

**OPEN RECORDS AND MEETINGS OPINION
2001-O-15**

DATE ISSUED: November 5, 2001

ISSUED TO: Mary O'Donnell, Rolette County State's Attorney

CITIZEN'S REQUEST FOR OPINION

On September 7, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dawn Bruce alleging the Rolette County Social Service Board violated various sections of the open meetings law regarding an August 8, 2001, special meeting of the Board. The same day, this office received a request from Ella Davis alleging similar violations by the Board regarding a regular meeting and a possible "pre-meeting" on August 28, 2001.

FACTS PRESENTED

The Rolette County Social Service Board (Board) held a special meeting on August 8, 2001. The notice of the special meeting included as separate agenda topics "employee relations" and "executive session." The minutes of the August 8 meeting indicate the Board announced it was convening in an executive session to consult with its legal counsel. In its supplemental response to the requests for this opinion, the Board further indicated it announced that the executive session was for "the purpose of attorney consultation regarding the personnel issues before the Board and the legal requirements under the personnel policies that would apply." Following the executive session, the Board voted unanimously to "deny" Ella Davis' job performance evaluation of Dawn Bruce. The Board also voted unanimously to terminate Ms. Bruce's employment with Rolette County Social Services. This office has reviewed the recording of the executive session, which lasted about thirty-five minutes.

The Board's next regular meeting was on August 28, 2001. Ms. Davis states she saw all five of the Board members enter the Rolette County courthouse between thirty minutes and one hour before the scheduled meeting at 1:00 PM. Ms. Davis suggests the members held a "pre-meeting" that was not open to the public or preceded by public notice, at which the Board discussed her employment as director of the Rolette County Social Services agency. At the beginning of the 1:00 PM regular meeting, the Board chairman added to the end of the meeting agenda a discussion with Ms. Davis. When it came time to address that item on the agenda, the Board unanimously passed a motion to place Ms. Davis on paid administrative leave pending preparation of a pre-termination letter outlining reasons for terminating her employment.

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Ms. Davis alleges the Board discussed the reasons for placing her on administrative leave during the "pre-meeting" on August 28 and further alleges that the notice and agenda of the regular meeting failed to indicate that the Board would be discussing the termination of her employment.

ISSUES

1. Whether the Board's executive session during its August 8, 2001, special meeting was authorized by law.
2. Whether the Board's announcement of the topics to be considered during its August 8 executive session was sufficient under N.D.C.C. § 44-04-19.2.
3. Whether the description of the executive session in the notice of the Board's special meeting on August 8 was in substantial compliance with N.D.C.C. § 44-04-20.
4. Whether the Board held a secret "pre-meeting" on August 28 before its regular meeting.
5. Whether the Board was required under N.D.C.C. § 44-04-20 to specifically indicate in the notice and agenda of its regular meeting on August 28 that it would be discussing termination of Ms. Davis' employment.

ANALYSES

Issue One:

A county social service board appointed under N.D.C.C. § 50-01.2-02 is a "governing body" of the county it serves. See N.D.C.C. § 44-04-17.1(6) (definition of "governing body"). Because the Rolette County Social Service Board is a "governing body" of Rolette County, its meetings must be open to the public "unless otherwise specifically provided by law." N.D.C.C. § 44-04-19.

"Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation." N.D.C.C. § 44-04-19.1(4). See also N.D.A.G. 99-O-04; N.D.A.G. 98-O-01. For "attorney consultation" to occur in an executive session, the attorney's advice must pertain to litigation or an adversarial administrative proceeding that is "pending" or "reasonably predictable." Id.

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The use of the phrase "reasonably predictable" in N.D.C.C. § 44-04-19.1 requires more than a simple possibility of litigation or adversarial administrative proceedings. A Georgia appellate court has recently stated regarding similar statutory language:

In our litigious society, a governmental agency always faces some threat of suit. To construe the term "potential litigation" to include an unrealized or idle threat of litigation would seriously undermine the purpose of the [open meetings] Act. Such a construction is overly broad. Construing [the attorney-client exception to the open meetings act] narrowly, we hold that a meeting may not be closed to discuss potential litigation under the attorney-client exception unless the government entity can show a realistic and tangible threat of legal action against it or its officer or employee, a threat that goes beyond a mere fear or suspicion of being sued.

Claxton Enterprise v. Evans County Board of Commissioners, 549 S.E.2d 830 (Ga. Ct. App. 2001). The observation of the court in the Claxton Enterprise case applies equally to the "reasonably predictable" standard in N.D.C.C. § 44-04-19.1: to hold an executive session under N.D.C.C. § 44-04-19.1 for "attorney consultation" regarding reasonably predictable litigation or adversarial administrative proceedings, a governing body must show more than a fear or potential of being a party to litigation or an administrative proceeding. The possibility of litigation or a proceeding by or against the governing body must be realistic and tangible.

