



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

October 17, 2013
OM 13-27B

Mr. John Marion

Re: Common Cause v. I-195 Redevelopment District Commission

Dear Mr. Marion:

This correspondence serves as a supplemental finding to Common Cause v. I-195 Redevelopment District Commission, OM 13-27, released September 11, 2013. In Common Cause, we reviewed your July 25, 2013 Open Meetings Act (“OMA”) complaint and concluded that the I-195 Redevelopment District Commission (“I-195 Commission”) violated the OMA when it failed to post notice for its July 8, 2013 meeting within a minimum of forty-eight (48) hours before the date of the meeting. The sole issue to be addressed in this supplemental finding is whether the I-195 Commission’s violation was willful or knowing.

In response to our finding, on September 26, 2013, this Department received a response from the I-195 Commission’s legal counsel, Jon M. Anderson, Esquire. In pertinent part, Attorney Anderson relayed:

“Notice of the July 8, 2013 meeting was in fact posted as part of the I-195 Commission’s annual schedule of meetings. * * * [T]he late posting of the supplemental notice was a mistake on the part of this firm for which we take full responsibility. The late posting was not intended to violate the law; to the contrary, the belief was that the posting was ‘better late than never.’ The agenda was also timely posted at the I-195 Commission’s office at 315 Iron Horse Way, Providence.

There is no need for injunctive relief, nor do we believe that it would be awarded.
* * * All of the actions taken at the July 8, 2013 meeting were ratified at the
Commission's meeting on August 19, 2013. * * *

This case involves a lawyer's mistake, and nothing more. * * * [T]here is no
evidence that the failure to post the supplemental notice was knowing or
intentional on the part of the I-195 Commission; my firm has taken full
responsibility for a mistake that was made over a holiday weekend. We should
have advised the client to have cancelled the meeting because, to turn a phrase,
late is not always better. * * * [T]he I-195 Commission 'will work diligently to
make certain that it does not happen again.' Finally, if you review your findings,
you will see that there is no record of any prior violations on the part of the I-195
Commission.

In closing, please accept that the volunteers on the I-195 Commission take their
obligation to the public seriously. As soon as the I-195 Commission realized that
counsel made a mistake, the I-195 Commission (1) took responsibility; (2) fixed
the matter by re-noticing and re-voting; and (3) invited your office to conduct an
educational training at its October [21], 2013 meeting."

We received your reply dated September 24, 2013. You state, in pertinent part:

"Common Cause believes the Commission knowingly violated [the] OMA on
July 8, 2013 when they convened a meeting less than 8 hours after posting notice
on the Secretary of State's website. We urge you to file suit against the
Commission for this violation.

The legal counsel for the Commission, in his letter dated August 19, 2013,
concedes that the posting of the notice at 9:47 a.m. on July 8 was 'an oversight on
the part of this firm.' Yet the minutes of that meeting begin with the following
sentence:

'The I-195 Redevelopment District Commission (the 'District') met on Monday,
July 8, 2013, in Public Session, beginning at 5 PM, at the offices of the Rhode
Island Economic Development Corporation, located at 315 Iron Horse Way, Suite
101, Providence, Rhode Island, *pursuant to notice of the meeting to all
Commissioners and public notice of the meeting, a copy of which is attached
hereto, as required by applicable Rhode Island law.*' [Emphasis in original].

* * *

The legal counsel's response places responsibility on the Commission's legal
counsel, but as [the Department of Attorney General's finding] states, 'it is the
responsibility of all public bodies to adhere to the requirements of the OMA and
although certain activities can be delegated to employees or agents of a public

body, ultimately, the public body bears responsibility to comply with the OMA.’ Clearly, it was the Commission’s responsibility to cancel the July 8 meeting.

* * *

In the current affair it does not matter, as the Commission’s counsel argued in response to our complaint, that July 8 fell after a holiday weekend. Any time a public body is aware that it has failed to give proper notice it should cancel its meeting and repost for a later date. A review of the Secretary of State’s listing of official holidays shows that Friday, July 5 state government was open for business.”

We acknowledge an additional response filed by the I-195 Commission on September 27, 2013.

Here, we focus on the posting of the meeting notice approximately eight (8) hours before the start of the July 8, 2013 meeting and the decision to convene the meeting after realizing that the proper forty-eight (48) hour notice had not been posted. By its own admission, the I-195 Commission, or its agent, knew the meeting had not been properly posted or convened, yet convened the meeting anyway. Indeed, legal counsel states that it was under the belief that the posting was “better late than never.” Although we acknowledge that legal counsel for the I-195 Commission attempts to accept full responsibility for the untimely posting, as this Department explained in Common Cause v. I-195 Redevelopment District Commission, OM 13-27, “it is the responsibility of all public bodies to adhere to the requirements of the OMA” and “the public body bears responsibility to comply with the OMA.” Since the posting did not comply with the requirements of the OMA, the I-195 Commission should have re-scheduled the meeting to a properly posted date.

Legal counsel consistently proffers that his law firm takes the blame for the error in posting, and it was not the fault of the I-195 Commission. Although it was in the context of an Access to Public Records Act (“APRA”) complaint, this Department, in Reilly & Olneyville Neighborhood Association v. Providence Department of Planning and Development and/or Providence Redevelopment Agency, PR 09-07B, considered the scope of an agency relationship.

As we explained in Reilly, “[f]or example, an ‘agent’ is defined as:

‘[a] person authorized by another (principal) to act for or in place of him; one entrusted with another’s business. One who represents and acts for another under the contract or relation of agency. A business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as

does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.

