COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. ~~92-30288~~ 92-3038

ANTHONY WITWICKI and others, [1]
Plaintiffs

vs.

BEVERLY SCHOOL COMMITTEE,
Defendant

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S COMPLAINT UNDER OPEN MEETING LAW

Plaintiffs, registered voters in the City of Beverly, brought this action alleging that the defendant, the Beverly School Committee, held an executive session on June 29, 1992 in contravention of the open meeting law, G.L. c. 39, § 23B. For reasons discussed below, the court concludes that the session was convened in violation of the statute and that the action taken there must be rescinded.

BACKGROUND[2]

At 7:35 PM on June 29, 1992, the Beverly School Committee (the "Committee") convened its regular, open meeting following advance notice of the meeting posted by the Superintendent of Schools. The minutes of the open meeting show that among the topics of

---

[1] Virginia Colton and Christine MacDougall.

[2] The record in the case consists of the parties' "Agreed Statement of Facts," including the minutes of the June 29, 1992 Beverly School Committee Meeting and Executive Session, and the affidavit of Jean Perron, Superintendent of Schools for the City of Beverly. A hearing on agreed upon facts was held on November 10, 1992.

discussion were a proposed school volunteer program, the election of athletic coaches, and a proposal for school renovations. The sole discussion of the school department budget came at the beginning of the meeting. It was agreed, without a formal vote, that Assistant Superintendent Harry Hartunian and another Committee member should be dispatched to the meeting of the Board of Aldermen[3/] to urge full funding of the school department budget proposal. There was no discussion of collective bargaining or nonunion contracts at the open meeting.

Sometime after 11:20 PM, the Committee voted unanimously to retire to executive session "for the purpose of discussion [sic] strategies relative to collective bargaining." In executive session, the sole agenda item was the employment contract of Assistant Superintendent Hartunian (hereafter "Hartunian contract"). Hartunian is a nonunion employee. After some discussion, the Committee voted to enter into a three-year, "roll-over" contract with Hartunian at a salary of $69,500 for the 1992-1993 year, representing a $7,000 increase over the salary under the preceding contract.

The Superintendent attests in her affidavit that the increase was intended to bring Hartunian's salary into line with other administration personnel. She further attests that in her opinion, publication of the vote to increase Hartunian's salary would have adversely affected collective bargaining negotiations with the

---

[3/] The Board of Aldermen was apparently meeting at the same time as the School Committee.

union that represents teachers, principals, and support staff in the Beverly school system. The Committee did not publish the minutes of the executive session until after a news article describing the vote was published in a local paper.

DISCUSSION

A. Open Meeting Law Violation

Under G.L. c. 39, § 23B, all school committee meetings must be open to the public with certain statutory exceptions. The provision is intended to "eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). There are exceptions to the open meeting requirement where there is a genuine need for a closed session consistent with the public interest. Thus, for example, discussions regarding pending litigation, collective bargaining strategies, and employee disciplinary proceedings and interviews with prospective employees may be conducted in private. In such cases, "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 (1990 ed.).

There are several prerequisites to convening an executive session. First, the body must convene initially in an open session for which public notice has been given. Second, the decision to meet in executive session must be by a majority vote taken by a roll call to be recorded in the minutes of the open meeting. Third, the presiding officer at the open meeting must cite the

purpose for the executive session. Finally, the officer must also state whether the body will reconvene after the executive session. G.L. c. 39, § 23B (1990 ed.).

Plaintiffs concede that discussion of the Hartunian contract in executive session is permitted under a statutory exception for negotiation of non-union employee contracts, but contend that the Committee failed to comply with the procedural aspects of the law. The court agrees. The statute plainly requires that the purpose of the proposed executive session be publicly announced. Here, the Committee announced that the executive session was being convened for one purpose, to discuss collective bargaining strategy, when in fact the purpose was to discuss the contract of a nonunion employee.

It is defendant's burden to show by a preponderance of the evidence that it has complied with the statute. G.L. c. 39, § 23B (1990 e.). See also District Attorney for the Northwestern Dist. v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981). Relying on Attorney General v. School Committee of Taunton, 7 Mass. App. Ct. 226 (1976), defendant argues that because negotiation of nonunion salaries has been held to fall within the "collective bargaining" exception, there was no impropriety in citing collective bargaining as the purpose of the session. In Taunton, there was a clear showing that public disclosure of proposed nonunion salary proposals could adversely impact negotiations then underway between the Committee and several unions. The court held that under those circumstances, the School

Committee was justified in meeting privately to discuss nonunion contract proposals given their demonstrated relevance to the pending collective bargaining negotiations.

