



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

March 24, 2016

OM 16-05

Ms. Cheryl Comley

Ccomley1@cox.net

Mr. Larry Anderson

Larryanderson1@verizon.net

RE: Comley et. al. v. Little Compton School Committee

Dear Ms. Comley and Mr. Anderson:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Little Compton School Committee (“School Committee”) is complete. By correspondence dated April 1, 2015, you allege the School Committee violated the OMA during its September 10, 2014 executive session by failing to record in its open session minutes that the closed session was convened by open call, and by a vote of a majority of the members. You allege this violated R.I. Gen. Laws § 42-46-4(a). You also allege the School Committee violated the OMA during this meeting when it failed to record in its open session minutes the vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of R.I. Gen. Laws § 42-46-5(a). You further allege that the School Committee also convened into executive session during the September 10, 2014 meeting for an improper purpose. More specifically, you allege the School Committee convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) to discuss potential litigation, yet the School Committee discussed “the extra paycheck for 2013-14.” You further allege that the posted notice and the agenda for the executive session for the September 10, 2014 meeting failed to include a statement specifying the nature of the business to be discussed regarding this “extra paycheck for 2013-14.” Finally, you allege that the School Committee violated the OMA during the September 10, 2014 meeting when it failed to record in its open session and executive session minutes, the members of the public body recorded as either present or absent, in violation of R.I. Gen. Laws § 42-46-7(a)(2).

In response to this Department's request, you submit that these OMA allegations should not be barred by the statute of limitations as you only became aware of these potential violations on or about November 19, 2014. See R.I. Gen. Laws § 42-46-8(b). You filed this complaint on or about April 1, 2015.

In response to your complaint, we received a substantive response from the School Committee's legal counsel, Benjamin M. Scungio, Esquire, who provided affidavits from the former School Committee Chairman, Mr. Donald Gomez, former School Committee Member, Mr. David Beauchemin and former School Committee Member, Mr. Joseph Quinn. Attorney Scungio states, in pertinent part:

"The School Committee meeting complained of took place on September 10, 2014. The executive and public session minutes of that meeting were approved at a public meeting of the Little Compton School Committee on October 1, 2014. Further, at the September 10, 2014 meeting, the Committee voted to seal the minutes of the executive session. * * *

Rhode Island General Laws [§] 42-46-8(b) states:

'No complaint may be filed by the attorney general after one hundred eighty (180) days from the date of public approval of the minutes of the meeting at which the alleged violation occurred, or, in the case of an unannounced or improperly closed meeting, after one hundred eighty (180) days from the public action of a public body revealing the alleged violation, whichever is greater.'

In Costantino v. Smithfield School Committee, OM 12-12, PR 12-08 * * * [t]he Attorney General decided as follows: * * *

'While the expiration of the statute of limitations for this Department to file a lawsuit in Superior Court does not necessarily bar this Department from reviewing a complaint and issuing a finding, under similar circumstances **when the statute of limitations has expired or is about to expire before a complaint is filed within [this] Department, we have consistently, but respectfully, declined to issue what would essentially be a non-binding advisory opinion. * * * Accordingly, we decline to review whether the School Committee improperly convened into executive session on April 21, 2008 due to the statute of limitations.** (Emphasis in original).

In the instant matter, the public and executive session minutes were publicly approved on October 1, 2014 * * * Since the complaint was filed on April 3, 2015 – more than 184 days has elapsed. The Committee respectfully submits that the Attorney General, in accord with past

decisions, decline to issue a non-binding decision on any of the issues contained in the complaint.

* * *

Further, with respect to the date of discovery argument made by the complainants, as the Attorney General points out in Block v. Rhode Island Board of Elections, OM 12-05 * * * [t]he above language provides two timetables for the statute of limitations. The first prohibits the filing of a complaint after 180 days from the date of the public approval of the meeting minutes at which the alleged violation occurred; and the second, prohibits the filing of a complaint after 180 days from 'the public action of the public body revealing the alleged violation,' but only in the case of an unannounced or improperly closed meeting.' * * *

In this case, it is not alleged that the school committee took any type of vote or public or other action in the executive session. The complainants merely claim that the Committee Members discussed a matter which was not listed on the agenda. For this reason, the second timetable does not apply to the instant case and is time barred as well.

* * *

Clearly, they did convene into the executive session for the purpose advertised. The minutes reflect that there was a discussion of potential litigation regarding Mr. Anderson's APRA request.

* * *

The extra paycheck matter concerns the District's overpayment of the certified staff [] during the 13-14 fiscal year.

* * *

All these issues, if properly posted, would have allowed a discussion and/or action pursuant to 42-46-5(a)(2) or potentially (9). Therefore, if properly posted, the extra paycheck issue could have been properly discussed by the Committee in executive session.

