

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



October 30, 2017

VIA HAND DELIVERY

The Honorable Yvonne Williams
Associate Judge, Superior Court
500 Indiana Avenue, NW
Chambers 1440
Washington, DC 20001

VIA ELECTRONIC MAIL

The Honorable Eugene Adams
Chief Judge
Office of Administrative Hearings
One Judiciary Square
441 4th Street, NW, Suite 450N
Washington, DC 20001
eugene.adams@dc.gov

RE: #OOG-0003_7.03.17 OMA Complaint_COST_AO

Dear Judge Williams and Judge Adams:

The Director of the Office of Open Government (OOG), pursuant to the authority set forth in § 503(a)(4) of the District of Columbia Administrative Procedure Act, effective March 31, 2011, (D.C. Law 18-350); D.C. Official Code § 2-593 *et seq.* (2017), and 3 DCMR § 10400 *et seq.* (2017), has investigated an Open Meetings Act (OMA) (D.C. Official Code § 2-571 *et seq.* (2017)) complaint regarding the June 29, 2017, meeting of the District of Columbia Commission on Selection and Tenure of Administrative Law Judges (COST). Specifically, the complaint, **#OOG-0003_7.03.17**, alleges the COST failed to properly notice a June 29, 2017, meeting in violation of D.C. Official Code § 2-576(1)(2)(A)(B). The complaint is properly filed with OOG, as this agency has previously determined the COST is a public body that must abide by the requirements of the OMA.¹

In the course of its investigation of the alleged OMA violations pertaining to the June 29, 2017, meeting of the COST, the OOG found it necessary to undertake an exhaustive review of the legislative history of the COST; the term appointments of all members of the COST; and all COST records pertaining to meetings occurring between January 1, 2014 to July 30, 2017. As the Office of Administrative Hearings (OAH) is the repository for many of the records pertaining to the COST, the OOG during the course of its investigation, submitted voluminous requests to the general counsel for the OAH, and found Chief Administrative Law Judge (ALJ) Eugene Adams, General Counsel Vanessa Natale, and Deputy General Counsel, Louis Neal to be eminently responsive and candid. The OOG thanks them for their cooperation, and recognizes that many of the violations discussed herein pre-date the tenure of the current leadership of the OAH.

¹ See, https://www.open-dc.gov/sites/default/files/OOG-004_9%207%2016%20OAH%20Advisory%20Opinion.corrected.pdf

The OOG bases the foregoing findings on meetings which occurred between November 10, 2014 and September 30, 2017.² Accordingly, the OOG finds the COST failed to provide proper notice of the June 29, 2017 meeting in violation of D.C. Official Code § 2-576(1); failed to comply with OMA location of notice requirements in violation of D.C. Official Code § 2-576(2-3); failed to properly enter into closed session in violation of D.C. Official Code §§ 2-575(c) and 2-575(b); failed to take a roll call vote in violation of D.C. Official Code § 2-577(3); and failed to make detailed meeting minutes available in violation of D.C. Official Code § 2-578.

The OOG finds also that the COST, has over the course of nearly three years and twelve meetings, consistently failed to meet notice requirements; closed session protocols; recording of roll call votes; recording of detailed meeting minutes in violation of D.C. Official Code § 2-578; making meeting minutes available to the public pursuant to D.C. Official Code § 2-536(a)(7); and to properly cancel a meeting under D.C. Official Code § 2-576(1).

A review of the legislative record and terms of the member of the COST show there are discrepancies in term periods for which the members are appointed, potentially impacting quorum requirements in the OMA pursuant to D.C. Official Code D.C. Official Code § 2-576.

BACKGROUND

The Charge and Actions of the COST Deliver Far-Reaching and Significant Impacts on the Citizens of the District of Columbia.

The COST is a public body statutorily created by the Council of the District of Columbia pursuant to section 9 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-076; D.C. Official Code § 2-1831.06(a))(OAH Establishment Act). Its mission is “to ensure the recruitment and retention of a well-qualified, efficient, and effective corps of Administrative Law Judges in the Office” (*Ibid*).

The COST’s enabling legislation empowers its members with the “final authority, to appoint, reappoint, discipline, and remove Administrative Law Judges” (D.C. Official Code § 2-1831.06(b)). The enabling statute authorizes the COST to “amend or repeal, in whole or in part, add to the rules “govern[ing] the process of selecting Administrative Law Judges.” (D.C. Official Code §§ 2-1831.11(b),(d)). The COST consists of three voting and two *ex officio* non-voting members.³ The three voting members serve staggered three-year terms with one appointment each respectively by: the Mayor; the Chairman of the Council of the District of Columbia, with approval of a majority of the Council; and the Chief Judge of the Superior Court of the District of Columbia. The two remaining COST members who serve as non-voting *ex officio* members are the District’s Attorney General,⁴ or his or her designee from within the

² OOG Director Traci L. Hughes requested the range of meeting records which would have coincided with the implementation of the OMA in an effort to gather documentation of all COST meetings. On November 10, 2014, Director Hughes trained the following COST members on the requirements of the OMA: Judge Yvonne Williams, Judge Wanda Tucker, Mr. Joseph Onek, Mr. James W. Cooper, and Ms. Nadine Wilburn. A July 22, 2013, COST agenda supplied to OOG by the OAH notes the OMA was discussed between 6:15 P.M. and 6:35 P.M. on that date. No representative from OOG attended that meeting, and no recording was provided in order for this office to ascertain the content of the discussion regarding the OMA, and its protocols necessary for compliance.

³ D.C. Official Code § 2-1831.07(a) provides: “[t]he Commission shall consist of 3 voting members.” D.C. Official Code § 2-1831.07(b) states: “[a] majority of the Commission’s voting members shall constitute a quorum.”

Therefore, two members of the COST constitute a quorum to conduct public business.

⁴The statute provides that this appointment is to be made by the Corporation Counsel. The Attorney General is the successor to the Corporation Counsel.

Senior Executive Attorney Service and the Chief Administrative Law Judge of the Office of Administrative Hearings (OAH) (D.C. Official Code § 2-1831.07(a)).

The three current voting members of the COST are: (1) the Honorable Judge Yvonne Williams, the Chief Judge of the D.C. Superior Court's appointee and who serves as the Chair of the COST; (2) Rob Hawkins, the Mayoral appointee; and Joseph N. Onek, the appointee by the Council Chairman.⁵ The current two *ex officio* non-voting members of the COST are Chief Administrative Law Judge Eugene A. Adams, and Nadine C. Wilburn, representing the Office of the Attorney General.

