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CASE NUMBER: 2020CV30001

MINERAL COUNTY DISTRICT COURT, STATE OF COLORADO 1201 North Main Creede, CO 81130 (719) 658-2575	
Plaintiff: MATT ROANE; v. Defendant: CREEDE SCHOOL DISTRICT BOARD OF EDUCATION.	▲ COURT USE ONLY ▲
	Case Number: 2020CV30001

ORDER DENYING MOTION FOR IN CAMERA REVIEW OF EXECUTIVE SESSION RECORDING

THE COURT, having reviewed Plaintiff's Motion for In Camera Review of Executive Session Recording (Motion), and Defendant's response to the same, hereby DENIES the Motion.

FACTS

In December of 2019, the superintendent of the Creede School District announced that he would end his tenure following the completion of the 2019-2020 school year. Upon receipt of the announcement, the Creede School District Board of Education (Board) opened an executive

search to replace the outgoing superintendent in February 2020. Ten candidates for the position were identified. On March 23, 2020, the Board held a special meeting during which the Board convened in executive session pursuant to C.R.S. 24-6-402(4)(g). Prior to moving into executive session, the Board stated, "So, we're going to be going into … the idea here is we go into executive session, we are going to be discussing the various candidates for the superintendent position and the discussions of those people with names are going to be done, and it has to be done, in executive session. Um, we will be coming out of executive session with a … we have ten applicants, we'll be coming out with likely a shorter list of applicants from executive session." Thereafter, the Board voted "to move into executive session pursuant to 24-6-402(4)(g) consideration of any documents protected by the mandatory nondisclosure provisions of the Open Records Act; except that records that are work product or part of a deliberative process privilege shall occur in open session." During the executive session, the Board discussed records and application materials of the ten individuals seeking the position of superintendent. Upon reconvening in open session, the Board formally voted to accept five candidates as finalists for the position.

Upon reviewing the Board's minutes from the special meeting, Plaintiff Roane suspected the Board had exceeded the scope of the announced topic and engaged in prohibited actions while in the executive session. Specifically, he believed the Board's narrowing of the pool of ten applicants for the superintendent position down to five finalists while behind closed doors was improper and that this constituted a "formal action" of a type which is prohibited by the Colorado Open Meetings Law. On May 14, 2020, Plaintiff Roane submitted a request to the Board seeking a copy of those portions of the executive session recording involving discussions

and actions not listed in C.R.S. § 24-6-402(4)(g). The Board rejected the request, citing to a statutory exception in the Colorado Open Records Act relating to confidentiality of non-finalists for an executive position. Thereafter, this Action was filed, seeking judicial review of the Board's decision and access to the recording.

ISSUES PRESENTED

Plaintiff Roane believes that the Board selected its five finalists for the superintendent position during the executive session and then held a "sham public vote" thereafter. He asserts that the executive session exceeded the scope of the purpose for which it was announced and that the consensus reached relating to finalists for the superintendent position was evidence of a formal action or improper exercise of the Board's policy making function in executive session. Plaintiff bears the burden of demonstrating grounds sufficient to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402(3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402(3)(a) or (4).

There is no question that the District convened an executive session to discuss candidates for the superintendent position. There is also no question that, following that executive session, the District voted unanimously on five finalists for the position without further public discussion. Ultimately, Plaintiff Roane asks this Court to find a violation of the Colorado Open Meetings Law and to review the recording of the executive session *in camera* and to make any portion of that session determined to violate COML public. The Court addresses two issues in turn. First, was the executive session improperly convened and did it exceed the stated purpose? Secondly,

is the kind of position or consensus reached during the executive session the type of policy decision contemplated by the COML?

APPLICABLE LAW

Much of the analysis in this case turns on well-established principles of statutory construction. First, the statutory scheme as a whole must be construed to give "consistent, harmonious and sensible effect to all its parts." *People v. Luther,* 58 P.3d 1013, 1015 (Colo.2002) (internal quotation marks omitted). If an interpretation of the statute would produce an absurd result, that interpretation is not favored. *Id.* A court interprets a statute in a manner that gives effect to the General Assembly's intent. *Carlson v. Ferris*, 85 P.3d 504, 508 (Colo.2003). To do this the court begins with the language of the statute, giving words their plain and ordinary meaning. *Id.* If the statute is unambiguous, the analysis goes no further. *Luther,* 58 P.3d at 1015. If the language is ambiguous, however, the court then looks to "legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme to ascertain the correct meaning of a statute." *Id.* When reviewing a specific statutory provision, a court is required to "consider the statutory scheme as a whole in an effort to give consistent, harmonious, and sensible effect to all its parts. If interrelated statutory sections are implicated, [courts] apply the same rules of construction to further the underlying intent of the statutory provisions." *Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004) (citations omitted).

