

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY, ARKANSAS
FORT SMITH DIVISION
CIVIL DIVISION

FILED
FT. SMITH DIST.
2015 SEP 2 PM 4:40
Cassie Hamrick
CIRCUIT CLERK SEB. CO. PLAINTIFF

CURTIS E. SORRELLS

v.

NO. CV-15-607 (VI)

FORT SMITH SCHOOL DISTRICT and
FORT SMITH PUBLIC SCHOOLS BOARD OF EDUCATION

DEFENDANTS

THIRD AMENDED COMPLAINT

Comes now the Plaintiff, Curtis E. Sorrells, and for his cause of action and third amended complaint against the Defendants, Fort Smith School District and Fort Smith Public Schools Board of Education, states:

1. This is an appeal from a denial of rights under the Arkansas Freedom of Information Act ("AFOIA") pursuant to Arkansas Code Annotated § 25-19-107(a).

2. In addition, this Complaint seeks declaratory and injunctive relief. This Court has subject matter jurisdiction over the Complaint for declaratory relief pursuant to AFOIA and pursuant to Ark. Code Ann. § 16-111-104.

Parties, Jurisdiction, and Venue

3. Plaintiff Curtis Sorrells is an adult citizen of the State of Arkansas, whose address is 313 Rivercrest Drive, Fort Smith, Arkansas, 72903; he brings this action as a matter of right under Arkansas Code Annotated § 25-19-107. Plaintiff is a taxpayer who resides in the Fort Smith District of Sebastian County, Arkansas and who pays taxes that support the Fort Smith Public School District.

4. Deanie Mehl, Susan McFerran, Jeannie Cole, Yvonne Keaton-Martin, Wyman Wade Jr., and David Hunton are duly elected members of the Fort Smith Public Schools Board

of Education. The School Board members are tasked with complying with the open-meeting provisions of the Arkansas Freedom of Information Act, codified at Ark. Code Ann. § 25-19-106.

5. Defendant Fort Smith School District is a political corporation organized under the laws of the State of Arkansas.

6. Defendant Fort Smith Public Schools Board of Education is the governing body of the Fort Smith School District.

7. This Court has subject-matter jurisdiction pursuant to Ark. Code Ann. Section 25-19-107(a).

8. Venue lies in the Fort Smith District of Sebastian County, Arkansas, under Ark. Code Ann. § 25-19-107(a).

Factual Background

9. On Monday, June 22, 2015, members of the Fort Smith Public Schools Board of Education met at 5:30 p.m. in the Service Center Building for its regularly scheduled meeting. Notice of the regularly scheduled meeting was given. See Exhibit A attached to the original Complaint.

10. Southside High School is a high school in Fort Smith, Sebastian County, Arkansas. High Schools in Arkansas typically have a school mascot, a school fight song, and a nickname for school members and/or athletic players.

11. Southside High School first opened in the 1960s. Since its inception, it has used the song “Dixie” as its fight song and what has been called the “Rebel” but is truly a southern gentleman or “Johnny Reb” as its mascot. The nickname for Southside High School students has been “Rebels” since the inception of the school. Based on information and belief, on Monday,

June 22, 2015, shortly before the regularly scheduled School Board meeting, the members of the Fort Smith Public Schools Board of Education met informally and discussed and deliberated on the subject of prohibiting the use of the song Dixie as the Southside High School fight song and changing the Southside High School mascot from the Rebel. A secret informal caucus can result in a consensus being reached on a given issue, thus rendering the formal meeting held before the public a mere charade. *See, e.g., Harris v. City of Ft. Smith, 359 Ark. 355, 197 S.W.3d 461 (2004).*

12. At the Monday, June 22, 2015, Fort Smith Public Schools Board of Education meeting, the School Board members voted to spend 70 million dollars to expand and renovate five local schools, including Southside High School and to ask voters to improve a millage increase in September 2016.

13. On June 22, 2015, a notice was sent out to various news media, notifying said news media, and which stated that: “The Fort Smith Board of Education will meet on Tuesday, June 23, 2015 at 5:30 p.m. in the Service Center, Building B, with the purpose of the meeting being the annual evaluation of the superintendent.” See Exhibit B attached to the original Complaint.

