STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 29, 2022)

BRITTANY DIORIO, STEPHANIE HINES, and KERRI THURBER	:	
VS.	:	**C.A. No. PC-2021-7234**
GINA BAE; AMANDA REGINO BASSE; PATRICK MCCRANN; MEGAN P. DOUGLAS; and ERIKA SEVETSON, individually and in their capacity as members of the Barrington School Committee; and the BARRINGTON SCHOOL COMMITTEE	:	

DECISION

LANPHEAR, J. On May 25, 2022, this Court issued a decision in this action which found that the Barrington School Committee violated the Open Meetings Act in August 2021 and September 2021 by failing to provide sufficient public notice before enacting its COVID-19 policy. The Court deferred its determination of the penalty, providing each party with the opportunity to be heard. Memoranda and an affidavit were submitted and now arguments are complete.

In *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784 (R.I. 2005), an open meeting violation was alleged as a result of a town council meeting on October 23, 2001. The day after plaintiff's counsel informed the town that a complaint would be filed, the town sent a notice for a new meeting essentially correcting the wrong. Corrective action was taken within a week, and plaintiff sued thereafter.

Here, the situation is different. The Plaintiffs at bar questioned the meetings of the Barrington School Committee of August and September 2021. They filed suit in November 2021.

In December 2021, this Court heard the case on the merits, and the Court found the Open Meetings Act violations on May 25, 2022. The Barrington School Committee alleges that its new hearing to correct the inadequate notice was held in June and July 2022, after the Court's decision.

The Barrington School Committee claims Plaintiffs should not be rewarded for their "waste of time and resources." (Defs.' Mem., Aug. 19, 2022, at 7.) The case was brought to hearing and the parties tried their case before any deficiency was corrected.

Defendants also claim on page 7 that "this case was a close case on the merits." Simply because the Attorney General did not commence proceedings does not make it a close case. Defendants' claim that no other court has regarded linking a proposed policy to an agenda not only misstates the Court's decision of May 25, 2022, but this did not require any policy to be "linked" (though it would have been easy to do).[1] Rather, this Court discussed *Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education*, 151 A.3d 301 (R.I. 2016) which held that when a policy was referenced but not enclosed, the notice was insufficient. It was the Supreme Court which said the 7b enclosures "should have been attached." *Id.* at 306.

This Court knows that it must consider "the totality of the circumstances" and did so in determining, months ago, that an Open Meetings Act violation occurred. The matter before the Court now is for consideration of penalties and sanctions.

The Open Meetings Act provides:

> "The court shall award reasonable attorney fees and costs to a prevailing plaintiff, other than the attorney general, except where special circumstances would render such an award unjust. The court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of this chapter. In addition, the court may impose a civil fine not exceeding five thousand dollars

[1] The term "linked" denotes inserting a uniform resource locator (URL) hyperlink in the internet posted meeting notice. Clicking on that hyperlink would open the document constituting the new policy.

($5,000) against a public body or any of its members found to have committed a willful or knowing violation of this chapter." G.L. 1956 § 42-46-8(d).

The Court will review each statutory penalty in turn. Section 42-46-8(d) first establishes that the Court "shall award" attorney's fees unless the Court finds that "special circumstances" make it unjust. This alters the usual practice in America—where each side pays for its own legal expenses. Paying for opposing counsel is rare and clearly demonstrates that our Legislature intended the statute to be enforced even if the Attorney General doesn't prosecute. In such an event, the violator (not the complainant) should pay the plaintiff's fees. The violator can argue that there has been a technical violation and cure the problem promptly, stopping future fees, but such was not done here. Plaintiffs hired outside counsel, the case became focused on the alleged Open Meetings Act violation by February, and continued. The Barrington School Committee did not correct its error. It did not step back, readvertise the issue, and vote again after sufficient notice.

Fees will be allowed and will be discussed below.

Voiding the Policy

Plaintiffs want their positions reinstated, and if the Court voids the policy that could be accomplished. Voiding the policy is allowed under the Open Meetings Act as a remedy. Here, doing so may not penalize the Barrington School Committee at all. Practically speaking, the Barrington School Committee could pass the policy again with sufficient notice (and may have already done so). This leaves the teachers to be terminated again with the requisite termination hearings. It would place the Plaintiffs, their replacements, and students in continued legal limbo, wondering who their teacher would be day to day. The Plaintiffs could have ended the threatened terminations earlier by getting vaccinated. As there is no evidence that the terminated employees

have been vaccinated, such a penalty is unlikely to resolve any dispute or punish the Barrington School Committee.

The Court recognizes that the purpose of the complaint was to have Plaintiffs' jobs restored, and the referral to the Open Meetings Act was but one of the avenues suggested. While the Open Meetings Act was violated, there was no claim that the teachers failed to receive substantial due process, pretermination hearings, post-termination notices and hearings, time to cure before losing their jobs, and the like. Voiding the policy could also eliminate the mandatory masking of students and teachers, as the policy was enforced for a year. In short, to void the policy itself would only result in confusion, and the Barrington School Committee could terminate the teachers again. It accomplishes little. The Court will not void the policy.

