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LEGAL ADVISORY: *Boelter v. Board of Selectmen of Wayland*, (SJC-12353, April 5, 2018)

I. INTRODUCTION

In a case with clear implications for evaluation of Superintendents, on April 5, 2018 the Supreme Judicial Court ("SJC") held in *Boelter v. Board of Selectmen of Wayland*, 2018 WL 1631630 (SJC-12353) ("*Boelter*"), that the Wayland Board of Selectmen ("Board") violated the Open Meeting Law by circulating members' written evaluations of the Town Administrator's job performance prior to the public meeting during which the Administrator's performance was to be reviewed.[1] The case turned on whether an email exchange of evaluations constituted a "deliberation" under the Open Meeting Law (hereafter sometimes referred to as the "OML"). The SJC considered, "for the first time,"

> the meaning of the open meeting law's exemption to the definition of "[d]eliberation," which became effective in July, 2010, … [which exemption] permits members of public bodies to distribute to each other "reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed."

[1] The Open Meeting Law permits a public body to meet in executive session to discuss the "reputation, character, physical condition or mental health," or "discipline or dismissal," of an individual, but "professional competence" is subject to discussion at an open meeting. *See* M.G.L. c. 30A, § 21(a)(1).

Boelter, 2018 WL 1631630 at *1, *citing* St. 2009, c. 28, § 18; G. L. c. 30A, § 18; *See also* *Boelter* at *4-5.

The SJC decision[2] affirmed a Superior Court judgement finding that the Board violated the Open Meeting Law. The Attorney General had previously determined that the Board did not transgress the Open Meeting Law. *See Boelter* at *1, *4-6.[3] The decision vacated the Superior Court's purported "striking" of the Attorney General's January 2013 determination that the Board did not violate the Open Meeting Law, stating that the lower court lacked the authority to "strike" the determination. *Id*. at *7.

The SJC analyzed Board of Selectmen communications and deliberations relative to a Town Administrator evaluation in *Boelter*, but it is also likely that a School Committee's communications and deliberations relative to the evaluation of a Superintendent of Schools, for example, would be treated similarly assuming comparable facts. [4]

II. FACTS

During a January 3, 2012 public meeting, the Wayland Board of Selectmen reviewed procedures for conducting the Town Administrator's annual performance evaluation. *Id*. at *2. The Board agreed that individual members would submit written evaluations to the Chair of the Board ("Chair"). The Chair was to compile all evaluations and create a composite evaluation to be distributed to members prior to the Board's March 28 public meeting. *Id*. The Board intended

[2] The SJC heard this case upon transfer from the Appeals Court, on the SJC's initiative.

[3] Because all evaluations at issue had been made public subsequent to the open meeting, the Board also challenged the Superior Court decision as moot. The SJC held that dismissal for mootness was inappropriate, despite the evaluation being complete and the evaluations having been made publicly available, because the matter is of substantial public importance and the Board's actions were likely to recur. *Id*. at *1, *3-4.

[4] While, under the Open Meeting Law, "materials used in a performance evaluation of an individual bearing on his professional competence" are generally exempt from disclosure to the public under the personnel exemption to the public records law, materials "created by the members of [a public] body for the purposes of the evaluation" are not exempt from disclosure. *See Boelter* at *6, fn 9; *See also* M.G.L. c. 30A, § 22(e);

to discuss the Town Administrator's performance at the March 28th meeting, and to issue a final, written evaluation. *Id*.[5]

Guidance available on the Attorney General's website at the time stated, in the form of a Question and Answer as follows:

> Q. May the individual evaluations of an employee be aggregated into a comprehensive evaluation?
>
> A. Yes. Members of a public body may individually create evaluations, and then submit them to an individual to aggregate into a master evaluation document to be discussed at an open meeting. Ideally, members of the public body should submit their evaluations for compilation to someone who is not a member of the public body, for example, an administrative assistant. If this is not a practical option, then the chair or other designated public body member may compile the evaluations. However, once the individual evaluations are submitted for aggregation there should be no deliberation among members of the public body regarding the content of the evaluations outside of an open meeting, whether in person or over email.

