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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

DR. JOEL JOSEPH,
Petitioner-Appellee,

v.

GUAM BOARD OF ALLIED HEALTH EXAMINERS,
Respondent-Appellant.

Supreme Court Case No.: CVA13-023
Superior Court Case No.: SP0100-12

OPINION

Cite as: 2015 Guam 4

Appeal from the Superior Court of Guam
Argued and submitted on August 6, 2014
Hagåtña, Guam

Appearing for Respondent-Appellant:
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BEFORE: ROBERT J. TORRES, Chief Justice; KATHERINE A. MARAMAN, Associate Justice; JOHN A. MANGLONA, Justice *Pro Tempore*.[1]

PER CURIAM:

[1] Respondent-Appellant Guam Board of Allied Health Examiners ("the Board") challenges the trial court's judgment granting a peremptory writ of mandate/judicial review commanding the Board to set aside its decision suspending local veterinarian, Petitioner-Appellee Dr. Joel Joseph, from the practice of veterinary medicine. In his Petition for Judicial Review/Writ of Mandate ("Petition"), Dr. Joseph alleged, *inter alia*, that the Board violated the Open Government Law ("OGL") by failing to give proper notice of the evidentiary hearings conducted in his disciplinary action. The trial court agreed and vacated the Board's decision to suspend Dr. Joseph's veterinary license. For the reasons stated below, we affirm the trial court's decision on other grounds.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] This case originated from a disciplinary action brought by the Board against Dr. Joseph, involving charges of professional misconduct. The Board scheduled a special meeting to take place on December 2, 2011, for the purpose of conducting a "status and scheduling hearing" in Dr. Joseph's disciplinary case. *See* RA, tab 37, App. 2 at 1 (Pet'r's Reply Mem., Feb. 15, 2013). The Board later rescheduled the December 2 meeting to December 9, 2011. The December 9, 2011 special meeting was then continued until February 6, 2012, which is when the Board commenced the evidentiary hearings. The February 6, 2012 meeting was continued several times: February 8 and 15, 2012; April 16-19, 23-26, 2012; and June 11 and 13, 2012. After these

[1] Associate Justice F. Philip Carbullido recused himself from this matter. On May 16, 2014, pursuant to 7 GCA §§ 3109(f) and 6108(a), Chief Justice Torres appointed the Honorable John A. Manglona as Justice *Pro Tempore* in this matter.

evidentiary hearings, the Board issued a final decision suspending Dr. Joseph's veterinary license for five years.

[3] Dr. Joseph then timely filed his Petition with the trial court, asserting, *inter alia*, that the Board had violated the OGL. After a hearing, the trial court granted the Petition and determined that the Board violated the OGL by failing to provide adequate notice for the evidentiary hearings that began on February 6, 2012.

[4] The trial court rendered the Board's final decision void and determined the remaining claims in the Petition moot.[2] The trial court subsequently issued a writ, ordering the Board to set aside its Final Decision. This appeal ensued.

II. JURISDICTION

[5] This court has jurisdiction over an appeal from a final judgment of the trial court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-234 (2014)) and 7 GCA §§ 3107(b) and 3108(a) (2005). *See* Joseph v. Guam Bd. of Allied Health Exam'rs, CVA13-023 (Order at 2 (Mar. 25, 2014)) (denying Dr. Joseph's Motion to Dismiss Appeal).

III. STANDARD OF REVIEW

[6] "Generally, a reviewing court examines whether the Superior Court's grant of a writ of mandate is supported by substantial evidence." *Guam Election Comm'n v. Responsible Choices for all Adults Coal.*, 2007 Guam 20 ¶ 23 (citing *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 13). "But where there are no facts in dispute and the questions presented for review are strictly questions of law the court's review is *de novo*." *Id.* We examine whether the trial court's decision over a Petition for Judicial Review of an agency decision was in accordance

[2] The remaining claims are board bias, counsel bias, statutory bias, ex-parte communications, charging deficiencies, excessive and unauthorized discipline, and recording violation. *See* RA, tab 41 (Am. Dec. & Order, June 19, 2013).

