

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. BACV2011-00178

DAVID PIERCE & others<sup>1</sup>

vs.

COTUIT FIRE DISTRICT & another<sup>2</sup>

**MEMORANDUM OF DECISION AND ORDER**  
**ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

The Plaintiffs, David R. Pierce, William R. Tessier, and Ruth Pierce allege violations of the Massachusetts Open Meeting Law, G. L. c. 39, §§ 18-25. This action is before the court on Defendants' motion for summary judgment on the grounds that the twenty-one day statute of limitations under G. L. c. 39, § 23B bars the Plaintiffs' complaint.<sup>3</sup> For the following reasons, the Defendants' Motion is **ALLOWED**.

**BACKGROUND**

The summary judgment record establishes the following undisputed facts. The Plaintiffs allege that the Defendants violated G. L. c. 39, § 23B, on November 19, 2009, by meeting in

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<sup>1</sup> William R. Tessier, Jr. and Ruth Pierce

<sup>2</sup> Board of Fire Commissioners of the Cotuit Fire District

<sup>3</sup> The Defendants also argue that summary judgment should be granted on the grounds of claim preclusion, issue preclusion, and that Plaintiff David Pierce waived his rights to bring this action when he filed a complaint under the Massachusetts Whistleblower Statute, G. L. c. 149, § 185. Because the ruling on the Statute of Limitations issue is dispositive, the court declines to address the alternative grounds raised by Defendants

executive session to discuss complaints about Plaintiff David Pierce without giving him notice of or an opportunity to be heard. The Board did not record minutes during this executive session, nor of any executive sessions from September 25, 2007 to April 22, 2010.<sup>4</sup> During the November 19th executive session meeting, the Board decided to initiate a complaint with the Massachusetts State Ethics Commission against Plaintiff David Pierce, a captain on the Cotuit Fire Department, due to his marital relationship with a subordinate employee, Plaintiff Jayne Pierce, a lieutenant on the Department.<sup>5</sup> On November 20, 2009, the Board provided a copy of the ethics complaint to Plaintiff David Pierce and his union.<sup>6</sup> In October, November, December, and February of 2010, in compliance with the open meeting laws, the Board openly met and discussed Plaintiff David Pierce's ethics complaint.<sup>7</sup> At a hearing on November 23, 2010, Chief Olsen suspended Plaintiff David Pierce without pay effective December 3, 2010.

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<sup>4</sup> In June 2010, the Cape and Islands District Attorney investigated and determined that the Board failed to maintain records of executive sessions, in violation of G. L. c. 39, § 23B. Consequently, the Board was required to undergo training on the requirements of the open meeting law. Following the training, the District Attorney's Office indicated that it was satisfied with the steps the Board had taken and considered the case closed.

<sup>5</sup> In April 2009, Plaintiff Jayne Pierce had a verbal dispute with a subordinate firefighter. Plaintiff David Pierce was on the team investigating the verbal dispute between Plaintiff Jayne Pierce and the firefighter. After the investigation, Fire Chief Christopher Olsen demoted Plaintiff Jayne Pierce to firefighter. In August 2009, Chief Olsen received written complaints from other firefighters complaining that Plaintiffs David and Jayne Pierce caused a hostile work environment. On October 2, 2009, Plaintiff David Pierce wrote a letter to the Board of Fire Commissioners alleging that Chief Olsen was retaliating against him and his wife due to Plaintiff David Pierce's political support of a candidate for the Board in an upcoming election. The letter also alleges an ongoing hostile atmosphere, harassment, and that Chief Olsen was attempting to institute a "Familial Relations Policy." On October 14, 2009, the Board responded to Plaintiff David Pierce's letter and identified ethical problems inherent in Plaintiff David Pierce's supervision of his wife and requested that he seek an advisory opinion on the issue from the Ethics Commission.

<sup>6</sup> The Board sent a formal complaint to Plaintiff David Pierce on November 20, 2009 stating that he appeared to be in violation of G. L. c. 268A, §§19, 23.

<sup>7</sup> Excerpts from the transcripts of Board meetings on October 21, November 18, December 16, and February 17, 2010 show that there was public comment about Plaintiff David Pierce's ethics violation and the Board's decision to place him on administrative leave. Also, several local newspapers published articles discussing the Board's charges against Plaintiff David Pierce in December 2010 and January 2011.

The Board provided Plaintiff David Pierce notice on April 8, 2011 that it would hold a hearing, on April 20, 2011, at which the Board would consider his discipline or discharge in response to his failure to remedy his ongoing violations of state ethics laws. At the April 20, 2011 hearing, in compliance with the open meeting law, the Board met in executive session, at which Plaintiff David Pierce and his counsel were present. After hearing Plaintiff David Pierce's counsel's response, the Board implemented their decision to terminate his employment with the Cotuit Fire District. On March 28, 2011, the Plaintiffs filed the complaint in this case alleging the Defendants violated the open meeting law on November 19th, 2009. Plaintiff David Pierce requests that the Court rescind the order of the Board, and to reinstate him to his position as captain with full back pay, and lost benefits.<sup>8</sup>

### DISCUSSION

This court grants summary judgment where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. *Pederson v. Time Inc.*, 404 Mass. 14, 17 (1989). Once the moving party sufficiently suggests, by affidavit or otherwise, the absence of a triable issue, the party opposing the motion must respond and identify the existence of specific facts establishing a genuine issue of material fact. *Id.* at 17. The non-moving party cannot defeat the motion for summary judgment by resting

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<sup>8</sup> The labor grievance brought by Plaintiff has been resolved in part in his favor by arbitration.

on his or her pleadings and mere assertions of disputed facts to defeat the motion. *Lalonde v. Eissner*, 405 Mass. 207, 209 (1989).

