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

DAVID ESRATI,	**CASE NO. 2018 CV 00593**
Plaintiff,	**JUDGE RICHARD S. SKELTON**
-vs-	**DECISION AND ENTRY DENYING MOTION FOR PRELIMINARY INJUNCTION**
DAYTON CITY COMMISSION et al,	
Defendant,	

This matter is before the Court on the motion of the plaintiff, David Esrati, pro se, for a preliminary injunction compelling the Board of Education of the Dayton Public Schools to comply with the Ohio Sunshine law, commonly referred to as the Open Meetings Act, R.C. 121.22. After consolidating the hearing on the motion with the trial on the merits, and on a conference with the parties, the Court issued an "Order correcting and changing the March 2, 2018 consolidating order" and set the hearing on the motion for a preliminary injunction for March 15, 2018. 3/113/2018. The parties appeared and the Court heard evidence and argument on March 15, 2018. On March 16, DPS filed a Post Hearing Brief seeking dismissal of "Plaintiff's lawsuit with prejudice." DPS Brf., 1. Plaintiff filed a response. 3/19/2018.

DPS moved the Court for judgment in its favor as a matter of law, pursuant to Civil Rule 41(B)(2) at the hearing and the Court had tentatively denied the motion and heard evidence from DPS as well as from plaintiff. The Court again denies the motion of DPS to dismiss. Such a motion may have been in order if the hearing had remained consolidated with the trial on the merits

pursuant to Civ. R. 65(B)(2), Ohio R. Civ. P. However, it is not applicable to a hearing on a motion for preliminary injunction only, as scheduled in the Court's March 13, 2018 entry.

Based on the evidence admitted at the March 15, 2018 hearing, the Court makes the following findings and conclusions.

FACTS:

The Board of Education of the DPS directed the acting Superintendent of the Dayton Public Schools to make a recommendation about potential closing of school facilities. She formed a 20-member School Facilities Task Force, including 3 members of the Board of Education and a "broad array of community members and representatives of the City of Dayton." The purpose of the Task Force was to assess what school buildings, if any, should be closed and subject to demolition. The acting Superintendent organized the Task Force and scheduled a bus tour of schools on a pre-prepared list of school buildings for review. The Task Force was to assist the Superintendent in making recommendations and a report to the Board concerning which school buildings should be considered for demolition.

Plaintiff attempted to join the bus tour but was prohibited from doing so. The Task Force only visited one school, Valerie Elementary, since the Court had requested that the tour stop pending hearing plaintiff's request for an injunction, treated as a motion for a temporary restraining order. Since the bus tour stopped, the Court held the motion for a temporary restraining order to be moot.

After the tour, the Superintendent and the Task Force held two meetings that were open to the public concerning Task Force member suggestions of factors to be considered in the potential school closings. Thereafter, the Board met publicly and the Board has now announced its intention to close and demolish the Valerie Elementary School building. It scheduled a second public meeting for a vote on this proposal for March 20, 2018. Plaintiff then requested the expedited evidentiary hearing.

The evidence presented at the hearing did not establish that any deliberations or discussion of the public business of potentially closing the Valerie School building occurred during the bus tour from which plaintiff was denied the opportunity to attend and which was not noticed to the public as a meeting open to the public. All 20 members of the Task Force were present at the prearranged gathering on the bus tour. The only evidence is that the Task Force members entered the Valerie school building and heard a maintenance person describe the condition of the heating and/or cooling equipment.

ANALYSIS AND LEGAL CONCLUSIONS

R.C. 121.22(B)(1) defines the term "Public body" as "(a) Any board, commission, committee, council, or similar decision-making body . . .; (b) Any committee or subcommittee of a body described in division (B)(1)(a);" Division (B)(2) defines "Meeting" as "any prearranged discussion of the public business of the public body by a majority of its members." Division (C) states the legislative policy, as follows: "All meetings of any public body are declared to be public meetings open to the public at all time." Division (A) states the legislative direction to the courts and the public about interpreting the statute, as follows: "This section 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." There is no claim that the subject matter---closure of school buildings—is an exception to R.C. 121.22.

Division (H) provides the following:

> "A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule or formal action adopted in an open meeting 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) or (J) (G & J not applicable herein) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule or formal action violated division (F) of this section."

Division (F) sets forth requirements for notification of regularly scheduled and special meetings.

