STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: MARCH 12, 2012)

CITY OF WARWICK	:	
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	:	
V.	:	**K.C. No. 2009-1390**
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RI STATE LABOR RELATIONS BOARD	:	
	:	

DECISION

LANPHEAR, J. The City of Warwick appeals from a decision by the Rhode Island State Labor Relations Board that upheld a charge of unfair labor practices by the City and ordered the parties to bargain to a contract. The City's position is that the Labor Board's decision was unlawful as it was based on a vote cast by telephone to break a tie vote of the Board. The City denies the unfair labor practice and claims the vote should be reversed because the Labor Board violated the Open Meetings Act by conducting the telephone vote.

FACTS

The Rhode Island Laborers' District Council, Local 1033 (Union), represents the City's crossing guards' union. The Union and the City had a collective bargaining agreement that was to expire in June 2006. The City Council's ratification was required to extend the agreement. The Council ultimately refused to ratify the agreement.

On December 27, 2007, the Union filed a charge of unfair labor practices against Warwick alleging violations of G.L. 1956 § 28-7-13(3), (6), and (10). An informal hearing was

held on January 23, 2008 and the Board of Labor Relations[1] issued a complaint against the City on February 18, 2008. The complaint stated that the employer violated section 28-7-13(3) and (5) by discouraging union membership. The complaint also claims the City failed and refused to continue bargaining in good faith after the City Council refused to ratify a tentative agreement.

On August 8, 2008, the Board met and considered the case. Six of the seven Board members were present at the meeting. A motion was presented to dismiss the charge. The Board voted three in favor of the dismissal and three opposed. A second motion was then made to uphold the charge that Warwick had committed unfair labor practices against its crossing guard employees. The Board again voted three to three.

In order to break the tie, the staff contacted Joseph Mulvey, the seventh member of the Board who was not present at the meeting. Mr. Mulvey, did not participate in the meeting itself – he was not at the meeting. In a telephone conversation with the Board's staff after the meeting, Mr. Mulvey voted against the motion to dismiss, and in favor of the motion to uphold the charge of unfair labor practices. The Board considered these actions to be a finding of an unfair labor practice.

The City contends that Mr. Mulvey failed to appear at the meeting, before the scrutiny of the public, in violation of the Open Meetings Law. The City argues that because of this violation, the vote should be deemed null and void. The Board retorts that Mr. Mulvey's participation was identified and recorded in the open minutes of the meeting, the minutes were approved and posted for public view on the Secretary of State's website and therefore, the Board abided by the law and the decision should stand. According to the Board, the City should have had its agents attend the meeting to object to obtaining the tie-breaking vote in this manner.

[1] The Labor Board's authority is found in G.L. 1956 Chapter 7 of title 28.

STANDARD OF REVIEW

This Court's appellate review of administrative agencies such as the Labor Board is governed by the Rhode Island Administrative Procedures Act, G.L. 1956 § 42-35-1, et. seq. See Rossi v. Employees' Retirement Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). The applicable standard of review, codified at § 42-35-15(g), provides in pertinent part:

> "(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion of clearly unwarranted exercise of discretion."

In an administrative appeal, this Court "shall not substitute its judgment for that of the agency." Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). The Court must "uphold the agency's conclusions when they are supported by any legally competent evidence in the record." Rocha v. Public Utilities Commission, 694 A.2d 722, 725-6 (R.I. 1997). Substantial deference is due to an agency's interpretation of a statute. In Re: Narragansett Bay Commission General Rate Filing, 808 A.2d 631, 635 (R.I. 2002). Such deference is due even if the agency's interpretation is not the only permissible interpretation that could be applied. Autobody Association of Rhode Island v. State Department of Business Regulation, 996 A.2d 91, 97 (R.I. 2010).

ANALYSIS

The Rhode Island Open Meetings law requires that "public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." G.L. 1956 § 42-46-1. The law has special provisions regarding the exceptional circumstances under which meetings may be closed, or held through electronic communications. Specifically, section 42-46-5(b) provides that "no…use of electronic communication…shall be used to circumvent the spirit or requirements of this chapter." Electronic communication "shall be permitted only to schedule a meeting." G.L. 1956 § 42-46-5(b)(1).

