
OPINION OF THE PUBLIC ACCESS COUNSELOR

ALEX PATE; ET AL.,
Complainant,

v.

EASTERN GREENE SCHOOL CORP.,
Respondent.

Formal Complaint No.
19-FC-10

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Board of Education for the Eastern Greene School Corporation violated the Open Door Law.¹ Attorney James L. Whitlatch filed an answer to the complaint on behalf of Eastern Greene Schools. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal

¹ Ind. Code §§ 5-14-1.5-1 to -8

complaint received by the Office of the Public Access Counselor on January 23, 2019.

BACKGROUND

This case involves a dispute about certain personnel changes made by the Board of Education for the Eastern Greene School Corporation, and whether those actions comport with the Open Door Law.

On January 14, 2019, the Board convened an executive session followed by an organizational meeting, a regular meeting, a yearly board of finance meeting, and a second executive session.

Alex Pate (“Complainant”) asserts the Board took action on personnel items that were not included on the agenda for the Board’s public meeting. Specifically, Pate references three positions: (1) head football coach; (2) athletic director; and (3) varsity baseball coach.

The minutes from the Board’s public meeting show that the Board voted 4 to 3 to approve the hiring of Anthony James (AJ) Wells as the Varsity Baseball Coach for 2019 season. Conversely, the minutes do not reference the positions of head football coach or the athletic director.

Pate submitted articles from two newspapers, including one article from the day after the Board’s meeting, indicating that Eastern Greene Schools notified Head Football Coach Travis Wray and Athletic Director Aaron Buskirk that their contracts would not be renewed.

In essence, Pate takes exception with the Board approving the hiring of a new baseball coach because the item did not

appear on the Board's original agenda for the January 14 meeting. He also asserts, with regard to the football coach and athletic director positions, that the Board took final action outside of a public meeting.

As a result, on January 23, 2019, Pate filed a formal complaint with this office alleging the Board violated the Open Door Law.²

On February 18, 2019, the Board filed an answer with this office denying that it violated the Open Door Law as alleged. First, the Board contends that the only personnel action taken on January 14 was the hiring of a baseball coach, and that it properly added the item to the agenda "at or prior to the meeting."

Next, the Board asserts that the varsity football coach and the athletic director were not terminated at, before, or after the January 14 meeting. Instead, the Board maintains that both contracts are expiring on their face in August 2019; and thus, there was no action necessary in respect to these contracts.

Finally, the Board notes that it included, as an agenda item for the Board's meeting on February 11, 2019, a personnel report referencing the August expiration of the varsity football coach and athletic director contracts. The personnel report also indicated the district is advertising those positions

² Several other people filed formal complaints against the Board raising substantially similar claims against the Eastern Greene School Board. The general theme of the complaints is that the Board took final action to not renew the employment contracts of two employees outside a public meeting.

for 2019-2020 school year. The Board voted 4 to 3 to approve that report on February 11, 2019.

On February 21, 2019, Board member Scott Carmichael filed a supplemental response to the complaint on behalf of himself, and Board members Ron Childress and Matt Roberts dissenting from the answer provided by the Board's legal counsel in this case.

Carmichael asserts during the Board's second executive session on January 14, 2019, that Board President Duane Long directed the Superintendent to inform the varsity football coach and the athletic director that their contracts would not be renewed, and to post a combination position for those two roles within 24 hours. The Eastern Greene Schools website currently includes the combination position³ under the employment opportunities section.

³ The job posting states, in relevant part, the following: "We have a vacancy for a combination position--varsity football head coach and athletic director for the 2019-2020 school year. This position should be a certified teacher who will function as the AD, the head varsity football coach, and teach advanced physical education."

ANALYSIS

The primary issue in this complaint is whether the actions of the Board of Education for Eastern Greene Schools to constitute final action that should have been taken at public meeting.

1. The Open Door Law

It is the intent of the Open Door Law (“ODL”) that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* Ind. Code § 5-14-1.5-1. Except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. Ind. Code § 5-14-1.5-3(a).