with the law and supported by substantial evidence. *See Guam Waterworks Auth. v. Civil Serv. Comm'n*, 2014 Guam 35 ¶ 5 ("We examine whether the trial court properly determined that the CSC's decision was in accordance with the law and supported by substantial evidence."). In doing so, all conclusions of law are reviewed *de novo*, and we will hold unlawful and set aside any agency action, findings, and conclusions found to be irrational, or otherwise not in accordance with law or unsupported by substantial evidence in a case. *Id.*

IV. ANALYSIS

[7] The Board asserts on appeal that: (a) Dr. Joseph's claim the Board violated the OGL was not properly pleaded in the Petition; (b) the trial court erred in finding that the Board violated the notice provisions of the OGL; and (c) Dr. Joseph waived his claim that the OGL was violated by failing to raise it at the administrative level.[3]

A. Whether Dr. Joseph's Claim the Board Violated the OGL was Properly Pleaded in the Petition

[8] Focusing on the distinction between an appeal pursuant to the Administrative Adjudication Law ("AAL") and a mandamus action to void an agency's action not properly noticed, the Board argues that Dr. Joseph's Petition only pertained to a claim under the AAL. Appellant's Br. at 6 (Nov. 13, 2013). The Board contends that Dr. Joseph failed to properly plead his claim for OGL violation because the Petition does not satisfy the factual pleading requirements. *See id.* at 5-7. We reject this argument. Even though Dr. Joseph's Petition cited

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[3] Dr. Joseph argues that alternative grounds exist in the record to support affirming the trial court's judgment, namely, that other violations of the Open Government Law existed (i.e., the Board prevented and denied recording of hearings), and that he was deprived of a fair hearing because "Tainted Board Members Tainted the Proceedings" and board animus existed against him. *See* Appellee's Br. at 21-36 (Apr. 15, 2014). Because we affirm the trial court's judgment, we need not address these additional grounds.

the AAL, the Petition contained sufficient information to put the Board on notice that Dr. Joseph was asserting a violation of the OGL.

[9] Guam law requires only notice pleading, not fact pleading. *Guam Election Comm'n*, 2007 Guam 20 ¶ 94 (citing Guam R. Civ. P. 8(a)).[4] A review of the Petition reveals that the Board was on notice that it had allegedly violated the OGL by failing to comply with its notice requirements. RA, tab 3 at 2 (Pet. for Judicial Review/Writ of Mandate and Req. for Stay, June 15, 2012)). Specifically, the Petition identifies a number of meetings that were held before the Board:

> The Board held evidentiary hearings herein commencing February 6, 2012 through February 15, recommencing on April 16 through 25, 2012, the Board deliberated and voted on April 26, 2011. Respondent issued a Final Decision, Findings of Fact, Conclusions of Law and Order ("Final Decision") on June 13, 2012. A true and correct copy of the Final Decision is attached as Exhibit "3".

Id. The very next paragraph states that the Board "violated the Open Government Law (5 GCA section 8101 et. seq.) by . . . failing to comply with the notice requirements . . . ." *Id.* (citing 5 GCA § 8101 *et seq.*). Dr. Joseph was not required to identify the specific notice provision of the OGL. *See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1399 (7th Cir. 1989) ("Under a system of notice pleading, a party may prevail by establishing that its legal rights have been violated, whether or not it names the right statute.").

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[4] Rule 8(a) states:

> Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader seeks. Relief in the alternative or of several different types may be demanded.

Guam R. Civ. P. 8(a).

[10] Thus, applying the liberal rules of notice pleading, we hold that Dr. Joseph's Petition gave the Board fair notice of his OGL claim and the grounds upon which it rests. *See Guam Election Comm'n*, 2007 Guam 20 ¶ 94 n.58 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). We therefore hold that Dr. Joseph's OGL claim for insufficiency of notice was properly pleaded.

B. Whether the Trial Court Erred in Finding that the Board Violated the Open Government Law

[11] The crucial issue on appeal is whether the Board complied with the notice provisions of the OGL for the evidentiary hearings that commenced on February 6, 2012.

