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June 22, 2011

Brad Wells
[redacted]

RE: *File No. 10-M-145; Central City Board of Education; Brad Wells, Complainant*

Dear Mr. Wells:

This disposition letter is in response to your correspondence dated November 30, 2010, 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 (2008, Cum. Supp. 2010). Specifically, you have alleged that the Central City Board of Education (the "Board") violated the Act when it held an executive session during the November 15, 2010, school board meeting. As is our normal practice, we forwarded a copy of your complaint to the public body which is the subject of the complaint. In this case, we forwarded your complaint to the president of the Board, Dale Palser. On January 20, 2011, we received a letter from attorney Kelley Baker, who responded on behalf of the Board. On February 23, 2011, we received a follow-up letter from Mr. Baker, in which he provided us a copy of the agenda for the 2011 NASA/NASB Labor Relations Conference held on February 7-8, 2011, and the slides of a power point presentation on the Open Meetings Act he co-presented at the conference. Mr. Baker advises us that the entire Board and the school superintendent attended the presentation.

We have now had an opportunity to review your complaint and the Board's response and documentation in detail. Our conclusion and future action in this matter are set forth below.

FACTS

At the time of your complaint, you had served two years as a member of the Central City Board of Education. You indicate that on November 15, 2010, the Board went into executive session "in order to protect the reputation of an individual." The vote to close the meeting was unanimous. Once in the executive session, you indicate that the Board President questioned you about an ad you had placed in the local newspaper prior to the last election. You state that you did not know that you were to be the subject of the executive session, and that you had not been given any notice.

You indicate that you immediately stated that this was not a proper subject for an executive session, and that you wanted to have the discussion in open session. You represent that you stated this emphatically several times. You also questioned whether the executive session was a proper subject for a school board agenda. You further indicate that the other Board members did not want to move out of executive session. You state that the school superintendent stayed in the executive session and joined in the discussion.

Your complaint set out a list of the various topics discussed in the executive session. Some of those topics included:

1. Your political ad in the paper, its purpose and meaning.
2. Concerns over your stated endorsements for two school board candidates.
3. Concerns about putting out a contact e-mail address for constituents.
4. Your purported affiliation with the "Tea Party."
5. Your opinions "on the board following or not following board policy."
6. Your standing with the EMS association and the Fire Department.
7. Concerns as to why you were on the school board, and your "agenda."

You indicate that after talking for approximately *two hours*, and hitting a "stalemate," the Board members left the executive session. You further assert that the executive session was likely "discussed among several other members of the board before the meeting." You state that in retrospect you should have questioned the subject matter of the closed session, and should have left the closed session, but remained to defend your position on the Board. Finally, you mention that the Board has a "habit of closing the meetings and hanging around, discussing, things. Of which I could be considered just as guilty, but for issue of mostly feeling the need to, hang around, to see what subjects might be talked about outside of the meeting."

In his January 20, 2011, response, Mr. Baker informs us that the Board's November 15, 2010, agenda contains a notice that the Board could enter executive

session if it deemed appropriate. He states that the Board members wanted to discuss concerns that Board members were not acting cooperatively, and concedes that they thought that they could keep the conversation within the confines of the executive session. Mr. Baker also concedes that many of the issues discussed in the executive session related to your conduct. However, Mr. Baker points out that you brought up some of the issues, and that the executive session was intended to protect the reputation of all Board members, not just you. Mr. Baker also states that "the board members felt that it was in the public interest for them to discuss privately what are essentially personal issues, not board policy issues."

Mr. Baker also asserts that the issue was an appropriate agenda item for board discussion, but the Board members (mistakenly) believed that since the discussion was to be about relationships and cooperation among Board members, it did not need to appear separately on the agenda. Mr. Baker concedes that the Board members erred by amending the agenda less than 24 hours before the meeting; failing to follow the technical requirements of the statute with respect to the motion to close; and for failing to take a vote once you objected to the continuation of the closed session.

Mr. Baker further informs us that the Board has taken remedial steps, which involved preparation of a step-by-step outline of the Open Meetings Act, with an emphasis on executive sessions. The Board also attended the aforementioned presentation on the Open Meetings Act, and will hire a consultant to conduct a session(s) on Board member relationship and cooperation. Mr. Baker states that "board leadership will consult with legal counsel in the future to assure that the board complies with all the requirements of the Open Meetings Act."

