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August 1, 2018

Via U.S. Mail

Brett Boukather

Re: Mineral County Board of Commissioners - Open Meeting Law Complaint, O.A.G. File No. 13897-256

Dear Mr. Boukather:

The Office of the Attorney General ("OAG") is in receipt of your complaint ("Complaint") filed on November 17, 2017 alleging a violation of the Open Meeting Law ("OML") by the Mineral County Board of Commissioners ("Board") on November 1, 2017 concerning the Board's interview and consideration of candidates for the position of County Fire Chief.[1]

The OAG has statutory enforcement powers under the OML, and the authority to investigate and prosecute violations of the OML. Nevada Revised Statutes ("NRS") 241.037; NRS 241.039; and NRS 241.040. In response to the Complaint, the OAG reviewed the Complaint and attachments; the addendum to the Complaint; the response to the Complaint from the Boards' counsel, Sean A. Rowe, and the attachments thereto; and, the agenda, minutes, and audio from the Boards' November 1, 2017 meeting.

FACTUAL BACKGROUND

The Board is a "public body" as defined in NRS 241.015(4) and subject to the OML. On October 5, 2017, a Notice of Job Opening ("Notice") for the position of Mineral County Fire Chief was issued, opening the period for applications. The Notice stated that interviews would be "conducted by the Board of Mineral County Commissioners on Wednesday, November 1st, 2017, beginning at 1:30 pm."

[1] A Public Integrity Complaint was filed on December 1, 2017 regarding the same Mineral County Board of Commissioners Meeting. The appropriate OAG unit will review your Public Integrity Complaint. This letter addresses only the OML related issues raised related to the November 1, 2017 meeting.

On October 26, 2017, the Board published an agenda for a November 1, 2017 meeting, which included an item "For discussion and appropriate action on reviewing applications, possible interviews and selection of candidate, setting salary range and possible offer of employment for the Mineral County Fire Chief position. (If no selection is made, direction on re-advertising the vacancy.) (Public comment following.)"

Prior to the interviews, one of the candidates contacted the Mineral County Clerk, who serves as Clerk of the Board, and the County Recorder, who serves as the County's Human Resource Manager, to request his interview be conducted by video conference at 4:00 P.M. on November 1st. The officials conferred and approved the online appearance and provided the information to the Board.

On November 1, 2017, the Board proceeded with its meeting. At 1:30 p.m., two candidates were interviewed. The item was then continued until the final applicant was interviewed at 4:00 P.M. The public was then allowed to comment on the candidates and salary before the Board deliberated on the matter and made an offer to its chosen candidate.

The Complaint alleges several violations by citing to the Attorney General's Open Meeting Law Manual including:

"4.05 Telephonic conferences/video conferences"
"4.08 Serial Communications or "walking quorums"
"4.13 Appointment of a public officer"
"6.03 Stick to the agenda"
"8.03 When closed sessions may not be held"
"8.04 Closed Meeting; definition of "character" and "competence"; employment interviews and performance evaluations; notice requirements"
"8.06 How to handle closed sessions to consider character, allegations of misconduct, professional competence, or physical and mental health of a person."

DISCUSSION AND LEGAL ANALYSIS

Chapter 241 of the Nevada Revised Statutes requires the actions of public bodies "be taken openly and that their deliberations be conducted openly." NRS 241.010(1) *See McKay v. Bd. Of Supervisors*, 102 Nev. 644, 651 (1986).

. . .

1. THE BOARD DID NOT VIOLATE THE OML BY CONDUCTING AN INTERVIEW VIA VIDEOCONFERENCE OR TELECONFERENCE

The first allegation is that the Board violated OML by allowing one of its interviewees to participate remotely via skype or telephone.

