



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

April 27, 2015
OM 15-05

Mr. Robert Cushman

**Re: Cushman v. Warwick Retirement Board
March 13, 2015 complaint**

Dear Mr. Cushman:

Our investigation into your Open Meetings Act (“OMA”) complaint filed against the Warwick Retirement Board (“Board”) is complete. By email correspondences dated March 13, 2015 and March 19, 2015, you allege that the Board violated the OMA when it convened its March 4, 2015 meeting on less than forty-eight (48) hours notice. You further allege that the Board violated the OMA when, on March 18, 2015, the Board discussed matters in closed session not appropriate for discussion under R.I. Gen. Laws § 42-46-5(a)(7).

In response to your complaint, we received an affidavit from Ms. Jane Jordan, Personnel Director of the City of Warwick. Ms. Jordan attests, in pertinent part:

“3. The responsibilities of the Retirement Board include the exclusive jurisdiction in all matters affecting the pension funds and the administration of the proper operation of the plan.

4. In response to recommendations being made to the Retirement Board, and at the request of the Chairman, I scheduled a special meeting to take place on 3/4/15, and caused an agenda to be drafted for said meeting.

5. Said meeting notice, attached contained language regarding the agenda item, including that the Board may go into closed session pursuant to the provisions RIGL § 45-46-5(7) [sic] (investment plan of public funds on matters related thereto).

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6. Said meeting notice was inadvertently not posted within the required 48 hours prior to the meeting.
7. The 3/4/15 meeting was held, the Board went into closed session and discussed matters relating to the investment of public funds.
8. The 3/4/15 meeting was then deemed invalid due to lack of sufficient notice of closed session.
9. Thereafter, I caused to be drafted the agenda for the regular meeting of the Retirement Board, scheduled for 3/18/15 and added to the agenda the same matter that the Board convened in closed session pursuant to RIGL § 42-45-4(7) [sic] (investment plan of public funds) at the 3/4/2015 meeting.
10. The closed session agenda item was to review and ratify all prior actions on the subject matter before the Board on 3/4/15.
11. The Board convened in closed session, reviewed and ratified the prior actions, as set forth in the attached minutes for in camera review, having been sealed by Board vote.”

The Board did not substantially address the issues raised in your two (2) complaints. We acknowledge your rebuttal.

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 determine whether this Department believes that 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 Board violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

We first address your allegation that the Board violated the OMA when it convened the March 4 meeting on less than forty-eight (48) hours notice.¹ The evidence shows that the Board posted notice on the Secretary of State’s website on March 3 for its March 4 meeting and the only item on the agenda read: “[r]eview, discussion and possible action regarding recommended changes in the Municipal Pension Fund plan assumptions. The Board may convene in Executive Session

¹ The OMA provides that “[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general.” R.I. Gen. Laws § 42-46-8(a). See Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002). While we question whether you are “aggrieved” for purposes of the March 4 meeting, since the Board never raises this issue, we decline to address it. Frankly, even if you were not “aggrieved,” the seriousness of this issue may very well have warranted our independent investigation. See R.I. Gen. Laws § 42-46-8(g).

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pursuant to the provisions of R.I. General Laws 42-[46]-5(7) (investment plan of public funds or matters related thereto).” The evidence also shows that at the March 4 meeting, a quorum of the Board convened in closed session and voted to “accept the recommended assumption and method changes by Gabriel Roeder Smith & Company,” see March 4 Open Session Minutes, and that the Board later declared the March 4 meeting “null & void because of notice violation.”

The OMA requires that all public bodies “shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date” of the meeting. R.I. Gen. Laws § 42-46-6(b). This notice shall include “the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.” Id. The OMA also provides that a public body may hold a meeting on less than forty-eight (48) hours notice “when the meeting is deemed necessary to address an unexpected occurrence that requires immediate action to protect the public.” See R.I. Gen. Laws § 42-46-6(b). If an emergency meeting is called “a meeting notice and agenda shall be posted as soon as practicable and, upon meeting, the public body shall state for the record and minutes why the matter must be addressed in less than forty-eight (48) hours.” See R.I. Gen. Laws § 42-46-6(c).

