



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO  
*Attorney General*

KEITH G MUNRO  
*Assistant Attorney General*

GREGORY M. SMITH  
*Chief of Staff*

June 19, 2013

Elaine Hurd  
1520 Branding Iron Trail  
Mesquite, Nevada 89034

Kenneth D. Rock  
515 Greens Way  
Mesquite, Nevada 89027

Sandra K. Ramaker  
440 Crystal Canyon Drive  
Mesquite, Nevada 89027

Re: Open Meeting Law Complaint / AG File No. 13-002  
Virgin Valley Water District Board

Dear Ms. Hurd, Mr. Rock, and Ms. Ramaker:

This office received three Open Meeting Law (OML) complaints regarding the Virgin Valley Water District Board (Board), February 19, 2013, public meeting when General Manager Ken Rock was discharged. Allegedly the discharge violated the provisions of the OML, NRS 241.033(2)(b) (notice provision), and NRS 241.015(2)(a)(2) (prohibition of a "walking quorum"). Other alleged violations of the OML were deemed not within the jurisdiction of the OML and were not investigated.

The Attorney General has jurisdiction to investigate allegations of violations of NRS Chapter 241, the 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.

## BACKGROUND

This office subpoenaed records and other materials in the course of our investigation. Legal counsel and members of the Board were cooperative throughout the investigation. Records and related materials were subpoenaed pursuant to NRS 241.039.

We received affidavits from each Board member setting forth his or her recollection of any discussion, commitment, or promise, communicated to any other member of the VVWD Board, or to any other person if the discussion, commitment, or promise was connected with the Board member's vote to terminate VVWD General Manager Ken Rock on February 19, 2013. Copies of each VVWD Board of Directors member's electronic communication records, including cell phone records (lists of calls and recipients), were subpoenaed. Also subpoenaed were copies of emails, faxes, or other electronic media, by and between individual members of the VVWD in which discussion of the performance evaluation and/or the termination of Mr. Rock was discussed.

Counsel's response to the subpoena for electronic records informed us that the local phone company, Reliance Connects, does not keep records of individual local phone calls (home phone); therefore, Board members could not comply with our subpoena for all electronic communication records. Counsel provided a letter from Reliance Connects verifying that it does not keep records of local-to-local calls.

The Board provided a waiver, notice, and proof of service required by NRS 241.033, which had been served on Mr. Rock prior to consideration of his performance evaluation for the February 19, 2013, VVWD Board's public meeting.

We also requested and received a written response to the Complainants' allegations, prepared by legal counsel for the Board, on behalf of its members and in support of their individual affidavits. Finally, we requested and received copies of the video of the February 19, 2013, public meeting, the meeting agenda, and minutes, before rendering this Opinion.

## FEBRUARY 19, 2013 PUBLIC MEETING

Mr. Rock's performance evaluation was Item #11 on the Board's February 19, 2013, public meeting agenda. It read:

11. For Discussion & for Possible Action - Performance evaluation of Kenneth Rock, General Manager. Pursuant to NRS 241.031-241.033, possible action may include, but is not limited to, termination, suspension, demotion, reduction in pay, reprimand, promotion, endorsement, engagement, retention, salary increase, or 'no action'. (The Board of

Directors may consider character, alleged misconduct (if any), professional competence, physical or mental health pursuant to NRS 241.031.)

When Item #11 came up for discussion, President Miller startled the audience when he quickly declared that he would only accept the termination of Ken Rock as General Manager of the VVWD effective immediately. Upon request by Ms. Ramaker to repeat his statement, President Miller stated, "termination . . . effective at once . . . ." With that, he turned the matter over to the Board.

Two Board members, Sandra Ramaker and Karl Gustaveson were visibly taken aback. Both Ms. Ramaker and Mr. Gustaveson asked for further explanation and clarification for President Miller's sudden declaration. President Miller said that the General Manager served "at will," but did not expand on the reasons for his declaration.

Ms. Ramaker said she thought Mr. Rock had been doing a good job for the last two and a half years and that she was personally pleased with his performance. Mr. Gustaveson said he had heard comments about the good job Mr. Rock had been doing and had not heard any negative comments from those who worked for the District. He asked President Miller for more specificity about the reasons for the call for termination; none were forthcoming.

