

OFFICE OF THE GOVERNOR
STATE OF MONTANA

BRIAN SCHWEITZER
GOVERNOR



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REPORT OF INVESTIGATION

TO: Governor Brian Schweitzer

FROM: Investigation Committee members David Ewer, Chair, Vivian Hammill, and Ann Brodsky

SUBJECT: Montana Public Employees' Retirement Board Executive Director Recruitment and Selection Process

DATE: December 7, 2005

EXECUTIVE SUMMARY

The proper management of Montana's public employees' retirement system, with trust fund assets in excess of \$4.2 billion, is of utmost importance to the citizens of Montana, most of whom fund the system and some of whom are beneficiaries of the system, and must be conducted in accordance with the highest fiduciary standards. The system currently has an unfunded liability in excess of \$500,000,000.00. Consequently, the duty of the Public Employees' Retirement Board ("PERB") to recruit and retain the highest qualified professional to fill the position of executive director is not only of significant interest to the public, it also is one of the most important responsibilities of the board.

Based on our investigation, we conclude that the PERB failed in this important duty. We conclude:

- the PERB violated Montana's open meeting and public participation laws;
- the PERB failed to conduct a competent selection process by not properly recruiting, screening, interviewing, or evaluating candidates; and
- the selection process appears to have been tainted by bias.

While we are aware that PERB is responsible by statute for selecting an executive director and responsible under Montana's constitution for administering the

public retirement systems, we are concerned about the PERB's ability to conduct a competent, objective high-quality hiring process. In order to ensure that a competent, objective high-quality hiring process take place, we recommend:

- when PERB acts as a board in the hiring process, the process be open to the public to the maximum extent possible without violating individual applicants' rights to privacy;
- the PERB maximize the use of an outside, professional hiring or personnel firm throughout the recruitment and selection process;
- the PERB inform you of the selection process the board intends to use prior to implementing the process and expand its personnel committee to include Janet Kelly, Director of the Department of Administration.

A. PURPOSE AND AUTHORITY

On November 4, 2005, pursuant to Article VI, section 15 of the Montana Constitution, you appointed a committee to investigate and report on the adequacy of the recent recruitment and selection process used by the PERB for the position of executive director of the Montana Public Employee Retirement Administration ("MPERA"). The investigation was designed to review the adequacy, legality, competency, and objectivity of the entire recruitment and selection process.

The governor is chief executive officer of the State of Montana. MONT. CONST. Art. VI, sec. 4; Mont. Code Ann. § 2-15-103. The governor has the power to appoint and remove officers under him. MONT. CONST. Art. VI, sec. 8. The governor has the power and obligation to supervise the official conduct of all executive and ministerial officers and to require any officer to make special reports in writing, under oath. MONT. CONST. Art. VI, sec. 15; Mont. Code Ann. § 2-15-201(1), (2), and (11). Members of the PERB are officers subject to the Governor's supervision.

In addition, the Governor is the chief budget officer of the state. Mont. Code Ann. § 17-7-103. David Ewer is your appointed Budget Director. *See id.* Under Mont. Code Ann. § 17-1-132, the budget director has the power to demand and receive "at any time, any and all information requested" from any board or any department staff.

This committee's investigation was conducted under the above-cited authorities. The committee was appointed because of concerns that PERB's hiring process may have been conducted in violation of Montana's open meeting and public participation laws. You also had concerns about the adequacy and quality of the hiring process for the executive director, the importance of which were underscored by the unfunded liability facing the Montana's public employees' retirement system.

B. SCOPE OF REPORT

This report is based on the documents related to the recruitment and selection of the executive director of MPERA provided by Barb Kain, personnel officer at the Department of Administration, who assisted MPERA in the selection process. We obtained other documents related to this investigation from MPERA's web-site, through the assistance of MPERA legal staff, Melanie Symons, and from other state agencies. (Specific documents relied upon in this report are attached as exhibits.) This report also is based on interviews with Ms. Kain by members of this committee, as well as interviews with Mike O'Connor, current executive director of MPERA (whose position is being filled by the PERB), Melanie Symons, and other individuals who either contacted or were contacted by us.