[12] Dr. Joseph argues that the Board violated the OGL by failing to give proper notice of the February evidentiary hearings. Appellee's Br. at 8 (Apr. 15, 2014). Specifically, the Board should have issued a specific notice for the February 6, 2012 evidentiary hearing, instead of using a "'notice of continuance' stating that the status and scheduling hearing held December 9, 2011, was 'continued' to February 6, 2012." *Id.* at 4. The Board maintains that it "used the notice permitted by 5 G.C.A. § 8110 for adjournments, namely, it posted a notice in the window of the GBAHE office from December 9th onwards stating that the [December 9, 2011] hearing would be continued until February 6, 2012."[5] Appellant's Br. at 9 (citing ER at 144 (Decl. of Jane Diego (Feb. 1, 2013))).[6]

[13] The trial court did not specifically examine whether the notice for the February 6, 2012 hearing was sufficient. It simply found that the OGL was violated. This is likely because the

[5] Dr. Joseph also argues that the Board violated the OGL notice provisions for the evidentiary hearings that followed the initial February 6, 2012 evidentiary hearing. *See* Appellee's Br. at 8. We, however, need not address whether notice was sufficient for the post-February 6, 2014 hearings because of our finding that notice for the initial February 6, 2012 evidentiary hearing violated the OGL notice provisions.

[6] Whether the use of adjournment-style notice or separate notice would have been proper is not relevant in this case. At issue is whether the notice (regardless of the type) for the February 6, 2012 hearing reasonably informed the public that a hearing on the merits (as opposed to a "status or scheduling hearing") would be taking place at the February 6, 2012 hearing.

trial court found that the Board did not dispute the issue. RA, tab 41 at 4 (Am. Dec. & Order, June 19, 2013) ("[The Board] does not dispute that [it] did not provide adequate statutory notice for its disciplinary hearings. Nor does [it] dispute that these hearings were essential to its June 13, 2012 final decision."). The Board argues that this finding was erroneous. Appellant's Br. at 10. The Board argues that it never admitted to not providing notice; rather, it simply relied on the "adjournment style notice" posted on the window as being adequate notice of the February 6 hearing. Appellant's Br. at 9-11. We agree that the Board did dispute the issue of whether it provided adequate statutory notice for the disciplinary hearing. However, notwithstanding the trial court's erroneous finding, we affirm the court's decision on other grounds. *See Ramos v. Docomo Pac., Inc.*, 2012 Guam 20 ¶ 25 ("An appellate court may affirm the judgment of a lower court on any ground supported by the record." (quoting *People v. San Nicolas*, 2001 Guam 4 ¶ 29)).

[14] The record does not contain a copy of the notice of continuance for the December 9, 2011 hearing, but the Declaration from the Board's staff specified that a notice of continuance was posted on the entrance door of the Board office on December 10, 2011, stating that the December 9, 2011 hearing shall continue on February 6, 2012, and such notice remained posted continuously until February 6, 2012. *See* RA, tab 36, Ex. C (Resp't's Opp'n, Feb. 1, 2013). Nothing in the record suggests that the February 6, 2012 meeting would be an evidentiary hearing, and the Board did not offer proof that would show the hearing would be other than a continuance of the December 9, 2011 hearing.[7] Therefore, the record suggests the February 6,

[7] The only relevant notice contained in the record is the November 16, 2011 notice for the initial December 2, 2011 "status hearing," which states: "PLEASE TAKE NOTICE THAT a status and scheduling hearing in the above-captioned proceeding will be held on December 2, 2011 at 12:00pm, at the conference room . . . ." RA, tab 37 at 19 (Pet'r's Reply Mem., Feb. 15, 2013). The notice also contained the disciplinary proceeding caption and case number, as well as identified Dr. Joseph as the respondent. *See id.* The status hearing originally scheduled for

2012 hearing was a continuance of the December 9, 2011 hearing which was originally noticed as a status and scheduling hearing only.

[15] Based on the above, we must determine whether the notice for the February 6 hearing complied with the notice requirements of the OGL and permitted the Board to proceed with an evidentiary hearing (or a *hearing on the merits*).

[16] The stated purpose of the OGL is to ensure that "the formation of public policy and decisions is public and shall not be conducted in secret." 5 GCA § 8102 (2005). To effectuate this purpose, the OGL requires that a public agency, like the Board, give public notice of regular and special meetings. *See* 5 GCA § 8107 (2005). The hearings held before the Board are subject to the notice provisions for "special meetings" under the OGL.[8] *See* 5 GCA §§ 8107(b), 8108 (2005).

