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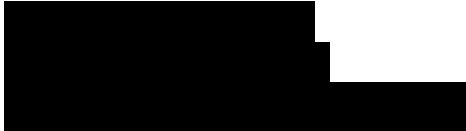
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January 16, 2024

Via U.S Mail and Email

Jacob R. Wiskerchen



**Re: Open Meeting Law Complaint, OAG File No. 13897-458
Board of Examiners for Marriage and Family Therapists and
Clinical Professional Counselors**

Dear Mr. Wiskerchen:

The Office of the Attorney General (“OAG”) is in receipt of your complaints (“Complaints”) alleging violations of the Open Meeting Law (“OML”) by the Nevada Board of Examiners for Marriage and Family Therapy and Clinical Professional Counselors (“Board”) regarding the Board’s August 19 and September 8, 2022, meetings.

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. The OAG’s investigation of the Complaints included a review of the Complaints; the Response on behalf of the Board; and the agendas, minutes and audio recordings for the Board’s August 19 and September 8, 2022, meetings. After investigating the Complaints, the OAG determines that the Board did not violate the OML as alleged in the Complaints.

FACTUAL BACKGROUND

In 2018, the Board delegated authority to its Executive Director to approve or deny licensing applications. The Board held a public meeting on

August 19, 2022. Item #9 on the public notice agenda involved the review of an application for licensure as a Marriage and Family Therapy intern. Prior to the meeting, the Executive Director reviewed the application and sought advice of two Board members regarding whether the applicant's education met the statutory requirements. The Executive Director spoke with these Board members on separate occasions. During the August 19 meeting, the Board discussed the applicant's education and background with her and ultimately chose to table the item to revisit later, to which the applicant agreed.

The Board held a public meeting on September 8, 2022. Other than public comment, the only substantive item on the Board's agenda was a disciplinary hearing. After roll call and determination of a quorum, the Chair announced that he would be removing the first public comment period but noted that there would be an opportunity for public comment at the end of the meeting.

The Chair then opened the disciplinary hearing. One Board member, Marta Wilson, announced she would recuse herself from the matter, but did not state a reason for her recusal. The Board's prosecutor presented a consent decree and the Board received advice from counsel regarding its review of the agreement. The Board spent two hours discussing the consent decree before voting to approve an amended version of it. The Chair then opened a public comment period and no members of the public chose to speak.

Your Complaints allege: (1) the Board's procedure for reviewing the licensing application in Item #9 prior to the August 19 meeting violated the OML; (2) the applicant at issue during the August 19 meeting requested certain members recuse themselves from deciding on the matter and the denial of her request was in violation of the OML; (3) removing the first public comment period during the September 8 meeting violated the OML; (4) publishing the minutes of the disciplinary hearing violated NRS 241.035(2)(a); and (5) Member Wilson's recusal during the September 8 meeting violated the OML because she did not state the reasons for her recusal.

LEGAL ANALYSIS

The Board of Examiners for Marriage and Family Therapists and Clinical Professional Counselors, created by NRS 641A.090, is a public body as defined in NRS 241.015(4) and is subject to the OML.

As a preliminary matter, allegations #2 and #5 do not fall within the OML and the OAG does not have jurisdiction to adjudicate them. Recusals for conflicts of interest or disqualifications in quasi-judicial matters fall under Nevada's Ethics in Government Law, NRS Chapter 281A, and Nevada's Administrative Procedures Act, NRS Chapter 233B. The OAG's jurisdiction under the OML is limited to NRS Chapter 241. NRS 241.039. As such, the OAG will not opine on these allegations.

A. The Board did not violate the OML when two Board members consulted with the Executive Director regarding a licensing application.

All meetings of public bodies must be open and public. NRS 241.020(1). A "meeting" under the OML occurs when a quorum of a public body gathers together with deliberation or action. NRS 241.015(3). A "quorum" means a simple majority of the voting membership of the public body or another proportion provided by law. NRS 241.015(5). For the Board, five members constitute a quorum. NRS 641A.130.

In this instance, the Executive Director sought advice from two Board members regarding the licensing application prior to the meeting. The OAG does not possess evidence that these two Board members discussed the issue or deliberated amongst themselves, but even if they did, they would not constitute a quorum of the Board. Thus, the OAG does not find a violation of the OML. *Dewey v. Redevelopment Agency of City of Reno*, 119 Nev. 87, 94-95, 64 P.3d 1070, 1975 (2003) ("[T]he Open Meeting Law is not intended to prohibit every private discussion of a public issue. Instead, the Open Meeting Law only prohibits collective deliberations or actions where a quorum is present.").

B. The Board did not violate the OML by declining to hear public comment related to a contested case prior to its conclusion.

The OML requires public bodies to accept comments by the general public either at the beginning of the meeting before any items on which action may be taken are heard by the body or after each action item is discussed by the body, but before the body takes action on the item. NRS 241.020(3)(d)(3). The OML exists to ensure that the public is able to meaningfully participate in government. *In re Clark County School District Board of Trustees*, OMLO 13897-265 at 6 (Oct. 5, 2018). However, the subject of a disciplinary matter being heard by a professional licensing board is entitled to certain constitutional due process protections. *Gilman v. State Board of Veterinary*

Medical Examiners, 120 Nev. 263, 269, 89 P.3d 1000, 1004 (2004); *In re Murchison*, 349 U.S. 133, 142 (1955).

As part of those due process protections, the adjudicators in a disciplinary matter, in this case the Board members, are prohibited from communicating, either directly or indirectly, regarding any issue of fact or law, related to the case, unless it is part of the properly noticed hearing. NRS 233B.126; NRS 622A.340. As noted on the September 8 agenda, the Board chose not to consider public comment regarding the contested case prior to its conclusion.¹ As the contested case was the only action item and only substantive item on the September 8 agenda, the removal of public comment did not violate the OML. The Chair did call for public comment after the conclusion of the contested case hearing, where the consent decree was approved, but no members of the public requested to speak.

C. The Board did not violate the OML by publishing the minutes from the September 8 disciplinary hearing.

A public body may hold a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. NRS 241.030(1). The OML requires public bodies to keep minutes of their meetings and make those minutes available to the public. NRS 241.035(1)-(2). However, minutes of closed meetings or closed portions of meetings have limits to access by the general public. NRS 241.035(2).

Your complaint alleges that the Board violated the OML by publishing the minutes of the disciplinary hearing held on September 8 to the public with its general meeting minutes in violation of NRS 241.035(2). While the Board may have been permitted to hold a closed meeting for portions of the disciplinary hearing, it is evident from the recording of the meeting that it did not. Neither the Board nor the subject of the hearing requested the meeting be closed and no motion was made to close the meeting pursuant to NRS 241.030(3). Therefore, the OAG does not find a violation of the OML in the Board's publishing of the minutes.

¹ The September 8 agenda stated, "Prior to the commencement and conclusion of a contested case or quasi-judicial proceeding that may affect the due process rights of an individual, the Board may refuse to consider public comment." The OAG notes that the Chair removed the public comment period without clarifying for the public that this was the reason. In addition, had there been any other action items on the Board's agenda, this public comment period would need to have been held for those items.

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CONCLUSION

Upon review of your Complaint and available evidence, the OAG has determined that no violation of the OML has occurred. The OAG will close its file regarding this matter.

Sincerely,

AARON D. FORD
Attorney General

By: /s/ Rosalie Bordelove
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Chief Deputy Attorney General

cc: Joelle McNutt, Executive Director
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