One authorized to transact all business of principal, or all of principal's business of some particular kind, or all business at some particular place.' Black's Law Dictionary, p. 63 (6th Edition)(internal citation omitted)(emphases in original).

Similarly, the Restatement (Third) defines agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) Agency § 1.01. (Emphasis in original).

The attorney-client relationship is governed by the principles of agency. Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995). An agency relationship exists when: (1) the principal manifests that the agent will act for him, (2) the agent accepts the undertaking; and (3) the parties agree that the principal will be in control of the undertaking. Lawrence v. Anheuser-Busch, Inc., 523 A.2d 864, 867 (R.I. 1987). See also, In re Quigley, 21 A.3d 393 (R.I. 2011) ("an attorney is authorized to take such steps 'as he [or she] deems legal, proper and necessary' in the representation of his client, 'and his [or her] acts, in the absence of fraud, are binding on the client.'"). As such, legal counsel acts as an agent on behalf of the principal (the I-195 Commission) and its actions (or inactions) are binding on the principal. Indeed, although legal counsel asserts that the untimely posting was the responsibility of the agent, and not the principal, no argument has been presented that the agent's action should not or cannot be attributed to the principal.

In Carmody v. Rhode Island Conflict of Interest Commission, 509 A.2d 452 (R.I. 1986), the Rhode Island Supreme Court examined the legal standard for a "knowing and willful" violation. As summarized in a later case, DiPrete v. Morsilli, 635 A.2d 1155, 1163-64 (R.I. 1994), the Court:

"has held that when a violation of the statute is reasonable and made in good faith, it must be shown that the official 'either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute * * * . Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is 'difficult to conceive of a violation that could be reasonable and in good faith. In contrast, when the violative conduct is not reasonable, it must be shown that the official was 'cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt.'" (internal citations omitted).

Considering the “willful and knowing” standard articulated by the Supreme Court, we must conclude that the I-195 Commission was “cognizant of an appreciable possibility that [it may] be subject to the statutory requirements and [it] failed to take steps reasonably calculated to resolve the doubt.” DiPrete, 635 A.2d at 1164. Indeed, in our opinion, the evidence demonstrates that on July 8, 2013 at 9:47 am, the I-195 Commission was aware that notice had not been timely posted, and as a result, it attempted to post public notice for the meeting scheduled for approximately eight (8) hours later. See id. (“it is ‘difficult to conceive of a violation that could be reasonable and in good faith’”). The I-195 Commission, either itself or through its agent, was cognizant of an appreciable possibility it was subject to the statutory requirements and it failed to take steps reasonably calculated to resolve that doubt. These facts distinguish this matter from Garceau v. Narragansett Planning Board, OM 07-22. Although we accept legal counsel’s remorse, that does not change the fact that this Department is charged with determining whether an OMA violation was willful or knowing when a public body was aware that public notice was not properly posted and yet still convened the meeting.

Legal counsel also suggests that the failure to timely post notice was not “knowing or intentional.” Respectfully, as discussed supra, “intentional” is not the standard used. Although we appreciate and accept legal counsel’s candor, if this Department determines that a public body commits a knowing or willful violation, yet allows the public body to escape the sanctions of such a determination by expressing after-the-fact remorse and ensuring future compliance, the OMA would be left in tatters. In Satchell v. West Warwick Town Council, OM 12-30B, this Department concluded that the West Warwick Town Council knowingly or willfully violated the OMA when it posted the public notice for its June 4, 2012 meeting on the Secretary of State’s website seven (7) minutes prior to the start of the meeting. This Department filed a civil lawsuit in Superior Court. In Kerwin v. Rhode Island Student Loan Authority, OM 12-32B, this Department concluded that the Rhode Island Student Loan Authority knowingly or willfully violated the OMA when it posted the public notice for its June 26, 2012 meeting on the Secretary of State’s website twenty-four (24) hours prior to the start of the meeting. This Department filed a civil lawsuit in Superior Court. When met with similar situations, this Department’s response should be similar.

Finally, although we acknowledge some of the mitigating factors identified in the I-195 Commission’s response, namely the fact that the I-195 Commission re-noticed and re-voted on the July 8, 2013 matters at the properly posted August 19, 2013 meeting, and the lack of similar previous violations,¹ we must nonetheless conclude that when the I-195 Commission convened its July 8, 2013 meeting knowing that it had posted notice on the Secretary of State’s website earlier that same day, the I-195 Commission willfully or knowing violated the OMA as described by the Supreme Court. In doing so, we observe that this Department has never adopted an interpretation or practice that a public body that violates a particular OMA or Access to Public Records Act provision for the first time cannot be found to have committed a willful or knowing violation, see Black v. Town of Barrington, OM 05-04; Satchell v. West Warwick Town Council, OM 12-30B, and such an interpretation is inconsistent with Carmody and DiPrete. The

¹ To be fair, the I-195 Commission is of recent vintage. See <http://sos.ri.gov/documents/publicinfo/omdocs/minutes/5943/2011/24346.pdf>.

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facts and evidence presented in this case are simply not distinguishable from those presented in Satchell and Kerwin. Accordingly, this Department will file a civil lawsuit against the I-195 Commission.

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

Very truly yours,

A handwritten signature in black ink, reading "Lisa A. Pinsonneault". The signature is written in a cursive style with a large, looping initial "L".

Lisa A. Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: Charles F. Rogers, Jr., Esq.
Jon M. Anderson, Esq.