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July 25, 2011

OML 2011 - 28

Michael C. Loughran
Collins, Loughran & Peloquin, P.C.
320 Norwood Park South
Norwood, MA 02062

RE: Open Meeting Law Complaint/Foxborough School Committee

Dear Mr. Loughran,

This office received a complaint from Mr. Andres Navedo, dated December 26, 2010, alleging that the Foxborough School Committee (the "Committee") violated the Open Meeting Law, G.L. c. 39, § 23B, and G.L. c. 30A, §§ 18-25. Specifically, the complaint alleges that the Committee, "met in executive session for the purpose of discussion [of] union and non-union negotiating strategies" on June 21, 2010 and that, "the contract of the School Superintendent was approved during that meeting and that the School Superintendent was present throughout the meeting." The complaint further alleges that the Committee waited four months, until October 18, 2010, to release the minutes of the June 21, 2010 executive session, although the purpose for confidentiality expired immediately after the June 21, 2010 meeting. The complaint was originally filed with the Committee on or about November 10, 2010. The Committee responded to the complaint in a letter dated December 1, 2010.

We find that the Committee violated the Open Meeting Law by failing to follow proper procedure in entering executive session at its June 21, 2010 meeting. The Committee further violated the Open Meeting Law by agreeing to a contract addendum during that executive session and failing to subsequently ratify that agreement in open session, then failing to publicly release the contract addendum. In reaching this determination, we reviewed the November 10, 2010 and December 26, 2010 complaints, as well as the Committee's December 1, 2010 response. We reviewed the open and executive session minutes for the June 21, 2010 and October 18, 2010 Committee meetings. We reviewed the meeting agenda for the June 21, 2010 meeting. We reviewed the contract between the Committee and Superintendent Christopher Martes dated June 29, 2009 and the contract addendum dated June 22, 2010. We reviewed a

partial transcript of the October 18, 2010 Committee meeting provided by the complainant. We reviewed a number of newspaper articles, published between October 14, 2010 and December 16, 2010, which were provided by the complainant and concern the issues underlying this complaint. Finally, we conducted an interview with Katie Adair, who was the Committee's chair at the time the complaint was filed, by phone on February 23, 2011 regarding the issues alleged in the complaint.

We acknowledge that at the time of the alleged violation on June 21, 2010 neither the revised Open Meeting Law nor the regulations promulgated in accordance with the revised Open Meeting Law, 940 CMR 29.00, were in effect. The revised Open Meeting Law, G.L. c. 30A, §§18-25, was passed as part of the Ethics Reform Act of 2009. The revisions took effect on July 1, 2010. Therefore, because the alleged violation occurred before the new version of the law took effect, we apply the version of the Open Meeting Law in effect on June 21, 2010—G.L. c. 39, § 23B.

However, we will apply the Attorney General's regulations to the complaint process, as the complaint was first filed with the public body on or about November 10, 2010—after the revised Open Meeting Law and regulations took effect. The Attorney General's regulations require that the complaint, "be filed within 30 days of the alleged violation of [the Open Meeting Law] or if the alleged violation of [the Open Meeting Law] could not reasonably have been known at the time it occurred, then within 30 days of the date it should reasonably have been discovered." 940 CMR 29.05(3). Here, because the violation could not have been reasonably discovered until October 18, 2010, when the Committee released the executive session minutes of the June 21, 2010 meeting, we find that the complaint was timely filed with the Committee on November 10, 2010, within 30 days of discovery of the violation.

FACTS

On June 29, 2009, Foxborough public schools Superintendent Christopher Martes signed a three-year employment contract with the Foxborough School Committee. This contract expires on June 30, 2012. Sometime in June 2010, Superintendent Martes reached out to Committee Chair Katie Adair and explained that he would become eligible to access his retirement pension on his birthday, August 13, 2010. According to Committee Chair Adair, Superintendent Martes asked to speak with the School Committee about amending his employment contract so he could simultaneously access his pension and continue to serve as Superintendent of the Foxborough public school system. According to an article in the *Foxboro Reporter*, Martes notified the Committee at its June 7, 2010 meeting that he would become eligible to retire on August 13, 2010, and that he would come back to the Committee with a financial proposal aimed at allowing him to keep working while drawing his pension. Frank Mortimer, *School Chairman Signed Martes Retirement Papers June 22*, FOXBORO REPORTER, November 18, 2010. Presumably this conversation occurred in executive session as members of the public were not aware at that time that Superintendent Martes would be seeking to access his pension. The executive session minutes of the June 7, 2010 meeting state only that "Discussion took place regarding technology support of the town by school personnel and non-union negotiations."

