



STATE OF OKLAHOMA

WORKERS' COMPENSATION COMMISSION

MINUTES

of the

WORKERS' COMPENSATION COMMISSION

FOR THE STATE OF OKLAHOMA

for the

August 6, 2014

Special Public Meeting

August 6, 2014

MINUTES OF THE MEETING OF THE WORKERS' COMPENSATION COMMISSION
FOR THE STATE OF OKLAHOMA, AUGUST 6, 2014

NOTICE OF THIS MEETING WAS FILED WITH THE SECRETARY OF STATE ON THURSDAY, JULY 31, 2014.

The members of the Workers' Compensation Commission for the state of Oklahoma met in the Court En Banc, Denver Davison Building, 1915 N. Stiles Ave., Oklahoma City, Oklahoma, on August 6, 2014.

Members present: Troy Wilson – Chairman, Robert Gilliland, and Denise Engle.

Chairman Wilson expressed appreciation for those in attendance and announced the agenda has been posted for this meeting. The Chairman tabled agenda item 5. *Approval of Minutes from Regular Meeting of July 17, 2014*, per the advice of the Attorney General's office.

After the roll was taken, the Chairman announced the presence of a quorum and affirmed that all documents had been filed. The meeting was called to order at approximately 9:00 a.m.

Per the Attorney General's request, the only item on the agenda for this meeting was:

Attorney General's Review and Advice Regarding the Workers' Compensation Commission's Compliance with the Oklahoma Open Meeting Act and Remedial Measure under the Act relating to: (1) meeting with vendors; (2) discussion of personnel matters and budget in executive session and required agenda language; and (3) termination of employees.

This report is identified as Exhibit A and is included as a part of these minutes.

Adjournment

Chairman Wilson announced that the next Regular Public Meeting of the Commission will be Thursday, August 21, 2014 at 1:30 p.m. in Oklahoma City and the meeting was adjourned.

**ATTORNEY GENERAL'S REVIEW AND
ACTION PLAN TO WORKERS' COMPENSATION COMMISSION
ON APPLICATION OF THE OPEN MEETING ACT AND
REMEDIAL MEASURES UNDER THE ACT RELATING TO:**

- meeting with vendors
- discussion of personnel matters and budget
in executive session and required agenda language
- termination of employees

Introduction

The Attorney General's office has reviewed agendas and minutes of the meetings of the Commission for the time period of November 8, 2013, through July 17, 2014, to provide advice to the Commission related to application of the Oklahoma Open Meeting Act, 25 O.S.2011, §§ 301-314, in the three specific areas stated above. This report will discuss the law with regard to these three areas as well as remedial actions to be taken. Advice given on these three areas also applies to the applicability of the Open Meeting Act to the ongoing work of the Commission.

**The Open Meeting Act was Enacted for the Public's Benefit and Should be Liberally
Construed in Favor of the Public**

The public policy of the Oklahoma Open Meeting Act is to "encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems." 25 O.S.2011, § 302. Because the Open Meeting Act was enacted for the public's benefit, it is to be construed liberally in favor of the public.

With this recognition in mind, we advise the Commission on the best practices for going forward that allow the Commission to operate effectively while facilitating the public's right to know and maintaining governmental transparency. Advice on specific remedial action is offered to cure any invalid actions to avoid costly and time consuming litigation and to allow the Commission to continue its mission of efficiently handling claims of injured Oklahoma workers.

Some general legal principles emerge from the specific fact situations that have arisen. Among those are these:

- The Open Records Act has a valid public purpose and every effort must be made to comply with the Act for the proper functioning of government.
- Executive sessions are the exception; not the rule. The language of the Act, "No public body shall hold executive sessions unless otherwise specifically provided in this section", reinforces this principle. See 25 O.S.2011, § 307(A). No agency should include executive session items on its agenda as a matter of course and executive sessions are permitted only for the specific purpose set forth in the Act and listed on the agenda. **No discussion shall be had beyond the purpose for which the executive session was called.**
- Notice and agenda provisions are at the very heart of the Act and the proper wording of meeting agendas is crucial to compliance with the Act. Agendas are the means by which the public knows what is being discussed, whether in open session or in executive session, and should provide the public with sufficient notice to determine what matters are to be considered and what action may be taken by a public body.
- The key to complying with the Act is proper understanding of its provisions. The Attorney General's office stands willing to provide additional training on the Open Meeting Act and to provide specific training to key personnel on the issues identified by this review of the Commission's agendas and meetings.

I.