The functions of local school boards are governed by the provisions of Section 22-32-101 et seq. Interestingly, neither party cited any provisions from Title 22 in their briefing of this issue. Section 22-32-108(5)(a) contains the same statutory language interpreted by the court in *Wheeler v. School Dist. No. 20, El Paso County,* 521 P.2d 178 (Colo. App. 1973). That section

provides in pertinent part, "All regular and special meetings of the board shall be open to the public. . . At any regular or special meeting the board may proceed in executive session in accordance with the requirements of this paragraph (a) and paragraph (d) of this subsection (5). Only those persons invited by the board may be present during executive session, and the board shall not make final policy decisions while in executive session." § 22-32-108(5)(a). A school board is required to comply with the requirements pertaining to holding a meeting in executive session, including the provisions of section 24-6-402(2)(d.5)(II)(A), which provides, for recording of discussions in executive session and a mechanism whereby an individual who seeks access to that recording can request an *in camera* review and release of the recording by a court. The party seeking access to the information bears the initial burden of showing "grounds sufficient to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402(3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402(3)(a) or (4). If the applicant fails to show grounds sufficient to support such reasonable belief, the court shall deny the application. . . ." § 24-72-204 (5.5)(a) C.R.S.

School boards must comply with the requirements of section 24-6-402(4) when convening an executive session. Specifically, the Board must announce to the public the topic to be discussed in executive session in as much detail as possible without compromising the purpose for which the executive session is authorized. *Id.* The applicable statutory purpose in this case was, "Consideration of any documents protected by the mandatory nondisclosure provisions of the "Colorado Open Records Act", part 2 of article 72 of this title; except that all

consideration of documents or records that are work product as defined in section 24-72-202(6.5) or that are subject to the governmental or deliberative process privilege shall occur in a public meeting unless an executive session is otherwise allowed pursuant to this subsection (4)." § 24-6-402(4)(g) C.R.S. The requirements for executive session at school board meetings are further enumerated in section 22-32-108(5) C.R.S.

Generally, school boards are subject to the Colorado Open Records Act. However, there are exceptions to the general requirement that a custodian of public records shall allow any person the right of inspection of those records. The exception which applies in this case, and upon which the Board relied in denying Plaintiff's request for information is the following:

> The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest pursuant to this subsection (3):
>
> (XI)(A) Records submitted by or on behalf of an applicant or candidate for an executive position as defined in section 24-72-202(1.3) who is not a finalist. For purposes of this subparagraph (XI), "finalist" means an applicant or candidate for an executive position as the chief executive officer of a state agency, institution, or political subdivision or agency thereof who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5), and if only three or fewer applicants or candidates for the chief executive officer position possess the minimum qualifications for the position, said applicants or candidates shall be considered finalists.
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> (B) The provisions of this subparagraph (XI) shall not be construed to prohibit the public inspection or copying of any records submitted by or on behalf of a finalist; except that letters of reference or medical, psychological, and sociological data concerning finalists shall not be made available for public inspection or copying.
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> (C) The provisions of this subparagraph (XI) shall apply to employment selection processes for all executive positions, including, but not limited to, selection processes conducted or assisted by private persons or firms at the request of a state agency, institution, or political subdivision.

§ 24-72-204(3)(a) C.R.S. School boards, specifically, are governed by other statutory requirements for confidentiality relating to employment applications. Section 22-32-109.7(4) C.R.S. provides that any information received by a board pursuant to the statutory requirements relating to employment of personnel "shall be confidential information and not subject to the provisions of part 2 of article 72 of title 24, C.R.S." The provisions within 22-32-101 *et seq* direct school boards regarding what policies they are required to make and what policies they are permitted to make. To the extent that the statutory provisions address policy making specifically, selecting finalists for a superintendent position or any other employment position are not listed among the boards "policy" making functions.

While there appears to be no case law directly on point relating to the selection of superintendent finalists, the Court finds *Wheeler, supra,* instructive. The case involved transfer of a tenured teacher from a position as principal to a position as a classroom teacher. The plaintiff asserted that the action was ineffective because the action was taken at a meeting of the school board that was not open to the public. At 181. The applicable statute at the time provided, "All regular and special meetings of the board shall be open to the public, . . . At any regular or special meeting the board may proceed in executive session, at which only those persons invited by the board may be present, but no final policy decision shall be made by the board while in executive session" *Id. quoting* 1965 Perm.Supp., C.R.S. 1963, 123-30-8(5). The language of that statue was interpreted by the court to permit some decision making in executive session but all 'final policy decisions' were required to be made in open meetings. The court went on to find, "the decision to transfer plaintiff from his position as principal was a type of specific, *ad hoc* action which the board of education may take in executive session." At 181.

The statutory language interpreted by the appellate court in *Wheeler* is the same statutory language contained in section 22-32-108(5)(a) at present.

