



State of Rhode Island and Providence Plantations

OFFICE OF THE ATTORNEY GENERAL

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VIA EMAIL ONLY

December 20, 2019

OM 19-43

Ms. Gayle Corrigan

Jeffrey Kasle, Esquire
Legal Counsel, State Labor Relations Board

RE: Corrigan v. State Labor Relations Board

Dear Ms. Corrigan and Attorney Kasle:

We have completed our investigation into the Open Meetings Act (“OMA”) complaint filed by Ms. Gayle Corrigan (“Complainant”) against the State Labor Relations Board (“Board”). For the reasons set forth herein, we find that the Board violated the OMA.

Background

Beginning in June 2018, the Board held public meetings to consider twenty-nine (29) alleged unfair labor practices against the Town of East Greenwich (“Town”). During one of the proceedings, specifically on October 30, 2018, the Town raised various legal issues surrounding whether one Board member was prohibited from participating in these matters based on the Code of Ethics and a prior Ethics Commission opinion. According to the Complainant, the Board’s Chairperson “told everyone in attendance to leave the hearing room,” except for the Labor Board’s Administrator, the Board’s legal counsel, and the four Board members in attendance. The Complainant thereafter alleges that the Board convened “in an executive session meeting without taking an ‘open call’ vote and without having first properly notified the public at least 48-hours in advance of the meeting that the Labor Board may convene into a closed, executive session meeting as required by the Rhode Island Open Meetings Act.” The Complainant continues that there was no “mention as to why the Labor Board needed to convene so urgently – without notice – into executive session,” and that the Board violated the OMA by “not immediately disclosing the votes taken during its closed, executive session once the Labor Board reconvened in open session.”

This Office received a substantive response from the Board's legal counsel, Jeffrey W. Kasle, as well as an affidavit from the Board's Chairperson, Walter J. Lanni. In brief, Attorney Kasle submits that the recess to discuss legal issues amongst the Board members and its legal counsel does not constitute a "meeting" under the OMA. As such, Mr. Kasle contends the Board did not violate the OMA.

We did not receive a rebuttal from the Complainant.

Relevant Law and Findings

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

In order for the OMA to apply a "quorum" of a "public body" must convene for a "meeting." *See Fischer v. Zoning Board for the Town of Charlestown*, 723 A.2d 294 (R.I. 1999). 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). Here, we focus on whether the Board convened for a "meeting" when it recessed the October 30, 2018 meeting to discuss the legal issues that arose during the open session.

The Rhode Island Superior Court faced a somewhat similar situation in *Fischer v. Zoning Board for the Town of Charlestown*. *See Fischer v. Zoning Board for the Town of Charlestown*, WC No. 93-0624, *aff'd* on other grounds, 723 A.2d 294 (R.I. 1999) (emphasis added). In that case, the Rhode Island Superior Court had previously rendered a decision affecting the Zoning Board of Review for the Town of Charlestown. As a result of this decision, the Charlestown Solicitor prepared and distributed a memorandum to the Zoning Board of Review members, and subsequently, met with one or two Zoning Board of Review members to discuss the memorandum and to answer questions. Based upon legal counsel's consultations with the one or two Board members outside the public's purview, an OMA complaint was filed in the Rhode Island Superior Court.

In a written decision delivered by then-Superior Court Justice Frank J. Williams, the OMA complaint was dismissed. Of particular significance, Justice Williams wrote that:

this Court does not believe that such discussions fall within the spirit or requirements of our Open Meetings Act. There was neither a convening of a public body nor a quorum. *More importantly, this Court believes in the free and unhindered discussions between lawyer and client.* Quite simply, that is what occurred in this case, and such discussions should not be, nor are they, subject to the requirements of the Open Meetings Act, especially where there is no meeting of a public body. *Fischer*, WC No. 93-0624, *aff'd on other grounds*, 723 A.2d 294 (R.I. 1999) (emphasis added).

Subsequent to *Fischer*, this Office entertained a request from the Rhode Island Ethics Commission that asked “whether, during the course of Commission hearings held in open session, the Commission may withdraw to deliberate or to seek legal advice in closed session even when none of the exceptions to the Open Meetings Act apply.” See *In re Ethics Commission*, ADV OM 00-03. This Office responded with the following instruction:

Commission members who merely address questions to legal counsel (and receive answers from legal counsel) will not constitute a “meeting” for purposes of the OMA. See *In re Providence School Board*, Adv. OM 99-08. *This Department’s opinion is limited to the fact that the Commission members are engaged in a colloquy with legal counsel and that Commission members are not collectively discussing and/or acting upon any matter over which the Commission has supervision, control, jurisdiction, or advisory power. See R.I. Gen. Laws § 42-46-2(a).* With respect to your question concerning deliberations, we believe that if a quorum of the Commission members collectively discuss any matter over which it has supervision, control, jurisdiction, or advisory power, as your request implies, these discussions must be held in open session unless otherwise exempt pursuant to R.I. Gen. Laws § 42-46-5.