The Applicability of the Open Meeting Act to meetings with vendors when considering discrete proposals

Under the Open Meeting Act, meetings of public bodies are to be open to the public. 25 O.S.2011, § 303. A meeting is defined as:

the conduct of business of a public body by a majority of its members being personally together or, as authorized by Section 307.1 of this title, together pursuant to a video conference. Meeting shall not include informal gatherings of a majority of the members of the public body when no business of the public

body is discussed.

25 O.S.2011, § 304(2) (Emphasis added): This definition contains three elements: (1) a majority of a public body; (2) personally together or together via teleconference; and (3) conducting the business of the public body.

The Attorney General has issued a number of opinions related to the “conduct of business” by public bodies and have found it to be broader than just voting or decisionmaking. A.G. Opin. 79-331, 77-285. In A.G. Opin. 2012-24, we considered a number of instances in which the majority of members of a public body attend functions together such as meetings conducted by the Legislature, other governmental agencies, or private entities in which matters related to the public body are discussed. **We determined that the distinguishing factor was whether the members of the body were “considering discrete proposals or specific matters within the [body’s] jurisdiction.”**

The Act contains specific provisions authorizing a public body to discuss information technology in executive session but only if the discussion specifically identifies one of the seven listed authorizations in Section 307 (B)(9)(e), or the investigation of an act of terrorism that has already been committed. The authorization for executive session applies to information technology if the discussion specifically identifies matters such as security monitoring, specific location or placement of systems and system identification numbers, names, or connecting circuits; not contracts for services.

The issue:

It has come to our attention that the Commission, with all three members being present, met with a vendor to discuss a potential contract for services. A proposal had been completed for an electronic document filing system and a potential vendor had been selected by an evaluation committee. The three Commissioners met with the vendor to allow the vendor to make a presentation. The Commission was considering purchasing the system for its use. Thus, this was a specific, discrete matter within the Commission’s jurisdiction and as such, the discussion should have taken place in a public meeting for which an agenda had been posted. Advice given to the contrary was incorrect.

Under the above definition of “meeting”, this constitutes a meeting for which notice and the posting of an agenda is required as it is the conduct of business of the public body.

Remedial action:

Under the Open Meeting Act, any action taken in wilful violation of the Act is invalid. 25 O.S.2011, § 313.

The Commission did not enter into a contract with the potential vendor. Thus, no remedial action is required.

If other gatherings of a similar nature have been held, the Commission should seek legal counsel from the Attorney General on whether the gatherings constituted a meeting under the Act. If any action was taken in violation of the Act, the Commission must rescind that action and begin the process anew by posting as an agenda item and proceeding in a public meeting.

II.

Matters Appropriate for Discussion During Executive Session and Agenda Language for Executive Session

Under the Open Meeting Act, executive session may be held only for limited purposes. Those purposes are articulated at 25 O.S.2011, § 307(B). The Act contains specific requirements for agendas for executive sessions. If a public body chooses to conduct an executive session, the agenda shall:

- a. contain sufficient information for the public to ascertain that an executive session will be proposed;
- b. identify the items of business and purposes of the executive session; and
- c. state specifically the provision of Section 307 of this title authorizing the executive session.

25 O.S.2011, § 311. The public body must strictly comply with certain procedures to go into executive session. Those procedures require (1) that the proposed executive session provision under which the meeting is authorized be properly noted on the agenda; (2) that the executive session be authorized by a majority vote of quorum of the members present; and (3) that any vote or action of any item of business considered be taken in public with the vote of each member publicly cast and recorded. 25 O.S.2011, § 307(E).

The specific executive session purpose applicable to recent conduct by the Commission is articulated in Section 307(B)(1) which states that executive session will be permitted for the purpose of :

B(1) Discussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public office or employee.

(Emphasis added). The Attorney General has had occasion to interpret this provision,

specifically the language “any individual salaried public officer or employee”, in a number of Attorney General Opinions. With regard to the discussion of employment matters, we have specifically held:

An executive session authorized for the purpose of discussing “the employment, hiring, appointment, promotion, demotion, disciplining, or resignation of any individual salaried public office or employee” applies to discussing a particular current or prospective public officer or employee and does not permit the discussion of a job opening when no particular individual is to be discussed.

A.G. Opin. 06-17 (emphasis added). The Attorney General held earlier, in A.G. Opin. 97-61, that where personnel matters are to be discussed, the position must be identified by either the position or the individual salaried employee who is the subject of the discussion. We noted, “The Act does not specify that a person must be identified by name, however, in light of case law, it is evident that identification by name is necessary unless the position held by the person is so unique as to allow adequate identification.” If the action is a hiring, the agenda need only identify the position.

The Issues:

Our view of the Commission’s past agendas shows that most agenda items for discussing personnel matters in executive session do not meet the requirements of the Act. Two primary deficiencies have been found. First, the language of the agenda is overly broad and not in compliance with the requirements of the Act. Secondly, the Commission has engaged in discussions not appropriate for executive session, either because the discussions are beyond the purpose stated in the agenda or are not for purposes authorized by the Act.

