

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 99-O-06

DATE ISSUED: June 14, 1999

ISSUED TO: Ed Malazdrewicz, Chair, North Dakota Board of Examiners on
Audiology and Speech-Language Pathology

CITIZEN'S REQUEST FOR OPINION

On February 23, 1999, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from John Skowronek, on behalf of Larry Martin, asking, in effect, whether the North Dakota State Board of Examiners on Audiology and Speech-Language Pathology (hereafter, Board) violated N.D.C.C. § 44-04-19 on open meetings and N.D.C.C. § 44-04-19.2 on the procedure to hold confidential or closed meetings, and whether the Board violated the law by failing to give notice to Larry Martin when it held meetings on January 27, 1999, February 8, 1999, and a series of telephone calls from February 12, 1999, through February 15, 1999.

FACTS PRESENTED

The Board met on January 27, 1999, February 8, 1999, and held a series of telephone calls from February 12, 1999, through February 15, 1999, on matters relating to the pending adversarial administrative proceeding involving the Board and Larry G. Martin. Almost all of the January 27 and February 8 meetings were closed to the public for attorney consultation under N.D.C.C. § 44-04-19.1. The purpose of the closed portions of these meetings was to seek and receive the advice of the Board's attorney regarding how the Board should respond to the administrative law judge's (hereafter, ALJ's) recommended findings of fact, conclusions of law, and order in the pending adversarial administrative proceeding involving the Board and Larry Martin. John Skowronek is Larry Martin's attorney. The Board's attorney stated that the procedures in N.D.C.C. § 44-04-19.2 to hold closed meetings were followed, but that at the February 8 meeting the Board forgot to vote to go into closed session. The closed portions of the January 27 and February 8 meetings were tape-recorded.

Another meeting was held by a series of telephone calls from February 12 through February 15 to vote on whether to accept or reject the ALJ's decision and whether to formally adopt the Board's findings of fact, conclusions of law, and order as decided upon in its previous January 27 and February 8 meetings. There are seven Board members. The Board minutes reflect that two members' votes were recorded on February 12, a third member's votes were recorded on February 14, and a fourth member's votes were recorded on February 15. Thus, by the end of February 15, a quorum of the Board had called in their votes by telephone. The minutes also reflect a fifth member's votes being recorded on February 22. No substantive discussion took place during this series of telephone calls.

Notice of each meeting was filed with the Secretary of State's office. The Board has no main office and no official newspaper. The Board did not receive any requests for notice of meetings from the news media or Larry Martin.

ISSUES

1. Whether failure to give notice to Larry Martin of the January 27, 1999, February 8, 1999, and February 12-15, 1999, meetings was a violation of the open meetings law.
2. Whether the discussions in the closed portions of the January 27 and February 8 meetings were limited to those authorized by law to be held in a closed meeting.
3. Whether the procedures for closing the January 27 and February 8 meetings were substantially met.
4. Whether the minutes of the January 27 and February 8 meetings include the necessary information regarding the closed sessions held during those meetings.

ANALYSES

Issue One:

Notice of every meeting 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 day of the meeting. In addition, . . . the notice must be filed in the office of the secretary of state for state-level bodies . . ." N.D.C.C. § 44-04-20(4). Notice must also be made available to anyone requesting the information. N.D.C.C. § 44-04-20(5). "In the event of emergency or special meetings . . . the person calling such a meeting shall also notify the public entity's official newspaper, if any, and any representatives of the news media which have requested to be so notified of such special or emergency meetings . . ." N.D.C.C. § 44-04-20(6). The notice requirements are violated when a notice is not provided in substantial compliance with N.D.C.C. § 44-04-20. N.D.C.C. § 44-04-20(9).

Notices of the January 27 meeting, the February 8 meeting, and the February 12-15 meeting through a series of telephone calls, were filed with the Secretary of State's office. The Board has no principal office and no official newspaper, thus, the requirements of posting notice at the principal office and notifying the official newspaper do not apply to the Board. Absent a request from Mr. Martin for notice of meetings of

the Board, the Board was under no duty under the open meetings law to provide him with notice.

Since Larry Martin did not request notice of the Board meetings, the Board did not violate N.D.C.C. § 44-04-20 by not giving him notice of any of the three meetings.

Issue Two:

Almost all of the Board's January 27 and February 8 meetings were closed for "attorney consultation." State law provides:

. . . .