14. A second media alert was sent to the news media on June 23, 2015 at 3:22 p.m. notifying the media that, “Members of the Fort Smith Public Schools Board of Education will meet today for the annual evaluation of Superintendent Benny Gooden. A fax regarding this **closed** meeting was sent yesterday.” See Exhibit C attached to the original Complaint. The purpose of the notice was to lead members of the public and media into believing that the meeting was solely to discuss a personnel issue and that the meeting would not be open to the public, or at least for the most part not open to the public, because it concerned a personnel issue.

15. Despite the notice which was designed to tell the public and media to not attend the meeting, on June 23, 2015, five members of the Fort Smith Public Schools Board of Education held a special and/or emergency meeting for the purpose of prohibiting the use of the song Dixie as the Southside High School fight song and to change the Southside mascot from what has been called the Rebel, but again is truly “Johnny Reb” or a southern gentleman. Despite the fact that this was the purpose of the Fort Smith Public Schools Board of Education, no notice of the purpose was ever provided to the media, to taxpayers, or to any person other than the members of the Fort Smith Public Schools Board of Education who had secretive knowledge that such issue was going to be addressed and voted upon. A “tip” was sent to KFSM 5 News by an anonymous person(s) that members of the Fort Smith Public Schools Board of Education may be meeting to change the Southside High School fight song and mascot.

16. The meeting held on June 23, 2015 was held at exactly the same time as the “closed” meeting of the School Board was to be held. Defendants attempted to circumvent the open meeting provisions of AFOIA by calling the meeting a committee meeting, rather than a Board meeting. Such action was nothing more than a concealment to evade the open meeting and notice requirements of AFOIA.

17. After convening, five members of the Fort Smith Public Schools Board of Education, including Deanie Mehl, Susan McFerran, Jeannie Cole, Yvonne Keaton-Martin, and Wyman Wade Jr., passed a motion to stop using Dixie as the Southside High School fight song in the 2015-2016 school year and to change the Southside mascot in the 2016-2017 school year. Shortly after the June 23, 2015 Board meeting, School Board member Susan McFerran told KFSM 5 News, “It’s official.”

18. A video footage posted by KFSM 5 News on the night of the vote, June 23, 2015, clearly shows only five members of the Fort Smith Public Schools Board of Education casting their vote. Further, KFSM News reporter, Aubry Kilion, who was in the room at the time of the vote because of an anonymous tip, reported in a 5 News story immediately after the vote that the Fort Smith School Board passed a motion to ban the song “Dixie” and the Southside High School mascot by a vote of five to zero. See Exhibit E attached to the First Amended Complaint. See Exhibit F attached to the First Amended Complaint.

19. On June 23, 2015, at approximately 7:42 pm, Zena Featherston, Director of Communication with the Fort Smith Public Schools District, sent an email stating: “The Fort Smith Public School Board convened as a Committee of the Whole tonight and passed a motion with a 6-0 vote to stop using “Dixie” as the Southside High School fight song in the 2015-2016 school year and to change the Southside mascot from the Rebel in the 2016-2017 school year. See Exhibit G attached to the First Amended Complaint.

20. On July 23, 2015, at approximately 10:52 am, Plaintiff Curtis E. Sorrells filed an AFOIA Complaint and Request For Hearing. See Exhibit H attached to the First Amended Complaint.

21. On information and belief, Fort Smith Public Schools Board of Education member David Hunton was not present when the Fort Smith Public Schools Board of Education discussed the motion concerning “Dixie” and the Southside High School mascot and was not present when the vote was taken on the issue. See Exhibit E and F.

22. On July 23, 2015, Fort Smith School District spokesperson, Zena Featherston, was interviewed by Dave Hughes of the Arkansas Democrat-Gazette and said, “David Hunton

arrived at the meeting later and also cast a vote to make the change.” See Exhibit I attached to the First Amended Complaint.

23. After the original AFOIA Complaint and Request For Hearing was filed, Plaintiff learned that Fort Smith Public School Board of Education member David Hunton voted after the meeting of June 23, 2015 in favor of the motion to change “Dixie” and the Southside High School mascot. A press release was made by Zena Featherston, acting on behalf of the Fort Smith Public School District that Defendant Hunton had voted in favor of the change.

