4/12/73

UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consumers Power Company	)	Docket Numbers 50-329A
(Midland Plant, Units 1	)	50-330A
and 2)	)	
	)	

THIS DOCUMENT CONTAINS
POOR QUALITY PAGES

INTERVENORS' ANSWER TO
MOTION TO COMPEL THE
PRODUCTION OF DOCUMENT

To: Jerome Garfinkel, Esquire, Chairman,
Atomic Safety and Licensing Board

Pursuant to Section 2.730(c) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Intervenors */ respectfully request the Chairman, or the Board, to deny Consumers Power Company's motion to compel the production of a document in the possession of the Department of Justice and to issue a protective order pursuant to Section 2.740(c) (6) with respect to the document held by the Department of Justice and to all other similar documents in the possession of the members of the MMCPP. In support of these requests, Intervenors state as follows:

I. Background

The Chairman and the Board were made especially aware of the

*/ Specifically, the Municipals of Grand Haven and Traverse City and the Cooperatives of Northern Michigan and Wolverine, which comprise the Michigan Municipal Cooperative Power Pool (MMCPP).

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subject of the documents in question at the second pre-hearing conference held on October 25, 1972, where at R 104-105, counsel for Intervenors stated as follows:

> "Mr. Fairman: I don't have anything further to say, but I would like to let it be known that during the course of this proceeding there are engineering meetings going on in connection with a present contract with the Municipal Cooperative Pool and these matters are going forward to provide an interim kind of arrangement for power supply. To my knowledge these discussions have not touched subjectively on any of the issues which may be involved in this proceeding."

The document in question is directly related to discussions by members of the Michigan Municipal Cooperative Power Pool (MMCPP) with their Engineering Consultant - Daverman Associates, Inc., at Grand Rapids, Michigan on February 14, 1973, and relates to current contract negotiations with Consumers Power Company concerning the purchase of wholesale electric energy. Several meetings between representatives of the MMCPP and Consumers Power Company have been held since the inception of the instant case. These meetings, negotiations and discussions in no way relate to the Midland Plant or to the transmission facilities owned by Consumers Power. As stated by counsel,"[T]hese discussions have not touched subjectively on any of the items which may be involved in this proceeding."

II. Contract Negotiations Are Still In Progress

Attached hereto as Appendix "A" is a letter dated March 29, 1973 from W. Jack Mosley to H. Rademauer and A. L. Edwards, transmitting Consumers Power's latest draft proposal for the agreement between the MMCPP and Consumers Power Company. This indicates clearly that negotiations are not only currently proceeding on this agreement but also that further discussions and meetings are contemplated. The document in question relates solely to this agreement and is not an appropriate subject for discovery by Consumers Power.

III. Intervenors Are the Real Parties in Interest

We do not know how a copy of this document came into the possession of the Department of Justice, except that Daverman and Associates, Inc. have been furnishing the Department of Justice with materials concerning its clients relative to engineering studies being conducted in preparation for this case. We assume that it was sent in error since it does not directly relate to any of the issues of this proceeding. Consumers Power directed interrogatories to the MMCPP members concerning the Pool activities, billings and other data, and including the minutes of pool planning and

operating committees. These have been supplied. There was no interrogatory requesting documents, studies or materials concerning the present negotiations with Consumers Power Company. Had such a request been made an objection would have been made and a protective order would have been promptly requested. The joint document requests did not request such information of the Company nor have any such current materials been supplied. In its motion, Consumers Power alludes to more than fifty documents relating to negotiations between the Company and MMCPP members concerning which counsel sought and received a stipulation of confidentiality from counsel. These are not documents concerning these current negotiations.

Accordingly, we herewith lodge a single copy of the "so called" confidential documents for in camera inspection by the Chairman and so that he may have the opportunity to compare them with the Daverman document being furnished by the Department of Justice for similar in camera inspection.

We can state that in our preliminary review of the 25,000 pages furnished by Consumers Power we find most if not all of these "confidential" documents supplied in duplicate in other numbered pages. It is incongruous to label a document "confidential" when its duplicate version

has been furnished without such label. We are also unable to find any document relating to the current contract negotiations within the "confidential" documents.

