




FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
1250 H Street, NW Washington, DC 20005

December 22, 2009

MEMORANDUM FOR: GREGORY T. LONG
EXECUTIVE DIRECTOR

FROM: THOMAS K. EMSWILER 
GENERAL COUNSEL

SUBJECT: Canceling the December Board Meeting

I am responding to your question whether that Agency may cancel the December Board meeting. As discussed below, it may.

DISCUSSION:

As you are aware, 5 U.S.C. § 8476(a)(1) requires the Board to meet at least monthly. With this in mind, the Agency had scheduled a Board meeting for December 21st at 10:00 a.m. The only items on the Board meeting agenda were the routine review of participation statistics and investment returns. No action was required of the Board members.

On December 19th, the Washington metropolitan area was hit by a record setting blizzard, with many areas receiving as much as two feet of snow. Most secondary roads remained impassible on December 20th and most above-ground metro stations were closed. As a consequence, the Office of Personnel Management announced that Federal government offices in the Washington metropolitan area would be closed on December 21st. In response, the Agency cancelled its December 21st Board meeting.

It is a maxim of the law that "no one is bound to do what is impossible."¹ Similarly, the Supreme Court has ruled: "performance is excused when "performance is rendered impossible by the act of God ... or the other party." Columbus Railway Power & Light Co. v. City of Columbus, 249 U.S. 399, 412 (1919).

An act of God (the December 19th blizzard) made holding the scheduled Board meeting impossible. Therefore, the Agency clearly had a basis to cancel it. The question remains whether the Agency must reschedule the meeting and hold it sometime in December. I have concluded that it need not do so.

The Federal government is in a liberal leave status today. This means employees who cannot report for work due to conditions related to the blizzard may request

¹ *Nemo tenetur ad impossibile*. Blacks Law Dictionary, 5th Ed. (1979). See also *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities). *Id.*

unscheduled leave for their entire scheduled workday. It is uncertain whether, or how long, this status will be extended. The President has announced that the Federal government will be on a half-day schedule December 24th and December 25th is the Christmas holiday. December 31st is New Year's Eve. It is possible that the President may also close the Federal government early on that day as well. Many employees and Board members will also be on leave during this period and it may also be difficult to obtain a court reporter. Consequently, there are very few days remaining in which to reschedule the Board meeting this month and it is unclear whether essential personnel would be available to attend this meeting. These factors demonstrate that it would be impractical, but not necessarily impossible to reschedule the meeting for December. However, other factors permit not holding a meeting in December.

The Government in the Sunshine Act provides that "the public is entitled to the fullest practicable information regarding the decision making process of the Federal Government." See Pub. L. No. 94-409, § 2. It normally requires that meetings be announced at least one week prior to the scheduled meeting date. 5 U.S.C. § 552b(e)(1). If we were to submit a meeting announcement to the Federal Register today, it could be published no earlier than December 24th.² 1 C.F.R. § 17.2(d). To comply with the seven day requirement notice requirement, the only day on which the Board could convene a meeting would be December 31st.

The Agency also has a duty to act solely in the interest of participants and beneficiaries. 5 U.S.C. § 8477(b)(1). Rescheduling the meeting would not be in the interest of participants and beneficiaries. As discussed above, whether the Federal government will be open the full day on the 31st and whether essential personnel will be available is uncertain.³ Additionally, whether TSP participants and beneficiaries and members of the press could attend a meeting on New Year's Eve is also open to question.⁴ Consequently, interested TSP participants might be denied the opportunity to attend the meeting and might also not be able to review press reports of the meeting due to the absence of reporters. Therefore, since the Board meeting agenda included only routine items that can be reviewed at the January meeting, it is in the interest of participants and beneficiaries to have these matters reviewed at the regularly scheduled January meeting.

² Absent an emergency. See 1 C.F.R. §§ 17.3-17.6.

³ Agency staff, like everyone else, need time off from work. Absent an emergency, it would not be in the interest of participants and beneficiaries to deny employees leave (and the ability to refresh and recharge for the coming year) merely to require them to participate in a routine Board meeting.

⁴ In addition to the Sunshine Act notice, the Agency announces the full year's meeting schedule in the last quarter of the prior calendar year. This permits interested parties to plan, well in advance, to attend Agency Board meetings. Rescheduling the December 21st Board meeting for a date sometime in December would deny interested parties such planning opportunities.