2. Attorney consultation is exempt from section 44-04-19 [the open meetings law]. That portion of a meeting of a governing body during which an attorney consultation occurs may be closed by the governing body under section 44-04-19.2 [procedure to close meetings].

. . . .

4. "Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.
5. "Adversarial administrative proceedings" include only those administrative proceedings where the administrative agency . . . acts as a complainant, respondent, or decisionmaker in an adverse administrative proceeding.

. . . .

N.D.C.C. § 44-04-19.1. The Board's attorney states that the January 27 and February 8 executive sessions were held "for the specific purpose of seeking and receiving its attorney's advice regarding how the Board should respond to the ALJ's recommended findings of fact, conclusions of law, and order in the pending adversarial administrative proceeding involving the Board and Larry G. Martin." It is my opinion that a proceeding by a state board to revoke or suspend the license of a licensee falls within an "adversarial administrative proceeding" defined in N.D.C.C. § 44-04-19.1.

This office has reviewed the tapes of the closed parts of the January 27 and February 8 meetings. Most of the January 27 and all of the February 8 closed meeting involved an exchange between Board members and the Board's attorney regarding the ALJ's recommended findings of fact, conclusions of law, and order and how that document did not sufficiently reflect an understanding of the profession of audiology and speech-language pathology. The exchange also included a discussion between the Board and its attorney about how the Board's findings of fact, conclusions of law, and order should be worded to support the Board's position regarding revocation of Mr. Martin's license. This type of discussion between a professional board and its attorney, in my opinion, falls within "attorney consultation" as defined in N.D.C.C. § 44-04-19.1. Compare N.D.A.G. 98-O-12 (the Bismarck Public School board's discussion of alternate uses of the Hughes property with its attorney is directly related to the eminent domain action considered by the board and falls under the definition of "attorney consultation.")

The entire closed portion of the February 8 meeting consisted of attorney consultation as described in the preceding paragraph. Therefore, it is my opinion that the discussion in the closed portion of the February 8 meeting was limited to that authorized by law. The majority of the discussion in the January 27 meeting also consisted of the same form of attorney consultation. However, toward the end of the closed portion of the January 27 meeting, the Board and its attorney discussed when to have the next meeting. This discussion lasted for approximately eight minutes, followed by approximately two minutes of properly-closed attorney consultation, then finally a very brief discussion about what the minutes of the meeting should say. The discussion regarding when the next meeting should be held and what should be in the minutes does not properly fall within the attorney consultation exception to the open meetings law. Therefore, it is my opinion that the discussion in the closed portion of the January 27 meeting was not limited to that authorized by law to be held in a closed meeting.

Issue Three:

State law provides an executive session may be held if:

- a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive session;
- b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;

.....

N.D.C.C. § 44-04-19.2(2). These requirements were met in the Board's January 27 meeting. At the February 8 meeting the Board forgot to make a motion and vote on whether to close the meeting, but the other requirements were met. No Board member expressed opposition to having the February 8 closed session and no member of the public was present at the meeting to make a complaint even though proper notice of the executive session had been filed in the Secretary of State's office. Based on these facts, it is my opinion that the requirements for closing the February 8 meeting were substantially met.

Issue Four:

State law provides:

The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session.

N.D.C.C. § 44-04-19.2(4). The minutes of both the January 27 and February 8 meetings include all of the requirements listed above. Therefore, it is my opinion that the minutes of the January 27 and February 8 meetings include the necessary information regarding the executive sessions held during those meetings.

CONCLUSIONS

1. Failure of the Board to provide notice to Larry Martin of the January 27, 1999, February 8, 1999, and February 12-15, 1999, meetings did not violate the open meetings law.
2. The discussions in the closed portion of the January 27, 1999, meeting went beyond those authorized by law to be held in a closed meeting. The discussions in the closed portion of the February 8, 1999, meeting were limited to those authorized by law.
3. The procedures for closing the January 27 and February 8 meetings were substantially met.
4. The minutes of the January 27 and February 8 meetings include the necessary information regarding the closed sessions held during those meetings.

STEPS NEEDED TO REMEDY VIOLATIONS

The Board should provide Mr. Skowronek a copy of that portion of the tape of the closed portion of the January 27, 1999, meeting relating to a discussion of the next meeting date and what should be in the minutes of the meeting.

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