Personnel matters

The agenda of December 11, 2013 provides at ¶ 11:

Pursuant to 25 O.S. § 307(B)(1), discussion and possible vote to enter Executive Session to address the hiring of specific employees, **including but not limited to** consideration of the following positions: Executive Director, Executive Secretary/Assistant, Administrative Law Judges.

(Emphasis added). The inclusion of the “including but not limited to” language violates the Open Meeting Act as it authorizes the hiring of employees not listed on the agenda. Under this agenda language, the Commission could consider the hiring of any employee for any position. This does not give the public sufficient information to know what is to be discussed in executive session.

The same type of flaw occurs in the agendas of December 17, 2013, January 16, 2014, February 5, 2014, February 20, 2014, March 20, 2014, April 2, 2014, April 17, 2014, May 15, 2014 and May 30, 2014.

Budget Matters

Furthermore, the Open Meeting Act does not authorize the discussion of budget items during executive sessions. At the meeting held December 17, 2013, the Commission went into executive session pursuant to a broad agenda that authorized the discussion of "personnel, staffing needs, and related budget priorities." When the Commission reconvened in open session, the Chairman called for a vote on action taken in executive session. Commissioner Gilliland moved to approve the Oklahoma Workers' Compensation Commission budget for FY 2015 "as amended in earlier discussions." Votes were taken and the motion passed.

A discussion of the FY 2015 budget should have been placed on the agenda and discussed in open session. There is no authorization under Section 307 to discuss budget matters in executive session and a discussion of the FY 2015 budget in this situation during executive session violated the Act.

Discussion of unauthorized matters

A preliminary review of the executive session minutes shows that the Commission's discussions, at times, included discussion of matters that (1) did not come within one of the enumerated authorizations for executive session discussion set forth in Section 307(B); and/or (2) went beyond the specific purpose of the posted executive session agenda.

Remedial action:

Under 25 O.S.2011, § 313, any action taken in meetings where executive sessions were not properly held or where matters were improperly discussed in executive session in violation of the Act are invalid.

Matters involving the FY 2015 budget may be moot. See *Rogers v. Excise Bd. of Greer County*, 1984 OK 95, ¶ 15 (because of the lapse of the fiscal year, the issue of whether the budget should be adjusted when a meeting was held to finalize the budget in violation of Open Meeting Act was moot). If any action was taken on the FY 2015 budget is determined, after consultation with counsel, not to be moot and needs the attention of the Commission, the Commission should post the matter on the next agenda and proceed to consider the matters anew in open session. Courts have considered whether action taken in violation of the Open Meeting Act may be cured by subsequent ratification and have generally held that more than simple ratification is required. For instance, in *In the Matter of the Appeal of the Order Declaring Annexation Dated June 28, 1978*, 1981 OK CIV APP 1270, the Court, upon finding that actions taken in violation of

the Act were invalid, found the effect would be to require the violating public body to start over, this time in compliance with the Act. Full reevaluation is required to comply with the Act.

In addition, another remedial action required under Section 307 is that the minutes and other records of the executive session, including tape recordings, are to be immediately made public. Section 307 specifically states that a wilful violation of the Act shall “**cause the minutes and all other records of the executive session, including tape recordings, to be immediately made public.**” The Commission maintains minutes of the executive sessions, as is required by law. See *Berry v. Bd. of Governors of Registered Dentists*, 1980 OK 45, ¶ 12 (finding that requirements that minutes be kept applies to executive sessions).

Because the Commission violated the Act by discussing the FY 2015 budget in executive session, the minutes of that meeting shall be released to the public pursuant to the Oklahoma Open Records Act.

When discussions were had on matters that were appropriate for executive session and were properly enumerated in the agenda, the minutes related to the discussion of those matters need not be made public. As stated above, however, our review has revealed that, at times, discussions were held on matters that exceeded the purpose stated in the agenda. **The minutes of any discussion of matters beyond those properly enumerated and appropriate for executive session must be made available to the public when requested pursuant to the Oklahoma Open Records Act.** For example, if an agenda listed the hiring, sharing, and/or transfer of positions 1, 2 and 3 or the specific employees holding those positions, preceded by a phrase such as “including but not limited to”, the minutes related to discussions of positions 1, 2, and 3 need not be made public. If, however, the Commission discussed positions 4, 5, and 6, minutes relating to discussions of those positions would be required to be made public, when requested pursuant to the Open Records Act.

If the agenda contains surplus language such as the “including but not limited to” language discussed above and no discussion is had beyond the agenda items that are proper for discussion, the surplus language does not require the release of the minutes.

