

**OPEN RECORDS AND MEETINGS OPINION
2010-O-11**

DATE ISSUED: September 24, 2010

ISSUED TO: Grand Forks 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 William J. Couchigian asking whether the Grand Forks School Board (Board) violated N.D.C.C. §§ 44-04-19 and 44-04-20 by discussing an agenda topic that was not specifically listed on the agenda and holding an improper executive session.

FACTS PRESENTED

On June 2, 2010, the School Board's "Superintendent's Evaluation Committee" ("Committee") held a special meeting. The only agenda topic listed was "1. End-of-the-year Recap." At the meeting the Committee received materials regarding the district planning themes and information regarding the superintendent's contract, wage increases for all employee groups, and a 2009 end-of-year recap. The Committee discussed updates to the district's planning themes, commented on areas of accomplishment and what areas the district should improve such as school board development, communications planning, and strategic planning. The Committee agreed upon a number of recommendations including: to provide the superintendent with performance pay as set forth in his 2009-2012 contract; to eliminate the performance clause next year and instead roll the amount into the superintendent's salary; and finally, to increase the superintendent's salary by 3% to 3.5%. The superintendent was in attendance when these topics were discussed.

On June 14, 2010, the Board held a regular meeting that included an executive session. The Board believed the session was authorized under N.D.C.C. § 44-04-19.1(9) for negotiation strategy. During the executive session, the Board agreed to the following contract changes that were recommended by the Board members on the Committee: a salary increase, deletion of the performance clause, clarification that the school district

will pay for the superintendent's annual physical, and that the contract term should be from 2010 – 2013.¹

After the Board came out of executive session, the Board officially received the report of the Committee during which the Committee made the recommendations discussed in executive session. After receiving the report, the Board passed a motion making the changes to the contract that were agreed upon in executive session.

ISSUES

1. Whether the School Board's Superintendent Evaluation Committee violated N.D.C.C. § 44-04-20 by failing to properly notice its June 2, 2010, special meeting and by discussing matters during a special meeting that were not in the notice.
2. Whether the School Board held an executive session during its June 14, 2010, regular meeting that was not authorized by law.

ANALYSIS

Issue One

"Unless otherwise provided by law, public notice must be given in advance" of every meeting of a governing body of a public entity.² A notice for a special meeting must contain the date, time, location, and topics to be considered.³ The topics that may be considered at an emergency or special meeting are limited to those included in the notice.⁴ Notice of meetings must be provided in substantial compliance with N.D.C.C. § 44-04-20.⁵

The requester alleges that the agenda for the June 2, 2010, Committee special meeting failed to indicate that the superintendent's 2009-2012 contract was going to be discussed. According to the Board's attorney, because the title of the Committee was the "Superintendent's Evaluation Committee" the public should have known that the meeting involved the superintendent's evaluation and that the "end-of-the-year recap" was "obviously a review of the superintendent and his performance."

¹ At the time of this meeting, the superintendent was in his first year of a three year contract. The Board's actions resulted in a new three year contract.

² N.D.C.C. § 44-04-20(1).

³ N.D.C.C. § 44-04-20(6).

⁴ N.D.C.C. § 44-04-20(6).

⁵ N.D.C.C. § 44-04-20(9).

The title "Superintendent's Evaluation Committee" coupled with the phrase "end-of-the-year recap" may give the public a general idea of the Committee's purpose. It fails, however, to clearly set forth what the Committee intended to discuss at the June 2, 2010, meeting. I have repeatedly concluded that general "catch-all" descriptions of agenda items are not appropriate for special meetings.⁶ For example, in 2002, this office concluded the phrase "any other issues that may need council attention will be discussed" failed to provide the public with proper advance notice of the topics to be discussed at a special meeting.⁷ Likewise here, the phrase "end-of-the-year recap" did not provide the public with advance notice that the Committee would discuss the superintendent's salary or contract for the upcoming year.

The law requires a level of specificity from a special meeting agenda that is not required for regular meetings because a governing body may only discuss topics during the special meeting that are listed on the notice.⁸ The phrase "end-of-the-year recap" indicates that only the past school year would be discussed. In fact, the minutes of the meeting included several topics that were outside the scope of even the general topic stated in the notice. For example, district planning themes, school board development, communications, and strategic planning are prospective rather than recaps and do not necessarily relate to the superintendent's evaluation.

Here, the notice failed to notify the public of the specific topics discussed at the June 2, 2010, meeting and the Committee discussed topics that were not included in the notice. Thus, it is my opinion that the notice for the June 2, 2010, special meeting did not substantially comply with N.D.C.C. § 44-04-20.

Issue Two

School board meetings must be open to the public unless otherwise specifically provided by law.⁹ The Board closed its June 14, 2010, meeting pursuant to N.D.C.C. § 44-04-19.1(9) which states:

A governing body may hold an executive session under section 4-04-19.2 to discuss negotiating strategy or provide negotiating instruction to its attorney or other negotiator regarding. . . contracts, which are currently

⁶ See N.D.A.G. 2009-O-03; N.D.A.G. 2005-O-17; N.D.A.G. 2002-O-11.