We intended to interview all PERB members as part of this investigation. We requested that interviews be set up following a PERB meeting of November 16, 2005, and invited MPERA legal staff, Melanie Symons, to attend. At the November 16, 2005 PERB meeting, it was announced that, because of a lawsuit filed by the Governor against PERB the previous day concerning the board's hiring process (discussed in the following paragraph), at the advice of counsel, PERB members refused to be interviewed and required, instead, that any interviews be conducted through formal discovery depositions.

On November 30, 2005, PERB President Carole Carey submitted written testimony about the board's hiring process to the legislative State Administration and Veterans' Affairs Interim Committee. This report, therefore, also incorporates information learned by Ms. Carey's written statement.

As stated, a part of this investigation focused on PERB's legal compliance with Montana's open meeting laws during the recruitment and selection process for the executive director. As a result of information learned early in the investigation, on November 15, 2005, you filed a lawsuit seeking to void the recent selection of the new executive director on grounds that the hiring violated Montana's open meeting and public participation laws. The action was necessitated because a suit to set aside and void actions taken in violation of Montana's open meeting and public participation laws must be brought within 30 days of the meeting. Mont. Code Ann. §§ 2-3-114 and 2-3-213. This committee had just learned, as part of its investigation, that the PERB's personnel committee took committee action to screen applicants at an October 17, 2005 meeting, which was not publicly noticed. In order to preserve the ability to challenge actions taken by the personnel committee at its October 17, 2005 meeting in violation of the public's right to know, you directed the lawsuit be filed immediately.

The PERB held an emergency meeting on November 21, 2005 to discuss its response to the lawsuit. At the November 21 meeting, in recognition of the previous open meeting law violations committed by the PERB and its personnel committee, and at the advice of counsel, in response to the lawsuit, the full PERB voted unanimously to void its selection of Terry Teichrow to fill the position of executive director and to begin the selection process anew. PERB President Carole Carey also appointed a new personnel committee and the full board voted unanimously to hire an outside consulting firm to assist in the hiring process.

C. DISCUSSION

The PERB is charged under the Montana Constitution and statutorily with administering all state retirement systems, except the teachers' retirement system, as a fiduciary of system participants and their beneficiaries. MONT. CONST. Art. 8, sec. 15; Mont. Code Ann. § 19-2-302. According to the job profile for the executive director position, the trust fund assets of the systems exceed \$4.2 billion, with annual growth exceeding \$267 million. See job profile, attached as Exhibit A. The MPERA is the executive branch agency that handles the day-to-day administration of the retirement systems. By statute, the PERB is responsible for hiring the MPERA executive director.

Mont. Code Ann. § 19-2-404. According to the job profile, public employers report over 32,000 active members, and MPERA provides benefits in excess of \$180 million annually to more than 18,000 retirees. See Exhibit A.

On August 25, 2005, Mike O'Connor, executive director of MPERA, submitted a letter of resignation from the position he has held since 1995. Neither the agenda nor the minutes of the August 25, 2005 meeting indicated his resignation.

The PERB had a personnel committee comprised of board members Carole Carey, PERB President, Troy McGee, and Bob Griffith. Carole Carey has been on the PERB since April 1992; Troy McGee has been on the board since 1988; and Bob Griffith was appointed in April 1998.¹

We learned through interviews with Barb Kain that PERB's personnel committee first met on September 6, 2005. The PERB's personnel committee provided no public notice of its meeting.

PERB President Carole Carey and Barb Kain provide differing accounts of the role Ms. Kain played in the hiring process. Ms. Kain informed this committee that although she assisted PERB in the hiring process, she did not regard her role as an advisor to PERB or its personnel committee unless asked. She stated she did not read the candidates' application materials, did not formulate screening criteria or interview questions, and did not participate in asking the applicants questions or rating them. Her only role was to assist in the mechanics of hiring (e.g., advertising the position and mailing materials to members) and to observe the process being conducted by the board members.