Vice President Kenyon Leavitt and Board member Rich Bowler expanded on certain reasons they would support Chairman Miller's call for termination. Mr. Leavitt pointed to community and staff reaction to the direction Mr. Rock had been leading the District, and that he had been concerned about these matters for some time.

Mr. Bowler said numerous people addressed their concerns with him, as well as several contractors who told him about their concerns regarding the lack of credibility the District has had in the bid process. He added that one of his concerns is that information provided to the Board is a lot of times "steered," and that he felt like the Board was getting information "spoon fed" to them, based on what Mr. Rock wanted the Board to see.

Mr. Bowler added that he felt the "straw that broke the camel's back" was Mr. Rock's insubordination over painting a Mesquite water tank. He said the Board had directed Mr. Rock through a motion clearly directing the process. In another meeting, Mr. Bowler asked why it was being done differently, Mr. Rock said it was, "to accommodate the Chamber of Commerce." Mr. Bowler said to Mr. Rock that was clear insubordination since it was not done the way the Board directed.

Mr. Bowler added comment that he thought Mr. Rock had an environmental agenda, and as Ms. Ramaker and Mr. Gustaveson thought, Mr. Rock was "a forward thinker," then questioned if that is what the Districted needed "right now."

Mr. Leavitt spoke last. Before making a motion, he explained that he had stayed awake nights for months knowing that this day would come; he wondered how he was going to vote; and what kind of motion would he make if he had to make that choice. He concluded that because of the response that he received from members of the community and members of the Water District that work here, that morale should be a heck of a lot more than what it was . . . they are not getting led the way they would hope. Mr. Leavitt then made the motion to terminate Mr. Rock's employment as General Manager of VVWD; Mr. Bowler seconded the motion. The motion passed 3 – 2, with Ms. Ramaker and Mr. Gustaveson in the minority.

Among the records we received were Mr. Rocks' recent performance evaluations dated February 2011 and February 2012. Review of the Board members comments and the overall evaluation for 2011 and 2012 were good and did not shed any light on the comments made by members in support of termination on February 19, 2013.

### INVESTIGATION

Each member of the Board submitted a sworn affidavit setting forth his or her recollection of any discussion, commitment, or promise, communicated to any other member of the VVWD Board, or to any other person, if the discussion, commitment, or promise was connected with the Board member's vote to terminate VVWD General Manager Ken Rock on February 19, 2013. The scope of this subpoena required the members of the Board to recall in-person conversations and electronic communications such as email, text, and telephone.

President Miller recalled a conversation with Mr. Bowler in December of 2012 concerning Mr. Rock and his employment relationship with the District. President Miller recalled voicing displeasure about Mr. Rock's handling of meeting agendas.

In early January, President Miller recalled a telephone conversation with Mr. Bowler in which they discussed not renewing Mr. Rock's employment at the upcoming annual evaluation in February. In February, both men realized that Mr. Rock did not have a written employment contract with the District.

President Miller also recalled speaking to a District employee about Mr. Rock and realized that another employee was doing much of the day-to-day work that he thought the General Manager should be handling. He recalled having already made his decision to terminate Ken Rock, but did not share this decision with the employee.

President Miller recalled two conversations with Kraig Hafen, a Mesquite City Councilman, regarding Mr. Rock; one in early Fall 2012, and again about a month before the February 19, 2013, Board meeting. He and Mr. Hafen agreed that Mr. Rock was not a good General Manager. Mr. Hafen advised President Miller to say as little as possible in the meeting when Mr. Rock's review and possible termination would be discussed.

President Miller also recalled discussing Mr. Rock with Bill Tanner, City of Mesquite Public Works Director, regarding use of sewer effluent to recharge the water aquifer; both men believed that Mr. Rock would not allow that to happen.

President Miller's affidavit stated the conversations described in his affidavit were the only conversations or communications he had that were connected to his vote to terminate Ken Rock's employment. His affidavit also states he did not receive nor send any emails connected to the employment termination of Mr. Rock. Review of his phone records for the 30-day period prior to February 19, 2013, did not reveal calls either to or from other VVWD Directors.

