COURT OF COMMON PLEAS
FOR LICKING COUNTY, OHIO

Dennis Cauchon,	)	**Case No. 18CV0341**
	)	
Plaintiff,	)	**Judge Branstool**
	)	
v.	)	
	)	**Defendant(s)' Motion for**
Granville Exempted Village School District Board of Education, (et al.),	)	**Judgment on the Pleadings**
	)	
Defendant(s).	)	

Now come Defendants Granville Exempted Village School District Board of Education, Russ Ginise, Thomas Miller, Jen Cornman, and Amy Deeds, by and through Counsel, and pursuant to Ohio Civil Rule 12(C) hereby move for judgment on the pleading and dismissal Plaintiff's Complaint on all counts. The facts and authorities that support this Motion appear in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Granville Exempted Village School District Board of Education filled a vacant board position in the tight 20-day window the law affords it with one of 11 residents who applied for the empty seat. Plaintiff, a mere bystander and non-applicant, claims in his Complaint and Request for Injunctive Relief that the Board violated the Open Meetings Act during its efforts to secure a fifth board member. Plaintiff is plainly wrong. The Board acted in complete compliance with the law and the Complaint is bereft of merit.

II. ARGUMENT

A. Standard of Review

A motion for judgment on the pleadings is an appropriate mechanism to efficiently resolve dispositive questions of law at the outset of litigation. Pursuant to Civ. R. 12(C), Plaintiff is entitled to have all of the material allegations in his Complaint, with all reasonable inferences to be drawn therefrom, construed as true. *Hester v. Dwived*, 89 Ohio St.3d 575, 577, 2000-Ohio-230. Utilizing this standard, the facts and arguments establish that Defendants are entitled to judgment as a matter of law.

B. Plaintiff's Material Allegations of Fact

Effective February 28, 2018, the Granville Exempted Village School District Board of Education ("Board") had a vacancy caused by the resignation of one of its five members. Eleven residents applied for the vacant seat. After one applicant withdrew, the remaining four Board members interviewed the 10 candidates in executive sessions on March 5 and March 15, 2018.

After the Board conducted its tenth and final interview on March 15, it deliberated in executive session and then, in public session at that same meeting, it updated the public on the

vacancy-filling process by informing it that the candidate pool had been narrowed to four. The Board provided the names of the four finalists to the public and it further informed the public that additional deliberations were scheduled to occur in executive session on March 19. The Board President called the 10 candidates between March 15 and March 18 to give them the same update that was announced at the March 15 meeting.

The Board met again in executive session on the morning of March 19 to further deliberate over the four finalists for the vacant seat. After the Board came out of executive session, the Board President indicated in public session that he believed a consensus had been reached on the appointment of a new board member and that the Board would take formal action on the matter in public at the Board's meeting later that evening.

At the Board's regular meeting on the evening of March 19, the Board took formal action to select its new Board member who was immediately sworn in, provided a temporary paper name card for the meeting, and was photographed for the District's website.

C. The Law

1. Defendant Board members are named in the Complaint, presumably, in their official capacity as board members. As such, they are entitled to dismissal because claims against political subdivision employees in their official capacities are de facto claims against the entity itself, i.e. the school board. *DiGeorgio v. Cleveland*, 2011-Ohio-5878, 2011 WL 5517366, ¶32 (8th Dist.) Moreover, individual board members are subject to statutory immunity in this matter pursuant to R.C. 2744. *Whiting v. Coyne*, 1996 WL 492266 (8th Dist.)

2. There can be no question but that a public body, including a board of education, must conduct its business in public, except as otherwise provided by law. R.C. 121.22(C). There are limited exceptions to this general principle, including the authorization to conduct

executive sessions codified in R.C. 121.22(G). Relevant here is R.C. 121.22(G)(1), which permits a public body to move into executive session to "consider the ... employment or appointment of a public official or employee." R.C. 121.22(G)(1) reflects a legislative judgment that balances "the two objectives of open, public consideration and full and complete consideration, and determined that in personnel matters the inhibiting effect of open discussion is determinative and overrides the need for public discussion." *Kauffman v. Tiffin City Council* (3rd Dist. August 14, 1985), 1985 Ohio App. LEXIS 8627, at *4.

In executive session, a public body may deliberate over matters that fall within the scope of the statutorily authorized purpose. See R.C. 121.22(H) ("A ... formal action... that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) ... of this section and conducted at an executive session held in compliance with this section." While the term "deliberations" is not specifically defined by the sunshine law, Ohio courts have had no trouble identifying its attributes. They have observed variously that:

- "Deliberations involve a ***decisional*** analysis, i.e., an exchange of views on the facts in an attempt to reach a decision." *Piekutowski v. South Central Ohio Educational Service Center Governing Board* (4th Dist. 2005) (emphasis added), 161 Ohio App. 3d 372, 379, 2005-Ohio-2868 at 13.