In contrast, President Carey indicates that Ms. Kain was "hired . . . to shepherd us through the hiring process" because it "was a completely new procedure for us." She indicates the PERB needed assistance to ensure the hiring was conducted "according to law and state procedures." See Carey statement, attached as Exhibit B, at 1.

¹ Other members of the PERB are Betty Lou Kasten, PERB Vice President, appointed in January 2003; John Paull, appointed in April 2005; and Terrence Smith, appointed in August 2005.

At its September 6, 2005 meeting, the personnel committee finalized the job profile and vacancy announcement for the executive director position. The position was advertised at a salary range of \$70,362 to \$87,953. It was decided that the position would be posted on the employment section of the state web page for two weeks and that the announcement was to run on one Sunday, only, in major Montana newspapers. The application deadline was September 21, 2005. At the September 6 meeting, the personnel committee discussed but rejected conducting a regional or national search because, according to Ms. Kain, Mike O'Connor previously had announced his resignation at a national meeting of state retirement agencies. Ms. Kain did not know the name of the national organization at which Mr. O'Connor made his announcement, its membership, the date of the meeting, who attended the meeting, to whom Mr. O'Connor's announcement was made, or whether he stated the date of his resignation.

A PERB policy adopted in May 2005 directs the PERB to inform the Governor of important matters. (See policy, page 8, attached as Exhibit C.) The Governor, too, has expressed his strong interest in working with not only the PERB, but also with the Teachers' Retirement Board and the Board of Investments, which is responsible for investing retirement funds. Accordingly, in our experiences, the Governor has made unprecedented overtures to coordinate the work of the three boards and encourage these boards to work with him and his Budget Director. (See letter to board members, attached as Exhibit D.)

Despite the PERB's own policy and the Governor's request to the boards that they involve the Budget Director in their significant actions, the PERB had not communicated with the Governor's Office about the executive director's announced resignation or that the PERB was undergoing a recruitment and selection process for his replacement. Instead, David Ewer heard the position was being advertised by happenstance.

Soon after, Mr. Ewer met with Troy McGee, PERB member and member of the personnel committee, to express his serious concerns that the recruitment was of too short a duration and was too limited in scope. He expressed to Mr. McGee the Governor's preference that a national search for the position be conducted. He asked

to speak to the personnel committee to express these concerns. Rather, Mr. Ewer described to the committee the quality, professional process for hiring a Chief Investment Officer that the Board of Investments had recently used (e.g., conducted a national search using a national hiring firm and increased the salary for the position) and suggested the PERB use a similar quality, professional hiring process to ensure the highest-quality, professional candidate was hired. At all times, Mr. Ewer's intentions were to improve the pool of high-quality applicants available to the PERB for its hire. At no time did he insist the PERB do anything. As a result of the conversation, the PERB invited Mr. Ewer to attend and speak at its September 29, 2005 meeting.

According to Barb Kain, ten people submitted applications for the executive director position by the deadline of September 21, 2005. On or about that day, Barb Kain states that PERB President Carole Carey instructed her to extend the deadline another two weeks until October 6, 2005, to continue to post the announcement on the state's web site, and to re-advertise the position one more Sunday in Montana newspapers (on September 25) and by notifying those on the "list-serve" of the National Association of State Retirement Administrators. Ms. Carey indicates in her written statement that this decision was made based on Mr. Ewer's remark to the personnel committee. See Exhibit B at 1-2.

During our interview of Mr. O'Connor, he expressed his opinion that the PERB could have done a better job advertising to fill the executive director position.

The PERB's public notice and agenda for its September 29, 2005 meeting provided no notice that Mr. Ewer had been invited to speak. Rather, the only cryptic reference to Mr. Ewer's appearance on the board agenda was an agenda item entitled "Tri-Party Board Communications & other activities." This cryptic notice refers to efforts by the Schweitzer Administration to coordinate the work of the PERB, the Teachers' Retirement Board, and the Board of Investments. The PERB's notice did not meaningfully inform the public of the content of its agenda, and therefore violated the constitutional rights to know and participate.

