

**OFFICE OF THE ATTORNEY GENERAL**

In the Matter of: )  
 )  
WASHOE COUNTY SCHOOL DISTRICT )  
and its BOARD OF TRUSTEES. )  
\_\_\_\_\_ )

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**AG FILE No. 13897-141**

**OMLO No. 2015-01**

**BACKGROUND**

On March 24, 2015, the Reno Gazette-Journal (RGJ) submitted a complaint alleging that the Washoe County School District (WCSD) Board of Trustees (Trustees), a public body, violated the Nevada Open Meeting Law (OML), Chapter 241 of the Nevada Revised Statutes (NRS). The RGJ alleges that agenda item 7.02 of the Trustees’ open meeting agenda for March 24, 2015, did not provide notice that the Trustees would appoint a permanent School District Superintendent.<sup>1</sup> The RGJ alleges that the vote and selection of Traci Davis (Davis) as Superintendent violated NRS 241.020(2)(d)(1) and (2), which require an agenda to provide a clear and complete statement of topics and action scheduled to be considered during the meeting.<sup>2</sup>

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<sup>1</sup> Trustees’ agenda item 7.02 states: “DISCUSSION ON SUPERINTENDENT SEARCH (FOR DISCUSSION AND POSSIBLE ACTION).”

<sup>2</sup> NRS 241.020(2)(d)(1)–(3) specifies the fundamental requirements of a public body’s agenda:

- (d) An agenda consisting of:
  - (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
  - (2) 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 or, if the item is placed on the agenda pursuant to NRS 241.0365, by placing the term “for possible corrective action” next to the appropriate item.
  - (3) Periods devoted to comments by the general public, if any, and discussion of those comments. Comments by the general public must be taken. . . .

The Office of the Attorney General (OAG) has jurisdiction to investigate OML complaints. NRS 241.039.<sup>3</sup> Public bodies working on behalf of Nevada citizens must conform to OML requirements in open meetings under an agenda that provides full notice and disclosure of discussion topics and any possible action. Agenda items must be clear and complete. NRS 241.020. Action and deliberation must be properly noticed and taken openly. NRS 241.010. The OAG may sue a public body to void an action, or may sue a person or a public body for injunctive relief in a court of competent jurisdiction to require compliance with the OML. NRS 241.037. Criminal and civil penalties, including monetary fines, are also authorized by statute. NRS 241.040. The OAG may issue Findings of Fact and Conclusions of Law following an investigation. NRS 241.039.

The OAG's investigation of the appointment of Davis as permanent school district superintendent was primarily based on the OAG's review of the video of the Trustee's meeting and its agenda for March 24, 2015. During investigation by this office, Trustee Angela Taylor (Taylor), who submitted a declaration to the OAG, had been newly appointed to the Board the preceding November. Another declaration was submitted by the in-house legal counsel for the School District, Christopher Reich (Counsel Reich). Their declarations explained their respective roles in events that occurred outside the public meeting on March 24, 2015 during a recess.

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<sup>3</sup> NRS 241.039 Enforcement by Attorney General; subpoenas; penalty for failure or refusal to comply with subpoena.

1. Except as otherwise provided in NRS 241.0365, the Attorney General shall investigate and prosecute any violation of this chapter.
2. In any investigation conducted pursuant to subsection 1, the Attorney General may issue subpoenas for the production of any relevant documents, records or materials.
3. A person who willfully fails or refuses to comply with a subpoena issued pursuant to this section is guilty of a misdemeanor.

## **FINDINGS OF FACT**

1. Agenda item 7.02 for the Trustee's meeting on March 24, 2015, entitled "Discussion of Superintendent Search," was intended for discussion of the search for a new superintendent for the School District. During discussion on this agenda item at the meeting, WCSD Human Resources Officer Dawn Huckaby (Huckaby) explained three search options to the Trustees summarizing her assessment of cost and other factors.

2. Following Huckaby's presentation, and still under agenda item 7.02, fifteen (15) citizens individually offered public comment to the Board expressing their views on the selection of a superintendent. Most of this public comment, approximately forty (40) minutes in length, supported the candidacy of Davis; however, no public comment suggested her immediate appointment.

