

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY**

STATE OF OHIO ex rel.
BRIAN M. AMES,

Relator-Appellant,

- v -

PORTAGE COUNTY BOARD
OF COMMISSIONERS,

Respondent-Appellee.

CASE NO. 2021-P-0067

Civil Appeal from the
Court of Common Pleas

Trial Court No. 2020 CV 00273

OPINION

Decided: January 18, 2022
Judgment: Affirmed

Brian M. Ames, pro se, 2632 Ranfield Road, Mogadore, OH 44260 (Relator-Appellant).

Victor V. Vigluicci, Portage County Prosecutor, and *Christopher J. Meduri*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Respondent-Appellee).

MATT LYNCH, J.

{¶1} Relator-appellant, Brian M. Ames, appeals the judgment rendered by the Portage County Court of Common Pleas in favor of respondent-appellee, the Portage County Board of Commissioners, on Ames' claim of violation of the Open Meetings Act (Sunshine Law). For the following reasons, we affirm the decision of the court below.

{¶2} On April 27, 2020, Ames filed a Verified Complaint in Mandamus, Declaratory Judgment, and Injunction against the Board of Commissioners, alleging two

violations of R.C. 121.22 arising from a meeting held on April 9, 2020: Considering in an Executive Session a Subject Matter Not Specifically Excepted by Law (Count 1) and Failure to Keep Full and Accurate Minutes (Count 2).

{¶3} The matter was tried by the court on June 15, 2021, at which the following persons testified: Janet Kovick (director of human resources); Sabrina Christian-Bennett (member of the board of commissioners); Vicki Kline (vice president of the board of commissioners); Kathleen Clyde (president of the board of commissioners); and Amy Hutchinson (clerk of the board of commissioners). During the course of the April 9 meeting, a motion was made and approved to move “into executive session to consider the employment of a public employee” (in the words of the meeting minutes). The three Commissioners along with Kovick, Chris Meduri (an attorney), and Gene Roberts (water resources department director) participated in the session. A “succession plan,” developed by human resources, was discussed according to which the Deputy Director of Portage County Water Resources would be transitioned or promoted to the newly created position of Interim Director. The offer of the new position was to be made on April 15. The performance of the Deputy Director was discussed, in particular, her leadership skills demonstrated during the pandemic. After the executive session concluded, the following journal entry was adopted: “After exiting Executive Session, the Board of Commissioners agreed to stay the succession plan for the Water Resources Director for the duration of the public health emergency.”

{¶4} On June 24, 2021, the trial court issued the following ruling:

Relator alleges that the Respondent board improperly entered executive session on April 9, 2020. Relator says that the executive session violated R.C. 121.22 because the matters discussed in the

session were beyond the announced basis for holding the session. The Respondent entered executive session to discuss “the employment of a public employee.” During this private meeting the evidence shows that the commissioners discussed the employee’s job performance, the COVID pandemic (as it relates to the employee’s duties), and the county’s managerial succession plan, (as it relates to the employee and her possible promotion).

The issue presented to the Court is whether a discussion during an executive session of a department succession plan, impact of the COVID pandemic on the department, and promotion of the subject employee is proper where the public body holds an executive session to consider “employment of a public employee”?

Revised Code 121.22(G)(1) empowers a public body to hold an executive session to consider “the appointment, employment, dismissal, promotion, demotion ... of a public employee”. This section further requires the public body to state “which one or more of the approved purposes listed ... are purposes for which the executive session is to be held”. This public body is not required to include the name of any person considered at the meeting.

The evidence adduced at trial clearly shows the discussions about the succession plan and pandemic were related to the subject employee’s job duties. As such, the board’s discussion of these related topics did not violate the Open Meetings Act because they related to the employment of a public employee, which was the purpose of their adjournment to executive session.

Therefore the Court finds the Portage County Board of County Commissioners did not violate R.C. 121.22 when it held an executive session on April 9, 2020.

{¶5} On June 25, 2021, Ames filed a Notice of Appeal. On appeal, Ames raises the following assignment of error: “The trial court erred by finding that a discussion during an executive session of a department succession plan, impact of the COVID pandemic on the department, and promotion of the subject employee is proper where the public body holds an executive session to consider ‘employment of a public employee’.”

{¶6} Ames defines his argument on appeal as a legal one. Does the statutory authorization for a public body to hold executive sessions to consider the “employment” of a public employee permit, as a matter of law, the discussion of an employee’s job performance, the COVID pandemic (as it relates to the employee’s duties), and the county’s managerial succession plan (as it relates to her possible promotion) at an executive session? Accordingly, the issue raised on appeal should be decided de novo and without deference to the lower court’s legal conclusions. *State v. Tidwell*, 165 Ohio St.3d 57, 2021-Ohio-2072, 175 N.E.3d 527, ¶ 18; *Rancho Cincinnati Rivers, L.L.C. v. Warren Cty. Bd. of Revision*, 165 Ohio St.3d 227, 2021-Ohio-2798, 177 N.E.3d 256, ¶ 11 (“the construction and application of the language of [a statute] * * * is a question of law that we review de novo”).

