

VALENCIA
COUNTY

News-Bulletin

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Jan. 29, 2015

Office of New Mexico Attorney General Hector Balderas
Civil Division
PO Drawer 1508
Santa Fe, NM 87504

Dear Mr. Balderas,

I have been a reporter with the News-Bulletin for eight years. Recently, I believe the Belen Consolidated Schools Board of Education violated the New Mexico Open Meetings Act.

On Monday, Jan. 19, the board called a special meeting at 8 a.m. to meet in executive session to continue discussion of the district superintendent's evaluation and contract. At about 10:30 a.m., the board came out of executive session, returned to open session and adjourned. There was no action taken, as per the agenda (please see attached).

The next day, on Tuesday, Jan. 20, the superintendent was placed on paid administrative leave. He was informed of the decision in writing and turned over district property to the board president.

While the OMA allows for executive sessions to discuss limited personnel matters, it also clearly states that subsection H(2) "is not to be construed as to exempt final actions on personnel from being taken at open public meetings."

The attorney general's OMA compliance guide further clarifies the law in its commentary, on Page 22 of the most current edition available on the AG's website, saying, "... In all cases, final action on an employee matter falling within this exemption must be taken in open session."

By placing the superintendent on administrative leave without a proper public vote, the board has clearly violated the New Mexico Open Meetings Act.

Thank you for your attention to this matter.

Sincerely,

Julia M. Dendinger

Valencia County News-Bulletin Assistant Editor

Dir: 966-8157



Attorney General Of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

November 20, 2015

Larry Lindberg, Board President
Belen Consolidated Schools
520 North Main Street
Belen, New Mexico 87002

Re: Open Meetings Act Complaint

Dear Mr. Lindberg:

Thank you for providing, on behalf of the Belen Consolidated School District Board (the "Board"), the responses dated March 10 and May 29, 2015, with documents and information requested by our office regarding the complaints submitted by Julia Dendinger, a reporter with Valencia County News-Bulletin, (the "Complaints") alleging that the Board violated the New Mexico Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013).

The two primary allegations contained in the Complaints are: (1) the Board held a special closed meeting on January 19, 2015 and placed the superintendent on administrative leave outside of an open meeting and without proper notice or record of any Board action; and (2) that in February 2015, the Board appointed two different acting superintendents outside of open meetings and without proper notice or record of actions taken by the Board. Our office requested information and documents from the Board, as well as any other information concerning personnel actions taken by the Board related to the superintendent. Our findings are based on review of the Complaints, responses provided by the Board, and our own research.

As further discussed below, our office has determined the Board committed numerous OMA violations as alleged in the Complaints and should act swiftly to assure compliance with state law. This determination addresses the violations found and also provides information in regards to ensuring future compliance.

All Meetings Must Comport to Agenda Requirements and Specific Minute Obligations

Our review revealed several recurring problems regarding vague descriptions used by the Board for agenda items and the absence of any required disclosure of closed executive sessions in the Board's meeting minutes. Providing adequate information to the public is essential, as evidenced in OMA's explicit requirements concerning meeting notices, agendas, and minutes.

Pursuant to OMA, a public body must provide notice with an agenda or information on how to obtain a copy of the agenda. See § 10-15-1(F) (2013). The agenda must "contain[] a list of specific items of business to be discussed or transacted at the meeting..." Id. The law's requirement that agendas include "a list of specific items of business" is intended to prevent general or vague descriptions and ensure that the public is reasonably informed of what business the public body intends to conduct. See N.M. Atty. Gen. Open Meetings Act Compliance Guide, p. 17, ex. 26 (8th ed. 2015).

Meetings on January 27, February 10 and February 24, 2015, included the vague description of "personnel matters" as a basis for closing the public meeting. This description is insufficient because it does not provide the public with adequate notice of what business the Board is discussing.¹ Notices or agendas describing business items only as "personnel matters" violate OMA Section 10-15-1(F). See also Cox Enterprises, Inc. v. Bd. of Trustees of Austin Indep. Sch. Dist., 706 S.W.2d 956 (Tex. 1986) (holding that the school board did not provide full and adequate notice for the selection of a new school superintendent because, as a matter of public importance, the selection is noteworthy and the label of "personnel" fails as an adequate description of the subject); 62 C.J.S. Municipal Corporations § 309 (meetings called for a discussion notices simply as "employment, hiring, resignation" failed to sufficiently advise the public of the specific nature of the meetings).

