AlaFile E-Notice

03-CV-2016-000315.00

Judge: HON. JOHNNY HARDWICK

To: MCCRARY MICHAEL VANCE
vmccrary@thegardnerfirm.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

SHEILA REMINGTON V. PEEHIP, SARAH SWINDLE, BILL NEWTON ET.AL.
03-CV-2016-000315.00

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
TIFFANY B. MCCORD, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

SHEILA HOCUTT REMINGTON, Plaintiff,	)	
V.	)	Case No.: CV-2016-000315.00
SWINDLE SARAH S, CLEVELAND PHILLIP DR., NEWTON BILL, BOOZER YOUNG ET AL, Defendants.	)	

ORDER

This case, which arises under the Open Meetings Act, Ala. Code § 36-25A-1 *et seq.*, is before the Court on cross-motions for summary judgment. For reasons explained herein, the Court will deny Defendants' motion and will grant Plaintiff's motion, and will issue appropriate relief.

Facts

This action concerns a decision by the Public Education Employees' Health Insurance Board, a body established under Ala. Code § 16-25A-2 to make decisions regarding the Public Education Employees' Health Insurance Plan (PEEHIP). A majority of the Board members voting, on April 27, 2016, voted to increase premiums and other associated payments that PEEHIP members must pay for health insurance.

Plaintiff Sheila Hocutt Remington is the duly elected President of the Alabama Education Association. She is also a long-time employee in the public schools of Alabama, and is an employee covered by PEEHIP. Defendants' summary judgment submissions no longer dispute

that Plaintiff has standing to bring this action.

Defendants Sarah S. Swindle, Bill Newton, Young Boozer, Dr. Philip Cleveland, Dr. Susan Williams Brown, Richard Brown, Joe Ward, Luke Hallmark, Susan Lockridge, Russell Twilley, John R. Whaley, Charlene McCoy, C. Ray Hayes, and Donald L. Large, Jr., sued in their official capacity, were members of the Board at the time at issue in this suit. Swindle was the Board chair at the time.

The Board gave public notice that it would be having a meeting on April 27, 2016, at 1:00 pm.

But before that, the Board gathered by prearrangement at 9:30 am on the morning of April 27th, 2016. The prearranged gathering was attended by all then-sitting members of the Board. The 9:30 am. portion of that day's gathering was arranged and called by (among others) Board chair and Defendant Swindle.

No public notice or agenda of the 9:30 am. gathering was given. Don Yancey, a PEEHIP staff member stated in writing that the 9:30 am. portion of the morning gathering was for Board members and PEEHIP staff only. Representatives of AEA asked for permission to attend the 9:30 am portion of that day's gathering, but permission was refused.

During the 9:30 am gathering – as anticipated and intended by Board chair and Defendant Swindle – PEEHIP staff made a presentation regarding the financial status of PEEHIP, and recommended increases in member premiums and associated member payments as solutions. (Swindle Deposition, pp. 20, p. 25 ("The topic was the recommendations that the staff was presenting on PEEHIP. We had a financial report from our chief financial officer … and they made recommendations on ways to remedy the financial situation."), p. 28.

("Q: … tell me, what was the purpose for the entire board getting together earlier before the 1

o'clock noticed time?

A. So that we could -- so that everybody could have access to what was being recommended by the staff, so they would have time to -- the board does not like to just walk in and not have any information ahead of time, so this was an effort to expose them to the financial situation and the recommendations. So that's why we had that meeting. Excuse me, that training session."); p. 35 ("Q: And the recommendation was to increase the rates that participants would pay?

A. On premiums.

Q. On premiums?

A. And increase the surcharge for spouses."); p. 36.

("Q. Those two things was a recommendation that the staff wanted to see happen?

A. Right. The staff advocated for the increases.)

These proposed increases in member premiums and associated payments were to come before the PEEHIP Board for a vote that very afternoon. Board chair and Defendant Swindle knew this at the outset, and it was quickly known by other Board Members as well.

Board Members asked questions and otherwise communicated with each other during the morning portion of the gathering. Some of that communication conveyed the Board Members' support of or opposition to the proposal to increase member premiums and other associated member payments. While Swindle and PEEHIP staff may have attempted to avoid any "deliberation" during the morning gathering, they did not succeed.