Taunton, however, is distinguishable from the case here. Most notably, in Taunton, the executive session was properly identified as being for the purpose of discussing nonunion personnel. In this case, by contrast, there was no public indication that the Committee would be discussing a nonunion contract, although it appears that this was the tacit understanding among the members of the Committee.[4/]

Further, in Taunton, the Committee was actively engaged in union negotiations at the time of the decision to go into executive session. Id. at 277. In the case at bar, however, the relationship between the decision to convene in executive session and union negotiations is speculative at best. Although the Superintendent attests that the potential impact of the Hartunian contract on union negotiations motivated the decision to convene privately, it is unclear whether union negotiations even had begun when the Committee voted to go into executive session. The Committee contends that it had invoked a funding clause in its contract with the union permitting the Committee to reopen collective bargaining negotiations if the Committee's proposed

---

[4/] When Taunton was decided there was no statutory exception allowing discussion of nonunion contracts in executive session. The statute has since been revised to expressly authorize such sessions. G.L. c. 39, § 23B(3). Thus the Committee's failure to invoke this provision is all the more troubling.

budget was not fully funded by the City. The minutes of both the open meeting and the executive session, however, indicate that the school budget proposal was still on the table before the Board of Aldermen on June 29th. Thus, it is not clear that union negotiations were a pressing concern when the committee voted to go into executive session.

Moreover, according to the Perron affidavit, the Hartunian contract was first discussed at a previous meeting, before the funding clause had been invoked, and thus before it was clear that union negotiations would be reopened. Further, the minutes of the executive session, which serve as the official record of the body's deliberations, give no inkling that union negotiations were a concern.[5/] In sum, the defendant has not met its burden of showing that the session falls within the collective bargaining exception.

B. Remedy

Having found a violation of the statute, this court may rescind the vote. G.L. c. 39, § 23B. Defendant argues that failure to announce the purpose of the executive session is a de minimis violation insufficient to warrant rescission. The court does not agree. The legislature authorized certain exceptions to the open meeting requirement and did not convey unfettered

---

[5/] Accepting arguendo that negotiations were underway, the court is not convinced that the Committee could properly withhold this information in the name of protecting its bargaining position. If the expenditure on the Hartunian contract is a legitimate factor constraining the Committee's wage proposals to the union, the employer's duty to bargain in good faith requires disclosure of pertinent budget information. See N.L.R.B. v. Perkins Mach. Co., 326 F.2d 488 (1964).

discretion to convene privately. The statute accords equal weight to the procedural and substantive requirements serving to limit the Committee's discretion: it is the defendant's burden to show that its action was both "in accordance with and authorized by" the statute. G.L. c. 39, § 23B (1990 ed.) (emphasis added).

As has been noted, the exceptions to §23B may not be invoked as a subterfuge by which a public body may cloak its actions from contemporaneous public scrutiny. Sunderland at 666. See also Puglisi v. School Committee of Whitman, 11 Mass App. Ct. 142, 144 (1980). The rule that the purpose of executive sessions be publicly announced is the public's chief protection against such ruses. Even inadvertent non-disclosure may deprive the public of its right to know.

Defendant argues that equity requires that the vote under which the Hartunian contract was entered into not be rescinded because otherwise a non-culpable party will be harmed. Proportionality is a concern not to be ignored. The remedy to be adopted must be of a severity sufficient to insure compliance with the language of the statute to vindicate its policies, and yet not so stern as to be disproportionate to the violation. In this court's view, the balance to be struck results in rescission. To allow the Committee's action to stand is to ignore the statutory requirement of public disclosure in disregard of the language of the statute and the policies underlying it. "It is quite apparent . . . . that the Legislature desired to sharpen the bite of the statute by providing sanctions which would affect past violations,

as well as future ones." Puglisi at 145. Absent specific exceptions, the purpose of the statute is to require that the public's business be done publicly. It is this principle which this court seeks to vindicate. Rescission is appropriate.[6/]

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the action of the Beverly School Committee taken in executive session on June 29, 1992, authorizing the Hartunian contract be **RESCINDED**; and that the Beverly School Committee comply fully with the letter of G.L. c. 39, §23B in all future proceedings.

David M. Roseman
Justice of the Superior Court

DATED: January 14, 1993

/lb

[6/] The Committee of course, is free to approve the Hartunian contract again, this time in accordance with the terms of the statute.