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Office of the Attorney General

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December 23, 2015

Rhonda Clark



RE: *File No. 15-M-148; Johnson-Brock Board of Education; Complainant Rhonda Clark*

Dear Ms. Clark:

This letter is in response to your complaint received by us in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act (hereinafter, the "Act"), Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2014), by the Johnson-Brock Board of Education ("Board") at its October 12, 2015 meeting. As is our normal practice with such complaints, we forwarded a copy of your complaint to the public body which is the subject of the complaint. We have received a response from the Johnson-Brock Schools' Superintendent, Jeffrey Koehler, and have now had an opportunity to review in detail your complaint, its accompanying documentation, and the Board's response. Our conclusions in this matter are set forth below.

FACTS

Our understanding of this matter is based upon your complaint and the response we received from the Board. Your complaint regarding the October 12, 2015 meeting of the Board concerns (1) an allegedly improper closed session called to discuss "Administrative Assistants;" (2) public comments made by three individuals regarding topics not on the Board's agenda for October 12, in violation of the Board's policy on public comment; and (3) the failure of the Board to correct one item addressed in our prior letter dated October 20, 2015 concerning violations by the Board of the Open Meetings Act.

ANALYSIS

Closed Session

Your first complaint regarding the October 12, 2015 meeting of the Board concerns the closed session that was called at the end of that meeting. The minutes reflect that the Board made a motion “to enter into executive session at 8:48 p.m. to discuss Administrative Assistants.” The motion passed and the Board discussed this matter in closed session for approximately 30 minutes. Your concerns are two-fold: first, that the item “Administrative Assistants” was not on the agenda, and second, that the motion to enter into closed session was procedurally deficient.

Agenda sufficiency

The Open Meetings Act requires a public body to give “reasonable advance publicized notice” of each of its meetings, which is to include either the agenda, or notice of where the agenda is available for public inspection. Neb. Rev. Stat. § 84-1411 (1) (2014). The agenda must be kept “continually current” and may not be altered, except for items of an emergency nature, within 24 hours of the meeting. *Id.* “Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” *Id.*

In our October 20 letter, we discussed the need of the Board to ensure that its agendas complied with the Open Meetings Act in being “sufficiently descriptive” so that the public has notice of what is to be discussed at each meeting. That letter also noted that the Board’s counsel had reminded it of the specificity required by the Open Meetings Act as to agenda items. However, our October 20, 2015 letter did not reach the Board before the meeting at issue here. Nevertheless, based on its letter to this office dated September 16, 2015, the Board was aware before the October 12 meeting that it had not fully complied with the Open Meetings Act in the past as to its agenda items.

Despite this, it appears to us that the Board failed to provide a sufficiently descriptive agenda item for the closed session at its October 12 meeting. The Board, through the Superintendent, explains to us that the closed session was called to discuss an agenda item found on “Appendix B,” the Superintendent’s Report. The Superintendent states that “the executive session was needed to discuss the secretary’s wages and the discussion of negotiation was listed and discussed during the meeting and listed under my appendix.” While the Superintendent’s Report is found on the agenda as Item IX, the four agenda items found on the report are lacking in the required specificity to call a closed session concerning “Administrative Assistants.” Appendix B lists Item “D. Negotiations schedule and date.” It makes no mention of

administrative assistants. Item D could be referring to any number of people or groups and topics. We do not believe that this item provided any of the required specificity in order to discuss "Administrative Assistants" in closed session. The Board violated the Open Meetings Act by discussing an item that was not found with sufficient clarity on its agenda. We do note that we have reviewed the most recent agenda for the Board's meeting held on December 14, 2015. The Board has discontinued the practice of listing "Appendix A" and "Appendix B" for items that the Principal and Superintendent, respectively, will be addressing at the meeting. Those items are now specifically listed on the agenda under "Principal's Report" and "Superintendent's Report." We believe this to be a preferable practice and encourage the Board to continue listing the items on the agenda in this way to ensure that sufficient notice is provided to the public of items to be discussed. As we believe the Board has now taken necessary steps to ensure it does not repeat its past Open Meetings Act violations as to its agenda items, we will take no action against the Board as to this portion of your complaint.