Most relevant to the case at bar, the Open Meetings Law allows members of public bodies who have a disability to "participate [in a meeting] by use of electronic communication or telephone communication in accordance with the process below." G.L. 1956 § 42-46-5(b)(3)(ii). For this exception to the Open Meetings Law to be satisfied, the member must have a disability as defined in Chapter 87 of title 42 and be incapable of participating in the meeting in person. In addition, the Governor's Commission on Disabilities must "grant a waiver that allows a member to participate by electronic communication or telephone communication only if the member's disability would prevent him/her from being physically present at the meeting location, and the use of such communication is the only reasonable accommodation." G.L. 1956 § 42-46-5(b)(4)(ii). Finally, all such waiver decisions shall be a matter of public record. G.L. 1956 § 42-46-5(b)(4)(iii). The burden is on the agency to show compliance with the requirements of the act. G.L. 1956 § 42-46-14.

Mr. Mulvey's telephonic votes do not fit into any of the excepted categories of section 42-46-5. Though the Board argues that the electronic communication at issue was used to allow

the participation of a member with a disability, the Board did not prove compliance with the statutory requirements of this exception.

> (1) The disabled board member must actually "participate in the meeting" to qualify. The Board has not presented evidence of Mr. Mulvey's participation in the meeting beyond his actual vote which he cast once the meeting was already over;
> (2) the Board did not request a waiver allowing Mr. Mulvey to participate by electronic communication because of his disability as is required by section 42-46-5(b)(4); and
> (3) even if the Board had been granted a waiver, Mr. Mulvey would still have been obligated by statute to "participate in the meeting" via electronic communication before casting his vote. G.L. 1956 § 42-46-5(b)(3)(ii).

By contrast, here the meeting took place, and once the meeting was complete, staff called Mr. Mulvey so he could cast a vote. The Board did not comply with the procedures required by Rhode Island's Open Meetings Law.

CONCLUSION

Without Mr. Mulvey's vote, the decision would have remained deadlocked at three to three. The tie break resulted from a clear violation of the Open Meetings Act and therefore the Board acted improperly by rendering a decision based on Mr. Mulvey's vote. This appeal must be sustained as the City met its burden in proving that the Board's decision was a violation of Rhode Island statute. The tie votes rendered the motion to dismiss denied, for lack of a majority, and the finding of an unfair labor practice denied, for lack of a majority. See Lecht v. Stewart, 483 A.2d 1079, 1081 (R.I., 1984), Richard v. Zoning Board of Review, 47 R.I. 102 (1925) and Sprint Nextel Corp. of America v. F.C.C., 508 F.3d 1129 (C.A.D.C., 2007).

In review of an administrative appeal, this court may affirm, reverse, remand or modify an agency decision. G.L. 1956 Sec. 42-35-15(g), see also Birchwood Realty, Inc. v. Grant, 627 A.2d 827, 834 (R.I.1993). Remand is often necessary to complete the record. In Arnold v. Lebel, 941 A.2d 813 (R.I., 2007) a remand was appropriate so that the record could reflect *ex parte* communications, correct deficiencies in the record and thus afford the litigants a meaningful review. In Lemoine v. Department of Mental Health, Retardation and Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974) remand was needed to correct deficiencies in the record by allowing for additional evidence to be taken. In Champlin's Realty Associates v. Tikoian, 989 A.2d 427, 448 (R.I. 2010) a remand was "necessary so that the *ex parte* contacts of the sort found by the trial justice may be placed in the record and the parties be offered the opportunity to respond."

Here, there is no need to supplement the record. The record is complete, it is only the legal construction of the final agency votes which are in issue. By negating Mr. Mulvey's after-the-meeting vote, there was an opportunity for a full hearing, there is a complete record and there is a resultant decision. A remand does not further the interests of justice – it merely delays and offers a second bite at a very aged apple. This second hearing and second vote is unnecessary and inherently unfair.[2] Hence, the instant case is more comparable to Easton's Point Association, Inc. v. Coastal Resources Management Council, 559 A.2d 633, 636 which held "[w]e do not believe that a remand of this case would further the interests of justice. Since the facts and issues have been developed and clarified, further remand would not provide decisive new information."

As the Board's actions prior to Mr. Mulvey's vote are unchallenged, the Court finds the result of the vote on the motion to dismiss the charge was three to three, and the motion fails.

[2] There is no allegation that the City was responsible for the wrong, rather, the improper voting procedure was employed by the adjudicatory agency itself.

Nullifying Mr. Mulvey's after-the-meeting vote renders the most just result. A second motion was made, after hearing, to uphold the charge and find that the employer committed an Unfair Labor Practice. Without Mr. Mulvey's vote, the vote on this motion was three to three, and the motion fails.

The decision of the Board is therefore reversed.