

**OPEN RECORDS AND MEETINGS OPINION
2004-O-22**

DATE ISSUED: October 12, 2004

ISSUED TO: Cavalier City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. §44-04-21.1 from Cyril J. Kalinowski (Kalinowski) asserting that the Cavalier City Council (Council) violated the open meetings law by failing to list topics in the notice of a special meeting of the personnel committee, failing to list an executive session in the notice of a regular meeting of the Council, and failing to decide an issue considered in an executive session in an open meeting.

FACTS PRESENTED

Special Meeting

The personnel committee, consisting of the mayor and three other members of the seven member Council, held a special meeting the morning of July 12, 2004, regarding compensation for the newly-promoted assistant police chief. A public notice of the meeting was posted stating the time, date, and location of the meeting. The notice did not list any topics to be considered at the meeting. The Committee decided to recommend a pay increase to the Council, and the Council acted on the recommendation at its regular meeting.

Regular Meeting

The requester, Kalinowski, is a former Cavalier city policeman. On June 7, 2004, the city attorney received a settlement offer from Kalinowski's attorney. The city attorney contacted Kalinowski's attorney and told her the council would consider Kalinowski's June 7 settlement offer at the first regular meeting following the June 22, 2004, reorganization meeting. The July 12, 2004, regular meeting was that meeting. The City attorney did not communicate the statement he made to Kalinowski's attorney to the city auditor, or anyone else at the city.

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The weekend before the meeting the city attorney remembered he had told Kalinowski's attorney that the Council would consider the settlement offer, but by then the notice of the July 12 meeting and the agenda had already been posted. Monday morning, the day of the meeting, the city attorney advised the mayor he would ask him to amend the agenda to include an executive session to consider the settlement offer from Mr. Kalinowski's attorney. At the regular meeting July 12, the city attorney asked the mayor to add "C.J. Kalinowski" as an agenda item.

Toward the end of the meeting, a motion was made to close the meeting under N.D.C.C. § 44-04-19.1 "for attorney consultation on C. J. Kalinowski's case." According to the city attorney, the executive session was necessary to discuss the offer made by Kalinowski's attorney. After the executive session, in an open meeting, the city attorney stated it was his opinion that the city should reject the offer from Kalinowski's attorney. A motion was made and passed to reject the settlement offer.

In addition to the settlement negotiations with the city, Kalinowski had filed a discrimination claim with the Labor Department. On July 7, 2004, a Labor Department mediation hearing on the claim was held.

ISSUES

1. Whether the Council violated N.D.C.C. § 44-04-20 by failing to list the topics to be considered in a public notice of the personnel committee meeting.
2. Whether the Council violated N.D.C.C. § 44-04-20(2) by failing to list an executive session in the public notice of a regular meeting at which an executive session was held.
3. Whether the Council violated N.D.C.C. § 44-04-19.2(2)(e) by taking final action on a topic discussed during an executive session.

ANALYSES

Issue One

Unless otherwise provided by law, notice of every meeting of a governing body of a public entity "must be posted at the principal office of the governing body holding the meeting, if such exists, and at the location of the meeting on the date of the meeting." N.D.C.C. § 44-04-20. The July 12, 2004, personnel committee meeting was a gathering of a "governing body," both as a quorum of the Council and as a smaller group acting pursuant to authority delegated by the full Council. N.D.C.C. § 44-04-17.1(6), (14);

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N.D.A.G. 98-O-13. The gathering was therefore a “meeting” under N.D.C.C. § 44-04-19 and public notice of the meeting must comply with N.D.C.C. § 44-04-20.

Notices of public meetings must “contain the date, time, and location of the meeting and, where practicable, the topics to be considered.” N.D.C.C. § 44-04-20(2). In the case of a special meeting, the notice must contain the topics to be considered. N.D.C.C. § 44-04-20(6) (emphasis added). The failure to list in its notice the topics to be discussed at a special meeting violates N.D.C.C. § 40-04-20(6); N.D.A.G. 2003-O-20 (by failing to include the topics to be discussed, the public is prevented from obtaining proper advance notice of the special meeting). The notice of the personnel committee meeting did not list any topics. The only topic considered was the compensation of the assistant police chief. The failure to include a reference to the topic of the meeting was a violation of N.D.C.C. § 44-04-20(6).