Here, the Board concedes that it failed to provide timely notice and insists that it was “inadvertently not posted within the required 48 hours,” however, a review of all the evidence suggests otherwise. Specifically, on the Secretary of State’s website in the space provided for “Meeting Details” is the remark “SPECIAL NOTE: This is an emergency meeting.” To us, this suggests that the Board was well aware that it was convening its March 4 meeting on less than forty-eight (48) hours notice. Notwithstanding this remark, neither the agenda nor the meeting minutes indicate that the meeting was an “emergency meeting,” and the open meeting minutes show that the Board did not “state for the record and minutes why the matter must be addressed in less than forty-eight (48) hours,” as required by the OMA. See R.I. Gen. Laws § 42-46-6(c). Furthermore, at no moment does the Board argue that the meeting was “an emergency meeting” or explain why it was labeled as such on the Secretary of State’s website. Indeed, both the agenda and meeting minutes label the meeting as “Special Meeting of the Retirement Board.”

In addition, Ms. Jordan attests that “at the request of the Chairman, I scheduled a special meeting to take place on 3/4/15, and caused an agenda to be drafted for said meeting,” yet Ms. Jordan avers that the notice was “inadvertently” posted on less than forty-eight (48) hours notice. The Board makes no attempt to explain why this matter could not have been properly advertised within forty-eight (48) hours as required by the OMA nor does the Board attempt to explain the “inadvertent[]” posting. At the very least, this evidence suggests that the Board knew when it posted the March 3 notice that the posting failed to comply with the forty-eight (48) hours provision yet it still convened the March 4 meeting. As such, we respectfully reject that Board’s contention that the notice was “inadvertently” posted with less than forty-eight (48) hours notice. It also deserves mention that the Board’s consequential invalidation of the March 4 discussions and actions in no way absolves the Board of its failure to comply with the OMA. Therefore, we

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find that the Board violated the OMA when it held a meeting on less than forty-eight (48) hours notice.² See R.I. Gen. Laws § 42-46-6(b).

You further allege that the Board violated the OMA when it discussed matters not appropriate for discussion under R.I. Gen. Laws § 42-46-5(7) in the Board's March 18 closed session. You state, in pertinent part:

"1) Nothing in the discussion of the new actuarial assumptions should be considered '*related to the question of the investment of public funds where the premature disclosure would adversely affect the public interest*' as outlined in 42-[46]-5(7). (Emphasis original).

4) Gabriel Roeder Smith & Company (GRS), the professional actuarial firm for the municipal pension created a document that was published on the city website before this meeting was held listing all the new assumptions the board would consider at this meeting. As such the statement '*where the premature disclosure would adversely affect the public interest*' is not applicable. In fact, the actuarial [sic] for GRS, Mr. Joseph Newton testified before the city council[s] March 16 meeting that all assumptions were approved by the pension commission." (Emphasis original).

As indicated above, on March 4 the Board met in closed session under R.I. Gen. Laws § 42-46-5(7) for "review, discussion and possible action regarding recommended changes in the Municipal Pension Fund plan assumptions" at which time the Board voted to "accept the recommended assumption and method changes by Gabriel Roeder Smith & Company." The March 4 meeting was subsequently deemed null and void due to the deficiency in notice and the Board added the March 4 pension matter to the agenda for the Board's March 18 meeting. Prior to the March 18 Board meeting, however, the Warwick City Council held a meeting on March 16 at which time the Gabriel Roeder Smith & Company actuarial assumptions, *i.e.*, the same assumptions that were reviewed, discussed, and voted on by the Board on March 4, were presented to the City Council and the public in open session. An actuary presented the 2014 actuarially valuations and Board member Mr. Alfred Marciano was present and available to answer any questions from the public and City Council members. See <http://ustre.am/:43KE9>. Indeed, the agenda for the Warwick City Council's March 16 meeting indicates "Mr. Al Marciano, Chair of the Warwick Retirement Board to Brief The City Council on the Status of the Municipal Pension." Also during the City Council's meeting, Councilmember Mr. Steve Merolla inquired as to when the Board met and approved the assumptions, to which Board member Mr. William DePasquale replied that the Board discussed and "voted in the affirmative" on March 4, but that the Board was notified that the meeting notice was not posted within forty-eight (48) hours, in violation of the OMA, and that the Board would meet again to review and

² See Gorman v. Central Coventry Fire District, OM 14-09 (Since the OMA requires a public body to ensure compliance with its provisions, the argument that the Clerk, but not the Fire District, is responsible for OMA compliance is rejected).

vote on the assumptions. Id. Subsequently, on March 18, the “Board convened in closed session, reviewed and ratified the prior actions.” See Affidavit.