As stated in the complaint letter, the OAG's OML Manual states that a telephone conference may be a lawful method of conducting the public's business. Furthermore, a complete reading of the section that was referenced warning public bodies against using technology as a subterfuge to avoid compliance with the OML is concerned primarily with members of the body linking together using technology and the impact such action could have on the public's opportunity to listen to the discussions and votes by all the members. Here, there are no facts supporting a claim that the Board's decision to allow one candidate to interview via telephone or skype inhibited public participation or observation in any way. Thus, the Board's decision to allow the telephonic interview did not constitute an OML violation.[2]

2. THE BOARD DID NOT VIOLATE THE OML BY ENGAGING IN SERIAL COMMUNICATIONS.

The next allegation is that the Board violated OML by use of serial communications amongst it members.

Serial communications by a quorum of members of a public body for the purpose of deliberating "toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law." *Del Papa v. Bd. of Regents of Univ. & Cmty. Coll. Sys. of Nevada*, 114 Nev. 388, 400, 956 P.2d 770, 778 (1998).

Here, the only factual allegation supporting the claim that the Board engaged in unlawful serial communications is the assertion that a staff member commented in a public area that one of the applicants was unable to make the interview and that "the staff member's comments made it obvious that there was internal communication and planning in favor of the absentee applicant prior to the interview time." Counsel for the Board explained that the applicant's request to delay his interview was made to the Mineral County Clerk and the County Recorder who approved the request. The record is void of

[2] It is also worthy of noting that neither the Notice of Job Opening nor the posted agenda mention that that interviews will be conducted in person or inform the public that the interviewees will be physically present.

any evidence that any individual Board members had any input regarding the requested telephonic interview, much less that a quorum of the Board had serial communications regarding the Fire Chief applicants. The decision by the Mineral County staff members to allow the requested delay and telephonic interview of one of the Fire Chief applicants does not constitute an OML violation.

3. THE BOARD DID NOT VIOLATE THE OML BY CONDUCTING A CLOSED MEETING

The next allegation regards the prohibition of a closed meeting for the purposes of appointing a public officer. You have not alleged that the Board held any closed sessions related to the selection of its new Fire Chief or to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. Moreover, neither the response from the Board's counsel nor the meeting minutes reflect that a closed session was held at any time. Thus, no evidence supports a finding that a closed session occurred and, thus, no OML violation is substantiated.[3]

4. THE BOARD DID NOT VIOLATE THE OML BY DELAYING THE INTERVIEW OF ITS FINAL FIRE CHIEF APPLICANT

The next allegation concerns the Board's alleged deviation from its published agenda.

Nevada Revised Statute (NRS) 241.020 governs the notice of a public meeting and requires that public bodies must, amongst other items, provide written notice of meetings that includes an agenda with "a list describing the items on which action may be taken and clearly denoting that action may be taken on those items by placing the term 'for possible action' next to the appropriate item..." NRS 241.020(2)(d)(1). A public body's agenda must also include notification that items on the agenda may be taken out of order, that the public body may combine two or more agenda items for consideration, and that the public body may remove an item from the agenda or delay discussion relating to an agenda item at any time. NRS 241.020(2)(d)(6).

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[3] Board Counsel did not address whether the position of Fire Chief was a public officer as defined by NRS 281.005. While it is likely that a position of Mineral County Fire Chief involves the continuous exercise of a public power trust or duty as described in NRS 281.055(1)(b), because there was no evidence of a closed session, that question need not be decided for the purposes of this opinion.

Here, the Board properly noticed its November 1, 2017 meeting and posted an agenda with adequate notice to the public that it could take items out of order or delay discussion relating to an item at any time. Thus, the delay of the final interview for the position of Mineral County Fire Chief did not violate the OML.

CONCLUSION

Having reviewed the available evidence and finding that no violations of the OML have occurred, contrary to the claims of the Complaint, the OAG will close the file for this matter.

Sincerely,

ADAM PAUL LAXALT,
Attorney General

By: _____
GREGORY D. OTT
Chief Deputy Attorney General
Boards and Open Government
Division

cc: Sean A. Rowe, District Attorney, Mineral County