We note, in contrast, that the agenda for the legislative State Administration and Veterans Affairs ("SAVA") Committee, meeting November 30, 2005, contained an

agenda item stating: "Public Employee Retirement Administration: Hiring process re Executive Director – David Ewer, OBPP: Briefing on the Administration's inquiry into the hiring process – Carole Carey, President, PERB: Overview of recruitment and selection process." (*Compare* agendas of PERB and of the SAVA Committee, attached as Exhibit E.) In comparing the agendas, the inadequacy of the PERB notice concerning Mr. Ewer's presentation to the board on September 29, 2005 is glaring.

Among the many matters he addressed when speaking to the PERB, Mr. Ewer urged the Board consider a strong working relationship with the Office of Budget Program and Planning ("OBPP") in its selection process for the executive director. He made this request while acknowledging PERB's status as a quasi-judicial agency, free from the control of the Department of Administration, to which it is administratively attached. He described to the full board the open relationship between the OBPP and the Board of Investments in its recent search for a Chief Investment Officer, including the opportunity he was given to meet with and interview the final applicant(s) for that position prior to the hire.

We learned from Barb Kain that the PERB personnel committee met on October 17, 2005. The meeting was not noticed. (We learned for the first time through President Carey's written statement that the personnel committee also met on September 28.) According to Ms. Kain, the purpose of the October 17 meeting was to screen the 19 applicants for the executive director position.

Ms. Kain reports that Troy McGee prepared the screening criteria to apply to the nineteen applications. Ms. Kain stated she played no role during the screening process other than to observe and tally ratings. She stated she was "surprised at how smoothly the screening process went" and reported no give and take, but rather general agreement among the personnel committee as to the ratings of the applicants.

According to Ms. Kain, the personnel committee narrowed the field to three candidates, none of whom received any "-" marks when the committee applied the screening criteria. The personnel committee expanded the list to be interviewed to a total of five, by including two additional applicants who scored relatively well.

We reviewed the personnel committee's application of the screening criteria to the nineteen applications for the executive director position. (The applicants were rated with a "+", "✓", or "-" to indicate "positive," "acceptable," or "minus" for each quality scored.) We conclude that the screening criteria were not appropriately or consistently applied.

For example, retirement systems are based on actuarial analysis and assumptions, which in turn are grounded in statistics. However, the personnel committee did not believe one applicant's master's degree in statistics satisfied the committee's education criterion and this applicant was given no score for this educational attainment. As another example, one candidate was given a "✓" rating in the category of "benefits programs retirement/insurance programs," despite the fact the candidate's application materials indicated an exceptionally strong background managing Montana's employee benefits program. One candidate licensed as a certified public accountant was given a "-" rating for the criterion measuring the educational background. One candidate with a juris doctorate and extensive public pension program experience was given no rating in the category of "educational qualifications" and was given a "-" rating under the criterion measuring "benefits programs retirement/insurance programs." One candidate with an extensive work history in the legislative branch was graded with a "✓" for the job criterion measuring legislative experience. These are examples of some of the most blatant discrepancies we noted between the screening criteria and actual applicant ratings.

Additionally, in reviewing the applications against the screening criteria used, we conclude that members of the personnel committee generally had a favorable bias toward applicants they knew from their association with MPERA, while those lacking direct MPERA experience were undervalued in relation to their overall backgrounds. Either the screening criteria, themselves, or their application by the personnel committee were flawed.

In short, based on our review of the application materials, we conclude the screening of applicants was not conducted in either a competent or an objective manner.

Hiring committees must be unbiased in their composition in order to ensure that personal favoritism or prejudice based on familiarity does not taint the process. When there is a strong personal connection to an applicant, what is known in the personnel field as a "halo effect" can occur. That term is used to describe a situation in which an applicant is liked or has a known characteristic or ability, and, as a result, a member or members of a hiring team wrongly infer the applicant has other positive characteristics or attributes as well. In other words, the familiarity, characteristic, or ability of the applicant distorts other aspects of, or the entire, rating process.