Plaintiff asserts that the Task Force is a "public body" because it is a committee or subcommittee of a decision-making body described in R.C. 121.22(B)(1)(a), namely, the Board of Education. The Court agrees and finds as a matter of law that the Task Force consisting of three Board members and others suggested by the Mayor of Dayton is a Committee or Sub-Committee of the decision-making body, the Board of Education. The Court rejects the argument of DPS that the Task Force was only an advisory group for the Superintendent and was not a "public body" itself. Its purpose and membership demonstrate that it was a committee of the Board. The DPS argument would allow avoidance of the OMA requirements simply because the group formed by the Board's delegate, the acting Superintendent, who would make the ultimate recommendation to the Board after hearing from the committee. Pretending that the Task Force, including three members of the Board, was only for the Board's employee would allow a simple subterfuge to avoid the OMA. See *Cincinnati Enquirer v. City of Cincinnati*, 145 Ohio App.3d 335, 338, 762 N.E.2d 1057 (1st Dist. Hamilton County 2001). It would not be consistent with the legislative mandate to liberally construe the statute to favor open public meetings on public business.

Plaintiff does not challenge the two meetings after the bus tour, since they were held in open public meetings. He argues, however, that those meetings were tainted because they resulted from the non-public meeting, namely, the bus tour. Division (H) renders the formal action invalid where it results from a violation of the OMA. He asserts that the Task Force's gathering to inspect the school buildings constituted a "meeting" since it was a "prearranged discussion of the public business of the public body by a majority of its members." Division (B)(2).

As indicated, the Task Force meets the definition of a "public body." "A 'committee' is a 'subordinate group to which a deliberative assembly or other organization refers business for consideration, investigation, oversight, or action,' Black's Law Dictionary (9th Ed. 2009), or 'a body of persons delegated to consider, investigate, or take action upon and usu. to report concerning some matter or business.' Webster's Third New International Dictionary (1986) 458." *State ex rel.*

ACLU, etc. v. Cuyahoga Cty. Bd. Of Comm'rs, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 43. Various "committees" have been held to be a "public body" subject to the OMA. 2011-Ohio-625, ¶ 45.

The analysis for the Court hinges on whether or not the "resolution, rule, or formal action" stated in R.C. 121.22 (H) results from alleged "deliberations" in a meeting not open to the public. In other words, did deliberations occur on the bus tour which resulted in any formal action, resolution or rule as stated hereinabove. This Court is well aware that "the intent of the Sunshine Law is to require governmental bodies to *deliberate* public issues in public." *Berner v. Woods,* 9th Dist. Lorain No. 7CA9132, 2007-Ohio-6207 (Nov. 26, 2007), ¶ 15 (emphasis added), cited in *ACLU, supra.* "However, 'deliberations' involve more than information-gathering, investigation, or fact-finding. *Holeski v. Lawrence* (1993) 85 Ohio App.3d 824, 829, 621 N.E.2d 802." Id. Deliberation is the act of weighing and examining the reasons for and against a choice or measure. *Berner, supra,* citing Webster's. "In this context, a 'discussion' entails an 'exchange of words, comments or ideas by the [committee]." Id. If the bus tour of the Task Force was engaged *solely* in information gathering and fact-finding, it is not a meeting where deliberation is occurring. *Berner, supra,* ¶18.

Plaintiff's evidence fails to show that any deliberation or discussion of the closure issues occurred on the bus tour. It is such discussion and/or deliberation that renders such a gathering of a committee a "meeting" or an "invalid meeting" within the language of the statute. At best, the evidence is that the Task Force merely observed the heating and cooling facilities at the Valerie School and heard factual information from maintenance personnel.

The burden is on the plaintiff to prove that such deliberative discussion occurred during the bus tour and was used by the Board in proposing its formal action. The plaintiff did not produce the first witness who offered any proof that a deliberative or any other discussion was had on the bus tour at issue. The evidence is clear that plaintiff has not met his burden at this juncture. The Court

has no basis to find that plaintiff has shown he is likely to succeed on his claimed violation of the OMA at the trial on the merits.

Accordingly, plaintiff's motion for a preliminary injunction invalidating the proposed formal action of the Board of Education is **DENIED.**

SO ORDERED:

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JUDGE RICHARD S. SKELTON

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So Ordered