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Contract Extension Held Unenforceable Due to Open Meeting Law Violation

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In a decision roundly endorsing the purposes behind the Open Meeting Law, Judge Raymond Veary, Jr., recently dismissed a Complaint brought by the former Superintendent of the Sandwich Public Schools seeking to enforce a vote taken during an unlawful meeting of the Sandwich School Committee. On April 30, 2010, the Sandwich School Committee voted 4-2 to extend the Superintendent's contract for an additional two years, to June 30, 2013. But after the Town Clerk sent a letter to the District Attorney of the Cape & Islands District questioning the validity of the vote, the DA concluded that the April 30th meeting was not adequately posted and, therefore, violated the Open Meeting Law. (Prior to July 1, 2010, the District Attorney was responsible for enforcing Open Meeting Law compliance by municipal bodies. M.G.L. c. 39, § 23B. Under the "new" Open Meeting Law, M.G.L. c. 30A, §§ 18-25, enforcement with respect to all governmental bodies (state and local) is vested in the Attorney General. M.G.L. c. 30A, § 23(a)).

Although the School Committee had met on April 28, 2010, then suspended its meeting for the purpose of re-convening two nights later, the April 30th meeting, stated the DA, still required posting at forty-eight (48) hours in advance. Because this was not done, any business undertaken at the April 30th meeting – including the vote to extend the Superintendent's contract – was a "nullity." Thus, the DA ordered: "The meeting should be re-posted and reheard pursuant to the provisions of the Open Meeting Law."

And that's exactly what the Sandwich School Committee did. On May 26, 2010, the School Committee accepted the DA's decision and, three weeks later, at a lawfully-posted meeting, voted again on the Superintendent's contract extension. Only this time, due to an intervening election held one week after the April 30th vote, the outcome of the vote was different; the motion to extend was defeated 4-3. Preferring the first outcome over the second, the Superintendent sued the School Committee to enforce her two-year contract extension. Arguing the prior vote could *only* be invalidated by an action filed in Superior Court within 21 days of the alleged violation (M.G.L. c. 39, § 23B), the Superintendent insisted that the failure to timely pursue a judicial remedy effectively insulated the April 30th vote from any subsequent change or challenge.

On behalf of the School Committee, PD&P moved to dismiss the Superintendent's Complaint under Rule 12(b)(6). Rejecting the notion that judicial invalidation served as the *exclusive* remedy for enforcement of the Open Meeting Law, the School Committee insisted the DA's declaration of its April 30th vote as a "nullity" had teeth. The School Committee was not free to disregard a decision issued by the officer expressly appointed to enforce the statute. Moreover, case law has long supported and, indeed, courts have encouraged governmental bodies to voluntarily cure known Open Meeting Law violations, just as the Sandwich School Committee did here.

Judge Veary agreed with the DA that a "do over" was entirely appropriate. "The requirement [to post a meeting at least 48 hours in advance] is hardly an idle one. It assures that members of the public will have a consistent, reliable and authoritative means of learning the times and places of meetings which they have an interest in attending." Any plea that substitute notice was somehow adequate – *e.g.*, notice on a high school bulletin board, an article in the local paper – landed on deaf ears. Moreover, such substitutes still fell short of the minimum 48-hour notice requirement. As for the Superintendent's argument that the first vote should stand because no timely action was taken to judicially invalidate it, the Court recognized such a remedy was indeed available. However, the statute expressly provided that the judicial remedy was

"not exclusive." "In this instance, the School Committee chose another such available remedy by taking up the subject matter again at a subsequent meeting."

Although Judge Veary was interpreting the "old" Open Meeting Law, his views on the importance of its statutory protections should be a lesson to all governmental bodies. Despite the Superintendent's stance that the violation was *de minimis* and, therefore, should be forgiven, Judge Veary clearly disagreed, calling the April 30th meeting "fatally flawed." The Superintendent's final attempt to salvage the second vote by accusing her opponents on the School Committee of personal animus met with equal success. The School Committee members "lawfully voted their preference." In a pithy conclusion, Judge Veary reminded all parties: "Democracy is not a tort."

Stay tuned; the Superintendent appealed the judgment of dismissal to the Appeals Court. Johnson v. Sandwich School Committee, App. Ct., No. 2011-P-0858. No date has yet been scheduled for oral argument.

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