To guard against this occurring, alternative hiring processes are appropriate to ensure that hiring decisions are made based on objective standards. For example, a hiring agency can request individuals outside the agency to be part of the hiring process in order to neutralize potential favoritism. Some state agencies use a neutral and skilled personnel officer to perform the first screening of applications for the specific purpose of ensuring objectivity of the hiring process. When the position is a high level, professional position, hiring agencies typically include on the hiring team professionals with expertise in the substantive area of the job. All these processes are available to ensure objectivity and competence in the process.

In this case, the three members of PERB's personnel committee – Carole Carey, Troy McGee, and Bob Griffith – collectively served with the selected applicant, Terry Teichrow, on the PERB for thirty-five years. In fact, Mr. Teichrow had served on the personnel committee with Troy McGee and Bob Griffith until the expiration of Mr. Teichrow's term on March 31, 2005. Additionally, prior to the expiration of his term, each of these three PERB members wrote the Governor letters in support of reappointing Mr. Teichrow to the Board. (See letters attached as Exhibit F.) Given their past relationships, we believe a more objective process for hiring the executive director should have been used in order to eliminate, or reduce, at least the appearance of impropriety. Our opinion is reinforced by having reviewed the application materials considered by the personnel committee and compared those materials to the personnel committee's ratings of the candidates. Our opinion is also reinforced by the comments we heard from those who said they knew the outcome of the hiring process (that Terry

Teichrow would be offered the position) even before the application deadline had closed.

The full PERB met on October 27 and 28, 2005 to interview the five applicants selected to be interviewed by the personnel committee. No public notice was provided of the October 28, 2005 meeting. Nothing on the public notice of the October 27 agenda indicated the MPERA was interviewing candidates for the executive director position or taking formal action on the hire. Indeed, nothing on any agenda of PERB from the time Mr. O'Connor resigned until after the PERB offered the position to Mr. Teichrow ever indicated the PERB was in the process of hiring a new executive director.

On either October 21 or 24, 2005, Troy McGee invited Mr. Ewer to attend the interviews, but not ask questions. Mr. McGee informed Mr. Ewer that he believed the PERB would make a final decision at its October 28 meeting and there would not likely be a need for second interviews.

Because of a previous out-of-state commitment, Mr. Ewer was unable to attend the interviews. Instead, he requested a member of his management staff at OBPP, Judy Paynter, to participate in his place. Also, because Mr. Ewer was beginning to have questions about the adequacy of the hiring process, he asked Ms. Paynter to request a copy of the interview questions. Within a day or two, Ms. Kain notified Ms. Paynter that she would not be allowed to attend the interviews in Mr. Ewer's place. Neither Mr. Ewer nor Ms. Paynter received copies of the interview questions.

When Mr. Ewer learned that Ms. Paynter would not be allowed to participate, he asked that Janet Kelly, Director of the Department of Administration to which the PERB is administratively attached, attend instead. On the morning of October 27, Board President Carole Carey informed Janet Kelly that the Board did not want her to participate in the interviews.

In her written statement, President Carey described the board as reluctant to allow Mr. Ewer to attend the interviews and expressed her opinion that was "highly unusual." She also indicated the Board refused to have Mr. Ewer's designees attend because it did not want to "open that can of worms."

Including individuals in addition to those with the ultimate hiring authority in the process, including the process of interviewing candidates, is not only acceptable hiring practice, it is often highly recommended. As stated above, where a potential for bias exists, the inclusion of third parties may help minimize that bias. For professional hires, the inclusion of third party professionals helps ensure competence in the process.

Particularly where the PERB's President has acknowledged the PERB was not capable of conducting the process, alone, the PERB should have welcomed the administration's offer for these professionals to partake in the process.

