IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

JAMES M. PALENICK,

Plaintiff - Appellant,

v.

Court of Appeals No. 30136

CITY OF RIO RANCHO,

Defendant – Appellee,

NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT'S AMICUS CURIAE BRIEF

APPEAL FROM
THIRTEENTH JUDICIAL DISTRICT COURT
THE HONORABLE GEORGE E. EICHWALD
No. D1329-CV08-089

Submitted by:

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COMES NOW the New Mexico Foundation for Open Government ("NMFOG"), by and through counsel, Dines & Gross PC (Gregory P. Williams), and submits the following *amicus curiae* brief in accordance with Rule 12-215 NMRA. NMFOG herein urges this Court to reverse the District Court's conclusion of law that when the City of Rio Rancho "cured" a violation of the New Mexico Open Meetings Act by subsequently taking additional actions, the later actions were "retroactive" to the date of the original violation as if that violation had never occurred. The Open Meetings Act does not allow such "retroactive" action under these circumstances, and to interpret the Act to do so would undermine its fundamental purpose of holding public entities accountable for conducting public business in secret.

I. ABOUT THE NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT

The New Mexico Foundation for Open Government ("NMFOG") is an educational and charitable organization with the mission of helping the general public, students, educators, public officials, media and legal professionals understand, obtain and exercise their rights and responsibilities under state and federal "sunshine laws." Among NMFOG's activities is to assist members of the public in enforcing their rights under New Mexico's Open Meetings Act and Inspection of Public Records Act.

On occasion, NMFOG takes an active role in litigation in cases when New Mexico courts are considering important issues related to New Mexico's sunshine laws. *See, e.g., City of Farmington v. The Daily Times*, 2009-NMCA-057, 146 N.M. 349, 210 P.3d 246 (City of Farmington found to have violated Inspection of Public Records Act when it refused to disclose applications for City Manager).

NMFOG is involved in the present case because of the importance of the issue of "retroactivity" under the Open Meetings Act. If the district court's interpretation of the Act is allowed to stand, and public entities are allowed to "cure" violations of the Act by retroactively applying later lawful actions to a date of their own choosing, as if the violation had never occurred, the deterrent effect of the Act will be substantially lessened. Public entities will be emboldened to violate the Act, knowing that if they are "caught" they can simply erase their violation by conducting a subsequent lawful meeting and then declaring their lawful Act "retroactive" so as to avoid any consequence from the prior violation. NMFOG believes that the Court should not create a loophole that defeats the Act's purpose of ensuring that public business should be conducted in the open.

II. INTRODUCTION

The City of Rio Rancho violated the Open Meetings Act when it tried to fire its City Manager, James Palenick, by means of an illegal "rolling quorum." When called upon its unlawful act by Mr. Palenick and later by the New Mexico Attorney

General, the City acted again, this time properly terminating Mr. Palenick following the procedures of the Act. The City now claims that its termination of Mr. Palenick was "retroactive." In other words, it asserts that Mr. Palenick's termination was effective on the date that it first attempted to terminate him, even though that attempt was in violation of the Act and thus invalid. The City does so to avoid paying Mr. Palenick the salary and benefits he earned between the attempted termination and the actual termination.

The Open Meetings Act does not allow such a result. Under the plain language of the Act, no action taken in violation of the Act is valid. NMSA 1978 § 10-15-3 (1997). As a result, when the City violated the Act when it attempted to terminate Mr. Palenick, no valid termination took place. Mr. Palenick was not validly terminated until nearly a year later. The Act does not authorize a public entity to make a valid action "retroactive" to some prior date of its choosing. To allow such a result would undermine the Act's purpose.

III. ARGUMENT

A. PURPOSE OF THE OPEN MEETINGS ACT

Often a court must struggle to divine the intent of the New Mexico Legislature in enacting a particular piece of legislation; in the case of the New Mexico Open Meetings Act, the Legislature has explicitly stated the public policy behind the Act:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings.