Before its June 21, 2010 meeting, the Committee listed a topic on its meeting agenda reading "Executive Session – Discussion of Union and Non-union Negotiating Strategies."

According to the open session minutes of the June 21, 2010 meeting, the Committee entered executive session, "for the purpose of discussing union and non-union negotiating strategies and not return to open session." The executive session minutes, which were approved and released publicly by the Committee at its October 18, 2010 meeting, reveal only that "[d]iscussion took place regarding union and non-union contract negotiations." The minutes then state that the Committee voted to "[a]pprove the addendum to the Superintendent of Schools' contract for FY 11 as presented." Attached to the minutes was a document entitled "Addendum to Superintendent's Employment Contract." According to Committee Chair Adair, the Committee met with Superintendent Martes in the executive session and discussed how to keep the Superintendent in his role. The Committee discussed and approved the addendum to his contract, which made adjustments to Superintendent Martes' compensation through June 2011. The original contract set the Superintendent's salary at \$175,049 for July 1, 2009 through June 30, 2010. The addendum made the following changes to the Superintendent's compensation:

\$21,544, effective July 1, 2010 through August 13, 2010
\$45,000, effective August 14, 2010 through December 31, 2010
\$45,000, effective January 1, 2011 through June 30, 2011

According to Committee Chair Adair, the Superintendent told the Committee he would come back to the Committee at a future meeting to discuss amending his compensation for fiscal year 2012. Additionally, the addendum granted the Superintendent up to four consulting days a month for "engaging in outside activities." This increased the number of consulting days to 48 from the original the contract, which granted the Superintendent up to 15 consulting days annually. The Committee made no public announcement or disclosure of the agreement following the meeting.

Committee Chair Adair and Superintendent Martes signed the Addendum to Superintendent Martes' contract, and dated the document June 22, 2010. According to Committee Chair Adair, she also signed Superintendent Martes' application for retirement the very same day. See also, Frank Mortimer, *School Chairman Signed Martes Retirement Papers June 22*, FOXBORO REPORTER, November 18, 2010. On or about August 13, 2010, Superintendent Martes became eligible for retirement and began drawing from his pension.

On or about October 12, 2010, a reporter for the Foxboro Reporter, while researching a story on salaries of local public officials, discovered that Superintendent Martes met with the School Committee in executive session to amend his employment contract. The reporter contacted Martes and told him that a story would run on October 14, 2010 regarding the amended agreement. Frank Mortimer, *Martes Deal a Secret*, FOXBORO REPORTER, October 14, 2010. This prompted Superintendent Martes to send an email to staff on October 13, 2010 notifying them of his retirement. Id. At this time, Superintendent Martes called Committee Chair Adair to inform her that he would retire. According to Committee Chair Adair, this was the first time she learned that Martes would retire at the end of the 2010/2011 academic year. Her understanding following the June 21, 2010 Committee meeting was that Martes would be returning to the Committee to discuss amending his compensation so that he could continue to serve as School Superintendent while drawing from his pension through the 2011/2012 academic year.

On October 14, 2010, an article appeared in the Foxboro Reporter highlighting the addendum to the contract, along with an editorial condemning the Committee for amending the contract in executive session. Frank Mortimer, *Martes Deal a Secret*, FOXBORO REPORTER, October 14, 2010; *Editorial, Oct. 14: A Shroud of Secrecy*, FOXBORO REPORTER, October 14, 2010.

On October 18, 2010, the Committee met in executive session and voted to release the minutes from the June 21, 2010 executive session, and the addendum to Superintendent Martes' employment contract. At that meeting, the Committee members discussed in open session the negative press coverage and noted their disagreement with the Reporter's implication that the Committee acted secretly and with intent to conceal the contract addendum. According to the transcript of the Committee's October 18, 2010 open session meeting, Committee Chair Adair stated that, "at no time was there a secret deal between the School Committee and Dr. Martes as has been reported. Due to the open meeting law, executive session minutes cannot be discussed until they are approved and released by the school committee." The Committee members expressed that their intention was to retain Superintendent Martes, and that they did not believe that he would be retiring before the completion of his contract.

DISCUSSION

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). A public body may enter executive session for one of ten purposes defined in the Open Meeting Law. G.L. c. 39, § 23B (now codified at G.L. c. 30A, § 21). One purpose for executive session under the statute is to "conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel." Id. When entering executive session, the chair of a public body must "cite the purpose for an executive session." Id. The chair must include in that citation as much information as the public body may reveal without compromising the purpose for entering executive session. See District Attorney for Northern Dist. v. School Committee of Wayland, 455 Mass. 561, 567 (Mass. 2009) ("[a] precise statement of the reason for 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"). Although the law allows a public body to conduct contract negotiations with non-union personnel in executive session, it does not authorize a public body to approve a contract in executive session. A public body may reach an agreement on the terms of a contract in executive session, but then must ratify any terms agreed to immediately upon returning to open session. Additionally, the "records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer." G.L. c. 39, § 23B.

