

Freedom of Information Commission

Final Decision FIC2014-343

In the Matter of a Complaint by

FINAL DECISION

Aaron Brantley and the New Haven
Firefighters Local 825,
Complainants

against

Docket #FIC 2014-343

Board of Fire Commissioners, City of New
Haven;
and City of New Haven,
Respondents

May 13, 2015

The above-captioned matter was heard as contested case on March 6, 2015, at which time the complainants and the respondents appeared and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1)(A), G.S.

2. By letter dated June 3, 2014 and filed with the Freedom of Information Commission (the "Commission" or the "FOIC") on June 4, 2014, the complainants appealed to the Commission, alleging that, with reference to a June 2, 2014 meeting, the respondent Board violated the Freedom of Information Act ("FOIA"). Specifically, the complaint alleged that, despite the fact that complainant Aaron Brantley elected an open meeting pursuant to §1-200(6)(A), G.S., the respondent Board held two executive sessions to discuss terminating complainant Brantley's employment. The respondent Board subsequently voted to terminate complainant Brantley. The complaint also alleged that the reasons for the executive sessions were not stated, as required by §1-225(f), G.S. Finally, the complaint sought as relief an order declaring null and void complainant Brantley's termination at the respondent Board's June 2, 2014 meeting.

3. Section 1-200, G.S., states in relevant part:

(6) "Executive sessions" means a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting; (emphasis added)

4. Section 1-206, G.S., states in relevant part:

(b)(2) In any appeal to the Freedom of Information Commission under subdivision (1) of this subsection or subsection (c) of this section, the commission may confirm the action of the agency or order the agency to provide relief that the commission, in its discretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act. The commission may declare null and void any action taken at any meeting which a person was denied the right to attend. (emphasis added)

5. Section 1-225, G.S., states in relevant parts:

(a) The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public.

....

(f) A public agency may hold an executive session as defined in subdivision (6) of section 1-200, upon an affirmative vote of two-thirds of the members of such body present and voting, taken at a public meeting and stating the reasons for such executive session, as defined in section 1-200. (emphasis added)

6. Section 1-231(a), G.S., states in relevant part:

the minutes of such executive session shall disclose all persons who are in attendance except job applicants who attend for the purpose of being interviewed by such agency. (emphasis added)

7. It is found that complainant Brantley had nine and a half years of service as a New Haven firefighter prior to his termination on June 2, 2014. Probably in March 2012, he sustained a work related injury while fighting an active fire in a trash compactor immediately adjacent to the Yale New Haven Hospital. As a result of his injury, he was on light duty in 2013 and had one day surgery on December 15, 2013 at Shoreline Surgery in Guilford, Connecticut.

8. It is further found that, at the time of his termination, complainant Brantley had a civil action pending at the Commission of Human Rights and Opportunity ("CHRO"). Moreover, as of complainant Brantley's termination date, Assistant Fire Chief Patrick Egan was also on administrative leave with pay pending the outcome of two investigations commissioned by the City of New Haven (one by attorney Martin Philpot and the second by attorney Steven Mednick) concerning allegations of harassment and discrimination against firefighters who had been injured. At the FOIC hearing, James Kottage, President of the complainant Firefighters Local, testified that Assistant Fire Chief Egan had harassed complainant Brantley. Complainant Brantley is African-American.

9. It is also found that in January 2014 complainant Brantley was arrested, and in May 2014, he was convicted of attempting to bribe a witness in connection with his action at the CHRO. As of the FOIC hearing date, his conviction remained on appeal at the Appellate Court. Shortly after his arrest, he was placed on administrative leave with pay, and the day after his conviction, he received a letter commencing termination proceedings.

10. It is found that the subject of "[p]ersonnel matters" relating to complainant Brantley had been on the agenda for the May 16, 2014 meeting of the respondent Board, but that there was no substantial discussion of this agenda item at the May meeting. It is also found that "[p]ersonnel matters" relating to complainant Brantley was on the agenda for the June 2, 2014 meeting.