It is also required under OMA that the meeting minutes must include a statement regarding any closed session. See § 10-15-1(J). The law requires that "minutes [] shall state that the matters discussed in the closed meeting were limited only to those specified in the motion for closure or in the notice of the separate closed meeting" and that such statement must be approved by the public body as part of its minutes. The intent of this requirement is to reinforce the position that closed session is limited to the matter listed in the agenda and topics expressly excepted from open meeting requirements, and to alleviate concerns and suspicion about any perceived misuse of the exceptions allowing closure of a public meeting.

None of the Board meeting minutes received by our office included any disclosure or statement regarding the limited content of the closed session or any affirmation by the Board that

¹ The separate closed meeting on January 19 included sufficient description of the business to be discussed. The notice described the business item as discussion of "the continuation of the Superintendent's evaluation and discussion of the Superintendent's contract." This provides adequate notice for an agenda item to evaluate the superintendent.

no action was taken in closed session. Failure to include such statement in the minutes after any closed meeting violates OMA Section 10-15-1(J).

Action on Personnel Must Take Place in Open Session and Be Recorded in Minutes

A public body may hold a closed meeting for certain exemptions enumerated in OMA. An evaluation of the superintendent falls under the limited personnel matters exception in OMA, which is defined as “the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee[.]” Section 10-15-1(H)(2) (emphasis added). This exception allows for closed meetings only for the discussion of personnel matters – any action on personnel matters must be taken in public.

The statute explicitly addresses this issue in the exception, which continues with: “provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings[.]” Id. The law requires that action by a public body take place in open session and meeting minutes must be maintained by the body to include “a record of any decisions and votes taken that show how each member voted.” Section 10-15-1(G). These requirements illustrate the state’s policy on open meetings, “that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Section 10-15-1(A).

1) **Action Taken Against the Superintendent**

The Board held a closed meeting on January 19, 2015, to continue the evaluation of Superintendent Ron Marquez and discuss the superintendent’s contract. A decision was made by the Board during the closed meeting and, as stated in the March 10 response letter to our office, the Board reached a consensus and made a decision together to have the Board president, on behalf of the Board, place the superintendent on administrative leave. The Board’s discussion and deliberations concerning the evaluation of the superintendent are not subject to the open meeting requirements of OMA and may be discussed in closed session. It is also established under OMA that any “final action” by the Board concerning the position of the superintendent must be taken during an open meeting.

The Board’s response insinuates that placing the superintendent on leave was temporary and therefore not a “final” action subject to open meeting requirements, and stated that “placement of our only employee on administrative leave with pay is a temporary means prior to employment action being decided.” Authority to take action on personnel matters concerning the superintendent is vested with the Board, as the Board acknowledged in its May 29 response letter. See NMSA 1978, § 22-5-4 (2005) (statute granting local school boards powers and duties, including employment of a district superintendent). The Board reasoned that “[p]lacing our only employee on paid administrative leave is not an action that is required to be taken in an open

public meeting as it is a personnel matter.” Board Response (March 10, 2015). Both of these approaches are problematic.

First, it is clearly established that actions by the public body regarding personnel must be taken during open session. The Board’s reasoning that the personnel matters exception in OMA allows for such action is counterintuitive to legislative intent and the mandate under OMA requiring that “the conduct of business by vote shall not be conducted in closed meetings.” Section 10-15-1(A). This requirement is reiterated again within the law’s limited personnel matters exception, which explicitly states that the provision “is not to be construed as to exempt final actions on personnel from being taken at open public meetings[.]” Section 10-15-1(H)(2).

Second, defining the term “final action” in the OMA exception to mean only the most serious or ultimate action (presumably final termination in this specific case) could lead to unreasonable, if not absurd, results. See generally Kleinberg v. Board of Educ. Of Albuquerque Public Schools, 1988-NMCA-014, 751 P.2d 722. Placing the superintendent on indefinite administrative leave is not insignificant. See Board Notification Letter to Ron Marquez (Jan. 20, 2015) (notification provided to the superintendent stated the Board was placing him on leave until further notice and instructed him to immediately return all school property, not contact any district employees, and to remain off district property). Presuming that any personnel action short of ultimate termination is not a “final action” could lead to seemingly limitless ways for a public body to decide personnel matters or take other board action outside of open meetings. The superintendent can only be placed on administrative leave by a formal action of the Board, and by the Board alone. We find that executing the Board’s authority in an enforceable decision to place the superintendent on leave is a “final action” under OMA. See, e.g., Kanahele v. Maui County Council, 307 P.3d 1174, 1204 (Haw. 2013) (finding that “final action” should be defined by its plain mean to mean “the final act required to carry out the board’s authority on a matter”).

