

**OPEN RECORDS AND MEETINGS OPINION
2004-O-21**

DATE ISSUED: October 8, 2004

ISSUED TO: Fort Totten Public School District No. 30 Board of Education

CITIZEN'S REQUEST FOR OPINION

This office received a timely 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 Fort Totten School District No. 30 violated N.D.C.C. §§ 44-04-19.1 and 44-04-19.2 by holding an executive session which was not authorized by law and by failing to include in the minutes of the open meeting a summary of the general topics discussed or considered during the executive session.

FACTS PRESENTED

The Board of the Fort Totten Public School District (Board) held an executive session during its regular meeting on July 7, 2004. The Board gave N.D.C.C. § 44-04-19.1, which authorizes public entities to hold executive sessions for negotiation strategy, as the legal authority for the session. The executive session was not recorded. Following the executive session, the Board reconvened the open meeting and, by a vote of four to one, approved a motion to formally reprimand the superintendent of schools.¹ This office has reviewed both the minutes of the July 7, 2004, regular meeting and the separately prepared minutes of the executive session.

ISSUES

1. Whether the Board violated N.D.C.C. § 44-04-19 by holding an executive session on July 7, 2004, under the authority provided in N.D.C.C. § 44-04-19.1(7).
2. Whether the Board violated N.D.C.C. § 44-04-19.2(4) by not including in the minutes of the regular meeting a summary of the general topics discussed or considered during the executive session held during that meeting.

¹ Subsequently, on September 1, 2004, the Board voted to rescind the reprimand.

ANALYSES

Issue One

The Fort Totten 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. As a public entity, meetings of its governing body, the Board of Education, 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-08. Under N.D.C.C. § 44-04-19.1(7) a meeting may be closed to discuss negotiating strategy regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. N.D.C.C. § 44-04-19.1(7). The Board relied on this subsection as the legal authority for its executive session.

In this case, it appears the reference to holding an executive session for “negotiation preparation” was mere pretext. The minutes of the executive session compiled by the Board make no reference to any negotiation. In addition, an executive session may be held to discuss negotiating strategy only when an open meeting would have an adverse fiscal effect on the bargaining position of the public entity. N.D.C.C. § 44-04-19.1(7). In this case, the superintendent attended the session thereby negating the right to hold an executive session. Cf. N.D.A.G. 2002-O-01 (the executive session for attorney consultation regarding reasonably predictable litigation was not authorized by law because the potential litigant was allowed to attend the executive session).

The minutes of the executive session reveal the true purpose of the executive session was to discuss a personnel matter. As this office has previously concluded, no matter how uncomfortable it might be for a governing body to discuss an employee’s job performance in public, there is no exception to the open meetings law for personnel matters. N.D.A.G. 2004-O-19; N.D.A.G. 2001-O-17.² See also N.D.A.G. 2001-O-09 (executive session may not be used to discuss personnel issues); N.D.A.G. 2000-O-09 (executive session may not be used to perform employee evaluations); N.D.A.G. 98-O-05 (no exception to the open meetings law for discussing personnel matters).

² The exceptions to the open meetings law for reviews of school superintendents are quite limited. Generally, these exceptions apply only when a school board is contemplating discharge or nonrenewal of the superintendent, and not to all discussions of the job performance of these school administrators. N.D.C.C. §§ 15.1-14-06(4), 15.1-14-10 (board meetings concerning the dismissal for cause, or nonrenewal of a superintendent must be closed unless the superintendent agrees otherwise). These statutes were not given as legal authority for the Board’s executive session on July 7, 2004.

OPEN RECORDS AND MEETINGS OPINION 2004-O-21

October 8, 2004

Page 3

Therefore, it is my opinion that the Board violated N.D.C.C. § 44-04-19 when it discussed personnel matters in an executive session.

Finally, state law requires that all executive sessions be recorded. N.D.C.C. § 44-04-19.2(5). The Board violated the law by not recording the executive session.

Issue Two

Public entities are required to prepare minutes of their meetings. N.D.C.C. § 44-04-21(2). The minutes must include a summary of the general topics discussed or considered during any executive session held during a meeting. N.D.C.C. § 44-04-19.2(4).

In this case, the minutes of the Board's July 7, 2004, regular meeting state in part:

OLD BUSINESS: Derrick motioned to enter into Executive Session per NDCC 44-04-19.1 for negotiation preparation. Seconded by Doug. All in favor. Motion carried. The Board exited into executive session at 5:20 P.M.

Doug motioned to reconvene into regular session at 6:05 P.M. Seconded by Arlene. All in favor. Motion carried.

Derrick motioned to formally reprimand the Superintendent for illegally paying an employee before services were rendered. Seconded by Doug. Mr. Peltier would like to see the legalities of this issue before he is reprimanded. If he is guilty then reprimand him. Mr. Peltier would like two weeks to investigate this issue. The Board decided if this issue is not illegal then the Board will rescind this motion. 4 in favor. 1 opposed. Motion carried.

Although the minutes describe the topic considered during the executive session, they fail to explain that that topic was the subject of the executive session. Members of the public reading the minutes would not have known what the topic of the executive session was. Based on the minutes, they would have thought the topic considered related to "negotiation preparation." Thus, it is my opinion that the minutes of the July 7, 2004, meeting did not comply with N.D.C.C. § 44-04-19.2(4) because they did not explain that the superintendent's alleged improper payment was the general topic discussed during the executive session.

CONCLUSIONS

1. The Board violated N.D.C.C. § 44-04-19 when it discussed personnel matters in an executive session. The Board also violated N.D.C.C. § 44-04-19.2(5) by failing to record the executive session.
2. The Board violated N.D.C.C. § 44-04-19.2(4) because the minutes of the open meeting did not explain that the superintendent's alleged improper payment was the topic discussed in the executive session.

STEPS NEEDED TO REMEDY VIOLATIONS

A copy of the minutes of the Board's executive session of July 7, 2004, must be provided to Mr. Bormann, and incorporated into the minutes of the open portion of that meeting. In addition, the minutes must be revised to state clearly that the general topic considered during the executive session was the Board's discussion of allegedly unlawful payments to an employee before services were rendered. Because no tape recording was made, the minutes must provide sufficient detail about the discussion held during the executive session, and should indicate the positions Board members took in the executive session. The Board must also establish procedures to ensure that a recording is made of any portion of future meetings held in executive session.

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.

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