The COST appoints all Administrative Law Judges to the OAH, who have jurisdiction to adjudicate⁶ cases arising from the:

- (1) Department of Health;
- (2) Department of Human Services;
- (3) Board of Appeals and Review;
- (4) Adjudications of Youth Residential Facilities licensing and enforcement matters (Child and Family Services Agency);
- (5) Adjudications of violations of the Solid Waste Management and Multi-Material Recycling Act; and illegal dumping of waste;
- (6) Department of Insurance, Securities and Banking;
- (7) Adjudications of violations of Inclusionary Zoning for low-income and moderate-income residents;
- (8) Department of Employment Services public worker's compensation;
- (9) Department of Consumer and Regulatory Affairs, including Rent Administrator matters;⁷
- (10) Department of For-Hire Vehicles;
- (11) Adjudication of Office of Tax and Revenue protests;
- (12) Adjudication of enforcement actions brought by the Historic Preservation Review Board;
- (13) Adjudication of fines for violations of firearm registration requirements;
- (14) Adjudication regarding denials or revocations of firearm registration certificates;
- (15) Adjudication regarding denials or revocations of firearm dealer licenses;
- (16) Adjudication regarding the imposition of fines for violations of the Americans with Disabilities Act of 1990;
- (17) Adjudication regarding failures to abate graffiti;
- (18) Adjudication regarding vehicle impoundments as a result of prostitution-related offenses;
- (19) Adjudication regarding tax abatements for new residential developments
- (20) Adjudication regarding failures to report child sex abuse;
- (21) Adjudication regarding possession or transfer of marijuana in the amounts of one ounce or less;
- (22) Adjudication regarding revocations of Certified Business Enterprise registrations;
- (23) District Department of Transportation;
- (24) Adjudication regarding civil fines or penalties imposed by the Higher Education Licensure Commission;
- (25) Adjudication regarding the reimbursement of emergency housing and relocation assistance;
- (26) Adjudication of cases arising under subchapter IV of Chapter 5 of Title 32;

⁵ By statute, the terms of Judge Williams and Mr. Hawkins terminate respectively on April 30, 2018 and April 30, 2019. Mr. Onek was recently reappointed to COST pursuant to the Commission on Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings Joseph N. Onek Reappointment Resolution of 2017, effective September 22, 2017 (Res. 22-221; 64 DCR 38), for a term to end April 30, 2020.

⁶ D.C. Official Code § 2-1831.03.

⁷ Excludes DCRA cases under the jurisdiction of the Real Property Tax Appeals Commission. Id. at (b)(2) and 2-1831.03(2).

Additionally, the Chief ALJ has the discretion to accept referrals of cases from agencies, boards and commissions that are not included in the above listing. Alternatively, agencies, boards and commissions may elect to be covered under the jurisdiction of the OAH. (D.C. Official Code § 2-1831.03(c)(1-2)). Boards and commissions with the authority to issue occupational or professional licensing may delegate hearing authority to OAH. (Id. at (i)(1))⁸

Consequently, the reach of the OAH and the findings of ALJs reach into nearly every corner of District government, leaving the COST with the weighty charge of determining the appointments or reappointments of ALJs hearing matters that are impacting the public in innumerable ways.

DISCUSSION

The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and the official actions taken by government officials.⁹ Therefore, all OMA complaints are reviewed by the OOG with the aim of supporting the policy of the OMA, and will strictly construe the application of exceptions to the Act. The issues concerning COST compliance with the OMA are numerous. The OOG will, however, deal first with the primary matter at hand which is whether the COST failed to properly notice its June 29, 2017, meeting.

The Matter Giving Rise to This OMA Complaint Reveals Several Violations Regarding COST Compliance with the OMA.

On June 29, 2017, the following COST members convened for the purpose of considering the reappointment of five ALJs: Judge Yvonne Williams, Chair; Mr. Joseph Onek; Chief ALJ Adams; Ms. Nadine Wilburn;¹⁰ and Ms. Natale. The ALJs to be considered for reappointment were: Nicholas Cobbs, Sharon Goodie, Scott Harvey, Mary Masulla and Arabella Teal.

As it relates to this meeting, the OOG finds numerous violations of the OMA. First, the COST failed to properly notice the meeting in violation of the OMA “Notice of meeting” provision (D.C. Official Code § 2-576) which states:

Before meeting in open or closed session, a public body shall provide advance public notice as follows:

(1) Notice shall be provided when meetings are scheduled and when the schedule is changed. A public body shall establish an annual schedule of its meetings, if feasible, and shall update the schedule throughout the year. Except for emergency meetings, a public body shall provide notice as early as possible, but not less than 48 hours or 2 business days, whichever is greater, before a meeting.

(2) Notice shall be provided by posting:

⁸ The OAH Summary of Services as described in its Fiscal Year 2018 Budget submission describes its function as an independent agency that “[A]djudicates cases for over 40 District of Columbia agencies, boards, and commissions. <https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/DC%20GOVT%20FY%202018%20BUDGET%20%E2%80%93%20CONGRESS%20%E2%80%93%20VOL%202.pdf>

⁹ D.C. Official Code § 2-572.

¹⁰ Pursuant to the OAH Establishment Act (D.C. Official Code § 2-1831.07(a)), the Chief Administrative Law Judge is an ex-officio member. The representative from the Office of the Attorney General (OAG) is also non-voting, but there is no indication in the legislative record as to the reason for the seating of a representative from the OAG. The OOG presumes the presence of a non-voting representative from OAG is necessary to advise the members of the COST on the proper application of the body’s enabling statute and any applicable regulations relevant to the appointment and reappointment of ALJs.

- (A) In the office of the public body or a location that is readily accessible to the public; and
- (B) On the website of the public body or the District government.
- (3) Notwithstanding the notice requirement of paragraph (2) of this subsection, notice of meetings shall be published in the District of Columbia Register as timely as practicable.
- (4) When a public body finds it necessary to call an emergency meeting to address an urgent matter, notice shall be provided at the same time notice is provided to members and may be provided pursuant to any method in paragraph (2) of this subsection.

Failure to provide proper notice is a fact that was duly acknowledged by the OAH Office of General Counsel (OGC)¹¹ in response to the OOG's July 5, 2017, Notice of Complaint.¹² OAH General Counsel, Ms. Vanessa Natale wrote:

"For the June 29, 2017 meeting of the COST, OGC submitted to the [District of Columbia] Register the Notice and agenda for that meeting on June 21st. Unfortunately, the Notice was returned on June 26, 2017 due to a technical error. When we resubmitted the notice in the correct format, it was too late for that week's publication. Additionally, on June 22, 2017, OGC sent the Notice and agenda for that meeting to all of OAH personnel.

We acknowledge that this may not be sufficient notice to the public for that meeting and apologize. We have taken affirmative steps to make sure that this does not happen again. We have reached out to the office that handles the publication of the DC [R]egister and received excellent advice and a schedule for submissions and publication dates."

Upon admission by Ms. Natale, and the findings of the OOG, it is clear the COST violated D.C. Official Code § 2-576(1) for failing to provide proper notice of its June 29, 2017, meeting. Notice in the D.C. Register amounted to, at best, to a fait accompli, as notice of a past meeting was neither timely nor practicable as afforded under D.C. Official Code § 2-576(3).

The COST Also Failed to Comply with OMA Location and Means of Notice Requirements Pursuant to D.C. Official Code § 2-576(2-3).

The OMA requires notice to be provided to the public within 48-hours or two business days in advance, whichever is greater before a meeting. In this instance, notice (in addition to the D.C. Register) was distributed by email internally to OAH personnel only. This appears to be a pattern of non-compliance by the COST.¹³ Such internal notice to only OAH personnel is a misapplication of the OMA regarding notice, and violates its provisions.

¹¹ The OAH is the administrative arm of the COST, and has assumed the responsibility to post and publish COST meeting notices. D.C. Official Code § 2-1831.12 mandates an Executive Director of the OAH, appointed by the Chief Administrative Law Judge. Customarily, it is the executive director who manages and provides administrative support to public bodies falling under the purview of a governing agency. OOG's review of records provided by the OAH make clear the line is blurred between the administrative support OAH provides to the COST and the legal advice given to the COST during the course of its meetings. The general counsel for OAH appears to serve in an informal legal advisory capacity to COST members contrary to the OAH Establishment Act (D.C. Official Code § 2-1831.12(e)).