[17] The relevant notice provision is section 8108,[9] which provides in relevant part: "*The call and notice shall specify* the time and place of the special meeting and *the business to be*

December 2, 2011 was rescheduled to December 9, 2011. Appellee's Br. at 3 n.2. Although the record is unclear regarding the manner in which the hearing was rescheduled, the parties do not assert the December 9, 2011 hearing violated any provisions of the OGL.

[8] The Board treated Dr. Joseph's disciplinary hearings as special, not regular meetings under the OGL. *See, e.g.*, RA, tab 37 at 19 (Pet'r's Reply Mem.) (November 16, 2011 notice of hearing stating that "[t]he Health Professional Licensing Office will cause public notice of this special meeting in accordance with 5 G.C.A. §§ 8107-8108.").

[9] Title 5 GCA § 8108 states:

> A special meeting may be called at any time by a public agency, by delivering personally, or by mail, written notice to each member of a public agency. Notice shall also be given to each newspaper of general circulation and broadcasting station which airs a regular local news program within Guam. Such notice must be delivered personally or by mail at least five (5) working days, and a second public notice at least forty-eight (48) hours, before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at such meetings by the public agency. The five (5) days notice and the forty-eight (48) hours notice may be waived in the event of an emergency certified to in writing by a public agency. A public agency may also consider all necessary business in the event of an emergency. This Section shall not require a public agency to give notice of its meetings by paid advertisements in any newspaper or over any broadcasting station. Written notice may be dispensed with as to any member who at, prior to or

transacted. No other business shall be considered at such meetings by the public agency." 5 GCA § 8108 (emphases added). Section 8108, however, does not provide the extent to which a governmental entity must specify the "business to be transacted," and this court has never addressed the issue. *Id.* Jurisdictions that have addressed the issue have applied a reasonableness standard based on the circumstances of each case.[10]

[18] The case of *State ex rel. Buswell v. Tomah Area School District*, 732 N.W.2d 804 (Wis. 2007), is instructive in our examination of whether we should adopt this standard in our jurisdiction. In *Buswell*, the Wisconsin Supreme Court held that:

> the language of § 19.84(2) [of the Wisconsin Open Meetings Law] and the policies underlying the open meetings law do not abide a bright-line rule where the general topic of a meeting constitutes sufficient subject matter notice as a matter of law. Rather, they demand a reasonableness standard according to which notice must be reasonably specific under the circumstances of the case.

> subsequent to the time the meeting convenes, files with the clerk or secretary of the public agency a written waiver of notice. Such written notice may be dispensed with as to any member who is actually present at a meeting at the time it convenes.

5 GCA § 8108. The other notice provision for special meetings is section 8107(b), which states:

> Notice of Special Meetings. Any public agency which holds a meeting not previously scheduled by statute, regulation or resolution, or for which notice is not already provided by law, shall give five (5) working days public notice of such meeting, and a second notice at least forty-eight (48) hours, prior to the start of such meeting as required by this Chapter. The public agency must comply with the Title II of the ADA requirements for effective communication for people with disabilities and include information in the notice that individuals requiring special accommodations, auxiliary aids or services shall contact and submit their request to the designated agency or department representative or ADA Coordinator. The public agency shall make available the name, office address and telephone number, including TDD, of the designated ADA Coordinator.

5 GCA § 8107(b).

[10] *See, e.g., Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986) ("[The public has a] right to be notified with reasonable specificity of the subject matter to be considered at a meeting of a governmental body, particularly when the subject is one in which the public can reasonably be expected to have a special interest . . . ."); *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 732 N.W.2d 804, 814-15 (Wis. 2007); *Tanner v. Town Council of Town of E. Greenwich*, 880 A.2d 784, 797 (R.I. 2005) ("[T]he requirement that a public body provide supplemental notice, including a 'statement specifying the nature of the business to be discussed,' obligates that public body to provide fair notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon.").