IV. The Document Requested Does Not Fall Within The Michigan Statutes Providing For Public Inspection

While it may be construed that the municipals must maintain an open book policy with respect to the public, the situation involving the document in question poses an entirely different set of circumstances. In this matter, the MMCPP members have been and are continuing to negotiate a contract for wholesale electric power with Consumers Power Company. Meetings have been held separately and together with the Company to negotiate an agreement. The document sought by this Consumers Power motion consists of a report of one private meeting held between the MMCPP members and its engineering consultants to discuss current Consumers Power proposals and the prospective terms and conditions relating thereto. If disclosed by the inadvertency of its having been supplied in error to the Department of Justice, it could cause irreparable harm to the MMCPP members in further negotiations with Consumers Power. In this respect, Intervenors have not requested similar

internal memoranda from Consumers Power concerning this current negotiation with the MMCPP. However, if the document in question is ordered to be disclosed, we would and hereby request that the Chairman direct Consumers Power Company to furnish all of its internal memoranda, discussions, Board of Directors and Executive Committee minutes relating to this current MMCPP agreement. Such documents should include any reports concerning engineering, feasibility, costs of service or other studies which relate thereto. Further, this document deals with the underlying policies inherent in the process of negotiation, arbitration and collective bargaining. If the terms and conditions contemplated by one side are disclosed to the other side, any possibility of negotiation will be destroyed and the agreement resulting would reflect only those most unfavorable terms to the party whose prospective terms and conditions were so exposed.

We direct the Chairman's attention to a Florida case */ which is directly in point. The Florida "Government in the Sunshine" law (Fla. Stat. §286.011) was invoked to

*/ Bassett v. Braddock, 262 So. 2d 425 (Florida Supreme Court, January Term, 1972). See Appendix B.

open contract negotiations which were conducted in private. In affirming the lower courts, the Florida Supreme Court said:

> ". . . meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations. . . The public's representatives must be afforded at least an equal position with that enjoyed by those with whom they deal."

This is directly analagous to the document and others in question in that the municipals would be forced to disclose their bargaining position to the detriment of the citizens of the municipality while Consumers Power Company hides comparable documents under a protective order. Further, if the Board construes Michigan law to mean that such documents must be revealed to Consumers Power Company, it is forcing the Cooperative Corporations, which are partners of the municipals in the MMCPP, to waive those rights enjoyed by Consumers Power.

V. Consumers Power Interrogatories And Document Requests Did Not Request That Such Documents Be Supplied

As stated earlier, those interrogatories and document requests directed to the members of the MMCPP did not list current

negotiations between the Muni-Coop Pool and the Company. Also, those interrogatories and document requests directed to the municipals did not include these materials. The Board's attention is directed to item 80 of the municipal interrogatories, which is as follows:

> "80. Furnish a copy of any coordinating or integration agreement, contract or understanding for the sale or exchange of electric power and energy between the systems and any other electric utility now in effect, or in effect at any time during the period January 1, 1960 to date. Exclude any such agreement with Consumers Power Company." [emphasis ours].

CONCLUSIONS

1. The Chairman should examine in camera the document in question as well as the copy of the so-called "confidential" materials furnished by Consumers Power to counsel under a stipulation of confidentiality.

2. The document, after in camera review by the Chairman, should be protected under §2.740(c) (6), or, if disclosure is ordered, all similar Consumers Power Company documents should be ordered to be produced and similarly disclosed.

3. The document in question, deposited in error

with the Department of Justice, represents a report on only one of several such meetings which have been held relating to the proposed agreement. While we do not have a copy of this document in issue or any others pertaining to this MMCPP-Consumers Power agreement, we would assume such documents do exist, and, if so ordered, would also be included in the disclosure along with all of those similar Consumers Power documents relating to this agreement.

4. The subject matter of the document and the negotiations pertaining thereto do not relate to the relevant matters in issue. These private meetings, in which bargaining terms and conditions are discussed, should not be revealed to either side of the negotiations. We do not imply that letters or proposals exchanged between the parties should be protected, since both sides are in receipt of those materials, and to the extent they are relevant they could be supplied without harm to either party. We do contend that Consumers Power did not request such materials from the municipals and thus they were not supplied.

WHEREFORE, for the above stated reasons, intervening municipals Grand Haven and Traverse City and

intervening cooperatives Northern Michigan and Wolverine, respectfully request that the motion to compel the production of a document in the possession of the Department of Justice be denied, and further, that a protective order with respect to this document and to any others in existence falling into the same category be promptly issued. In the alternative, we request that Consumers Power Company be ordered to disclose all similar documents without stipulation as to confidentiality, and that such disclosures be ordered concurrently with disclosure of documents in the possession of the MMCPP.