Civil Fine

What does a civil fine accomplish? It sends a clear message that a statute has been impermissibly violated. It punishes rather than making anyone whole. In our state, school committees have limited funds to perform one of the most basic requirements of Rhode Island local government: educating our students. For this task, they are appropriated limited funds by their town council or town meeting and certain state aid.

Practically speaking, if the Court imposes a civil penalty of $1,000 or $10,000 for every day of violation, that money would move from the Barrington School Committee back to the state. The Barrington School Committee, faced with a balanced budget requirement, must take money from another area, perhaps removing a teacher or aide. The Barrington School Committee would be impaired, but the students would suffer. If the Court imposes a civil penalty, less money is available for local education.

Nevertheless, this is a law which may be enforced. The civil penalty, more than anything else, sends a message that the conduct was wrong, future conduct must be different, and the Barrington School Committee was responsible. The Open Meetings Act infraction cannot go undeterred.

The Court is empowered to award a civil fine per § 42-46-8(d). It may only do so when the public body or any members are "found to have committed a willful or knowing violation . . ." The phrase "willful or knowing violation" has been based in federal law and other state laws and has been interpreted there. Obviously, it is a rare case when a person or body acknowledges knowing the law and violating it willfully. Accordingly, courts must depend upon not only the direct evidence, but circumstantial evidence and reasonable inferences. Courts often instruct "there is no way of fathoming or scrutinizing the . . . human mind." *See State v. Fry*, 130 A.3d 812, 823 (R.I. 2016).

In *Carmody v. Rhode Island Conflict of Interest Commission*, 509 A.2d 453 (R.I. 1986), our high court determined two separate appeals in one decision. The common question in each case was the meaning of the phrase "willful and knowing violation" in a civil context. Our high court applied the standard of the United States Supreme Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) to define the phrase to be "either knew or showed reckless disregard for the question of whether the conduct was prohibited by that statute . . ." *Carmody*, 509 A.2d at 460. It does not include situations when the defendant acts in good faith.

This Court cannot find that the Barrington School Committee acted in good faith for several reasons. First, the Barrington School Committee was very aware of the Open Meetings Act and its limitations. In fact, before the vaccine mandate was first passed on August 24, 2021, the Barrington School Committee spent considerable time discussing the Open Meetings Act as it related to other

agenda items. *See* Joint Ex. 2, Aug. 24, 2020 at 50:32 to 1:09:00 and 3:36:00 to 3:45:00. It discussed the Attorney General's annual forum on the Open Meetings Act.

Second, the Barrington School Committee discussed the topic of mandatory vaccinations on August 24 and September 2, 2021 without ever referencing mandatory vaccinations or mandatory masks in the notice. These were important issues at the time, important to individuals' education, health, and employment. On October 21, 2021 this was brought to the Barrington School Committee's attention. Joint Ex. 2 at 41:00-44:00. Chairperson Bae's testimony of January 19, 2022 indicates that the protocol was discussed at a subcommittee meeting on August 14, 2020 but vaccine mandates were not discussed. Instead, the mandate was drafted by legal counsel after meetings on August 4, 2020 and August 19, 2020 with Chairperson Bae and Superintendent Messore. The chairperson recognized the mandatory vaccine issue was important to parents and the public. The Barrington School Committee was conscious, wary, and concerned about the Open Meetings Act in regard to other issues at the time.

The Barrington School Committee was dealing with significant issues which carried substantial interest by members of the public: Mandatory masking and vaccinations at schools. It advertised that a new protocol was being considered but did not advertise the new masking and vaccine mandates specifically. Per *Pontarelli* they should have. The Barrington School Committee also recognized the breadth of the Open Meetings Act and queried about its limitations at the meetings indicated at Joint Ex. 2. This Court concludes that the Barrington School Committee showed reckless disregard for the question of whether its conduct was prohibited by the Open Meetings Act. As the *Carmody* Court stated, "[W]here the mandate of the law is clear, as it is in this case, it is difficult to conceive of a violation that could be reasonable and in good faith." *Carmody*, 509 A.2d at 461. It is difficult to conceive how not mentioning mandatory vaccination

or mandatory masking in schools was not worthy of specifying in the notice, or as the *Carmody* case explained,

> "We are convinced that even if Luby did not intend to violate the law, a reasonable person in these circumstances certainly would have realized that it would be improper . . ." *Id.* at 462.

Using the *Carmody* precedent, this Court finds the conduct of the Barrington School Committee to constitute a "knowing and voluntary violation" under the Open Records Act.

In awarding and assessing the amount of a civil fine, this Court considers factors set forth by the federal courts in assessing civil penalties. These include '"the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."' *Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc.*, 32 F.4th 99, 103 (1st Cir. 2022, *en banc*) (quoting 33 U.S.C. § 1365(a)).