24. If Defendant Hunton voted in favor of the motion to change “Dixie” and the Southside High School mascot after the original vote, such actions would be void and invalid and in violation of the open meetings provisions of the Arkansas Freedom of Information Act.

25. The Fort Smith Public Schools Board of Education’s meetings on June 22, 2015 and June 23, 2015 were special meetings because Fort Smith Public Schools were not in session during the month of June 2015. See Ark. Code Ann. § 6-13-619. Furthermore, the cited statute does not permit two regular meetings on two consecutive days. Therefore, the meeting of June 23, 2015 was unequivocally a special meeting.

26. The Fort Smith School District has policies and procedures on Special Board Meetings which states: “Special meetings of the Board of Education shall be called by the President or any three members of the Board or when petitioned to do so by a petition in writing signed by fifty electors in the District No business shall be transacted at any special meeting of the Board which does not come within the purpose(s) set forth in the call for the meeting, unless all members of the Board are present and by majority vote agree to consideration of the additional items. *Each member of the general public shall be notified of the time, place and*

purpose of the special meeting in accordance with the established procedure.” [emphasis added] See Exhibit D attached to the original Complaint.

COUNT ONE: AFOIA OPEN MEETING VIOLATION

27. Plaintiff restates the facts and allegations in paragraphs 1 through 26, *supra*, as if laid out in full herein.

28. The Arkansas Freedom of Information Act (herein “AFOIA”) states: “It is vital in a democratic society that the public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward the end, this [act] is adopted, making it possible for them, or their representatives to learn and report fully the activities of their public officials.” As Founding Father James Madison said, “A Popular Government, without popular information, or the means of acquiring it is but a Prologue to a Farce or a tragedy, or perhaps both.” Louis Brandeis and Woodrow Wilson stated, “Publicity is justly commended as a remedy for social and industrial diseases,” Brandeis once wrote, and “[s]unlight is said to be the best of disinfectants...” Similarly, Wilson remarked that “[l]ight is the only thing that can sweeten our political atmosphere [and] open to view the innermost chambers of government.”

29. Under AFOIA, “except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts and all boards, bureaus, commissions, or organization of the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings.” Ark. Code Ann. § 25-19-106(a).

30. AFOIA requires that a governing body give notice of special or emergency meetings at least two hours in advance to media organizations that have requested notice. Ark. Code Ann. § 25-19-106(b)(2).

31. The special meeting held on June 23, 2015 violated AFOIA and the policies and procedure of the Fort Smith School District in that: (a) business at the special meeting was transacted that did not come within the purpose set forth in the call for meeting, said call attached hereto as Exhibit B and C; (b) no notice of the special meeting to discuss the Southside High School fight song and mascot was given by the Fort Smith School District to media organizations; and (c) the public was led to believe that the meeting of June 23, 2015 was a closed meeting to only evaluate the superintendent.

32. The informal meeting held before the regularly scheduled meeting on June 22, 2015 violated the AFOIA in that: (a) a governing body must hold a public meeting even if its purpose is to discuss proposals or gather information; (b) the Freedom of Information Act entitles the public to learn not only of actions taken on particular matters, but the reasons for the actions and the Freedom of Information Act reaches every step of the decision-making process, not simply the point at which the decision is announced. *See* John J. Watkins & Richard J. Peltz, “The Arkansas Freedom of Information Act” (5th ed.), at 297 (citing *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W.2d 350 (1975)).

33. On July 27, 2015, another meeting of the Fort Smith Public School Board of Education was held. Prior to such meeting, a committee had been appointed and given specific direction by Benny Gooden, superintendent of Fort Smith Public Schools, to determine what song should be the new fight song of Southside High School. Prior to the July 27, 2015 meeting, funds were spent in support of funding a new fight song and the decision was made by

committee members prior to July 27, 2015 that the Southside High School fight song would be changed.

COUNT TWO: DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

34. Plaintiff restates the facts and allegations in paragraphs 1 through 33, *supra*, as if laid out in full herein.

35. In adopting AFOIA, the Arkansas legislature intended that AFOIA should be liberally construed to achieve the intent of the act. The intent of AFOIA was to establish the right of the public to be fully apprised of the conduct of public business. Such statute is to be interpreted most favorably to the public. *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998); Ark. Code Ann. § 25-19-102.

