



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 12, 2015

OM 15-05B

Mr. Robert Cushman

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

Dear Mr. Cushman:

This correspondence serves as a supplemental finding to Cushman v. Warwick Retirement Board, OM 15-05, released April 27, 2015. In Cushman, we reviewed your March 13 and March 19, 2015 Open Meetings Act (“OMA”) complaint and concluded that the Warwick Retirement Board (“Board”) violated the OMA when it failed to post notice for its March 4, 2015 meeting within a minimum of forty-eight (48) hours before the date of the meeting and when it discussed matters in closed session that were not appropriate under the exemption cited. The sole issue to be addressed in this supplemental finding is whether the Board’s violations were willful or knowing.

In response to our finding, this Department received a supplemental response from legal counsel for the Board, Ms. Diana Pearson, Esquire. In pertinent part, Attorney Pearson relayed:

“The Warwick Municipal Retirement Board is the city body which monitors and makes changes to investments of the city’s pension funds, as well as approving pension applications.

The Warwick City Council scheduled the city’s actuary to speak before it on 3/16/15 regarding the actuary’s recommendation of changes to other city and state pension plans. Because the Retirement Board is to approve and make changes to the plan before being made public, the Retirement Board quickly tried to schedule a special meeting before the City Council meeting on 3/16/15. The members of the Retirement Board were contacted to schedule a meeting and ensure a quorum. The only date before the City’s Council’s meeting that a quorum could meet was 3/4/15. Upon confirmation with the members of the date, the secretary posted the

meeting notice on 3/3/15. The secretary posted the agenda on 3/3/15 for that meeting as an emergency believing the short notice to review investment changes before a public hearing qualified as an exception to the 48 hour notice requirement, not understanding the scope of an emergency meeting requires immediate action to protect the public. Those notice requirements have been reviewed and explained with the person posting notices for future compliance. The less than required notice was not willful or knowing violations [sic] but a misunderstanding of the limitations for which short notice may be made.

...

The actuary gave a presentation to the City Council in the open session [of the March 16, 2015 City Council meeting]. The Retirement Board was not present for it, except for Chair and Council's representative and had not approved any discussed recommended changes. On 3/18/15, the Retirement Board went into closed session to consider and review the recommendations, to ask questions of the actuary, to accept some, none or all of the recommendations. The City Council and Retirement Board operate independently, especially on matters of pension investments, which include changes to the plans."

First, we focus on the posting of the meeting notice less than forty-eight (48) hours before the start of the March 4, 2015 meeting and the decision to convene the meeting after realizing that the proper forty-eight (48) hour notice had not been posted. Based on the Board's supplemental response, it appears that the Board, through its clerk, had actual knowledge that the meeting had not been properly posted or convened, yet convened the meeting anyway. Indeed, legal counsel states that the "secretary posted the agenda on 3/3/15 for that meeting as an emergency believing the short notice to review investment changes before a public hearing qualified as an exception to the 48 hour notice requirement." Although we acknowledge that the Board has "reviewed and explained with the person posting notices for future compliance," it is the responsibility of all public bodies to adhere to the requirements of the OMA, and while the failure to adhere to the forty-eight (48) hour notice requirement may have been a "misunderstanding of the limitations for which short notice may be made," ultimately the public body bears responsibility to comply with the OMA. See Common Cause v. I-195 Redevelopment District Commission, OM 13-27.

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).

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. Although the Town Council attested that the failure to comply with the forty-eight (48) hour notice requirement was the “result of mistake, inadvertence and excusable neglect,” we expressed grave concern that the Town Council, by its own admission, knew that posting notice of its meeting on seven (7) minutes notice was in violation of the forty-eight (48) hours required by the OMA, yet the meeting was still held. 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. We noted that our focus was not on the Authority’s failure to post its notice on June 23, 2012, but rather on the Authority’s decision to convene its meeting on June 26, 2012, after realizing on June 25, 2012 that the proper forty-eight (48) hour notice had not been posted. Consequently, we filed a lawsuit in Superior Court.

In Common Cause v. I-195 Redevelopment District Commission, OM 13-27B, this Department concluded that the I-195 Commission willfully or knowingly violated the OMA when it posted the public notice for its July 8, 2013 meeting approximately eight (8) hours before the start of the July 8, 2013 meeting. Legal counsel for the Commission conceded that it knew the meeting had not been properly posted yet convened the meeting anyway and proffered that his law firm took the blame for the error in posting, not the I-195 Commission. Nevertheless, we indicated that 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, blaming the violation on its agent, and ensuring future compliance, the OMA would be left in tatters. Similar to Satchell and Kerwin, this Department filed a civil lawsuit in Superior Court.

