

MINUTES OF THE SPECIAL MEETING OF THE OPEN MEETINGS COMPLIANCE BOARD
January 29, 2013, at 10:50 a.m.
Office of the Attorney General
200 St. Paul Street
Baltimore, Maryland 21202

In attendance:

Board and Board staff:

Elizabeth L. Nilson, Esq., Board Chair
Courtney J. McKeldin, Board Member
Julio A. Morales, Esq., Board Member
Ann MacNeille, Board Counsel
Deborah P. Spence, Board Administrator

Others:

Eric C. Broussides, Esq., Carney, Kelehan, Bresler, Bennett and Scherr
Charlett Bundy, Esq., Washington Suburban Sanitary Commission
Jeffrey L. Darsie, Esq., Office of the Attorney General
Elena R. DiPietro, Esq., Office of the Baltimore City Solicitor
Tom Reynolds, Maryland Municipal League
Richard Taboteau, Office of the Attorney General

Call to order and welcoming remarks

Ms. Nilson called the meeting to order at 10:50 a.m. She explained that she called this special meeting of the Board in response to Delegate Morhaim's request that she ascertain the Board's position on the legislation that has now been introduced as HB 331. The Board will address that bill and 5 other legislative proposals today. Ms. Nilson said that there had been earlier signs of a proposal to give the Compliance Board the authority to impose fines, but that such a proposal had not been introduced. She expressed concerns about being authorized to penalize public bodies given the structure and limited powers of the Board, which is not an adjudicatory body. Ms. McKeldin concurred. Ms. Nilson advised the attendees that the length of the agenda and the need for the Board to address six bills might preclude the level of participation permitted at the Board's annual meetings, which the Board uses as an opportunity to hear thoughts from the public. Mr. Morales commented that the attendees could offer valuable perspectives. Ms. Nilson advised that comments from the attendees would probably have to be brief. Copies of the 6 bills were distributed to all.

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1. HB 331:

Ms. Nilson summarized the three changes the bill would effect, and the Board discussed each.

1. Under a new § 10-502.5(i)(3), a member of a public body found in violation by the Board would be required to announce the violation and orally summarize the opinion at the public meeting following the issuance of the opinion. A majority of the public body's members would be required to sign the opinion and return the signed copy to the Board. The announcement could not be made by counsel or another representative. Discussion ensued on whether the requirement that the announcement be made by a member, and not by counsel or staff, would preclude counsel and staff from explaining the opinion to the members, and it was agreed that the amendment would not have that effect. Ms. Nilson explained that the members of public bodies are not always told about the Board's opinions. The Board unanimously decided to support the proposed amendment.

2. An amended § 10-511 would authorize the circuit court, in an action filed under § 10-510, to levy a penalty against a public body in an amount "not to exceed \$1,000 for the first violation and \$10,000 for each subsequent violation" that occurs within three years of the first, if the public body willfully met with knowledge that the meeting violated the Act. The amendment would eliminate the \$100 maximum penalty against individual members. Ms. McKeldin expressed concern that the amounts were excessive. Mr. Morales stated that the fines were not mandatory and that the court could impose lesser fines, or none at all, in its discretion. Ms. Bundy expressed concerns about the ability of private citizens to bring actions in court. The Board tabled further discussion of the proposed amendment until its discussion of Delegate O'Donnell's and Delegate Bobo's proposals on the subject of penalties. In its later discussion, the Board supported the amendment, with two caveats. First, Ms. Nilson expressed concern about addressing the proposed legislation bill by bill, on a piecemeal basis, because the General Assembly's vote on one amendment might change the Board's view on another. Ms. McKeldin also expressed a wish that the proposals be consolidated into a unified measure because the outcome of the other legislative proposals on penalties might have an impact on the effectiveness of this one. Second, Mr. Brousaides pointed out that it is unclear whether the phrase "not to exceed" modifies both penalty amounts, or just the \$1,000 amount. The Board agreed to recommend that the language be clarified by changing the text to read "not to exceed \$1,000 for the first violation and not to exceed \$10,000" With those caveats, the Board unanimously supported this change.

3. § 10-502.5(j), which provides that the Board's written opinions may not be introduced in actions brought under § 10-510, would be repealed. Mr. Morales wondered how, if the provision were not repealed, a plaintiff would prove a "first violation" for

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purposes of the proposed amendment to § 10-511, under which the amount of the maximum penalty would increase for a public body which has violated the Act for the second time in three years. The Board discussed the courts' ability to assess the admissibility of the Board's opinions and unanimously decided to support the repeal of the provision.

2. HB 140:

Ms. Nilson summarized the two changes the bill would effect. Ms. McKeldin discussed the need for some consensus among the bill sponsors to coordinate the reforms in order to improve the clarity and rationality of the proposals.

First, the bill would require the board to include in the recommendations set forth in its annual report "any adjustment in the penalty for a violation [of the Act]." The Board unanimously decided that it has no objection to the provision and would be willing to include such recommendations.

Next, the bill would amend § 10-511 to add a section requiring the Office of the Attorney General, in collaboration with the Board, to "adopt regulations to establish a range" of penalties additional to the \$100 maximum penalty that may now be assessed against members of public bodies. Ms. Nilson and Ms. McKeldin stated that it should be made clear that the Compliance Board, as it is set up now, should not be the entity imposing penalties and that the discretion to impose penalties remains with the courts. The Board discussed § 10-511 again during its discussion of Delegate Bobo's proposed change [now HB 485] and decided at that time that it preferred the approach taken in HB 330: the imposition of a fine against the public body, not its members, in two "not to exceed" amounts. The Board therefore did not support this part of the bill.