The Plaintiffs' Compliance with the Statute of Limitations for Filing a Complaint under the Massachusetts Open Meeting Law, G. L. c. 39, § 23B

While the issue of compliance with the requirements of the Open Meeting Law are ultimately not relevant to the disposition of the time bar claim, some discussion is necessary, at least to provide context.

The open meeting law reflects a general policy that all meetings of a governmental body should be open to the public unless exempted by the statute. See *Attorney Gen. v. School Comm. of Taunton*, 7 Mass. App. Ct. 226, 229 (1979). The Legislature designed the open meeting law “to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.” *Ghiglione v. School Comm. of Southbridge*, 376 Mass. 70, 72 (1978). However, the Legislature has recognized that “not everything done by public officials and employees can and should occur in a public meeting.” *McCrea v. Flaherty*, 71 Mass. App. Ct. 637, 641 (2008). Accordingly, § 23B carves out several exceptions that allow a governmental body to convene in a private executive session.

The Defendants claim that the November 19th meeting falls under the § 23B(3) exception which allows a governmental body to meet in executive session for the purpose of discussing with the Board’s counsel its position in expected litigation.<sup>9</sup> See *Doherty v. School Comm. of*

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<sup>9</sup> The G.L. § 23B(3) exception to the open meeting law allows a governmental body to meet in executive session to discuss “strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in

*Boston*, 386 Mass. 643, 648 (1982) (holding § 23B(3) permits public body to meet in executive session, without sending notice, to discuss litigation strategy). Although it is undisputed that the Board's counsel was present during the November 19th executive session, Plaintiffs contend that there is no record of what was discussed during this executive session because the Board did not record minutes. Without the executive session minutes, the Defendants have a heavy burden of demonstrating that the purpose of the November 19th executive session was in fact to consult with counsel.

Notwithstanding the Defendants likely violated G.L. c. 39, § 23B, the Plaintiffs' claim is time barred because they did not file their complaint within the statute of limitations. The Massachusetts open meeting law in effect on November 19, 2009, the date on which the Plaintiffs allege that the Defendants violated the law, provides that a plaintiff is required to file a complaint alleging an open meeting violation "within twenty-one days of the date when such action is made public."<sup>10</sup> G. L. c. 39, § 23B. The statute defines "made public" as "when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body." G. L. c. 39, § 23A.

A governmental body can cure any violation of the open meeting law by taking independent deliberative action at a subsequent open meeting. See *Benevolent & Protective*

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preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel." *Id.*

<sup>10</sup> Since the alleged open meeting violation on November 19, 2009, the Massachusetts Open Meeting Law has been amended, effective January 14, 2011, and now provides for a thirty-day statute of limitations that begins to run from the date of the alleged violation. See G. L. c. 30A, § 23.

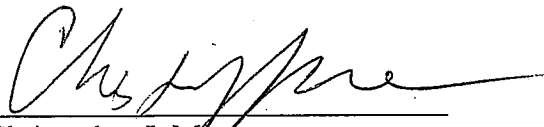
*Order of Elks, Lodge No. 65 v. City Council of Lawrence*, 403 Mass. 563, 566 (1988); *Pearson v. Board of Selectmen of Longmeadow*, 49 Mass. App. Ct. 119, 125 (2000). In this case, the Board cured the November 19th violation of the open meeting law at the subsequent open meeting on October 21, 2010 where there was discussion of the same ethic violations, relating to Plaintiff David Pierce, as discussed during the executive session on November 19, 2009. See *Allen v. Board of Selectmen of Belmont*, 58 Mass. App. Ct. 715, 719 (2003) (holding open meeting law violation cured when subject matter of executive session discussed at subsequent open meeting). The statute of limitations began to run for the Plaintiffs on October 21, 2010 when the Board cured the November 19th open meeting law violation with this subsequent properly noticed and properly conducted open meeting. See *id.* at 720. That the Defendant David Pierce filed a complaint in the Federal District Court on December 3, 2010 alleging a violation of the Act by the Board's conduct on November 19, 2009, eliminates any doubt that any earlier tolling of the statute stopped. Therefore, the Plaintiffs' claim is time barred because they waited until March 28, 2011 to file their complaint, which is far outside the twenty-one day statute of limitations provided in G. L. c. 39, § 23B.

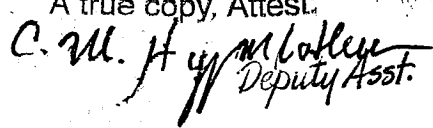
Accordingly, the Defendants' motion for summary judgment is **ALLOWED**

**ORDER**

For the reasons stated herein, it is hereby **ORDERED** that Defendant's motion for summary judgment be and hereby is **ALLOWED**.

October 22, 2012

  
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Christopher J. Muse  
Justice of the Superior Court

A true copy, Attest:  
  
Deputy Asst. Clerk