In this case, the Board indicated it had already been accused of racial discrimination. According to the Board's response to the requests for this opinion, Ms. Bruce told the Board during an August 2 meeting "You go ahead and fire me, and then I'll do what I have to do." Ms. Davis had just prepared a very positive job performance evaluation for Ms. Bruce, and the Board felt the evaluation exaggerated Ms. Bruce's job performance in order to make it more difficult to sustain any decision by the Board to terminate Ms. Bruce's employment. Ms. Davis also suggested Ms. Bruce would have grounds to appeal the termination under the state veterans' preference law. See N.D.C.C. ch. 37-19.1.

N.D.C.C. § 44-04-19.1 does not require a governing body to wait until the moment before a lawsuit or administrative appeal is filed before obtaining its attorney's advice in an executive session.¹ Under the facts presented by the Board, it was reasonable for

¹ The "reasonably predictable" standard was added in 1997 to replace the term "imminent." See 1997 N.D. Sess. Laws ch. 381, § 15. The legislative history of the 1997 amendment indicates the terminology was changed to allow "attorney consultation" to be held not only when a lawsuit or proceeding is about to be filed, but also "after an incident occurs that can reasonably be expected to result in litigation at an

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the Board to conclude that there was a realistic and tangible threat of litigation or an adversarial administrative proceeding, or both, that went beyond a mere fear or suspicion. This conclusion is bolstered by the attendance of Ms. Bruce's attorney at the August 8 special meeting.

Having concluded that an executive session for "attorney consultation" was authorized in this situation, the remaining question is whether the discussion during the executive session was limited to receiving and discussing the attorney's advice regarding the reasonably predictable litigation or adversarial administrative proceeding. It is my opinion the August 8, 2001, executive session of the Board was authorized by law. The deciding factor is that the Board's discussion during the executive session did not involve whether to terminate Ms. Bruce's employment, which would not fall under any exception to the open meetings law. The discussion involved how to follow all applicable laws and personnel regulations in a way to place the Board in a strong legal position should its decision be challenged in court or in an administrative appeal. The Legislature enacted N.D.C.C. § 44-04-19.1 to allow this type of consultation. The recording indicates the discussion during the executive session was limited to the attorney's advice on that question and the Board's discussion of that advice.

Issue Two:

Before holding a lawfully authorized executive session, a governing body must "announce 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). The purpose of the announcement is to provide the public with a legally sufficient reason for holding the executive session. N.D.A.G. 2000-O-10. The requirements for the announcement of an executive session are conjunctive: a governing body must announce both the legal authority and the topic to be considered during the executive session. N.D.A.G. 99-O-04. A public entity must do more than cite or quote the applicable open meetings exception. Id. When an executive session is held for "attorney consultation" under N.D.C.C. § 44-04-19.1, an announcement is sufficient if it indicates that the reason for the executive session is 1) attorney consultation 2) regarding reasonably predictable or pending litigation or adversarial administrative proceedings and 3) further indicates the topic of the executive session by announcing the names of the other parties to the litigation or proceeding, the purpose of the executive session, or other information about the topic of the executive session that does not reveal closed or confidential information. N.D.A.G. 2000-O-10.

indefinite later time." Hearing on S.B. 2228 Before the House Comm. on Government and Veterans Affairs 1997 N.D. Leg. (Mar. 13) (Written section-by-section analysis by Office of Attorney General at p. 12).

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In N.D.A.G. 99-O-04, the governing body announced it was holding an executive session for "attorney consultation" but failed to indicate that the topic of the session was reasonably predictable litigation regarding a specific incident. The situation presented in this opinion is very similar. The Board announced it was holding an executive session for "attorney consultation," without citing any specific North Dakota statute, and described the topic of the session as "personnel issues before the Board" and the legal requirements of the applicable personnel policies. However, an executive session is not authorized to discuss general personnel issues. N.D.A.G. 2001-O-09. In addition, an executive session for "attorney consultation" is not authorized under N.D.C.C. § 44-04-19.1 to receive general legal advice regarding the interpretation or application of a personnel policy. As discussed in Issue One of this opinion, "attorney consultation" must pertain to pending or reasonably predictable litigation or adversarial administrative proceedings for an executive session to be authorized under N.D.C.C. § 44-04-19.1.

Viewing the Board's announcement in its entirety, the absence of a statement that the attorney consultation pertained to reasonably predictable litigation or administrative proceedings left doubt as to the statutory authority the Board was invoking as well as the topic considered during the executive session. In this case, as in N.D.A.G. 99-O-04, the announcement of the executive session on August 8, 2001, simply did not provide the public with a legally sufficient reason for the Board's executive session. Although I have concluded in Issue One of this opinion that the executive session was authorized under N.D.C.C. § 44-04-19.1, it is my opinion the Board's announcement of the executive session was not sufficient under N.D.C.C. § 44-04-19.2.

Issue Three:

All meetings subject to N.D.C.C. § 44-04-19 must be preceded by written public notice. N.D.C.C. § 44-04-20. The notice must include all topics the governing body expects to consider at the time the notice is prepared. N.D.C.C. § 44-04-20(2). A meeting notice must include "the general subject matter of any executive session expected to be held during the meeting" and special and emergency meetings must be limited to the topics included in the notice. N.D.C.C. § 44-04-20(2), (6). See also N.D.A.G. 2000-O-03, N.D.A.G. 98-O-01.