732 N.W.2d at 814.[11] The court stated that the reasonableness standard requires taking into account the circumstances of the case in determining whether notice is sufficient, including analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate. *Id.* In applying the reasonableness standard, the court carefully examined these three factors:

> The first factor, the burden of providing more specific information on the body noticing the meeting . . . balances the policy of providing greater information with the requirement that providing such information be "compatible with the conduct of governmental affairs." Whether more detailed notice is compatible with the conduct of governmental affairs is determined on a case-by-case basis. Such a determination may include, but is not limited to, the time and effort involved in assessing what information should be provided in a notice and the inherent limitations of citizen boards. . . . The crucial point is that the demands of specificity should not thwart the efficient administration of governmental business.
>
> In considering the second factor, we are persuaded that particular public interest in the subject matter of a meeting may require greater specificity in the hearing notice. Particular public interest may be a matter of both the number of people interested and the intensity of that interest. The level of interest, in and of itself, however, is not dispositive. Rather, it must be balanced with other factors on a case-by-case basis.
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> Third, the degree of specificity of notice may depend on whether the subject of the meeting is routine or novel. Where the subject of a meeting recurs regularly, there may be less need for specificity because members of the public are more likely to anticipate that it will be addressed. However, novel issues are more likely to catch the public unaware. Novel issues may therefore require more specific notice.

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[11] Section 19.84(2) is the notice provision for the Wisconsin Open Meetings Law, which provides in relevant part:

> Every public notice of a meeting of a governmental body *shall set forth the time, date, place and subject matter of the meeting*, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

Wisc. Stat. Ann. § 19.84(2) (West 2007) (emphasis added).

> The determination of whether notice is sufficient should be based upon what information is available to the officer noticing the meeting at the time notice is provided, and based upon what it would be reasonable for the officer to know. Thus, whether there is particular public interest in the subject of a meeting or whether a specific issue within the subject of the meeting will be covered, and how that affects the specificity required, cannot be determined from the standpoint of when the meeting actually takes place. Rather, it must be gauged from the standpoint of when the meeting is noticed.

Id. at 814-15 (citations omitted).

[19] In *Buswell*, the school board "held a special meeting in closed session to discuss the provisions of the new TEA master contract." *Id.* at 809. The notice issued for the special meeting stated: "Contemplated closed session for consideration and/or action concerning employment/negotiations with District personnel pursuant to Wis. Stat. § 19.85(1)(c)." *Id.* During the special meeting, while in closed session, "the Board tentatively approved the TEA master contract subject to TEA ratification and ratification by the Board in open session." *Id.* at 810. A regular meeting was later held, where "the Board officially ratified the TEA master contract that had been tentatively approved" at the special meeting. *Id.*

[20] The court held that the notice for the meeting was not sufficiently specific because the "description is vague, for it could cover negotiations with any group of district personnel or with any individual employee within the district." *Id.* at 816. The court further found the notice to be misleading because it stated that the closed session was for "considering matters related to individual employees, not for considering collective bargaining agreements." *Id.* Analyzing the circumstances of the case, the court determined that three factors support the conclusion that the notice required greater specificity. *Id.* at 817. First, it would not have been a burden to the Board to state that the TEA master contract would be discussed at the June 1 meeting because it would only require a few words. *Id.* Further, the notice for the second meeting "actually listed the TEA master contract on the agenda, and there is no contention that listing it there was a

burden." *Id.* "Second, the TEA master contract included a new hiring provision for coaches that was of interest to a number of people in the community. Several citizens had made the effort to petition the Board regarding whether to put a provision for hiring coaches into the master contract." *Id.* "Third, the TEA master contract was not a routine subject insofar as it contained a new hiring provision for coaches to which a number of members of the community objected. This suggests that the notice should have mentioned the TEA master contract." *Id.*

[21] We are persuaded by the reasoning in *Buswell* and adopt the reasonableness standard set out by the court. Applying the *Buswell* reasonableness standard, there is no question that the notice reasonably informed the public that the February 6 hearing would involve Dr. Joseph's *disciplinary proceeding* and that a status or scheduling hearing would be taking place. The notice presumably contains a case number and caption, identifies Dr. Joseph as a respondent, and specifically states "status and scheduling hearing." *See, e.g.*, RA, tab 37, App. 2 at 1 (Pet'r's Reply Mem.). However, the Board's act of holding a *hearing on the merits* (as opposed to a "status and scheduling hearing") at the February 6, 2012 meeting exceeded the scope of the notice.