[Rhode Island General Laws] § 42-46-4 provides, in pertinent part: '**No public body shall discuss** in closed session any public matter which does not fall within the citations of § 42-46-5(a) referred to by the public body in voting to close the meeting, even if these discussions could otherwise be closed to the public under this chapter. (Emphasis in original).

The redacted minutes of the meeting state ‘A discussion took place pertaining to the extra paycheck for 2013-2014.’ Further Counsel’s letter of November 19, 2014 further explains ‘For clarification purposes, you will find that there is no Committee vote regarding the resolution of the pay check issue. The School Committee was advised of an agreement with the Teachers’ Union to rectify the situation. No vote was necessary to address the payroll issue.’”¹

We acknowledge your rebuttal dated May 19, 2015.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the School Committee violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

Initially, we address the allegations that: (1) the School Committee violated R.I. Gen. Laws § 42-46-4(a) during its September 10, 2014 executive session by failing to record in its open session minutes that the closed session was convened by open call, and by a majority vote of its members; (2) the School Committee violated the OMA during this meeting when it failed to record in its open session minutes the vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of R.I. Gen. Laws § 42-46-5(a); (3) the School Committee violated the OMA during the September 10, 2014 meeting when it failed to record in its open session and executive session minutes, the members of the public body recorded as either present or absent, in violation of R.I. Gen. Laws § 42-46-7(a)(2); and (4) the School Committee violated the OMA when the posted notice and agenda for the executive session for the September 10, 2014 meeting failed to include a statement specifying the nature of the business to be discussed regarding the “extra paycheck for 2013-14.”

Rhode Island General Laws § 42-46-8(b) states:

“[n]o complaint may be filed by the attorney general after one hundred eighty (180) days from the date of public approval of the minutes of the meeting at which the alleged violation occurred, or, in the case of an unannounced or improperly closed meeting, after one hundred eighty

¹ The affidavits of Messrs. Gomez, Beauchemin and Quinn contain information that is substantially similar to the information contained in Attorney Scungio’s response. As such, for purposes of this finding, we do not set forth the contents of the three (3) affidavits.

(180) days from the public action of a public body revealing the alleged violation, whichever is greater.” (Emphasis added).

While the expiration of the statute of limitations for this Department to file a lawsuit in Superior Court does not necessarily bar this Department from reviewing a complaint and issuing a finding, under similar circumstances when the statute of limitations has expired or is about to expire before a complaint is filed with this Department, we have consistently, but respectfully, declined to issue what would essentially be a non-binding advisory opinion. See Tingle v. Chariho School Committee, OM 98-21; Valentine v. Narragansett Bay Commission, OM 98-22; Engelhard v. Jamestown School Committee, OM 98-27; Portsmouth Democratic Town Committee v. Portsmouth Town Council, OM 11-33; Maloney v. North Kingstown Planning Commission, OM 12-19.

Your complaint makes clear that you contend that the foregoing alleged violations occurred during the School Committee’s September 10, 2014 meeting. The minutes for the September 10, 2014 meeting were approved on or about October 1, 2014. We received your OMA complaint on April 3, 2015. Accordingly, the statute of limitations for this Department to file a lawsuit relating to foregoing allegations expired on or about April 1, 2015, before this Department received your complaint. Thus, consistent with our precedent, this Department will not render a finding as to these alleged OMA violations.² See R.I. Gen. Laws § 42-46-8(b).

We now address your remaining allegation that the School Committee convened for an improper purpose during its September 10, 2014 executive session meeting. More specifically, you allege the School Committee convened into executive session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) to discuss potential litigation, yet you contend the School Committee also discussed “the extra paycheck for 2013-14.” The agenda for the September 10, 2014 executive session stated:

“Discussion of potential litigation regarding APRA request from Mr. Anderson and legal advice re same. R.I. Gen. Laws § 42-46-5(a)(2).”

It appears on November 10, 2014, Ms. Comley made an APRA request to the Little Compton Superintendent of Schools, seeking, inter alia, a copy of the “minutes of the meeting when [the overpayment of staff in fiscal year 2014 and a request of repayment by June 30, 2015] was discussed and the [date the] vote approving this decision was taken.” In response to this APRA request, Attorney Scungio provided a response, which included a copy of the redacted minutes of the School Committee’s September 10, 2014 executive session. Attorney Scungio’s response also indicated:

² We pause to note that based upon a footnote in your submissions, it appears that you were both present at the September 10, 2014 meeting, which leaves us to ponder the reason for the delay in filing this complaint and question whether or not you were aggrieved by the alleged violations. See Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002).

“For clarification purposes, you will find that there is no Committee vote regarding the resolution of the pay check issue. The School Committee was advised of an agreement with the teachers’ Union to rectify this situation. No vote was necessary to address the payroll issue.”³

The redacted executive session minutes revealed that a “discussion took place pertaining to the extra paycheck for 2013-14.” Accordingly, for purposes of determining when the statute of limitations began to run with respect to your allegation that the School Committee improperly convened into executive session, we deem the action publicly revealing the alleged OMA violation to be November 19, 2014, and thus, your complaint was filed within the statute of limitations.

