IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

STATE OF OHIO EX REL CRAIG A JONES et al,	CASE NO.: 2016 CV 04132
Plaintiffs,	JUDGE STEVEN K. DANKOF
-vs-	
BOARD OF EDUCATION OF DAYTON PUBLIC SCHOOLS,	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OVERRULING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
Defendant.	

This matter comes before the Court on Plaintiffs' January 30, 2017 Motion for Summary Judgment ("Plaintiffs' Motion") and Defendant's January 30, 2017 Motion for Summary Judgment ("Defendant's Motion").[1] For the following reasons, Defendant's Motion is **GRANTED** and Plaintiffs' Motion is **OVERRULED**.

A. FACTS

On March 7, 2013, Plaintiff Craig A. Jones ("Jones") entered into a Treasurer's Contract of Employment – Employment Agreement with Defendant Board of Education of the Dayton City School District (the "Board").[2] Jones was to serve for "a three (3) year term of employment" from August 1, 2013 to July 31, 2016.[3]

On February 11, 2016 and consistently with the Board's Notification of Meetings Policy ("BDDA")[4], Cherisse Kidd, Manager of Research and Administration for Dayton Public Schools, sent an

[1] Plaintiffs also filed a Memorandum in Opposition on February 13, 2017 and Defendant filed a Reply in support of its Motion and in opposition to Plaintiffs' Motion on February 13, 2017.
[2] *Stipulations*, dated January 30, 2017, ¶1 & Exh. A.
[3] *Id.* Throughout his tenure, Jones received W-2s and signed a W-4 Employee Withholding Allowance Certificate. Stipulations, Exh. N.
[4] The BDDA provided:
"A special meeting may be called by the President, the Treasurer or any two board members of the Board by serving written notice of the time and place of the meeting upon each Board member at least two days before the date of the meeting. The notice must be signed by the officer or members calling the meeting. . ." *Id*. at ¶2 & Exh. B. For all intents and purposes, the BDDA is identical to R.C. 3313.16.

email entitled "Special Meeting – February 23, 2016" at the direction of the Board President, Adil Baguirov.[5] Attached to the email was a "Special Meeting" notice.[6] On February, 19, 2016, another email regarding the special meeting was sent from the address PIONews@dps.k12.oh.us with a "Special Meeting" notice dated February 19, 2016.[7] The notice was on Dayton Board of Education letterhead, which included the name of Dr. Baguirov as Board President, but did not contain a signature. It read:

> "In accordance with Section 3313.16 of the Ohio Revised Code and File: BD of the Handbook of Policies, Rules & Regulations of the Board, I hereby call for a special meeting of the Board of Education of the Dayton City School District, Montgomery County, Ohio, to be held on **Tuesday, February 23, 2016**[8] at 5:30 p.m. in the Legal Conference Room (4th Floor) of the Administration Building, located at 115 S. Ludlow St. Dayton, Ohio.
>
> Immediately after convening, the board will go into executive session to consider the ***employment***[9] of public employees.
>
> Once they have reconvened in public session, the board may decide to act on recommendations from the superintendent and/or treasurer at this meeting.
>
> The media is being advised of the meeting in compliance with the Ohio Sunshine Law."[10]

Jones was among the recipients of both emails and notices prior to the February 23, 2016 meeting and he acknowledges ***he had actual notice of the special meeting prior to February 23***. Pursuant to Board Policy,[11] Ms. Kidd posted the meeting agenda, which did not mention Jones's contract by name, prior to February 23.[12]

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[5] *Id*; Defendant's Motion Exh. A., Adil Baguirov Affidavit, and Exh. B., Cherisse Kidd Affidavit. When calling a special meeting, Dr. Baguirov's practice was to have Ms. Kidd inform all Board members, media, and other relevant parties of the time, place, and purpose of the meeting and issue the requisite notices according to the BDDA and Ohio law.

[6] Which is purportedly attached to the Stipulations as Exh. C-2. However, the Court notes the document is dated February 19, 2016.

[7] Based on the Court's review, the "Special Meeting" notice listed as Exh. H-2 is identical to that attached as Exh. C-2. This discrepancy is of no import, as there is no dispute that Jones received this notice before the February 23, 2016 special meeting.

[8] Emphasis in original.

[9] Emphasis added.

[10] Stipulations, *supra*, at Exh. H-2.

[11] Known as "BDDC". *Id*. at Exh. D.

[12] Kidd Affidavit, *supra*, ¶10.