Section 10-15-1(A)

This Court has held that "[t]he purpose of the Act is 'to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret.'" *Kleinberg v. Board of Educ. of Albuquerque Public Schools*, 107 N.M. 38, 42, 751 P.2d 722, 726 (Ct. App. 1988), *citing Gutierrez v. City of Albuquerque,* 96 N.M. 398, 400, 631 P.2d 304, 306 (1981). "With few exceptions, the public policy of this state, as expressed in the Act, is to conduct the public's business in the open, allowing persons, so desiring, to attend and listen to the proceedings. § 10-15-1." *Id.*

B. CASE FACTS

The facts underlying this case are fully set forth in Plaintiff-Appellant's Docketing Statement and Brief-in-Chief, but for the Court's assistance certain important facts (as set forth by the District Court) are restated as follows:

1. James Palenick was the City Manager for the City of Rio Rancho. (District Court's Findings of Fact and Conclusions of Law, at Finding No. 1, page 1) (RFP 357).

2. Mr. Palenick and the City entered into an Employment Agreement, which required the City to give Mr. Palenick specified severance benefits if he were to be fired without just cause. (Findings of Fact and Conclusions of Law, at Finding No. 3, pages 1-2) (RFP 357-58).

3. At a meeting of the City's Governing Body on December 13, 2006, the Governing Body voted to terminate Mr. Palenick's employment without specification of just cause. (Findings of Fact and Conclusions of Law, at Finding No. 4, page 2) (RFP 358).

4. The Attorney General of New Mexico later issued an opinion that the Open Meetings Act was violated by the City's Governing Body due to prior discussions of Mr. Palenick's employment status which invalidated the action by the Governing Body to terminate Mr. Palenick at the meeting on December 13, 2006. (Findings of Fact and Conclusions of Law, at Finding No. 16, page 3) (RFP 359).

5. On November 14, 2007, the City's Governing Body adopted Resolution 99 to address the Attorney General's concerns about the Governing Body's action on December 13, 2006, terminating Mr. Palenick. (Findings of Fact and Conclusions of Law, at Finding No. 17, page 3) (RFP 359).

6. Resolution No. 99 states, in part, that "If at all relevant, any and all prior action undertaken in terminating Mr. Palenick's employment with the City

and set forth in writing are hereby ratified and approved." (Findings of Fact and Conclusions of Law, at Finding No. 19, page 4) (RFP 360).

7. By adopting Resolution No. 99 the Governing Body intended to ratify and approve its prior action terminating Mr. Palenick's employment effective December 13, 2006. (Findings of Fact and Conclusions of Law, at Finding No. 20, page 4) (RFP 360).

C. THE DISTRICT COURT'S CONCLUSIONS OF LAW

The district court made the following relevant conclusions of law:

1. The City's action resulting from the December 13, 2006 meeting concerning Mr. Palenick's termination was in violation of the Open Meetings Act. (Findings of Fact and Conclusions of Law, at Conclusion No. 2, page 4) (RFP 360).

2. The adoption of Resolution No. 99 by the City's Governing Body on November 14, 2007, retroactively ratified, rectified, and approved its prior action on December 13, 2006 terminating Mr. Palenick's employment and cured any violations of the Open Meetings Act. "Procedural defects in the Open Meetings Act may be cured by taking prompt corrective action." Kleinberg v. Board of Educ. Of Albuquerque Public Schools, 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988) (citing Board of Educ. Of Santa Fe Public Schools v. Sullivan, 106 N.M. 125, 740

P.2d 119 (1987)). (Findings of Fact and Conclusions of Law, at Conclusion No. 3, page 4) (RFP 360).

D. THE DISTRICT COURT IMPROPERLY HELD THAT THE CITY COULD "RETROACTIVELY" APPLY ITS DECISION TO THE DATE OF ITS ORIGINAL OPEN MEETINGS ACT VIOLATION

The district court effectively ruled as follows: when a public entity violates the Open Meetings Act, it can make that violation vanish by taking subsequent actions and unilaterally declaring that the subsequent actions are "retroactive" to the date of its choosing. Nothing in the Act authorizes such a result, and in fact such an interpretation undercuts the Act's purpose by allowing a public entity to erase prior violations with no penalty whatsoever.