- "Deliberations involve more than information-gathering, investigation, or fact-finding, they involve the weighing and examining of reasons for and against ***a*** *course of action.*" *Springfield Local School Dist. Bd. of Education v. Ohio Association of Public School Employees, Local 530* (9th Dist. 1995) (emphasis added), 106 Ohio App.3d 855, 864, citing *Holeski v. Lawrence* (11th Dist. 1993), 85 Ohio App.3d 824, 829.

- " '[F]or purposes of Ohio's Sunshine Law, a public body deliberates upon official business after it has obtained the relevant and salient facts necessary to reach a correct, proper, prudent and responsible decision. We hold that after a public body has obtained the facts, it deliberates by thoroughly discussing all of the factors involved, carefully weighing the positive factors against the negative factors, cautiously considering the ramifications of its proposed action, and gradually

> arriving at a proper ***decision*** which reflects this legislative process.' " *Board of Trustees of the Tobacco Use Prevention & Control Foundation v. Boyce* (10th Dist. 2009) (emphasis added), 185 Ohio App. 3d 707, 730, 2009-Ohio-6993, at 72, quoting *Theile v. Harris* (June 11, 1986 1st Dist.) 1986 Ohio App. LEXIS 7096 at *15.

Consequently, so long as the Board confines its discussion in executive session to a permissible subject for which the session was entered, a board of education is permitted to "engage in a decisional analysis," to "weigh the pros and cons," "to thoroughly discuss all the factors involved," "consider the ramifications" and "gradually arrive[...] at a proper decision which reflects this legislative process."

Deliberations in executive session may properly include the process of narrowing a list of applicants for a job. *State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education* (2002), 97 Ohio St.3d 58, 2002-Ohio-5311. In *Worthington*, in the course of deciding a public records case, the Supreme Court of Ohio recognized that narrowing the field of candidates for a position [in that case, a school treasurer] should be done in executive session:

> "... the evidence establishes that as of January 22, 2002, when respondents received [the requestor's] initial requests, the board had not yet reduced the field of candidates from five to two. In this regard, Board President McNaghten conceded that private board deliberations to narrow the list of viable candidates had to be conducted in executive session at a scheduled board meeting and that the board did not conduct an executive session narrowing the field of treasurer candidates from five before January 24. See, e.g., *State ex rel. Floyd v. Rock Hill Local School Bd. of Edn.* (Feb. 10, 1988), Lawrence App. No. 1862, 1988 WL 17190 ('The sunshine law does not permit deliberations concerning the employment of a public employee to be conducted during one-on-one conversations. Such deliberations, if not held in public, must be held during an executive session at a regular or special meeting')."

Id., at ¶43 (emphasis added).

A similar conclusion was reached by the Court of Appeals in *Kauffman v. Tiffin City Council* (1985), 1985 Ohio App. LEXIS 8627. In *Kauffman*, the Tiffin City Council met in executive session called pursuant to R.C. 121.22(G)(1) concerning filling a vacancy on council.

In the executive session, council chose two names as possible appointments and eliminated other applicants. The city council held no formal public meeting and took no public action to winnow the candidate list. But, after settling on two finalists in executive session, council subsequently voted publicly on a resolution naming one of the two finalists to fill the vacant position. Id., at *10.

The plaintiff in *Kauffman* argued that the act of eliminating candidates in executive session without a public vote was an action which violated R.C. 121.22. The Court of Appeals rejected that contention, holding that the elimination of candidates from consideration during council's deliberations in executive session was a preliminary decision which did not require a vote in a public meeting. The Court explained:

> "The official or final act of the legislative body is the act of 'filling' the vacancy. Until this was accomplished, no ultimate decision had been made. Any appropriate person could have been considered up to that point."
>
> "Under Section 121.22(H) the 'resolution' or 'formal action' is only invalid, if adopted in an open meeting, if it 'results' from an executive session unless that executive session was authorized under R.C. 121.22(G). In the latter case, it is valid. Here the formal action resulted from deliberations at an executive session properly authorized. No determination, resolution or formal action was taken at the executive meeting. Whatever was there accomplished was preliminary and neither binding nor determinative in nature. Thus, the resolution so adopted is valid."

Kauffman, at *10-11 (emphasis added).

Even though the Tiffin City Council narrowed the list of candidates it wished to consider to two in executive session without a public vote, the Court held that "it was proper for council to take such formal action" - that is the public vote to fill the vacancy - "based on prior deliberations at an executive meeting since the executive session was authorized by R.C. 121.22(G)(1). The formal action in this matter is authorized by R.C. 121.22." *Kauffman*, at *10.

