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Dale Beach
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Lee Houts
238 Edith Lane
Dayton, Nevada 89403

Re: Open Meeting Law Complaints / AG File Nos. 13-022 and 13-024
Storey County Board of Commissioners

Dear Mr. Beach, Mr. Phillips, and Ms. Houts:

BACKGROUND

This opinion concludes an investigation into three Open Meeting Law Complaints concerning alleged violations during the Storey County Board of Commissioners (BOCC) consideration of Item #4 on its June 18, 2013, agenda. Item #4 was entitled: Approval of the Agenda, it was listed for possible action. Two of the Complaints allege that Chairman Bill Sjovangen denied Dale Beach the right to publicly comment on Item #4, and one Complaint alleges that Mr. Beach was unlawfully ejected from the meeting as a result of his attempt to comment on Item #4.

FACTS

On June 18, 2013, the BOCC held a public meeting. The BOCC considered Item #4 on the agenda – Approval of the Agenda. Mark Phillips (a complainant herein) was speaking during public comment on Item #4 when Chairman Sjovangen thanked him indicating that he was done speaking. Chairman Sjovangen immediately asked whether there were any other changes to the agenda, then he said, "If not, I'll have a motion to approve the agenda."

As soon as Mr. Phillips sat down, Mr. Beach stood up and approached the gate to the speaker's podium. However, Chairman Sjovangen had already called for a motion to approve the agenda. Mr. Beach waited at the gate directly in front of the Commission with his hand raised where he thought he would be recognized.

Mr. Beach was standing only a few feet from the Commissioners. The Chair had called for a motion on the item and it had been voted on. Only then did he turn to the audience where Mr. Beach had been standing with his arm raised. Mr. Beach said he was there to speak to agenda Item #4. He was told he was too late, as the Agenda had been approved. Chairman Sjovangen repeatedly told Complainant to "have a seat." Mr. Beach said, "No, I won't." Chairman Sjovagen called a meeting recess and then the video recording stopped. We were not able to determine from the video recording what happened during the recess.

In correspondence made available to this Office, Mr. Beach stated he is permanently disabled with hearing impairment and severe back pain. His Complaint stated he had provided a copy of his letter of disability to each Commissioner before this meeting as he was there to comment (on Item #4) on the Commission's decision to move public comment to end of the agenda. He had asked to sit near the podium on a bench to aid his ability to hear and alleges he was later told he could not sit there anymore, although the video shows another member of the public, Mr. Phillips, seated on the bench.

In a letter to this Office, Mr. Beach stated he has been permanently disabled since the mid-1990s. He claims he needs to sit close to the front to hear enough to keep up with the agenda. Mr. Beach added that he has made use of county-provided headphones during Commission meetings to listen.

The Commissioners submitted written statements. Commissioner Gilman and Chairman Sjovangen denied that Mr. Beach had been denied the right to speak. The Commissions' response asserts that Mr. Beach was simply too late to comment on Item #4 as the Commission had already approved agenda Item #4 when Mr. Beach asked to speak. The Chairman stated that Mr. Beach was out of order when he insisted he be allowed to comment on Item #4.

Chairman Sjovangen's statement to this Office said he twice asked for comment about changes to the agenda. After he asked the first time, Mr. Phillips spoke. Chairman Sjovangen's said that he asked again after Mr. Phillips sat down, but there was no response from Mr. Beach. Chairman Sjovangen acknowledged that the video showed the Complainant approaching the BOCC after the motion to approve Item #4 was called, but denied that the Board had been aware that Complainant wished to speak.

Chairman Sjovangen said Mr. Beach left the room abruptly without allowing the Board the opportunity to "rectify" the situation. He also claims that Complainant was never told to leave the room and that his departure was voluntary. However, the video showed that Chairman Sjovangen told Mr. Beach that he was too late to comment on the agenda, then because of Mr. Beach's persistence, the Chair told him he could "sit down and be quiet," "leave the room," or be "escorted out."

Despite the threats, Mr. Beach was not ejected nor did he complain that he had been ejected. He told this Office that he left the meeting of his own volition. He said his only intent was to complain about what he felt was deprivation of his right to speak to Item #4 on the agenda.

Storey County allowed one period of general public comment on its June 18th agenda.[1] During general public comment, (Item #25 was the last item on the agenda), Chairman Sjovangen replied to a question from Mr. Phillips about why public comment had been moved to the end of the meeting. He said, "It served several purposes. [Moving it to the end] got rid of Dale Beach right at the get-go." Then he added that the 20–30 minutes of public comment at the beginning of Commission meetings seemed excessive when "high paid state employees are waiting in the audience to address the Board."