The notice of the August 8 special meeting was patterned after a form notice prepared by this office, but simply listed "employee relations" and "executive session" as separate agenda items. A member of the public reading the notice would not have been aware that the executive session listed as the third item on the agenda was related to the second item on the agenda listed as "employee relations." In a previous opinion issued by this office, the notice of a meeting included a reference to "attorney consultation" regarding "pending litigation." N.D.A.G. 2000-O-10. The notice in that opinion was considered sufficient because it contained a "general description" of the executive

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session. Id. In this case, unlike the situation in N.D.A.G. 2000-O-10, the notice does not contain any description of the subject matter of the executive session. As a result, it is my opinion the Board did not provide sufficient public notice of its special meeting on August 8, 2001.

Issue Four:

In her request for this opinion, Ms. Davis alleges she saw the Board members arrive at the county courthouse between 12:00 and 12:30 PM on August 28 and suggests that the Board members held a secret meeting prior to the regular meeting scheduled at 1:00 PM the same day. The Board does not dispute the possibility that all the Board members were present in the county courthouse before the scheduled time for the regular meeting on August 28, but categorically denies that the members held a "pre-meeting" regarding Board business. Whether a quorum of the Board members participated in a gathering regarding the Board's business is a question of fact. It is beyond my authority in issuing opinions under N.D.C.C. § 44-04-21.1 to resolve disputed facts. For purposes of this opinion, I must assume as true the Board's denial that its members participated in a "pre-meeting" prior to the regular Board meeting at 1:00 PM on August 28. Under the facts presented, it is my opinion the Board did not hold a secret, closed meeting on August 28.

Issue Five:

As discussed in Issue Three of this opinion, the "[t]opics that may be considered at an emergency or special meeting are limited to those included in the notice" of the meeting. N.D.C.C. § 44-04-20(6). There is no such limitation regarding the topics that may be considered during a regular meeting.

All topics anticipated to be considered at a meeting of a governing body of a public entity must be included on the agenda and notice compiled before the meeting, including topics anticipated to be discussed in a lawfully authorized executive session. N.D.C.C. § 44-04-20. However, if, at the time of the regular meeting, it is determined that an executive session needs to be held that was not anticipated before the meeting, the fact that the executive session and topic to be considered in the executive session are not listed on the agenda and notice does not prohibit the governing body from holding the executive session. The agenda can be amended on the day of the regular meeting or even during the meeting.

N.D.A.G. 98-O-21.

In response to the requests for this opinion, the Board indicates that the chairman of the Board had serious concerns about the conduct and job performance of Ms. Davis. The Board further states that the day before the August 28 meeting, the chairman learned Ms. Davis submitted the budget for Rolette County Social Services to the county auditor without the approval of the Board, which he interpreted as evidence of insubordination. The Board indicates it was for these reasons that the chairman added the "personnel issue" item to the agenda of the August 28 Board meeting. Because the discussion of a governing body at a regular meeting need not be limited to the topics included in the notice of the meeting, it is my opinion that the Board did not violate N.D.C.C. § 44-04-20 when it added a "personnel issue" to the agenda of its August 28 regular meeting at the beginning of the meeting.

CONCLUSIONS

1. It is my opinion the August 8, 2001, executive session of the Board was authorized by law.
2. It is my opinion the Board's announcement of its executive session on August 8, 2001, was not sufficient under N.D.C.C. § 44-04-19.2.
3. It is my opinion the Board did not provide sufficient public notice of its special meeting on August 8, 2001.
4. It is my opinion the Board did not hold a secret, closed meeting on August 28, 2001.
5. It is my opinion that the Board did not violate N.D.C.C. § 44-04-20 when it added a "personnel issue" to the agenda of its August 28, 2001, regular meeting at the beginning of the meeting.

STEPS NEEDED TO REMEDY VIOLATIONS

The Board's failure to sufficiently announce the topic of its August 8 executive session is sufficiently remedied by the summary of the Board's position in this opinion. No further remedial action is necessary except to amend the minutes of the August 8 meeting to explain that the topic to be considered during the executive session was "reasonably predictable civil litigation or adversarial administrative proceedings against the Board on a personnel matter." See 2000-O-02. This correction can take place at the next meeting of the Board.

The deficiency in the notice of the August 8 meeting affects only the portion of the meeting which was not adequately described in the notice. Because the public was not

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entitled to attend the executive session, a new meeting is not necessary to remedy the Board's failure to describe in the notice the legal authority for the session or the topic considered during the session. Instead, the amended minutes the Board is required to prepare to remedy the deficiency of the announcement of the executive session will provide the necessary explanation of the legal authority and topic considered during the executive session and no further remedial action is necessary. See N.D.A.G.1998-O-01.

Failure to provide public notice within seven days of the date this opinion of a meeting to take the corrective measures described in this opinion 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.

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