

E-mail
Delivery
Available
Call 909
579 7051
for details

The San Bernardino County

Sentinel

News of Note
from Around the
Largest County
in the Lower
48 States

Friday, March 25, 2011

10808 Foothill Blvd. 160-446 Rancho Cucamonga, CA 91730

(909) 579-7051

Probe Finds Bighorn Water Board Violated Brown Act

LANDERS—Members of the Bighorn-Desert View Water Agency's board of directors violated California's open public meeting law last year when they voted to increase the district's executive director's salary and benefits without advertising the vote prior to the meeting, the district attorney's office has concluded.

On April 27, 2010, board president Terry Burkhart, board vice president J. Larry Coulombe, and board member Michael McBride voted, with board members David Larson and Martha Oswald dissenting, to up general manager Marina West's compensation by six percent to \$106,000 per year. Burkhart, Coulombe and Larson voted, with McBride and Oswald dissenting to provide West with an additional 40 hours of administrative leave. The board voted 4-1, with Oswald dissenting, to grant West one extra week of vacation to give her a total of three weeks per year and to provide West with an additional \$1,000 toward her education stipend.

Those actions were not included on the board's agenda for the April 27 meeting.

When he learned about the vote after the fact, Jim Harvey, a desert resident, wrote the district a letter alleging the Ralph M. Brown Act, California's open meeting law which requires that all governmental action voted upon by elected and appointed officials be done in an open forum that is previously noticed to the public, had been violated. According to Harvey, the board majority was attempting to confer on West a contract enhancement without triggering a negative response from the public. He called upon the district to cure the error.

In his letter, dated May 1, 2010, Harvey wrote,

"The discussions and actions taken by the board pertaining to Marina West's compensation during the April 27th regular board meet-

ing were not noticed on the agenda for that meeting. The agenda did not adequately describe this item of business, so as to alert interested members of the public to the full scope of the business to be considered. The agenda only contained an item of notification for a closed session public employee performance evaluation. The board is only allowed to evaluate the general manager's performance in closed session, not discuss or take action on compensation."

Harvey's letter continued, "Pursuant to Government Code Section 54960.1, I demand that the legislative body cure and correct the illegally taken action of amending the General manager's compensation on April 27th as follows: 1. Reversal of any action taken, with notice to all immediately affected persons. 2. Rescheduling of the matter to a future meeting 3. Adequate description of the matter on that meeting agenda, and 4. Commit to adequately describing the full topic of discussion for each agenda item in the future, and limiting the scope of business to be discussed or transacted to the agenda item as described."

The agency, which serves Johnson Valley, Flamingo Heights, Landers and a portion of Yucca Valley, entertained the notion of filing legal action against Harvey to recover costs for having to respond to his complaint, and then detailed the agency's attorney, Susan Trager, to issue a fact-finding letter relating to the issue.

On May 10, 2010 Trager responded in a letter to West. "We have found no statute requiring that the discussion about compensation be called out specifically in an agenda when the item is described as 'public employee performance evaluation.' Similarly, no case law requires the noticing of a separate item," Trager wrote, continuing, "As to specific salaries, it was held [in an earlier matter]:

...[The question of ...an] individual's salary is an integral part of an evaluation of that individual's past performance and the terms or conditions of his future employment. Such discussions, dealing solely with an evaluation of an employee's performance, may properly be conducted in executive session."

Trager went on to assert, "The agency has fully complied with the Brown Act's policy of transparency, conducted its discussions and deliberations in open session consistent with the notice of the topic being discussed, employee performance evaluation, and the notice is sufficient so that any reasonable and practical person would understand that the agenda item necessarily included a discussion about compensation. As there was no Brown Act violation on the part of the agency's board as alleged by the complainant, the demands that the legislative body cure and correct are not warranted."

Undaunted, Harvey persisted, prodding the district attorney's office to look into the matter. While the district attorney's office was making its examination, Trager resigned as counsel to the agency. Replacing her was the Irvine-based firm of Aleshire & Wynder.

During its probing of the attendant issues, the district attorney's office corresponded with Wesley A. Miliband, an attorney with Aleshire & Wynder. Miliband, essentially, had sought to reassert Trager's contentions regarding the April 27 vote.

