

Monterey Town Administrator

From: Justin Makuc <justin@montereyma.gov>
Sent: Wednesday, March 2, 2022 11:04 AM
To: johnw@montereyma.gov; steve@montereyma.gov
Cc: admin@montereyma.gov; johnweingold@gmail.com
Subject: Fwd: Question about approving minutes

Document for today's meeting:

----- Forwarded message -----

From: Brian Riley <BRiley@k-plaw.com>
Date: Wed, Mar 2, 2022 at 9:06 AM
Subject: RE: Question about approving minutes
To: 'justin@montereyma.gov' <justin@montereyma.gov>

Hi, Justin. This is a difficult position ? while I urge the Board to approve a set of minutes from 10/4/21, if that is not possible, I recommend that all three drafts be kept on file ? in the event of an Open Meeting Law (OML) complaint that then Board did not timely approve such minutes, we would need to explain what happened and that the Board was unable to get two members to agree what the minutes should say.

The OML provides at G.L. c.30A, ?22: ?A public body shall create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes.? So, as you state, the minutes are required to summarize everything the Board discussed and what actions were taken. A few years ago, the Attorney General adopted the following regulation regarding the approval of minutes:

Minutes of all open and executive sessions shall be created and approved in a timely manner. A ?timely manner? will generally be considered to be within the next three public body meetings or within 30 days, whichever is later, unless the public body can show good cause for further delay. The Attorney General encourages public bodies to approve minutes at the next meeting whenever possible.

This regulation applies to both open and executive sessions. So the 10/4/21 executive session minutes are obviously very late in being approved. The regulation excuses late approval for ?good cause,? but the AG has interpreted that phrase narrowly in accepting late approval. I have seen a determination of the AG's Division of Open Government (in response to a complaint) in which the Division found ?good cause? where the board went through several drafts of the minutes regarding a ?sensitive? matter over a four month period. In my opinion, however, the Division would be very unlikely to accept what you describe below as good cause for failing to approve minutes from four months ago.

Therefore, I would urge the Board to come up with a draft of these minutes that can be approved, by at least two members if not unanimous, in order to avoid to being found by the Attorney General to be in violation of the Law ? not approving a final version of meeting minutes is a clear OML violation. If that proves unachievable, however, then all three drafts should be maintained on file, to at least show that the members attempted to produce the minutes as mandated by the OML.

Brian

Brian W. Riley, Esq.

KP | LAW

101 Arch Street, 12th Floor
Boston, MA 02110
O: (617) 654 1722
F: (617) 654 1735
C: (617) 909 9084
briley@k-plaw.com
www.k-plaw.com

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From: justin@montereyma.gov <justin@montereyma.gov>
Sent: Monday, February 28, 2022 6:53 PM
To: Brian Riley <BRiley@k-plaw.com>
Subject: RE: Question about approving minutes

Dear Attorney Riley,

I just wanted to follow up with the draft minutes of last week's meeting that may help you understand the situation:

On the topic of approving 10/4/21 Executive Session Minutes:

"Prior to discussion the 10/4/21 executive session minutes Steve read the following statement into the record, 'On advice of counsel and with the understanding that the actions that occurred on October 4, 2021 and on February 16, 2022 may constitute an attempt to breach the contract of a town employee, I shall abstain from any discussion and voting on any executive session minutes of 10/4/21. I shall remain in the meeting and will be independently recording the meeting. I expect this statement to be included in the minutes of this meeting.' As Steve is abstaining, Justin is unable to approve the draft, edited minutes himself. Justin will reach out to counsel to ask how to proceed when each Board member has a draft and are unwilling to accept the others."

Justin Makuc

----- Original Message -----

Subject: Question about approving minutes

From: <justin@montereyma.gov>

Date: Sat, February 26, 2022 5:03 pm

To: "Brian Riley" <BRiley@k-plaw.com>

Dear Attorney Riley,

I am in a difficult situation and it was agreed by the Select Board at our last meeting that I could reach out for your legal advice.

The Select Board has not approved minutes for our October 4, 2021 Executive Session meeting. We met February 16 and February 23 to discuss and approve executive session minutes, and have approved all of the minutes except for October 4. Steve has his draft, I have my draft, and John had his draft but was not present at the last meeting.

Steve stated that he will not vote to approve my draft of the minutes, not because he claims that it is inaccurate or misrepresents what happened at the meeting, but because his personal counsel asserts that actions taken at the October 4 meeting constitute a breach of contract of the Town's contract with the Town Administrator. Whether or not actions taken at a meeting constitute a violation of law, the minutes should reflect what actually occurred at the meeting, right?

To the extent that we cannot agree upon a set of minutes, we all do have our own draft minutes. Is it a violation of the OML if members cannot come to an agreement on minutes if they have tried to, and just cannot come to a consensus?

If you are able to provide an answer by Wednesday at noon, that would be great, but no worries if not.

Thanks,

Justin Makuc