[22] A hearing on the "merits" and a "status or scheduling hearing" are completely different proceedings. A hearing on the merits is a proceeding where the substance of a claim or a defense is tried and involves the presentation of evidence. *See* Black's Law Dictionary 990-91 (6th ed. 1991) (defining "merits" as "[t]he substance, elements, or grounds of a cause of action or defense."). A status or scheduling hearing occurs prior to a hearing on the merits and provides the parties with a venue to address "pre-trial" issues, such as scheduling, settlement, discovery, etc. *See, e.g.*, Guam R. Civ. P. 16. Here, the actions taken at the February 6, 2012 meeting went beyond those that generally occur at a status or scheduling hearing and involved the presentation

of evidence.[12] Several witnesses testified against Dr. Joseph at the February 6, 2012 meeting, and Dr. Joseph's motion to dismiss the charges was argued and denied. RA, tab 34 at 17, 21 (Pet'r's Opening Br., Jan. 4, 2013); *see also* RA, tab 30 at 3-5 (Mot. Augment Administrative R. & Vacate "Certification" of R., Dec. 14, 2012). Therefore, the notice contained insufficient and misleading information about the actions that would be taken at the February 6, 2012 meeting.

[23] The notice may have been appropriate had it simply contained the language "hearing," instead of something specific like "status hearing." However, because the notice limited the scope of the February 6, 2012 meeting to that of a "status or scheduling hearing," it was improper for the Board to hold a hearing on the merits.

[24] Courts have voided agency action that went beyond the scope of the posted notice. In *Tanner v. Town Council of Town of E. Greenwich*, the Rhode Island Supreme Court stated:

> Clearly, fair notice to the public under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon, *is not met by misleading information about the actions to be taken at a meeting of a public body.*

880 A.2d 784, 798 (R.I. 2005) (emphasis added).[13]

[25] In that case, the town posted notice of a town council meeting with the only agenda item being: "'Interviews for Potential Board and Commission Appointments,' followed by the names of six potential appointees beside their respective scheduled interview times, with each interview scheduled twenty minutes apart." *Id.* at 789.[14] At the meeting, rather than just conduct the

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[12] Note that a transcript of the February 6, 2012 meeting was not included as part of the record.

[13] The court did "not suggest that the town council intentionally misled the public with regard to the notice, and the hearing justice found that plaintiff did not prove a knowing and willful violation, but we do believe that the notice was insufficient under the circumstances presented in the record . . . ." *Tanner*, 880 A.2d at 798 n.16.

[14] Section 42-46-6(b) of the Rhode Island Open Meetings Act ("OMA") contains similar language as Section 8108. It provides:

interviews, "the town council also voted to appoint one person as an alternate to the town zoning board, voted to appoint one person to the position of alternate to the planning board, and voted to promote one person from an alternate to a full member of the planning board." *Id.*

[26] Applying the reasonable standard test, the court found the notice to be insufficient because it did "not reasonably describe the purpose of the meeting or the action proposed to be taken as including 'voting' on the appointments of these potential board members." *Id.* at 798. The court reasoned:

> The posted notice clearly implies that the purpose of the meeting was to conduct interviews only, and that at the close of the last twenty-minute interview the meeting would end. The posted notice neither states nor implies that the town council would vote to appoint these potential board members; instead, the notice implies that the town council would not vote on the appointments, but rather conduct interviews, i.e., gather information from the potential appointees.

Id.

[27] *Haworth Board of Education of Independent School District No. I-6, McCurtain County v. Havens*, 637 P.2d 902 (Okla. Civ. App. 1981), a case decided by the Oklahoma Court of Appeals, is also instructive. In that case, the board filed suit against the superintendent to challenge the validity of his employment contract that was approved by the previous board during a special meeting. *Havens*, 637 P.2d at 903. Prior to the special meeting, the board

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> Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. *This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.* Copies of the notice shall be maintained by the public body for a minimum of one year. Nothing contained herein shall prevent a public body, other than a school committee, from adding additional items to the agenda by majority vote of the members. School committees may, however, add items for informational purposes only, pursuant to a request, submitted in writing, by a member of the public during the public comment session of the school committee's meetings. Said informational items may not be voted upon unless they have been posted in accordance with the provisions of this section. Such additional items shall be for informational purposes only and may not be voted on except where necessary to address an unexpected occurrence that requires immediate action to protect the public or to refer the matter to an appropriate committee or to another body or official.