We now address the merits of this allegation. In the three (3) affidavits, Messrs. Gomez, Beauchemin and Quinn all state, with respect to the issue of the extra paycheck, that this matter “was not discussed, considered or voted upon among Committee Members.” Attorney Scungio, in his correspondence to you dated November 19, 2014, states “[f]or clarification purposes, you will find that there is no Committee vote regarding the resolution of the pay check issue. The School Committee was advised of an agreement with the Teachers’ Union to rectify this situation. No vote was necessary to address the payroll issue.” (Emphasis added). Indeed, based upon the evidence presented it appears the School Superintendent and the School Business Manager were both present in the executive session and provided the School Committee – in Mr. Scungio’s words – with a “heads up” that the matter had been resolved. Attorney Scungio also states that “[p]roviding information to the Committee in this manner is analogous to a Superintendent’s submission of an informational weekly packet to the Committee and as long as the Committee does not discuss the matter, it is not a violation based on the plain language of the statute.”

In order for the OMA to apply, a “quorum” of a “public body” must convene for a “meeting” as the OMA defines those terms. Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294 (R.I. 1999). A “public body” is defined as “any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government.” R.I. Gen. Laws § 42-46-2(c) (emphasis added). A “meeting” is defined as “the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a). This Department has rendered several findings on the issue of whether a “meeting” is convened for purposes of the OMA when a quorum of members convene, but fail to “discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.”

In Neubert v. Governor’s Office and Exeter Town Council, OM 98-09, the Exeter Town Council attended a presentation by Dr. Robert Carl and a member of the Governor’s Office on the development possibilities for the Ladd Center. The members of the Exeter

³ It appears that a copy of the letter of resolution with the Union was also included as part of the APRA response.

Town Council represented to this Department that they did not collectively discuss the Ladd property, or vote or to take any other actions. As noted in the finding, the Open Meetings Act defines a “meeting” as the “convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws Section 42-46-2(a). Based on the representations by the Exeter Town Council that its members made no attempts to collectively discuss Council business or exchange facts concerning the Ladd property, vote or take any other actions, this Department determined that their attendance at the presentation was not a “meeting” governed by the Open Meetings Act.

Similarly, in Fogarty v. North Cumberland Fire District & Valley Falls Fire District, OM 95-18, members of the Boards of Trustees of the North Cumberland Fire District and Valley Falls Fire District were invited by the two fire chiefs to an informational presentation on the pros and cons regarding the possibility and potential merger of the two fire districts. The board members represented to this Department that they did not participate in the presentation nor did they engage in any discussions or take any action of any kind with respect to the merger or any other issue. Based on these specific facts, it was the determination of this Department that the presentation was not a “meeting” as defined by the Open Meetings Act. See also In re: Advisory Opinion, Open Meetings Act, Adv. Op. 99-01 (the Mayor invited members of the Town Council and School Committee to a “reception” to “meet the members of the General Assembly.” It was the opinion of this Department that the mere attendance of members of the Town Council and School Committee did not by itself constitute a violation of the Open Meetings Act)(emphasis added). See also, Vadenais v. North Smithfield Town Council, OM 14-03

Based upon the evidence presented, it does not appear that the School Committee members had a collective discussion about the extra paycheck issue amongst each other or with the School Superintendent or the School Business Manager. Although some contradictory evidence was presented as to whether or not a discussion/vote was taken by the School Committee,⁴ this Department reviewed the September 10, 2014 meeting minutes, the response from the School Committee’s legal counsel and the affidavits from the three (3) School Committee members. In the three (3) affidavits, Messrs. Gomez, Beauchemin and Quinn all state, with respect to the issue of the extra paycheck, that this matter “was not discussed, considered or voted upon among Committee Members.”

Having reviewed the evidence, it appears that, although the executive session meeting minutes indicated: “A discussion took place pertaining to the extra paycheck for 2013-14,” the “discussion” occurred between the School Superintendent and the School Business Manager. Based upon the evidence, we cannot conclude that the School Committee collectively discussed and/or acted upon a matter over which the public body

⁴ For example, in a correspondence dated September 26, 2014, the Business Manager for the Wilbur & McMahan Schools indicated that the extra paycheck issue was “discussed and approved by the School Committee.”

had supervision, control, jurisdiction, or advisory power. R.I. Gen. Laws § 42-46-2(a). As such, we find no violation of the OMA.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so 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 our file as of the date of this letter.

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

Very truly yours,

A handwritten signature in cursive script that reads "Lisa Pinsonneault". The signature is written in black ink and is positioned above the typed name and title.

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Benjamin M. Scungio, Esquire
bscungio@brasm.com