{¶7} “Ohio’s ‘Sunshine Law,’ R.C. 121.22, requires that public officials, when meeting to consider official business, conduct those meetings in public.” *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 668 N.E.2d 903 (1996); R.C. 121.22(A) (“[t]his 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 exempted by law”). “The [Open Meetings Act], R.C. 121.22, seeks to prevent public bodies from engaging in secret deliberations with no accountability to the public.” *Cincinnati Enquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, ¶ 9 (1st Dist.).

{¶8} The law provides certain exemptions from the mandate for open meetings, such as “executive sessions. “An executive session ‘is one from which the public is excluded and at which only such selected persons as the board may invite are permitted

to be present.” (Citation omitted.) *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, 972 N.E.2d 115, ¶ 15 (12th Dist.).

{¶9} Under the Open Meetings Act, the members of a public body may hold an executive session “[t]o consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official.” R.C. 121.22(G)(1). “If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section are the purposes for which the executive session is to be held, but need not include the name of any person to be considered at the meeting.” *Id.*

{¶10} This court has held, based on “persuasive authority,” that “a public body must *specifically* identify the permitted purpose or purposes for an executive session.” *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 2019-Ohio-3729, 144 N.E.3d 1010, ¶ 57 (11th Dist.). “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.” *Id.* at ¶ 62, quoting *Maddox v. Greene Cty. Children Servs. Bd. of Dirs.*, 2014-Ohio-2312, 12 N.E.3d 476, ¶ 18 (2d Dist.).

{¶11} Ames argues that, although “employment” is identified under the statute as a proper purpose for holding an executive session, the Commissioners’ use of the word did not reflect the actual or true purpose of the executive session. “In enacting R.C. 121.22, the General Assembly chose several words to specify approved purposes for which executive sessions relating to employees could be held * * *. There is no word among those that can be applied to * * * the discussion of the pandemic. Discussions of

the transition plan would fall under the specific approved purpose of promotion rather than employment. Likewise, discussions of an employee's lack of leadership skills and lack of performance would fall under one or more of the approved purposes of dismissal, discipline, and demotion rather than employment. To hold that the discussions held in the Executive Session are proper is to hold the words appointment, dismissal, discipline, promotion, demotion, and compensation, chosen by the lawmakers in enacting R.C. 121.22, to be meaningless. Therefore, the discussions were improper and the decision of the trial court must be reversed." Appellant's merit brief at 22.

{¶12} We find no error. The term "employment" fairly describes the substance of what was considered in the executive session, i.e., whether the position of Interim Director would be offered to the current Deputy Director. Discussion of the pandemic, as recognized by the trial court, was incidental to the Deputy Director's job performance. And discussion of her job performance, in turn, was incidental to whether she was offered the position. We reject Ames' suggestion that the discussion of the Deputy Director's performance properly fell under the categories of dismissal, discipline, or demotion, as there is no evidence that the downgrading of the Director's position was even considered in the executive session. The transition plan was relevant to the executive session only to the extent that it provided for the creation of a new position and fixed a date for an appointment thereto. There was no discussion regarding the substance of the plan.

{¶13} Ames urges that the meaning of "employment" should be limited to the hiring of a new employee. He cites this court's decision in *Weisbarth v. Geauga Park Dist.*, 11th Dist. Geauga No. 2007-G-2780, 2007-Ohio-6728, as supporting the proposition that "[t]his Court has already defined employment to mean hiring." Appellant's

reply brief at 3. *Weisbarth*, however, does not define “employment” for the purposes of R.C. 121.22(G)(1), but characterizes the permissible purposes for going into executive sessions “as hiring, discipline, termination, etc.” *Id.* at ¶ 27; compare *State ex rel. Patrick Bros. v. Bd. of Putnam Cty. Comms.*, 3d Dist. Putnam No. 12-13-05, 2014-Ohio-2717, ¶ 36 (“R.C. 121.22(G)(1) * * * is the section allowing executive sessions for discussion of hiring and firing people”). None of the purposes for executive session contained in R.C. 121.22(G)(1) are statutorily defined and we are aware of no authority applying these terms in anything but their common usage. Furthermore, it is evident that in their common usage the terms appointment, employment, dismissal, discipline, promotion, demotion, and compensation are not mutually exclusive but, to a certain extent, are capable of describing similar conduct. In the present case, a letter offering the position of Interim Director to the Deputy Director was drafted although never presented to her. This document alternatively described itself as an “offer of employment,” “an opportunity to be promoted,” and an invitation to “accept appointment to this position.” Arguably, the subject of the executive session could have been described as an appointment, employment, or promotion. As the sole focus of the executive session was whether to offer the position to the Deputy Director, there was no need to identify more than one purpose for holding the executive session. In fact, the identification of multiple statutory purposes to ensure that an executive session is “covered for all employment-related discussions” is a practice disapproved of by the courts. *State ex rel. Hicks v. Clermont Cty. Bd. of Comms.*, 2021-Ohio-998, 171 N.E.3d 358, ¶ 41 (12th Dist.); *Ames*, 2019-Ohio-3729, 144 N.E.3d 1010, at ¶ 58.

{¶14} The sole assignment of error is without merit.

{¶15} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas in favor of the Commissioners is affirmed. Costs to be taxed against the appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.