3. HB 139:

Ms. Nilson summarized the changes the bill would effect. First, the bill would require the Board and the Office of the Attorney General to develop and offer an online training program. § 10-502.4 (d)(2). It was noted that the Office of the Attorney General has already developed such a program with the Institute of Governmental Service and Research at the University of Maryland, that future programs of that caliber would likely require funding, and that the Board is not funded. The Board unanimously supports the goal of educating members of public bodies on the requirements of the Act.

Next, the bill would require public bodies to designate employees, officers, or members to receive the online training and forward a list of those people to the Board. § 10-502.7. Those designees would be required to complete the training within 30 days of the designation and to complete annual online training. The bill does not require the

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Board to monitor compliance. The Board discussed its prior position on similar bills introduced in the 2011 and 2012 sessions. Mr. Reynolds wondered whether the training requirement could be met by attending one of the Open Meetings courses offered by the Academy for Excellence in Local Governance. Board counsel explained that those courses are core requirements in a certificate program. Ms. Bundy also expressed interest in the question and stated that the public bodies could submit comments on the type of training to be required.

The Board unanimously decided that it does not object to receiving lists of designees. The Board agreed that it would not be able to monitor compliance.

4. SB 230:

Ms. Nilson summarized the bill, which would add to the definition of a public body an entity created by a memorandum of understanding between the State Department of Education and a majority of the county boards of education. Ms. Nilson explained that the bill was likely introduced in response to the Board's determination in 2004 that the Public Secondary Schools Athletic Association was not a "public body" under the Act. Mr. Morales and Ms. McKeldin stated that the Board lacks current facts on the nature of the entity in question. Ms. Nilson expressed her view that the issue of which entities should be covered by the Act posed a question for the Legislature, not the Board. The Board unanimously decided to take no position.

5. HB 485:

Ms. Nilson explained that the bill had not been introduced yet and that staff had received the text shortly before the meeting. After the members read the bill, she summarized it. The bill would amend SG § 10-611. That section currently authorizes the imposition of a civil penalty of not more than \$100 against a member of a public body who "willfully participates in a meeting of the public body with knowledge that the meeting is being held in violation" of the Act. The amendment would instead authorize the imposition of the penalty against a member "who attends a meeting of the public body held in violation" of the Act. The bill would add a provision that a member would not be subject to the penalty if that member had made, or voted in favor of, a motion that would have prevented the violation. Ms. Bundy stated that members should bear liability for violations. The Board discussed the possibility that a member who mistakenly participated in a meeting in violation of the Act could be subject to the fine. Mr. Reynolds stated that members of small public bodies may not always have advice of counsel. Mr. Brousaides stated that members of public bodies are motivated by their wish to comply with the Act. He questioned whether the \$100 penalty provision was central to the enforcement of the Act. The Board members and others at the meeting expressed uncertainty as to whether a circuit court had ever assessed the penalty. Ms. Nilson stated

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that the Board does not have that power. Mr. Morales stated his view that the current penalty provision provides more protection to a member of a public body who mistakenly participates in a meeting that violates the Act. The Board unanimously decided not to support the deletion of the “willful participation” and “knowledge” standards from the section.

The Board also discussed the penalty provisions in HB 331. Mr. Morales stated that members of public bodies should work as a team and that the responsibility for complying with the Act should be a group responsibility. Ms. Nilson instructed counsel to include on the agenda of the 2013 annual meeting an item for discussion of ways in which to emphasize each member’s responsibility. Ms. Nilson expressed her view that public bodies were motivated to comply with the Act by the possibility that a court would void actions taken in a meeting held in violation of the Act. She noted that the Act excludes certain actions from that remedy and wondered whether the repeal of those exclusions would provide a means of getting the attention of the public bodies that take those actions. The Board unanimously decided to support the imposition of penalties against public bodies, not individual members.

6. HB 484:

Ms. Nilson explained that this bill also had not been introduced yet and that the Board was seeing it for the first time. She summarized the bill, which would authorize the Attorney General or a State’s Attorney, on that official’s own initiative or on receipt of a verified complaint from a member of the public that a public body “has failed or may fail to comply” with certain provisions of the Act, to sue a public body in the appropriate circuit court to seek one of the remedies already set forth in § 10-610. Board members and attendees wondered what the bill meant by a “verified” complaint, and it was surmised that it meant an affidavit. Board members then discussed ramifications of the proposal on its role as an advisory body and on whether a claim that a public body “may” violate the Act could be presented to the appropriate official and litigated in time to prevent the violation. Ms. McKeldin stated reservations about the bill’s remedy for violations that had not yet occurred and said she was neutral on the other provisions. Counsel explained the current procedures for the Board’s action on prospective complaints. Mr. Brousaides wondered whether members of the public would continue to use the Compliance Board complaint procedures. Mr. Morales stated that the amendment would result in a far-reaching change in the structure and enforcement of the Act and make a radical change to the operation of the Act and the roles of the Attorney General and the Board. He stated that the proposal might work if it were part of a restructuring done from the beginning and that the Board needed more time to address the question. Ms. Nilson said that maybe the Board should be reconstituted as, or replaced by, an adjudicatory board with staff and paid members with fact-finding powers so as not to

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overburden the State's Attorneys, the Attorney General's Office, and the courts. She stated that the bill had too many unknown consequences. The Board agreed with the goal of the proposal to provide an enforcement mechanism for members of the public without their own lawyers but questioned the efficacy of this proposal. The Board unanimously decided that it would not take a position on the bill without further study and clarification and an opportunity for further thought.

Closing remarks and adjournment

Ms. Nilson thanked the group for the discussion and adjourned the meeting at 12:30 p.m.