Mr. Bowler stated in his affidavit that he had, publicly and privately, discussed his displeasure with Mr. Rock's performance as General Manager of the VVWD, but said he had not discussed the evaluation of Mr. Rock's job performance with any Board member other than President Miller. Review of his phone records for the 30-day period, prior to February 19, 2013, did not reveal calls either to or from other VVWD Directors. His affidavit also stated he neither received nor sent any emails connected with the termination of Mr. Rock's employment. Mr. Bowler added that the only other people he spoke with regarding Mr. Rock's employment were Kraig Hafen and former VVWD board member Mark McEwen.

Mr. Bowler said his decision to vote for termination was based solely on his own observations. He believed Mr. Rock was not providing pertinent information to the Board and felt that Mr. Rock had not followed Board direction on a number of issues, including the water tank, basin study, and the habitat conservation plan.

Vice President Kenyon Leavitt, the third Board Member who voted to terminate Mr. Rock's employment with VVWD, stated in his affidavit that he had discussed Mr. Rock's performance as VVWD General Manager with Robert Bunker, (Water Master for the Bunkerville Irrigation Company) on February 15, 2013. Mr. Leavitt stated that he did not discuss how he might vote concerning Mr. Rock's employment with VVWD with Mr. Bunker.

Mr. Leavitt also spoke with Crescent Hardy (current State Assemblyman from District 19 comprising most of eastern Clark County, former Mesquite City Councilman and former VVWD Director). Mr. Leavitt said this conversation concerned Mr. Hardy's personal interaction with Mr. Rock. Mr. Leavitt said he and Mr. Hardy did not discuss whether Mr. Rock should be terminated.

The conversations recounted in his affidavit were the only ones he said he had that were connected with his vote to terminate Mr. Rock's employment. Mr. Leavitt stated that he neither received nor sent any emails connected to the termination of Mr. Rock. Review of his phone records did not show calls to or from any other Director for the 30-day period prior to February 19, 2013.

Sandra Ramaker and Karl Gustavson's affidavits stated that neither one had any communication with anyone else, including other Board members, regarding the employment termination of Mr. Rock prior to the meeting at which the termination occurred.

## DISCUSSION

### NOTICE

Three separate OML Complaints, each alleging violation of the OML's prohibition against serial communication (walking quorum) by the three Directors who voted for termination at the public VVWD meeting, were received. One Complaint alleged a due process violation because the Directors did not address the performance evaluation agenda item. Mr. Rock served at the pleasure of the Board of Directors; he and the Board had not entered into a written employment agreement.

We have reviewed the response from the Directors and conclude that VVWD complied with the notice provisions of NRS Chapter 241. First, we verified that Mr. Rock received statutory notice of the February 19, 2013, performance evaluation meeting. Statutory notice of the Board's meeting to consider Mr. Rock's character, professional competence, alleged misconduct, or physical or mental health was served on Mr. Rock on February 12, 2013<sup>1</sup>. It was timely served. Mr. Rock signed a waiver of any other formal notice requirements required by the OML.

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<sup>1</sup> NRS 241.033 Meeting to consider character, misconduct, competence or health of person or to consider appeal of results of examination: Written notice to person required; exception; public body required to allow person whose character, misconduct, competence or health is to be considered to attend with representative and to present evidence; attendance of additional persons; copy of record.

1. Except as otherwise provided in subsection 7, a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person or to consider an appeal by a person of the results of an examination conducted by or on behalf of the public body unless it has:

- (a) Given written notice to that person of the time and place of the meeting; and
- (b) Received proof of service of the notice.

2. The written notice required pursuant to subsection 1:

(a) Except as otherwise provided in subsection 3, must be:

- (1) Delivered personally to that person at least 5 working days before the meeting; or
- (2) Sent by certified mail to the last known address of that person at least 21 working days before the meeting.

(b) May, with respect to a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person, include an informational statement setting forth that the public body may, without further notice, take administrative action against the person if the public body determines that such administrative action is warranted after considering the character, alleged misconduct, professional competence, or physical or mental health of the person.