Respectfully submitted,

James Carl Pollock

Attorney for the Municipals of Coldwater, Grand Haven, Holland, Traverse City, and Zeeland; the Michigan Municipal Electric Association, Northern Michigan Electric Cooperative and Wolverine Electric Cooperative

April 17, 1973

Law Offices of:
George Spiegel
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

NITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consumers Power Company	)	Docket Numbers 50-329A
(Midland Plant, Units 1 and 2)	)	50-330A

AFFIDAVIT

DISTRICT OF COLUMBIA, SS:

James Carl Pollock, being first duly sworn, deposes and says that he is the attorney for the Municipals of Coldwater, Grand Haven, Holland, Traverse City, and Zeeland, the Michigan Municipal Electric Association, Northern Michigan Electric Cooperative and Wolverine Electric Cooperative;and that as such he has signed the foregoing Intervenors' Answer to Motion to Compel the Production of Document for and on behalf of said parties; that he is authorized so to do; that he has read said Answer and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information or belief.

James Carl Pollock

Subscribed and sworn to before me
this 17th day of April, 1973.

Notary Public

My commission expires September 30, 1974

APPENDIX A

W. Jack Mosley
Vice President

Consumers Power Company

General Offices: 212 West Michigan Avenue, Jackson, Michigan 49201 • Area Code 517 788-0621

March 29, 1973

Mr. H. Rademauer
Mr. A. L. Edwards, Director
Grand Haven Board of Light & Power
Washington Street
Grand Haven, MI 49417

Gentlemen:

Attached is our latest draft proposal for the agreement between the MMCPP and Consumers Power Company. Similar transmittals are also being made to Messrs. Keen, Houg, Steinbrecker and Daverman.

This agreement incorporates many of the suggestions made by MMCPP at our last meeting, together with those matters concerning rates and need for both an interconnection and wholesale power agreement as discussed by telephone with Mr. Keen about two weeks ago. It is our intention to attempt to convert the wholesale power contract form from a kVA base to a kW base within two years.

After you have had time to consider this latest proposal, we would be pleased to meet with you to discuss any further details that need to be worked out.

I regret that it has taken this long to develop this draft, but I would like you to be assured that it has received all the attention that the press of work would allow us to devote to it.

Yours very truly,

W. Jack Mosley

WJM/lrt

RECEIVED
APR 6 1973
GEORGE SPIEGEL

Patricia K. BASSETT, and Kenneth Hopkinson, joined by Mrs. Crutcher Harrison, Appellants,

v.

G. Holmes BRADDOCK et al., Appellees,

v.

DADE COUNTY CLASSROOM TEACHERS ASSOCIATION, Inc., Intervenor Appellee.

No. 41315.

Supreme Court of Florida.

May 17, 1972.

Action by citizens of county against school board for injunction; teachers' association intervened upon counterclaim for declaratory decree as to teachers' collective bargaining rights. The Circuit Court, Dade County, Rhea Pincus Grossman, J., entered judgment and plaintiffs appealed. The Supreme Court, Dekle, J., held that labor negotiators employed by school board in preliminary or tentative teacher contract negotiations with teachers' representatives may negotiate outside of public meetings without being in violation of the "sunshine law" and that board may instruct and consult with its labor negotiators in private without such violation.

Affirmed.

Roberts, P. J., concurred specially and filed opinion.

Adkins, J., dissented and filed opinion concurred in by Boyd, J.

1. Labor Relations ⇐179

Attorney employed in public by school board for preliminary or tentative teacher contract negotiations with teachers' representatives could negotiate outside of public meetings without being in violation of the "sunshine law." F.S.A. § 286.011.

2. Labor Relations ⇐179

School board may instruct and consult with its labor negotiators in private without being in violation of the "sunshine law." F.S.A. § 286.011.

3. Schools and School Districts ⇐53(1)

Any initial violation of law resulting from election of chairman and vice-chairman of school board by secret written ballot was cured by the corrective, open, public vote which followed. F.S.A. § 286.011.

William S. Frates, Larry S. Stewart and Jon I. Gordon, of Frates, Floyd, Pearson & Stewart, Miami, for appellants.

Frank A. Howard, Jr., Miami, for appellees.