¹² M. Borbely OMA Complaint #OOG-003_7.03.17

¹³ Internal email notice provided to all OAH personnel on April 18, 2017, for the April 20, 2017 COST meeting; internal email notice provided to all OAH personnel on April 21, 2017, for the April 25, 2017 COST meeting; internal email notice provided to all OAH personnel June 22, 2017, for the June 29, 2017 COST meeting. This was specifically acknowledged by Ms. Natale's June 29, 2017, letter to OOG Director Hughes. Internal email notice provided to all OAH personnel on July 5, 2017, for the June 28, 2017 COST meeting.

The OMA is clear that an ‘Open meeting’ is one in which the “Public is deemed to be physically present.” [Emphasis added] (D.C. Official Code § 2-575. The public means all members of the public, and is not confined to just OAH personnel or the ALJs under consideration for appointment or reappointment by the COST. Failure by the COST to provide notice to the public obviated the very purpose of the OMA to allow the public to be present during a meeting of a public body gathered to consider, conduct, or advise on District Government operations, which includes the COST’s hugely impactful decisions regarding the reappointments of ALJs. (D.C. Official Code § 2-574(1)).

Further, the OOG found no evidence that the COST published notice of the the June 29, 2017 meeting in a location readily accessible by the public, or on the OAH website as required by D.C. Official Code § 2-576(2)(A-B).¹⁴ Therefore, the COST failed to provide proper notice to allow the public to be physically present in violation of D.C. Official Code § 2-575(a)(1) and failed to make meeting information readily accessible to the public in violation of § 2-576(2).

The COST Failed to Properly Enter into Closed/Executive Session in Violation of D.C. Official Code § 2-575(c).

The content of the June 29, 2017, meeting agenda also fails to meet D.C. Official Code § 2-576(5) directing the proper protocol for providing notice to the public when a portion of the meeting is anticipated to be closed. “Each meeting notice shall include the date, time, location, and planned agenda to be covered at the meeting. If the meeting or any portion of the meeting is to be closed, the notice shall include, if feasible, a statement of intent to close the meeting or any portion of the meeting, including citations to the reason for closure under D.C. Official Code § 2-575(b), and a description of the matter to be discussed.” Here, the COST notes generally, “D.C. Code D.C. Official Code § 2-575(c)(1)” as a basis for entering into closed session. The stating of that section of the code in the meeting agenda is imprecise as it refers to the protocol for entering into closed session, rather than the reason for the closed session: “Before a meeting or portion of a meeting may be closed, the public body shall meet in public session at which a majority of the members of the public body present vote in favor of closure.” In order to notice a closed session on a meeting agenda, the OMA requires a public body to enter into closed/executive session for precisely enumerated reasons as specified under D.C. Official Code § 2-575(b)(1-14). These exceptions to the OMA are to be strictly construed as to provide the public as much information about the reasons for closure, and a record of the roll call votes taken during a closed session as the votes are the official actions taken by members of a public body during a closed/executive session.

Specifically, the OMA requires a body to: (1) read into the public record the reason for entering into closed session, citing the specific reason for closure. Since the COST was meeting to discuss the reappointments of ALJs, the presiding officer of the COST could have relied upon, and read into the record the citation to § 2-575(b)(10) to discuss “the appointment, employment...removal, or resignation of government appointees.”

OOG reviewed all meeting notices published in the D.C. Register.

<http://www.dcregs.dc.gov/Search/FullTextSearch.aspx?SearchType=DCR&KeyValue=Selection+and+Tenure> .
(Last accessed, September 14, 2017).

¹⁴ A review of the OAH website reveals the June 29, 2017, meeting date was not listed. (<https://oah.dc.gov/newsroom>.) (Last accessed 9.13.17). It is worth noting that the listing of the COST meetings is far from conspicuously located on the OAH site. OOG recommends OAH include a tab on the homepage dedicated to listing COST information, meeting dates, agendas and related records. Or in the alternative, take avail of the OOG central calendar and embed a link to the central calendar on the OAH so that the public may readily access COST meeting dates. Although posting on the OOG central calendar is not mandatory, the OAH has long held access (since 4.28.16). The assigned administrative point of contact for OAH had the option of uploading the meeting notice, agenda and relevant records to the OOG calendar, and would have met the requirement of § 2-576(2).

The recording of the June 29, 2017, meeting reflects the COST ignored all requirements for entering into closed session:

JUDGE WILLIAMS: “So, can I get a motion to close the remainder of the meeting so we may pursue other pending personnel issues?”

COST MEMBER: “So moved.”¹⁵

COST MEMBER: “Second.”

JUDGE WILLIAMS: “Alright let’s move, let’s close the meeting so if everyone could depart.”

Therefore, the COST not only failed to provide proper notice of the closed session per D.C. Official Code § 2-576(5); it failed to follow the clear protocol for entering into closed session in violation of D.C. Official Code § 2-575(b) and 2-575(c)(2). The OOG will discuss, *infra*, whether a majority of the members of the COST were present to properly enter into closed session (Id. at § 2-575(c)(1)) during the June 29, 2017 meeting.¹⁶

The OOG makes no determination as to any violation of D.C. Official Code § 2-575(c)(2) requiring the reading into the record of any votes taken in closed session during the June 29, 2017 meeting, as no official action was taken. However, members of the COST, although not specifically noted as a reason for closure on the agenda, did have an extended discussion regarding the proper seating of Mr. Onok on the COST during the June 29, 2017 meeting, and upcoming meetings.

The Recording of the Public Portion of the June 29, 2017, Meeting Reveals Members of the COST Failed to Meet OMA Protocols for the Adoption of Revisions to Meeting Agendas.

It is not the purpose of the OMA to frustrate the efficient operation of a public body and the ability of its members to conduct government business. To that end, the OOG is well aware of the balance that must be maintained between a public body meeting its statutory or ordered mandate, and the public’s right to full and complete information regarding the affairs of government and those who represent them. “To maintain this balance, the OOG has consistently interpreted D.C. Official Code § 2-576 to authorize public bodies to revise a draft public meeting agenda for adoption as the final public meeting agenda provided: (1) at the start of a meeting a roll call vote is taken by members of the public body; and (2) the vote to revise the public meeting agenda is unanimous.” See, OMA OOG-0004_7.03.17_AO.¹⁷ This interpretation has been made clear by way of opinion, and in all OMA trainings of public body members the OOG has conducted since 2013.

¹⁵ No roll call vote was taken, so it was not clear which COST member, other than Judge Williams, was speaking in favor of the vote to enter into improper closure.

¹⁶ OOG Director Hughes discussed with members of the COST during an OMA training the protocol for entering into closed session. Meeting minutes for the November 10, 2014, meeting state: “[G]enerally, there are 9 categories under which a public body can close the public session and discuss matters in a private, closed session. One of the categories includes hiring/personnel matters.” And, “The COST must call meetings to order in public session, confirm whether a quorum is present, roll call the present parties to vote on whether to enter into closes session, cite the OMA regulation(s) that apply thereto, discuss business that falls into one of the nine categories that qualify for closed session meetings, re-open the public session and adjourn the meeting.”

https://oah.dc.gov/sites/default/files/dc/sites/oah/release_content/attachments/Public%20Notice%20of%20Meeting%20on%20Reappointments%20Nov.%2010,%202014.pdf

¹⁷ As an agenda must be in draft form when published and can only be adopted upon the establishment of a quorum at the start of the public body meeting, all amendments must necessarily be made and approved by roll call vote when the meeting is convened.