The Board, after a break, reconvened that same day, April 27, 2016, for the second portion of its prearranged gathering, the only portion of which public notice had been given and the only portion that was open to the public.

During the second portion of the day's gathering, the vote was 7-6 to increase "member

costs," ie., the premiums that covered employees and retirees would have to pay monthly for PEEHIP coverage, effective October 1, 2016.

Among other increases, the Board vote *doubled* the monthly premium for active employees with single coverage; *doubled* the monthly surcharge for spousal coverage for active employees and non-Medicare retirees; *increased* the monthly premium for family coverage for active participants; and *increased* the monthly premiums for retirees and their spouses in various ways.

For an employee seeking coverage for his or her spouse and children, the premium increase pursuant to this vote will be an *additional* $80 per month, or $960 per year, beyond the yearly amount an employee was already paying before this vote.

Discussion

1. Defendants violated the Open Meetings Act.

The Board gathered together by prearrangement for the whole day of April 27. But the public was given notice of, and was allowed to attend, only part of that day's prearranged gathering: the afternoon portion. The public was given no notice of, and was not allowed to attend, the morning portion of the day's gathering.

The court finds that the morning portion of the gathering either constituted or was part of a "meeting" within the meaning of the Open Meetings Act, therefore the Defendants violated § 36-25A-1(a) and -3 by failing to give notice and by holding the morning portion of the gathering in private. This is actionable under § 36-25A-9(b)(1) and (2).

The Act defines "meeting" in § 36-25A-2(6)(a). The subparts of that definition that's

most pertinent here are the second and third provisions:

> 2. The prearranged gathering of a quorum of a governmental body … during which the full governmental body … is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.
>
> 3. The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body at a later date.[In this case in only a matter of hours.]

The Act's definition of "meeting" also contains some exclusions, of prearranged gatherings that are not "meetings." Defendants have claimed that their conduct falls within one of those exclusions, § 36-25A-2(6)(b)(1), as they claim that the morning portion of the gathering was a "training session." That subsection provides that the term "meeting" does not include:

> 1. Occasions when a quorum of a governmental body… attends social gatherings, conventions, conferences, training programs, press conferences, media events, association meetings and events or gathers for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body, or otherwise gathers so long as the … full governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the … full governmental body at a later date.

Defendants have also invoked § 36-25A-2(6)(b)(2), which says that the term "meeting" does not include "Occasions when a quorum of a subcommittee, committee, or full governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the subcommittee, committee, or full governmental body."

The Court concludes that the morning gathering constituted, or was part of, a "meeting" within the meaning of the Act for each of the three following reasons, any of which alone would be sufficient. Therefore, Defendants violated the Act by holding that meeting, beginning at 9:30 am., without public notice and without allowing public attendance.

A. First, the entire day's gathering constituted a meeting, and Defendants violated the Act by holding a portion of that meeting in private without public notice.

Defendants gathered by prearrangement all day long on April 27. On that day, they could (and did) deliberate and exercise their powers. The primary subject of the morning part of the gathering was the same as the primary subject of the afternoon part of the gathering: ie., whether to adopt member cost increases recommended by PEEHIP staff. Thus the day's gathering constituted a "meeting" within the definition of § 36-25A-2(6)(a)(2) and (3).

Defendants contend that this was not one gathering, but two – and that only the second part was a "meeting." But that contention does not fit within the language of the Open Meetings Act itself, or with the common understanding of that language. The Act does in fact recognize that a single "meeting" can have different "portion[s]," which is a very apt description of what happened here, see, § 36-25A-2(2), -2(7). The Act recognizes that a meeting can be separated into different "portions" – and that one "portion" can take place in private *when permitted by the parts of the Act dealing with executive sessions*. (The member cost increases at issue here would not have been a proper subject for an executive session, and Defendants implicitly conceded that point.) But simply holding one part of a gathering in a different room, and excluding the public, does not make that part of the gathering a different "meeting." The reasonable conclusion is that when a covered entity meets all day on the same topic, there is one meeting rather than two or more.