Tobias Simon and Elizabeth J. duFresne, Miami, for intervenor appellee.

Robert L. Shevin, Atty. Gen., and Daniel S. Dearing, Chief Trial Counsel, Tallahassee, as amici curiae.

DEKLE, Justice.

We affirm on this direct appeal the findings and judgments of the learned chancellor. An injunction was sought by certain Dade County citizens as plaintiffs (appellants) against Appellees-Dade County School Board for alleged failure to comply with the so-called "Government in the Sunshine" law.[1] Dade County Classroom

1. Fla.Stat. § 286.011, F.S.A.: "*Public meetings and records; public inspection; penalties.*—(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, *except as otherwise provided in the constitution, at which official acts are to be taken* are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or *formal action* shall be considered binding except as taken or made at such meeting. (2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit

Teachers' Assoc., Inc., was intervenor upon counterclaim for declaratory decree as to teachers' "collective bargaining" rights. The injunction was properly denied; the declaratory decree was correct as to "bargaining rights."

The principal issues are framed as follows:

1. Whether labor negotiators employed by the Board in preliminary or tentative teacher contract negotiations with the teachers' representatives may negotiate outside of public meetings without being in violation of the "Sunshine Law"?

2. Whether the Board may instruct and consult with its labor negotiators in private without such violation?

The appeal is from the chancellor's affirmative answers to these queries. We affirm.

The constitutional question vesting jurisdiction in this Court (Fla.Const. art. V, § 4(2)), F.S.A. relates to Fla.Const. art. I, § 6, which guarantees collective bargaining for employees.[2] See also this Court's expression thereon in Dade County Classroom Teachers' Assoc., Inc. v. Ryan, 225 So.2d 903 (Fla.1969)

Implementing legislation unfortunately has not yet been passed to give guidance and meaning to this vital constitutional protection.[3] Public employees are also entitled to their place in the "sunshine". At the 1972 regular legislative session, which is the third since passage of this 1968 provision, proposals in this regard have again been considered without passage. It is to be hoped that this will in time reach fruition. Meanwile, however, this Court remains hesitant to allow itself to be propelled into "judicial implementation." For purposes of this appeal, therefore, we merely affirm the lower court's action in these respects. To do otherwise could well deny the public employees' rights to "bargain collectively" as guaranteed by Fla.Const. art. I, § 6. Such "intensity" of the "sunrays" under the statute, as urged by this appeal, could cause a damaging case of "sunburn" to these employees or to the public which elected the Board. It quite possibly would conflict with the protective umbrella of the constitutional guarantee of § 6.

Here we have a literal *constitutional* exception expressly provided within the Sunshine Law which states: ". . . except as otherwise provided in the *constitution* . . . ." (emphasis ours) The "sunshine" of the statute is still afforded in the debate and adoption of the ultimate employment contract at a public meeting but with the constitutional polaroid filter from the damaging "ultra violet rays" of preliminary skirmishing.

The able chancellor's finding as to bargaining negotiations was based on impressive, uncontroverted testimony by respectable national authorities in the field, that meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations.[4] It would pit the public

courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizens of this state." (emphasis ours)

2. "*Section 6. Right to Work.*—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

3. We urged this in Dade Classroom Teachers' Ass'n., Inc. v. Ryan, 225 So.2d 903 (Fla.1969).

4. We quote with interest from "On Prior Restraint" by Paul A. Freund '31, published in the Harvard Law School Bulletin of August, 1971:

"The framers of the Constitution scrupulously maintained the secrecy of their deliberations in the convention of 1787. Madison's notes, the best record, were not published until his death, forty years later. Secrecy, it is fair to suppose, promoted free and candid debate within the con-

body as a virtual "David" without benefit of "sling"[5] against the Goliath champion (negotiators) for 7,500 employees in this immediate case and over 200,000 employees who could be ultimately involved.

The public's representatives must be afforded at least an equal position with that enjoyed by those with whom they deal. The public should not suffer a handicap at the expense of a purist view of open public meetings, so long as the ultimate debate and decisions are public and the "official acts" and "formal action" specified by the statute are taken in open "public meetings."[6] This affords the adequate and effective protection to the public on the side of the "right to know" which was intended.[7]

[1] The Board's employed attorney for the negotiations ("negotiator") was employed in public; he had no authority to bind the Board (and in fact his recommendations were later modified by the Board in open meetings); he made his report to the Board in public where the discussions were spirited and the ultimate vote was 4 to 3! Full consideration of the *recommendations* of the Board's negotiator was accordingly had in a public meeting and aired and voted upon in public. Those recommendations were in a sense simply the acorn from which the final contract grew—in the sunshine. There is no violation.