Although discussion regarding evaluation of the superintendent may take place in closed executive session, the decision to place him on administrative leave is a formal and final action by the Board that must take place in open session with votes recorded in the minutes. The Board’s action is a clear violation of OMA Section 10-15-1(A). Taking action without minutes as record of the decision and of votes taken by each Board member is a violation of OMA Section 10-15-1(G). Additionally, the next open meeting after the January 19 closed meeting did not include any statement in the minutes regarding the closed session, which is a violation of OMA Section 10-15-1(J).

2) Appointment of Acting Superintendent George Perea

Mr. George Perea assumed the position of acting superintendent on January 20, 2015, one day after the Board placed the prior superintendent, Ron Marquez, on administrative leave. Although no public action was taken on January 19 to appoint Mr. Perea, the power to appoint a superintendent rested only with the Board. There is no record of a vote regarding Mr. Perea’s appointment, as the January 19 meeting was a separate closed meeting without minutes, and

there is no record of any other meeting at which the Board took action related to the appointment of Mr. Perea as acting superintendent. The Board stated that it relied on a chain of command for Mr. Perea to assume the position. The chain of command memo provided indicated that the chain of command would be followed in “case of an emergency situation in the district.”

Whether Board action placing the superintendent on administrative leave is an “emergency situation” intended in the chain of command memo is dubious. It is probable that the chain of command is intended for situations where the superintendent is out of reach, incapacitated, or otherwise unavailable during a time in which emergency requires immediate leadership or action. The district’s chain of command appears to be a hierarchy or leadership structure that is implemented automatically, without Board action, in cases of personnel absences. In this case, Mr. Perea was not simply filling in or assuming the position until the Board could make a decision.

It is apparent based on the responses from the Board that the appointment of Mr. Perea was the result of a deliberate decision made by the Board on January 19 in closed session. Board action to formally appoint Mr. Perea was not taken during a public meeting or recorded in any meeting minutes. The Board’s January 19 appointment of Mr. Perea violated OMA Sections 10-15-1(A) and (G).

3) Appointment of Acting Superintendent Jennifer Brown

Mr. Perea was subsequently replaced by Ms. Jennifer Brown, who was appointed as acting superintendent during the executive session portion of the regular Board meeting on February 10, effective February 11, 2015. The Board indicated in its March 10 response that it was notified that Mr. Perea did not possess the appropriate licensure to hold the position of superintendent. Notice for the February 10 meeting did not reference appointment or consideration of the acting superintendent and an agenda item for closed executive session was only given a vague description of “personnel matters.” Records show that the Board entered into executive session on February 10, but the meeting minutes do not include any statement regarding the limited nature of the matters discussed and there is no record of any action taken by the Board related to personnel after returning from closed session.

There is clear evidence that the Board appointed Ms. Brown on February 10. Ms. Brown emailed district faculty and staff on February 11, stating that she had been “asked by [the] board to serve the district as Acting Superintendent for the next several weeks.” The Board acknowledged in its May 29 response that “Ms. Brown was appointed on February 10.”

There are several issues that raise concern with the February 10 meeting. The Board appointed Ms. Brown on February 10, but the decision was not made in public when it returned to open session as required by OMA Section 10-15-1(A). Although the Board admits that Ms. Brown was appointed on February 10, there is no record of the action or votes in the minutes from that meeting as required by OMA Section 10-15-1(G). Although it could be argued that Ms.

Brown was simply serving as superintendent pursuant to the chain of command pending formal action by the Board, it was made clear by the Board's responses and Ms. Brown's February 11 email that her appointment was official and that the Board had made the decision. In explaining the action, the Board stated in its response that "[p]lacing the appointment of Jennifer Brown as acting superintendent on the agenda could not occur in time for the February 10 Board agenda[.]" and that the "Board took appropriate public action at the February 24, 2015 Board meeting[.]"