We are cognizant that the statute speaks with regard to remedies for acts taken in wilful violation of the executive session portion of the Open Meeting Act. 25 O.S.2011, § 307. Courts have not been consistent in interpreting the term “wilful” and we, therefore, offer the above advice out of an abundance of caution, regardless of whether any wilful violation has occurred. See *Rogers v. Excise Bd. of Greer County*, 1984 OK 95.

By advising the Commission to release the minutes, or portions of the minutes, we make no determination that the Commission willfully violated the Act and recognize that certain acts may not have been wilful. We offer this advice out of an abundance of caution to aid the Commission in moving toward a resolution of the pending issues so that the Commission may

resume its statutory functions.

III.

Termination of Commission Employees

By statute, the Commission is empowered to “appoint as many persons as may be necessary to be administrative law judges and in addition may appoint such examiners, investigators, medical examiners, clerks, and other employees as it deems necessary to effectuate the provisions of [the] Act.” 85A O.S. 2011, § 22(B)(1). The Chair of the Commission, on the other hand, has the power and authority to “employ administrative staff for the Commission...” 85A O.S. 2011, § 19(E)(2).

These provisions, when read together, are ambiguous and are susceptible to more than one interpretation. For example, a court could find that the provision dealing with the Commission’s authority is simply a broad grant of authority giving the Commission the power to appoint any and all necessary employees, with the provision dealing with the Chair’s authority to hire administrative staff as a means to exercise that authority.

Conversely, a court could construe the provisions as requiring that the enumerated positions be appointed by the Commission, and additionally that any position in addition to those enumerated positions actually appointed by the Commission must be terminated by the Commission as the appointing authority.

The provision dealing with the Chair’s power to employ administrative staff could be interpreted to permit the Chair to hire and fire any employee who would fall within the broad definition of “administrative staff”, including those specifically enumerated in the statute dealing with the Commissions’s broad authority.

Because legal advice is the furnishing of a counsel’s best educated judgement of how court may rule next time – the giving of legal advice is not an exact science. Thus, in situations such as this, there is no guarantee that any particular advice regarding interpretation of these statutes given by counsel would be adopted by a court.

If the terminations required Commission action, that action should have taken place in an open meeting. A public body cannot transact business outside a public meeting. As the Commission is a public body, the conducting of business by the Commission is to take place in a public meeting. As discussed above, a public body may hold executive sessions to discuss the employment of any individual employee. Actions taken must be taken in open session.

The issue:

Sixteen specific employees, including various clerks, were terminated and there was no specific agenda items for executive session and no discussion of such terminations under the Open Meeting Act. There were two general agenda items that could have encompassed such discussion but the agendas were broadly worded and no action was taken on the agenda items. There was an agenda item on May 30, 2014, to "address personnel matters regarding specific employees, related to FY 2015 budget" and another on June 19, 2014, to "address employment of all Commission staff, including funding and assignments for fiscal year 2014-2015." The June 19, 2014, agenda items included the language, "Staff list - Page 2" and a listing of Commission staff was attached. No action was taken at either meeting to terminate any employees. There was no vote by the Commission in an open meeting to terminate these employees. Thus, if a court were to adopt an interpretation that would require the Commission to appoint and terminate all enumerated positions in Section 22 — even if the positions fell with the broad reading of "administrative staff" — terminations without Commission action would be ineffective.

Remedial action:

Because, as noted above, the statutes dealing with the appointing and terminating authority of the Chair and Commission are susceptible to various interpretations, out of an abundance of caution, we advise the Commission to begin the process of the termination of these sixteen positions. The action being considered as to each employee should be placed on the agenda, identifying each individual by name or position. If desired, the Commission is authorized to discuss such matters in executive session and the Commission must then return to open session to vote on whether the employees should be terminated. We further recommend this action be taken in conjunction with the Chair taking action to also terminate all employees, if such action has not been taken.

This remedial action will ensure that all terminations are effective and remove any claim that employees were discharged based on a misinterpretation of the statutes governing appointment and employment by the Commission or Chair.

Conclusion

This review of the Commission's past agendas and minutes of its meetings does not constitute an exhaustive review of all potential issues. The discussion of the three specific issues is not intended to be a full discussion of all issues that may have arisen, or may subsequently arise, under the Open Meeting Act but is intended to address the most pressing issues. The Attorney General's office will continue to provide advice to the Commission on these, and other matters.

As a matter of general practice, the Commission should seek the advice of Senior Assistant Neal

Leader during the interim period while Assistant Attorney General Jan Preslar is unavailable. Mr. Leader will offer specific advice relating to compliance with the Open Meeting Act and will review all prospective agendas.