In this instance, the recording of the June 29, 2017, meeting makes clear the chair of the COST summarily announced the start of the meeting, without properly taking a roll call vote to formally adopt changes to the agenda that resulted in the delay in the consideration of the reappointment of ALJ Arabella Teal. The content of the discussion lays bare the COST's violation of D.C. Official Code § 2-576 and 2-577(3) requiring all votes to be taken by roll call.

JUDGE WILLIAMS: "... order of the Commission on the selection and tenure of administrative law judges. Roll call, I can confirm that all of the members on the COST are here. So today we are going to be considering the reappointment of five administrative law judges. However, well really just four. With respect to ALJ Arabella Teal it's my understanding that the Chief is going to be recommending her reappointment, but we've not gotten all the materials yet to make that a final decision. So, we will be holding off on that vote although it is on the agenda. We will be holding off on that vote until a later date.... We will be holding off on that vote until such time we have all the materials so that we can have the fulsome review we are required by the regulations to do."

"Ok so with respect to ALJ Nicholas Cobbs have the Commission members had the opportunity to review the materials submitted by him as well as OAH? Yes? Ok. And I to have had the opportunity to review them. And so, does the Commission support his reappointment which I think his current appointment expires August 29th. Thank you. Ok. And so, is the Commission all in favor of reappointing ALJ Cobbs for another term? All say, please say 'Aye' if you agree."

COST MEMBERS: "Aye."

JUDGE WILLIAMS: "Ok, aye."

JUDGE WILLIAMS: "Next on the list is Judge Goodie who I do know is here. Judge Goodie has been recommended by the Chief for reappointment. Have the Commission members had the opportunity to review the materials that she has submitted as well as those from OAH? Yes?"

COST MEMBER: "Yes."

COST MEMBER: "Aye."

JUDGE WILLIAMS: "Ok. Is the Commission members all in...well did you have any questions or concerns? Ok. No? Alright. Ok, so. Can you all say 'Aye' if you support the reappointment of Ms. Goodie please? Judge Goodie. Excuse me."

COST MEMBER ONEK: "Aye."

JUDGE WILLIAMS: "Aye?" Alright. Judge Goodie will be reappointed.

JUDGE WILLIAMS: "Today is...what is today? June 29th. Alright, next on the is Judge Harvey.... Alright, so Judge Harvey is up for reappointment. His current term expires on August 29th 2017, has the Commission members all had the opportunity to review the materials submitted by Judge Harvey as well as OAH?"

COST MEMBER: "Yes."

JUDGE WILLIAMS: "Yes?" Ok. Chief Judge has recommended him for reappointment. Is the Commission in favor of that recommendation?"

JUDGE WILLIAMS: "Aye?"

COST MEMBER: "Aye."

JUDGE WILLIAMS: “Aye.” Alright, we can support the reappointment of Judge Harvey. He’ll be reappointed.”

JUDGE WILLIAMS: “And then finally there is Judge Masulla who is...is Judge Masulla here?”

COST MEMBER: “No.”

JUDGE WILLIAMS: “Ok. Her term expires on August 15th 2017. It is my...has everyone had the opportunity to review the materials submitted by her, as well as OAH? And Chief Judge has recommended her reappointment. We concur with that recommendation. All say ‘Aye’.”

COST MEMBER: “Aye”

JUDGE WILLIAMS: “Alright, Judge Masulla will be reappointed. Ok so as I indicated at the beginning of the meeting we still have to review the materials of Judge Teal, and obviously the materials the other two...reappointments that are coming up will be Judge Tucker and Judge Jenkins, which are also currently under review as well. So that will be for a later meeting.

Ok, so, but for the record, Judges Cobbs, Goodie, Harvey and Masulla have been reappointed to another term to work at the Office of Administrative Hearings. Alright, Thank you. So, can I get a motion to close the remainder of the meeting so that we may pursue other pending personnel issues?”

COST MEMBER: “So moved.”

JUDGE WILLIAMS: “Alright, let’s move, let’s close the meeting so if everyone would depart.”

The OOG Finds Evidence of the COST’s Historical Non-Compliance with the OMA During Meetings Occurring Prior to, and After, June 29, 2017.

In light of the many procedural violations found with just the June 29, 2017, meeting of the COST, the OOG undertook an exhaustive review of prior meetings, and meetings that were held subsequent to June 29, 2017. Below is a discussion of the OOG’s findings regarding the COST’s compliance with the OMA between November 10, 2014, to present. The OOG’s search of the D.C. Register,¹⁸ inquiries of the Office of Documents and Administrative Issuances, search of the OAH website,¹⁹ and the OOG Central Calendar,²⁰ OOG identified twelve meetings of the COST over a nearly three-year period. Each meeting date, and respective compliance and/or non-compliance with the OMA will be listed in turn.

November 10, 2014 – District of Columbia Commission on Selection and Tenure of Administrative Law Judges of the Office of Administrative Hearings – Notice of Agenda of Meeting. Noticed in the D.C. Register on November 14, 2014.

The COST violated timeliness of notice pursuant to D.C. Official Code § 2-576 as the notice of the meeting was published in the D.C. Register after the meeting occurred. The introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10) to discuss the reappointment of ALJs and other personnel matters. D.C. Official Code § 2-575(c)(1) was improperly read into the record upon the vote of COST members as reason for entering into closed session. Additionally, the OMA training conducted by

¹⁸ <http://www.dcregs.dc.gov/Search/FullTextSearch.aspx?SearchType=DCR&KeyValue=Tenure> (last accessed 10.13.17).

¹⁹ <https://oah.dc.gov/newsroom> (Last accessed 9.13.17).

²⁰ https://www.open-dc.gov/public-bodies/meetings/pastadminview?combine=tenure&field_dates_value%5Bvalue%5D%5Bmonth%5D=5&field_dates_value (Last accessed 10.13.17).

Director Hughes was not listed, nor cited pursuant to D.C. Official Code § 2-575(b)(12). Closed session detailed meeting minutes or recording(s) were not provided by OAH pursuant to the records requested in relation to this complaint. Therefore, the OOG has no way to determine compliance with notice, but does find the COST violated the OMA's "Open meeting" provisions: (1) for conducting meetings in improper closed session (D.C. Official Code § 2-575(a)); (2) for failing to strictly adhere to the OMA's protocol for entering into closed/executive session (D.C. Official Code § 2-575(c)); and (3) for failing to make the records available for public inspection in violation of D.C. Official Code § 2-578.²¹

March 3, 2016 – Commission on Selection and Tenure of Administrative Law Judges, the Office of Administrative Hearings Public Notice of Meeting. Noticed on the OOG Central Calendar.²²

It cannot be determined if timeliness of notice pursuant to D.C. Official Code § 2-576 is proper. Although the introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10) to discuss the reappointment of administrative law judges, it is unclear if the proper citation was read into the record for entering into closed session, as the portion of the agenda noting the closed session cited D.C. Official Code § 2-575(c)(1). No detailed meeting minutes of the public portion of the meeting were published on the OAH website or the OOG Central Calendar. The recording of the meeting was not provided by OAH pursuant to the records requested in relation to this complaint. Therefore, the OOG has no way to determine compliance with notice, but does find the COST failed to make the records available for public inspection pursuant to D.C. Official Code § 2-578. Additionally, since the record is incomplete, the OOG can make no determination regarding whether the agenda was amended and whether closure was proper.

