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October 31, 2011

OML 2011 - 44

Darren Klein, Esq.
Kopelman and Paige, P.C.
101 Arch St.
Boston, MA 02110

RE: Open Meeting Law Complaint

Dear Attorney Klein:

This office received a complaint from Maria Capobianco and the Stoughton Teachers Association dated December 23, 2010, alleging that the Stoughton School Committee (the "Committee") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Committee on or about October 25, 2010, listing Ms. Capobianco as the sole complainant and alleging violations relating to the Committee's September 28, 2010 meeting.¹ Specifically, the October 25, 2010 complaint alleges that 1) the notice for the September 28, 2010 meeting "did not include 'a listing of topics that the chair reasonably anticipates will be discussed at the meeting'"; 2) the Committee "met in executive session without the chair first stating 'the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called'"; and 3) the Committee "met in executive session to discuss the professional competence of the Superintendent." The Committee responded to the original complaint in a letter dated November 10, 2010. The Complainant subsequently alleged an additional violation in the December 23, 2010 complaint, relating to the specificity of the Committee's notice for its October 12, 2010 meeting.

We reviewed the complaints dated October 25, 2010 and December 23, 2010; the Committee's November 10, 2010 response; the meeting notice, open and executive

¹ The Memorandum attached to the October 25, 2010 complaint stated, "Complainant reserves the right to amend this list of violations as more information becomes available." The Office of the Attorney General will not investigate allegations raised for the first time in a complaint filed with the Office. Potential violations discovered after a complaint has been filed with a public body should be alleged in a subsequent complaint filed with that body. This allows the public body an opportunity to investigate and take appropriate remedial action with regard to the additional allegations.

session minutes, and video recording of the open session portion of the Committee's September 28, 2010 meeting; a January 26, 2011 letter from the Committee to our office in response to a request for documents; the open and executive session minutes from the August 24 and September 14, 2010 meetings; the open session minutes from the October 12 and October 26, 2010 meetings; a February 13, 2011 letter to our office from School Committee Member Dr. Erdem Ural; a March 1, 2011 letter from the Complainant to our office; and a March 2, 2011 letter from the Committee to our office. Finally, we conducted telephone interviews in April 2011 with Committee Chairman Thomas Colburn, Committee Member Dr. Erdem Ural, and Superintendent Dr. Marguerite Rizzi. We appreciate the patience of the parties as we considered this complaint.

Following our review, we find that the Committee violated the Open Meeting Law in three separate instances. The Committee failed to list topics with sufficient specificity in its meeting notice for the September 28, 2010 meeting, as required by G.L. c. 30A, § 20(b) and 940 CMR 29.03(1)(b).² In addition, the Committee failed to follow proper procedures for entering executive session during that meeting, in violation of G.L. c. 30A, § 21(b). Finally, while we find that the Committee acted appropriately when it entered executive session to conduct contract negotiations with the Superintendent, we find that the Committee violated the Open Meeting Law when it voted on the Superintendent's contract extension in executive session rather than during an open session.

FACTS

Based upon our review of the material listed above, the facts are as follows. On June 30, 2010, Dr. Rizzi completed her first year as Superintendent of the Stoughton Public Schools. The term of Dr. Rizzi's employment, according to her original contract, was three years – from July 1, 2009 until June 30, 2012.

On August 24, 2010, the Committee met and the open session minutes reflect that "Superintendent's evaluation" was a topic of discussion under "Old Business." At this time, according to the minutes, Dr. Rizzi had completed "a report for the first one hundred days." The Committee discussed timing for sharing that report. Later in the meeting, "the Committee was polled and a unanimous roll call vote taken to adjourn the open session and convene in Executive Session for the purpose of a negotiations, grievance update and pending litigations."³ During the executive session, the Superintendent's evaluation was discussed further. The minutes reflect that, "[t]he process in which the superintendent will be evaluated was discussed. Deliberation will be in open session and contract discussions will be in executive session."⁴

² Though the violation was not properly alleged in a complaint with the public body, it does appear that the notice for the October 12, 2010 meeting similarly failed to include specific detail.

³ We note that the same reason was cited as the purpose for executive session in each of the five meetings whose minutes we reviewed.

⁴ Though not raised in the complaint, we note that procedures for conducting an evaluation are not an appropriate subject for executive session.