ISSUES

I. Whether Complainant was denied the right to speak during the Board's consideration of Item #4?

II. Whether Complainant had been ejected from the June 18, 2013, BOCC meeting?

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[1] The agenda notice stated that public comment would be allowed at the beginning of each meeting; public comment was not heard until the end of the June 18th meeting. The discrepancy was called to the Commission's attention during public comment. The Chair said the discrepancy would be corrected to reflect that future public comment will be heard at the end of the meeting. NRS 241.020(2)(c)(3)(II)

DISCUSSION

The Nevada Legislature has given the right to speak to public bodies during public comment. NRS 241.020(2)(c)(3). "Citizens have an enormous first amendment interest in directing speech about public issues to those who govern their city. It is doubtless, partly for this reason, that such meetings, once opened have been regarded as public forums, albeit limited ones." *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). *See also Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175, 97 S. Ct. 421, 426, 50 L. Ed. 2d 376 (1976); *Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory*, 656 F.2d 917, 922 (4th Cir.1981).

Question I

Whether Complainant was denied the right to speak during the Board's consideration of Item #4?

The first issue presented is not whether Mr. Beach had the right to speak to the Commissioners, but whether he was deliberately denied the right to speak during public comment on Item #4. Mr. Beach said in his Complaint that he "heard the Chairman mumble something he could not understand and [the Chairman] called for the next item [#5] on the agenda." It was only after the next item had been called that Mr. Beach complained that he had not been heard.

We reviewed the video of the alleged incident several times. Mr. Phillips, a member of the public who makes frequent public comment, sat on a bench next to the podium from which he was clearly visible to Chairman Sjovangen. Mr. Beach alleged he had been told he could not sit there, but we conclude he could have since another member of the public also sat there. Mr. Beach sat in the front row in the audience. Headphones were available for his use; he did not use them.

Chairman Sjovangen called for "changes to the agenda," even as Mr. Phillips continued to speak. The transition from public comment to Commissioner action may have caused some confusion for Mr. Beach. As Mr. Phillips sat down, Chairman Sjovangen called for "any other changes," and almost in the same breath asked for a motion to approve the agenda.

Mr. Beach believes that Chairman Sjovangen deliberately avoided allowing him to comment. For support, he referred to Chairman Sjovangen's comment, which occurred during public comment later in the meeting. Chairman Sjovangen said, in response to a question from Mr. Phillips, that moving public comment to the end of the

meeting "got rid of Dale Beach at the get-go." Chairman Sjovangen did not explain the reason for this remark in his statement to this Office even though Mr. Beach included the statement in his Complaint.

Answer to Question One

The Commissioner's statements and our review of the video did not provide evidence of a deliberate act that prevented Mr. Beach from speaking during public comment on Item #4. It was an inadvertent omission. Public comment on Item #4 had been allowed before the Commission approved the agenda and Chairman Sjovangen asked twice whether there were any other changes to the agenda. Mr. Beach did not speak up before the Commission approved the agenda even though he had gotten up and moved to the gate next to the podium.

Chairman Sjovangen said that he did not know that Mr. Beach wished to speak during Item #4. We do not believe the video contradicts that statement. The vote to approve the agenda occurred in a few seconds, and even after the vote when Mr. Beach was standing in front of the Commission, no one seemed to recognize him for another few seconds.

If the Commission utilized comment cards for agenda items, an incident like this could be avoided in the future. The public could submit speaker cards indicating their intention to speak and also identify which items on which they wish to speak. But in the absence of speaker cards, we urge the Chairman to exhibit patience and insure that he asks the audience if anyone else wishes to comment before moving on to another agenda item.

Question II

Whether Complainant had been ejected from the June 18, 2013, BOCC meeting?

Chairman Sjovangen's remark later in the meeting causes uncertainty about whether Mr. Beach had been deliberately denied his right to speak. But the remark about getting rid of Mr. Beach seemed casual to us and it occurred at the end of the meeting. The intervening time between the incident and the remark attenuated the significance of the remark. In our view, it did not provide sufficient evidence of intent regarding Mr. Beach's allegation of denial of his right to speak during consideration of Item #4.

Answer to Question II

The evidence is insufficient to find that Mr. Beach was ejected from the meeting. During our interview with Mr. Beach, he said he was not ejected, nor did his Complaint allege he had been ejected.

CONCLUSION

We conclude that no OML violation occurred based on our investigation of the allegations in the Complaint. We ask BOCC to allow the video tape to remain running during any called recess where the issue is whether someone may be ejected.

We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

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GHT/rmh
cc: William A. Maddox, District Attorney, Counsel for Board of Commissioners
Storey County Board of Commissioners
Bill Sjovangen, Chairman
Marshall McBride, Vice Chairman
Lance Gilman, Member