36. The Court should declare that June 23, 2015 School Board meeting which was called a “Committee meeting” with the committee being five of seven School Board members and without notice to the media is prohibited by AFOIA because it is a special meeting of the School Board without notice to the media. The actions taken at the purported “Committee as a Whole” meeting were intended to have the same effect as a decision of the School Board because a special committee was formed, prior to the July 27, 2015 School Board meeting for the purpose of selecting a new fight song for Southside High School as directed by virtue of the actions and vote at the June 23, 2015 School Board meeting.

37. The Court should further enjoin the Defendants from holding Board meetings by disguising them as a “Committee as a Whole” meeting in the future.

COUNT THREE: DECLARATORY AND INJUNCTIVE RELIEF

38. Plaintiff repeats the allegations set forth in paragraphs 1 through 37, *supra*, as if laid out in full herein.

39. The Court should declare that purported “Committee as a Whole” meeting of June 23, 2015 at approximately 5:30 p.m. was a meeting of the Fort Smith Public Schools Board of Education for which notice was required by AFOIA.

40. The Court should declare that the holding of a public meeting that is required by law to be open, as occurred at approximately 5:30 p.m. on June 23, 2015, after notice of a closed meeting is given is prohibited by AFOIA.

41. The Court should issue an injunction prohibiting Defendants from engaging in the actions set forth in this Count, including using “Committee as a Whole” to circumvent AFOIA and holding a meeting that is required to be public at the same the time scheduled for a closed meeting.

COUNT FOUR: DECLARATORY AND INJUNCTIVE RELIEF

42. Defendants failed to follow their own policies and regulations that have the effect of law in regard to the June 23, 2015 meeting. In this regard, the Defendant’s own policies state, as noted in paragraph 26, above, that “*Each member of the general public shall be notified of the time, place and purpose of the special meeting in accordance with the established procedure.*”

43. The Court should declare that the Defendants failed to follow such policy in regard to the June 23, 2015 meeting.

44. The Court should further enter an injunctive requiring the Defendants to follow their own policies, including the recited policy, with respect to all future meetings of the Fort Smith Public Schools Board of Education.

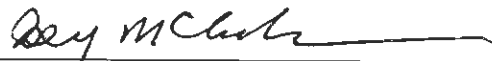
Waiver of Attorney Fees

45. Plaintiff and his counsel knowingly and voluntarily waive the right to seek attorney's fees as part of this action.

Prayer for Relief

WHEREFORE, the Plaintiff, Curtis Sorrells, prays that the Court grant the relief requested herein; that the Court find that the June 23, 2015 School Board meeting was in violation of the Arkansas Freedom of Information Act and that such meeting was a Board Meeting; that the Court enjoin the Defendants from holding a meeting of the Fort Smith Public School Board of Education and avoiding the notice requirements of the Arkansas Freedom of Information Act by calling the meeting a meeting of a "Committee as a Whole" in order to circumvent the requirements of the Freedom of Information Act; that the Court enjoin the Defendants from holding a public meeting without notice after giving notice that the meeting would be a closed meeting unless the requirements for a public meeting are met in advance of the public meeting; that the Court declare that Defendants failed to follow their own policies with respect to the June 23, 2015 meeting; that the Court enter an injunction compelling Defendants to follow their own policies with respect to all future meetings; for such other relief as is requested herein; for attorney's fees; for costs; and for such other relief as is just and proper, except that Plaintiff waives all right or entitlement to attorney's fees in this action.

Respectfully submitted,



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Service of any documents by e-mail will not be received by counsel for the Plaintiff unless copied to pam@mccutchenlawfirm.com

CERTIFICATE OF SERVICE

I, Joey McCutchen, hereby certify that a copy of the above and foregoing pleading was hand delivered to all attorneys of record as listed below on September 2, 2015:

Mr. James Mitch Llewellyn
Thompson & Llewellyn
412 South 18th Street
Fort Smith, AR 72902-0818



Joey McCutchen