The Committee met again on September 14, 2010. The open session minutes for this meeting also reflect discussion of the Superintendent's evaluation. The "Superintendent's End of Year Report-2010," a self-evaluation prepared by Dr. Rizzi, was discussed in some detail. According to the minutes, Committee Member Sovinee "listed areas [where] she has seen positive growth" and Chairman Colburn noted that "He would like to see continued improvement on providing information to the community." Chairman Colburn then stated he would "collect the evaluations from the School Committee members and review with Dr. Rizzi." Later in the meeting, "the Committee was polled and a unanimous roll call vote taken to adjourn the open session and convene in Executive Session for the purpose of a negotiations, grievance update and pending litigations." During the executive session, "Dr. Rizzi's potential contract length and salary increases" were discussed. The executive session minutes do not provide any detail of the discussion beyond that single sentence, however in his interview with this office, Dr. Ural stated that they discussed Dr. Rizzi's request to raise her salary so it was in line with comparable superintendents, and possibly other Town officials.

Sometime after the September 14, 2010 meeting, but before the Committee's September 28, 2010 meeting, Committee members submitted their individual written evaluations of the Superintendent to Chairman Colburn for compilation into a single document. During that same time period, Dr. Rizzi indicated to Chairman Colburn that she was being courted by at least one other school system, but wanted to stay in Stoughton if she could obtain some assurance of job security. According to Dr. Rizzi, she did not want to wait until the end of her contract term to look for another position, if that were to become necessary.

The Committee next met on September 28, 2010. The meeting notice, dated September 24, 2010, listed twelve topics for discussion, including "2. Old Business – Superintendent Evaluation" and "11. Executive Session: Level III Grievance & Negotiation Updates; Possible Litigation." The notice did not state that the Superintendent's contract would be a topic of discussion during the executive session. According to Chairman Colburn, the meeting notice was created by the Superintendent and her staff, with his input. Both he and Dr. Rizzi knew at the time it was created that a potential contract extension for the Superintendent would be a topic of discussion during the executive session.

During the open session portion of the September 28, 2010 meeting, Chairman Colburn stated that he was compiling the Superintendent's evaluation, and would be meeting with Dr. Rizzi in the near future.⁵ At several points during the meeting, Committee members praised Dr. Rizzi's good work, such as when they heard updates on items including MCAS scores and the retention of a grant writer. At the end of the meeting, Chairman Colburn took a vote to enter executive session "for the purpose of

⁵ The open session minutes from the September 28, 2010 do not reflect any conversation about the Superintendent's evaluation, though it was on the meeting agenda and the video recording shows it was briefly discussed by Chairman Colburn.

Level III grievance and negotiation updates, [] possible litigation” and noted there would be “the opportunity to go back into open session if we need to for any voting.” The Chair did not state that the Superintendent’s contract would be a subject of the closed session. A roll call vote was then taken and the members voted unanimously to enter executive session.

The executive session was convened at 8:41 p.m. and adjourned at 10:15 p.m. Although it lasted for more than an hour and a half, the minutes from the September 28, 2011 executive session are extremely sparse and take up only one third of one page.⁶ It appears the Committee discussed at least one grievance, as well as contract negotiations with personnel, including the Superintendent. No litigation matters were discussed.

Dr. Rizzi and Chairman Colburn both stated during interviews with this office that they knew they could not discuss the Superintendent’s evaluation behind closed doors, and made this fact clear to others on the Committee at some point prior to the September 28, 2011 meeting. Under “Superintendent Review”, the executive session minutes state only that “A discussion took place regarding Dr. Rizzi’s potential contract length and salary increases. Possible tie with teacher salary increases will be discussed publicly at a later date.” Discussion of Dr. Rizzi’s job performance during the executive session appears to have been minimal. According to Chairman Colburn, the discussion was limited to whether a longer contract was good for the school system. Dr. Ural stated that several Committee members also commented that the Superintendent was doing a good job and it would be a shame to lose her. Dr. Ural further noted that Dr. Rizzi raised the matter of a possible pay increase during this meeting, and discussion then turned to tying her salary to the teachers’ pay increase. After this idea was rejected, Dr. Rizzi then asked for an extension of her contract. Dr. Rizzi proposed specific terms for a contract extension and the Committee adopted them. The minutes reflect that Committee member Husseinini made a motion to extend the Superintendent’s contract by four years, beginning at the end of the current contract. Chairman Colburn did not recall the Committee asking Dr. Rizzi any questions, and stated that the vote on her contract extension “seemed totally procedural.” Chairman Colburn also stated that the vote may have been somewhat premature given that they had not yet done an evaluation of the Superintendent, but since there was “no money attached” he felt there was no reason to delay the vote. Dr. Ural stated that he argued no action needed to be taken on Dr. Rizzi’s contract at that time, but the rest of the Committee was amenable and the motion passed with three in favor and one opposed.