Appellants urge that the Act and our prior decisions compel public meetings for "not only formal acts, but also acts of deliberation, discussion and deciding, occurring, prior to and leading up to affirmative formal action." While conceding that our opinions have been as broad as possible to let in the sunshine under the Legislature's enactment, nevertheless a careful rereading of our opinions and the Act fail to support the foregoing contention. It was not specifically involved in our prior decisions which have dealt principally with "meetings" (some informal) of a board. We have in earlier opinions referred to "matters on which foreseeable action will be taken by the Board" and "any discussions on matters pertaining to the duties and responsibilities of the Board of Public Instruction of Broward County."[8] These are broad considerations but they still do not invade the areas of deliberation here involved, for it will be noted that in all of these observations by the Court, they are predicated upon a "meeting." Here the required action under the statutes *was* taken in a public meeting; changes were made and voting had, all in public. The *discussions* and *deliberations*, however, in an executive process often take place beyond the veil of actual "meetings" of the body involved. It is only in those "meetings" that official action is taken. Preliminary "discussions" may never result in any action taken. There may be numerous informal exchanges of ideas and possibilities, either among members or with others (at the coke machine, in a foyer, etc.) when there is no relationship at all to any meeting at which any foreseeable action is contemplated.[9] Such things germinate gradually

vention, and vitally encouraged the shifts in voting, the great compromises, calculated ambiguities and deliberate lacunae that made possible in the end a masterful charter. . . . ."

"The original Constitution contained no guarantee of freedom of speech, save for members of Congress, and none for the press. When the first Congress proposed the First Amendment, the Senate, it is worth remembering, sat in secrecy. For five years the Senate held its debates behind closed doors. Believing in the liberty of the press, at the same time the members believed it right to shield their own discussions from the public and disclose only the final actions taken."

5. I Samuel 17:39–40.

6. Fla.Stat. § 286.011.

7. Board of Public Instruction v. Dornn, 224 So.2d 693 (Fla.1969); City of Miami Beach v. Berns, 245 So.2d 38 (Fla.1971).

8. *Id.*

9. Massachusetts has a "right-to-know" law. Massachusetts General Laws, Annot. Ch.

and often without really knowing whether any action or meeting will grow out of the exchanges or thinking.

Every action emanates from thoughts and creations of the mind and exchanges with others. These are perhaps "deliberations" in a sense but hardly demanded to be brought forward in the spoken word at a public meeting. To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government. One must maintain perspective on a broad provision such as this legislative enactment, in its application to the actual workings of an active Board fraught with many and varied problems and demands.

[2] As to the second issue—the Board instructing its negotiator in private—it likewise follows that this is authorized on the same grounds and reasoning above. The "other side" (teachers' negotiator) is being "coached" and given advices privately and from time to time during the bargaining period; it is only common sense and fair play that "our team" have the same advantage in order to be effective in his efforts. It might be noted that in a case like the present where the negotiator is an *attorney* that certainly he is entitled to consult with the Board on matters regarding preliminary advices.[10] He is also thereby guided toward an effective result. It is not that appellees are "hiding" anything but simply trying to get the best "bargain" available for the public schools and not to be placed at a disadvantage in their efforts. It therefore follows that this is not in violation of the "Sunshine Law" for the Board to instruct and to consult with its labor negotiator in private without it being a violation of § 286.011.

[3] We affirm also on the Board's cross-appeal, the final judgment that the election of the chairman and vice-chairman of the Dade County School Board was valid in the particular circumstances here. It was first by secret written ballot but was then unanimously by election upon motion and vote in open meeting. In this particular instance, any initial violation by secret written ballot was cured and rendered "sunshine

9. § 23A (Supp.1969). An Attorney General opinion has held this law to be inapplicable to collective bargaining sessions conducted between negotiators.