DISCUSSION

We now address the allegations in your complaint, mainly that the Board violated the Open Meetings Act when it went into executive session November 15, 2010, to discuss you, and a variety of other topics. From the outset, we believe the Board violated a number of provisions of the Open Meetings Act, including

(1) The technical requirements in the motion to close the meeting [§ 84-1410(1)];

(2) The failure by the Board to take a vote once you objected to the closed session [§ 84-1410(3)];

(3) The failure by the Board to provide you notice that you were to be the subject of the closed session and give you an opportunity to have the discussion in an open session [§ 84-1410(1)];

(4) By specifically amending the agenda during the meeting [§ 84-1411(1)].

To the Board's credit, Mr. Baker has already identified these shortcomings in the Board's response to us, and it would serve no purpose for us to engage in a lengthy discussion of each violation again here. Instead, we will focus on other violations not listed above and on matters where we disagree with the Board's response.

In order to be valid, a closed session must be clearly necessary for the protection of the public interest or to prevent needless injury to the reputation of an individual, and that individual has not requested an open forum. If a public body's reason for going into closed session does not fall under either of these two statutory reasons, *the session is improper*. We further note that § 84-1410(2) states, in pertinent part, that "[t]he public body holding such a closed session shall restrict its consideration of matters during the closed portions to only those purposes set forth in the motion to close as the reason for the closed session." And subsection (4) of § 84-1410 provides, in pertinent part, that "[n]othing in this section shall be construed to require that any meeting be closed to the public." "Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed. *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 165, 343 N.W.2d 718, 723 (1984).

Based on the documentation provided to us, it appears that at some point in time the other five members of the Board concluded that a closed session was necessary to hash out issues pertaining to their working relationship with you. The other Board members believed that the discussion would be more productive in closed session where they could speak "freely and openly." The stated reason for the closed session was "to protect the reputation of an individual" [you]. However, we understand that you brought up other issues to discuss during the course of the closed session. And according to Mr. Baker, the closed session ultimately served to protect the reputations of all of the Board members, not just you. We find this scenario problematic for a variety of reasons. First, protecting the reputations of the *other* Board members was not the basis to close the meeting in the first place. And we fail to see how their reputations were susceptible to injury by discussing a range of topics directed at you and your business. In that regard, we have reviewed the list of topics discussed by the Board during its closed session, and it does not appear to us those matters would necessitate closing the meeting, particularly since you had no obligation to respond. Consequently, under the circumstances here, we have serious concerns about the propriety of the closed session held on November 15, 2010.

We must also address your assertion that the other five Board members discussed the idea of holding a closed session sometime before the actual meeting. Neb. Rev. Stat. § 84-1410(4) of the Open Meetings Act specifically precludes members of a public body to engage in a "closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication . . . for the purpose of circumventing the requirements of the act." You indicate that the closed session was added to the agenda as the meeting was being called to order. There was no discussion as to why the session was necessary—just a motion, second and vote. Under these circumstances, we are having difficulty believing that Ms. Armatys made the motion to add an executive session without first discussing it with some or all of her fellow Board members prior to the meeting. It appears to us then that the other Board members discussed and came to some consensus about having the closed session outside of an open meeting. There is no other way to view the actions taken.

ACTION BY THE ATTORNEY GENERAL

The question now becomes what action to take in light of our conclusion that the Central City Board of Education violated the Open Meetings Act when it added and conducted the executive session at its meeting on November 15, 2010. We do not believe that a criminal prosecution for a "knowing" violation of the Open Meetings Act is appropriate under the facts of this case. Further, a civil suit to void is not necessary because the Board took no formal action as a result of its closed session, and even if it did, it could cure any defects arising out of an improper closed session, by taking those actions again in a meeting which meets all of the statutory requirements. *See Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W. 2d 281 (1979). Instead, we will admonish the other members of the Board, by forwarding a copy of this response to Mr. Baker, that closed sessions are only permissible when clearly necessary to protect the public interest or prevent needless injury to an individual's reputation and that individual has not requested a public meeting. If the Board is unable to make such a showing, then the closed session is improper.

We would also like to point out to the members of the Board that they have now been fully advised 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 further questionable conduct occur. However, based on Mr. Baker's assurances, we are confident that this Board will not repeat the errors made in the present case.

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

Sincerely,

JON BRUNING
Attorney General

Leslie S. Donley
Assistant Attorney General

c: Kelley Baker

49-620-30