



STATE OF NEVADA
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April 25, 2013

Michael Rebaleati
P. O. Box 556
Eureka, Nevada 89316

Re: Open Meeting Law Complaint / AG File No. 13-011
Eureka County Board of School Trustees

Dear Mr. Rebaleati:

We have reviewed your Open Meeting Law (OML) Complaint against the Eureka County Board of School Trustees (Trustees). Specifically it alleges the Trustees' agenda for its March 28, 2013, public meeting violated the OML because agenda item #3 was not "clear and complete" as required by NRS 241.020(2)(c)(1).

The Attorney General has jurisdiction to investigate allegations of violations of NRS Chapter 241, Open Meeting Law. This office may seek civil remedies against public bodies, including injunctive relief, to require compliance with the OML, or to prevent violations of the OML. A criminal misdemeanor penalty and a monetary penalty for violations of the OML are also authorized relief against individuals in any court of competent jurisdiction. NRS 241.037; NRS 241.040.

Item #3 from the Trustee's March 28 agenda, which was approved by the Trustees, read as follows:

Discuss, Approve, or Deny accepting Guaranteed Maximum Price (GMP) from Core Construction for the Phase II construction of the gymnasium/recreational facility. Presentation by Mike Mitchell Owners Representative and Core Construction representatives.

Action to include authorizing Superintendent to enter into negotiations with Core Construction for the construction of the Phase II project. Contract will be subject to review and approval by District's legal counsel. FOR POSSIBLE ACTION. Public Comment

It was alleged that Item #3 was not "clear and complete" because the plans for construction of a new high school gymnasium were not final; therefore, the certainty of a Guaranteed Maximum Price for construction is called into question. Complaint alleged the Trustees' March 28, 2013, action approving item #3 was based on the Trustees' previous vote on February 12, 2013, when it voted to accept a "conceptual drawing" – not a final design plan, for Phase II, the new gymnasium. NRS 338.1696 requires a public body to have in place final plans before it enters into a contract with a construction manager at risk. Additionally, it is alleged item #3 was not "clear and complete" because the final amount/cost for construction of Phase II was not disclosed on any agenda.

Our review of agendas and minutes of the March 28, 2013, and February 12, 2013, meetings persuades this office that the Trustees' approval of agenda item 2a on February 12, 2013, based on "conceptual drawings with some revisional changes" instead of "final" drawings was not a deliberate omission. Later discussion of this issue during the March 28, 2013, meeting shows that the evidence is equivocal about whether the drawings that were accepted and approved were "conceptual" drawings or final drawings. Architect Jack Hawkins spoke during public comment on March 28, 2013, asserting that the drawings were 100% complete and that the plans that were bid were 100% complete, not 95% complete.

Similarly, the omission of the dollar amount of the contract (GMP) from the March 28, 2013, agenda item #3, when compared to Trustee Brown's motion during that meeting to accept the Guaranteed Maximum Price (GMP), which he stated was \$10,545,247.00, clearly the omission was not a deliberate attempt to circumvent the OML or hide any facts from the public. This project has been discussed by Trustees for nearly 2 years. Multiple meetings have occurred since June of 2011.

Nevertheless, in response to the Complaint and to avoid potential costs of delay¹ of the project, the Trustees met in a special meeting on April 19, 2013, to review the allegation of violation of the OML "clear and complete" rule. In an abundance of

¹ In its response to this office prior to its April 19, 2013, meeting, Trustees represented that cost of delay per week would be almost \$12,000, and a protracted delay would impact the time to complete the "dry in" phase of construction before the onset of winter.

caution, trustees elected to take corrective action by considering the following agenda items, which were drafted to correct the alleged omissions of the Trustee's March 28, 2013, agenda item #3 and its February 12, 2013, agenda item #2.

1. Discuss, Approve or Deny acceptance of the finalized design and project status of Phase II of the gymnasium/recreational facility project. Presentation by Mike Mitchell, Owner's representative. Action to include possible approval of finalized design of Phase II of the gymnasium/recreational facility project. FOR POSSIBLE ACTION. Public comment.

2. Discuss, Approve or Deny award of Guaranteed Maximum Price (GMP) contract to Core Construction for the construction of Phase II of the gymnasium/recreational facility project in an amount of \$10,720,247.00. Presentation by Mike Mitchell, Owner's Representative. Action to include authorizing Superintendent to enter into a contract with Core Construction for the construction of Phase II of the gymnasium/recreational facility project. FOR POSSIBLE ACTION. Public comment.

Action by a public body taken in violation of the OML is void. NRS 241.036. But, a public body may reauthorize action taken on a matter within its jurisdiction and control for a future meeting once the issue of noncompliance becomes known or if a complaint is filed describing an alleged violation. Corrective action or "cure" is available to the public body whenever there is any question of non-compliance. A public body is "not forever precluded from taking the same action at another legally called meeting. *Valencia v. Cota*, 617 P.2d 63 (Ariz. Ct. App. 1980); *Cooper v. Arizona W. Coll. Dist. Governing Bd.*, 610 P.2d 465 (Ariz. Ct. App. 1980); *Spokane Education Ass'n v. Barnes*, 517 P.2d 1362 (Wash. 1974). However, mere perfunctory approval at an open meeting of a decision made in an illegally closed meeting does not cure any defect of the earlier meeting or relieve any person from criminal prosecution for the same violation. *Scott v. Town of Bloomfield*, 229 A.2d 667 (N.J. Super. Ct. Law Div. 1967). The matter should be put on an agenda for an open meeting and reheard." OML Manual, §11.04 (11th ed. 2012).

Trustees' reconsideration of the issues in this Complaint, during its April 19, 2013, meeting, was not perfunctory or merely a rubber-stamp of prior action.

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Owner's representative, Mike Mitchell, made a presentation concerning the project stating that the designs and drawings were 100% complete. A proposed Guaranteed Maximum Price contract with Core Construction was submitted to the Trustees for consideration. Designs were approved and the Superintendent was authorized to execute the contract with Core Construction.

We believe that the issue of whether the Trustees violated the OML's rule that all agenda item topics must be described in a "clear and complete" statement was rendered moot when the Trustees took immediate corrective action at its special meeting on April 19, 2013. We are satisfied that the corrective action responded to the Complaint; no further action by this office is necessary.

We are closing our file on this matter.

Sincerely,

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Attorney General

By: 

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GHT/rmh

cc: Mike Pavlakis, Esq., Counsel for Board of Trustees
Eureka County Board of Trustees:
Kathy Bacon Bowling, President
Darla Baumann, Member
John Brown, Member
Terri Lynn Brown, Member
Sara Simmons, Member
Lisa Jones, Secretary