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June 20, 2014

Brad Wells
1796 Equineus
Central City, NE 68826

RE: *File No. 13-M-111; Central City Public Schools Board of Education; Brad Wells, Complainant*

Dear Mr. Wells:

This letter is in response to your complaint received by us on June 3, 2013, in which you allege that the Central City Public Schools Board of Education (the "Board") violated the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2008, Cum. Supp. 2012; Supp. 2013) (the "Act"), during certain meetings. As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In this case, we forwarded your complaint to Dale Palser, Board president. On July 15, 2013, we received correspondence from attorneys Kelley Baker and Bobby Truhe of the law firm Harding & Shultz, who responded on behalf of the Board. We have now had an opportunity to review your complaint and the Board's response in detail. Our conclusion and future action in this matter are set forth below.

Before we begin, we would like to advise you that this office received an open meetings complaint filed against the Board a couple of weeks prior to receiving your complaint. This earlier complaint, filed by a school district patron, also included allegations that the Board violated the Open Meetings Act with respect to reasonable accommodations and the public's right to hear. Upon review of the record in that complaint [File No. 13-M-108], we determined that no violations of the Act occurred. Since the allegations in your complaint provided us with no new evidence or information, we will rely on our findings in our earlier disposition letter to address the allegations made here.

YOUR ALLEGATIONS

Your complaint arises from "several meetings" held by the Board in May and April 2013. You do not specify the dates of these meetings except that the "third meeting," occurred on May 20, 2013.[1] You indicate that there was significant interest in some of the issues discussed by the Board, which resulted in larger than normal crowds. According to your complaint, you allege that the Board violated the Open Meetings Act with respect to the following:

1. You allege that the Board violated the Act by "not accommodating foreseen attendance by the public";

2. You allege that the Board violated the Act by "not making provisions for the public to hear the boards [*sic*] business";

3. You allege that there was "questionable use of executive session" by the Board; and

4. You allege that the Board held a "non-chance meeting of quorum groups, [a] meeting outside of meeting time frames, in order to discuss school issues."

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska Open Meetings Act states:

> *It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.*
>
> *Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.*

The primary purpose of the public meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska public meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

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[1] For the record, the Board convened on April 22, 2013, April 25, 2013, May 1, 2013 and May 20, 2013. There were no issues raised in the previous complaint about the meeting held on May 20, 2013, nor have you specifically alleged that the Board violated the Open Meetings Act during this meeting.

I. Reasonable Accommodation.

You state that despite moving the meetings to the elementary school cafeteria, which you acknowledge could accommodate more people, many were forced to stand during the meetings. You further state that since the executive sessions at two of the meetings last several hours, "this seemed to bring a high level of discomfort to many present." You state that at two of the meetings, members of the audience rearranged the seating so more people could sit. You indicate that by the third meeting on May 20, the audience had decreased so everyone had a seat.

In our disposition letter to File No. 13-M-108, we stated, in pertinent part:

> According to the Board, there is nothing to support a finding that the Board members held the meeting in the elementary cafeteria to circumvent the Act, or knew that the cafeteria would be too small to accommodate the audience. While using the gym was considered because of its additional seating, it was determined that it would be far more difficult to hear in the gym than in the cafeteria. The Board also considered using the performing arts center, but a number of factors—e.g., the notice of the meeting had been advertised for the elementary school—ultimately resulted in rejecting this venue.
>
> Additionally, the Board states that the cafeteria was not too small for the anticipated crowd. The Board states that hundreds of chairs were set up, and more were added when the larger crowd arrived. Board members and administrators who sat in the front saw several open chairs, and when additional chairs were brought in, attendees declined them when offered. The Board further states that although it was not required to move its meetings from its traditional meeting place, it did so to accommodate more patrons. The Board represents that "[it] met in the cafeteria on April 25th and May 1st because it was sufficiently large, administrators could move in additional chairs as needed, and it was close to the administrative offices for the ease of retrieving and copying materials."