3. Following public comments on agenda item 7.02, Trustee Lisa Ruggiero (Ruggiero) asked a question regarding the agenda item and the three search options that had been presented by Huckaby for the Board's consideration. Ruggiero announced, "I think it's pretty clear how I feel . . . so just to clarify today, just a question, this is an item [item 7.02] for discussion or action today? Do we have to choose between one of the [three] options or can we just appoint interim Davis today? Would that be allowed under this agenda?"

4. Board President John Mayer (President Mayer) looked to Counsel Reich, who sat just behind and to the right of Mayer at the meeting. On the video they appear to have conferred for a moment, and then Counsel Reich answered Ruggiero's question, stating, "Yes, that's part of the process." President Mayer then repeated Counsel Reich's answer aloud. Ruggiero said that was all she had at that time.

5. In turn, and following Trustee Ruggiero's questions and Counsel Reich's reply about appointing Davis under agenda item 7.02, several other Trustees offered their personal views about whether they should take immediate action to approve the

appointment of Davis as permanent school superintendent. Trustees Howard Rosenberg (Rosenberg), Barbara McLaury (McLaury), Angela Taylor, and President Mayer expressed their support for Davis to lead the School District as the next superintendent without spending any more money to search for other candidates. They were in favor of an immediate vote to appoint Davis.

6. Two Trustees who had been elected and were seated on the Board in January expressed their views that the Trustees should not appoint Davis during the meeting because further time was needed to study the search options. Trustee Nick Smith (Smith) expressed his view against a quick appointment of Davis. Trustee Veronica Frenkel (Frenkel) said she wasn't ready to make a selection during this meeting.

7. Trustee Rosenberg made a motion that "the Board of Trustees hire Interim Superintendent Traci Davis as the Superintendent of the Washoe County School District, pending contract negotiations." The motion was seconded by Trustee Ruggerio. President Mayer called for the vote. The vote taken was 5–2 in favor of the motion, with Trustees Frenkel and Smith voting against.

8. Following this vote, President Mayer called for another vote to make it unanimous, but it failed unanimity by one vote, with Trustee Smith voting against.

9. After a short celebration of Davis' appointment and some remarks from Davis, the Trustees resumed their meeting. After an hour and one-half of Board discussion of other agenda matters, President Mayer called a recess.

10. Trustee Taylor's declaration states that during this recess she learned from WCSD staff in the hallway just outside the Trustees' meeting room about a newly posted comment on the RGJ's website stating that the Trustees' vote to appoint Davis appeared to have been taken in violation of the OML.

11. Taylor discussed the matter with Counsel Reich, who advised her and President Mayer to rescind the Board's prior vote on agenda item 7.02. Counsel Reich

made this recommendation pursuant to NRS 241.0365(4). Based upon the available evidence, there was no discussion among the Trustees during the recess about the suggested vote to rescind their appointment of Davis. Taylor states that no poll or vote by the Trustees was taken during the break in the meeting, or at any other time outside the open public meeting, regarding “what to do, if anything, about the possible OML violation that may have occurred by the vote [. . .] to appoint Davis.” Counsel Reich’s declaration states he did not participate in, nor witness Trustees taking a poll. Counsel Reich states he did not hear any other discussion outside the meeting room that could have constituted an informal vote about reconsideration or rescission of the vote to appoint Davis.

12. After the recess but prior to eventual adjournment, Trustee Taylor offered a motion, seconded by Trustee Frenkel, that “the Board of Trustees rescinds the vote to hire Interim Superintendent Traci Davis as the Superintendent of the Washoe County School District, pending contract negotiations; and directs staff to place an item on a future agenda of the Board of Trustees related to the possible appointment of Interim Superintendent Davis as Superintendent of the Washoe County School District.” Taylor stated that she had just learned from WCSD staff that they had received an alert from the RGJ that the OML might not have been observed when the Trustees voted to appoint Davis. Following a short discussion, the Trustees unanimously passed Taylor’s motion prior to adjournment of the meeting.<sup>4</sup>