This meeting of the COST occurred at the law offices of Arnold and Porter, 601 Massachusetts Avenue, NW. The OMA does not preclude a public body from meeting in an offsite/non-government building. However, the location cannot be so burdensome to discourage physical attendance of the public at a public body meeting contrary to D.C. Official Code § 2-575(a)(1). The OOG has no way to determine whether the location of the meeting at a private law firm impeded public attendance.

June 21, 2016 – Administrative Hearings, Office of – Commission on Selection and Tenure of Administrative Law Judges Meeting – Reappointment of Administrative Law Judges. Noticed in the DC Register on June 17, 2016. Noticed on the OAH website on June 8, 2016. Noticed on the OOG Central Calendar on June 3, 2016.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper. The proper citation for entering into closed session to consider the reappointment of ALJs is properly indicated in the introductory paragraph as D.C. Code § 2-575(b)(10) to discuss the reappointment of ALJs and other personnel matters. The agenda improperly notes D.C. Official Code § 2-575(c)(1) as reason for entering into closed session. The recording of the meeting was provided to OOG in relation to this complaint. Upon review of the recording, the OOG finds that the COST violated the OMA's "Open meeting" provisions: (1) for conducting meetings in improper closed session (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA's protocol for entering into closed/executive session (D.C. Official Code § 2-575(c)(1)). Judge Williams declined to take a roll call vote prior to entering into closed session stating:

JUDGE WILLIAMS: "We are all here, except for Chief Judge Adams could not appear, but his staff is here for any information that we do need from him....So now, we've opened. We don't

²¹ The Freedom of Information Act requires all minutes of proceedings of all public bodies to be made public without the necessity of a FOIA request. D.C. Official Code § 536(a)(7).

²² The meeting notice is located here: <http://bega.dc.gov/event/commission-selection-and-tenure-march-meeting>. (Last accessed, 10.26.17) The exact time and date of publication of the 3.3.16 notice on the OOG central calendar cannot be determined because the meeting was published to the version 1.0 calendar maintained on www.bega-dc.gov. Version 2.0 of the calendar was migrated to the OOG website, www.open-dc.gov in May of 2016. All publication dates and times are tracked on the calendar maintained on www.open-dc.gov.

really have any public business per se. All of our matters are employment matters, so I am going to take a motion to close the meeting to consider employment matters.”

COST MEMBER²³: “So moved.”

JUDGE WILLIAMS: “All in favor?”

COST MEMBER: “Aye.”

Additionally, no detailed meeting minutes of the public portion of the meeting were published on the OAH website. Therefore, the OOG finds also that the COST failed to make the records available for public inspection pursuant to D.C. Official Code § 2-578.

July 13, 2016 – Administrative Hearings, Office of – Commission on Selection and Tenure of Administrative Law Judges Meeting. Noticed in the DC Register on June 17, 2016. Noticed on the OAH website on June 15, 2016.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper as notice was published nearly a month in advance in the D.C. Register and on the OAH website. No detailed meeting minutes were published on the OAH website in violation of D.C. Official Code § 2-578. The recording of the meeting was provided by OAH pursuant to the records requested in relation to this complaint. Based on the record before the OOG, the OOG cannot find a basis for a violation of the OMA, but does note that the Chair of the COST referenced a “status hearing” which occurred on July 12, 2016. No record of the status hearing was provided to the OOG. The OOG cautions that if the status hearing was a gathering of a quorum of the COST to consider, conduct or advise on District Government operations, the meeting must be noticed pursuant to D.C. Official Code § 2-576, and with proper citation to closure pursuant to D.C. Official Code § 2-575(b). Based on the record before the OOG, the OOG reserves its right to determine violation(s) of the OMA in relation to the July 12, 2016 meeting date.

September 20, 2016 – Administrative Hearings, Office of – Commission on Selection and Tenure of Administrative Law Judges Meeting – Reappointment of Administrative Law Judges. Noticed in the DC Register on September 16, 2016. Noticed on the OOG Central Calendar on September 19, 2016.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper. Although the introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10) to discuss the reappointment of administrative law judges, it is unclear if the proper citation was read into the record for entering into closed session, as the portion of the agenda noting the closed session cited D.C. Official Code § 2-575(c)(1). No detailed meeting minutes were published on the OAH website, and the recording of the meeting was not provided by OAH pursuant to the records requested in relation to this complaint. Therefore, the OOG has no way to determine compliance with notice of the agenda, but does find the COST failed to make the records available for public inspection pursuant to D.C. Official Code § 2-578. Additionally, since the record is incomplete, the OOG can make no determination regarding whether the agenda was amended and whether closure was proper.

October 26, 2016 – Administrative Hearings, Office of. Noticed in the D.C. Register on October 28, 2016. Noticed on the OOG Central Calendar on October 17, 2016.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper, as notice was timely published on the OOG Central Calendar. It is unclear why notice was published in the D.C. Register after the meeting occurred. Although the introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10) to discuss the reappointment of administrative law judges, it is unclear if the proper citation was read into

²³ No roll call vote was taken, so it is unclear which COST member was speaking.

the record for entering into closed session, as the portion of the agenda noting the closed session cited D.C. Official Code § 2-575(c)(1). No detailed meeting minutes were published on the OAH website, and the recording of the meeting was not provided by OAH pursuant to the records requested in relation to this complaint. Therefore, the OOG has no way to determine compliance with notice of the agenda, but does find the COST failed to make the records available for public inspection pursuant to D.C. Official Code § 2-578. Additionally, since the record is incomplete, the OOG can make no determination regarding whether the agenda was amended and whether closure was proper.

April 20, 2017 – Administrative Hearings, Office of – District of Columbia Commission on Selection and Tenure of Administrative Law Judges – Public Notice of Closed Meeting. Noticed in the D.C. Register on April 21, 2017.

The COST violated timeliness of notice pursuant to D.C. Official Code § 2-576 as the notice of the meeting was published in the D.C. Register after the meeting occurred. Introductory language in the notice improperly cites “D.C. Official Code § 2-575(10)”, rather than D.C. Official Code § 2-575(b)(10) to discuss the appointment of an ALJ to fill a vacant seat.²⁴ Detailed meeting minutes provided by OAH of the April 20, 2017, meeting reveal that a roll call vote of attending members was taken; however, there was no vote taken to enter into closed session in violation of D.C. Official Code § 2-575(c)(1). Nor was the reason for the closed session read into the record in violation of D.C. Official Code § 2-575(b).

Based on the record before the OOG, the OOG finds that the COST violated the OMA’s “Open meeting” provisions: (1) for conducting meetings in improper closed session (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA’s protocol for entering into closed/executive session (D.C. Official Code § 2-575(c)).

