

**OPEN RECORDS AND MEETINGS OPINION
2013-O-11**

DATE ISSUED: August 6, 2013

ISSUED TO: State Board of Higher Education

CITIZEN'S REQUEST FOR OPINION

This office received requests for an opinion under N.D.C.C. § 44-04-21.1 from Dale Wetzell and Ryan Johnson asking whether the State Board of Higher Education violated N.D.C.C. § 44-04-19 by holding an improper executive session.

FACTS PRESENTED

On May 29, 2013, two members of the State Board of Higher Education (SBHE), SBHE president Duaine Espegard and SBHE member Grant Shaft, received a proposed Separation Agreement from North Dakota University System (NDUS) Chancellor Hamid Shirvani's attorney.¹ Because of conflicts of interest of NDUS and SBHE's own counsel, the decision was made by Mr. Espegard and Mr. Shaft to forward the Agreement on to Attorney Sara McGrane.² Ms. McGrane proceeded to negotiate and exchange various contract proposals with Chancellor Shirvani's attorney.³

The SBHE held its annual retreat on June 2 and 3, 2013, in Medora, North Dakota. During the meeting, the SBHE voted to hire Ms. McGrane as a special assistant attorney general to represent the board in negotiations with Chancellor Shirvani's employment contract.⁴ On Monday, June 3, 2013, the agenda was amended to add an executive session "to Discuss Negotiation of Chancellor's Contract" citing the legal authority to close the meeting as "to discuss a contract negotiation under N.D.C.C. § 44-04-19.1(9)."⁵

¹ See June 25, 2013, letter from NDUS to Attorney General's office.

² Id. The SBHE hired Ms. McGrane as counsel regarding Chancellor Shirvani's contract during the meeting held on June 2, 2013.

³ Id.

⁴ See June 2, 2013, SBHE draft meeting minutes.

⁵ See June 3, 2013, amended SBHE agenda.

Prior to the executive session on June 3, 2013, Mr. Espegard announced that the Board would enter into an executive session. He explained that Dr. Shirvani had approached him with the option of either extending or buying-out his contract as Chancellor and cited N.D.C.C. § 44-04-19.1(9) as the legal authority for closing the meeting.⁶ Mr. Espegard noted Ms. McGrane, who would be participating telephonically, had been retained to provide guidance on a negotiating strategy and advice on the fiscal effects, and the executive session would be narrowly limited to the topics described.⁷ The SBHE voted and proceeded into executive session, which lasted approximately seventy-seven minutes.⁸ The executive session was recorded as required by N.D.C.C. § 44-04-19.2.

When the SBHE resumed the open portion of the meeting, several motions were made with regard to the Chancellor's employment.⁹ Ultimately, the SBHE voted and unanimously agreed to offer a Separation Agreement labeled as "option two" to the Chancellor.¹⁰

Mr. Dale Wetzel, managing editor of the Great Plains Examiner, and Mr. Ryan Johnson, reporter for The Forum, allege that the SBHE's executive session held on June 3, 2013, was improper.

ISSUE

Whether the executive session held on June 3, 2013, by the SBHE, was authorized by law.

ANALYSIS

All meetings of the governing body of a public entity must be open to the public unless otherwise specifically provided by law.¹¹ The SBHE is the governing body of the NDUS and is a "public entity" subject to open record and meeting laws.¹² Specific statutory exceptions allow a governing body to hold an executive session. The exemptions relevant to this opinion are commonly referred to as "attorney consultation" and "negotiation strategy." Both exemptions have certain requirements that must be met in order to close a meeting.

⁶ See June 3, 2013, SBHE draft meeting minutes.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ N.D.C.C. § 44-04-19.

¹² See N.D. Const. art. VIII, § 6; N.D.C.C. §§ 15-10-01, 44-04-17.1(13)(a); N.D.A.G. 2013-O-06.

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The SBHE closed its June 3, 2013, meeting pursuant to N.D.C.C. § 44-04-19.1(9):

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator 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. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigation positions of the public entity.¹³

To properly close a meeting for negotiation strategy, three elements must be met.¹⁴ First, the public entity must be discussing negotiating strategy or providing negotiating instructions to its attorney or other negotiator.¹⁵ Second, there must be litigation, adversarial administrative proceedings, or contracts which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future.¹⁶ Third, a meeting may be closed under this subsection only if keeping the meeting open would have an adverse fiscal effect on the public entity's bargaining or litigating position.¹⁷ In other words, if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity, a meeting may be closed.¹⁸

A member of my office reviewed the recording of the executive session. According to the recording, after closing the meeting, Mr. Shaft made introductory comments and explained the course of events that led to the options before the Board. These introductory comments and background information were not negotiation strategy or instructions. In several past opinions this office has explained that N.D.C.C. § 44-04-19.1(9) does not authorize an executive session for a governing body to receive an update, history, or summary from its negotiator on the status of contract negotiations.¹⁹ Presenting this information during the open portion of the meeting would not have negatively impacted the Board's position regarding its negotiations with Dr. Shirvani and was therefore improperly closed to the public.²⁰

¹³ N.D.C.C. § 44-04-19.1(9) (emphasis added).