Applying this analysis, the Committee violated the Open Meeting Law in two instances: first, the Committee Chair failed to state the proper purpose for entering executive session; and second, the Chair's statement in entering executive session was not sufficiently specific because it did not identify with whom the Committee would be negotiating. The Committee failed to inform the public of the nature of the executive session prior to entering it at its June 21, 2010

meeting. The chair announced that the Committee would enter executive session, "for the purpose of discussing union and non-union negotiating strategies and not return to open session." This statement did not meet the requirements of the Open Meeting Law. The chair failed to state that the Committee would be meeting to conduct contract negotiations with specific non-union personnel, as opposed to discussing general non-union negotiating strategies. Additionally, the statement failed to provide enough information so that a member of the public would understand the specific nature of the executive session. The Committee should have publicly stated that the executive session was being held for the purpose of conducting contract negotiations with Superintendent Martes.

The Committee also violated the Open Meeting Law by failing to vote on the contract addendum in open session. Had the Committee properly stated the purpose for entering executive session, it would have been appropriate to enter executive session to meet with Superintendent Martes to conduct contract negotiations. However, once the contract negotiations were complete, and the two parties had agreed to terms, the Committee should then have reconvened in open session and voted to approve the contract addendum, rather than taking such a vote in executive session. The Committee could also have waited until the agreement was reduced to writing, and approved the written document at a subsequent open session before the addendum was signed by the chair. However, instead of following either of these approaches, the Committee proceeded by agreeing to a contract in a closed session and then withheld it from the public for four months.

It is also important to note that, once the Committee voted to approve the addendum, publication of the minutes and records of the session would no longer "defeat the lawful purposes of the executive session," and therefore they should have been immediately released. G.L. c. 39, § 23B. On July 1, 2010, the revised Open Meeting Law, G.L. c. 30A, §§ 18-25, took effect. Therefore, as of July 1, 2010, the Committee was obligated by law to periodically review the executive session minutes to determine whether continued non-disclosure was warranted. G.L. c. 30A, § 22(g)(1). The Committee did not conduct a review until October 18, 2010. The Committee had no justification for withholding the minutes of the June 21, 2010 executive session, or the addendum to the Superintendent's contract, from the public for four months. The Committee met an additional five times between June 21, 2010 and October 18, 2010, and could have entered executive session to review and release the minutes at one of these meetings.

At its October 18, 2010 meeting, members of the Committee cited the Open Meeting Law as justification for withholding disclosure of the Committee's agreement to amend the Superintendent's contract. While Committee Chair Adair was correct in stating that "executive session minutes cannot be discussed until they are approved and released by the school committee," the Committee was obligated to approve and release the minutes and related documents as soon as the purpose for having entered executive session no longer warranted non-disclosure. The Open Meeting Law allows a public body to enter executive session to conduct certain types of business in closed session, but cannot be used as a justification for continued non-disclosure once the purpose for executive session has expired. At the June 21, 2010 Committee meeting, the apparent purpose for the executive session was to negotiate a contract for non-union personnel, and that purpose for executive session expired as soon as the contract amendment was agreed upon.

CONCLUSION

We find that the Committee violated the Open Meeting Law by failing to cite a lawful purpose for entering executive session at its June 21, 2010 meeting, by failing to ratify in public session a contract agreement made during executive session between the Committee and the Superintendent of Schools, and by failing to publicly disclose that document for four months after the meeting. Although we decline to nullify the actions of the Committee taken at its June 21, 2010 executive session, as requested by the complainant, we hereby order immediate and future compliance by the Committee with the Open Meeting Law, and caution the Committee that a determination by our office of similar violations in the future may be considered evidence of intent to violate the Open Meeting Law. We also order the Committee to create and release accurate minutes of the June 21, 2010 executive session, which should include a summary of the discussion. Finally, we order the Committee to attend a training on the Open Meeting Law, G.L. c. 30A, §§ 18-25, within 90 days of receipt of this letter, to be conducted by an attorney or organization familiar with the requirements of the Open Meeting Law and approved by this Office. We are taking the additional step of ordering training because we are concerned with the appearance of secrecy around this transaction.

We now consider this matter closed. If you have any questions regarding this determination, or believe any of the facts presented to be inaccurate, please do not hesitate to contact me at the number below.

Sincerely,



Jonathan Scarsic
Assistant Attorney General
Division of Open Government
617-963-2045

cc: Bruce Gardner, Chair, Foxborough School Committee
cc: Andres Navedo ✓