

STATE OF NEBRASKA
Office of the Attorney General

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JON BRUNING
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

February 16, 2011

Jamie E. Kinkaid
Johnson Law Office
506 Main St.
PO Box 160
Plattsmouth, NE 68048

Re: *File No. 11-M-104; Village of Union Board of Trustees; Debra McWha*

Dear Ms. Kinkaid:

This letter is in response to your correspondence in which you requested that this office investigate alleged violations by the Village of Union Board of Trustees ("Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Cum. Supp. 2010). In accordance with our normal procedures, we requested a response from the Board after we received your complaint, and we subsequently received a response from David Chipman, Village Trustee on behalf of the Board. We have now had an opportunity to review your allegations and the Board's response in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, its supporting documentation, and the response from the Board. We have identified the following Open Meetings Act allegations in your correspondence:

- (1) Improper closed sessions at five meetings in 2009;
- (2) A vote of the Board during closed session on September 9, 2009; and
- (3) Amendment of the agenda at the meeting of September 8, 2010 to address a non-emergency issue.

You have also enclosed minutes from other meetings of the Board, including from August 2010. But, as you have made no specific Open Meetings Act complaints regarding these meetings, we will not address these meetings.

ANALYSIS

First, as to the allegations of improper closed sessions in January, February, June, and July 2009, this office has previously addressed the issue of deficiencies in the Board's closed sessions in a letter dated July 14, 2009. It is not necessary to investigate or address these allegations again. Our letter of July 2009 is enclosed herein for your information.

SEPTEMBER 9, 2009 CLOSED SESSION

You have alleged that the Board entered into an "unlawful closed session" on September 9, 2009. The Open Meetings Act states:

(1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:

- (a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;
- (b) Discussion regarding deployment of security personnel or devices;
- (c) Investigative proceedings regarding allegations of criminal misconduct; or
- (d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.

Neb. Rev. Stat. § 84-1410 (2008).

While the Board stated "personnel issues" as the reason for its closed session on September 9, 2009, that 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, and indicate why the closed session was clearly necessary for the protection of the public interest or the prevention of needless injury to the reputation of an individual. However, the Board's deficiencies in its motion to enter into closed session does not make the closed session "unlawful" as you have characterized it. The Board has advised that the closed session was requested by Ms. McWha to discuss her resignation, which is acceptable under § 84-1410 (1)(d).

In addition, the statute of limitations has expired as to any violations of the Open Meetings Act that may have occurred in September 2009. Neb. Rev. Stat. § 84-1414. Therefore, our office will take no action against the Board related to this complaint.

The Board will be advised, however, through a copy of this letter, to review the requirements of the Open Meetings Act related to closed sessions and ensure that it is complying with all the requirements of the Act when it votes to enter into closed sessions.

VOTE DURING CLOSED SESSION

You also complain that the Board violated the Open Meetings Act by voting during closed session on September 9, 2009. The Open Meetings Act requires that, if a closed session is held, the "meeting shall be reconvened in open session before any formal action may be taken." Neb. Rev. Stat. § 84-1410(2). The September 9, 2009 minutes reflect that a vote was taken during closed session to accept the resignation of Ms. McWha. While the Board's response is that a vote was not necessary to accept Ms. McWha's resignation, that does not negate the fact that a vote was taken during closed session, which is not permitted by the Open Meetings Act.

However, as explained above, action taken by the Board in violation of the Open Meetings Act in September 2009 is outside the one-year statute of limitations. Therefore, this office will take no action against the Board related to the September 9, 2009 meeting or the vote in closed session.

AGENDA

Neb. Rev. Stat. § 84-1411 (2010) provides the agenda requirements for purposes for the Open Meetings Act.

(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The

public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

Your complaint states that an agenda item was added at the meeting of September 9, 2009. We believe you meant the meeting of September 8, 2010, as we could find no such motion in the minutes from September 2009.

On September 8, 2010, the minutes state "Chipman motioned to add agenda item E: Decision to file lawsuit to recoup penalties and interest on Debra McWha's failure to file and pay withholding taxes." The motion was approved, and later in the meeting, that agenda item was discussed by the Board.

The Board has responded, citing a local ordinance that allows the Board to add items to its agenda at a public meeting. However, this ordinance is not in compliance with the requirements of the Open Meetings Act. We have concerns about the Board adding this agenda item at the beginning of the meeting, without designating the item as an emergency. But, in its response, the Board has provided us with a copy of the agenda and minutes from January 12, 2011, in which ratification of the Board's decision to file the lawsuit against Ms. McWha was properly on the agenda. The Board discussed and voted on this agenda item, curing any violation of the Open Meetings Act that occurred in September 2010. Thus, this situation does not warrant further action by this office. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979).

We would caution the Board, by a copy of this letter, not to continue to utilize the ordinance which permits them to add agenda items at the beginning of a meeting. It is a violation of the Open Meetings Act to do so, unless the item is of an emergency nature.

CRIMINAL SANCTIONS

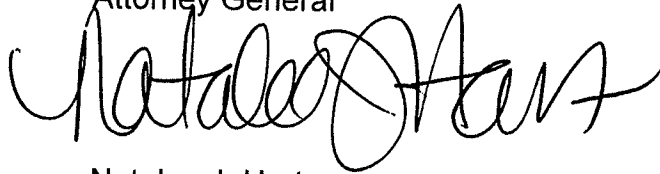
You have also asked us to review the alleged Open Meetings Act violations by the Board for misdemeanor prosecution. It appears to us that the Board's attorney was present at the September 9, 2009 meeting during which uncured violations may have occurred. In the past, this office has taken the position that if a public body is acting on the advice of counsel, it is difficult to sustain a prosecution for a knowing violation of the Open Meeting Act under Neb. Rev. Stat. § 84-1414(4). Therefore, we do not feel criminal prosecution is appropriate in this instance.