"After careful considerations, I have concluded that this statute does not apply to collective bargaining sessions with school employees. The decisive point is that such sessions are not 'meetings' within the meaning of that term in the statute. The meetings to which the statute refers are rather those in which the internal discussions, deliberations and voting of an agency are of public concern. A collective bargaining session, on the other hand, is a meeting at which the employer and employees are engaged in a process of interchange and analysis of each other's proposals and counterproposals. This is a different kind of process from that involved in the conduct of an agency's internal deliberations or the making of its official decisions." Letter from State Attorney General to Commissioner of Education, Owen B. Kiernan, Sept. 12, 1967, p. 3. —As quoted from The Law and Practice of Teacher Negotiations by Wollett and Chanin, p. 432.

This is also the view of the Attorney General of Wisconsin, where the statute provides that no formal action of any kind may be introduced, deliberated upon, or adopted at any closed meeting of the school board. The Attorney General's informal opinion reads as follows:

"I believe it may be broadly stated that preliminary negotiations between a representative of a municipal employer and a representative of its employees are not subject to requirements of Sec. 14.90, Stats. (Anti-Secrecy Law), but that deliberations and adoption of any specific recommendation on the part of the municipality must comply with that statute. 'School Board and Teacher Negotiations in Wisconsin Public Schools' at pp. 11-12, Wisconsin Assn. of School Boards, Wisconsin (1967)—as stated in Wollett and Chanin, supra."

10. The Sacramento Newspaper Guild v. The Sacramento County Board of Supervisors, 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968). Cf. Times Publ. Co. v. Williams, 222 So.2d 470, 475-476 (2d DCA Fla.1969).

bright" by the corrective open, public vote which followed.

Affirmed.

CARLTON and McCAIN, JJ., and DREW, J. (Retired), concur.

ROBERTS, C. J., concurs specially with opinion.

ADKINS, J., dissents with opinion.

BOYD, J., dissents and agrees with ADKINS, J.

ROBERTS, Chief Justice (concurring specially).

I concur in the opinion and judgment of Mr. Justice Dekle. However, I note that there was apparently an informal secret straw ballot between the members as to the selection of a chairman with an obvious understanding that the result of the straw vote would be approved in an open formal meeting. Since the secret straw vote was an integral part in the selection of the chairman, the vote of the individual members at the informal straw poll should have been made public in the minutes.

ADKINS, Justice (dissenting):

I dissent. The questions involved in this litigation would never have arisen if the Legislature by statute had implemented the provisions of Fla.Const. art. I (Declaration of Rights), § 6, F.S.A., reading:

"The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

In limiting our consideration of this case solely to the powers of the judicial branch of government, we should only determine whether or not Fla.Stat. § 286.01 (government in the sunshine law), F.S.A., is applicable to collective bargaining by public employees.

Thus far the government in the sunshine law has withstood various attacks where a few misguided local boards and agencies have attempted to seek a means by which they could circumvent the law so as to resume secret meetings.

Appellees say that meaningful collective bargaining would be destroyed if full publicity were accorded at each step of the negotiations. It should be recognized that every taxpayer is an interested party in negotiations concerning the salaries to be paid public employees. The members of the school board are mere representatives of the public and any action taken by the school board is the action of the public.

We have previously defined a secret meeting in the following language:

> "A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials mentioned in Fla.Stat. § 286.011, F.S.A., transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal." City of Miami Beach v. Berns, 245 So.2d 38, 41 (Fla.1971).

Also in Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla.1969), we held that the statute was intended to cover any gathering dealing with some matter on which foreseeable action would be taken by the Board.

The statute does not make reference to the existence of a quorum, so that a meeting of any agency or authority of the Board may be a public meeting which should be open to the public at all times. The important question is not whether a quorum must be present, but whether the agency or authority of the Board deals with any matter on which foreseeable action may be taken by the Board.

The right of the public to be present, to be heard, and to participate should not be circumvented by having secret meetings of various committees appointed by the Board and vested with authority to make recommendations or suggestions to the Board concerning a matter on which foreseeable action may be taken. It is true that during the early years of our democracy public officials felt that most meetings concerning governmental decisions should be secret, but they soon became aware that an enlightened public is the foremost safeguard for the continued existence of our form of government. It is even more important that local boards, subject to the immediate scrutiny of the local citizen, be required to conduct their meeting in the presence of those who will be directly affected by the decisions of the Board. This is a renovation of the "town hall meeting" where public officials were able to secure the benefit of the thoughts and ideas of those most interested in government—that is, the citizens who pay the taxes.

