

**OPEN RECORDS AND MEETINGS OPINION  
2004-O-18**

DATE ISSUED: July 16, 2004

ISSUED TO: Mount Pleasant Public School District No. 4

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Davy Zinke asking whether the Mount Pleasant School District No. 4 violated N.D.C.C. § 44-04-20 by discussing and voting on an item not included in the agenda of the school district's Board of Education (Board) meeting held on April 20, 2004, and violated N.D.C.C. § 44-04-19 because a quorum of members of the school district's governing body discussed public business in a nonpublic gathering.

**FACTS PRESENTED**

The Mount Pleasant School District No. 4 held a regular monthly meeting on April 20, 2004. During the meeting a motion was offered to nonrenew the superintendent's contract. The motion was seconded and approved by a vote of 6 to 3. The subject of the superintendent's contract was not on the agenda for the meeting. Mr. Zinke, president of the Rolla Education Association, alleges that two Board members were unaware such a motion was going to be made at the meeting. He believes six other members were called prior to the meeting and polled on their votes. Mr. Zinke asserts that there was no discussion on the motion's merit prior to the vote, indicating that a quorum of the Board discussed the motion prior to the meeting.

According to the school district, the Board did discuss the motion prior to the governing body's vote on the issue. Letter from Brian Hankla, attorney for the School Board, to Assistant Attorney General Michael Mullen, June 7, 2004. The motion was revised and clarified three times based on Board discussion. Id. In addition, the school district stated that the superintendent's performance was discussed by Board members during its regularly scheduled meetings for many months prior to the April 20 meeting. Id. The school district denies that a quorum of members of the Board called each other prior to the April 20, 2004, meeting to discuss the nonrenewal of the superintendent's contract and assure unity on the motion as alleged in the opinion request.

## OPEN RECORDS AND MEETINGS OPINION 2004-O-18

July 16, 2004

Page 2

### ISSUES

1. Whether the school district violated N.D.C.C. § 44-04-20 by discussing and voting on an item not included in the agenda of a regular meeting of the Board.
2. Whether the school district's Board members violated N.D.C.C. § 44-04-19 by making a series of telephone calls to discuss nonrenewal of the superintendent's contract.

### ANALYSES

#### Issue One

The Mount Pleasant Public School District is a public entity. N.D.C.C. § 44-04-17.1(12)(b). See also N.D.A.G. 2002-O-07 and N.D.A.G. 97-O-02. Unless otherwise provided by law, all meetings of a public entity 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). As long as it does so, "the lack of an agenda in the notice, or a departure from or an addition to, the agenda at a meeting [other than an emergency or special meeting] does not affect the validity of the meeting or the action taken [at the meeting]." N.D.C.C. § 44-04-20(2). A governing body is free to discuss any topic at a regular meeting, as long as the notice of the meeting listed all the topics the governing body expected to discuss when the notice was prepared. N.D.A.G. 99-O-08. According to the Board president, he did not know at the time the agenda was prepared that a motion to nonrenew the superintendent's contract would be made. This office must base the opinion on the facts given by the public entity. N.D.C.C. § 44-04-21.1. Because the Board did not expect to discuss the superintendent's nonrenewal at the time the notice was prepared, the school district did not violate N.D.C.C. § 44-04-20 when it considered that topic at its regular meeting.

#### Issue Two

"Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public." N.D.C.C. § 44-04-19. "Meeting" means a formal or informal gathering, whether in person or through other means such as a telephone or video conference of less than a quorum. N.D.C.C. § 44-04-17.1(8)(a)(2). A quorum means one-half or more of the governing body's members. N.D.C.C. § 44-04-17.1(14). A "meeting" also includes a series of smaller gatherings collectively involving a quorum if the members hold the gatherings for the purpose of avoiding the open meetings law. N.D.C.C. § 44-04-17.1(8)(a)(2). The definition does not include chance or social

## OPEN RECORDS AND MEETINGS OPINION 2004-O-18

July 16, 2004

Page 3

gatherings as long as public business is not considered or discussed. N.D.C.C. § 44-04-17.1(8)(b). "Public business" includes all matters that relate to a public entity's performance of its governmental functions or use of public funds. N.D.C.C. § 44-04-17.1(11). Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity and all votes of whatever kind taken at any public meeting must be open, public votes. N.D.C.C. §§ 44-04-20(1), 44-04-21(1).

In this case, it is alleged that prior to the school district's April 20, 2004, meeting, a quorum of Board members participated in a series of telephone calls to discuss nonrenewing the superintendent's contract. Mr. Zinke implies that his allegation is supported by the fact that no Board discussion took place regarding the motion to nonrenew the contract. In a past opinion, this office found that the State Board of Higher Education violated the open meetings law when it intentionally met in smaller groups collectively involving a quorum and engaged in discussions that should have been held in an open meeting. N.D.A.G. 98-O-05. That opinion also warned against conducting "straw votes" in light of the open voting requirements in N.D.C.C. § 44-04-21(1).

The school district stated there was discussion on the motion and the motion was revised three times based on those discussions. It is unclear whether the discussion related to the motion's merits or to its form. The school district also stated, however, that at several previous meetings the superintendent's performance was discussed. This could explain why there may not have been a need to discuss the motion at length during the April 20 meeting.

Regardless of whether the motion's merits were discussed, the school district denies that a quorum of Board members participated in a series of telephone calls. This office must base the opinion on the facts given by the public entity. N.D.C.C. § 44-04-21.1. Accordingly, under the circumstances presented, it is my opinion the Board did not hold a meeting in violation of N.D.C.C. § 44-04-19.

### CONCLUSIONS

1. The school district did not violate N.D.C.C. § 44-04-20 by discussing and voting on an item not included in the agenda.
2. The school district did not hold a meeting through a series of telephone calls to discuss nonrenewal of the superintendent's contract and therefore did not violate N.D.C.C. § 44-04-19.

OPEN RECORDS AND MEETINGS OPINION 2004-O-18

July 16, 2004

Page 4

Wayne Stenehjem  
Attorney General

Assisted by: Michael J. Mullen  
Assistant Attorney General

pg