Jones and the superintendent did not attend the special meeting nor did they propose any recommendations for consideration.[13] At the meeting, Dr. Baguirov moved for the Board to enter an executive session:

> "Pursuant to Section 122.22 (G) <2> of the Ohio Revised Code, I move that this board go into Executive Session in a legal conference room. This meeting is being held to consider the employment of public employees. We will return to this room."[14]

After returning from the executive session, the Board voted on a resolution not to renew Jones's or the superintendent's contracts by a four to one vote.[15] Ms. Kidd. amended the agenda after the meeting to reflect the non-renewal resolutions.[16]

In a letter dated February 25, 2016, the Board informed Jones of its decision regarding his contract.[17] The Board hired Hiwot Abraha as the treasurer for the district for the 2016 – 2017 school year.[18]

B. <u>SUMMARY JUDGMENT</u>

Summary judgment is appropriate when, based on the evidence, "reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made."[19] The "evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law."[20]

The moving party "bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact[.]"[21] This burden cannot be discharged "simply by making a conclusory assertion[.]"[22] If the moving party fails to satisfy this burden, "the motion for summary judgment must be denied."[23]

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[13] Stipulations, *supra*, ¶¶ 6 & 7. Jones attributes his absence to a prior understanding between him and Dr. Baguirov, where Jones would be invited to special meetings and executive sessions only if Dr. Baguirov thought Jones should attend. Otherwise, his presence was considered unnecessary: 1) He received no such invitation from Dr. Baguirov or any other Board member; and 2) he would not have been present during executive session. Plaintiffs' Motion, Exh. A at ¶2.
[14] Defendant's Motion at 5.
[15] All Board members were present for the vote save Ronald C. Lee. Ronald Lee averred that he would have voted for the non-renewal of the contracts had he been present. Defendant's Motion, *supra*, at Exh. A, Affidavit of Ronald C. Lee.
[16] Kidd Affidavit, *supra*, ¶10.
[17] Stipulations, *supra*, ¶ 9.
[18] Kidd Affidavit, *supra*, ¶6.
[19] Ohio Civ. R. 56(C).
[20] *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996)
[21] *Id*.
[22] *Id*.
[23] *Id*.

After "the moving party has satisfied its initial burden," the burden shifts to the non-moving party to demonstrate a genuine issue of material fact by setting forth specific facts as outlined in Rule 56(E).[24] The non-moving party "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."[25]

C. LAW AND ANALYSIS

a. Writ of Mandamus

"[T]he general principle governing mandamus is that it is a summary and extraordinary writ, the issuance of which is within the sound discretion of the court and, although mandamus is classified as a legal remedy, its issuance is largely controlled by equitable principles, and the writ may be refused for reasons comparable to those which would lead a court of equity, in the exercise of its sound discretion, to withhold its protection of an undoubted legal right. Under the guise of enforcing a public right, the writ will not issue if in fact it will operate to the detriment rather than to the benefit of the general public."[26] "Mandamus cannot be used to *control* the exercise of discretion by a school board (*i.e.*, to compel such board to construe a statute in a *particular* way)."[27]

b. Procedure for Calling a Special Meeting of the Board

R.C. 3313.16 outlines the procedure for calling a special meeting of a school board:

> "A special meeting of a board of education may be called by the ***president*** or treasurer thereof or by any two members, by serving a written notice of the time and place of such meeting upon each member of the board at least two days prior to the date of such meeting. Such notice must be ***signed*** by the official or members calling the meeting. For the purpose of this section, service by mail is good service."[28]

Ohio courts have found that failure to strictly adhere to the notice requirements of the statute do not nullify a special meeting.[29] In fact, the entire written notice may be waived if the relevant parties have actual

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[24] *Dresher*, *supra*, at 293.
[25] *Id*. (quotations and citations omitted).
[26] *State ex rel. Beane v. Krebs*, 75 Ohio App. 427, 433, 62 N.E.2d 526, 529 (2nd Dist. Montgomery 1945) (citations and quotations omitted).
[27] *State ex rel. Mack v. Board of Education*, 1 Ohio App.2d 143, 144, 204 N.E.2d 86, 88 (2nd Dist. Miami 1963).
[28] R.C. 3313.16 (emphasis added).
[29] *See Stuble v. Board of Education of the Cuyahoga Valley Joint Vocational Sch. Dist.*, 1982 Ohio App. LEXIS 12318, 1982 WL 5953 (8th Dist. Cuyahoga) (notice found to be adequate despite being signed by a director instead of the superintendent); *Wolf v. E. Liverpool City Sch. Dist. Bd. Of Educ.*, 2004-Ohio-2479 (7th Dist. Columbiana); *Cleveland City School Dist. v. Cleveland Teachers Union*, 68 Ohio App.2d 118, 427 N.E.2d 540, Syllabus ¶1 (8th Dist. Cuyahoga 1980) ("A meeting in which all the members of a board of education participate in labor negotiations with a union constitutes a special meeting of the board within the purview of R.C. 3313.16, even if notice of the meeting has not been given in accordance with this statute"); and *Bd. of Educ. Of Indian Hill Exempted Vill. Sch. Dist. v. Bd. of Educ*., 1952

notice of a special meeting. "The significance of [relator's] actual notice. . . is that it tends to show he was not prejudiced by the lack of written notice because he could have acted on his actual knowledge and attended the meeting."[30] Specifically, failure to utilize the proper signature has been found to be insignificant when relator had actual notice of a special meeting.[31]