The relevant statute, Neb. Rev. Stat. § 84-1412(4), provides:

> No public body shall, for the purpose of circumventing the Open Meetings Act, hold a meeting in a place known by the body to be too small to accommodate the anticipated audience.

Subsection (5) goes on to state that "[n]o public body shall be deemed in violation of this section if it holds its meeting in its traditional meeting place

> which is located in this state." Neb. Rev. Stat. § 84-1412(5) (2008). In other words, if the Board had held the meetings at issue in the CCPS Board Conference Room, which we understand is the "traditional meeting place" and smaller in size than the cafeteria, there could be no violation of the Act. Here, the Board moved the meeting to a larger venue to accommodate more people. We understand that the venue was not perfect, and some people had to stand during one or more of the meetings. However, it appears from the information provided that the cafeteria was in fact large enough to accommodate everyone who wished to attend the meetings. No one was turned away. As a result, we are unable to conclude that the Board was trying to circumvent the Open Meetings Act by moving the meeting to the cafeteria, and it appears to us that the Board's actions in this regard were reasonable.

II. The Public's Right to Hear.

You indicate that at all of the meetings, many members of the audience complained that they could not hear the business being conducted at the Board table. You state that at the "last meeting," complaints about not being able to hear came from one of the Board members. You go on to state "that the district does have the facilities and or the equipment to rectify is [*sic*] situation easily. Also this is an item I addressed many times in my tenure on the board."

With respect to this particular allegation raised in File No. 13-M-108, we determined:

> Your second allegation relates to the audience members' ability to hear what was being said at the meetings. According to the informal survey, everyone surveyed indicated that they could not hear clearly at one or more of the meetings. You state that no microphones were used during the meetings, even though Board members were asked to speak up and there was a sound system available. You further allege that at the April 22, 2013, meeting, teachers in the audience were unable to hear the discussion, motion, etc. with respect to snow day make up dates. You state that two Board members, Lisa Wagner and Kara Wells, mistakenly voted to require three additional contract days, not one, presumably because of the crowd noise.
>
> The Board represents that the meetings at issue were contentious, particularly the April 22 meeting. According to the Board, "many audience members were cheering, booing, yelling, and shouting interjections during the meetings" and "several patrons intentionally provoked and riled up audience members during their comments." The Board states that at

times the crowd noise was so loud that it interfered with the audience members' ability to hear the discussion. Board members raised their voices and even yelled to be heard over the noise, and also waited at times for the crowd noise to subside before continuing discussion. The Board states that classified staff members sitting in the back of the cafeteria indicated they could hear the Board members' discussion.

With respect to the sound system that was not used, the Board indicates that the superintendent tested the system in the cafeteria and gym before the April 22 meeting, but found it "was not designed for that type of amplification and was not working properly." The Board indicates that a larger and more effective sound system has since been purchased, which it is now using. The Board further advises that a recording of the meeting indicates that the two Board members "actively engaged in the discussion on contract days" and that their questions on the subject were clarified by the superintendent. The Board believes that any misunderstanding was a result of the difficulty in computing contract days, not the crowd noise and any inability to hear the discussion.

Neb. Rev. Stat. § 84-1412(7) states that "[t]he public body shall, upon request, make a reasonable effort to accommodate the public's right to hear the discussion and testimony presented at the meeting." In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Henery v. City of Omaha*, 263 Neb. 700, 705, 641 N.W.2d 644, 648 (2002). The plain language of subsection (7) indicates that a public body must make a *reasonable effort* to accommodate the public's right to hear what is being said at a public meeting. The record indicates that the meeting room was noisy—people were "cheering, booing, yelling, and shouting interjections." The record also indicates that the Board members attempted to speak louder, to the point of yelling in order to be heard. Board members also paused at various times to allow the noise in the meeting room to subside. In addition, we read nothing in the statute that would require a public body to use a microphone or a sound system during a meeting. Under these circumstances, it appears to us that the Board made a reasonable effort to accommodate the public's right to hear. Our conclusion in this regard is generally supported by the legislative history of this provision, which indicates that a reasonable effort to accommodate the public's right to hear at a public meeting does not involve an absolute requirement that all persons present shall be able to hear. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 21, 1983, at 1794-1795.