The Court also finds *Hanover School Dist. No. 28 v. Barbour*, 171 P.3d 223 (Colo. 2007) instructive. That case involved the non-renewal of an employment contract of a probationary teacher. The board in *Hanover* held a special meeting on April 7, 2004 wherein, after a few minutes, the board moved into executive session without announcing the topic of discussion for the executive session. At 225. While in executive session, the board discussed whether to renew the teacher's contract for the next year. *Id.* The Board formally voted on a later date not to renew the teacher's contract. The appellate court held that any decision not to renew the teacher's contract made by the board in executive session did not have any effect because taking formal action or policy making during executive session is prohibited. *Id.* at 228. The court held that "the decision not to renew a teacher is a final policy decision that can only be made at a public meeting." *Id.* Thus, the court determined that "any Board actions during the April 7 executive session were inconsequential." *Id.* At issue in *Barbour* was whether a letter sent after the improperly convened April meeting but before the May meetings in which votes on retention decisions were taken constituted sufficient written notice to notify the teacher of termination of his employment. The court found it did not because the board could not simultaneously argue that no formal action was taken during the April 7, 2004 meeting but that formal written notice was given following that meeting, before the vote was properly taken in a public meeting at a later date. *Id.* The Court finds that this analysis does not directly apply to this case as the discussion taking place in executive session here did not involve a current employee or an employment decision. Rather, the discussion involved candidates for employment.

In *Bagby v. School Dist. No. 1, Denver*, 528 P.2d 1299 (Colo. 1974), the issue was whether certain gatherings of the board called "superintendent's conferences" were meetings within the meaning of the statutes pertaining to open meetings. "Although no final formal action was taken, Board matters were thoroughly discussed at superintendent's conferences. All members of the Board were given advance notice and usually all attended. The record shows that the agenda was quite extensive and many of the same matters were acted upon later in the properly called regular or special meetings which the public attended. However, they usually were given only cursory treatment and put to a vote, thereby indicating that the underlying pros and cons for the final decisions had been previously dispensed with during the superintendent's conference when the public was excluded." At 1300. The reviewing court found that the "superintendent's conferences" were meetings which were governed by the Colorado Open Meetings Law. *Id.* at 1302. However, the court specifically stated, "Executive sessions relate to subject matter not here involved and not raised by the parties herein. We therefore do not decide what are or are not proper subjects for executive sessions." *Id.* Thus, the Court finds the holdings of *Bagby* are inapplicable to the facts presented in this case, which wholly address the propriety of an executive session of the Board.

"A meeting is part of the policy-making process when the meeting is held for the purpose of discussing or undertaking a rule, regulation, ordinance, or formal action." *See Bd. of Cty. Comm'rs, Costilla Cty. v. Costilla Cty. Conservancy Dist.*, 88 P.3d 1188, 1193– 94 (Colo. 2004). In order to prevail on a claim under the Open Meetings Law, the claimant must "point to a pending action by the public body holding the meeting with regard to a rule, regulation, ordinance, or formal action by that public body that has a meaningful connection to the gathering

in question." *Intermountain Rural Elec. Ass'n v. Colorado Public Utilities Com'n*, 298 P.3d 1027, 1030 (Colo. App. 2012). Plaintiff asserts that the selection of the superintendent is part of the policy making function of the Board because the superintendent is heavily involved in making and enforcing policy. This assertion fails to acknowledge that the superintendent was not selected as a result of this executive session. In reality, five finalists for the position were selected following the executive session, and all of the materials relating to the finalists for the position then became public. By law, the confidential materials submitted by the non-finalists could not be made public and could not be publicly discussed.

Like the action taken in *Intermountain Rural Elec. Ass'n*, the action taken by the Board in selecting finalists "had no demonstrable connection to any pending" policy determination. *Id.* at 1031. The Intermountain Rural Electric Association asserted that the Public Utilities Commission undertook a formal action by reaching a formal opinion about pending legislation. The court aptly pointed out that, "IREA's argument fails to distinguish between 'formal actions' of the PUC, which create public policy within the purview of the PUC's policy-making powers, and other duties and actions of the PUC, which do not." *Id.* at 1032. The court went on to explain what constitutes a formal action; "Thus, to be a "formal action" and therefore part of the "policy-making responsibility" of the group, an action must fall within the group's ability *to make public policy. See Hanover Sch. Dist. No. 28 v. Barbour,* 171 P.3d 223, 227 (Colo.2007) (the OML applies to "meetings that concern matters related to *the policy-making function of that body")* (emphasis added)." *Id.* Following this analysis, the court stated, "[t]he mere fact that a public body reaches a 'decision' does not necessarily mean that making the decision is a 'formal action.'" *Id.* at 1033.

