to open session to vote on the contract extension.

If a vote is improperly taken in executive session, a public body may cure the violation of the Open Meeting Law. To do so, the public body must take an independent, deliberative action, and not merely engage in a ceremonial acceptance or perfunctory ratification of a secret decision. See Pearson v. Board of Selectmen of Longmeadow, 49 Mass.App.Ct. 119, 125 (2000) (citing Tolar v. School Bd. of Liberty County, 398 So.2d 427, 429 (Fla. 1981)). Here, the Committee provided an in-depth discussion of the contract negotiation process and an opportunity for public comment during the June 7, 2011 meeting. However, the Committee indicated at the outset of the discussion that the Committee had already formed a legally binding contract as of June 1, 2011. Counsel for the Committee reaffirmed this point by stating "to vote in public at this point ... [would be] in effect formalizing or ceremonially approving a contract

that has already been approved by the Committee." Although the Committee took steps to ratify the contract in open session, they did so with the presumption that a legally binding contract was already in effect. The Committee's vote to ratify the contract extension during the June 7, 2011 open session was merely a perfunctory ratification, and therefore did not effectively cure the violation of the Open Meeting Law. Despite the violation, however, we do not believe nullification is appropriate here. At the time of the violation, our office had only just recently issued a determination interpreting the Open Meeting Law to require that non-union personnel contracts be voted upon or ratified in open session. See OML 2011-12 (May 4, 2011). We do not believe the Committee had been made aware of our determination at the time of the violation.

IV. There is No Evidence that the Committee Discussed the Superintendent's Professional Competence in Executive Session

The complainant alleges that the Committee discussed the Superintendent's professional competence in executive session. One purpose for executive session in the Open Meeting Law is to "to discuss the reputation, character, physical condition or mental health, rather than professional competence of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual." G.L. c. 30A, § 21(a)(1). Discussions about an employee's performance evaluation must therefore be held in open session.[5] Where professional competence is not discussed in the context of an evaluation, but rather discussed as a factor to be considered in a contract negotiation, it is appropriate for executive session, provided that the public body has first discussed professional competence openly though an evaluation process. See Wayland, 444 Mass. at 568 ("While professional competence must first be discussed in an open session, how that evaluation will factor into a contract or salary negotiation strategy may be suitable discussion for an executive session."); OML 2012-10; OML 2011-44. However, there is no evidence in the minutes that the Committee discussed the Superintendent's professional competence even in this context. We find, therefore, that although the vote to extend the Superintendent's contract during executive session was improper, the discussions leading up to the vote were appropriate for executive session. See OML 2011-15.

V. The Public was Not Denied Access During the June 7, 2011 Committee Meeting

The Open Meeting Law requires that "except as provided in section 21, all meetings of a public body shall be open to the public." See G.L. c. 30A, § 20(a). Implicit in this requirement is that the meeting be held in a facility that provides the public with access to the deliberations of the public body. Access must include the opportunity to be physically present as well as to see and hear what is being said by, to, and among, the members of the public body. Furthermore, public bodies must make reasonable accommodations for such occurrences as overflow crowds, and ensure that meetings are held at times and in places that do not discourage public attendance.

During the June 7, 2011 open session, the Chair acknowledged that the crowd in attendance exceeded the meeting room's capacity. The Chair indicated that the meeting room was the largest space available at that time, and suggested that the meeting be suspended and

[5] See Attorney General's Open Meeting Law Guide, at 7, available at www.mass.gov/ago/openmeeting.

moved to a larger location once an alternative space became available. However, as the meeting progressed, no such action was taken. Ms. McKenna's complaint alleges that many people who were standing in the hallway could not see or hear the discussion or the TV monitors that were set up to accommodate the overflow of attendees. Furthermore, the complaint alleges that the Committee should have foreseen that the room would be too small to handle the anticipated crowd considering the public's response to the Superintendent's contract extension. While it appears that the physical meeting room could not fully accommodate the overflow of attendees, we find that the Committee made reasonable efforts to ensure that all members of the public had access to the meeting, and do not believe the Committee violated the Open Meeting Law in this regard. However, given the concerns raised by the complainant that the video monitors in the hallway were not visible to all members of the public in attendance, we recommend in the future that the Committee postpone and relocate any meeting where a significant overflow crowd is anticipated.

CONCLUSION

For the reasons stated above we find that the Committee violated the Open Meeting Law by failing to state in its meeting notices the name of the person whose contract it planned to discuss. Furthermore, we find that the Committee improperly voted to extend the Superintendent's contract in executive session during its June 1, 2011 meeting. We order immediate and future compliance with the Open Meeting Law. Because the Committee did not have the benefit of the guidance in our decision in OML 2011-28 at the time of this meeting, we do not order nullification of the action taken by the Committee in approving the Superintendent's contract, however we caution the Committee that future similar violations may result in nullification of any action taken.

We now consider the complaints addressed by this determination to be resolved. Please feel free to contact me if you have any questions or believe any facts in this letter to be inaccurate.

Sincerely,

Jonathan Sclarsic
Assistant Attorney General
Division of Open Government

cc: Eric Eid-Reiner
Dawn McKenna

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by this order may obtain judicial review through an action filed in Superior Court pursuant to G.L. c. 30A, § 23(d). The complaint must be filed in Superior Court within twenty-one days of receipt of this order.