CONCLUSION

If you disagree with the analysis we have set out above, you may wish to review the provisions of the Open Meetings Act to determine what additional remedies, if any, are available to you and Ms. McWha under those statutes.

Sincerely,

JON BRUNING
Attorney General

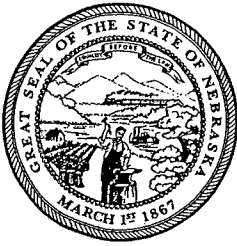
A handwritten signature in black ink, appearing to read "Natalee J. Hart". The signature is fluid and cursive, with the first name "Natalee" being the most prominent part.

Natalee J. Hart
Assistant Attorney General

Enclosure

cc: Board

02-205-30



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JON BRUNING
ATTORNEY GENERAL

NATALEE J. HART
ASSISTANT ATTORNEY GENERAL

July 14, 2009

Terry McClane, Chairman
Village of Union Board
P.O. Box 127
Union, NE 68455

Re: *File No. 09-M-132; Village of Union Board; Concerned Citizens*

Dear Mr. McClane:

This letter is in response to the complaint received by this office on May 26, 2009 signed "Concerned Citizens," in which that group requested that this office investigate alleged violations by the Village of Union Board of Trustees (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§84-1407 through 84-1414 (2008). Our normal procedure is to reply, with a detailed analysis, to the person making the complaint against the public body, and copy the public body on the response. However, as we have no contact information for "Concerned Citizens," we cannot reply to that group. Therefore, in order that the Board may have closure to the complaints made, we will reply directly to you with our findings.

We have had an opportunity to review the complaints of "Concerned Citizens" and your response. Our review concerned only those complaints relating to the Open Meetings Act, as the authority of this office does not extend to the other matters complained about. We have no general supervisory authority over municipalities, and will limit this response only to the Open Meetings Act. Therefore, our review only concerned the allegations regarding a lack of notice and decisions being made without a quorum. This office must assume that a public body is acting in good faith, and in accordance with the Open Meetings Act, unless there is evidence to the contrary. As the Board has denied the Open Meetings Act allegations, and Concerned Citizens have provided no documentary evidence to substantiate their claims, we cannot find any violations of the Open Meetings Act relating to these allegations received by this office on May 26, 2009.

However, in investigating this matter, our office did print meeting minutes from the Board's website. We do have one area of concern regarding those minutes, specifically the Board's procedures in entering and leaving a closed session. This office will ask that you reexamine your procedures, and comply strictly with the Open

Terry McClane, Chairman
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Meetings Act requirements concerning closed sessions, as more fully explained herein, when the Board meets in closed session in the future.

Neb. Rev. Stat. §84-1410 (2008) addresses closed sessions.

(1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close. Closed sessions may be held for, but shall not be limited to, such reasons as:

- (a) Strategy sessions with respect to collective bargaining, real estate purchases, pending litigation, or litigation which is imminent as evidenced by communication of a claim or threat of litigation to or by the public body;
- (b) Discussion regarding deployment of security personnel or devices;
- (c) Investigative proceedings regarding allegations of criminal misconduct; or
- (d) Evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of a person and if such person has not requested a public meeting.

Nothing in this section shall permit a closed meeting for discussion of the appointment or election of a new member to any public body.

(2) The vote to hold a closed session shall be taken in open session. The entire motion, the vote of each member on the question of holding a closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. If the motion to close passes, then the presiding officer immediately prior to the closed session shall restate on the record the limitation of the subject matter of the closed session. The 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. The meeting shall be reconvened in open session before any formal action may be taken. For purposes of this section, formal action shall mean a collective decision or a collective commitment or promise to make a decision on any question, motion, proposal, resolution, order, or ordinance or formation of a position or policy but shall not include negotiating

Terry McClane, Chairman
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guidance given by members of the public body to legal counsel or other negotiators in closed sessions authorized under subdivision (1)(a) of this section.

Neb. Rev. Stat. §84-1410 (emphasis added).

We have identified two deficiencies with the Board's minutes from January 21, 2009 and February 11, 2009 relating to the closed session in each of these meetings. First, the Open Meetings Act states that the subject matter and the reason for the closed session shall be identified in the motion to close, and the entire motion should be recorded in the minutes. The minutes of each of these meetings only states "motion to enter executive session was made", which identifies neither the subject matter, nor the reason for the closed session. Second, the Open Meetings Act 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. The minutes do not reflect that this was done. We will remind the Board that the requirements for closed session must be strictly complied with, and the minutes must fully reflect this compliance, as this is the only record of the meeting.

In addition, we are unclear as to why the Board is making two motions following the executive session – both a motion to exit executive session and a motion "to re-enter regular meeting." While it may seem counterintuitive, the motion to exit the close session should be done in open session. Therefore, only one motion to exit the closed session and continue with the regular meeting is necessary. While it is not a violation of the Open Meetings Act to have two such motions, it is not required under that Act to do so.

If you have any questions regarding our review of this matter, please do not hesitate to contact the undersigned. Thank you for your cooperation.

Sincerely,

JON BRUNING
Attorney General

A handwritten signature in black ink that reads "Natalee J. Hart". The signature is written in a cursive, flowing style.

Natalee J. Hart
Assistant Attorney General