### NO EVIDENCE OF SERIAL COMMUNICATIONS

NRS 241.015(2)(a) forbids serial meetings amongst a quorum of members of a public body where a consensus or vote or other decision is made. These are private meetings, they are not noticed to the public, since less than a quorum is gathered at each meeting. These are "walking quorums" used to form a secret consensus or vote out of sight of the public. The OML prohibits them as a violation of the letter and spirit of the OML.

When less than a quorum of the members of a public body gather to privately discuss public issues or even lobby for votes, the OML is not implicated. *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770,778 (1998); Section 5.08 of the Open Meeting Law Manual (11th ed. 2012). The OML is not intended to prohibit every private discussion of a public issue; it only prohibits collective deliberations or actions where a quorum is present. *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87,94-95, 64 P.3d 1070,1075 (2003).

### CONCLUSION

Our review of the documents, affidavits, and other materials submitted during this investigation did not provide evidence that a "walking quorum" of the VVWD met at any time on or before February 19, 2013, to deliberate or decide whether to terminate the employment of Mr. Rock as General Manager for VVWD.

President Miller, Vice President Leavitt, and Board Member Bowler's affidavits all say that other than privileged communications with spouse or legal counsel, they did not communicate with anyone else concerning their vote to terminate Mr. Rock's employment with VVWD. Affidavits of Ms. Ramaker and Mr. Gustaveson say that they had no conversations with anyone prior to the February 19, 2013, meeting when Mr. Rock's employment was terminated.

Discussions between President Miller and Mr. Bowler did not offend the OML because they did not constitute a quorum; their discussions were private and thus, not a violation of the OML. Review of the mobile device phone records of the three members who voted to terminate employment with VVWD during the 30 days prior to Mr. Rock's termination, did not reveal any mobile phone calls to or from either of the other two prior to their vote to terminate Mr. Rock's employment.

President Miller, Mr. Leavitt, and Mr. Bowler admitted to discussions with individuals about Mr. Rock's performance, his management of VVWD, and his relations with the Board. Both Mr. Miller and Mr. Bowler admitted to speaking with Mr. Hafen regarding Mr. Rock prior to his termination, but they also spoke with each other. Even if they discussed public business with Mr. Hafen, the OML is not offended. The individuals who met with President Miller, Mr. Leavitt, and Mr. Bowler to discuss Mr. Rock, his performance, or his management, were not members of the Board of

Directors; therefore, the OML was not offended. Members of public bodies must be able to meet with their constituents, members of the public, and other interested persons regarding public business without offending the OML.

There is no evidence or allegation that any of the interested persons, who spoke with the three directors who voted for termination, were acting as a conduit to circumvent the OML by creating a secret consensus. Each of the three Board member's affidavits named the individuals they had spoken with about Mr. Rock's future employment termination; each affidavit states that there were no other persons or conversations. It was noted that only Kraig Hafen spoke to more than one Board member; he spoke with President Miller and Mr. Bowler. Mr. Leavitt's affidavit did not name him as someone with whom he had spoken.

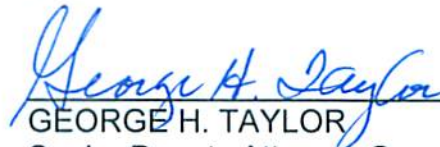
The fact that President Miller, Mr. Leavitt, and Mr. Bowler spoke about Mr. Rock's employment to other persons did not create a walking quorum.

We are closing our file on this matter.

Sincerely,

CATHERINE CORTEZ MASTO  
Attorney General

By:



GEORGE H. TAYLOR  
Senior Deputy Attorney General  
Open Meeting Law  
100 North Carson St.  
Carson City, Nevada 89701  
Tele: (775) 684-1230

GHT/rmh

cc: Jedediah Bo Bingham, Esq, Board Counsel  
Virgin Valley Water District Board:  
Ted Miller, President  
Kenyon Leavitt, Vice President  
Sandra Ramaker, Secretary-Treasurer  
Richard Bowler, Board member  
Karl Gustaveson, Board member