

Board training: Overview of responsibilities, records and rulemaking

Oregon Aviation Board

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Assistant Attorney General Rachel Bertoni

Overview of Board service

- ▶ Board members are public officials and hold the public's trust
- ▶ Board members have duties:
 - ▶ Agency-specific:
 - ▶ Statutory mandates of ORS Ch 835-838
 - ▶ Generally applicable:
 - ▶ State ethics laws (ORS Ch 244)
 - ▶ Public meetings and public records laws (ORS Ch 192)
 - ▶ Rulemaking (ORS Ch 183)



Today's topics

1. **Public ethics**
 - ▶ Highlights
2. **Public meetings**
 - ▶ Executive session
3. **Public records**
 - ▶ Maintenance
 - ▶ Public inspection
4. **Rulemaking**
 - ▶ Authority
 - ▶ Process



1. Public ethics

- ▶ **Who is covered?**
 - ▶ Public officials (ORS 244.020(15))
- ▶ **What is prohibited?**
 - ▶ Use, or attempted use, of official position for financial gain or avoidance of financial detriment (ORS 244.040(1))
 - ▶ Solicitation or receipt of promise of future employment based on official actions(ORS 244.040(3))
 - ▶ Use of confidential information for personal gain (ORS 244.040(4), (5))



1. Public ethics

- ▶ What is required of Board members?
 - ▶ For a potential conflict of interest, must announce publicly the nature of the potential conflict prior to taking any action
 - ▶ For an actual conflict of interest, must announce publicly the nature of the actual conflict and refrain from participation in any discussion/debate or vote on the issue



1. Public ethics / conflicts of interest

▶ Actual Conflict	▶ Potential Conflict
<ul style="list-style-type: none">▶ ORS 244.020(1)▶ Any action, decision or recommendation by a public official, the effect of which would be to the private pecuniary benefit (or detriment) of:	<ul style="list-style-type: none">▶ ORS 244.020(13)▶ Any action/decision by a public official, the effect of which could be to the private pecuniary benefit (or detriment) of:
<ul style="list-style-type: none">▶ Public official (ORS 244.020(15))▶ Public official's relative(ORS 244.020(16))▶ Business associated with public official or relative (ORS 244.020(3))	



1. Public ethics

- ▶ Compliance with the public ethics law is a personal responsibility
- ▶ Oregon Government Ethics Commission
 - ▶ *Guide for Public Officials*
 - ▶ Ethics Commission staff may be able to answer specific questions ((503) 378-5105)
 - ▶ Free training



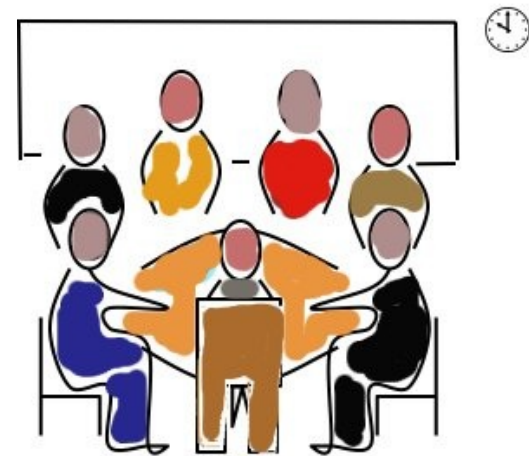
2. Public meetings

▶ Basic requirements

- ▶ Notice the meeting
- ▶ Access by the public
- ▶ Access by persons with disabilities
- ▶ Record or take minutes
- ▶ Vote on official actions

▶ Be careful...

- ▶ Don't accidentally have a public meeting (email, hallway talk)
- ▶ Avoid "sham" voting (coordinating votes privately in advance)
- ▶ Consider appearances



2. Public meetings / executive session

- ▶ Meetings of the governing body that are closed to the public
 - ▶ Must be noticed, with specific basis (ORS 192.640(2))
 - ▶ Must be minuted or recorded (ORS 192.650(2))
 - ▶ Only permissible for certain matters (ORS 192.660)

- ▶ When meeting in executive session
 - ▶ Discussion must stay on topic
 - ▶ Not a time to discuss policy issues
 - ▶ Final decisions are always in public session (ORS 192.660(6))



3. Public records / retention

- ▶ What is a public record that must be retained?
- ▶ It is any information that:
 - ▶ Is prepared, owned, use or retained by a state agency;
 - ▶ Relates to an activity, transaction or function of a state agency; and
 - ▶ Is necessary to satisfy the fiscal, legal, administrative or historical policies, requirements or needs of the state agency. (ORS 192.005(5)(a))
- ▶ It is not:
 - ▶ “extra copies of document, preserved only for convenience of reference” and stocks of publications. (ORS 192.005(5)(b)(D) & (E))
- ▶ Note: “information”—not “document”—all media formats.
 - ▶ Except voicemail. ORS 192.005(5)(b)(F).



3. Public records / retention

- ▶ **Public records retention obligations apply to**
 - ▶ Public work...
 - ▶ Done anywhere...
 - ▶ On any device...
 - ▶ In any account...

- ▶ **No distinction between**
 - ▶ Private email account and agency email account...
 - ▶ Personal computer and agency computer...