13. Previously, six members of the WCSD Board of Trustees – current members Mayer, McLaury, Rosenberg and Ruggerio, together with previous Board members David Aiazzi and Barbara Clark – were sued by the OAG in September 2014, based on six (6) counts of OML violations alleged to have occurred on July 22, 2014

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<sup>4</sup> On the Agenda for the Trustees next meeting, on April 14, 2015, agenda item 6.04 states: “(2) the possible appointment, pursuant to NRS 391.110, of current interim superintendent Traci Davis as permanent Superintendent subject to negotiation and approval of an appropriate written employment contract (for discussion and possible action).”

concerning former Superintendent Pedro Martinez; the parties settled that complaint and the six (6) Board members agreed to monetary penalties. That settlement was expressed in a “Settlement and Consent Agreement Regarding Violations of Nevada Open Meeting Law; Findings of Fact and Conclusions of Law,” executed with the six Board members, including Mayer, McLaury, Rosenberg and Ruggerio, who admitted that they had taken action in a closed meeting that terminated the employment of former School District Superintendent Pedro Martinez, without proper notice and a proper agenda, in violation of NRS 241.020.

### **CONCLUSIONS OF LAW**

1. The Trustees violated the OML on March 24, 2015, when they voted to appoint Davis as permanent Superintendent without proper notice and an agenda item to permit that action. NRS 241.020. Agenda item 7.02 did not provide notice to the public that Davis or any other person could actually be appointed to the office of Superintendent at the meeting.

2. The Trustees should have recognized and obeyed the fundamental principle of the OML – there can be no action taken unless it appears on the agenda. Although agenda item 7.02 was identified as an action item, the Trustees erred by exceeding the type of action permissible under that agenda item. Instead, Trustee Ruggerio asked Counsel Reich whether agenda item 7.02 gave the Trustees authority to appoint Davis; Counsel Reich appeared to respond affirmatively, and a vote was taken. Reliance on advice of counsel during a public meeting may be a defense to an OML complaint; however, the facts in this context do not support advice of counsel as a defense.

3. Members of a public body are encouraged to discuss with counsel any foreseeable action taken by a public body during a meeting if a member is uncertain of its legality under the OML, preferably before a public meeting. There is no evidence that

Counsel Reich had been consulted beforehand on the issue of whether the Trustees could appoint Davis at the March 24 meeting. A full discussion of the agenda item among Counsel Reich and the Trustees was lacking in this instance. Furthermore, advice of counsel may not be defense in any matter where members have previously admitted to facts constituting a similar violation.

4. The OML does not provide immunity to members of a public body for reliance on counsel's advice when there are specific facts showing that such reliance was clearly unreasonable. *Brown and Banks on behalf of the State of Minnesota v. Cannon Falls Township*, 723 N.W.2nd. 31, 44 (Minn. Ct. App., 2006). Under the facts presented, and in the opinion of the Attorney General, the Trustees' reliance on counsel's advice in this matter was not reasonable.

5. There are notable differences between the previously-admitted violations of the OML that occurred on July 22, 2014 in the matter of former Superintendent Pedro Martinez, and this violation that occurred eight (8) months later on March 24, 2015. The agenda for the July 22, 2014 meeting did not contemplate any discussion or possible action whatsoever about the position of superintendent or then-Superintendent Martinez. By contrast, agenda item 7.02 for the March 24, 2015, meeting permitted discussion of the search for a new superintendent for the School District, but the agenda item was not sufficient for the appointment of a new superintendent.

6. The Trustees' rescission of Davis' appointment prior to adjournment of the meeting was timely. NRS 241.0365(4). Their immediate corrective action taken by a vote before adjournment to rescind the prior vote to appoint Davis effectively mitigates the severity of the earlier violation.

7. A public body that voluntarily takes prompt corrective action as soon as an alleged violation becomes apparent, as occurred in this matter, strengthens its defense to even a subsequent complaint. The fact that the Trustees unanimously took corrective

action during the same meeting, without any objection or resistance from any individual Trustees, is a significant mitigating factor in this violation.

EFFECTIVE DATED this \_\_\_\_\_, day of January, 2016.

STATE OF NEVADA, OFFICE OF THE ATTORNEY GENERAL,

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_