Prior to the October 27 and 28 interviews, Barb Kain sent the full board copies of the five interviewees' application materials. Because only the personnel committee had received copies of the application materials submitted by all the applicants, the remainder of the PERB had no way to determine whether the personnel committee had properly screened the applications to narrow down the field to be interviewed.

The PERB conducted what is known as a "structured interview," asking eleven prepared questions and rating applicants in relation to prepared "model answers." (The interview questions are attached as Exhibit G.) Barb Kain reports that Troy McGee wrote the interview questions and model answers, while President Carey states the questions and answers were written by the full personnel committee. The PERB asked questions such as: What are the important ingredients of successful supervision and management of employees? How would you deal with a "problem employee"? What would you do if you were unable to meet a deadline?

We compared the interview questions asked by the PERB for the executive director position with interview questions asked by the Board of Investments of the applicants for the recently hired position of Chief Investment Officer. (The Board of Investment's questions are attached as Exhibit H.) The latter included questions such as: Describe your educational background and a high-level summary of your relevant work experience? Describe your experience leading or participating in the search for a general or specialized investment consultant? What is your experience working with such consultants? Describe your direct experience leading or participating in asset allocation or asset liability studies?

While recognizing the two positions are different, the comparison confirms our own observation that the interview questions used by PERB were superficial and generic and not designed to adequately ascertain the qualifications of the candidates to the high-level position of executive director of MPERA.

Each applicant interview lasted only one hour. President Carey asked all the questions. Barb Kain instructed the PERB members not to diverge from the interview questions. She reports that the members adhered to these instructions, with the exception that board members on occasion asked for clarification of candidates' responses.

While recognizing the need to treat candidates equitably, follow-up questions and dialogue are critical and essential components of an in-depth interview process. They often are the only means of engaging candidates and truly measuring the quality of their responses and qualifications for the position.

Barb Kain reports that after the interviews were held, the PERB members rated the five interviewed candidates based on their answers to the interview questions, alone. Therefore, once the candidates were selected to be interviewed, their application materials and answers to supplemental application questions played no part in the rating of the candidates. We find serious fault with this aspect of the hiring process, because oral interview questions, alone, do not adequately demonstrate a candidate's overall qualifications for a management position such as this. The problem was exacerbated in this case by the weakness of the oral questions.

Following the interviews, the PERB rated the applicants with the same rating system – "+", "✓", and "-". Ms. Kain reported that the PERB spent about one and one half hours as a group rating the candidates following their interviews. One candidate received nine "+" ratings of eleven questions asked; another received eight "+" ratings. Two candidates received five "+" ratings and one received four "+" ratings. No minuses were given any candidate.

Ms. Kain states that no one mentioned conducting reference checks of the applicants. We have confirmed from other sources that the PERB did not check references of the two top-scoring candidates. When asked why references for the

selected candidate were not checked, Ms. Kain responded that perhaps it was because the PERB members knew him, and he was "part of the family." Barb Kain told us that in her many years of personnel work for the state she was unaware of any other hiring for which references were not checked.

Checking references is vital not only to verify information provided by applicants in the application process but also to assess the quality and competence of applicants' past and current job performances and abilities. We believe that the failure to check references was a violation of sound hiring practices. The problem in failing to check references was exacerbated in this case because the top two candidates were ranked so closely.

After completing the rating process, Ms. Kain estimated the board members discussed the applicants for fifteen to thirty minutes. She suggested to the PERB they think about their decision over the weekend, but they declined, preferring to make their decision at the October 28 meeting while they were all present.

The PERB did not select the applicant with the most "+" ratings as the new executive director. (See final rating sheet, with names of non-selected candidates redacted, Exh. H.) Instead, the board offered the position to the second-ranked candidate. Barb Kain states there was no discussion about the fact that the board did not select the top-ranked candidate.