The process of narrowing the list of applicants approved by the Court of Appeals in *Kauffman* is virtually identical to that followed by the Board in the current search. The Board voted on multiple occasions, at its regular business meeting or special meetings, to enter into executive session for the purposes described in R.C. 121.22(G)(1). In those executive sessions, board members learned the identities of applicants, invited candidates to its executive sessions to discuss their candidacy, shared with each other their views on the pros and cons of those individuals, thoroughly discussed all the factors involved and shared with each other their perspectives, gradually arriving at a decision as to which candidates they wished to consider further. Here, as in *Kauffman*, this process of narrowing of the field was preliminary, and did not become binding or determinative.

To be sure, there are cases in which courts have held that a vote or decision may not be taken in executive session. Each of these decisions is inapposite since they concerned situations in which the public body did not go into executive session for a reason authorized by R.C. 121.22(G) or met in an unlawful private meeting, in which case its action was void ab initio under R.C. 121.22(H), see *Piekutowski v. South Central Ohio Education Service Center Governing Board, supra* (straw vote conducted in executive session on the creation of a new school district which was not a purpose authorized by R.C. 121.22(G)); *Keystone Committee v. Switzerland of Ohio School District Board of Education* (7th Dist. 2016), 2016-Ohio-4663 (same); *State ex rel. Delph v. Barr* (1989), 44 Ohio St.3d 77 (decision of civil service commission to suspend competitive examination for police made at informal meeting at the home of a commission member invalid under R.C. 121.22); or did not take formal action in public meeting after deliberating in a properly convened executive session. *Mansfield City Council v. Richland County Council AFL-CIO* (5th Dist. 2003), 2003 WL 23652878 (decision

made in executive session not to join lawsuit was announced by city council in a public statement but no public vote was taken); *Mathews v. E. Local School Dist.* (4th Dist. January 4, 2001), 2001 Ohio App. LEXIS 1677 (board of education voted in executive session to deny bus route grievance, made announcement of decision, but did not vote publicly). In contrast, the board here met in executive session for a purpose authorized by R.C. 121.22(G)(1) and, ultimately, took a public vote.

Courts have repeatedly approved public bodies deliberating and making preliminary decisions in a properly called executive session for the employment or appointment of someone under R.C. 121.22(G)(1). No one is hired or appointed until the public body takes formal action in public session to make the appointment or employment. Until that formal action, the individual preferred in the executive session has no authority to act for the public entity, supervise anyone employed by the entity, or be paid by the entity's fiscal officer. Defendant Board has filled the vacancy in the only way possible--by and through a publicly approved action by the requisite majority or supermajority at a properly called public meeting.

Plaintiff argues for "transparency" in government. While the Board does not disagree with that, the General Assembly in R.C. 121.22(G), created a balance between openness and the effective functioning of government. Governmental subdivisions can consider and deliberate on a number of specific things in executive session. As the courts have recognized, "deliberations" can lead to a preliminary or informal "decisions" in executive session. However, no real action is taken in which legal relationships are changed, until the public body takes formal action in public to actually do one of the things enumerated in the executive session section, such as hiring someone, (from the Superintendent or Treasurer to a crossing guard), finalizing a collective

bargaining agreement, making a contract to purchase or sell real property, or appointing someone to fill a vacancy.

The public's interest in this case also favors reaching the same conclusion as the Court of Appeals did in *Kauffman, supra*. The sunshine law allows political bodies to hold executive sessions and thus make preliminary decisions on the appropriate subjects of hiring employees, setting their compensation, disciplining them, directing legal counsel in pending or threatened litigation, directing a broker as to his/her authority in negotiating the acquisition of land, negotiating a labor contract with a union, and making building security plans and arrangements. In all these cases the board needs to give definitive guidance and direction to its agents, yet it would be highly detrimental to the public interest for the board to have to finalize its limits, authority to an agent, proposals or counterproposals to a union or building security plans in public by formal action. It is the formal action of the board in approving a contract, a settlement agreement or setting compensation in public that accomplishes the end the public is seeking. In fact, the General Assembly felt so strongly about the need for secrecy in certain subjects that it made the public release or dissemination of information learned or discussed in an executive session a crime. R.C. 102.03(C); 102.99(B)(misdemeanor of first degree).

The public interest is represented by the legislative balance between public openness and the need for nonpublic discussion (even leading to preliminary decisions) on certain subjects. That includes appointment of a public official under R.C. 121.22(G)(1). There is no dispute that the board vacancy is the position of a public official; that the board properly moved to executive sessions to deliberate about the appointment; and that the board made the appointment in its public action on March 19, 2018. All these facts precisely fit the sunshine law and its exceptions. The public interest has been served.

Defendant is entitled to Judgment as a matter of law. Construing Plaintiff's Complaint as true in all material respects, there are no facts that support Plaintiff's claim of a sunshine law violation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendant(s)' Motion for Judgment on the Pleadings was sent by email to denniscauchon@gmail.com and by regular U.S. mail, postage prepaid, to Dennis Cauchon, Plaintiff, 935 River Road, Suite G, Granville, Ohio 40323 this 10th day of April, 2018.

James K. Stucko, Jr.