With respect to the two Board members who voted for the additional contract days, the evidence indicates that they were able to hear sufficiently to make informed decisions.

III. Questionable Use of Executive Sessions.

Your third allegation relates to the Board's use of executive sessions during the meetings at issue. Specifically, you state that you have "concerns . . . with the wide reasoning for going into the session, the extend [*sic*] lengths of time, several hours, that all three have taken, the actions or reactions of a couple of the members after returning to open session, and this boards [*sic*] past habits of misusing closed sessions." You also indicate that the Board attorney attended the closed sessions, and you assume that he "kept them on task."

The Board represents that it entered closed session properly on April 25, May 1 and May 20, through legally sufficient motions. For example, at the April 25, 2013, meeting, the Board closed its meeting in this manner:

> Mr. Palser: Is there a motion for the board to enter closed session to evaluate the job performances of employees and to prevent needless injury to the employees' reputation, because it is in the employees', district's and public's interest to do so in closed session?
>
> Mr. Buhlke: So moved.
> Ms. Wells: Second.

The vote taken on the motion to close was unanimous. In addition, the motion was preceded by an inquiry to the superintendent as to whether the affected individuals were advised that the Board might discuss the matter in closed session, and given the opportunity to have the discussion held publicly. Dr. Conradt indicated that "[t]he employees agreed that the board could consider and discuss this matter in closed session." The Board advises us that the motions to close for the May 1 and May 20 meetings were "substantially similar."

The Board also represents that beyond the technical requirements, the propriety of the closed sessions fell within the parameters of the statute. As you know, Neb. Rev. Stat. § 84-1410 allows a public body to hold a closed session when it is clearly necessary to protect the public interest or to prevent needless injury to the reputation of an individual, and that individual has not requested a public meeting. In the present case, the Board closed the meetings to discuss the job performance of district employees—one of the "reasons" to go into closed session enumerated in § 84-1410. With respect to the length of the closed session, the Board maintains that the Act does not limit the amount of time public bodies may remain in closed session, "so long as the

discussion held in the closed session is germane to the subject matter of the motion." In this regard, the Board indicates that the discussion in closed session stayed within the limitations set out in the motion to close.

Upon review, it appears that the motions to close were done properly.[2] The subject matter of the closed session—to evaluate the job performance of employees—is expressly authorized under the statute. The district employees involved did not want an open meeting. We agree with you that the closed sessions were very long. However, we also understand that the discussions involved contentious personnel issues which provoked intense community involvement. In any event, there are no time limitations on closed sessions set out in the Act, and we are unable to conclude that the Board violated the Act in this regard. With respect to the concerns you have about certain Board members' "actions or reactions" after returning to open session, and the Board's past misdeeds relating to closed sessions, you have provided us no further information which would allow us to determine whether a violation of the Act occurred. Since there is nothing in your complaint to support your claims/concerns, we are unable to address them.

IV. Board Discussion After a Meeting.

Your final allegation relates to a purported meeting by four Board members upon the adjournment of the public meeting. (You do not indicate the particular meeting.) You indicate that at some juncture, the group (including the Board president) "moved to a small room towards the front of the main room and spent some time talking at that location." You state that after several more minutes, you approached the group, called Mr. Palser aside, and "reminded him that the board had been admonish [*sic*] for this type of action before." You indicate that Mr. Palser "tried to justify this action by explaining something to the effect that they were explaining or discussing policy." You state that you cut him off and "reaffirmed that their actions were not proper." You indicate that the others in the group seemed to catch the drift of [your] conversation and dispersed.