There is no legal exception that permits a public body to forgo requirements of OMA and take formal action outside a public meeting as the Board did when appointing Ms. Brown as acting superintendent during closed session on February 10. Under the circumstances, the Board should have called a special meeting with notice and agenda provided at least seventy-two hours' prior to a public vote on their decision.

The Board's February 24 meeting agenda began with an executive session to "review/discuss personnel matters" before the rest of the business agenda. The minutes do not provide further detail or statement regarding the limited nature of the closed session as required by Section 10-15-1(F) and (J). However, the public agenda included an item labeled as "Consideration to Appoint Acting Superintendent" and the Board ratified the appointment of Ms. Brown during the public meeting.

The Board was correct to add the appointment of the superintendent as an agenda item for its February 24 meeting in order to ratify the invalid action made two weeks prior and rectify the OMA violations from the February 10 meeting. Because the Board took this remedial action we consider the OMA violations cured.

However, both the February 10 and 24 open meetings included executive sessions that failed to comply with OMA requirements. Agenda items listed merely as "personnel matters" in both meetings are overly vague and fail to provide adequate notice, a violation of OMA Section 10-15-1(F). The Board also failed to include a statement regarding the limited nature of the closed session in of the meetings' minutes, a violation of OMA Section 10-15-1(J).

Further Considerations

It is important the Board take action to address the violations found by our office in order to ensure future compliance with state law. Reasonable notice must be provided in advance of all meetings and include an agenda or information on how to obtain an agenda with specific items of all business, including reasonably specific descriptions for agenda items potentially exempt from open meeting requirements. As already discussed, our office finds that additional language beyond vague descriptions such as "limited personnel matters" is needed to comply with notice and agenda requirements of OMA Section 10-15-1(F).

To illustrate, sufficient notice might include such description as "limited personnel matters – performance evaluation of superintendent". Additional examples and information can

be found in the OMA Compliance Guide published by our office. State law allows for such closed session exceptions to the open meeting requirement but reasonable notice must still be provided of the matters to be discussed in closed session. There is a distinguishable balance between preserving confidentiality and maintaining necessary transparency while conducting public business. Charged with protecting public confidence, the Board must recognize and work to maintain this important balance.

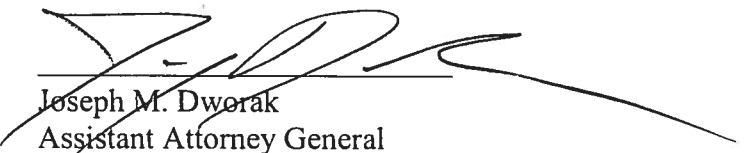
Our analysis of the Board's procedures for calling closed meetings and entering into closed sessions during open meetings is primarily based on the Board's recorded minutes. As such, meeting minutes are extremely important in reviewing whether a public body has complied with OMA. Because of the sensitivity of and importance in maintaining public trust, our office strongly encourages the Board review and strictly follow OMA's explicit procedures for entering into and returning from closed session. The Board should also document in its meeting minutes compliance of each OMA requirement in order to help avoid future complaints and violations. To rectify the inadequate minutes required by Section 10-15-1(J) concerning closed sessions, the Board should add language that describes the limited nature of each closed session and re-approve the amended minutes during an open meeting.

Consequences for failure to comply with these laws can be serious, and legal action can be taken to enforce OMA. See § 10-15-3. A judicial finding of a violation may result in a court order, costs, and reasonable attorney fees paid by the public body. A criminal proceeding can result in additional penalties, including a misdemeanor with a fine of up to five hundred dollars (\$500) per offense. See § 10-15-4.

For more information about OMA, please see the enclosed Open Meetings Act Compliance Guide, also available on our website at: www.nmag.gov. If you have questions about the specific matters addressed in this determination or the Open Meetings Act in general, you may reach me directly at jdworak@nmag.gov or contact the Open Government Division of the Office of the Attorney General at (505) 827-6070.

Thank you for your prompt attention to this important matter.

Sincerely,



Joseph M. Dworak
Assistant Attorney General

Enc: OMA Compliance Guide
Cc: Ms. Julia Dendinger, w/o enclosure