We caution the Commission that if its members engage in a collective discussion, vote, or take other action while asking questions to legal counsel, a “meeting,” as defined by the OMA, will convene and the requirements of the OMA will [] apply. Any attempt by the members of the Commission to engage in a collective discussion under the guise of asking questions to legal counsel will be deemed by this Department to be a “meeting.” To the extent that any minutes are maintained, these minutes should reflect that no collective discussion and/or action occurred.

Id. (emphasis added).

The above decisions indicate that individual members of a public body asking questions of legal counsel will not constitute a meeting and implicate the OMA as long as members do not engage in a collective discussion regarding a matter over which they have control. We emphasize that the inquiry regarding whether a meeting has occurred can be very fact-intensive and public body members should proceed with caution, particularly if a quorum of the public body is present when questions are asked of legal counsel.

In this case, the evidence demonstrates that prior to recessing the October 30, 2018 meeting, the Board had been engaged in discussions with one or more parties regarding various legal issues. As described by the Board’s Chairperson in his affidavit:

[a]fter listening to the Town’s arguments and concerns on these issues, I called for a recess of the hearing. *During the recess, I and three other Board members discussed how to proceed with regard to the Town’s objections. The Board’s administrator and legal counsel were also present. Board members discussed with legal counsel options for proceeding. After this discussion, we agreed, without*

*taking any votes, that further investigation of the ethics claim made by the Town's counsel was appropriate. * * **

When I reconvened the hearing, I indicated to the parties that the Board was taking the Town's objection regarding the ethics issue under advisement and would contact the Ethics Commission for clarification of its decision. I then directed that the hearing to commence. The Town's counsel then asked for the hearing to be stopped so he could proceed to court for apparently injunctive relief. I agreed, and the hearing ended for the day. (Emphasis added).

The Board does not dispute that a "quorum" of a "public body" convened and discussed matters pending before the Board. As such, unless the Board's discussion fell within an enumerated exception for holding an executive session meeting, *see* R.I. Gen. Laws § 42-46-5(a), or unless the OMA did not apply to the Board's recess discussion, the Board would have violated the OMA.

Here, there is no evidence that the Board's recess to discuss the legal issues presented was convened pursuant to any executive session exception. *See* R.I. Gen. Laws § 42-46-5(a). As such, this basis cannot justify the Board's discussion outside the public purview. Moreover, while this Office has previously opined that a public body may discuss legal issues with its attorney, our opinion was expressly "limited to the fact that the Commission members are engaged in a colloquy *with legal counsel* and that Commission members are *not* collectively discussing and/or acting upon any matter over which the Commission has supervision, control, jurisdiction, or advisory power." *In re Ethics Commission*, ADV OM 00-03. To the extent individual Board members asked questions of legal counsel, this may have fallen within the ambit of *Fischer*. However, the evidence in this case demonstrates, *inter alia*, that the Chairperson and "three other Board members discussed how to proceed with regard to the Town's objections." This collective discussion among four Board members only (which may have been part of a larger discussion that included legal counsel) regarding a matter over which the Board had supervision, jurisdiction, and control, *i.e.*, a matter pending before the Board, violated the OMA. Our conclusion is consistent with the Superior Court's decision in *Fischer, supra* ("this Court believes in the free and unhindered discussions between *lawyer and client*") (emphasis added).

Because we find that the Board's discussion and action that occurred outside the public purview violated the OMA – and because there is no evidence that the Board convened into executive session – we do not find that the Board violated the OMA by "not immediately disclosing the votes taken during its closed, executive session once the Labor Board reconvened in open session." Any violation by the Board for failing to disclose its vote to further investigate the ethics allegations is subsumed within our finding of violation. *See, e.g., Mudge v. North Kingstown School Committee*, OM 14-01 (noting a public body could not avoid the disclosure of an executive session vote by reaching a "consensus").

Conclusion

The OMA provides that the Office of the Attorney General may institute an action in Superior Court for violations of the OMA on behalf of a complainant or the public interest within one

hundred eighty (180) days of public approval of the minutes of the meeting at which the alleged violation occurred. *See* R.I. Gen. Laws § 42-46-8(a), (e). The Superior Court may issue injunctive relief and declare null and void any actions of the public body found to be in violation of the OMA. *See* R.I. Gen. Laws § 42-46-8(d). Additionally, the Superior Court may impose fines up to \$5,000 per violation against a public body found to have committed a willful or knowing violation of the OMA. *Id.*

In this case, we find no evidence of a willful or knowing violation. Indeed, the issue presented for our consideration represents a “close” call and portions of the recess discussion may very well have fallen within *Fischer* and/or *In re Ethics Commission*. Additionally, based on the nature of the Board’s actions – further investigating the ethics allegations – we find that injunctive relief is also not appropriate. This finding does, however, provide notice to the Board that its actions violated the OMA and that future similar action may be considered a willful or knowing violation.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court as specified in the OMA. The Complainant may pursue an OMA complaint 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 are closing this file as of the date of this finding.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Michael W. Field
Michael W. Field
Assistant Attorney General