



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 17, 2014
OM 14-34

Mark McBurney, Esquire¹

Re: Desmarais v. Manville Fire District

Dear Attorney McBurney:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Manville Fire District (“Fire District”) is complete. By email correspondence dated February 5, 2014, you allege the Fire District violated the OMA because the minutes for the July 10, 2013, July 17, 2013, August 14, 2013, August 29, 2013, September 10, 2013, September 18, 2013, October 9, 2013, November 19, 2013, December 3, 2013 and January 8, 2014 meetings have not been posted on the Secretary of State’s website consistent with R.I. Gen. Laws § 42-46-7(b)(2). You also allege the Fire District violated the OMA because its 2014 annual notice has not been posted on the Secretary of State’s website in violation of R.I. Gen. Laws § 42-46-6 and you contend this violation is willful or knowing based upon this Department’s finding in Desmarais v. Manville Fire District, OM 12-09. You further allege that the Fire District violated the OMA because its agendas for the July 10, 2013, July 17, 2013, and December 3, 2013 meetings failed to indicate the date, time and location of the meetings, and the date the agenda was posted. Additionally, you allege the Fire District violated the OMA when its agendas for the August 14, 2013, August 29, 2013, September 10, 2013, December 11, 2013, January 8, 2014, and January 15, 2014 (7:30 p.m. and 8:00 p.m.) meetings failed to indicate the date the agenda was posted. You allege this violation is willful or knowing based upon this Department’s finding in Desmarais v. Manville Fire District, OM 12-09.

¹ Mr. Desmarais filed this complaint on February 5, 2014, in his individual capacity. On May 21, 2014, this Department received an email from Mark McBurney, Esquire, indicating he represents Mr. Desmarais in this matter. Accordingly, this finding is addressed to Mr. McBurney as legal counsel for Mr. Desmarais. Any reference to “you” in this finding is meant to reference Mr. Desmarais.

Lastly, you allege the Fire District violated the OMA by failing to make available to the public a record of all votes taken, listing how each member voted on each issue at its November 13, 2013 meeting. Specifically, you contend that the Fire District's November 13, 2013 minutes indicate that a prior meeting's minutes were approved, with one abstention, but fail to indicate the member who abstained or how a fourth member voted. You further allege the Fire District violated the OMA when its January 15, 2014 meeting minutes do not properly reflect how members voted on the approval of meeting minutes and the adjournment of the meeting. Finally, you allege the Fire District violated the OMA during its November 13, 2013 meeting because there is no record reflecting how all members voted on the topic of filling the warden vacancy.² Additional facts will be set forth as necessary.

In response to your complaint, we received a substantive response from the Fire District's legal counsel, Daniel V. McKinnon, Esquire. Attorney McKinnon states, in pertinent part:

"I provide the following response to Mr. Desmarais' issues. The response is in the same numerical order as that which references his issues previously in this letter:

* * *

(2) It is my understanding that Rhode Island General Laws 42-46-7(b)(2) was amended on July 15, 2013. At that time volunteer fire companies were required to file electronically with the Secretary of State's Office. Resultantly all dates referenced in Mr. Desmarais' complaint which predates July 15, 2013 I would suggest is irrelevant. The Manville Fire District, in the past, was neglectful of this duty but has begun and will continue to file as required.

(3) Mr. Desmarais is correct. Again, the Manville Fire District * * * has been somewhat neglectful[.] [I]t will fully comply going forward.

(4) I have not been able to review the postings referenced in Mr. Desmarais' complaint, but I am confident that Mr. Des[m]arias would not be so specific if it was not accurate. * * * [T]he Manville Fire District has been somewhat neglectful. It will fully comply going forward.

(5) Again, I have not been able to review the minutes referenced. * * * I [] would suggest that the board member who abstained could easily be deduced from the minutes of the meeting as Mr. Desmarais describes them. The Board of

² In Mr. Desmarais' original complaint, he further alleged that the Fire District violated the OMA when it failed to provide copies of documents, such as the budget, agenda, chief's report, and tax collector's report at certain meetings when copies had been previously provided. Since this allegation did not implicate the OMA or the Access to Public Records Act, it was not investigated by this Department.

Fire Commissioners will try to be more precise in its minute taking but [is] unable to engage professional talent to record the minutes due to expense.

