



State of Rhode Island and Providence Plantations

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VIA EMAIL ONLY

January 30, 2020

OM 20-07

Stephen Fanning, Esquire
Legal Counsel, Mr. Carlos Lopez

George A. Comolli, Esquire
Legal Counsel, Westerly Housing Authority

RE: Lopez v. Westerly Housing Authority Board of Commissioners

Dear Attorneys Fanning and Commoli:

We have completed an investigation into the Open Meetings Act (“OMA”) complaint filed by Mr. Carlos Lopez (“Complainant”) against the Westerly Housing Authority Board of Commissioners (“Board”). For the reasons set forth herein, we find that the Board violated the OMA.

Background

The Complainant alleges that the Board violated the OMA when it discussed his job performance during executive session at its April 9, 2019 meeting without prior notification to him. Specifically, Complainant alleges that the Board did not notify him that he could require the discussion of his job performance be held in open session, nor did the Board state on the record at the April 9 meeting that it in fact provided such notice to the Complainant, in violation of R.I. Gen. Laws § 42-46-5(a)(1). The Complainant also alleges that the Board took a vote of “No Confidence” in the Complainant during the open session immediately following the executive session discussion.

The Board provided a substantive response in affidavit form through its legal counsel, George A. Comolli. The Board contends that the Complainant is the Executive Director of the Westerly Housing Authority charged with “attending all meetings of the [Board], preparing all agendas, minutes and providing required legal notices for all meetings.” The Board indicates that the Complainant received notice that his job performance would be discussed during the April 9 executive session when the Complainant put that item on the April 9 agenda. The Board contends

Complainant received an email on April 4, 2019 with an outline of the April 9 meeting agenda that contained a line item which read:

EXECUTIVE SESSION:

- (1) Possible union arbitration
- (2) Executive director job performance

Finally, the Board argues that “any violation at the April 9, 2019 meeting” was the fault of the Complainant because it was the Complainant’s “sole responsibility to send legal notices” in connection with the April 9 meeting. We note that Attorney Comolli’s affidavit also attests that the Complainant was not present at the April 9 executive session; however, the executive session minutes reveal that the Complainant was in fact present during the executive session, which is confirmed by the Complainant.

We acknowledge the Complainant’s rebuttal wherein he maintains that it was the Board’s “responsibility to inform [him] in writing” and that “[a] directive to include the Executive Director job performance [on the agenda] is not the same of [sic] advising [him] of [his] right to have it in open or closed session.”

Relevant Law and Findings

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

The OMA mandates that all meetings of public bodies must be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5. *See* R.I. Gen. Laws § 42-46-3. Pursuant to R.I. Gen. Laws § 42-46-5(a)(1), a public body may convene into executive session for the following purpose:

“Any discussions of the job performance, character, or physical or mental health of a person or persons provided that such person or persons affected shall have been notified in advance in writing and advised that they may require that the discussion be held at an open meeting.

Failure to provide such notification shall render any action taken against the person or persons affected null and void. Before going into a closed meeting pursuant to this subsection, the public body shall state for the record that any persons to be discussed have been so notified and this statement shall be noted in the minutes of the meeting.”

The Board does not dispute that Complainant’s job performance was discussed during the April 9 executive session. The Board also does not dispute that the Complainant did not receive notice that the discussion of his job performance could be held in open session pursuant to R.I. Gen. Laws § 42-46-5(a)(1). Furthermore, this Office’s review of the April 4 email, which the Board maintains constituted sufficient notice to the Complainant, did not contain any language stating that the

Complainant could request to have his job performance discussed in open session. Additionally, it is undisputed that the meeting minutes for the April 9 meeting do not contain R.I. Gen. Laws § 42-46-5(a)(1)'s required statement that the person to be discussed pursuant to R.I. Gen. Laws § 42-46-5(a)(1) was notified and advised of his or her rights described in R.I. Gen. Laws § 42-46-5(a)(1). Moreover, the Board also contends that the Complainant had notice of the intended discussion because the Complainant "placed that item on the agenda." Although the Complainant clearly had notice that his job performance would be discussed, the April 4 email does not meet the notice requirements under R.I. Gen. Laws § 42-46-5(a)(1).

Although the Board contends that the responsibility of providing notice pursuant to R.I. Gen. Laws § 42-46-5(a)(1) lays with the Complainant as Executive Director, the OMA applies to public bodies. As a public body, the Board is responsible to ensure that its meetings comply with the OMA. Accordingly, we find the Board violated the OMA.

Conclusion

The OMA provides that the Office of the Attorney General may institute an action in Superior Court for violations of the OMA on behalf of a complainant or the public interest. *See* R.I. Gen. Laws § 42-46-8(a), (e). The Superior Court may issue injunctive relief and declare null and void any actions of the public body found to be in violation of the OMA. *See* R.I. Gen. Laws § 42-46-8(d). Additionally, the Superior Court may impose fines up to \$5,000 against a public body found to have committed a willful or knowing violation of the OMA. *Id.*

The OMA provides that failure to provide the notification required by R.I. Gen. Laws § 42-46-5(a)(1) "shall render any action taken against the person or persons affected null and void." However, we do not find that the Board took any action against the Complainant during the April 9, 2019 executive session meeting such that the action could be declared "null and void" pursuant to R.I. Gen. Laws § 42-46-5(a)(1). The vote of "No Confidence" was taken during the open session on April 9. Additionally, based on the Board's undisputed representations, discussion of the Complainant's job performance was re-noticed and re-discussed at the Board's July 9, 2019 meeting. Our review of the July 9, 2019 meeting minutes confirms that the Board discussed and voted in open session to place Complainant on leave. Accordingly, we do not find injunctive relief appropriate.

Based on the evidence presented, we do not conclude that the Board's conduct evinces a willful or knowing violation. It is undisputed that the Complainant had notice that his job performance was going to be discussed during the April 9 executive session. Additionally, the Complainant was present during the April 9 executive session discussion of his job performance and the April 9 open session vote of "No Confidence." We also note that the Board does not have any prior similar OMA violations. However, this finding serves as notice to the Board that the conduct discussed herein violates the OMA and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court as specified in the OMA. The

Complainant may pursue an OMA complaint within “ninety (90) days of the attorney general’s closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later.” R.I. Gen. Laws § 42-46-8. Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

B: /s/ Kayla E. O’Rourke
Kayla E. O’Rourke
Special Assistant Attorney General