On October 12, 2010, the Committee held another meeting. During the open session portion of this meeting, Chairman Colburn discussed the contract extension and stated his belief that the vote was appropriately taken in executive session. A representative from the Stoughton Teacher’s Association then read a statement regarding a recent vote of no confidence in the Superintendent, and requested that the Committee reconsider its vote to extend Dr. Rizzi’s contract. A discussion followed regarding the

⁶ The minutes from the September 14, 2010 executive session, which also lasted for an hour and a half, are equally brief, comprising only one third of one page.

possibility of re-voting in public, and a motion was made by Chairman Colburn to reconsider the vote on Dr. Rizzi's contract. Following additional statements by the public in support of and opposition to the extension, a vote was taken to reconsider the contract extension. The motion failed, and the vote was not reconsidered.

On October 26, 2010, the Committee met again and the evaluation of Dr. Rizzi that Chairman Colburn compiled was presented. It is unclear from the meeting minutes whether the evaluation was discussed in any depth at that time.

DISCUSSION

The complaint alleges three violations of the Open Meeting Law stemming from the Committee's meeting on September 28, 2010. We address these issues in turn.

1. Notice for the September 28, 2010 Meeting did not Contain Sufficient Specificity to Reasonably Advise the Public of Issues to be Discussed

The Open Meeting Law requires a public body to post a meeting notice 48 hours in advance of a meeting and include, a "listing of topics that the chair reasonably anticipates will be discussed at the meeting." G.L. c. 20, § 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 what the nature of the public body's discussion will be.

We find that the Committee's September 24, 2010 meeting notice was not sufficiently specific to advise the public of the issues the Committee planned to discuss during its executive session. The notice for the September 28, 2010 meeting described the executive session topic only as "Executive Session: Level III Grievance & Negotiation Updates; Possible Litigation." The Committee stated in its November 10, 2010 response that it "acknowledges that both the agenda and motion could have been more artfully crafted but both clearly state that one of the purposes of going into executive session was for negotiations." Nevertheless, the meeting notice still 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. G.L. c. 30A, § 21(b)(3); 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").

Because Chairman Colburn was aware at the time the meeting notice was created that Dr. Rizzi's contract would be a topic of discussion, the meeting notice should have specifically stated that the Committee would be meeting in executive session to negotiate

a contract extension with Dr. Marguerite Rizzi. Providing the public with this additional information would not have been detrimental to the Committee's negotiating position, particularly as Dr. Rizzi was aware of the session and planned to attend. It would, however, have put any interested member of the public on notice that there was a specific individual with whom the Committee was negotiating.

2. Chairman Failed to Make a Sufficiently Detailed Statement of the Purpose for the September 28, 2010 Executive Session

Prior to entering executive session, the chair of the public body 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). For the same reasons that the meeting notice was deficient, Chairman Colburn's verbal statement of the reason for the executive session also did not meet the requirements of the Open Meeting Law. Chairman Colburn announced that the Committee would enter executive session, "for the purpose of Level III grievance and negotiation updates, [] possible litigation". This statement failed to provide enough information so that a member of the public would understand the nature of the executive session. The Chairman should have publicly stated that the executive session was being held for the purpose of conducting contract negotiations with Dr. Marguerite Rizzi. Doing so would have made clear that the Committee intended to meet to conduct contract negotiations with specific non-union personnel, rather than discuss general non-union negotiating strategies.

As a final matter, the reason for an executive session as stated in the meeting notice and verbally by the chair should reflect items that the chair reasonably expects to discuss during that session. The statement should not, as appears to have been the case here, be a "catch-all" statement that is listed on every meeting agenda. Such boilerplate statements do not give the public sufficient notice of topics that will be discussed at that particular meeting.

3. The Committee did not Meet in Executive Session on September 28, 2010 to Discuss the Professional Competence of the Superintendent, but did Take an Improper Vote on Contract Extension

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). However, the Open Meeting Law permits public bodies to enter executive session and conduct deliberations outside of the public view for ten specific purposes. See G.L. c. 30A, § 21(a). When meeting in executive session, a public body may only address subjects related to the narrow executive session purpose the public body cited when entering executive session. See District Attorney for the Northwestern Dist. v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981) (executive session may not be used as a blanket reason to deliberate on matters other than those pertaining to the specific purpose for which executive session was called). One appropriate purpose for executive session is "[t]o

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 2”).

On September 28, 2010, the Committee entered executive session for the purpose of “Level III grievance and negotiation updates, [] possible litigation.” Although minutes from the executive session are sparse, it appears the Committee discussed contract negotiations with personnel, including the Superintendent. Complainant alleges that the Committee also discussed the Superintendent’s professional competence during the executive session, stating that it “belies comprehension as to how a decision to renew the Superintendent’s contract can be undertaken without any discussion of her professional competence. Professional Competence is intrinsically and inseparably tied to the issue of contract extension.” Complaint Memorandum, p. 6.