- ▶ **Content controls, not format**



3. Public records / inspection

- ▶ “Every person has a right to inspect any public record of a public body in this state, except as expressly provided by ORS 192.338, 192.345 and 192.355.” (ORS 192.314(1))
- ▶ “Public record”: any writing that contains information relating to the conduct of the public’s business... regardless of physical form or characteristics. (ORS 192.311(5)(a))
- ▶ “Public body”: every state officer, agency, department, division, bureau, board and commission. (ORS 192.311(4))



3. Public records / inspection

- ▶ If public records contain a mix of exempt and non-exempt materials, the non-exempt portion must be made available for inspection (ORS 192.338)
 - ▶ Conditional exemptions/public interest balancing test (ORS 192.345)
 - ▶ Express exemptions (ORS 192.355)

- ▶ Attorney General's role (ORS 192.411)
 - ▶ Public records petitions / orders
 - ▶ Quasi-judicial role (applies law objectively, not as agency's advocate)
 - ▶ Presumption favoring disclosure



4. Rulemaking

- ▶ **Vocabulary:**

- ▶ ORS—Oregon revised statute
- ▶ OAR—Oregon administrative rule

- ▶ **Authority:**

- ▶ A state agency "has no inherent power, but only such power and authority as has been conferred upon it by its organic legislation." *Ochoco Const., Inc. v. Department of Land Conservation and Development*, 295 Or 422, 426 (1983)



4. Rulemaking/statutes v. rules

- ▶ **Statutes**: Laws that are enacted (created) by the legislature and signed by the governor.
 - ▶ Agency-specific (ORS Ch 835, 836, 837, 838)
 - ▶ Generally applicable statutes (ORS Ch 183, 192, 230)
- ▶ **Rules**: Laws that are promulgated (created) by agencies.
 - ▶ Agency's power to create rules is grounded in and limited by its governing statutes.
 - ▶ Agency must have statutory authority for any rule it adopts.



4. Rulemaking/rules v. policies

- ▶ “Rule” means “any agency directive, standard, regulation or statement of *general applicability* that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency.” ORS 183.310(9)
- ▶ Policy is not defined, but “internal management directives, regulations or statements *which do not substantially affect the interests of the public...*” are not rules. ORS 183.310(9)



4. Rulemaking/process

- ▶ Rules Advisory Committee provides advice to agency
 - ▶ Not required to use a RAC
 - ▶ RAC does not decide anything
- ▶ Agency drafts rules
 - ▶ Can be iterative with the RAC
- ▶ Draft rules are filed with Secretary of State and notice given to interested parties
- ▶ Public may comment on draft rules before enactment
- ▶ Agency considers public comments, discusses and determines final rules by Board vote
- ▶ Rules are filed with Secretary of State



4. Rulemaking/ statutory authority

- ▶ When enacting rules, an agency must look to what authority was given by the legislature
- ▶ Examination of the words in the statutes that govern the agency
 - ▶ Exact terms
 - ▶ Inexact terms
 - ▶ Delegative terms

Springfield Education Assn v. School Dist,
290 Or 217 (1980)



4. Rulemaking/exact terms

- ▶ **Words of precise meaning**
 - ▶ We know exactly what the legislature meant
 - ▶ No changing these by rule!

- ▶ **Examples:**
 - ▶ 21 years of age
 - ▶ 30 days
 - ▶ Marion County



4. Rulemaking/inexact terms

- ▶ Those of less precise meaning that require agency interpretation; word has different possible meanings and interpretations
- ▶ Agency's goal: determine what the legislature intended
- ▶ “An agency may express its determination of which interpretation effectuates the statutory policy either by rule or, as here, by order in a contested case.” (*Springfield*)

- ▶ Examples:
 - ▶ Employee
 - ▶ Weapon
 - ▶ Wildlife



4. Rulemaking/inexact terms

- ▶ How does an agency figure out what the legislature intended?
- ▶ Legal question
- ▶ Three step method of statutory interpretation:
 1. Examine the text and context of the statute. This step is given primary weight in the analysis;
 - 2: Examine legislative history;
 - 3: If, after the first two steps, the legislature's intent is ambiguous, general maxims of statutory construction are used to clarify the intent.

State v. Gaines, 346 Or 160, 171-172 (2009) (modifying *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993))



4. Rulemaking/delegative terms

- ▶ Those terms that “express non-completed legislation in which the agency is given delegated authority to complete.” (*Springfield*)

- ▶ **Examples:**

- ▶ “Good cause”
- ▶ “Unfair”
- ▶ “Unprofessional conduct”
- ▶ “Adopt rules establishing sanitation and safety requirements for advanced nonablative esthetics procedures.”



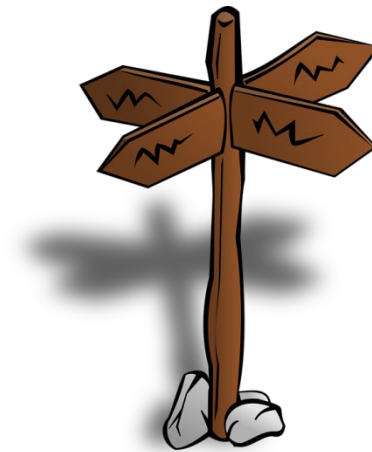
4. Rulemaking/delegative terms

Agencies must stay within intent of legislature



4. Rulemaking/takeaways

- ▶ Just because something would benefit the public doesn't mean the Board has authority to do it
- ▶ Can't make rules "on the fly" outside of the statutory process for rulemaking
- ▶ The statutes need to be the constant guidepost for rulemaking.



Conclusion

- ▶ Questions
- ▶ Discussion
- ▶ Future topics?