April 25, 2017 – Administrative Hearings, Office of – District of Columbia Commission on Selection and Tenure of Administrative Law Judges – Public Notice of Closed Meeting - Interview of administrative law judge candidates. Noticed in the D.C. Register on April 28, 2017

The COST violated timeliness of notice pursuant to D.C. Official Code § 2-576 as the notice of the meeting was published in the D.C. Register after the meeting occurred. The introductory paragraph of the notice cites D.C. Official Code § 2-575(10) improperly. It should have stated “D.C. Official Code § 2-575(b)(10)” to discuss the appointment of an ALJ.²⁵ It is unclear if the proper citation was read into the record for entering into closed session, as the portion of the agenda noting the closed session states no citation at all. No detailed meeting minutes were published on the OAH website, and the recording of the meeting was not provided by OAH pursuant to the records requested in relation to this complaint. Therefore, the OOG has no way to determine compliance with notice, but does find the COST failed to make the records available for public inspection pursuant to D.C. Official Code § 2-578. Additionally, since the record is incomplete, the OOG can make no determination regarding whether the agenda was amended and whether closure was proper. Based on the record before the OOG, the OOG reserves its right to determine whether the COST violated the OMA’s “Open meeting” provisions: (1) for conducting meetings in improper closed session (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA’s protocol for entering into closed/executive session (D.C. Official Code § 2-575(c)).

June 29, 2017 -- Administrative Hearings, Office of – Public Meeting. Noticed in the D.C. Register on June 30, 2017.

See discussion *supra*.

²⁴ Item number III of the April 20, 2017 agenda states: “Discussion of the candidate applications for the vacant administrative law judge position.)

²⁵ The single item on the April 25, 2017 agenda states: “Interview of administrative law judge candidates.”

July 19, 2017 -- Administrative Hearings, Office of – Commission on Selection and Tenure of Administrative Law Judges Meeting. Noticed in the D.C. Register on July 14, 2017. Noticed on the OAH website on July 28, 2017. Noticed on the OOG Central Calendar on July 11, 2017.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper, as notice was timely published in the D.C. Register and on the OOG Central Calendar. It is unclear why notice was published on the OAH website after the July 19, 2017 meeting date. Although the introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10) to discuss the reappointment of administrative law judges, it is unclear if the proper citation was read into the record for entering into closed session, as the portion of the agenda noting the closed session cited D.C. Official Code § 2-575(c)(1). No detailed meeting minutes were published on the OAH website, and the recording of the meeting was not provided by OAH pursuant to the records requested in relation to this complaint. Therefore, the OOG has no way to determine compliance with notice, but does find the COST failed to make the records available for public inspection pursuant to D.C. Official Code § 2-578. Additionally, since the record is incomplete, the OOG can make no determination regarding whether the agenda was amended and whether closure was proper. Based on the record before the OOG, the OOG reserves enforcement on whether the COST violated the OMA's "Open meeting" provisions: (1) for conducting meetings in improper closed session (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA's protocol for entering into closed/executive session (D.C. Official Code § 2-575(c)).

July 19, 2017 -- Administrative Hearings, Office of – Commission on Selection and Tenure of Administrative Law Judges Meeting. Noticed in the D.C. Register on July 14, 2017. Noticed on the OAH website on July 28, 2017. Noticed on the OOG Central Calendar on July 11, 2017.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper, as notice was timely published in the D.C. Register and on the OOG Central Calendar. It is unclear why notice was published on the OAH website after the July 19, 2017 meeting date. Although the introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10), the portion of the agenda noting the closed session cited D.C. Official Code § 2-575(c)(1). The recording of the public meeting is published on the OOG Central Calendar²⁶. The members of the COST did not vote to enter into closed session, nor did the COST read into the record the reason for closure. The OOG finds that the COST violated the OMA's "Open meeting" provisions: (1) for conducting meetings in improper closed session (D.C. Official Code § 2-575(a)); and (2) for failing to strictly adhere to the OMA's protocol for entering into closed/executive session (D.C. Official Code § 2-575(c)(1)).

July 28, 2017 – Administrative Hearings, Office of – Notice of Public Meeting. Noticed in the D.C. Register on August 4, 2017. Noticed on the OAH website on July 26, 2017. Noticed on the OOG Central Calendar on July 26, 2017. And **July 28, 2017** -- Administrative Hearings, Office of – Notice of Cancellation of Public Meeting. Noticed in the D.C. Register on August 4, 2017.

Timeliness of the first notice of the July 28, 2017, meeting pursuant to D.C. Official Code § 2-571 *et seq.* was proper. No detailed meeting minutes were published on the OAH website, and the recording of the meeting was not provided by OAH pursuant to the records requested in relation to this complaint as the meeting was improperly canceled on the date the meeting was to occur in violation of D.C. Official Code § 2-576. The OOG finds the COST violated the OMA's notice requirements under D.C. Official Code § 2-576 by failing to cancel the meeting within 48 hours or 2 business days. Additionally, the OMA requires posting of the notice of cancellation: (1) in the office of the public body or a location that is

²⁶ COST July 19, 2017, meeting occurred in the BEGA hearing room. Although the recording equipment was working, members of the COST failed to turn on their microphones during the entire portions of the open and closed sessions. Ambient microphone did record details of the closed session. <https://www.open-dc.gov/meeting/district-columbia-commission-selection-and-tenure-administrative-law-judges-office-1> (Last accessed, October 25, 2017).

readily accessible to the public; and (2) on the website of the public body or the District Government. In this instance, notice was published in the D.C. Register after the cancelled meeting date on August 4, 2017, and on July 28, 2017, on the OAH website. Additionally, records provided to OOG reflect an internal notice was sent to all OAH personnel at 11:48 A.M. for the July 28th meeting that was to have occurred at 3:30 P.M. Again, timely notice is to be made to the public, not just to OAH personnel. (*Supra*).

The record indicates that COST Chair, Judge Williams, cancelled the meeting at the last minute. OAH personnel notified Director Hughes on October 18, 2017, that the cancelation was due to the receipt of the July 17, 2017, letter to Judge Williams from Council Chairman Phil Mendelson regarding the term lapse of COST member Joseph Onek. *Infra*. Therefore, the OOG finds a clear nexus between the abrupt cancelation of the meeting and the communication from the Council.

September 29, 2017 – Administrative Hearings, Office of – Notice of Public Meeting. Noticed in the D.C. Register on September 29, 2017. Noticed on the OAH website on September 29, 2017. Noticed on the OOG Central Calendar on September 25, 2017.

Timeliness of notice pursuant to D.C. Official Code § 2-576 is proper, as notice was timely published in the D.C. Register and on the OOG Central Calendar. It is unclear why notice was published on the OAH website after the September 29, 2017, meeting date. The introductory paragraph of the notice cites D.C. Official Code § 2-575(b)(10), and the portion of the agenda noting the closed session cited D.C. Official Code § 2-575(b)(10) in compliance with the OMA. Further, the recording of the public meeting (parts 1 and 2) are published on the OOG Central Calendar.²⁷ Although the COST met the protocol regarding notice, a review of the recordings finds the COST failed to properly enter into closed session for part one of the public meeting, and then failed again at an attempt to correct the error when the COST reconvened for part two of the open session upon the conclusion of the closed session. In both instances, the COST failed to properly read into the record the reason for entering into closed session in violation of D.C. Official Code § 2-575(c). Further, no roll call vote was taken to enter into closed session in violation of D.C. Official Code § 2-575(c).

JUDGE WILLIAMS: “But now, as per the agenda, thank you very much...the Commission is gonna move into the closed session portion of this meeting. We will resume the public meeting at the conclusion of the closed session which will consist of [the] Commission discussing the (inaudible) and other related matters as appropriate. So, pursuant to D.C. Code, this public session is adjourned for now.”

JUDGE WILLIAMS: “The public session of this meeting is now reconvened and called to order. I failed to take a vote on closing the meeting. Quickly, all in favor of closing the meeting which we are now done, would you please say yes.”

