



TIMOTHY J. CRUZ
DISTRICT ATTORNEY

COMMONWEALTH OF MASSACHUSETTS
PLYMOUTH DISTRICT

OFFICE OF THE DISTRICT ATTORNEY

MAIN OFFICE:

32 BELMONT STREET

P.O. BOX 1665, BROCKTON, MA 02303-1665

TEL: (508) 584-8120

FAX: (508) 586-3578

March 11, 2010

John Clifford, Esquire
Town Counsel
76 North Bedford Street
East Bridgewater, MA 02333

Re: Town of Rockland
Open Meeting Law Investigation

Dear Attorney Clifford:

This office has reviewed the information that you provided relative to the complaint filed by Selectman Michael Zupkofska in the above named investigation. Based on that information and on this office's own investigation, we find that the Rockland Search Committee (the "Search Committee") has violated the Open Meeting Law. In addition, this office finds that the Rockland Board of Selectmen (the "Board") has also violated the Open Meeting Law. The violations are outlined in detail below.

A. Violations by the Board:

- i. The Board exceeded the scope of the stated purpose for entering into executive session.

This office finds that the Board violated the Open Meeting Law on June 1, 2009, by exceeding the scope of the stated purpose for entering into executive session. The Board's stated purposes were "collective bargaining and litigation, negotiation." Purpose (3) allows a governmental body 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 governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel and to conduct collective bargaining sessions or contract negotiations with nonunion personnel. G.L. c. 39, §23B(3). The Board has the burden to demonstrate that the executive session was in fact held to address the stated purpose, rather than some other unstated purpose. G.L. c. 39, §23B; District Attorney for the Northern Dist. v. School Comm. of Wayland, 455 Mass. 561, 566 (2009), citing District Attorney for the Northwestern Dist. v. Selectmen of Sunderland, 11 Mass. App.

Ct. 663, 666 (1981) (collective bargaining purpose was deemed a pretext where no employees were present for purposes of bargaining); Puglisi v. School Comm. of Whitman, 11 Mass. App. Ct. 142, 144-145 (1981) (executive session purpose to discuss reputation of superintendent was deemed to be a sham to hold private discussion on firing of school employee).

The Board acknowledges that during its June 1, 2009 meeting, it voted to go into executive session for the purposes of “collective bargaining and litigation, negotiation” and the minutes reflect this. During the executive session the Board concedes that Town Administrator Allan Chiocca informed the Board that former full time and current interim Town Accountant Eric Hart was interested in returning to Rockland as the full time Town Accountant. There was a motion by Selectman Michael Johnson and seconded by Board Chairman James Simpson to “arrange a meeting with Mr. Hart to investigate the terms for his return.” The motion passed with a 4-1 vote (Selectman Zupkofska voting no). A second motion, made by Selectmen Michael Johnson and seconded by Selectman Zupkofska, was made to advertise the Town Accountant’s position on the Massachusetts Municipal Association (“MMA”) website.¹ The motion passed with a 5-0 vote. No collective bargaining, litigation or negotiation was actually discussed.

Further exceeding the scope of the purpose stated the Board inappropriately discussed naming the Town Forest, which also had nothing to do with the stated purposes.

- ii The Board inappropriately formed the Search Committee in executive session.

Also during that executive session, Chairman Simpson “designated” Selectman Larry Chaffee, Selectman Johnson and Finance Committee Chair Bill Minahan to “screen applicants for the Board.” In other words, the Board formed the Search Committee during that executive session. This office finds that the Board did not merely consider Mr. Hart’s request, but also inappropriately formed the Search Committee in executive session in violation of the Open Meeting Law.

¹ On June 2, 2009 the position was advertised on the MMA website and applications were due by June 15th. The advertisement required that applicants have knowledge of GAAP, UMAS and GASB regulations, and have MUNIS and Softright experience. Applicants were required to have a Bachelor of Science degree in Accounting, a minimum of three years municipal accountant experience with Mass. General Laws, and knowledge of municipal procedures. The advertisement required a letter of application, a resume and three professional references. The advertisement did not state that the job was limited to full time employment and did not distinguish between a full time employee and an independent consultant. Mr. Hart’s resume did not comport with all of the requirements in the advertisement and he did not send the required application letter or provide three professional references.