11. It is found that the June 2, 2014 meeting of the respondent Board was convened at 3:30 p.m., with five commissioners and others in attendance. The five commissioners were Commissioners George Longyear, Vincent Mauro, Jr., Wendy Mongillo, Eldren Morrison, and Paul Nunez. Others in attendance included complainant Brantley, Fire Chief Allyn Wright, Assistant Fire Chief Egan, Corporation Counsel Victor Bolden, Deputy Corporation Counsel Christopher Neary, Attorney Patricia Cofrancesco, representing the complainants, President Kottage, and Investigator Michael Hunter. Attorney Audrey Kramer, the normally assigned counsel for the respondent Board, was not in attendance.

12. It is found that it was highly unusual for the Corporation Counsel or the Deputy Corporation Counsel to attend meetings of the respondent Board. Indeed, George Longyear testified that in his fifteen years of service as a commissioner on the respondent Board, the June 2, 2014 meeting was the first time a Corporation Counsel had ever attended a meeting of the respondent Board. (Mr. Longyear was a commissioner at the time of the June 2, 2014 meeting, but because his term expired on February 1, 2015, he testified at the Commission's March 6, 2015 hearing as a former commissioner.)

13. It is found that, at the beginning of the June 2, 2014 meeting, Attorney Cofrancesco, on behalf of complainant Brantley, asked for an open meeting for the consideration of complainant Brantley's termination. It is also found that the first thirty minutes of the June 2, 2014 meeting was devoted to presentations by complainant Brantley, Deputy Corporation Counsel Neary and President Kottage, with participation from some commissioners, Corporation Counsel Bolden, and Attorney Cofrancesco. President Kottage presented and discussed a set of three decisions that he had won at the Connecticut State Board of Labor Relations which, in his view, demonstrated that Assistant Chief Egan had a pattern of not upholding the workplace rights of firefighters. President Kottage and Attorney Cofrancesco urged the respondent Board to slow down its termination proceedings until after the Appellate Court had ruled on complainant Brantley's criminal conviction.

14. It is found that at the June 2, 2014 meeting, as Deputy Corporation Counsel Neary related his views concerning evidence at complainant Brantley's criminal trial, Attorney Neary and Attorney Cofrancesco entered into an exchange that culminated in Attorney Neary threatening to file a grievance against Attorney Cofrancesco.

15. It is found that, at 4:00 p.m., the respondent Board convened an executive session, following a motion by Commissioner Mongillo and a second by Commissioner Mauro. The complainants did not object. The presiding officer took a voice vote, asking for "ayes," but not asking for "nays." It is also found that this voice vote of only those in the affirmative did not permit a determination as to whether two thirds of the members present and voting were in favor of convening the executive session. Moreover, no reasons were given for the executive session. Nor did the minutes of the meeting include: a) the vote of each member as to whether to convene an executive session; or b) any statement as to who was in attendance at the executive session. The first executive session lasted thirty minutes, with both Corporation Counsel Bolden and Deputy Corporation Counsel Neary in attendance.

16. At the FOIC hearing, counsel for the respondents argued that the reason for the first executive session was to effectuate a "time out," following the conflict discussed at paragraph 14, above. However, both President Kottage and former Commissioner Longyear testified that the reason for the first executive session was not to effectuate a "time out." President Kottage emphasized that, at the time of the first executive session, there were not enough votes to terminate complainant Brantley's employment. Former Commissioner Longyear, who attended the

first executive session, testified that, at this executive session, Corporation Counsel Bolden, Deputy Corporation Counsel Neary and Fire Chief Wright discussed the reasons for the criminal conviction of complainant Brantley. Mr. Longyear further testified that Corporation Counsel Bolden did not make a recommendation and no votes were taken at the first executive session.

17. It is found that, after the first executive session, twenty minutes of open meeting ensued. There was some further testimony from complainant Brantley, President Kottage, as well as members of the Fire Department, mostly concerning whether complainant Brantley's work assignments had been appropriate in light of his injury or had constituted harassment.

18. Mr. Longyear testified that his "gut feeling" was that, up until the time of the second executive session, Commissioner Morrison did not want to offend the African-American community with a vote to terminate and that Commissioner Mongillo was uncertain how to vote. Mr. Longyear also felt that Commissioners Nunez and Mauro wanted to terminate complainant Brantley. Commissioner Longyear opposed termination.

