

AARON D. FORD
Attorney General



JESSICA L. ADAIR
Chief of Staff

KYLE E. N. GEORGE
First Assistant Attorney General

CHRISTINE JONES BRADY
Second Assistant Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

RACHEL J. ANDERSON
General Counsel

HEIDI PARRY STERN
Solicitor General

555 E. Washington Ave. Suite 3900
Las Vegas, Nevada 89101

July 20, 2020

Via U.S. Mail

Certified Mail No.: [REDACTED]

Joseph Giannone
[REDACTED]
[REDACTED]

Re: Open Meeting Law Complaint, AG File No. 13897-279 Public Employees' Retirement System of Nevada Retirement Board

Joseph Giannone filed a Complaint (Complaint) with the Office of the Attorney General (OAG) alleging violations of the Nevada Open Meeting Law (OML) by the Public Employees' Retirement System of Nevada Retirement Board (Board). The Complaint alleges that the Board violated the OML by failing to give the Complainant notice that his reemployment application would be heard by the Board at its February 15 and March 15, 2018, meeting in violation of NRS 241.033 and NRS 241.034.¹

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 Complaint included a review of the Complaint and attachments, the Response from the Board's legal counsel and attachments, and the agendas, minutes, and recordings for the February 15 and March 15, 2018, meetings. After investigating this matter, the OAG determines that the Board did not violate the OML as notice to Complainant was not required under NRS 241.033 or NRS 241.034.

FACTUAL BACKGROUND

The Board is a "public body" as defined in NRS 241.015(4) and is subject to the OML. On or about January 8, 2018, Complainant submitted a reemployment application to the Board. Complainant had the ability to

¹ To the extent that the Complaint makes allegations regarding whether the application was properly granted or denied, those allegations do not fall within the purview of the OML and are not considered in this opinion.

check a box on the application waiving his right to written notice of the date the application would be considered or a box choosing not to waive the notice. Complainant checked a box stating:

I do not waive my right to receive written notification of the hearing of my reemployment application. I affirm that the Board may not discuss, consider or act on my application until written notice has been given to me at least 21 working days prior to the meeting. I understand that my application will not be considered by the Board until the next available meeting after notification has been given to me. I acknowledge that this notification requirement may delay the date on which my application is considered by the Board.

The Board included Complainant's application in its February 15, 2018, agenda and denied Complainant's application during that meeting. The Board did not discuss Complainant's character during the meeting or discuss Complainant in any way other to approve staff's recommendation to deny the application.²

On or about March 2, 2018, Complainant provided additional information to the Board and requested that his application be re-reviewed. On or about March 5 or 7, 2018, staff for the Board stated to Complainant over the phone that his application would be heard during the Board's March 15, 2018, meeting, but did not receive a waiver from Complainant regarding notice. The Board included Complainant's application in its March 15, 2018, agenda and denied Complainant's application during the meeting. The Board did not discuss Complainant's character during the meeting or discuss Complainant in any way other than to approve staff's recommendation to deny the application.

DISCUSSION AND LEGAL ANALYSIS

The legislative intent of the OML is that actions of public bodies "be taken openly, and that their deliberations be conducted openly." NRS 241.010(1); *see also McKay v. Board of Supervisors*, 102 Nev. 644, 651, 730 P.2d 438, 443 (1986) ("the spirit and policy behind NRS chapter 241 favors open meetings"). Public bodies working on behalf of Nevada citizens must conform to statutory requirements in open meetings under an agenda that provides full notice and disclosure of discussion topics and any possible action. *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003). Any

² The OAG cautions the Board to clarify in its motions what actions are being taken with respect to approvals and denials.

exceptions to the open meeting law must be narrowly construed. *McKay* at 651.

NRS 241.033 requires public bodies to provide written notice to a person if the public body intends to consider the person's character, alleged misconduct, professional competence, or physical or mental health. As the Board did not discuss Complainant's character at either of the meetings at issue, the Board was not required to provide Complainant notice under NRS 241.033 and thus did not violate the OML in this respect.

NRS 241.034 requires public bodies to give written notice to a person if the public body intends to consider whether to take administrative action against the person. The notice requirement for both NRS 241.033 and NRS 241.034 is 5 working days if delivered personally and 21 working days if delivered by certified mail. NRS 241.033(2)(a); 241.034(1)(b). The term "administrative action against a person" is not defined in the OML. The OAG has previously considered "action against a person" as action involving an individual's characteristics or qualifications, not those of either objective or discretionary standards relating to inanimate matters. NEVADA OPEN MEETING LAW MANUAL at 55-57 (12th ed. Jan. 2016).

The Board has argued that the notice requirements in NRS 241.034 do not apply to reemployment applications made pursuant to NRS 286.350 as the action taken is not *against* the applicant. NRS 286.650(2) allows a recipient of disability retirement benefits to be employed and continue to receive that recipient's benefits if the recipient applies to the Board and the Board approves the application. The application must include a full description of the proposed employment and a declaration why the proposed employment should not be found to conflict with the recipient's disability. NRS 286.350(2). The simple denial of a request does not constitute administrative action *against* a person where the individual is requesting to be considered and the denial leaves the individual in the same position he or she was prior to the request. Thus, Complainant was not required to receive notice under NRS 241.034 and no violation of the OML occurred.

However, the OAG notes that the language contained on the application gives applicants an expectation of receiving notice prior to their application being heard by the Board. While this expectation does not rise to the level of requiring the Board to provide notice under the OML, it serves to unnecessarily confuse applicants where the Board does not provide the notice stated.

CONCLUSION

The OAG has reviewed the available evidence and determined that no violation of the OML has occurred. The OAG will close the file regarding this matter.

Sincerely,

AARON D. FORD
Attorney General

/s/ ROSALIE BORDELOVE

Rosalie Bordelove
Chief Deputy Attorney General

cc: Chris Nielsen, Esq.

Certified Mail No.: 7019 0160 0000 0498 6223