R.I. Gen. Laws § 42-46-6(b) (emphasis added).

published two notices. *Id.* The first notice contained the following agenda, which read: "To discuss appointment of board member. Discussion of hiring administrator. Hiring principal." *Id.* The second notice stated:

> 1. Appoint new board member.
> 2. Interview a new administrator.
> 3. Hire principals.

Id. at 904. The court found that "[a] plain reading of the agendas shows School Board's action materially exceeded its announced purpose and intention." *Id.* The court reasoned that:

> the agendas specifically limited the business of the meeting to (1) hiring of principals and (2) interviewing and discussing the hiring of an administrator. Use of the terms "interviewing" and "discussing the hiring" of an administrator in juxtaposition with "hiring" of principals is misleading. It creates more than an inference that the two agenda items are distinct, the latter being limited to "discussion" and "interview."

Id. The court found the notice to be "deceptively vague and ambiguous" and held that it was "likely to mislead the average reader and is a 'willful violation' of the [Oklahoma Meeting] Act which nullifies the action taken." *Id.* The court defined "the term 'willful' to include any act or omission which has the effect of actually deceiving or misleading the public regarding the scope of matters to be taken up at the meeting." *Id.* The court further stated that an "agency action which exceeds the scope of action defined by the notice" constitutes a willful violation of the Oklahoma Meeting Act.[15] *Id.*

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[15] The notice provision of the Oklahoma Open Meeting Act for special meetings provides:

> Special meetings of public bodies shall not be held without public notice being given at least forty-eight (48) hours prior to said meetings. Such public notice of date, time and place shall be given in writing, in person or by telephonic means to the Secretary of State or to the county clerk or to the municipal clerk by public bodies in the manner set forth in paragraphs 2, 3, 4, 5 and 6 of this section. The public body also shall cause written notice of the date, time and place of the meeting to be mailed or delivered to each person, newspaper, wire service, radio station, and television station that has filed a written request for notice of meetings of the public body with the clerk or secretary of the public body or with some other person designated by the public body. Such written notice shall be mailed or delivered at least forty-eight (48) hours prior to the special

[28] Similarly, in this case, the act of holding a hearing on the merits at the February 6, 2012 meeting exceeded the scope of the action defined by the notice. Nothing in the notice would have reasonably alerted the public that the February 6, 2012 meeting was going to be a hearing on the merits. The original November 16 notice for the December 2011 meeting that was continued to February 6, 2012 may have been appropriate had the notice not contained the phrase "status and scheduling conference," or indicated that a hearing on the merits would be taking place (or some other statement to that effect). The public was therefore likely misled into thinking that the February 6, 2012 meeting was only going to be a "status or scheduling conference" as opposed to a hearing on the merits. Thus, based on the above, notice for the February 6, 2012 meeting was improper and therefore in violation of the OGL.

C. Whether Dr. Joseph Waived his Open Government Law Argument by Failing to Raise it During the Disciplinary Proceedings Before the Board

[29] The Board argues that Joseph waived his OGL claim by failing to raise the issue before the Board at the administrative level. Appellant's Br. at 11-12. Dr. Joseph argues that the OGL (or any Guam case) does not impose such a requirement. *See* Appellee's Br. at 16-18.

> meeting. The public body may charge a fee of up to Eighteen Dollars ($18.00) per year to persons or entities filing a written request for notice of meetings, and may require such persons or entities to renew the request for notice annually. *In addition, all public bodies shall, at least twenty-four (24) hours prior to such special meetings, display public notice of said meeting, setting forth thereon the date, time, place and agenda for said meeting.* Only matters appearing on the posted agenda may be considered at said special meeting. Such public notice shall be posted in prominent public view at the principal office of the public body or at the location of said meeting if no office exists. Twenty-four (24) hours prior public posting shall exclude Saturdays and Sundays and holidays legally declared by the State of Oklahoma.
>
> B. 1. *All agendas required pursuant to the provisions of this section shall identify all items of business to be transacted* by a public body at a meeting, including, but not limited to, any proposed executive session for the purpose of engaging in deliberations or rendering a final or intermediate decision in an individual proceeding prescribed by the Administrative Procedures Act.