19. It is found that, at 4:50 p.m., the respondent Board convened a second executive session, following the same procedure as for the first executive session (see paragraph 15, above). There was a motion and a second, though the moving and seconding commissioners are not recorded in the minutes. Again, the complainants did not object. The presiding officer took a voice vote, asking for "ayes," but not asking for "nays." It is also found that this voice vote of only those in the affirmative did not permit a determination as to whether two thirds of the members present and voting were in favor of convening the second executive session. As with the first executive session, no reasons were given for the second executive session. Nor did the minutes of the meeting include: a) the vote of each member as to whether to convene an executive session; or b) any statement as to who was in attendance at the second executive session. The second executive session lasted twenty minutes, and it is found that again both Corporation Counsel Bolden and Deputy Corporation Counsel Neary were in attendance.

20. Former Commissioner Longyear, who also attended the second executive session, testified that the second executive session was to make a decision. He further testified that Corporation Counsel Bolden, assisted by Deputy Corporation Counsel Neary, made a forceful presentation to sway the respondent Board. Chief Wright, who had previously been undecided, recommended termination of complainant Brantley's employment. Former Commissioner Longyear also testified, and it is found, that there was a vote by all commissioners during the second executive session, resulting in a four to one vote to terminate complainant Brantley. Only Commissioner Longyear opposed termination.

21. President Kottage testified that the respondent Board often honored his requests, such as his request to slow down the proceeding to terminate complainant Brantley. Moreover, he would usually be given a chance to comment during Board deliberations, and often Board members would ask his views. But particularly because of the second executive session, his customary opportunity to influence the deliberations was curtailed at the June 2, 2014 meeting.

22. It is found that, immediately following the second executive session, the respondent Board had another vote in public session, which also resulted in the same four to one vote to terminate the employment of complainant Brantley (Commissioner Longyear opposed). No member of the respondent Board noted in the public session that an identical vote had just previously been taken in executive session.

23. Near the outset of the FOIC hearing, counsel for the respondents offered to stipulate that the respondent Board held two executive sessions on June 2, 2014 that violated the FOIA. Moreover, at the hearing, the parties seemed to agree that the contested issue in the case concerned the proper remedy, specifically whether the termination of complainant Brantley should be declared null and void.

24. Following the FOIC hearing, the respondents filed, on March 30, 2015, two affidavits, one by Commissioner Rev. Dr. Eldren Morrison, and another by Commissioner Wendy Mongillo, both dated March 27, 2015. Upon receipt, the complainants immediately filed an objection to the late filed affidavits, correctly noting that neither of the relevant Commissioners appeared at the FOIC hearing and that the late filed affidavits precluded cross examination. The hearing officer over-ruled the complainants' objection and marked both affidavits as late filed exhibits. Both affidavits state the opinion that complainant Brantley was terminated "because of his conviction, not because of anything that happened during the executive sessions."

25. It is not necessary to find, as a matter of causation, whether or not complainant Brantley would have been terminated at the June 2, 2014 meeting but for the two executive sessions. Complainant Brantley and his partisans claim that he would not have been terminated but for the two executive sessions. The respondents and those who supported termination claim that he would have been terminated regardless of the two executive sessions. The Commission can only find that, because the decision was taken to conduct the two executive sessions, what the outcome would have been concerning complainant Brantley's termination in the absence of those executive sessions will always be a matter of speculation and can never be known.

26. Based on all the foregoing findings, especially those in paragraphs 13, 15 and 19, it is concluded that both executive sessions held by the respondent Board on June 2, 2014 violated the requirements of §1-200(6)(A), G.S. There is no continuing burden to object to an executive session immediately prior to the time it is convened or to renew a request that the discussion be held at an open session, particularly where the public agency has not stated the reason for the executive session. Attorney Cofrancesco's request at the beginning of the June 2, 2014 meeting was legally sufficient to require that the discussion of complainant Brantley's dismissal as a public employee be held at an open meeting.

27. It is also concluded, based on the findings in paragraphs 15 and 19, that the absence of proof of an affirmative vote of two thirds of the members present and voting, and the failure to state the reasons for both executive sessions, violated the requirements of §1-225(f), G.S.

28. It is further concluded, based on the findings in paragraphs 15 and 19, that the failure of the minutes of the meeting to include any statements as to who was in attendance at both executive sessions violated the requirements of §1-231(a), G.S.