In sum, the Board has not satisfied its burden to show that it confined its discussions in executive session to the purposes stated. Board members must strictly confine their executive session discussions to the cited purpose. District Attorney for the Northern Dist. v. School Comm. of Wayland, 455 Mass. at 566-568; District Attorney for the Northwestern Dist. v. Selectmen of Sunderland, 11 Mass. App. Ct. at 664. The Board strayed from the purposes stated by discussing the naming the Town Forest, by voting to advertise the position of Town Accountant on the MMA website, and by appointing the Search Committee in executive session. They also failed to properly describe the true purpose for the executive session, i.e. to consider strategy in preparation for negotiations with nonunion personnel. G.L. c. 39, §23B(3); District Attorney for the Northern Dist. v. School Comm. of Wayland, 455 Mass. 561 (2009) (Board inappropriately described negotiations with nonunion personal as collective bargaining).

B. Violations by the Search Committee.

i. The Search Committee presented only one applicant for consideration by the Board.

This office finds that the Search Committee violated the Open Meeting Law on June 15, 2009 by presenting only one applicant for consideration by the Board, i.e., the hiring body. The Search Committee asserts that it received four applications, including Mr. Hart's, for the position of Town Accountant. The Search Committee claims that the first opportunity it had to discuss these applicants was during the June 15, 2009 open session of the Board. Mr. Johnson, acting as a Search Committee member, informed the Board that three of the unnamed applicants "were not qualified by experience or by virtue of the fact that they were not seeking full time employment." Mr. Johnson then made a motion to vote to hire Mr. Hart as Town Accountant, subject to contract negotiations and a background check. Search Committee member Minahan was present, concurred with Mr. Johnson's assessment of the other candidates and joined in Mr. Johnson's recommendation to hire Mr. Hart. Mr. Chaffee, as a Search Committee member, concurred. The Board, based on the Search Committee's recommendations, voted 4 to 1 (Selectman Zupkofska voting no) to hire Mr. Hart.

The Search Committee takes the position that "[e]ach individual member of the screening committee came to the conclusion that there were no candidates, other than Mr. Hart, who were sufficiently qualified to even merit screening." The Search Committee takes the additional position that none of the candidates (other than Mr. Hart) was qualified. Thus, they were not "considered as part of the final decision making process" and therefore, they were not finalists. The Search Committee later conceded, as it must, that one of the three other candidates was in fact "qualified by experience" but was not considered a finalist because he requested the position as an independent consultant. Regardless of the Search Committee's position on the candidates' qualifications, however, the fact remains that the Search Committee presented only one applicant for consideration before the Board in violation of the Open Meeting Law.

The Search Committee takes the additional position that “any person having interest in the selection process for the Town Accountant position would have notice by virtue of the posting of the Selectmen’s meeting” for June 15, 2009. Contrary to the Search Committee’s assertion, no one, other than the Board, the Search Committee, and anyone who happened to look at the MMA website, was on notice that the Board was about to hire a new Town Accountant. The earliest the public could have been aware of the Board’s decision would have been on June 2, 2009 when it was advertised, but again, since the advertisement only appeared on the MMA website, only those persons who were aware of the advertisement or the website would have known that the posting was there. And the June 15, 2009 posting for the Board meeting only reflected that the Board would be discussing the Town Accountant vacancy. By the time the general public learned of the search for a Town Accountant, the decision to present only one candidate to the Board had already been made.