The parties agree that the Eastern Greene School Corporation is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. *See* Ind. Code § 5-14-1.5-2. Additionally, the parties do not dispute that the Board of Education for Eastern Green Schools (“Board”) is the governing body of the school corporation for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

2. Meeting Agenda

Pate contends that the Board’s original agenda for the regular meeting on January 14 did not reference the personnel items concerning the baseball coach, the head football coach, or the athletic director.

The Board maintains that it properly added the personnel item concerning the baseball coach to the agenda “at or prior to” the meeting. The meeting minutes show the Board voted 4 to 3 to approve the hiring of a baseball coach for 2019.

Under the ODL, if a governing body uses an agenda, the agenda must be posted at the entrance to the meeting location before the meeting. Ind. Code § 5-14-1.5-4(a). Although the ODL does not specify what agenda items are required, it does state that “a rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void.” *Id.*

Here, Pate does not claim that the Board failed to post the agenda on the night in question. Rather, he takes exception to the Board’s action to add an item that was not included in the Board’s original agenda.

Nothing in the ODL prohibits a governing body from amending an agenda for a public meeting. This office has consistently acknowledged meeting agendas to be a worthwhile endeavor, but the purpose is not to strictly bind an agency to the items listed on the schedule.

That stated, this office has also maintained that if the nature of the agenda item is reasonably expected to generate increased public interest, it should appear on the posted agenda before the meeting. If not, then it makes sense to table the issue until a later date. This is especially true when final action is involved. Blindsiding the public with an unexpected action item is never good government business.

Because the Board is not prohibited from amending its meeting agenda under the ODL, it did not violate the statute by

adding a personnel item to hire a new baseball coach. Whether it was an intentional omission to avoid scrutiny beforehand is unknown. If it was, that would go against the spirit of the law.

3. Final Action by the Board

Pate also asserts, with regard to the nonrenewal of the contracts for the head football coach and athletic director, that the Board improperly took final action outside of a public meeting.

Pate relies, in part, on two articles published by separate newspapers reporting the school district notified the head football coach and athletic director the day after the regular meeting that the Board would not renew their contracts.

There is no dispute that those positions were not included in the Board's personnel report at the January 14 public meeting, and the Board did not vote on those items.

As a result, Pate—and other complainants—concluded the Board must have taken final action on these personnel items, but not at a public meeting. This argument is bolstered by the supplemental, dissenting response filed by a three member coalition of the Board that includes Scott Carmichael, Ron Childress, and Matt Roberts. The dissenters contend the Board president directed the superintendent, during the second executive session on January 14, to notify the football coach and the athletic director that the Board would not renew their contracts, and to advertise the vacancy within 24 hours.

The Board counters by arguing the varsity football coach and the athletic director were not terminated at, before, or

after the January 14 public meeting. Instead, the Board asserts that the only decision made (hiring a baseball coach) was made in a public meeting. Additionally, the Board argues that no action is necessary because the two contracts expire in August.

Again, it is worth mentioning that three members of the Board contend that the Board president directed the Superintendent—during the Board’s second executive session on January 14—to notify the head football coach and athletic director that their contracts would not be renewed and to advertise a vacant combination position for varsity football head coach and athletic director.

The news articles, which include interviews with the affected employees about the nonrenewal of their contracts and the job posting on the district’s website, strengthen this claim.

Even so, on February 11, 2019, the Board’s agenda included a personnel report that referenced the expiring contracts and that those positions would be advertised for next school year. Although the Board describes the report as informational only, it approved the report by a vote of 4 to 3.

3.1 Final Action

Under the ODL, a final action must be taken at a meeting open to the public. Ind. Code § 5-14-1.5-6.1(c). “Final action” means “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.” Ind. Code § 5-14-1.5-2(g).

Here, the Board argues that it did not take final action on the contracts of the varsity football coach and athletic director because no action needs to be taken on a contract that is expiring on its face. The Board also contends that the current varsity football coach and the athletic director are still under contract until August 2019.

In context, the issue is not whether the Board needed to take action on the two expiring contracts. Rather, the issue is whether the Board's decision to refuse continuation of these contracts, the creation of a new consolidated position, and the solicitation of applicants for the new, vacant position requires final action by the Board.