Id.

As discussed, three Board members submitted written evaluations to the Chair in advance of the March meeting. *Id*. The Chair created a mostly positive composite evaluation based on those three evaluations and his own. *Id*. The Chair then emailed the composite evaluation, as well as each of the three individual evaluations, to each member of the Wayland Board of Selectmen within an agenda packet for the March 28th open meeting. *Id*. At the March 28th meeting, the Board reviewed, discussed and approved the composite evaluation as final. *Id*. Both the composite and the individual evaluations were subsequently released to the public. *Id*. A group of registered voters alleged this process violated the OML.

[5] This process is commonly used for evaluating Superintendents.

III. RELEVANT LAW

M.G.L. c. 30A, §§ 18-25, the state's "Open Meeting Law," requires public bodies, inclusive of Boards of Selectmen and School Committees, to post advance notice of meetings, and to open those meetings to the public. *See* M.G.L. c. 30A, §§ 18 and 20. Public bodies may only conduct meetings in executive session under enumerated, statutorily prescribed circumstances. *See* M.G.L. c. 30A, §§ 18, 20 and 21.

Under the Open Meeting Law, a "meeting" is defined as "a deliberation by a public body with respect to any matter within the body's jurisdiction," subject to noted exclusions. *See* G. L. c. 30A, § 18. The Law defines "deliberation" as:

> an oral or written communication through any medium, including [email], between or among a quorum of a public body on any public business within its jurisdiction; **provided, however, that 'deliberation' shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural material or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.**

(emphasis added). *Id*.

IV. THE SUPREME JUDICIAL COURT'S ANALYSIS

At issue in *Boelter* was whether the Chair's distribution of written evaluations to Board members in advance of the March 28th meeting constituted a "deliberation" by a public body outside of an open meeting, and whether the Chair's transmittal of the evaluations falls within the M.G.L. c. 30A, § 18 exemption to the definition of "deliberation" as

> . . . a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.

Rightly, the SJC first determined that the written evaluations contained the opinions of the Board members. The OML does not define the term "opinion," however, "[i]n ordinary

usage, an 'opinion' is 'a view, judgment, or appraisal formed in the mind about a particular matter." The Court found that

> [t]he individual and composite evaluations prepared by the board members and shared with the quorum doubtless constituted "appraisals" of the town administrator's performance, and therefore contained board members' opinions.

Boelter at *4, *citing Webster's Third New International Dictionary*, 1582 (1993) (other internal citations omitted).

Next, the SJC considered whether the Chair's circulation of the written evaluations to the Board members in advance of the public meeting was permissible. On this point, the Board and the Attorney General admitted that member opinions were contained in the evaluation documents attached to the Chair's email, but argued that circulation was permissible because there was no opinion contained in the body of the Chair's email itself. The Board asserted that the language of M.G.L. c. 30A, § 18 permitting distribution of documents, "provided that no opinion of a member is expressed," pertains only to "the distribution of reports or documents," and not to the reports or documents themselves. *Id*. at 5.

While the argument has some surface appeal, it discounted the substance of the transmission. Under this convenient theory, the Chair's email was void of members' opinions and was simply a mechanism for "the distribution of reports that may be discussed at a meeting," and therefore was not within the definition of "deliberation" under M.G.L. c. 30A, § 18. The SJC rejected these arguments, finding that such an interpretation would render the Open Meeting Law "toothless," and further, that the Attorney General's determination is not supported by the plain meaning of the statute. *See Id*. at *5-6.

V. CONCLUSION

Most notable in this case is the SJC's holding, as a matter of first impression, that the Board violated the Open Meeting Law by using email to circulate evaluations expressing members' opinions in advance of the public meeting. Circulating the evaluations constituted the "deliberation" of a quorum of a public body outside of an open meeting.