(6) I do not know of any rule [or] regulation promulgated by the Attorney General's Office that recites how detailed minutes must be kept. The meeting referenced was opened to the public, debate and discussion occurred and the vote was taken. My understanding is that the minutes simply need to reflect what transpired."

We acknowledge Attorney McBurney's rebuttal dated July 2, 2014.³

In examining whether an OMA violation 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 Fire District violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

You allege the Fire District violated the OMA when its meeting minutes for the July 10, 2013, July 17, 2013, August 14, 2013, August 29, 2013, September 10, 2013, September 18, 2013, October 9, 2013, November 19, 2013, December 3, 2013 and January 8, 2014 meetings were not posted on the Secretary of State's website pursuant to R.I. Gen. Laws § 42-46-7(b)(2). Rhode Island General Laws § 42-46-7(b)(2) became effective on July 15, 2013 and provides, in pertinent part:

"[i]n addition to the provisions of subdivision (b)(1), all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, whether it is incorporated or not, and whether it is a paid department or not, shall post unofficial minutes of their meetings within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state's website."

³ One of the points raised in Attorney McBurney's rebuttal is that this Department granted the Fire District two extensions to file its response to the complaint and that the Fire District's response was submitted after the extension date. Attorney McBurney proffers that the Fire District "provides no affidavit explaining or providing reasons for the [Fire District's] willful disregard of the [Department of Attorney General's] deadlines." Respectfully, we simply view this situation differently and believe Attorney McKinnon's recent entry into this case warrants the position taken by this Department. Additionally, Attorney McBurney does not present any evidence of prejudice caused by these extensions and doing so has allowed both interested parties to present their respective positions so that this Department can address the merits presented.

It appears that the minutes for the July 17, 2013, September 10, 2013, September 18, 2013, December 3, 2013 and January 8, 2014 meetings were not posted on the Secretary of State's website until February 5, 2014, the date your complaint was filed. The minutes for the August 14, 2013, August 29, 2013, October 9, 2013 and November 19, 2013 meetings do not appear to have been posted to the Secretary of State's website as of the date of this finding.⁴ Since the Fire District was obligated to file its post-July 15, 2013 minutes within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, its failure to do so was a violation of the OMA.

Additionally, you allege the Fire District violated the OMA because its 2014 annual notice is not posted on the Secretary of State's website. Rhode Island General Laws § 42-46-6(a) states, in pertinent part:

“[a]ll public bodies shall give written notice of their regularly scheduled meetings at the beginning of each calendar year.”

Similarly, you allege that the Fire District also violated the OMA because: 1) its agendas for the July 10, 2013, July 17, 2013, and December 3, 2013 meetings failed to indicate the date, time and location of the meetings, and the date the agenda was posted; and 2) because its agendas for the August 14, 2013, August 29, 2013, September 10, 2013, December 11, 2013, January 8, 2014, and January 15, 2014 (7:30 p.m. and 8:00 p.m.) meetings failed to indicate the date the agenda was posted.

Rhode Island General Laws § 42-46-6(b) states, in pertinent part:

“[p]ublic bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting * * *” (emphasis added).

With respect to the foregoing notice allegations, we find no evidence that you have been aggrieved by the alleged violations.

The OMA provides that only “aggrieved” citizens may file a complaint with this Department. R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the “aggrieved” provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission's March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission's March 25, 1996 meeting, Mr. Hawkins and his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission's notice was deficient, the trial justice determined that the Lottery Commission violated the OMA, and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was “unnecessary” to address the merits of the OMA lawsuit

⁴ The July 10, 2013 meeting was held prior to the effective date of R.I. Gen. Laws § 42-46-7(b)(2).

because “the plaintiffs Graziano and Hawkins ha[d] no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice. Id. at 221-22. (Emphases added).

Here, we have been presented no evidence concerning whether Mr. Desmarais attended the meetings in question, sought to attend the meetings in question, or could not attend the meetings in question because of the allegedly deficient notice. In brief, we have been presented with no evidence to demonstrate that you were aggrieved in any way by the notice issues you raise. Accordingly, in accordance with Graziano, we find insufficient evidence to determine that Mr. Desmarais was aggrieved and find no violation. Id.