The OMA states that “[e]very meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5.” See R.I. Gen. Laws § 42-46-3. The OMA allows a public body to hold a meeting closed to the public for a “matter related to the question of the investment of public funds where the premature disclosure would adversely affect the public interest.” See R.I. Gen. Laws § 42-46-5(7). In order to properly hold a meeting closed under this exemption, two prongs must be satisfied. First, the matter must be “related to the question of the investment of public funds,” and second, “the premature disclosure would adversely affect the public interest.”

In the present case, we assume that the first prong – a “matter related to the question of the investment of public funds” – would be met, however, for reasons discussed below, it is unnecessary to reach this decision. With respect to the second prong, after reviewing all the evidence presented, including an in camera review of the executive session meeting minutes, we fail to see, and the Board fails to address, how the “premature disclosure would adversely affect the public interest.” In fact, no reason has been provided concerning why the “review, discussion, and possible action regarding recommended changes in the Municipal Pension Fund plan assumptions” needed to be conducted in closed session. Instead, the Board states that “[t]he closed session agenda item was to review and ratify all prior actions on the subject matter before the Board on 3/4/15.” Since it appears that this matter was discussed publicly at the City Council’s March 16 meeting, we have great difficulty concluding that the disclosure of the Board’s March 18 executive session discussion “would adversely affect the public interest.”³ Based on the totality of the circumstances, including the lack of a response from the Board on this issue, we conclude that the second prong has not been satisfied, and that therefore, the Board violated the OMA when it discussed matters not appropriate for closed session in closed session at its March 18 meeting. It is significant that at no point in this investigation does the Board offer any argument, reasoning, or justification to any of the allegations raised in this complaint.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies available in suits filed under the OMA: (1) “[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];” or (2) “the court may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members found to have committed a willful or knowing violation of [the OMA].” R.I. Gen. Laws § 42-46-8.

This Department is charged with enforcing the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Specifically, in

³ At the City Council’s March 16 meeting, after the Gabriel Roeder Smith & Company report had been presented to the City Council and the public, Board member DesPasquale stated that the Board had already voted to accept the assumptions. See <http://ustre.am/:43KE9>.

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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)(emphasis added).⁴

Here, in light of the fact that the Board convened the March 4 meeting despite what appears to be actual knowledge that the meeting was convened on less than forty-eight (48) hours notice, and in light of the fact that the Board later deemed the March 4 meeting “invalid due to lack of sufficient notice of closed session,” this Department has serious concerns that the violation was willful or knowing. See R.I. Gen. Laws § 42-46-8(d). In our view, the fact that the Board posted notice on March 3 is capable of being read to suggest that the Board convened its March 4 meeting knowing that the public notice was posted with the Secretary of State less than forty-eight (48) hours before the meeting. Furthermore, the fact that the March 4 meeting was labeled an “emergency meeting” on the Secretary of State’s website, but the Board made no attempt to comply with the emergency provisions, supports our view. In other words, when the Board posted its notice the day before the meeting, it appears the Board knew or should have known that its posting failed to comply with the OMA. We also find insufficient evidence at this time to conclude that the Board’s inappropriate discussion and action during its March 18 closed session meeting was not willful or knowing. See Affidavit.

Before reaching a conclusion on whether the Board knowingly or willfully violated the OMA by holding its March 4, 2015 meeting on less than forty-eight (48) hours notice and by discussing matters in closed session that were not appropriate under the exemption cited, we will allow the Board ten (10) business days from the receipt of this finding to address these issues. Any response should be substantive and not conclusionary, with supporting evidence or arguments explaining the Board’s failure to comply with the OMA. The Board should provide you with a copy of its response and, if you chose, you may also provide a response within the same timeframe, which must also be provided to the Board’s legal counsel. At the expiration of this time period, this Department will determine whether the violation was willful or knowing and

⁴ This Department provides guidance in recent findings for what type of violation may be considered willful or knowing. See Satchell v. West Warwick Town Council, OM 12-30B; Kerwin v. Rhode Island Student Loan Authority, OM 12-32B.

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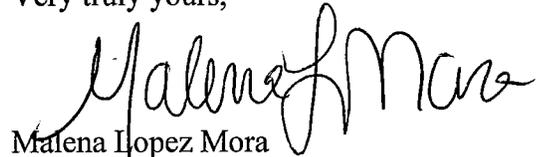
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whether this Department will seek civil fines and/or other penalties. See R.I. Gen. Laws § 42-46-8(d). A supplemental finding will follow.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Malena Lopez Mora". The signature is written in a cursive, flowing style.

Malena Lopez Mora
Special Assistant Attorney General
Ext: 2307

Cc: Diana Pearson