The facts of this case are also somewhat similar to those presented in *City of Fort Morgan v. Eastern Colorado Pub. Co.*, 240 P.3d 481 (Colo. App. 2010), wherein city council members completed individual employment review forms prior to meeting, and discussed an overall performance rating and whether or not to increase the pay of a city official in executive session which led the council members to "tentatively agree on a final evaluation which consisted of an overall rating of 3.0 (rounded up from 2.8), deferral of the decision on increasing Mr. Nagy's compensation to the next evaluation, and their comments (including those added during executive session). After the City Council returned to open session, its members voted unanimously to approve Mr. Nagy's final evaluation." At 484. The reviewing court determined that the individual review forms did not express any final decision by any council member, finding instead that "[t]he final decision here was the vote on the final performance evaluation in open session." *Id.* at 487.

THE EXECUTIVE SESSION WAS PROPERLY CONVENED AND THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT A REASONABLE BELIEF THAT THE DISTRICT ENGAGED IN SUBSTANTIAL DISCUSSION OF MATTERS NOT ENUMERATED IN SECTION 24-6-402(4)(g).

Prior to determining whether a local public body violated the prohibition in C.R.S. § 24-6-402(4) regarding the appropriateness of an executive session, a threshold inquiry is whether the public body was properly convened in the closed session. In its executive session announcement, the Board cited to C.R.S. § 24-6-402(4)(g) authorizing the consideration of documents protected by the mandatory nondisclosure provisions of the Colorado Open Records Act. Plaintiff argues that if the Board selected finalists in the executive session, the Board did not cite to any other subsection of the statute authorizing such action. The Court is not

persuaded. The Court finds that the executive session was properly convened in accordance with applicable statutory and case law.

Section 24-6-402(4)(g) C.R.S. allows a local public body to hold an executive session to "[c]onsider[] . . . any documents protected by the mandatory nondisclosure provisions of the "Colorado Open Records Act." The Colorado Open Records Act provides that "[r]ecords submitted by or on behalf of an applicant or candidate for an executive position as defined in section 24-72-202(1.3) who is not a finalist" shall be denied the right of inspection. See C.R.S. § 24-72-204(3)(a)(XI)(A). "[F]inalist means an applicant or candidate for an executive position as the chief executive officer of a state agency, institution, or political subdivision or agency thereof who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5)." *Id.* The superintendent position qualifies as the chief executive officer of the District, and the ten individuals seeking the position were clearly not finalists but rather the entire pool of applicants. Further, and as already alluded to, the Board was obligated to discuss and review these applications in executive session. The nondisclosure provisions of the Open Records Act which allowed the Board to convene in closed session, are not discretionary. The law makes clear that "[t]he custodian shall deny the right of inspection of the following records" (among them are the records submitted by applicants who are not finalists for an executive position). C.R.S. § 24-72-204(3)(a). Additionally, school boards have a separate statutory provision requiring that information received in the context of employment of personnel be kept confidential. *See* § 22-32-109.7(4). To the extent that the discussion led to consensus among Board members regarding the qualifications of applicants, that consensus is not unlawful.

THE CONSENSUS REACHED BY THE BOARD RELATING TO FINALISTS IS NOT AN ADOPTION OF A PROPOSED POLICY, POSITION, RESOLUTION, RULE, REGULATION, OR FORMAL ACTION.

The Court further finds that the Board's discussion in executive session cannot be considered the "adopt[ion] [of] a proposed policy, position, resolution, rule, regulation, or formal action . . . in contravention of section 24-6-402(3)(a) or (4)." Here, no employment decision was made by the Board in executive session or open session. No employee was hired. No employee was fired. Rather, the Board discussed protected candidate applications to maintain confidentiality of non-finalists as is required by law. To the extent that review of the materials led to a consensus of Board members, it does not rise to the level of the formal employment decision at issue in *Barbour*. The Board lawfully convened in executive session, and in fact was required to discuss and review the candidate applications outside of public view, as a matter of law. As a part of that review, it is apparent that members of the Board would share thoughts about the qualifications of the candidates that would lead to individual decisions of Board members and potential consensus. The Court finds that the discussion of superintendent candidates is not a formal policy action – even if a determination as to who the finalists were to be was made in executive session. That decision, if there was a decision, is less closely related to the "policy making" function of the Board than the decision made in *Wheeler*, *supra*. Additionally, the Board was under strict confidentiality requirements relating to the discussion of the application materials of any of the non-finalists for the position such that, had they publicly discussed their assessment of the candidates, they could be sued for a violation of the two separate statutory provisions requiring that such information be kept confidential. In evaluating

the statutory scheme as a whole, the Court finds that requiring public discussion of non-finalist candidates' application materials would lead to an absurd result.

IT IS THEREFORE ORDERED that Plaintiff's Motion is DENIED.

SO ORDERED this 13th day of August, 2020.

Honorable Crista Newmyer-Olsen
District Court, Mineral County