The government in the sunshine law prevents the Board from functioning secretly under the guise of small committees. If this were done, each member would have an opportunity to commit himself on some matter, on which foreseeable action will be taken, by expressing himself at a secret committee meeting in the absence of the public and without giving the public an opportunity to be heard. The ultimate action of the entire Board in public meetings would merely be an affirmation of the various secret committee meetings held in violation of the law.

There is testimony, and the trial judge held, that meaningful collective bargaining would be destroyed if full publicity were accorded at each step of the negotiations. Therefore, the trial judge held that the statute would be unconstitutional if applied to collective bargaining as Blackmer's art. [illegible] F.S.A. guarantees the right to bargain collectively. It is also said that the public's representative must be afforded at least an equal [illegible] with that of [illegible] those with whom they deal. Such reasoning overlooks the provision in the constitution which prohibits strikes by public employees, thereby removing the only weapon by which labor may insure good faith collective bargaining.

In other words, the constitution contemplates open collective bargaining in good faith without secrecy and without strikes. The standards of performance in bargaining collectively as contemplated in the National Labor Relations Act are discussed in The Law of Labor Relations, by Werne, at page 255.

"While the Act, as amended, defines the duty to bargain collectively, it leaves to the Board and to the courts the determination of what tests shall be applied for the purpose of ascertaining whether employers and unions are performing such duty. The standard of performance is said to be negotiation in good faith to the end that agreement shall be reached with respect to wages, hours and conditions of work, and reduction of the agreement to a signed contract for a fixed reasonable period. Mere gestures in such a direction do not constitute collective bargaining. Nor does the requirement that the employees submit a list of demands, which are either accepted or rejected without explanation, satisfy the requirements.

"The submission of proposals by a union or by an employer, with a 'take-it-or-else' attitude, does not constitute collective bargaining. 'Negotiations with an intent only to delay and postpone a settlement until a strike can be broken' are not collective bargaining.

"Interchange of ideas, communication of facts peculiarly within the knowledge of either party, personal persuasion, and the opportunity to modify demands in accordance with the total situation thus revealed at the conference is of the essence of the bargaining process.'

"The nature of the good-faith requirement indicates that whether the standard

of performance is met will depend on the facts in each case where the issue is raised. The guide posts for performance and the manifestations of non-performance are considered in connection with refusals to bargain collectively."

The primary requirement is good faith. Certainly, negotiations in public would not detract from good faith bargaining. In fact, it may be said that bad faith emanates from closed doors. There is no case cited which requires that collective bargaining negotiation must be behind closed doors; therefore, for the Court to make this an exception to the government in the sunshine law would be legislation.

It is within the province of the Legislature, as a matter of policy, to determine whether collective bargaining should be an exception to the government in the sunshine law. I express no opinion on such a matter of public policy, but believe that it is not a violation of Fla.Const., art. I, § 6, F.S.A., to require such collective bargaining to take place in public at a public meeting.

In Board of Public Instruction of Broward County v. Doran, *supra*, we held that the statute did not authorize secret meetings on privileged matter. Under this decision the instructions to the negotiator should also be a matter of public concern. Even though this may, on its face, seem to give the negotiator for the teacher an unfair advantage, it will be necessary for him to bargain in good faith with full knowledge that his position cannot be enhanced by the use of the one weapon which ensures true collective bargaining in the classical sense, the strike. This puts each side on an equal footing so that public negotiation may result in benefits to the teachers, the Board, and the public. The Board is without benefit of secrecy and the teachers are without benefit of the threat of strike.

The further question appearing in this case was whether the secret ballot election of a School Board Chairman was made valid when the action was subsequently approved by the voice vote of the members at the same meeting.

Although in my judgment the election of the Chairman by secret ballot was contrary to the spirit and letter of the government in the sunshine law, the subsequent election of the Chairman by voice vote in this instance should not be upset. The reason for this view is that regardless of the prior violation of the statute, the Board members were at liberty to choose a Chairman of their choice by voice vote at a public meeting. This action should not be disturbed, although it may well be argued that it is the fruit of the illegal prior action.

BOYD, J., concurs.

UITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
Consumers Power Company	)	Docket Numbers 50-329A
(Midland Plant, Units 1 and 2)	)	50-330A

Certificate of Service

I hereby certify that the foregoing document in the above-captioned matter was served upon the following by deposit in the United States mail, first class or air mail, this 17th day of April, 1973.

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