Procedure of entering into closed session

You also complain that the motion to enter into closed session was procedurally deficient in that the motion did not contain the reason for the closed session and the minutes do not reflect that the limitation of the closed session was restated on the record immediately before going into closed session. In our October 20, 2015 letter, we reviewed a number of motions to enter into closed session and found them procedurally deficient. We refer you to that letter for the statutory language and a detailed analysis under Neb. Rev. Stat. § 84-1410. In the motions we addressed in our prior letter, the Board stated the reason for its closed sessions, i.e, protection of the public interest or prevention of needless injury to the reputation of a person, but failed to provide the subject matter to be discussed. On October 12, they provided the subject matter, Administrative Assistants, but failed to provide the reason, which is insufficient to meet the requirements of the Open Meetings Act. The Board is required to state both the subject matter and the reason for the closed session. While the Board's motion contains the subject matter for the closed session, the motion does not contain the required language as to the reason for the closed session. The Open Meetings Act also requires that if a motion for closed session passes, the "limitation of the subject matter of the closed session" shall be restated on the record, which, if it occurred, is not reflected in the minutes. As with the closed sessions we addressed in our prior letter, it appears that the Board again failed to restate the limitation of the closed session on the record on October 12.

In an attempt to remedy its Open Meetings Act violation, the Board has amended the minutes of the October 12 meeting to reflect that the motion made on that date properly contained both the reason and the subject matter for the closed session. We disagree that the minutes of the meeting could be altered after the fact in this manner.

The minutes must reflect the motion as made by the Board at the time of the meeting, whether that motion was made properly or not. To amend the minutes to include a reason necessitating a closed session that was not made on the record at the meeting was entirely improper.

We do find that that Board violated the Open Meetings Act with respect to this portion of your complaint. However, as the Board took no action regarding "Administrative Assistants" on October 12, there is no action to void or be voidable under Neb. Rev. Stat. § 84-1414 (1). Additionally, while this meeting occurred after the Board provided this office with its response as to your first set of complaints, our disposition letter as to those complaints had not yet been issued. We are disappointed that the Board continued to violate the Open Meetings Act following its prior admission that it had not been complying with the Act as to closed sessions, but we note that this deficiency occurred before the members of the Board were put on notice by our October 20, 2015 disposition letter as to their violations. As a result, we will admonish the Board, and strongly recommend that the Board meet with its legal counsel before it conducts another meeting to ensure that no further violations of the Open Meetings Act occur. However, at this time, no further action by this office is warranted as to this violation.

Public Comment

You have also raised concerns regarding public comment made by three individuals at the October 12 meeting. The individuals were teachers and an insurance agent who you complain were commenting on items not on the agenda, in violation of the Board's public comment policy. You are concerned that the Board is using the public comment period to add agenda items "without public knowledge."

It appears to us that the Board has made rules regarding public comment, which it may do under the Open Meetings Act, that those wishing to make public comment at a meeting may only comment on items found on that meeting's agenda. Such a rule is not a violation of the Open Meetings Act. However, it also appears that the Board is either not following this policy, or is using public comment to hear from individuals who should be listed as separate agenda items.