Based on the applicants' answers to the generalized interview questions, alone, the PERB did not select the top-rated candidate for the position. A majority of the PERB was very familiar with the selected candidate. The PERB did not attempt to become familiar with the top-ranked candidate, so as to give that candidate an equal opportunity for the position. The board did not consider a second interview, did not check references, did not compare the applicants' writing samples, and did not discuss their decision to offer the position to Mr. Teichrow for more than fifteen to thirty minutes. Again, we conclude the process was not competently or objectively conducted.

D. OTHER RELATED CONCERNS

As stated at the outset, the PERB is charged with the fiduciary responsibilities of managing eight public retirement systems, with trust fund assets in excess of \$4.2

billion. Due to a combination of investment market conditions and legislation passed in 2001 increasing retirement benefits without sufficient funding mechanisms, retirement systems managed by PERB today face an unfunded liability in excess of 500 million dollars. It is with this backdrop that the importance of the hiring of a new executive director takes on added significance.

Additionally, we cannot help but mention that the PERB faces credibility problems independent of its financial condition. These credibility problems pre-existed this Administration, but took on added significance following the 2005 Legislature, which continue today as we submit this report.

The 2005 Legislature passed SB 370, bringing detention officers under the sheriffs' retirement system. MPERA opposed the legislation and requested a veto by the Governor, a request which he rejected. PERB subsequently proposed administrative rules inconsistent with and narrowing the scope of the legislation. The rule-making process took on a life of its own, consuming the time of many individuals, including detention officers, lobbyists, legislators, legislative committees, and even the Governor's Office. For the first time, to our knowledge, a legislative committee employed a statutory power to poll the full legislature to determine whether the PERB's proposed rules were consistent with the legislature's intent when it enacted SB 370. The PERB ultimately rejected the proposed rules and adopted rules agreed to by those supporting SB 370. However, the aftermath of these events is as yet unsettled. On November 30, 2005, the SAVA Interim Legislative Committee met to consider six pieces of proposed legislation in response to what it perceives as an agency that has run amok in the rule-making process. Three proposed bills include a process for payment of expenses to a member of the public who has challenged a rule proposed or adopted by an agency or its staff in knowing or purposeful substantive violation of the Montana Administrative Procedure Act.

These recent events demonstrate what can happen when an administratively attached board, which operates with a considerable degree of independence, acts outside its authority and without accountability. The consequences can be many, as seen by the bills being considered by the SAVA committee. The consequences can

extend not only to the particular agency's credibility but can impact other agencies, as well.

During our investigation, we also learned that in 2001, MPERA staff had concerns that one board member tended to dominate the board and become excessively involved in the day-to-day operations of the MPERA. That board member was Terry Teichrow. Certain staff recommended, and the PERB agreed, to hire a consultant to train the board as to its fiduciary responsibilities. One item presented included the dangers of allowing a "super board member" to dominate. According to materials distributed to the PERB by its consultant, a "super board member" is one who leads many committees and task forces, has knowledge others do not have, acts as a sole fiduciary, and is the only board member who is prepared. (See portion of power point presentation related to "super board members" attached as Exhibit J.) In other words, a "super board member" is one who dominates a board, and to whom other board members tend to defer and depend upon, rather than taking equal responsibility.

We mention this not because Mr. Teichrow's role as a board member would necessarily be a precursor to a very different role he would have if he were ultimately selected as executive director. We mention this because we believe it is relevant to, and a symptom of, the credibility problems the PERB faces today.

Given these issues, the need for the PERB to employ an objective process of the highest quality to select the best applicant for the high-level position of executive director of MPERA is magnified. The PERB has taken the first step to begin the hiring process anew. The PERB must now take the steps necessary to ensure a proper hiring process is implemented.

E. SUMMARY OF PROBLEMS

We summarize below the problems we identified with the PERB's recruitment and selection process for the executive director position. Each problem, standing alone, warrants our concern. Cumulatively, the problems lead to our conclusion that the entire process was not designed in a manner that would result in the recruitment and retention of the highest qualified professional to fill the position of executive director.

1. Violations of open meeting and public participation laws, both constitutional and statutory. Our investigation revealed violations of these laws under circumstances beyond the PERB's hiring of an executive director.