29. It is finally concluded, based on the findings in paragraph 20 and longstanding Commission precedent, that taking a vote during the second executive session violated the requirements of §1-225(a), G.S. FIC # 2011-681, Lubee v. Housing Authority, Town of Wallingford; FIC # 2009-038, LeBlanc v. Adams; FIC # 2005-054, D'Angelo v. Board of Commissioners, Lake Zoar Authority; and FIC # 1990-169, Norbut v. New Britain Board of Public Works.

30. The Commission has had a substantial series of cases where a complainant was denied the right of have a personnel matter discussed at an open meeting pursuant to §1-200(6)(A), G.S., and the relevant personnel action was held null and void by the Commission. These cases include: FIC

2009-406, Stults v. Board of Selectmen, Town of Beacon Falls (employment terminated in Department of Public Works); FIC # 2007-191, Godoy v. Old Mystic Fire District et al (complainant removed from Fire Department membership list and relieved of duty); FIC # 1999-241, Tenore v. Third Taxing District of the City of Norwalk (complainant terminated as general manager); FIC # 1998-286, O'Meara et al v. Board of Ethics, City of Bristol et al (probable cause found of ethics violation); and FIC # 1992-266, Carey v. Old Saybrook Zoning Commission (employment terminated as temporary zoning enforcement officer).

31. Moreover, the Commission has had many additional cases where it has declared personnel actions of a public agency to be null and void because the meeting was not properly noticed. FIC # 2008-281, Madigan v. Keating et al., (complainant placed on administrative leave); FIC # 1999-561, Pitcher v. First Selectman, Town of Sherman et al, (termination of employment); and FIC # 1999-016, Harkins v. Elliott (termination of employment). The Commission has also had cases where other actions of a public agency have been declared null and void. FIC # 2008-204, Garofalo v. Planning and Zoning Commission, Town of Derby (zoning actions).

32. At the same time, the Commission has also had cases where it determined that the actions of a public agency should not be declared null and void, usually because such an order would not rectify the FOIA violation found. For examples, see FIC # 2010-444, Reimondo v. Engel (vote was to offer a severance package to complainant who had been reinstated); FIC # 1995-218, O & G Industries, Inc. v. Planning & Zoning Commission (vote to terminate operation of processing plant where complainant denied right to record proceedings), and FIC # 1993-307, Rizzuti v. Mayor (vote to dismiss charges against police chief where agenda not properly filed).

33. The Commission declines to address or consider the merits of the respondent Board's decision to terminate complainant Brantley or related policies within the New Haven Fire Department. This Commission's review is strictly limited to the respondents' compliance with the FOIA and any remedy ordered is strictly "to rectify the denial of any right conferred by the [FOIA]." Section 1-206(b)(2), G.S.

34. However, in the present case, there were not one, but two, illegal executive sessions. See paragraph 26, above. Two attorneys, including the Corporation Counsel for the respondent City, attended both executive sessions. Moreover, the second illegal executive session was the time (apart from questions of causation) when the decision to terminate complainant Brantley was made, as most clearly demonstrated by the illegal vote during the second executive session. See paragraph 29, above. Importantly, this is not a case where executive sessions were held for lawful purposes and there were merely procedural shortcomings in the manner in which the executive sessions were convened. In this case, complainant Brantley attempted to exercise his legal right to have the deliberations concerning his termination "held at an open meeting." Section 1-200(6)(A), G.S. Even in the polarized, contested context of the respondent Board's June 2, 2014 meeting, it is beyond question that complainant Brantley was denied his basic, unambiguous FOIA right.

The following orders by the Commission are hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The vote held by the respondent Board at its June 2, 2014 meeting to terminate complainant Aaron Brantley from his employment in the New Haven Fire Department is declared null and void.
2. Henceforth, the respondent Board shall conduct executive sessions only as permitted by the FOIA.

Approved by Order of the Freedom of Information Commission at its regular meeting of May 13, 2015.

Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

Aaron Brantley and the New Haven Firefighters Local 825
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Board of Fire Commissioners, City of New Haven;
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Cynthia A. Cannata
Acting Clerk of the Commission

FIC/2014-343/FD/cac/5/13/2015

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