

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

Douglas L. Fleming, Jr., Chief Judge
Stephen E. Sincavage, Judge
Jeanette A. Irby, Judge
James P. Fisher, Judge
James E. Flowman Jr., Judge



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March 5, 2020

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Re: Bragg V. Board of Supervisors, et al.
Case No. 16-180
Circuit Court for Rappahannock County

Dear Counsel,

This matter comes before the Court upon the Amended Petition for enforcement of the Virginia Freedom of Information Act filed by Marian Bragg.

This Petitioner complains of actions taken (or not taken) by the Board during five specific, consecutive Board of Supervisors ("Board") meetings held on June 6, July 6, August 1, September 7 and September 19 of 2016 in Rappahannock County, Virginia.

On those occasions the Board conducted its normal meeting in open session. Toward the end of the meeting on each occasion it was announced that the Board would go into closed session. After a short recess, a motion was made and a vote taken authorizing a closed meeting from the general public. After discussion occurred, a vote was taken certifying that only those

matters “lawfully exempted from the open meeting requirements” were discussed during closed session.

The Petitioner alleges that (1) the motions to close the meeting were not properly made (2) that she was improperly excused (3) that matters not in conformity with the closed meeting requirements of the Freedom of Information Act were discussed and (4) the motions certifying compliance were false.

She seeks declaratory relief of the violation, an injunction from further violations by the Board, imposition of fines on the Supervisors, and an award of costs and attorneys fees.

The Court will address these allegations in sequence.

I.

Did the Board properly enter into closed session and was she improperly excused from the meeting?

Respondents’ Exhibits 1 and 2 were drafted by then county attorney Peter Luke and expressly followed the requirements of the Virginia Code authorizing closed session meetings as provided in Va. Code sections 37.2-3711(A)(1) and (A)(7)¹. Further the vote was taken for this closed session and in each case it carried unanimously. The Respondent alleged in her pleading that she was ejected from the meeting before any motion was read or voted upon. The weight of the evidence is to the contrary. The exhibits and persuasive testimony reflected that formal motions were announced in open session that the Board would be going into a closed (or executive) session after a recess.

Based upon the practice of the Board that had developed over the years, prior to the Board going into closed session, a short recess or bathroom break would be taken during which time the spectators voluntarily left the meeting space. Thereafter the Board reconvened and the formal motion to go into executive session was read and a vote taken.

Subsequently, a sign was posted downstairs from the meeting space notifying the general public that the meeting was in fact closed. The motions read in this case identified the subject matter to be discussed, the provision of the Code permitting the closed session and purpose of the meeting. This is all that is required by law on this issue.

Further it was unclear from the evidence of the Petitioner which meetings, if any, from she was excluded. One witness, Page Glennie, claimed he was ejected from the meeting space prior to the formal motion being read. But there was no credible evidence that the Petitioner was present and thereby excluded in violation of Va. Code §2.2-2713(A).

The Court does not recognize “constructive ejection” (one person’s ejection equated as ejecting all persons) as argued by the Petitioner. In any event the weight of the evidence supports the Court’s finding.

1. Counsel for the Respondent provided the Virginia Code as it existed at the time of the meetings and this will be used by the Court.

II.

Was only the business lawfully exempted from the open meeting requirement discussed and was the motion on that issue properly made and recorded?

In the June meeting the closed meeting motion identified action to be taken under §2.2-3711(A)(1) and (A) (7), to-wit: “resignation of specific public officers”, in this case the current County Attorney. Mr. Luke announced his retirement during the closed session. It was argued by Petitioner that “retirement” and “resignation” are not the same, and that Mr. Luke had chosen to retire not resign. This is a distinction without a difference and the Board’s receipt of this information from Mr. Luke was not in violation of the Act.

However at this time or perhaps in more detail at the following meeting in July, contents of an advertisement seeking a replacement were discussed. Additionally, the Board discussed alternatives to the existing county attorney setup. The Respondent argued this was “legal advice” or in the alternative exempted from disclosure from the open meeting under the rubric of “prospective candidates for employment” in §2.2-3711 (A)(1).

The difficulty in this argument is that the context of the Code section suggests specific candidates, not candidates in general. While the County Attorney clearly could discuss his opinion regarding the various ramifications of criteria for employment under the auspices of legal advice, the court does not find that discussion by the Board, or a decision could be made, on this criteria without going into open session.

Mr. Luke was adamant in testifying that no votes were made in closed session and the Court accepts that as true. However the behavior of the Board and staff lead to a finding of a tacit grant of permission to allow the criteria of the job to be established by the staff. In this case running an advertisement in a Bar publication. Mr. Luke pointed out that hiring of an attorney is not covered by the public Procurement Act advertising requirements. While that may be the case (no challenge was made to this assertion), it still reflects Board action that was not exempted from the Freedom of Information Act.

Further the County Administrator and Attorney laid out several alternatives as set forth in Exhibits 9 and 10 which impacted the eventual advertisement (or lack of one) and the actions of County staff. Although again not formally voted upon this was a form of action and discussion thereon that should have occurred in open session. “All meetings shall be open unless an exemption is properly invoked” Va. Code §2.2-3700(B).

This is not an issue of burden of proof as suggested in Va. Code §2.2-3713(E) dealing with “exclusions”. The Court agrees with the Respondent that the burden of going forward lies with the Petitioner on the issue of exclusions, but “exclusions” deal primarily with documents, whereas exemptions from open meetings are covered under the presumption as stated in §2.2-3713(E) “any failure to follow the procedures established by this chapter shall be presumed to be a violation.” (emphasis added)

On the other hand the actions subsequently taken by the Board were not nullified by anything that had occurred in the prior closed meetings. "No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body reconvenes in open meeting and takes a vote..." Va. Code §2.2-3711(B) The procedure used to rehire a County Attorney / County Administrator was not done by resolution, ordinance, rule, contract, regulation or motion. That action came later and was voted upon in open session when the new County Attorney was hired.

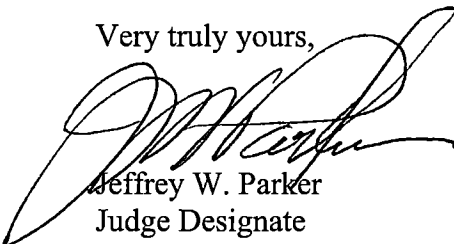
No formal actions were taken in closed session, only a response to comments of staff and some discussion by the Board regarding possible action to be taken, to-wit: whether certain County positions should be combined, and whether new hires should be treated as independent contractors or employees. Thus the motions coming out of closed session were not 100% correct in identifying their actions.

In considering the actions of the Board, they relied in apparent good faith upon the advice of experienced, knowledgeable Counsel to the Board. The Court finds that this violation was subject to the aforementioned mitigating factors, and to-wit: no ulterior motives, no monetary harm, belief that taxpayer money could be saved by the recommended form of advertising (in bar publications) and disclosure of procedures through litigation, no evidence of repeat violations. Therefore a civil penalty will not be imposed upon any member of the Board.

The Court further does not find any violations on the "land-fill" issue which was presented, due to lack of any tangible evidence of discussions on this issue during closed session².

To the extent that Petitioner seeks an injunction against further similar discussions of attorney hiring in closed session, that will be granted for a term of ten years. Consistent with its previous ruling the petitioner shall be allowed to present her motion for attorney's fees and costs. One hour shall be allowed for this hearing to be separately scheduled through the Clerk of the Court by counsel.

Very truly yours,



Jeffrey W. Parker
Judge Designate

2. The 'polling' issue and Declaratory Judgment issue were resolved prior to final argument in this matter and do not require a ruling.