According to the Board, no meeting was held by Board members when they remained in an area between the cafeteria and gym after one particular meeting. The Board points out that a meeting only occurs when a quorum of the Board engages in some of the activities set out in the statutory definition of meeting. The Board indicates that the members were fielding questions from patrons on such topics as public comment and the protocol for selecting coaches and activity sponsors, but "did not, at any time, discuss policy among themselves or attempting [*sic*] to formulate policy." The

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[2] Section 84-1410(2) requires that the entire motion to close be included in the meeting minutes. Upon review, it appears that only the *reason* for the closed session, i.e., the protection of an individual's reputation, was set out in the Board's minutes at issue. As a result, we will direct the Board to add this element to its minutes at its earliest opportunity.

Board represents that any discussion on policy was in response to a patron's question—which is not impermissible conduct. The Board further states that it understands your concern, and "will be cognizant of the impression given when a quorum is present anywhere together."

As the Board correctly points out, over time, this office has consistently taken the position that two things must occur for a public body to hold a "meeting" subject to the requirements of the Open Meetings Act. First, a quorum of a public body must be present. Second, the public body must engage in some of the activities set out in the definition of "meeting" in Neb. Rev. Stat. § 84-1409(2) (Cum. Supp. 2012)—"briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, absent either of those elements, no "meeting" of a public body has occurred under the Act. In the present instance, it is uncontroverted that a quorum of the Board congregated after a meeting. However, there is no clear evidence that the Board members were doing any of the four activities that constitute a meeting under § 84-1409(2) when they spent time fielding questions from school patrons. As a result, there is at least some question as to whether a true violation of the Open Meetings Act occurred.

We find additional guidance on this issue in *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). In *Schauer*, the Nebraska Supreme Court considered whether the City of Ord had violated the Open Meetings Act during its process to annex certain land to be used for an ethanol plant. Plaintiffs alleged, *inter alia*, that the city should have posted public notice of meetings relating to a tour of an ethanol facility and subsequent dinner attended by city officials. The number of officials who attended the events, and whether they constituted a quorum, was also at issue. In responding to these claims, the court stated:

> As indicated by *City of Elkhorn,* the secret formation of policy prohibited by the Open Meetings Act refers to the formation of such policy as a group. This implies some communication between a meaningful number of its members, from which the public has been excluded. If there is no meeting of a public body when less than a quorum convenes and discusses an issue, there is likewise no meeting of a public body when, although there is a quorum present, there is no interaction as to the policy in question. There is no meeting of a public body based upon unspoken thoughts of council members who happen to be sitting in the same room.

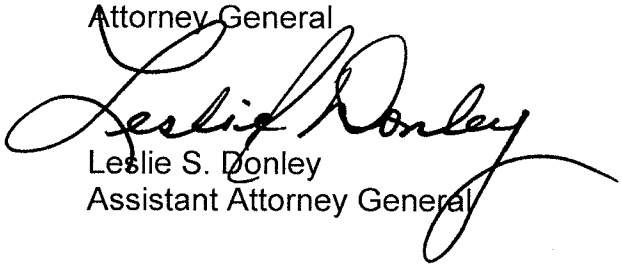
Id. at 447-448, 786 N.W.2d at 926. Applying the court's language to the circumstances here, we do not believe that the Board members were attempting to formulate Board policy in secret. Any "interaction" among Board members appears to have been minimal. There is also no evidence that the Board members attempted to take formal action or vote. *See Copple v. City of Lincoln*, 202 Neb. 152, 274 N.W.2d 520 (1979). Consequently, we do not believe that your allegation establishes a clear violation or

circumvention of the Act. We would suggest that the best practice for all involved is to avoid having a quorum of members appear together after a public meeting. As indicated above, the Board has assured us that it will be circumspect in this regard in the future.

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



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