

**FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT**

In the Matter of a Complaint by

FINAL DECISION

Gerald L. Fanfarelli,

Complainant

against

Docket #FIC 2009-015

William Celentano, Chairman, Board of
Fire Commissioners, City of New Haven;
Michael Grant, Chief, Fire Department,
City of New Haven; and Board of Fire
Commissioners, City of New Haven,

Respondents

August 26, 2009

The above-captioned matter was heard as a contested case on May 18, 2009, at which time the complainant and the respondents appeared, stipulated to certain facts 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), G.S.

2. By letter dated and filed January 6, 2009, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information Act ("FOI Act") in the following ways: by meeting in executive session to discuss the complainant's involuntary retirement and medical condition at one or more April 2008 Board of Fire Commissioner's (the "Board") meetings, without providing the complainant with notice and an opportunity to request that such discussions be conducted in public. The complainant further alleged that he first learned that the respondents had conducted such discussions about him following a December 9, 2008 contested hearing that took place in connection with Docket #FIC 2008-408; Gerald L. Fanfarelli v. William Celentano, Chairman, Board of Fire Commissioners, City of New Haven; Boise Kimber, Member, Board of Fire Commissioners, City of New Haven; Wendy Mongillo, Member, Board of Fire Commissioners, City of New Haven; Board of Fire Commissioners, City of New Haven; Michael Grant, Chief, Fire Department, City of New Haven; Ronald Dumas, Asssistant Fire Chief, Fire Department, City of New Haven; James Kottage, Chairman, Pension Board of the Policemen's and Firemen's RetirementFund, City of New Haven; Wendy Mongillo, Member, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; Jerome Sagnella, Payroll/Pension Administrator, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; and Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven. In the instant case, the complainant requested that a civil penalty be imposed upon the respondents.

3. The Commission takes administrative notice of the final decision in Docket #FIC 2008-408;

Gerald L. Fanfarelli v. William Celentano, Chairman, Board of Fire Commissioners, City of New Haven; Boise Kimber, Member, Board of Fire Commissioners, City of New Haven; Wendy Mongillo, Member, Board of Fire Commissioners, City of New Haven; Board of Fire Commissioners, City of New Haven; Michael Grant, Chief, Fire Department, City of New Haven; Ronald Dumas, Assistant Fire Chief, Fire Department, City of New Haven; James Kottage, Chairman, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; Wendy Mongillo, Member, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; Jerome Sagnella, Payroll/Pension Administrator, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; and Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven.(Notice of Final Decision dated June 15, 2009).

4. It is found that the complainant is a firefighter with almost 23 years of service who injured his back on or around October 23, 2006 in the course of his duties with the New Haven Fire Department (the "Department").
5. It is found that, as a result of his injuries, the complainant was out of work for a significant time.
6. It is further found that, at the time of the alleged violations in this case, the complainant was back at work on a light duty assignment.
7. It is found that, on or around April 2008, the complainant and at least one physician believed that the complainant was ready to return to full duty. It is further found that the complainant was eager to return to work, and made that desire known to his superiors.
8. It is found that the respondents received conflicting medical reports about the complainant's ability to return to full duty. It is further found that the respondents were concerned that, if the complainant returned to full duty and re-injured his back, he would need to be returned to light duty and the Department could be short a man on full duty.
9. It is found that the respondent Board held a regular monthly meeting on April 3, 2008 and held a special meeting on April 30, 2008.
10. It is found that the agenda for the respondent Board's regular April 3, 2008 meeting listed the following matter as an agenda item: "Long Term Sick and Injury Report."
11. The respondents contend that the instant complaint was not timely filed because the complainant failed to file the complaint within thirty days of receiving notice in fact that his medical condition was discussed. The respondents further contend that the April 3, 2008 agenda, indicating that an "Injury Report" would be discussed, was sufficient notice of the fact that the complainant might be discussed by the respondent Board at the April 3, 2008 meeting.
12. Section 1-206(b)(1), G.S., provides in relevant part:

Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of

appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives notice in fact that such meeting was held.

