

legal issues

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To: All School Committee Members and Superintendents
From: Michael J. Long Esq. & Stephen J. Finnegan, Esq.
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SUBJECT: SUMMARY OF WAYLAND CASE – SUPERINTENDENTS’ EVALUATION

On December 31, 2009, the Massachusetts Supreme Judicial Court (SJC) issued its decision in District Attorney for the Northern District v. School Committee of Wayland, finding a Superintendent’s professional competence must be discussed in open meeting. The Superintendent’s evaluation, **if related to salary or contract negotiation** in a timely manner such that a nexus exists between the evaluation and the salary negotiation, may be discussed in executive session. The SJC also held that email messages between school committee members in preparation for the superintendent’s evaluation constituted a “deliberation” in violation of the Open Meeting Law. Recent amendments to the Open Meeting Law effective on July of 2010, discussed below, may make this a case of limited durational impact.

FACTS:

On June 2, 2004, the chair of their five-person School Committee of Wayland, contacted via-email the other school committee members seeking their input on the performance of the Wayland Superintendent of Schools. One school committee member replied to the entire school committee and two other members replied directly to the chair. The School Committee chair then prepared a draft evaluation of the Superintendent.

On June 21, 2004, the School Committee voted in open session to convene in executive session “for purposes of matters relating to collective bargaining.” On June 28, 2004, the School Committee voted in open session to convene in executive session for “purposes of matters relating to collective bargaining and personnel.” During both executive sessions, the school committee discussed the draft evaluation of the superintendent. These two executive sessions occurred nine months before the Supt.’s contract was signed in March of 2005.

On May 21, 2005, a newspaper reporter filed a complaint alleging that the School Committee’s refusal to release the

Superintendent’s evaluation violated the open meeting law. The District Attorney determined that the school committee violated the open meeting law by conducting the superintendent’s performance evaluation “outside of the public view” in executive session, and ordered the school committee to make the written draft evaluation and final evaluation available to the public.¹

DISCUSSION:

a. Evaluations and Open Meeting Law

The District Attorney’s office initially concluded the Committee’s actions violated the Open Meeting law. On appeal, the Superior Court determined that the school committee properly entered into executive sessions to discuss matters relating to collective bargaining and negotiations with non-union personnel, i.e. decisions regarding the superintendent’s evaluation. The SJC overturned the superior court, finding that the school committee’s stated reasons for entering into executive sessions: “matters relating to collective bargaining”, were erroneous. First, since the superintendent is a non-union employee he is not covered by the collective bargaining exception to the open meeting law.² This was the only portion of exemption (3) cited by the Committee at its June 2004 meeting. Second, the open meeting law does permit the school committee to convene in executive session to “conduct strategy sessions in preparation for negotiation with non-union personnel.” However, there is no evidence based on the June 2004 executive session minutes of such a salary discussion or negotiations. The minutes only recorded a brief, 12 minute discussion on professional competence. Therefore, the school committee’s stated reasons for entering into executive session were not proper. There was a nine month gap between the evaluation and a salary discussion –too long a time to establish any real nexus. In distinguishing between the school committee’s discussion of professional competence versus the performance evaluation the

SJC stated, “[w]hile professional competence must first be discussed in an open session, how that evaluation will factor into a contract or salary negotiation strategy may be suitable discussion for an executive session.” According to the SJC, the “correct procedure” would have been for the school committee to discuss the professional competence of the superintendent in open session and, “when the school committee reached the state of deliberations where the preparation and drafting of the written performance evaluation was imminent, it should have voted to adjourn to an executive session” pursuant to clause (7), which permits executive sessions for purposes of ensuring compliance with other laws, such as the public records statute. Although the Superintendent here expressly permitted release of his evaluation, without “the Superintendent’s consent, the performance evaluation would be absolutely exempt from disclosure” Citing, Wakefield Teachers Association v. S.C. of Wakefield, 431 Mass.292 (2000) Justice Spina wrote that if the Committee had first discussed the Superintendent’s professional competence publicly, it could have “ moved into a proper executive session to draft the evaluation.”

b. Email Issues

With respect to the email messages circulated between school committee members, these constituted “deliberations” concerning the superintendent’s professional competence. As a result, and to the surprise of few, these email deliberations were impermissible under the open meeting law. “Governmental

bodies” the Justice, wrote “may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.” Amendments to the Open meeting law effective in July of 2010 specifically include electronic mail in the definition of “deliberations”.

The Court implied in a footnote that, by way of Chapter 28 of the Acts of 2009, the confidentiality of the Superintendent’s evaluation may be short-lived due to new language which does not exempt from disclosure evaluation materials prepared by the employer, but which specifically does exempt from disclosure evaluations materials “not prepared by the ... [committee] for the purposes of the evaluation.”

COMMENT:

As Chapter 28 of the Acts of 2009 will substantially amend Open Meeting law and Public Records procedures, this case may retain vitality only until July, 1, 2010 when new Open Meeting Law rules go into effect, and the issue of employee evaluations will be subject to new rules on public records. Please consult with counsel for specific advice on open meeting and evaluation procedures. We expect the Attorney General to issue new regulations on the new Open Meeting Law and public records laws.

¹ The School Committee also made public the written comments of one committee member who had circulated his comments via e-mail to the entire school committee, but did not release the comments of the two school committee members who e-mailed comments only to the School Committee chair.

² MGL Chapter 39 Section 23B states in relevant part, “Executive sessions may held only for the following purposes...(3) 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 or to conduct strategy sessions in preparation for negotiation with non-union personnel.” Wayland only cited the collective bargaining exemption.