1. A PUBLIC ENTITY CAN "CURE" A PRIOR OPEN MEETINGS ACT VIOLATION, BUT CANNOT DO SO RETROACTIVELY

The district court erred when it relied on two decisions, *Board of Educ. of Santa Fe Public Schools v. Sullivan*, 106 N.M. 125, 740 P.2d 119 (1987), and *Kleinberg v. Board of Educ. Of Albuquerque Public Schools*, 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988), for the proposition that public entities can both cure Open Meetings Act violations and retroactively apply to those cures. Both *Sullivan* and *Kleinberg* stand for the first concept (cure) but neither case even addresses the second concept (retroactivity).

In *Sullivan*, the Santa Fe school district attempted to terminate an employee's teaching contract but its manner of doing so did not comply with the Act. 106 N.M at 125, 740 P.2d at 119. The district then reinstated its termination proceedings, corrected the procedural defect and, relying on the same alleged acts of misconduct that had been relied upon in the original proceedings, terminated the employee's contract. Id. The New Mexico Supreme Court upheld this procedure. Id. Shortly thereafter, the Court of Appeals reached a similar finding in another case, *Kleinberg v. Board of Educ. of Albuquerque Public Schools*, 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988). In that case, the Court of Appeals stated that, pursuant to *Sullivan*, "procedural defects in the Open Meetings Act may be cured by taking prompt corrective action." Id. at 44, 751 P.2d at 728.

NMFOG agrees that, following *Sullivan* and *Kleinberg*, under certain circumstances a public entity which takes an action that violates the Open Meetings Act may later take the same action in a way that does not violate the Act. However, neither *Sullivan* nor *Kleinberg* held that a public entity, in "curing" a violation of the Act by taking a subsequent action, may "retroactively" apply the subsequent action to the date of the original violation. The district court relied upon *Sullivan* and *Kleinberg* for that very proposition (see RFP 360). However, neither *Sullivan* and *Kleinberg* addressed the issue of retroactivity.

In addressing whether a cure may be retroactive under the Act, this Court must examine both the plain language of the Act and the policy that underlies it.

a. THE PLAIN LANGUAGE OF THE ACT DOES NOT AUTHORIZE "RETROACTIVITY"

The Act states explicitly that actions taken in violation of the Open Meetings Act are not valid:

> No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.

Section 10-15-3(A).

The district court found that the City violated the Act when it attempted to terminate Mr. Palenick. In other words, the court ruled that the action taken by the City in attempting to terminate Mr. Palenick was not "taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1" and thus was not "valid."

Nothing in the Act states or even implies that when a public entity acts to "cure" an invalid action under § 10-15-3(A) by taking a subsequent action, the later act should be applied retroactively.

b. THE PUBLIC POLICY BEHIND THE ACT REQUIRES THAT LATER ACTS SHOULD NOT BE APPLIED RETROACTIVELY

In interpreting the Open Meetings Act, this Court's "central concern is to construe the statute so as to determine and give effect to the legislature's intent."

Board of County Com'rs, Luna County v. Ogden, 117 N.M. 181, 184, 870 P.2d 143, 146 (Ct. App. 1994), *citing State ex rel. Klineline v. Blackhurst,* 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). In ascertaining the legislative intent behind the Open Meetings Act, this Court must "look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied." *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 400, 631 P.2d 304, 306 (1981).

The issue before the Court is how to sort out the consequences when a public entity's actions have been found invalid under the Act. "Consequences of [an act later determined to be void] must . . . be determined with reference to the purposes underlying the [Open Meetings Act]. *Alaska Community Colleges' Federation of Teachers, Local No. 2404 v. University of Alaska,* 677 P.2d 886, 890-91 (Alaska 1984). The intent of New Mexico's Act is clear: to ensure that public entities carry out public business in an open manner. Allowing the City to retroactively "cure" a violation defeats this purpose. If the City's interpretation of the Act is allowed to stand, there will simply be no incentive for a public entity to comply with the Act. A public entity can merely take public actions in secret, and if caught, perform the same acts in a proper manner and "retroactively" apply the results.