While a vote to extend an employment contract does itself make a statement about the performance of the person whose contract is being extended, the fact of such a vote does not constitute concrete evidence that a discussion of that employee’s performance preceded. Certainly, it makes pragmatic sense for a public body to evaluate an employee’s performance before making decisions regarding the future of that person’s employment and, here, an in depth discussion of the Superintendent’s job performance in open session may have been helpful to members of the public wishing to know why the Committee felt it necessary to extend her contract at that time. On the evidence before us, however, it appears that no substantive discussion of the Superintendent’s professional competence was held in executive session prior to the September 28, 2010 vote on the Superintendent’s contract. Some discussion of the Superintendent’s performance did occur during the September 14, 2010 meeting, but the September 28, 2010 meeting appears to have been limited to the negotiation of the contract extension. These types of discussions are appropriate under Purpose 2. See Wayland, 455 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 a suitable discussion for an executive session.”). Therefore, had the meeting notice and the Chairman’s statement at the time of the vote to enter executive session been tailored to the specific topics the Chairman anticipated discussing and included sufficient detail about the session’s purpose, the Committee would have acted appropriately in holding this discussion in executive session.

Although the Committee’s negotiation of the Superintendent’s contract was an appropriate subject for executive session, once the negotiation reached fruition the Committee had an obligation to return to open session in order to vote on whether or not to extend the contract. The law allows a public body to conduct contract negotiations with non-union personnel in executive session, but does not authorize a public body to approve a contract in executive session. Therefore, while a public body may reach an agreement on the terms of a contract in executive session, it must subsequently vote to approve or ratify such agreements in open session before they become effective. See OML 2011-28 (finding that school committee violated the Open Meeting Law by voting to approve superintendent’s contract addendum in executive session). Chairman

Colburn's statement at the time the September 28, 2010 executive session was convened that there would be "the opportunity to go back into open session if we need to for any voting" suggests that he was, at least to some degree, aware of this requirement.

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 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, although an open session discussion of the merits of the contract extension did occur on October 12, 2011, this was insufficient to cure the earlier violation because the Committee did not re-vote on the contract extension during that meeting. Allowing public comment on an action already taken without publicly reconsidering the vote cannot cure a violation of the Open Meeting Law.

Because the vote on Dr. Rizzi's contract extension was not taken in public, and because the meeting notice did not provide the public with sufficient detail to know that such a vote was even a possibility during this meeting, the Committee acted inappropriately.

As a final matter, although not raised by the complainant, we note that the Committee's meeting minutes do not satisfy the requirement that minutes include "a list of documents and other exhibits used at the meeting." G.L. c. 30A, § 22(a). The minutes from the September 28, 2010 meeting did not include a list of any documents or exhibits used by the Committee, though the open session video recording shows the Committee discussed specific documents, such as a grant sheet which was handed out during the meeting. Public bodies are required to create and maintain accurate minutes of all meetings, including executive sessions. At minimum, meeting minutes must set forth "the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes." G.L. c. 30A, § 22(a). A transcript of the discussion is not required, but minutes should be sufficiently detailed to allow a person who was not in attendance to determine the essence of the discussion and what documents were used.

CONCLUSION

The Committee violated the Open Meeting Law by failing to provide sufficient detail about the purpose for its executive session, both in its meeting notice and when it convened in executive session during the September 28, 2010 meeting. The Committee further violated the Open Meeting Law by failing to ratify in open session a contract extension agreed to between the Committee and the Superintendent during executive session.

We accordingly order immediate and future compliance 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 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. Finally, we order the Committee to amend its September 28, 2010 meeting minutes to include "a list of documents and other exhibits used" at the Committee's September 28, 2010 meeting.

The Committee did not have the benefit of our decision in OML 2011-28⁷ at the time of this meeting, therefore we decline to take the further remedial action requested by the complainant, namely nullifying the action taken by the Committee in approving Dr. Rizzi's contract. While we do not order nullification, in the interest of transparency, we strongly recommend that the Committee reconsider the vote on the contract extension during an open session meeting. In addition, we caution the Committee that future similar violations may result in nullification of any action taken.

We now consider this matter closed. If you have any questions regarding this letter, or believe any of the facts in this letter are inaccurate, please do not hesitate to contact our office.

Sincerely,



Amy L. Nable
Assistant Attorney General
Director, Division of Open Government

cc: Maria Capobianco
Ashley Walter, Esq., Shaevel & Krems, LLP

⁷ OML 2011-28 found that a school committee violated the Open Meeting Law by, amongst other things, agreeing to a contract addendum during an executive session and failing to subsequently ratify that agreement in open session.