

**OPEN RECORDS AND MEETINGS OPINION  
2005-O-21**

DATE ISSUED: December 8, 2005

ISSUED TO: Harvey School Board

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mr. Joe Westby, Executive Director, North Dakota Education Association, asking whether the Harvey School Board ("Board") violated N.D.C.C. § 44-04-19.2(2)(e) by taking final action on a matter during an executive session.

**FACTS PRESENTED**

Mr. Westby alleges that, during an executive session, the Board took final action to unilaterally issue contracts to Harvey teachers following the failure to reach an agreement after the "fact-finding process" in teacher contract negotiations had been completed. According to the Board, the Board and the Harvey Education Association ("HEA") commenced formal negotiations on teacher contracts in May 2005 pursuant to North Dakota education laws.<sup>1</sup> After four negotiating sessions, an impasse was declared. On August 3, 2005, the North Dakota Education Fact Finding Commission ("Commission") conducted a public hearing. Following the hearing, the Commission issued its report. The parties returned to the negotiating table for two more negotiating sessions, but they were still unable to reach an agreement. Subsequently, the report was published in the Harvey Herald-Press.<sup>2</sup> On September 13, 2005, the Board met in executive session to discuss negotiation strategy and instruct its negotiators as to how they should proceed.<sup>3</sup> The executive session was recorded and a copy of the recording was provided to this office.

**ISSUE**

Whether the Board violated N.D.C.C. § 44-04-19.2(2)(e) by taking final action on a matter during an executive session of a Board meeting.

---

<sup>1</sup> See N.D.C.C. ch. 15.1-16.

<sup>2</sup> N.D.C.C. § 15.1-16-15(4) requires the Commission to make its findings and recommendations public.

<sup>3</sup> See N.D.C.C. § 44-04-19.1(9).

## ANALYSIS

The Harvey Public School District is a public entity.<sup>4</sup> As a public entity, meetings of its governing body, the Board, must be open to the public unless otherwise specifically provided by law.<sup>5</sup> A governing body may close a meeting to discuss negotiating strategy regarding contracts currently being negotiated.<sup>6</sup> An executive session may be held under this subsection only if holding the discussion during an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.<sup>7</sup> The Board relied on this subsection as the legal authority for its executive session.

Final action on a topic discussed during an executive session must occur during the open portion of the meeting unless final action is otherwise required by law to be taken during the executive session.<sup>8</sup> Some decisions a governing body makes during an executive session, however, are not treated as final action:

“[F]inal action” means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.<sup>9</sup>

In this case, a review of the audiotape of the executive session shows that the Board did vote on a motion during the executive session. The vote was to authorize its negotiators to meet again with the teacher negotiators to make a final offer before the unilateral issuance of contracts and to declare that good faith negotiations have been completed.

State law requires school boards to notify teachers individually whether their contracts are being renewed, however, this notification requirement is suspended during

---

<sup>4</sup> See N.D.C.C. § 44-04-17.1(12)(b); N.D.A.G. 2004-O-21; N.D.A.G. 2002-O-07; and N.D.A.G. 97-O-02.

<sup>5</sup> N.D.C.C. § 44-04-19.

<sup>6</sup> N.D.C.C. § 44-04-19.1(9).

<sup>7</sup> *Id.*; N.D.A.G. 99-O-01.

<sup>8</sup> N.D.C.C. § 44-04-19.2(2)(e); N.D.A.G. 2000-O-04.

<sup>9</sup> N.D.C.C. § 44-04-19.2(2)(e) (emphasis added). See also N.D.A.G. 2005-O-18 (no violation because there was no “final action” taken when the city council's only action during the executive session was to provide authority and instructions for further negotiations).

negotiations with an organization that represents the teachers.<sup>10</sup> North Dakota Supreme Court opinions have set out the procedure for bringing good faith negotiations to a conclusion when the parties cannot reach a mutual agreement.<sup>11</sup> When that occurs, the school board may issue contracts unilaterally based on its last offer.<sup>12</sup>

The motion in this case authorized the negotiators to take the steps necessary to conclude the negotiation process so that the Board could then issue contracts unilaterally based on the last offer. The portion of the motion giving the negotiators authority to make a final offer and, if unsuccessful, to declare that good faith negotiations were completed, was not "final action" as defined in the open meetings law.<sup>13</sup> The motion, however, also authorized the unilateral issuance of contracts. Had the negotiators thereafter declared that negotiations were at an end, the school district, without further action by the Board, would have issued contracts to the teachers.<sup>14</sup> The inclusion in the motion of authority to unilaterally issue the contracts goes beyond negotiation strategy or instruction, and the motion to issue contracts if the negotiations failed should have been made during the regular portion of the meeting. Accordingly, it is my opinion the Board violated N.D.C.C. § 44-04-19.2(2)(e) by voting on a motion authorizing the issuance of teacher contracts during an executive session.

#### CONCLUSION

The Board violated N.D.C.C. § 44-04-19.2(2)(e) because during the executive session it voted on a motion authorizing the issuance of teacher contracts.

#### STEPS NEEDED TO REMEDY VIOLATION

The Board must vote again during an open meeting, on a motion authorizing the issuance of teacher contracts.

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

---

<sup>10</sup> See N.D.C.C. § 15.1-15-04.

<sup>11</sup> Dickinson Ed. Ass'n v. Dickinson Public School Dist. No. 1, 252 N.W.2d 205 (N.D. 1977); Edgeley Ed. Ass'n v. Edgeley Public School Dist. No. 3, 256 N.W.2d 348 (N.D. 1977).

<sup>12</sup> Id.

<sup>13</sup> See N.D.C.C. § 44-04-19.2(2)(e).

<sup>14</sup> Telephone call with Robert Marthaller, Superintendent, Harvey Public Schools (Dec. 6, 2005).

under N.D.C.C. § 44-04-21.2.<sup>15</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>16</sup>

Wayne Stenehjem  
Attorney General

Assisted by: Michael J. Mullen  
Assistant Attorney General

mjm/vkk

---

<sup>15</sup> N.D.C.C. §44-04-21.1(2).

<sup>16</sup> Id.