COST MEMBER ONEK: “Yes.”²⁸

JUDGE WILLIAMS: “Now all in favor of reopening the meeting to the public.”

COST MEMBER ONEK: “Yes.”

²⁷ <https://oah.dc.gov/release/public-meeting-dc-commission-selection-and-tenure-administrative-law-judges-part-1-and-part-2>.

²⁸ COST member R. Hawkins was present at the meeting for the vote in closed session, however stated he needed to step out of the room to make a call. He was not present for the failed attempt to correct the record in violation of the D.C. Official Code § 2-575(c).

JUDGE WILLIAMS: “So I can confirm all members except Mr. Hawkins is present a quorum is retained.”

A review of the closed session reveals official action was taken on the reappointments of two ALJs, and no roll call vote was taken, amounting to a third violation of D.C. Official Code § 2-575(c) for the September 29, 2017 meeting. The members of the COST did announce which ALJs were reappointed during the closed session.

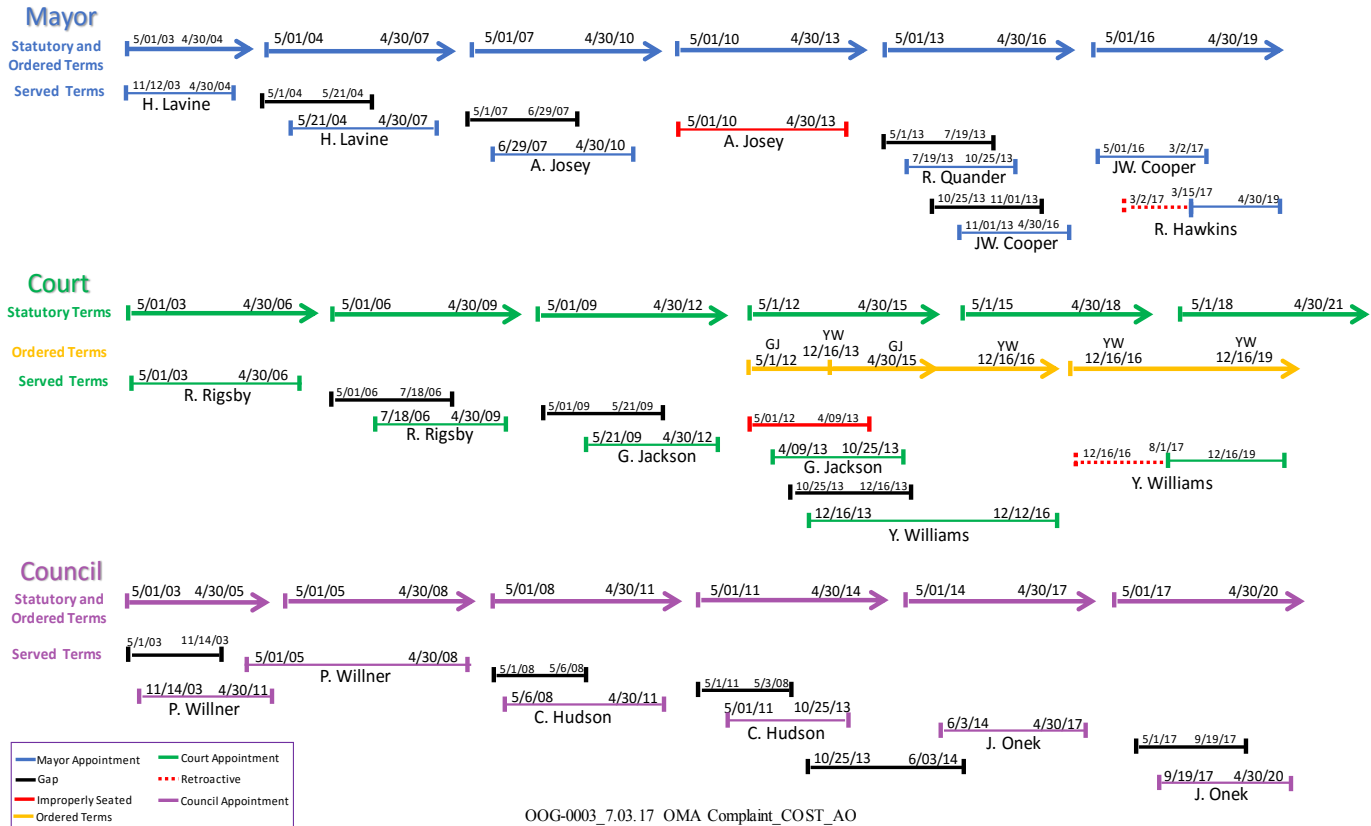
*Issues Pertaining to Quorum of the COST and Whether Actions Taken Were Improper as a Result*²⁹

The primary trigger for any official action to be taken by a public body is that quorum must be sound. D.C. Official Code § 2-574 defines a “Meeting” as “[A]ny gathering of a quorum of the members of a public body...to consider, conduct, or advise on public business, including gathering information, taking testimony, discussing, deliberating, recommending and voting...” Therefore, the OOG was compelled to undertake a review of which individuals were appointed to their terms by the Mayor, the Chief Judge of the D.C. Superior Court, and the Council to determine the validity of formal actions taken by the members of the public body.³⁰ As a result, the OOG has identified term appointments dating back to the beginning of the COST on May 1, 2003 to present, and finds troubling gaps between terms, and evidence, based upon the review of records of COST meetings, that official actions were taken when members of the COST may have been improperly held over, and therefore improperly seated.

The result of the OOG’s findings regarding COST terms is illustrated in the chart below:

²⁹ D.C. Official Code § 2-579(a) – violations of the OMA do not create a private right of action.

³⁰ The OOG compiled the term history from orders published in the D.C. Register, copies of orders supplied by the Court, and records provided by OAH. Compiling the term history was no small task. It was the experience of the OOG that the recording keeping for the COST was less than ideal, and required several inquiries of multiple people, agencies, entities and online searches to gather.



Members of the COST are appointees representing our separate branches of government to serve specific term periods:

“Except as provided in subsection (d) of this section, each member of the Commission shall serve a 3-year term and shall be eligible for reappointment. The terms of the first members of the Commission shall commence on May 1, 2003, and shall expire as provided in subsection (d) of this section. All subsequent terms for members of the Commission shall commence immediately upon the expiration of the previous term. If a vacancy exists after the start of any 3-year term of office, the person appointed to fill that vacancy shall be appointed to serve the unexpired portion of the term. If a member of the Commission leaves office before the expiration of his or her term, a new member may be appointed to serve out the remainder of the term.

(d) The initial term of the voting member of the Commission appointed by the Mayor shall expire on April 30, 2004. The initial term of the voting member of the Commission appointed by the Chairman of the Council shall expire on April 30, 2005. The initial term of the voting member of the Commission appointed by the Chief Judge of the Superior Court of the District of Columbia shall expire on April 30, 2006.” D.C. Official Code § 2-1831.07.

The OOG’s review of the enabling legislation and legislative history for the COST did not disclose any information concerning hold over of the current appointees. “Pursuant to D.C. Official Code § 2-1831.07, members of the COST serve staggered three-year terms and are eligible for reappointment upon expiration of a term. This provision also addresses the filling of a vacancy on the COST under two scenarios: (1) where a vacancy exists after the start of any three-year term of office; and (2) where a COST member leaves office before the expiration of their term. While the language differs slightly, i.e.,

“unexpired portion” or “remainder” of the term, the net of the term the replacing member receives appears to be the same.” (D.C. Official Code § 2-1831.07(c)).³¹ Concerning the ability of a member of the COST to hold-over after expiration of his or her term, the OOG’s review of the enabling legislation and legislative history for the public body did not disclose any information concerning this matter.