The minutes reflect that two teachers addressed the Board and gave updates on projects and curriculum. An insurance agent also addressed the Board after reviewing the school district's insurance coverage, premiums, and claims history. None of these items is found on the agenda. The Board addresses this complaint by stating that the Board allows anyone in attendance at a meeting to address the Board with concerns they may have. If this is the case, the Board is not following its policy and should consider a change to that policy eliminating the restriction on public comment on only

those items on the agenda. The Board continues by saying “[w]e always allow a teacher representative to give a brief rundown on what is going on in their room.” However, we do not believe this to be “public comment.” If the Board “always” allows a teacher to address the Board, that teacher should be on the agenda as a separate agenda item, and should not appear during “public comment.” A speaker invited by the Board to address the Board, with a planned update, is not public comment. Additionally, the Board states that “[w]e also had our insurance representative give the board a rundown on the coverage and premiums for the 2015-2016 year.” Again, this is not “public comment,” but was a report the Board commissioned and should have been on the agenda as a separate agenda item. To hear this during “public comment” on October 12 appears as though the Board either failed to put the item on the agenda or lacked enough notice for it to be placed on the agenda for the meeting, and instead circumvented the Open Meetings Act by having the agent provide information to the Board during public comment. This was an inappropriate use of the public comment time period. If the Board has plans to hear from particular individuals or groups with information for or briefing of the Board, it must be a separate agenda item and not heard during “public comment.” It does not appear that any action was taken by the Board following the briefings by the teachers or the insurance agent. As such, this office will simply remind the Board that public comment should be utilized for that purpose, and that any planned briefings to the Board should be placed on the agenda.

Weiss Constriction vote of August 10, 2015

In our October 20 disposition letter, we addressed the matter of the Board taking a vote on a bid by Weiss Construction for work on the football field. That vote was taken on an item not found on the agenda. The Board admitted in its September 16, 2015 letter to this office that it had violated the Open Meetings Act as to this vote and had assured this office that it would take action to cure this violation at its next meeting. We have reviewed the agendas, and minutes where available, for the meetings held on October 12, November 9, and December 14 and do not find where the Open Meeting Act violation as to this vote has been cured. Our October 20 letter stated “[p]rovided that the Board places this item on an agenda and then re-takes its vote in open session, the Board can cure its violation of the Open Meetings Act, and this situation does not require further inquiry or action by this office. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).” We are concerned that three meetings have now occurred since the Board’s recognition of its violation, and yet the Board has not yet cured the violation. We will remind the Board that this item must be cured at its next meeting.

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ACTION BY THE ATTORNEY GENERAL

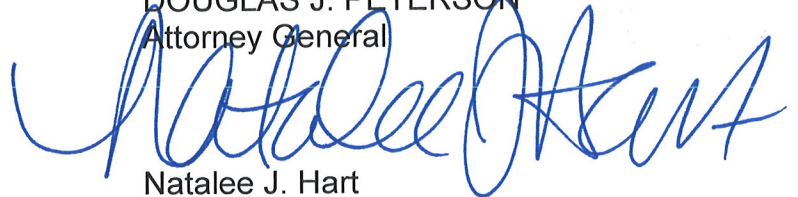
For the reasons stated above, we conclude that the Board violated the Open Meetings Act in its closed session on October 12, 2015 and by failing to correct a prior violation of the Open Meetings Act. The question now becomes what action to take in light of our conclusions that the Board has violated the Open Meetings Act. We do not believe that a criminal prosecution for a "knowing" violation of the Open Meetings Act is appropriate under the facts of this matter. Further, we will not pursue a civil suit to void because no action was taken during the October 12, 2015 meeting that is void or voidable. Instead, we will admonish the Board, through a copy of this letter, that all requirements of the Open Meetings Act are to be strictly adhered to in the future. We also reiterate that the Board must take immediate action to cure its prior violation as to the Weiss construction vote noted in our October 20 letter.

We would also like to point out to the members of the Board that they have now been fully advised, twice, as to how their conduct violated the Open Meetings Act. As a result, it will be far more difficult for those individuals to argue in the future that they did not "knowingly" violate the Act should any future questionable conduct occur. This office will consider referring any future violations to the County Attorney for action.

Since we have determined that no further action by this office is appropriate at this time, we are closing this file. If you disagree with our analysis, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Jeffrey Koehler, Superintendent

02-595-29