On March 16, deputy district attorney Michael Abney, of the prosecutor's office's public integrity unit, wrote Miliband, "[I]t is our opinion that the Bighorn Desert View Water Agency's April 27, 2010 votes on Ms. West's compensation violated the Brown Act. It is our understanding that the board of directors' April 27, 2010 regular meeting agenda included a closed session item stating:

'PUBLIC EMPLOYEE PERFORMANCE EVALUATION (Government Code section 54957(b)(1)) . ' No item regarding Ms. West's compensation was mentioned on the agenda for either the closed or open sessions. Nonetheless, during the open session of the meeting, the board of directors announced that Ms. West received a favorable evaluation during the closed session and the board then voted on four separate items to increase Ms. West's compensation.'

Abney's letter continues, "Furthermore, based upon my conversation with Ms. Trager, it is our understanding that it was Ms. West who drafted the agenda for the meeting - the very agenda that failed to give notice that increases in her compensation would be considered. It is our further understanding that Mr. Harvey promptly pointed out this violation of the Brown Act in his letter of May 1, 2010 and, pursuant to Government Code §54960.1, demanded that the board take action to correct its violation of the Brown Act.

Finally, it is our understanding that the board of directors did not respond to Mr. Harvey's demand. Instead, it appears that the board relied upon Ms. Trager's May 10, 2010 letter which opined that the board's actions did not violate the Brown Act."

Abney said the board had, contrary to Trager's assertions, violated the state's open meeting law.

"For the reasons set forth below, we disagree with the conclusions in Ms. Trager's May 10, 2010 letter," Abney wrote. "In Ms. Trager's letter of May 10, 2010, Ms. Trager acknowledged that 'discussions about the salaries of non-elected officers must be discussed in open session.' The letter failed to acknowledge, however, that each item that is to be discussed in open session must also be placed on the open session agenda pursuant to Government Code §54954.2(a)."

Abney said the district attorney's office would not pursue criminal charges against the board at this time, but chided the agency and Miliband for continuing to maintain that the agency had complied with the law.

"In your letter of March 10, 2011, you stated that a violation of the Brown Act has not been established and the board is not admitting a violation of the Brown Act. However, you also represent that in the future the board will provide separate notice on the open session agenda when employee compensation is to be considered even if notice of consideration of an employee's evaluation is also placed on the same agenda for closed session."

Abney went on to state, "Based upon your representation that the board will not repeat its above-described actions, we will consider this matter closed. We note, however, that for the reasons discussed above, we disagree with your statement that a violation of the Brown Act has not been established. We believe the facts and law make clear that the board violated the Brown Act. While we are satisfied with a promise that similar violations will not occur in the future, we are disappointed that the board fails to acknowledge this violation."

Moreover, Abney wrote, this is not the first time Bighorn-Desert View has flaunted the Brown Act. "We further note that our office has previously opined that the Bighorn Desert View Water Agency violated the Brown Act," Abney wrote. "We understand that the current members of the board were not members of the board the last time we opined that the board violated the Brown Act. Nonetheless, given the board's failure to admit a violation now, we are concerned about the board's future compliance with the Brown Act. Given this concern, we recommend that the current board members obtain training on the re-

quirements of the Brown Act."

Harvey said he was heartened by the district attorney's finding, but felt stronger action was called for.

In his remarks to the *Sentinel*, Miliband stopped short of asserting his clients had not broken the law. "Without commenting on whether or not there was a violation of the Brown Act, the district attorney felt there was a violation but there was no filing by the people of the state of California against the board and there was no finding of guilt," Miliband said.

Furthermore, Miliband said, it would be inappropriate to assume that Trager's handling of the case, including her advice to the board to proceed with the vote without previous explicit public notice as well as the discrepancy between her findings that the board had not broken the law and the district attorney's determination that the board did violate the law, had anything to do with her resignation as agency counsel. "That had no relation to this item," Miliband said. "Susan Trager is a highly respected and professionally competent attorney."

While West and the agency board appear to have weathered the Brown Act firestorm only slightly worse for wear, the *Sentinel* has learned that a more serious legal issue is weighing upon the agency. The county grand jury, according to a source of demonstrable reliability, is looking into the agency's misuse of bond money, over \$200,000 of which has disappeared from what was supposed to be a sequestered account.