B. Second, the morning portion of the gathering, even if taken alone, constituted a "meeting" under Ala. Code § 36-25A-2(6)(a)(2), and it was neither a "training program" under § -2(6)(b)(1) nor a meeting with "state or federal officials" of the sort that is excepted under § -2(6)(b)(2).

The morning portion of the gathering was a "meeting" even if taken in isolation because the Board had the authority to exercise its powers there. This definition (under § 36-25A-2(6)(a)(2)) does not ask whether the Board did exercise its powers in the morning session; it asks instead whether it could have. "By law," *id.*, there is no limitation on when or how often the PEEHIP Board can meet and exercise the powers which it possesses. On the contrary, the law governing PEEHIP's Board simply gives that Board the authority to exercise the powers which it possesses whenever it meets (so long as there are at least six votes). Ala. Code § 16-25A-2(d). And a body cannot exempt a meeting from the coverage of the Open Meetings Act simply by deciding that it will take no actual votes in that meeting; if the law were that simple, then there would be no need for the detailed definition of "meeting," and exceptions to it, in the Act.

The Board argues that the morning session was not a "meeting" because no deliberation took place in the morning. (The premise is incorrect, as shown in the next subsection, but the Court will accept it for purposes of this present part of the discussion only). In this, the Board relies on § 36-25A-2(6)(b)(1), and in particular on a broad reading of the phrase "otherwise gathers" in that subsection, to suggest that no gathering is a "meeting" unless there is deliberation. But that is a mis-reading of § -6(b)(1). It ignores two important canons of statutory interpretation: the canon against surplusage, *Ex parte Ward*, 89 So. 3d 720, 727-28 (Ala. 2011), and the canon of *ejusdem generis* when interpreting phrases such as "otherwise gathers," *State Superintendent of Educ. v. Ala. Educ. Ass'n*, 144 So. 3d 265, 274 (Ala. 2013). The phrase "otherwise gathers" refers to gatherings without deliberation that are *materially like* the other types of gatherings-without-deliberation specifically listed in that provision. It does not refer to a situation like the one in this case, where the Board met by prearrangement to hear a presentation by its own staff that was specifically designed to advocate for a particular vote on a particular

matter to be taken up by the Board on that very day.

The Board also contends that the morning gathering was not a meeting because it was a "training program" excluded under § 36-25A-2(6)(b)(1). But the Court does not agree. The ordinary meaning of the phrase "training program" can readily encompass events in which members of a body are trained as to how to do their jobs – eg., how to prepare or read a budget, how to follow rules of parliamentary procedure, or generally how to follow relevant law in employment matters that will come before them. It does not encompass a situation like the one in this case, where the Board met by prearrangement to hear a presentation by its own staff that was specifically designed to advocate for a particular vote on a particular matter to be taken up by the Board on that very day. That is not a "training program" in normal language usage. *Cockrell v. Pruitt*, ___ So.3d ___, 2016 Ala. LEXIS 82, *18 (Ala. 2016) (words to be given their ordinary meaning).

The Board also contends that the morning gathering was not a meeting because it was a gathering of the sort excluded under -2(6)(b)(2): ("Occasions when a quorum of a … governmental body gathers … with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the … governmental body"). The ordinary, natural and common meaning (*Cockrell*, *supra*) of the phrase "state or federal officials" in this context does not include a body's meeting with its own subordinates, its staff. The ordinary meaning refers to inter-governmental or inter-departmental meetings, not intra-entity meetings Had the Legislature meant to exempt meetings with an entity's own staff from the Open Meetings Act, "state or federal officials" is certainly not the phrase that would have been used. Moreover, reading the -6(b)(2) exception to include meetings with staff would create a bizarre anomaly: that state-level government bodies can meet in private with their own

staff at will, while local-level government bodies cannot. (After all, the exception is for "state or federal officials," not "local or state or federal officials.") There is no reason to believe that the Legislature intended that anomalous and important disparity. This is all the more reason to read the phrase "state or federal officials" according to its ordinary meaning, as *not* including an entity's meeting with its own staff.