Issue Two

A notice of a public meeting “must also contain the general subject matter of any executive session expected to be held during the meeting.” N.D.C.C. § 44-04-20(2). The requester, Kalinowski, asserts that the Council purposefully did not list an executive session regarding him in the notice of the regular meeting.

This office addressed the issue of conducting an executive session not included in the notice or on the agenda of a regular meeting in a 1998 opinion to the North Dakota Association of Soil Conservation Districts. That opinion stated:

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. Topics that have been deliberately omitted from a regular meeting, however, may not be discussed. N.D.A.G. 1999-O-37.

According to the city attorney, the executive session was not intentionally left off the notice and agenda. Rather, he forgot he had told Kalinowski’s attorney that the Council would consider the June 7 settlement offer at its next regular meeting, until the weekend

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prior to the regular meeting. Because the city attorney did not tell the auditor or anyone else in the city of this additional agenda item, the auditor had already prepared and posted the notice and agenda without listing the Kalinowski issue. On Monday morning, the city attorney informed the mayor that the Kalinowski matter would have to be added to the agenda. In any opinion issued under N.D.C.C. § 44-04-21.1, the attorney general shall base the opinion on the facts given by the public entity. N.D.C.C. § 44-04-21.1(1). Accordingly, this office must rely on the Council's assurance that the Kalinowski issue was not deliberately left off the agenda. The fact that during the regular meeting the Council decided an executive session was necessary was not a violation of the open meetings law.

Issue Three

Final action on a matter considered during a closed meeting is to be taken after the executive session is ended and the open meeting resumed. N.D.C.C. § 44-04-19.2(2)(e). Kalinowski believes that during the executive session, the Council discussed both his attorney's June 7 settlement offer and the proposed offer made in the mediation session with the Labor Department. He acknowledges that the council took final action on the June 7 offer made by his attorney in the open portion of the meeting. He asserts, however, that the Council made a final decision on the settlement offer proposed at the Mediation meeting with the Labor Department during the Executive Session.

A review of the tape of the executive session reveals that both the June 7 offer by Kalinowski's attorney and the offer made in the Labor Department's mediation were discussed. The mediation was not brought up to elicit a decision by the Council to accept or reject the offer made in mediation. Rather, the city attorney gave the Council enough information about the mediation so that the Council could make an informed decision regarding the settlement offer made by Kalinowski's attorney. According to the city attorney, the mediation was unsuccessful. Therefore, there was no reason for the Council to consider the offer made during the mediation. The tape confirms that the city attorney never asked the Council for a final decision on the mediation settlement offer as Kalinowski asserts. The Council received advice about the offer from Kalinowski's attorney and waited to make a final decision about it until it reconvened in an open meeting and passed a motion to reject the offer. It is my opinion that because it did not take final action on the mediation offer during a closed session, the council did not violate N.D.C.C. § 44-04-19.2(2)(e).

CONCLUSIONS

1. Failure to list the topic of the personnel committee meeting in the notice of its July 12 special meeting was a violation of N.D.C.C. § 44-04-20(2).

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2. Failure to list an executive session regarding a settlement offer in the notice of a regular Council meeting was not a violation of N.D.C.C. § 44-04-20(2).
3. Because the Council did not take final action on the mediation offer during a closed session, it did not violate N.D.C.C. § 44-04-19.2(2)(e).

STEPS NEEDED TO REMEDY VIOLATIONS

A notice of the July 12, 2004, special meeting that includes the topics discussed during the meeting must be prepared and filed with the city auditor and posted at the city's main office. The notice must also contain the date, time, and location of the meeting. N.D.C.C. § 44-04-20(2). N.D.C.C. § 44-04-20(4). The notice must also be provided to the city's official newspaper and any person who had previously requested to receive notice. N.D.C.C. § 44-04-20(5), (6). The notice must also specify that minutes are available from the city auditor to any member of the public who wants a copy free of charge.

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