Okla. Stat. Ann. tit. 25, § 311(A)(11), (B)(1) (West 2014) (emphases added).

[30] Guam law is silent as to whether an OGL violation for insufficiency of notice can be waived. *See* 5 GCA § 8101 *et seq.* The trial court also stated that it "is unaware of any binding or persuasive precedent that requires that a board's failure to provide adequate notice is waived if it is not raised before that administrative board." RA, tab 41 at 4 (Am. Dec. & Order). We agree.

[31] The Board relies on a Nebraska Supreme Court decision for the proposition that "[a] person who attends a public meeting and observes an alleged violation of the open government law but does not object, waives his right to object in court." Appellant's Br. at 12 (citing *Wasikowski v. Neb. Quality Jobs Bd.*, 648 N.W.2d 756 (Neb. 2002)). In *Wasikowski*, the court held that "[i]f a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date." 648 N.W.2d at 768.

[32] *Wasikowski*, however, is not helpful because the court did not have to examine a statute like section 8114 of the OGL, which strictly requires that:

> Any action taken at a meeting in violation of any Section of this Chapter shall be void and of no effect, provided that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned.

5 GCA § 8114 (2005). A review of the Nebraska Open Meetings Act reveals that actions under the Act are tried as equitable cases because the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. The relevant provision of the Act states:

> Any motion, resolution, rule, ordinance, or formal action of a public body made or taken in violation of the [public meetings statutes] shall be declared void by the district court if the suit is commenced within 120 days of the meeting of the public body at which the alleged violation occurred. Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in substantial violation of the [public meeting statutes] shall be voidable by the

> district court if the suit is commenced after more than one hundred twenty days after but within one year of the meeting of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.

Neb. Rev. Stat. § 84-1414(1) (2014).

[33] The first sentence of section 84-1414(1) is similar to Guam's section 8114, in that it requires that any formal action taken in violation of the Act be declared void. *Compare id.*, *with* 5 GCA § 8114. This sentence applies to suits filed within 120 days of the meeting at which the alleged violation occurred. Neb. Rev. Stat. § 84-1414(1). Unlike the first sentence, the second sentence (which governs suits filed more than 120 days but within 1 year of the meeting) gives the trial court more discretion in deciding whether to declare an action void. More specifically, any action in "substantial violation" (as opposed to an action "in violation") shall be rendered "voidable" by the court. *Id.*

[34] The Board's reliance on *Wasikowski* is misplaced because the second sentence of 84-1414(1), rather than the first sentence, applied. The claimant in that case filed her lawsuit after the initial 120-day period, triggering the discretionary standard under the second sentence. As such, the *Wasikowski* court was not held to the stricter standard set forth in the first sentence of 84-1414(1) and was therefore not required to void the action. The other Nebraska case cited by the Board, *Wolf v. Grubbs*, 759 N.W.2d 499 (Neb. Ct. App. 2009), also involved a meeting that occurred more than 120 days before the suit was filed, so voiding the meeting was likewise not required. Indeed, Nebraska case law shows that voiding an entire meeting is a proper remedy for violations of its Open Meetings Act. *See, e.g.*, *Steenblock v. Elkhorn Twp. Bd.*, 515 N.W.2d 128 (Neb. 1994) (finding that meeting was void and unlawful and failed to comply with requirements of public meetings law, because meeting was held in closed session, no member of public was

allowed to attend, and meeting was held without reasonable advance notice for action which did not constitute emergency). Therefore, based on the above, Dr. Joseph did not waive his objection under the OGL when he did not make his claim before the Board.

V. CONCLUSION

[35] For the foregoing reasons, we **AFFIRM** the trial court's judgment, but on grounds other than that decided by the trial court. Furthermore, we declare that the Board violated the Open Government Law Act by giving inadequate notice of the February 6, 2012 meeting. Accordingly, all actions taken by the Board subsequent to the December 10, 2011 Notice of Continuance are void and of no effect.

Original Signed By: Katherine A. Maraman

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: John A. Manglona

JOHN A. MANGLONA
Justice *Pro Tempore*

Original Signed By: Robert J. Torres

ROBERT J. TORRES
Chief Justice