In some instances, a retroactive application will have little practical effect. For example, if a school board were to choose to name the local football stadium after a former coach, and attempted to do so in a way that violated the Act, the board could later cure that violation and retroactivity would not matter. But in an employment situation like Mr. Palenick's, the issue of retroactivity is crucial. Mr. Palenick had a valid employment contract that entitled him to salary and benefits until the contract was terminated. The City attempted to terminate Mr. Palenick on December 11-13, 2006; that attempt has been found not valid. The City did not actually terminate Mr. Palenick until November 14, 2007, nearly a year later. For this Court to allow the City to unilaterally end its contractual obligations to Mr. Palenick merely by declaring its later lawful acts retroactive to a date of its choosing would undercut the purpose of the Act. There would simply be no incentive for a public entity to act lawfully under these circumstances, because it could always go back and retroactively fix its unlawful acts. The public entity would suffer no consequence, while the public employee who was illegally terminated would lose the salary and benefits to which he was entitled.

Other courts which have considered this issue have found that employees who are terminated in violation of open meetings acts are entitled to back pay dating back to the date of the original attempted termination. For example, in *Ferris v. Texas Bd. of Chiropractic Examiners*, 808 S.W.2d 514 (Tex. App. 1991),

the issue before the court was "whether an employee of a governmental agency who is initially illegally terminated in violation of the Open Meetings Act, but who is later properly terminated in compliance with the Act," was entitled to relief including back pay between the illegal termination attempt and the later effective termination. *Id.* at 516. The Texas court held that the employee was in fact entitled to such relief. *Id.* The court ruled that because the initial attempted termination violated the Open Meetings Act, it was void, and thus the employee continued to be employed by the Board until the legal termination occurred. *Id.* In doing so, the Texas court specifically rejected the defendant's argument that the subsequent legal termination "rectified" its prior illegal actions in a way that "cured" the prior violation.

Other courts have reasoned that "curing" an open meetings act violation is to be done in a way that puts the parties as close as possible to the situation they were in had the illegal act never taken place. "Ideally the plaintiff is entitled to be placed in the position he would have been in had the violation never occurred." *Revelle v. Marston*, 898 P.2d 917, 923-24 (Alaska 1995) (citation omitted). Similarly, in a case in which a public employee was terminated in violation of an open meetings act, the Kentucky Court of Appeals held that "in order to return the Plaintiff to his original position as if the termination had never occurred, Plaintiff Ratliff shall be entitled to his back pay from the date of the termination until the

date of his retirement in July of 1993." *Floyd County Bd. of Educ. v. Ratliff*, 2004 WL 2316759, 6 (Ky. App. 2004) (unpublished). *See also Puglisi v. School Committee of Whitman*, 414 N.E.2d 613, 615 (Mass. App. 1981) (an employee fired in violation of the open meetings law was entitled to back pay from the date of the faulty discharge.)

NMFOG urges this Court to follow the lead of these other courts and find that the City of Rio Rancho could not retroactively apply the termination to the date of its original attempted termination. To find otherwise would undermine the deterrent effect of the Act. It would effectively announce to public entities that they need not follow the Act, because if they are caught violating the Act they can later fix the problem and "retroactively" apply their decision. The Act simply cannot be interpreted in this manner.

IV. CONCLUSION

NMFOG hereby requests that the Court grant the relief sought by Plaintiff-Appellant James Palenick and reverse the finding of the District Court that the City of Rio Rancho's actions on November 14, 2007, are to be retroactively applied to December 13, 2006.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

In accordance with Rule 12-213(G) NMRA, I hereby certify that this Brief complies with Rule 12-213(F) NMRA. The number of words in the body of the brief is 3,009. This number was obtained using the word-processing program Microsoft Word, 2002 version.

Gregory P. Williams

I hereby certify that service of the above was mailed to:

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This 24 day of August, 2010.

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