The public record appears to show the Mayor’s appointee³² and the appointee of the Chief Judge of the Superior Court³³ may have been improperly seated between May 1, 2010 and April 30, 2013. As indicated in the chart above, the bold top arrow for each category of appointments are the actual terms, according to D.C. Official Code § 2-1831.07, that the COST members are to serve. Upon inquiry of the Mayor’s Office of Talent and Appointments (formally Office of Boards and Commissions), a search of the D.C. Register, request for term records from the Office of Documents and Administrative Issuances, the Court and OAH, the OOG was unable to find any records documenting the terms of the appointees for that timeframe, calling into question whether a quorum of the COST was seated.³⁴ The OOG makes no determination regarding non-compliance with the quorum requirements of the OMA, (D.C. Official Code § 2-574(1)), as the record regarding the terms is incomplete. A term history does clearly indicate that COST members are serving terms that are outside the statutory date ranges.

Also, the OOG finds problematic, within the context of quorum requirements and official actions of public body members taken pursuant to the OMA, the use of nunc pro tunc orders making term appointments retroactive. It is established that public bodies may utilize nunc pro tunc orders when necessary to clarify clerical or ministerial omissions, not when the intervening rights of third persons are impacted. (*State ex re. Wineholt v. LaPorte Superior Court*, 249 Ind. 152, 230 N.E.2d 92, 95 (1967) (“Modifications and amendments may be made where no intervening vest rights are involved.”); *Bruno v. Zoning Board of Adjustment*, 664 A.2d 1077 (Courts and administrative agencies have the inherent authority to correct obvious typographical and clerical errors.”)

The orders issued by the Court and the Mayor for the terms of Judge Williams³⁵ and Mr. Hawkins³⁶, respectively, do not have the impact of correcting mere administrative errors, but could jeopardize quorum where formal actions were being taken by the members of the COST.

³¹ In relevant part D.C. Official Code § 2-1831.07(c) reads: “...[I]f a vacancy exists after the start of any 3-year term of office, the person appointed to fill that vacancy shall be appointed to serve the unexpired portion of the term. If a member of the Commission leaves office before the expiration of his or her term, a new member may be appointed to serve out the remainder of the term.”

³² Judge Anita Josey-Herring.

³³ Judge Gregory Jackson.

³⁴ D.C. Official Code § 2-1831.07(b) establishes that a quorum of the COST is two members. Upon inception until March 31, 2011 when the Open Meetings Act became law, the COST was bound by the Open meetings provision of the Sunshine Act (section 742 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 831; D.C. Official Code § 1-207.42): “All meetings (including hearings) of any department, agency, board or commission of the District government, including meetings of the Council of the District of Columbia, at which official action of any kind is taken shall be open to the public. No resolution, rule, act, or other official action shall be effective unless taken, made, or enacted at such meeting.”

³⁵ The records obtained by the OOG memorialized the term of Judge Williams from December 16, 2013 to December 12, 2016; and December 16, 2016 to December 16, 2019. However, the Chief of the D.C. Superior Court issued a nunc pro tunc order on August 1, 2017, making Judge Williams’ COST term retroactive to December 16, 2016 to serve another three years. At issue, is the proper seating of Judge Williams between December 16, 2016 and August 1, 2017.

³⁶ The records obtained by the OOG memorialize the term of Mr. Hawkins by way a March 15, 2017 Nunc pro tunc Mayor’s Order 2017-072, making Mr. Hawkins’ term retroactive to March 2, 2017 for a term to be completed on April 30, 2019.

The absence of any administrative hold over fix is one that has been recently acknowledged by the Council of the District of Columbia in its recent re-appointment of Mr. Onek. Mr. Onek's first term on the COST was served according to statutory timeframe between June 3, 2014 and April 30, 2017. There was a gap in Mr. Onek's term between May 1, 2017 and September 19, 2017. In a July 17, 2017 letter from Council Chairman Phil Mendelson to Judge Williams, Chairman Mendelson states: "Our appointment, as you know, has been Joseph N. Onek. His term expired April 30th, but his reappointment is pending before the Council (PR 22-394). My understanding, however, is that Mr. Onek cannot holdover, which is to say the seat is technically vacant until the Council acts. I expect that the Council will vote either September 19th or October 3rd, and I expect the Council will vote favorably."³⁷ Again, Mr. Onek's term lapse calls into question for the purposed of the OMA whether a quorum of the COST was seated as Judge Williams' term had previously lapsed, absent the nunc pro tunc order, between December 12, 2016 and August 1, 2017. The OOG makes no determination regarding any potential OMA violations as the record is incomplete.

CONCLUSION

The OOG finds the COST failed to provide to provide proper notice of the June 29, 2017, meeting in violation of D.C. Official Code § 2-576(1); failed to comply with OMA location of notice requirements in violation of D.C. Official Code § 2-576(2-3); failed to properly enter into closed session in violation of D.C. Official Code §§ 2-575(c) and 2-575(b); and failed to take a roll call vote in violation of D.C. Official Code § 2-577(3).

The OOG finds also that the COST, has over the course of nearly three years and twelve meetings, consistently failed to meet notice requirements; closed session protocols; recording of roll call votes; recording of detailed meeting minutes in violation of D.C. Official Code § 2-578; making meeting minutes available to the public pursuant to D.C. Official Code § 2-536(a)(7); and improperly canceled the July 28, 2017, meeting in violation of D.C. Official Code § 2-576(1).

Finally, as it pertains to the terms of the COST impacting the quorum requirements of the OMA, the OOG will defer to the OAH, the Executive Office of the Mayor, and the Council to take whatever attendant action deemed suitable.

However, in light of the significant collateral damage of requiring the COST to nullify its meetings dating back to November, 2014, and any official actions taken thereof due to numerous instances of non-compliance with the OMA, the OOG urges the OAH, the Executive Office of the Mayor, and the Council of the District of Columbia to address gaping holes in the legislation governing the terms of COST members. Namely, whether COST members shall be held over until their successor has been appointed, and clarifying the roles of the OAH and representative of the Office of Attorney as they relate to the function of the COST.

The Office of Open Government reserves its authority to enforce against the members of the COST for non-compliance with the OMA; requires all members of the COST to undergo OMA training within 60 days of the issuance of this order, and for the training to be conducted only by the director of the OOG; to immediately back post on the OAH website, and/or the OOG central calendar all meeting minutes or audio files of the public portions of all meetings dating back to November 2014. The members of the COST must show good cause, by way of informing the OOG in writing, if it cannot publish the required records, and must indicate such for each respective meeting date. The members of the COST are required to immediately publish its yearly calendar of meeting dates in the District of Columbia Register, and to publish those dates on the OAH website and/or the OOG central calendar.

³⁷ Mr. Onek's Resolution for Reappointment was approved by the Council on September 19, 2017.

The OOG is at the disposal of the COST and the OAH to assist the COST with coming into compliance with the OMA.



TRACI L. HUGHES, ESQ.

Director, Office of Open Government

Board of Ethics and Government Accountability

Cc: Vanessa Natale, General Counsel OAH
Phil Mendelson, Chairman, Council of the District of Columbia