Simply put, Jones's assertion that the special meeting should be nullified for lack of strict adherence to the notice requirements of R.C. 3313.16 is sophistry. Why? Because it is undisputed that ***Jones had actual notice of the special meeting well in advance of February 23***. Citing a lack of signature on the notice and the fact that Cherisse Kidd sent the notice by email – at the behest of President Baguirov, which was the custom – is an attempt to hijack the words of the statute to undermine the spirit of the law. As other courts have found in similar situations, this Court finds Jones was not prejudiced by the Board's notice and hereby **GRANTS** Defendant's Motion insofar as it relates to Plaintiffs' first cause of action.

c. Open Meetings Act

The Open Meetings Act, R.C. 121.22, is one of Ohio's Sunshine Laws designed to promote transparency in government and other public bodies.[32] The statute states that it "shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."[33] "According to R.C. 121.22(H), any resolution, rule or other formal action taken by a public body that does not conform to the requirements of R.C. 121.22, or that does not qualify as a valid exception to R.C. 121.22, is invalid."[34]

R.C. 121.22(F) states: "Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and ***purpose*** of all special meetings."[35] "Ohio's Attorney General has stated that 'regular meetings,' as the term is used in R.C. 121.22, are 'those which are held at prescheduled intervals[,] * * * for example, monthly or

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Ohio Misc. LEXIS 392, * 23 – 24 (Ct. of Comm. Pls. Hamilton) ("If all of the members of the body are actually present, and particularly if their presence is in response to some kind of a notice, the purpose of the written notice has been served and its omission does not invalidate the vote").

[30] *Wolf, supra,* at ¶30.

[31] *Stuble, supra,* at 10 – 11.

[32] Of course, the Board is a public body under the statute. *Wolf, supra,* at ¶36.

[33] R.C. 121.22(A).

[34] *Wolf, supra,* at ¶35. *See also State ex rel. Bates v. Smith*, 147 Ohio St.3d 322, 326 2016-Ohio-5449, ¶16, 65 N.E.3d 718, 721.

[35] R.C. 121.22(F) (emphasis added).

annual meetings.'"[36] "In contrast, 'special meetings' are 'all meetings other than 'regular' meetings.'"[37] "The definition of the term 'special meeting' necessarily 'implies that such a meeting can only be held when there are specific reasons for holding it.'"[38] "Therefore, 'it follows that the notice of a special meeting must refer to those specific reasons, and that those specific issues are the only ones which can be addressed at such a meeting.'"[39] "We note, however, that nothing in R.C. 121.22 prohibits a public body from discussing more than one topic at such a meeting, provided that proper notice of the purpose of such a meeting has been given."[40]

"The rule is generally accepted that, in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner."[41] "[T]he party asserting a violation of [the Open Meetings Act] has the ultimate burden to prove [the Act] was violated (or was threatened to be violated) by a public body."[42]

Here, the Court finds that the Board did not violate R.C. 121.22 in the notice. *Warthman v. Genoa Twp. Bd of Trs.*[43] is instructive on this point. There, a township zoning inspector challenged her termination during a special meeting by the local board of trustees arguing *inter alia* a violation of the notice requirement of R.C. 121.22(F)—namely, inadequate notice of the meeting's purpose. The notices for the two meetings at issue stated one was for "the purpose . . . to discuss personnel matters in executive session, and any other business that may come before the Board" and the other for the "purpose . . . to discuss personnel matters."[44] The Fifth District found that these notices were sufficient under the Open Meetings Act, finding no issue with either references to "personnel matters" or "any other business that may come before the Board".[45]

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[36] *Hoops v. Jerusalem Twp. Bd of Trustees*, 1998 Ohio App. LEXIS 1496, *11 (6th Dist. Lucas 1998) citing 1998 Ohio Atty. Gen. Ops. No. 88-029.
[37] *Id.*
[38] *Id.* at *11 – 12 citing *Jones v. Brookfield Twp. Trustees*, 1995 Ohio App. LEXIS 2805 (June 30, 1995), Trumbull App. No. 92-T-4692.
[39] *Id.*
[40] *Id*. at *12 (citations omitted).
[41] *Brenneman Bros. v. Allen County Comm'rs*, 2015-Ohio-148, ¶18 (3rd Dist Allen) citing *State ex rel. Shafer v. Ohio Turnpike Com*., 159 Ohio St. 581, 590 (1953).
[42] *Id.* citing *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, ¶24, 972 N.E.2d 115 (12th Dist. Clermont).
[43] 2011-Ohio-1775 (5th Dist. Delaware).
[44] *Id.* at ¶106.
[45] *Id.* at ¶120.