13. It is found that, because the complainant had returned to work on light duty at the time of the April 3, 2008 meeting, it was reasonable for him to believe that his medical condition or his injury would not be discussed as part of the "Injury Report" identified as an item of discussion on the April 3, 2008 meeting agenda.

14. It is found further that the complainant first learned that his medical condition and medical records were discussed at one or more of the respondent Board's April 2008 meetings during a December 9, 2008 contested hearing, which took place in connection with Docket #FIC 2008-408; Gerald L. Fanfarelli v. William Celentano, Chairman, Board of Fire Commissioners, City of New Haven; Boise Kimber, Member, Board of Fire Commissioners, City of New Haven; Wendy Mongillo, Member, Board of Fire Commissioners, City of New Haven; Board of Fire Commissioners, City of New Haven; Michael Grant, Chief, Fire Department, City of New Haven; Ronald Dumas, Assistant Fire Chief, Fire Department, City of New Haven; James Kottage, Chairman, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; Wendy Mongillo, Member, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; Jerome Sagnella, Payroll/Pension Administrator, Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven; and Pension Board of the Policemen's and Firemen's Retirement Fund, City of New Haven.

15. It is therefore concluded that the complainant had notice in fact that he was discussed during at least one of the respondent Board's April 2008 meetings no earlier than December 9, 2008. Therefore, it is further concluded that the complainant's January 6, 2009 complaint is timely for purposes of §1-206(b)(1), G.S.

16. The complainant contends that the April 3, 2008 agenda was insufficient because merely indicating that the Board would discuss the "Long Term Sick and Injury Report" did not give proper notice to the public or to the individual firefighter who could be the subject of the report that he or she might be discussed.

17. Section 1-225(c), G.S., provides, in relevant part:

The agenda of the regular meeting of every public agency. . . shall be available to the public and shall be filed, not less than twenty-four hours before the meeting to which they refer. . . . Upon the affirmative vote of two-thirds of the members of a public agency present and voting, any subsequent business not included in such filed agendas may be considered and acted upon at such meetings.

18. It is found, however, that the April 3, 2008 meeting agenda, indicating that the Board would consider the "Long Term Sick and Injury Report," was sufficient to apprise the public that employees who were out of work due to a long term sickness or a long term injury could possibly be reported on and/or discussed during the open portion of the April 3, 2008 meeting. It is further found that any employee who had been out of work for a long period of time, whether it be for a sickness or for an illness, should have realized that he or she might be discussed in the context of the presentation of such a report. However, it is

further found that the April 3, 2008 meeting agenda did not give the public sufficient notice that, as part of the presentation and discussion of the long term sick and long term injury report, the respondents intended to discuss employees who were sick or injured, but were currently reporting to work.

19. Accordingly, it is concluded that the respondents did not violate the FOI Act with respect to the sufficiency of the April 3, 2008 meeting agenda, as such agenda pertained to the issues to be discussed in the open session of the April 3, 2008 meeting regarding the employees who were not currently able to work due to a long term sickness or a long term injury.

20. It is further concluded, however, that the respondents did violate the FOI Act with regard to the sufficiency of the April 3, 2008 meeting agenda, as such agenda pertained to the issues to be discussed in the open session of the April 3, 2008 meeting regarding employees, including the complainant, who were currently reporting to work.

21. The complainant next contends that the agendas of the April 3, 2008 and April 30, 2008 meetings were insufficient because they did not state that the Board intended to discuss the complainant during executive session. The complainant further contends that the respondents failed to give the complainant notice that they intended to discuss him during executive session or to provide the complainant with an opportunity to elect to be discussed during the open sessions of these meetings.

22. Section 1-225(a), G.S., provides in relevant part: “The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public.”

23. Section 1-200(6), G.S., provides in relevant part:

“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 . . .; and (E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210.

24. Section 1-225(d), G.S., provides in relevant part:

Notice of each special meeting of every public agency . . . shall be posted not less than twenty-four hours before the meeting to which such notice refers. . . .
. . . The notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings by such public agency. . . .

25. It is found that an executive session was identified as an agenda item on the respondent Board’s April 3, 2008 agenda, and that this agenda item included the subtopics “personnel matters and pending legal matters.”