2. Without explanation, the executive director position was not offered to the applicant who was rated highest by the PERB.

3. Subjective familiarity with the selected applicant, rather than objective qualifications, appears to have been an important if not the determining factor in the selection.

4. Long-term, close association between 5 of 7 PERB members, raises questions about objectivity.

5. Long-term, close association between members of the personnel committee, which made significant decisions directing the outcome of the entire process, raises additional and separate questions about objectivity.

5. Hiring process, in its entirety, not sufficiently professional and broad.

6. No reference checks conducted.

7. Interview process not designed to elicit highest quality, professional information about candidates; questions general and generic; no follow-up questions.

8. Written application materials (which, unlike the interview questions, were detailed and specific to the job) were not considered in the final ranking of candidates.

9. Flawed application of the screening criteria by the personnel committee; possibly also flawed screening criteria (e.g., candidate with master's degree in statistics not rated for this experience).

10. Inadequate advertising for the position, in scope and duration.

11. Hiring process was intentionally conducted quickly; this occurred at the expense of using the highest quality process.

12. Failure of the PERB to follow its own policy to inform the Governor of important matters and failure of the PERB to honor the request of the Governor and Budget Director, to work with, involve, and inform the Governor's office.

13. Refusal of PERB to let Budget Director's designated replacement participate in interviews; refusal of PERB to provide Budget Director or his replacement with a copy of the interview questions, as required under Mont. Code Ann. § 17-7-103.

F. RECOMMENDATIONS

As stated at the outset, the Governor is the chief executive officer of the State of Montana. MONT. CONST. Art. VI, sec. 4; Mont. Code Ann. § 2-15-103. The Governor also is the chief budget officer of the state. Mont. Code Ann. § 17-7-103. Although the PERB has the duty to hire its executive director, Mont. Code Ann. § 19-2-404, the Governor has the power and obligation to supervise the official conduct of members of the PERB. Mont. Code Ann. § 2-15-201(1).

Based on the problems identified above, we have concluded the recruitment and selection process used by the PERB for the executive director position was conducted in violation of Montana's open meeting laws, was not conducted competently, and, at a minimum, had the appearance of partiality. We have not ruled out a conclusion that the outcome of the hiring process was predetermined. For these reasons, we recommend that you exercise your supervisory powers over the PERB in order that the renewed recruitment and selection process be conducted with the highest level of competence and objectivity and in compliance with the constitutional and statutory requirements for open meetings and public participation.

The specific measures we recommend are as follows:

1. Open Meetings

The violations of Montana's open meeting and public participation laws by the PERB and its personnel committee are of constitutional magnitude. In response to the open meeting lawsuit you brought, the PERB has taken the first step of voiding the actions taken by the board and the personnel committee related to the hiring of an executive director.

We recommend that when the PERB acts as a board in the renewed hiring process, the process be open to the public to the maximum extent possible without violating individual applicants' rights to privacy. We also recommend that, in the future, the PERB and the MPERA management and legal staff more closely review their

practices related to the closure of meetings and better inform the public as to the content of the board and committee agendas. Finally, we take note of the importance of all boards, not only PERB, to make decisions through the process of motions, to provide clarity to their work for themselves and for the benefit of the public.

2. Renewed Hiring Process

We recommend that you exercise your supervisory powers as Governor by directing the PERB, prior to implementing a new hiring process, to report to you the process the board intends to use. We recommend the PERB maximize the use of an outside, professional hiring or personnel firm throughout the process. We also recommend that you direct the PERB to expand its personnel committee to include Janet Kelly, Director of the Department of Administration. Janet Kelly has extensive experience hiring professional staff. We believe her involvement in the selection process will greatly assist the PERB in conducting a competent, quality selection process. While we understand the need for PERB to promptly fulfill the position of executive director soon to be vacated by Mike O'Connor, we are of the opinion that it is more important that the PERB take these added steps – even if it means slowing the process down – in order to recruit and retain the best qualified candidate for the position.