⁷ See N.D.A.G. 2002-O-11. See also N.D.A.G. 2005-O-17 and N.D.A.G. 2009-O-03 (catch-all phrases such as "old business" invites unspecified matters to be discussed at special meetings).

⁸ See N.D.C.C. § 44-04-20(6).

⁹ N.D.C.C. § 44-04-19; N.D.A.G. 2000-O-09; N.D.A.G. 2000-O-05.

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 litigating position of the public entity.¹⁰

This section does not authorize an executive session for all contract discussions.¹¹ The discussion must be in the context of a negotiation and, even then, the discussion is only protected if disclosure of the remarks would have an adverse fiscal effect on the bargaining position of the governing body.¹²

After entering the executive session, the Board explained to those present that the purpose for the session was to determine the superintendent's salary increase and review his contract.¹³ The recording of the session reveals that much of the discussion involved the Board determining the exact percentage of salary increase to give the superintendent. The superintendent's contract provides that the Board has the sole discretion to increase the salary, not that the amount shall be negotiated yearly.¹⁴ Thus, the decision to give the superintendent a raise was a unilateral one and not subject to negotiation so any discussion by the Board to exercise its discretion under the contract should have been discussed in an open meeting.

The Board also discussed "renewing" the contract by extending it for one more year to 2013 and other modifications favorable to the superintendent. According to the Board's attorney, even though the superintendent was under a three year contract, it is not unusual for a new contract to be signed every year if a new contract is necessary to extend the term by one year.

Here, the superintendent was already under contract until 2012. The extension of the contract to 2013 was couched in the discussion of the superintendent's evaluation because the additional year was compensation for the superintendent's favorable review. Like the salary increase, the Board's decision to modify the superintendent's contract was unilateral and lacked negotiation.

¹⁰ N.D.C.C. § 44-04-19.1(9).

¹¹ N.D.A.G. 2000-O-09; N.D.A.G. 2000-O-05.

¹² N.D.C.C. § 44-04-19.1(9).

¹³ The announcement of the executive session in the agenda, meeting, and the description in the minutes all fail to describe what contract is being negotiated as required by law. N.D.C.C. § 44-04-19.2(2)(b). N.D.A.G. 2007-O-11. However, the requester did not seek an opinion on the sufficiency of announcement.

¹⁴ Grand Forks Public School District #1 Superintendent Contract July 1, 2009 through June 30, 2012. (The contract states: "Thereafter the School Board, at its sole discretion, may increase the salary").

The elements necessary for N.D.C.C. § 44-04-19.1(9) to apply are absent. There were no instructions given to an attorney or negotiator, and the executive session did not protect the bargaining position of the Board because the superintendent already knew what recommendations the Committee was going to make to the Board.¹⁵ The real purpose of the executive session appears to have been to determine whether the full Board would agree to the recommendations of the Committee. Compensation for the superintendent's positive review was openly discussed previously during the Committee special meeting and, under these circumstances, should have also been discussed openly when the matter was brought before the full board.¹⁶

This office has reviewed executive sessions held during the teacher contract negotiation process.¹⁷ In contrast to this executive session, the governing bodies in those opinions were responding to offers and counter offers and clearly giving instructions to district representatives to take back to representatives for the teachers.¹⁸ Even in those opinions, only the discussions that strictly adhered to the limitations of N.D.C.C. § 44-04-19.1(9) were found to be properly held in executive session.¹⁹

The elements necessary to hold an executive session pursuant to N.D.C.C. § 44-04-19.1 were absent. It is my opinion that the executive session held on June 14, 2010, was not authorized by law.

¹⁵ Most of the changes had already been discussed in the presence of the superintendent during the June 2, 2010, meeting of the Superintendent's Evaluation Committee. "Negotiation" is defined as "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." Black's Law Dictionary 1064 (8th ed. 2004).

¹⁶ As I have repeatedly explained, personnel matters must be discussed in an open meeting. See N.D.A.G. 2004-O-21; N.D.A.G. 2004-O-19; N.D.A.G. 2001-O-17.

¹⁷ See; N.D.A.G. 2004-O-13; N.D.A.G. 2000-O-09; N.D.A.G. 2000-O-05. See also Fargo Educ. Ass'n v. Paulsen, 239 N.W.2d 842, 847 (N.D. 1976) ("negotiate" as used in the teacher negotiation law means to present proposals and offer counterproposals, to discuss proposals, to carry on a dialogue, to exchange ideas, all for the purpose of persuading or being persuaded by logic and reasoning. . . . It is the art of friendly persuasion.)

¹⁸ See N.D.A.G. 2004-O-13 and N.D.A.G. 2000-O-05. See also N.D.A.G. 2004-O-09.

¹⁹ Id.

CONCLUSIONS

1. The School Board failed to properly notice its June 2, 2010, meeting of the Superintendent's Evaluation Committee because "end-of-the-year recap" did not provide notice of the specific agenda topics discussed at the special meeting.
2. The executive session held on June 14, 2010, was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATION

The executive session was not authorized by law so the recording of the executive session is an open record and must be provided upon request.

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. § 44-04-21.2.²⁰ It may also result in personal liability for the person or persons responsible for the noncompliance.²¹

Wayne Stenehjem
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²⁰ N.D.C.C. §44-04-21.1(2).

²¹ Id.