¹⁴ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2004-O-24; N.D.A.G. 2000-O-09.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ N.D.A.G. 2004-O-24; N.D.A.G. 2000-O-09.

¹⁹ See N.D.A.G. 2005-O-18; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-05.

²⁰ See N.D.A.G. 2005-O-18.

After the introductory comments by Mr. Shaft, Ms. McGrane began to discuss the option of continuing Dr. Shirvani's employment contract. She provided proposed language to add to the current employment contract and also asked for input on any additional language the Board would like added. She then reviewed the four separate buy-out agreements she had previously negotiated with Dr. Shirvani and his attorney. Ms. McGrane proceeded to go through the proposed agreements with the Board, pointing out differences, answering questions from the Board, and providing her advice regarding what option would put the Board in the best legal position. Ms. McGrane left the conversation after approximately fifty minutes without receiving any instructions from the Board.

After review of the recording, a better characterization of Ms. McGrane's conversation with the Board would have been "attorney consultation" rather than negotiation.²¹ A governing body may close an open meeting to receive advice from its attorney if the public entity's attorney is providing a mental impression, litigation strategy, or advice regarding reasonably predictable civil litigation.²² Because Dr. Shirvani had hired an attorney who indicated the possibility of a lawsuit, it would be reasonable for Ms. McGrane to conclude that there was a "reasonably predictable" threat of litigation.²³ Ms. McGrane provided the SBHE with advice regarding possible lawsuits and adversarial proceedings that may be brought by Dr. Shirvani and her litigation strategy concerning these lawsuits. She also made a recommendation on what proposed agreement was most beneficial as it related to litigation strategy. While the elements of an attorney consultation were present, the elements of a negotiation were not. Therefore, the discussion between the Board and its attorney was properly held in executive session but as an attorney consultation, not negotiation.

After Ms. McGrane left the executive session, the Board continued to review the various options for 17 minutes. The Board discussed the different options as they were presented and did not discuss the possibility of a counter proposal. Nothing said during the last 17 minutes would have had an adverse fiscal effect on the bargaining or litigation positions of the public entity so the third element necessary for an executive session to negotiate was absent. The Board came out of executive session and ultimately moved to accept the option labeled as "option two" and the matter was complete without any negotiation. While it is well within the Board's authority to accept

²¹ See N.D.C.C. § 44-04-19.1(2). It does not appear that the Board intentionally mischaracterized the nature of the executive session. It was reasonable to believe that the attorney's advice could have been used to develop a negotiation strategy. I note that the recording also reveals that the Board made a good faith effort to comply with the executive session laws.

²² See N.D.C.C. § 44-04-19.1(5).

²³ See N.D.A.G. 2007-O-09 (statements made by an individual's attorney predicted a lawsuit).

the proposed option, it is not a negotiation process. Therefore, the portion of the executive session after Ms. McGrane left the meeting was not properly held in executive session.

CONCLUSION

The portions of the executive session held on June 3, 2013, in which the SBHE received advice from its attorney regarding litigation strategy and recommendations were properly closed under N.D.C.C. § 44-04-19.1(5). The rest of the executive session was improperly closed as it did not involve negotiation strategy or instruction that would result in an adverse fiscal effect nor did it involve attorney consultation regarding reasonably predictable litigation, in violation of N.D.C.C. § 44-04-19.1(5) and (9).

STEPS NEEDED TO REMEDY VIOLATION

The SBHE must make a transcript or copy of the portion of its June 3, 2013, executive session and must provide the transcript or copy to Mr. Wetzel and Mr. Johnson, free of charge. The portion of the executive session in which the SBHE received advice from its attorney regarding litigation strategy and recommendations may be redacted. The minutes of the SBHE for the June 3, 2013, meeting must also be amended to summarize the discussions.

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. § 44-04-21.2.²⁴ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁵

Wayne Stenehjem
Attorney General

slv/vkk

²⁴ N.D.C.C. §44-04-21.1(2).

²⁵ Id.