C. Third, the morning portion of the gathering, even if taken alone, constituted a "meeting" under either section -2(6)(a)(2) or (3), and there was deliberation. Under § 36-25A-2(1), "deliberation" is an "exchange of information or ideas among a quorum of members of a … governmental body intended to arrive at or influence a decision as to how any members of the … governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the … body." Here, at the very least, there was deliberation in that the Board Chair exchanged information with others, which the Board Chair intended to influence their votes. The Board Chair called the meeting so that the others would be given information advocating their adoption of proposed member cost increases. And, as the evidence shows, other Board members reacted at the very least with questions. The very nature of those questions was, of necessity, to test the reliability of the information and the wisdom of the proposal that was being fed to them; there is no other conceivable purpose. As anyone who has ever attended an oral argument knows, any question conveys information too: information about what the questioner believes to be the weak spots in the argument, or information about what more persuasion the questioner would need in order to accept the argument. All of this is deliberation, and therefore again the morning session (even if standing alone) was a meeting that should have been open to the public.

2. Declaratory and injunctive relief are appropriate.

As to appropriate relief, the Court begins with a declaration (as authorized by Ala. Code § 36-25A-9(e)) that Defendants violated the Act by not giving public notice of the 9:30 am gathering, and by excluding the public from that gathering.

The Court also finds it appropriate to issue injunctive relief, as also authorized by section -9(e). This is not simply a matter, as Defendants would have it, of enjoining them to "follow the law." It is an injunction to enforce the law in a particular recurring type of scenario, where Defendants have – until this very moment – been operating under an incorrect view of their legal obligations. Therefore the Court ORDERS that Defendants and their successors shall give the public notice set forth in the Act and shall allow public attendance whenever a quorum of the Board gathers to hear a presentation by PEEHIP staff on any specific matter that is expected to come before the Board. If such matters are permissible subjects of the Act's provisions on executive sessions, the Board may follow those provisions on executive sessions.

3. Invalidation of the vote is also appropriate, leading to further relief.

Finally, the Court decides in its discretion to exercise the authority conferred in § 36-25A-9(f), to invalidate the challenged actions taken on April 27 (ie., the vote(s) raising member costs). The statute allows the Court to take such action if suit was promptly filed (it was) and if the violation was not the result of "mistake, inadvertence, or excusable neglect" (it was not, and Defendants implicitly concede point) and if "invalidation of the governmental action taken would not unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of the governmental body." There is no evidence in this case that anyone actually changed their position or took action in reliance on the votes in question. Defendants urge that PEEHIP members and vendors rely on the Board to keep PEEHIP financially afloat, and that may be true; but this Court is not in any position to conclude

that this is the same as saying that anyone took action or changed their position because of the votes taken on April 27.

Defendants also urge that this relief is barred by the provision which states that "any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting." But that argument depends on the premise that there were multiple separate meetings on April 27. The premise is wrong, as has been discussed above. There was one meeting (a day-long gathering, both morning and afternoon, both primarily focused on the same question of whether to increase member costs), though that meeting was broken up into different "portion[s]" to use the Act's terminology. As discussed above, the full-day meeting was not conducted in a manner consistent with the Open Meetings Act, as the public was given notice of only part of it and was allowed to attend only part of it. Moreover, the actions taken by the Defendants evidence an intention to violate the "spirit" if not the letter of the law. The position advanced by the Defendants would render the Open Meetings Act meaningless and nullify the legislative protection intended for the public.

Finally, Defendants rely on the fact that at a subsequent meeting, there was a failed motion to rescind the increased member costs. But the Court concludes that invalidating the challenged April 27 votes is still appropriate. If the failure of that motion is practically nearly equivalent to a ratification of the April 27 vote – as Defendants urge – then Defendants will be able to hold another vote promptly, and will be able to affirmatively adopt the member cost increases so long as they follow the Open Meetings Act and any other applicable law. Such an affirmative vote would remove any question about whether a failure of a motion to rescind is exactly the same as a ratification.

It is Ordered, Adjudged, and Decreed that the actions of the Defendants taken on April 27, 2016 are invalidated as a violation of the Alabama Open Meeting Act, Section 36-25A-1 et seq., Code of Alabama 1975,as amended.

Meanwhile, the amounts now held in escrow must be distributed by the Defendants back to the PEEHIP members who contributed those amounts.

DONE this 20th day of August, 2017.

/s/ HON. JOHNNY HARDWICK
CIRCUIT JUDGE