You also allege the Fire District violated the OMA by failing to make available to the public a record of all votes taken, listing how each member voted on each issue during its November 13, 2013 meeting. More specifically, you allege the minutes do not properly reflect which Fire District member abstained from a vote on accepting the meeting minutes, nor do the November 13, 2013 minutes indicate how a fourth member voted. A review of the November 13, 2013 meeting minutes reveals there was “a motion to accept the minutes from last meeting 10/09/2013. 1 Abstain.” The minutes also indicate that four Fire District members were present and that one member made a motion to approve, while a second member seconded the motion to approve. Rhode Island General Laws § 42-46-7(a) states, in pertinent part:

“[a]ll public bodies shall keep written minutes of all their meetings. The minutes shall include, but need not be limited to:

(3) [a] record by individual members of any vote taken.”

Rhode Island General Laws § 42-46-7(b)(1) states, in pertinent part:

“[a] record of all votes taken at all meetings of public bodies, listing how each member voted on each issue, shall be a public record and shall be available, to the public at the office of the public body, within two (2) weeks of the date of the vote.”

The minutes of the November 13, 2013 meeting did not record the individual members’ vote to approve the prior meeting minutes. In particular, no indication is provided concerning the

member who abstained, nor is there any indication how the fourth Fire District member voted. In fairness, the Fire District's minutes did provide a record by individual member of all other matters voted upon at the November 13, 2013 meeting. The Fire District violated the OMA with respect to this allegation.

You also allege the Fire District violated the OMA during its November 13, 2013 meeting when there was no record reflecting how all members voted on the topic of filling the warden vacancy. A review of the minutes of the November 13, 2013 meeting reveals the following under the agenda heading "New Business:"

"Warden Vacancy: We have 2 options, we can either fill the spot and hold a special tax payers meeting or we can leave it at 4 wardens."

Based upon the evidence presented, it appears no vote was taken with respect to this agenda item, and instead, our attention is directed by you to the Fire District's December 11, 2013 meeting minutes which state, in pertinent part:

"[t]he Board of Wardens call a special tax payers meeting on January 15, 2014 at 7:30pm at the Manville Fire Department, 112 Old Main Street, for the purpose of electing a new wardens position to fill the vacant seat."

Based upon the December 11, 2013 minutes, you allege that between the November 13, 2013 and the December 11, 2013 meetings, Fire District members must have discussed the two options outside the purview of the public. Respectfully, no evidence has been presented to draw such a conclusion and therefore we find that the Fire District did not violate the OMA with respect to this allegation. In particular, we observe that the December 11, 2013 minutes evince that during this meeting (on December 11, 2013) the Fire District discussed the instant subject matter and concluded that it would convene a vote for the warden vacancy on January 15, 2014.

Finally, you allege the Fire District violated the OMA when its January 15, 2014 minutes do not properly reflect how individual members voted on the approval of the meeting minutes and the adjournment of the meeting. A review of the January 15, 2014 meeting minutes reveals the following:

"motion to approve last meeting minutes by Charlie Malenfant, Second by Barry Nickerson motion approved

* * *

Adjournment @ 8:00pm Motion by Barry Nickerson, Second by Charlie Malenfant."

The minutes of the January 15, 2014 meeting did not record the individual members' vote approving the prior meeting minutes or adjourning the meeting. See R.I. Gen. Laws § 42-46-7(a), supra. The Fire District violated the OMA with respect to this allegation, but again in

fairness, the January 15, 2014 minutes evince a vote by individual members regarding all other matters discussed during this meeting.

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.

In the instant case, we find no evidence that the Fire District knowingly or willfully violated the OMA. While injunctive relief would be appropriate, we prefer to allow the Fire District the opportunity to remedy the violations on its own. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) (“By scheduling, re-noticing, and re-voting on the challenged appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that ‘public business be performed in an open and public manner.’”). In particular, the Fire District must file those minutes identified in this finding as required, but not yet filed, on the Secretary of State’s website. Additionally, the Fire District must amend its November 13, 2013 and January 15, 2014 minutes to reveal the vote of the individual members consistent with this finding to the extent that the Fire District can accurately record these past events. The Fire District should notify this Department within ten (10) business days of the date of this finding whether it will voluntarily correct the violations cited in this finding and must accomplish these remedial measures within thirty (30) business days of this finding. This finding shall serve as notice that future similar violations committed may be considered willful or knowing and this Department may seek civil penalties in Superior Court as authorized under law.

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.

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

Very truly yours,



Lisa A. Pinsonneault

Special Assistant Attorney General

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LP/pl

Cc: Daniel V. McKinnon, Esquire