The above findings stand for the authority that when met with similar situations, this Department’s response should be similar. Here, the evidence shows that the Board, through its agent, knew it was posting the agenda on “short notice” yet convened the meeting regardless because “[t]he only date before the City Council’s meeting that a quorum could meet was 3/4/15.” Since the posting did not comply with the requirements of the OMA, the Board should have re-scheduled the meeting to a properly posted date or, perhaps, should have requested that the City Council reschedule its March 16, 2015 meeting to a later date so that the Board could “approve and make changes to the plan before being made public.” Considering the “willful and knowing” standard articulated by the Supreme Court, we must conclude that the Board 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 fact that “the Retirement Board quickly tried to schedule a special

meeting before the City Council meeting of 3/16/15,” that “[t]he only date before the City Council’s meeting that a quorum could meet was 3/4/15,” and that the Board’s secretary labeled the March 4, 2015 meeting as an “emergency believing the short notice to review investment changes before a public hearing qualified as an exception to the 48 hour notice requirement,” demonstrates that the Board 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.” *Id.* Therefore, we find that the Board willfully or knowingly violated the OMA when it posted notice and convened its March 4, 2015 meeting on less than forty-eight (48) hours notice.

We reach the same conclusion with respect to the Board’s entering closed session to discuss matters not appropriate under the exemption cited at its March 18, 2015 meeting. In Cushman v. Warwick Retirement Board, OM 15-05, we found that the Board violated the OMA when it went into closed session at its March 18, 2015 meeting for “review, discussion and possible action regarding recommended changes in the Municipal Pension Fund plan assumptions” under R.I. Gen. Laws § 42-46-5(a)(7).¹ Specifically, we failed to see how the “premature disclosure would adversely affect the public interest” and expressly noted that, at no point in our investigation, did the Board offer any argument, reasoning, or justification for how the executive session discussion “would adversely affect the public interest.” *Id.* In fact, we indicated that we found insufficient evidence to conclude that the Board’s inappropriate discussion and action during its March 18 closed session meeting was not willful or knowing and allowed the Board an additional opportunity to address this issue. Notwithstanding this opportunity, the Board’s supplemental response still fails to adequately address this violation.

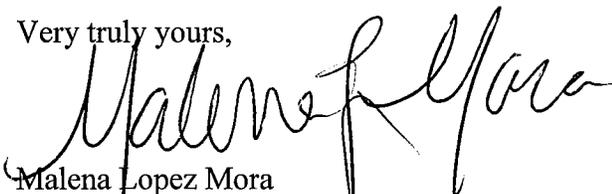
Here, the evidence shows that the Board knew our supplemental finding would address this issue, yet the Board neglects to provide any argument, reasoning, or justification for how its March 18, 2015 closed session discussions would have “adversely affect[ed] the public interest” if conducted in open session. Specifically, the first paragraph of the Board’s supplemental response states “the Department of Attorney General found that the Warwick Retirement Board committed two violations of the Open Meetings Act. The Department inquires why the Retirement Board’s actions do not constitute knowing or willful violations of the OMA.” (Emphases added). Furthermore, the last paragraph of the Board’s supplemental response states “[o]n 3/18/15, the Retirement Board went into closed session to consider and review the recommendations, to ask questions of the actuary, to accept some, none or all of the recommendations,” yet the Board makes no mention as to why this discussion would “adversely affect the public interest” as required under R.I. Gen. Laws § 46-42-5(a)(7) and as requested by this Department.

¹ Rhode Island General Laws § 42-46-5(a)(7) allows a public body to convene into executive session for “[a] matter related to the question of the investment of public funds where the premature disclosure would adversely affect the public interest. Public funds shall include any investment plan, or matter related thereto, including but not limited to state lottery plans for new promotions.” In Cushman v. Warwick Retirement Board, we assumed that the first prong, “matter related to the question of the investment of public funds,” would be met but determined that it was not necessary to reach such a conclusion since the Board’s discussion did not satisfied the second prong of the exemption.

In our opinion, the fact that the Board entered into closed session twice under R.I. Gen. Laws § 42-46-5(a)(7), once on March 4 and again on March 18, 2015, demonstrates that the Board was “cognizant of an appreciable possibility that [it may] be subject to the statutory requirements” and “failed to take steps reasonably calculated to resolve the doubt.” See DiPrete, 635 A.2d at 1164. Indeed, the Board has never provided this Department any explanation or justification for its executive session and the conclusion that premature disclosure would adversely affect the public interest. Therefore, based on standard articulated by the Supreme Court, we find that the Board willfully or knowingly violated the OMA when it discussed matters not appropriate for discussion in closed session. Accordingly, this Department will file a civil lawsuit against the Board for both violations.

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

Very truly yours,



Malena Lopez Mora
Special Assistant Attorney General
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Cc: Diana Pearson