26. It is further found that an executive session was identified as an agenda item on the respondent Board’s April 30, 2008 agenda, and that this agenda item included the subtopic “personnel matters.”

27. It is found that the agendas for the respondent Board's April 3 and April 30, 2008 meetings did not indicate that the Board planned to discuss the complainant's medical condition or his medical records in the context of an executive session.

28. It is further found that the complainant did not know or receive any notice that his medical condition or medical records would be discussed during the executive session portions of these meetings. Accordingly, it is found that the complainant was never provided with an opportunity to elect to have his medical condition and/or his medical records discussed during the open portions of the April 3 and April 30, 2008 meetings.

29. It is found that the complainant's medical condition and medical records were discussed during the executive session of the respondent Board's April 3, 2008 meeting. It is further found that it is very likely that the complainant's medical condition and medical records were discussed during the executive session of the respondent Board's April 30, 2008 meeting.

30. It is found that the Board discussed the complainant's medical condition and medical records in its April 3, 2008 executive session and very likely in its April 30, 2008 executive session because, due to conflicting medical reports, the Board had concerns about whether the complainant could return to work and whether a return to work would cause the complainant to reinjure himself. It is further found that the Board discussed the complainant's medical condition and medical records in executive session because the complainant had been out of work for approximately 18 months, and, according to the Board, once an employee is out of work for this length of time due to an injury or illness, the Fire Chief has the discretion to refer such employee over to the pension board for the commencement of an involuntary retirement.

31. The respondents contend that the notice described in §1-200(6)(A), G.S., was not required in this case because, if the complainant was discussed in executive session, he was discussed in executive session pursuant to §1-200(6)(E), not (A), because the Board believed that it could not discuss the complainant's medical records in public session and that the complainant would not want his medical records discussed publicly. The respondents further contend that they were not required to give notice to the complainant that the Board sought to discuss the complainant's medical records in executive session and inform him that he had an opportunity to elect to have such discussions occur during the public portion of these meetings.

32. It is found that the minutes of the Board's April 3 and April 30, 2008 meetings do not reflect that the Board went into executive session pursuant to §1-200(6)(E), G.S., to discuss the complainant or the complainant's medical records. It is further found that the minutes for these meetings do not give any indication of what issues or individuals were discussed in these executive sessions under the heading of "personnel matters."

33. It is concluded that discussing the medical condition and/or medical records of an employee in the context of considering whether such employee can return to work or whether an agency should initiate his involuntary retirement, constitutes "[d]iscussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or public employee" within the meaning of §1-200(6)(A), G.S.

34. It is therefore concluded that the respondents violated §1-200(6)(A), G.S., when they failed to give the complainant notice that his medical condition and medical records would be discussed in executive session.

35. It is found that the respondents' agendas for the April 3 and April 30, 2008 meetings were insufficient because they did not inform the public that the respondents intended to discuss the complainant's medical condition and medical records in the context of an executive session.

36. It is therefore concluded that the respondents violated the notice requirements of §1-225(c), G.S., and §1-225(d), G.S.

37. Finally, based on the findings in paragraph 32, above, it is concluded that the respondents violated the FOI Act by not stating in their minutes for the April 3, 2008 and April 30, 2008 meetings the purpose for which they entered into executive session.

38. The Commission declines to consider the imposition of a civil penalty.

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

1. Henceforth, the respondents shall strictly comply with the requirements of §1-225(c), G.S., and §1-225(d), G.S., by fairly and sufficiently detailing on their meeting agendas the purpose of any executive session they plan to conduct.

2. Henceforth, the respondents shall strictly comply with the requirements of §1-200(6)(A), G.S., by providing notice to any individual they plan to discuss in the context of an executive session that such a discussion is planned, and informing such individual that he or she may request that the discussion occur during an open meeting.

3. Henceforth, the respondents shall provide in their meeting minutes a statement of purpose of any executive session they have conducted.

Approved by Order of the Freedom of Information Commission at its regular meeting of August 26, 20

S. Wilson
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:

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C/o Elizabeth A. Ceriello, Esq.
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William Celentano, Chairman, Board of
Fire Commissioners, City of New Haven;
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S. Wilson
Acting Clerk of the Commission

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