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March 13, 2017

OML 2017 – 39

Michele Randazzo, Esq.
KP Law LLP
101 Arch Street
Boston, MA 02110

RE: Open Meeting Law Complaints

Dear Attorney Randazzo:

This office received a complaint from Kyle Miltimore, dated December 7, 2016 alleging that the Southampton Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaint alleges that the Board met in executive session to discuss Mr. Miltimore’s reputation and character without providing him with notice and the opportunity to be present. The complaint was originally filed with the Board on November 1, 2016, and the Board responded by letter dated November 21, 2016.

Following our review, we find that the Board violated the Open Meeting Law by taking a vote in executive session during its September 20, 2016 meeting that exceeded the Board’s authority to act in executive session under the purpose it cited. In reaching this determination, we reviewed the complaint filed the Board, the Board’s response, and the complaint filed with our office. Additionally, we reviewed the open session minutes, and reviewed *in camera* the executive session minutes of the Board’s August 25, 2015 and September 20, 2016 meetings. We spoke with Mr. Miltimore by telephone on December 7, 2016. Finally, we spoke with you by telephone on December 8, 2016 and received your email dated December 15, 2016 enclosing documents requested by our office.¹

FACTS

We find the facts to be as follows. Mr. Miltimore was an employee of the Town’s Fire Department. On March 5, 2015, Mr. Miltimore filed a complaint against another Town employee. Around this time, Mr. Miltimore was placed on administrative leave by the Town’s

¹ For purposes of clarity, we will refer to you in the third person hereafter.



fire chief. During the Board's meeting on August 25, 2015, the Board entered into executive session under G.L. c. 30A, § 21(a)(1) to discuss Mr. Miltimore's complaint against the Town employee. Because the executive session minutes have not yet been publicly released by the Board, we do not recount their content in detail here. However, during that executive session, the Board spoke with the employee who was the subject of the complaint following its investigation into the complaint's allegations. Mr. Miltimore was mentioned during the executive session, but in his role as a complainant, and not as the subject of discipline or action by the Board.

The Board convened in executive session on September 20, 2016 with the announced purpose to discuss the "reputation, character, physical condition or mental health, rather than professional competence, of an individual, or discuss the discipline or dismissal or, or complaints or charges against, a public officer, employee, staff member or individual." During this executive session, the Board met with a Town employee regarding an incident involving that employee and Mr. Miltimore. The meeting was called to discuss a complaint against that employee, and not specifically to discuss Mr. Miltimore. From our review of the executive session minutes, that is indeed what occurred. However, the Board did take a vote that affected Mr. Miltimore's employment status, although the Board does not directly oversee employees of the fire department other than the fire chief. Following that meeting, the Town's fire chief submitted a personnel change form, which would effectively terminate Mr. Miltimore's employment. We understand from the Board's counsel that no action has been taken on that form, and thus Mr. Miltimore is still employed by the Town, though he remains on administrative leave.

DISCUSSION

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding deliberation and decisions on which public policy is based." Ghiglione v. School Board of Southbridge, 376 Mass. 70, 72 (1978). A public body may enter executive session for any of ten enumerated purposes, provided that it has first convened in an open session, that a majority of members of the body have voted to go into executive session, and that the vote of each member is recorded by roll call and entered into the minutes. G.L. c. 30A, §§ 21 (a), (b). One executive session purpose allows a public body to enter executive session "to discuss the reputation, character, physical condition or mental health, rather than professional competence of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual." G.L. c. 30A, § 21(a)(1) ("Purpose 1"). The individual to be discussed during such an executive session must be notified in writing by the public body at least 48 hours prior to the proposed executive session and has the right to be present during deliberations, to have counsel present, and to speak on his own behalf. Id.

The complaint alleges that the Board discussed Mr. Miltimore in executive session on August 25, 2015 and September 20, 2016 without giving him the opportunity to be present. The Board properly convened the two executive sessions under Purpose 1 to discuss an employee other than Mr. Miltimore. Mr. Miltimore, while not the subject of the discussion, was discussed as the complainant in both matters. We have previously concluded that where a public body discusses an individual who is incidental to a Purpose 1 executive session discussion and who is

not the subject of the discussion, the public body is not required to provide that person with notice and the opportunity to participate in the executive session. See OML 2014-90; OML 2013-52.² Mr. Miltimore was incidental to the discussion about the Town employee who was the subject of the executive session discussions. However, during the Board's executive session on September 20, 2016, the Board took action that indirectly affected Mr. Miltimore's employment.³ While the Board does not directly supervise Mr. Miltimore, it did take action that apparently allowed his supervisor to proceed to terminate Mr. Miltimore's employment. By taking action that affected Mr. Miltimore, the Board exceeded its authority to act in that executive session. It should have taken action in open session, or convened a subsequent executive session under Purpose 1 while providing Mr. Miltimore notice and the opportunity to be present before taking its vote.

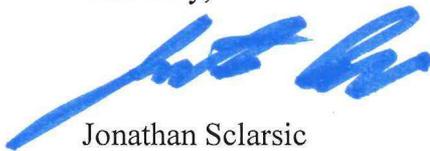
Mr. Miltimore requests that our office order his reinstatement and provide him with an opportunity to review the executive session minutes from the two Board meetings. We decline to order Mr. Miltimore's reinstatement because the Board did not have authority to place Mr. Miltimore on leave to begin with, nor did it do so here. The action taken by the Board, while improper under the executive session purpose, was indirect. Mr. Miltimore's employment status remains under the control of the Town's fire department, not the Board. However, because the Board took action in executive session that affected or could affect Mr. Miltimore, we order the Board to allow Mr. Miltimore to review the minutes of the Board's September 20, 2016 executive session only. These minutes are to remain confidential until the Board releases them publicly or are ordered by a court to be disclosed.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law. We order the Board's immediate and future compliance with the Open Meeting Law, and order the Board to allow Mr. Miltimore to review the minutes of the Board's September 20, 2016 meeting. Those minutes will remain confidential until properly released by the Board.

We now consider this matter closed. Please be advised that this letter does not resolve any other complaints that may be pending with this office or with the Board. Please feel free to contact our office at 617-963-2540 if you have any questions regarding this letter.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Director, Division of Open Government

² Open Meeting Law determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

³ We understand that whether the Town has terminated Mr. Miltimore's employment may be matter of dispute. Regardless, by taking a vote in executive session, the Board members understood that they were taking action that could indirectly affect Mr. Miltimore's employment.

cc: Southampton Board of Selectmen
Kyle Miltimore

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by a final order of the Attorney General may obtain judicial review through an action filed in Superior Court pursuant to G.L. c. 30A, § 23(d). The complaint must be filed in Superior Court within twenty-one days of receipt of a final order.