If a generic purpose of "personnel matters" is sufficient notice under the Open Meetings Act, then the notice for the February 23, 2016 surely passes muster. In this case, the notice stated the purpose for the meeting was for "the board will go into executive session to consider the employment of public employees" and that is exactly what it did. Jones had no right to participate in the executive session and merely stating the results of the session on the record was not beyond the scope of the notice. Also, the Court can find no authority that supports the notion that the results of the entire meeting are invalid because the Board did not address one of the items on the notice—namely, the recommendations of the superintendent and/or treasurer, who were ***not present***. Defendant's Motion is **GRANTED** insofar as it relates to Plaintiffs' second cause of action.

d. Executive Session

"Public officials may discuss certain sensitive information in a private executive session from which the public is excluded, if particular procedures are followed. Specifically, members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of specific matters. Pursuant to R.C. 121.22(G), a public body may conduct an executive session for certain specified reasons * * * [including] considering the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official[46][.] * * * The executive session exceptions contained in R.C. 121.22(G) are to be strictly construed."[47] "While a public body may not need to use exact statutory language when stating its purpose for entering executive session, it must make clear which specific statutory purpose applies."[48] However, it "***need not include the name of any person to***

[46] So it makes no difference whether Jones is considered an employee or official, as will be discussed *infra*.
[47] *Maddox v. Bd. of Dirs. Children Servs. Bd.*, 2014-Ohio-2312, ¶17, 12 N.E.3d 476, 486 (2nd Dist. Greene) (citations and quotations omitted).
[48] *Id*. at ¶18 citing, *inter alia*, *In re Removal of Kuehnle*, 161 Ohio App.3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, ¶ 93 (12th Dist.) ("The statute requires a public body to specify, in detail, the stated purpose for holding an executive session, although the law does not require that the specific nature of the matter to be considered be disclosed. The exceptions contained in R.C. 121.22(G) are to be strictly construed."); *Weisbarth v. Geauga Park Dist*., 11th Dist. Geauga No. 2007-G-2780, 2007-Ohio-6728, ¶ 27 ("Although appellee noted the purpose of going into executive session, i.e., to discuss 'personnel' matters, the statute requires appellee to be more specific by denoting the precise type of 'personnel' matters it would address, such as hiring, discipline, termination, etc.").

be considered at the meeting."[49] R.C. 149.011, as cited by the Open Meetings Act, states "'public official' includes all officers, employees, or duly authorized representatives or agents of a public office."[50]

In short, the Board properly entered executive session at the special meeting. "Employment" was a valid reason for entering the session as defined in the statute and the Board was not required to list Jones's contract by name. Jones's contentions that the Board cited the wrong subsection on the record – R.C. 121.22(G)(2) instead of (G)(1) – and that he was actually an official, not an employee, as reasons to invalidate the executive session is without merit. Jones signed a "Treasurer's Contract of ***Employment*** – ***Employment*** Agreement" where he was to serve for "a three (3) year term of ***employment***". He received W-2s and signed a W-4 Employee Withholding Allowance Certificate. He was not elected, his position was at will and subject to non-renewal or even dismissal for cause.[51] And, in the end, public employees are "employees". Even if the Court were to humor Jones by referring to him as a public official, such definition includes "employee". Jones's argument asserts a distinction without a difference.

Defendant's Motion is **GRANTED** insofar as it relates to Plaintiffs' third cause of action.

D. Conclusion

For the foregoing reasons, the Defendant's Motion is **GRANTED** in its entirety and Plaintiffs' Motion is **OVERRULED**. This is a final appealable order. There is no just cause for delay.

SO ORDERED:

JUDGE STEVEN K. DANKOF

[49] R.C. 122.22(G)(1) (emphasis added).
[50] R.C. 149.011(D). *See also Cordray v. Int'l Preparatory Sch.*, 128 Ohio St.3d 50, 50, 2010-Ohio-6136, ¶1, 941 N.E.2d 1170, 1171 ("an officer, employee, or duly authorized representative or agent of a community school is a public official and may be held strictly liable to the state for the loss of public funds").
[51] *See also* R.C. 3313.22, governing school district treasurers, which is littered with employment language.

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So Ordered