This infraction is not a small one. In the midst of a pandemic, forced to deal with serious protocols by the state, the Barrington School Committee wanted to require mandatory vaccination of staff, mandatory masking of students, and other protocols. These were serious issues and controversial during the summer of 2020. The Court understands that the protocols were reported, the union knew about it, and most staff followed it. Yet, the schools were dealing with important, controversial, somewhat unique, and strong measures effecting every classroom—and the public was not told. The public did not know the students would be required to wear masks (though they may have expected it), the teachers did not all know, nor did the parents and students know that teachers would be required to be vaccinated or face termination. The union leaders may have known, but not the teachers or the public. The policy was unknown, and votes were taken. In

fact, two separate votes were taken by the Barrington School Committee to adopt the mandatory vaccination/mandatory masking policy which was after other votes were taken by a subcommittee or policy group.

The Barrington School Committee countered that the union leadership was apprised of the modification and most of the staff favored the change. The Barrington School Committee notes that the press covered some school activities. However, the public was not informed as required by the Open Meetings Act and precedent. People lost their jobs as a result of the policies enacted, and students may have been disciplined. Their constitutional and statutory pretermination and post-termination hearings do not substitute for allowing the public to know what the government is doing before they do it so "citizens [are] advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." Section 42-46-1. The Open Meetings Act mandates telling the public in advance of the deliberation and decision . . . Not after the fact.

This is a law which must be enforced. The civil fine, more than anything else, sends a message that the conduct was improper, future conduct must be different, and the Barrington School Committee was responsible. Accordingly, the Court assesses a civil fine of $500.

Attorney's Fees

The final issue is attorney's fees. Here, the Court has no discretion as the Legislature, recognizing the keen importance of noticing public meetings, directed "[t]he court shall award reasonable attorney fees and costs to a prevailing plaintiff . . . except where special circumstances would render such an award unjust." Section 42-46-8(d). The Court finds no such circumstances here. The Court awards attorney's fees which the guidelines and factors set by case law, as summarized in *Colonial Plumbing & Heating Supply Co. v. Contemporary Construction Co., Inc.*

464 A.2d 741, 743 (R.I. 1983) and Rule 1.5(a) of the Rhode Island Supreme Court Rules of Professional Conduct.

Defendants claim in their memorandum of August 19, 2022 that the Court should review the specific circumstances of the case. It is clear to the Court that, unlike *Tanner*, there was no remediation or correction until the Court found that the Barrington School Committee had violated the Open Meetings Act. There was no "particularly close call" here, and this case was fought and argued every step of the way.

Meanwhile, Plaintiffs hired an independent attorney, the case moved forward, and they focused on the Open Meetings Act early on. The Court considered the inherent tenets of justice and fairness in awarding legal fees and awards them here. Doing so is proportional to the breach and the effect hereof. The public was deprived of full notice. The Plaintiffs here were never informed by a proper notice that their employment was at stake. None of this would have come to light but for the vigorous and undaunted prosecution by Plaintiffs' counsel. The fees requested are reasonable and dedicated to this case. There was no remedial action until after the Court explicitly found an Open Meetings Act violation. This award is proportional, and the attorney's work was the key to discovering and prosecuting the violation. The statute required public notice. The Barrington School Committee failed to clearly state the important issue being considered. Legal fees are appropriately awarded here.

The Court reviewed the time and labor involved and parses each bill entry for what was done or whether it was truly attorney time. Mr. Piccirilli is a seasoned litigator with significant experience in education law. There is no doubt that this took significant time from his practice, as this case involved a restraining order application, hearing, and a preliminary injunction hearing. It carried time constraints. The Barrington School Committee continually raised additional legal

issues, many which Mr. Piccirilli addressed. The Barrington School Committee suggests that the claim for backpay was frivolous. It was not, and it would flow from a mandatory injunction or a voiding of the policy. Plaintiffs' claims were all-inclusive (of course) but not close calls.

The Barrington School Committee argued that because their counsel had a retainer with a set hourly fee that Mr. Piccirilli's fees should be similar. That is not in accord with the rule. Mr. Piccirilli was not on an hourly fee arrangement with a government entity which would eventually but definitely pay the bill. He was entering a different area of law where many attorneys would fear to tread, confident that his clients were treated unfairly but never knowing for certain what the result would be. Frankly, the $300 per hour fee seems conservative in the 2022 world of attorney rates, but the Court requires an affidavit by independent counsel to the appropriateness of the rate.

Conclusion

Defendants shall pay a civil fine of $500. No injunction shall issue. The Court does not void the policy, even though the policy was passed in violation of the Open Meetings Act. The Court awards Plaintiffs with their legal expenses and court costs. Plaintiffs shall submit affidavit(s) regarding the appropriate hourly rates for counsel within ten days of the date of this Decision. Defendants shall submit opposing affidavits within five days thereafter, if any.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Brittany DiOrio, et al. v. Gina Bae, et al.**
CASE NO:	**PC-2021-7234**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 29, 2022**
JUSTICE/MAGISTRATE:	**Lanphear, J.**

ATTORNEYS:

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For Defendant:	**Sara Rapport, Esq.** **Caroline R. Thibeault, Esq.**