

OPEN RECORDS AND MEETINGS OPINION
2001-O-09

DATE ISSUED: August 31, 2001

ISSUED TO: Solen – Cannon Ball Public School Board President Gabe Plante
and District Superintendent Wanda Belgarde

CITIZEN'S REQUEST FOR OPINION

On July 5, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Clark Bormann on behalf of the North Dakota Council of Educational Leaders asking whether the Board of the Solen – Cannon Ball Public School District violated N.D.C.C. §§ 44-04-19 and 44-04-19.2 by holding an executive session which was not authorized by law and by failing to announce the legal authority for the executive session.

FACTS PRESENTED

The board of the Solen – Cannon Ball Public School District (Board) held an executive session on June 13, 2001. The response of the school district's superintendent on behalf of the Board indicates that no legal authority was announced prior to the executive session. The minutes and tape recording of the open portion of the June 13 meeting support this response. The topic of discussion was identified as a "personnel issue" and the Board referred to the resignation of an employee. The executive session lasted approximately 45 minutes and was recorded as required by N.D.C.C. § 44-04-19.2. The recordings of the executive session and the open portion of the meeting before and after the executive session have been reviewed by this office.

ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-19.2 by failing to announce the legal authority for the executive session.
2. Whether the Board violated N.D.C.C. § 44-04-19 by holding an executive session which was not authorized by state law.

ANALYSES

Issue One:

State law requires certain procedures to be followed when a governing body holds an executive (or closed) session. See N.D.C.C. § 44-04-19.2. One of the requirements is that the governing body announce "in the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics." N.D.C.C. § 44-04-19.2(2)(b). In this case, the minutes and recording of the June 13 meeting indicate the Board described the topic of discussion during the executive session as "personnel issues," but made no effort to identify the legal authority for the session, even after being reminded of that requirement by the executive director of the North Dakota Council of Educational Leaders. During the open portion of the meeting, a board member referred to the executive session authorized for discharging a teacher (currently N.D.C.C. § 15.1-15-08(7)), but that section clearly does not apply in this situation because the school district employee at issue had already tendered her resignation. In addition, the Board did not announce it was relying on that statute, or any other statute, as legal authority for the executive session. A person attending the open portion of the meeting would have no idea what legal authority the Board was relying on for closing a portion of its meeting. This office issued an opinion last year that concluded the Board violated this same section of the law. See N.D.A.G. 2000-O-01. The requirements of N.D.C.C. § 44-04-19.2 have not changed since the prior opinion issued to the Board. It is my opinion that the Board has again violated N.D.C.C. § 44-04-19.2 by failing to announce the legal authority for its executive session on June 13, 2001.

Issue Two:

It is alleged that no legal authority existed for holding the June 13 executive session. "All meetings of the Board, as the governing body of a North Dakota public school district, must be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-19." N.D.A.G. 2000-O-01. Here, as in N.D.A.G. 2000-O-01, the discussion during the executive session centered around personnel issues.

Portions of the audiotape of the executive session are inaudible. However, the portions which can be heard indicate that the discussion pertained exclusively to an employee who tendered her resignation to the Board and the reasons why she did not want to continue her employment. The discussion included job descriptions, job classifications, grievance procedures, and compensation. As in N.D.A.G. 2001-O-01, the Board offered no legal authority for its executive session and no such authority exists. There is no state law that authorizes a school board to hold an executive session to discuss general personnel issues. Thus, it is my opinion that the Board has again violated N.D.C.C. § 44-04-19 by holding an executive session to discuss personnel issues which was not authorized by law.

OPEN RECORDS AND MEETINGS OPINION 2001-O-09

August 31, 2001

Page 3

I recently observed that it is unnecessary, in issuing an opinion under N.D.C.C. § 44-04-21.1, to determine whether a violation is intentional, knowing, or accidental. N.D.A.G. 2001-O-07. However, this is the second opinion in the last two years determining that the Solen – Cannon Ball School Board improperly held an executive session to discuss personnel issues. Given the similarity in violations in this opinion and in N.D.A.G. 2001-O-01, the Board should consider carefully the potential consequences of knowingly violating the open records and meetings laws and related statutes.

Beginning on August 1, 2001, a knowing violation of the open records and meetings laws, and other related laws, specifically N.D.C.C. §§ 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, is a crime. N.D.C.C. §§ 44-04-21.3, 12.1-11-06. The State may not have jurisdiction over an Indian who commits a crime on a reservation. See N.D.A.G. 93-L-244. However, the federal government does have such jurisdiction in a variety of circumstances.

The federal criminal code is not as extensive as state criminal codes. To help plug the gaps, the General Crimes Act, also known as the Indian Country Crimes Act, makes applicable to Indian country all general federal laws. 18 U.S.C. § 1152. A general law included under the General Crimes Act is the Assimilative Crimes Act. 18 U.S.C. § 13. The Assimilative Crimes Act borrows state criminal law for application through federal law to areas where the federal government has jurisdiction. Thus, a violator of the Assimilative Crimes Act is charged with a federal offense and is tried in federal court, but the crime is defined and the sentence prescribed by state law.

Letter from Attorney General Wayne Stenehjem to Merle Boucher (April 17, 2001).

A violation of the open records and meetings laws is a class A misdemeanor, for which a maximum penalty of one year's imprisonment, a fine of \$2,000, or both, may be imposed. N.D.C.C. § 12.1-32-01(5).

A North Dakota public school district also can be sued for damages "in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater," and for attorneys fees and costs. N.D.C.C. § 44-04-21.2(1). Actions taken at an illegal meeting are voidable. N.D.C.C. § 44-04-21.2(2).

CONCLUSIONS

1. The Board violated N.D.C.C. § 44-04-19.2 by failing to announce the legal authority for its executive session on June 13, 2000.

2. The Board violated N.D.C.C. § 44-04-19 by holding an executive session which was not authorized by state law.

STEPS NEEDED TO REMEDY VIOLATIONS

The Board must make the recording of its executive session available to the public upon request as an open record and must specifically provide a copy to Mr. Bormann, at no charge. See N.D.C.C. § 44-04-18. In addition, the minutes of the executive session must be added to the minutes of the open portion of the June 13, 2001, meeting. Finally, because much of the recording of the executive session is inaudible, the Board must play the recording at an open public meeting and recreate any portions of the recording which are not audible to the public. The Board must give Mr. Bormann notice of the meeting at which it will play the recording.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

Wayne Stenehjem
Attorney General

Assisted by: James C. Fleming
Assistant Attorney General

vkk