The Board also argues that advertising an employment opportunity "does not require a public vote and is clearly within the authority of any Indiana public school superintendent or principal without Board approval or approval at a public meeting" in accordance with Indiana Code section 20-26-5-4.5.

That statute does not reference the advertisement of employment opportunities in school districts. Instead, it expressly states that a superintendent is responsible for the selection and discharge of personnel—including athletic coaches—"subject to the approval of the governing body." See Ind. Code § 20-26-5-4.5(emphasis added).

It is not clear why the Board relied on a statute that expressly conditions a superintendent's authority over the selection and discharge of personnel on the Board's approval to support the idea that their superintendent "clearly" has authority to act without the Board.

The Board had it right the first time, earlier in its response, when it declared it has authority to contract for athletic coaches in accordance with Indiana Code section 20-26-5-4. Notably, “each contract must be approved by a majority of all members of the governing body.” Ind. Code § 20-26-4-8. In other words, a superintendent has authority to select and discharge personnel, subject to Board approval.

Although the non-renewal of contracts are not terminations and do not generally require board action when they expire by their terms, the Board took action anyway. It seems clear that this situation amounts to more than the Board merely letting two contracts expire. This is particularly true if the dissenting Board members’ version of events is accurate. Instead, this looks more like a proactive personnel management action, which under normal circumstances would require a vote.

Based on the information provided to this office, the superintendent received a directive—possibly by the Board president with majority approval at an executive session—to preemptively refuse continuation of the varsity football coach and the athletic director’s contracts, and to post an employment opportunity combining both roles with 24 hours.

To argue this was simply a passive expiration of a contract is disingenuous. The Board has statutory authority to “[e]mploy, contract for, and discharge” personnel. Ind. Code § 20-26-5-4(a)(8)(A). A superintendent has the responsibility of selecting and discharging personnel, subject to the approval of the Board.

In other words, the superintendent does not have unilateral authority to decide if the Board will—or in this case, will not—contract for personnel, or to consolidate two positions into one, without the approval of the Board. It is relatively clear from the circumstances that a majority approval was secured beforehand, tantamount to a vote.

4. Executive Session Notice

Although not directly at issue in this complaint, the Board should be aware that the public notices it provides for its executive sessions that reference “I.C. 5-14-1.5-6.1(b)(6)(B) Personnel” are inadequate for purposes of the ODL.

Under the ODL, the public notice for an executive session must include—like all notices—the date, time, and place of the meeting. Ind. Code § 5-14-1.5-5. A notice for an executive session must also state the subject matter of the meeting by specific reference to the statutory exemptions for which executive sessions may be held. *See* Ind. Code § 5-14-1.5-6.1(d).

Here, the Board’s notice cites only half of the statutory exemption and designates the subject matter “personnel.” Indeed, certain personnel matters are perfectly appropriate for official action in executive session. Even so, there is not a general catch-all exemption for “personnel.”

For instance, the exception under Indiana Code section 5-14-1.5-6.1(b)(6) is only appropriate as follows:

With respect to any individual over whom the governing body has jurisdiction:

(A) to receive information concerning the individual's alleged misconduct; and

(B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:

- (i) a physician; or
- (ii) a school bus driver.

The plain language of this exception makes it clear that it is appropriate only to receive information about the alleged misconduct of an individual over whom the Board has jurisdiction *and* to discuss that individual's status as an employee, student, or certain types of independent contractors. In other words, this exception far narrower than a general discussion about personnel because alleged misconduct is a necessary for the exception to apply at all.

This office recommends the Board provide more specific information in its executive session notices in the future.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Board of Education for the Eastern Greene School Corporation did not violate the Open Door Law by adding a personnel item to approve the hiring of a new baseball coach to the agenda of its regular meeting on January 14, 2019.

Conversely, the totality of the circumstances indicate something akin to a final action occurred outside of a public meeting as it relates to the non-renewal of both the varsity football coach and athletic director's contracts, and the consolidation the two positions into one. This normally requires majority approval in the form of a vote.

Although the expiration of a contract does not require prior action—nor is it a termination or discharge—it appears the Board took final action anyway. Coupled with deficient notice of two executive sessions, the Eastern Greene School Board violated the Open Door Law.



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