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March 25, 2015

OML 2015 – 40

Tim D. Norris, Esq.
Collins, Loughran & Peloquin, P.C.
320 Norwood Park South
Norwood, MA 02062

RE: Open Meeting Law Complaint

Dear Attorney Norris:

This office received a complaint from Ms. Desiree Aselbekian, dated February 12, 2015, alleging that the Southborough Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on January 9, 2015, and the Board responded to the original complaint by letter dated January 29, 2015. In her complaint, Ms. Aselbekian alleges that the Board discussed the professional competence of the Town Administrator in executive session.

Following our review, we find that the Board violated the Open Meeting Law in the manner alleged. In reaching a determination, we reviewed the original complaint; the Board’s response; and the request for further review filed with our office.

FACTS

We find the facts as follows. The Board is a five-member public body that meets at regular intervals to discuss and act on matters of governance affecting the Town of Southborough. On December 16, 2014, the Board met in executive session to conduct a performance evaluation of Town Administrator Mark Purple. When the Board returned to open session during that same meeting, it stated that the results of the evaluation were favorable, and that Mr. Purple would receive a pay increase pursuant to his current contract.

Following the receipt of Ms. Aselbekian’s complaint, the Board held a meeting on January 20, 2015. During this meeting, the Board voted to formally adopt Mr. Purple’s performance evaluation, and voted separately to award him the pay increase provided for in his existing contract. No discussion of Mr. Purple’s professional competence took place during the Board’s January 20, 2015 meeting.

DISCUSSION

The Open Meeting Law permits public bodies to enter executive session to conduct deliberations outside of the public view for any of ten enumerated purposes. See G.L. c. 30A, § 21(a). A public body may only discuss matters in executive session that fit within one or more of these ten purposes. See OML 2013-91. One appropriate purpose for an executive session is to discuss “the reputation, character, physical condition or mental health, *rather than professional competence*, of an individual.” G.L. c. 30A, § 21(a)(1) (“Purpose 1”) (emphasis added). Another purpose allows a public body, “[t]o conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel.” G.L. c. 30A, § 21(a)(2) (“Purpose 2”). While it is clear that professional competence must first be discussed in an open session, how that evaluation will factor into a contract or salary negotiation strategy may be a suitable discussion for an executive session. See District Attorney for the North District v. School Committee of Wayland, 455 Mass. 561, 568 (2009).

Here, the Board’s December 16, 2014 discussion of Mr. Purple’s professional competence in executive session violated the Open Meeting Law. See OML 2012-66. The Board was not discussing how a previously conducted performance evaluation factored into contract negotiations with Mr. Purple, rather they were performing the actual evaluation. This type of performance review by a public body must be conducted in open session. See Wayland, 455 Mass. at 568. While we applaud the Board’s efforts to take corrective action in response to the present complaint, because the Board merely voted to adopt Mr. Purple’s performance evaluation during its January 20, 2015 open session meeting, rather than engaging in a substantive discussion about his professional competence, we find this action was not sufficient to fully address the violation that occurred. See Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125 (2000), citing Tolar v. School Board of Liberty County, 398 So.2d 427, 429 (Fla. 1981) (In order to cure a violation, the public body must take an independent, deliberative action, and not merely engage in a ceremonial acceptance or perfunctory ratification of a secret decision); OML 2014-72.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law. We order immediate and future compliance with the Open Meeting Law, and we caution that future similar violations may be considered evidence of intent to violate the law. Additionally, we order the Board, if it has not already done so, to release the minutes of its December 16, 2014 executive session within ten (10) days of receipt of this determination. Because this was not a lawful executive session held in compliance with G.L. c. 30A, § 21, the minutes may not be withheld in part or whole under the Public Records Law: See G.L. c. 30A, § 22(f) (stating that the minutes of an executive session may be withheld from disclosure to the public as long as publication may defeat the lawful purposes of an executive session, *provided that the executive session was held in compliance with section 27*); OML 2014-17.

We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with our office or the Board. Please feel free to contact the Division at (617) 963 - 2540 if you have any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'K. Manganaro', with a long horizontal flourish extending to the right.

Kevin W. Manganaro
Assistant Attorney General
Division of Open Government

cc: Ms. Desiree Aselbekian
Southborough Board of Selectmen

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.