The Search Committee asserts that “[t]he public’s right to be aware of the appointment of the Town Accountant was more than adequately served by the fact that the process took place at a properly posted and televised meeting of the Board.” This office does not agree with the Search Committee’s position and finds that it violated the Open Meeting Law by presenting only one candidate for final decision before the Board (the hiring body). G.L. c. 39, §23B(8). In presenting only one candidate for consideration before the Board, the Search Committee “conflated the separate functions of a preliminary screening process with a final selection process” and did so outside the bounds of a properly posted open session in violation of the Open Meeting law. Commonwealth v. Selectmen of Westborough, 21 Mass.L.Rptr. 545, *3 (2006) (inappropriate to recommend only one candidate worthy of consideration to the Board when other candidates also worthy of consideration); See also District Attorney for the Northern Dist. v. School Comm. of Wayland, 455 Mass. 561 (2009).

The Search Committee acknowledges that each Search Committee member reported his findings to the Board during its June 15, 2009 open meeting. However, the members of the Search Committee argue that they each reached their individual findings separately based on their individual review of the applications and then individually reported their findings to the Board. The Search Committee asserts that these individual representations were “not presented as a recommendation of the screening committee” and therefore argues that they did not deliberate for purposes of the Open Meeting Law and should not be subject to it.

The Search Committee’s position is incorrect. When a governmental body advertises a position for town employment, receives responses to its advertisement, shares and reviews that information as a committee and subsequently arrives at a position based on that gathered information, then that committee is said to have “deliberated” their findings, which is “sufficient to constitute a ‘verbal exchange’ between the committee members” for purposes of the Open Meeting Law. District Attorney for the Northern Dist. v. School Comm. of Wayland, 455 Mass. at 571, citing Gerstein v. Superintendent Search Screening Comm., 405 Mass. 465, 469-670 (1989). A governmental body may

not avoid the requirements of the Open Meeting Law by intentionally seeking to avoid its fundamental purposes. Id., citing McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-649 (2008). Thus, the comments by each of the three Search Committee members as relayed to the Board during the June 15, 2009 meeting constituted a deliberation.

ii. The Search Committee failed to post its June 15, 2009 meeting.

This office further finds that the Search Committee violated the Open Meeting Law by failing to post its own meeting that was held on June 15, 2009. Any time a quorum of a governmental body exchanges views, as was done on June 15, that governmental body must post its meeting. G.L. c. 39, §23A-23B. Although the Board posted its meeting for June 15, 2009, the Search Committee did not.

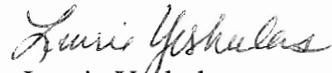
The Search Committee concedes that it did not properly post its meeting for June 15, 2009, but asserts that it was not required to do so under the Open Meeting Law. This office rejects the Search Committee's position in this regard and its claim that there is "no public purpose served by requiring concurrent postings for the subcommittee and the governmental body that appointed them." The Open Meeting Law states, "[e]xcept in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town." G.L. c. 23, §23B. The purpose of these postings is to put the public on notice that certain governmental bodies are conducting meetings that they may be interested in attending. Just because two members of the Search Committee were also members of the Board does not absolve the Search Committee from its obligation to post its own meeting notices.

As a remedy, the Board must state publicly, at an open session and without reservation, that it violated the Open Meeting Law on June 1, 2009. The Board must also release the executive session minutes for the June 1, 2009 executive session meeting. It must also acknowledge its own violations and the violations of its Search Committee by reading this letter aloud at a properly posted open meeting of the Board. The Board must then attach a copy of this letter to the minutes of that meeting so that it remains available to the public. The Board must also state publicly that it will comply with the Open Meeting Law in the future. When this office receives a copy of the minutes of the meeting where this Board complies with this remedy, this matter will be closed.

John Clifford, Esquire
March 11, 2010
Page 6

Please be advised that the Legislature has amended the Open Meeting Law. Beginning July 1, 2010, the Attorney General's Office will have sole investigatory jurisdiction to enforce the statute. The Board's obligations regarding posted notices, agendas and the subjects to be discussed will change on that date. Acts & Resolves, Stat. 2009, c. 28, §20(b) (added July 1, 2009 to take effect July 1, 2010).

Sincerely,



Laurie Yeshulas
Assistant District Attorney
For the Plymouth District

cc: Rockland Board of Selectmen
Mr. Michael Zupkofska