

Linda Willard

STATE OF NEBRASKA
Department of Justice



LINCOLN, NEBRASKA 68509 • TEL (402) 471-2682
ROBERT M. SPIRE
Attorney General

89063
NO. STATE OF NEBRASKA
OFFICIAL
OCT 12 1989
DEPT. OF JUSTICE

DATE: October 12, 1989
SUBJECT: Application of the Nebraska Open Meetings Law to actions of the University of Nebraska Board of Regents dealing with the employment status of Dr. Ronald W. Roskens.
REQUESTED BY: Senator Ron Withem
Nebraska State Legislature
WRITTEN BY: Robert M. Spire, Attorney General

OPINION SUMMARY

- I. The Nebraska Open Meetings Law requires public bodies to hold open meetings unless the subject matter is within one of the Law's specific exemptions. Recently the University Regents held closed sessions dealing with the employment status of Dr. Roskens. Did the Regents violate the Nebraska Open Meetings Law? No, for these reasons:
 - 1) The Law allows a closed session only if the public body identifies the closed session's purpose and votes in open meeting to hold the closed session. The Regents did this.
 - 2) The Law allows closed sessions for "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". The Regents identified this provision of the law as the purpose of the closed sessions and Dr. Roskens did not request open sessions. The approval of arrangements with Dr. Roskens (a) was made in open meeting, and (b) demonstrated that the closed session actually was a personnel matter within the statute's exception allowing a closed session.
- II. Public officials are stewards of the public interest. As such, they have a profound duty to account to the public for precisely how and why they perform the public's business as they do. This accountability, so essential to responsible

Senator Ron Withem
October 12, 1989
Page -2-

functioning of representative government, transcends the limited legal obligations of the Open Meetings Law and other statutes describing governmental procedures. In other words, beyond the strict legal issue of Open Meetings Law compliance, there is the larger issue of public accountability.

Thus, although not legally required, the concept of open and accountable government suggests a fuller public explanation than that made by the Regents.

OPINION

You are concerned with the interpretation placed upon the Nebraska Open Meetings Law, Neb.Rev.Stat. §§84-1408 et seq. (Reissue 1987), by the University of Nebraska Board of Regents in connection with the employment status of Dr. Ronald W. Roskens.

You ask if the Open Meetings Law allows an elected body to go into closed session to discuss a personnel matter, to reconvene, and then to vote without discussing the rationale for its actions. You also state your understanding that the purpose of the personnel exclusion in the Open Meetings Law is to protect the reputation of individual public employees involved in any discussions by a public body as opposed to protection of members of the governmental body itself. We agree that the personnel exception is for the protection of individual employees and not governmental officials. However, we believe that the language of the statute allows a governmental body to meet in closed session concerning personnel matters, and then take a public vote without discussion of its rationale. Our reasoning is set out below.

I. The Facts

The Nebraska Attorney General has specific enforcement responsibilities under the Nebraska Open Meetings Law. See Neb.Rev.Stat. §84-1414 (Reissue 1987). Therefore, the scope of our inquiry concerning Dr. Roskens and the Board of Regents has been broader than the issues raised by your letter. We contacted counsel for the Board of Regents, and asked for an explanation of the events surrounding the employment status of Dr. Roskens as President of the University. We were provided with copies of the Board minutes and other materials together with a legal analysis prepared by University counsel. Those materials establish these facts:

1. On May 12, 1989, the Board of Regents convened in a scheduled meeting, and, by a roll call vote, adopted a motion to hold a closed session to consider "personnel matters which required closed session discussion in order to prevent needless injury to the persons involved" under §84-1410. During this closed session, the Board discussed the performance of Dr. Roskens as President of the University. The Board did not complete its discussion of this subject during this closed session and the Board reconvened in open session.
2. On June 23, 1989, the Board of Regents convened its next scheduled meeting, and by a roll call vote, adopted a motion to hold a closed session to consider "personnel matters which require closed session discussion in order to prevent needless injury to the persons involved" under §84-1410. During this closed session, the Board continued its evaluation of the performance of Dr. Roskens. As that evaluation progressed, it became apparent that there was a possibility that Dr. Roskens might be requested to terminate his employment before the end of his existing contract. Under those circumstances, the Executive Subcommittee of the Board agreed to meet with Dr. Roskens to discuss the various alternatives available to resolve the situation. The Board then ended its closed session and reconvened in open meeting.
3. After the Board meeting on June 23, 1989, the Executive Subcommittee of the Board (consisting of Regents Hoch, Fricke, and Robinson) met privately with Dr. Roskens twice to discuss the situation with him.
4. On July 21, 1989, the Board convened for its next scheduled meeting, and, by a roll call vote, adopted a motion to hold a closed session to consider "personnel matters which require closed session discussion in order to prevent needless injury to the persons involved" under §84-1410. During this closed session, the Executive Subcommittee reported to the Board concerning its discussions with Dr. Roskens. After further discussion, Regents Hoch and Hansen, together with University counsel, agreed to meet with Dr. Roskens again to pursue further the alternatives available to them. The Board reconvened in open session on July 22, 1989. On July 22, 1989, and on July 31, 1989, Regents Hoch and Hansen met privately with Dr. Roskens. At the latter meeting, they assembled a tentative outline for a proposal to resolve the situation concerning the continued employment of Dr. Roskens.
5. On July 31, 1989, Regent Hoch, as Chairman of the Board, asked the University Corporation Secretary to issue notice of an emergency meeting of the Board of Regents to convene at 7:00

p.m. that evening, for the express purpose of evaluating and considering the employment status of the President. The Board convened that evening, and, by a roll call vote, adopted a motion to hold a closed session for the purpose of evaluating and considering the employment status of the President. During this closed session, Regents Hoch and Hansen reported to the Board concerning their various meetings with Dr. Roskens and the general terms of the proposal they had discussed with him. Following this report and discussions by the Board, the Board reconvened in open session. At that time, a written proposal was presented to the Board, and the Board, by a vote of seven in favor and one opposed, adopted a motion to approve an agreement with Dr. Roskens providing:

- a. Effective August 1, 1989, Dr. Roskens would be appointed President Emeritus.
 - b. Effective August 1, 1989, Dr. Roskens would be appointed Professor of Higher Education-University of Nebraska with tenure until June 30, 1991.
 - c. Dr. Roskens would vacate the Office of President effective July 31, 1989.
 - d. Dr. Roskens' contract of employment would be honored as follows: current salary would be paid through June 30, 1991, together with the standard University employment fringe benefits which are retirement, social security, accrued annual vacation leave, health and dental insurance, health and dependant reimbursement account, life insurance, and disability insurance.
 - e. The terms set forth above would be reduced to a written agreement which would include a provision that neither party would pursue legal recourse against the other except in the unlikely event of non-compliance with any portion of the agreement.
6. On August 23, 1989, Dr. Roskens and the Board executed a written agreement containing the terms of their settlement according to the action of the Board approved in open session at its emergency meeting on July 31, 1989. This agreement has been filed of record as a public document with the Corporation Secretary of the University.

7. At its regularly scheduled meeting on September 8, 1989, the Board, acting in open session, adopted a series of motions ratifying its previous actions concerning Dr. Roskens and ratifying the agreement and mutual release executed by them on August 23, 1989.
8. Dr. Roskens did not at any time during the various meetings described above request that the Board convene in a public meeting for the purpose of evaluating his performance as President of the University or discussing whether his employment as President would continue to the end of the term of his employment contract. The various votes to go into closed session described above were entered in the minutes of the Board of Regents.

II. The Law

The pertinent statute is Neb.Rev.Stat. §84-1410 (Reissue 1987), which provides:

- (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. 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 or litigation; (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 the 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 vote of each member on the question of holding a closed session, the reason for the closed session, and the

time when the closed session commenced and concluded shall be recorded in the minutes. 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 minutes as the reason for the closed session. The meeting shall be reconvened in open session before any formal action may be taken.

III. Legal Analysis

The facts set out above demonstrate that the Board of Regents did comply with the strict provisions of §84-1410. In each instance where there was a closed session of the Board, that session was preceded by an affirmative vote of the Board as required by the statute. Moreover, no formal action was taken in any instance until the Board reconvened in an open, public session. We believe the discussion of Dr. Roskens' job performance falls squarely within the exception contained in §84-1410(d) which allows a closed session for "evaluation of the job performance of a person when necessary to prevent needless injury to the reputation of the person." In addition, actions by the Executive Subcommittee were not covered by the Open Meetings Law under §84-1409, which provides that the Open Meetings Law shall not apply to subcommittees of public bodies unless such subcommittees are holding hearings, making policy or taking formal action. Consequently, we do not believe that the Board's actions involving Dr. Roskens constituted violation of our Open Meetings Law.

Based upon certain language in Grein v. Board of Education, 216 Neb. 158, 343 N.W.2d 718 (1984), you question whether an elected body can go into closed session, discuss a personnel matter, and then conduct a public vote with no explanation of the rationale underlying its decision. We do not read the Grein case to prevent such an action. Grein involved a situation where the initial closed session was clearly impermissible under the Open Meetings Law. Our Nebraska Supreme Court indicated that a public vote after such an improper closed session, with no explanation of the vote, could not cure that statutory violation. In contrast, we believe the situation concerning Dr. Roskens and the Board of Regents involves a legitimate use of the open meetings exception for personnel discussions. To conclude that such a proper use of the personnel exception would require a detailed public explanation before a vote would negate the purpose of the exception. In other words, if protection of the reputation of the individual involved requires confidential discussion by the public body, how can that confidentiality be maintained if a detailed public explanation of

Senator Ron Withem
October 12, 1989
Page -7-

the body's action is necessary before a vote? Such a detailed public explanation would defeat the confidentiality of the closed discussion.

CONCLUDING THOUGHTS

Although we have concluded that the Regents did not violate the Open Meetings Law under the specific circumstances here, we emphasize the importance of this language from the Grein case:

The Nebraska Public Meetings Laws are a statutory commitment to openness in government. As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy. The public can observe and within proper limits participate in discussions and deliberations of a public body. . . . Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed.

216 Neb. at 163-165, 343 N.W.2d at 722, 723 (citations omitted).

Our Open Meetings Law clearly involves a commitment to open government. Therefore, the rule for any public agency must be, "[i]f a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public." Grein at 168, 343 N.W.2d at 724. This means that a public body should resolve any doubts it has in favor of open sessions. In other words, when in doubt, play it safe: punt.

All public officials, including the Board of Regents, remain accountable to the public for their actions even if, as here, they have in a strict legal sense properly held a closed session of the public body. If nothing else, the public will assess the propriety of their actions at the ballot box. As a result, even in instances where there is a legally legitimate closed session, public officials should attempt to provide some type of explanation for their actions, albeit limited. The public is entitled to such an explanation.

Senator Ron Withem
October 12, 1989
Page -8-

After all, when performing our public duties, we public officials owe our primary allegiance to the public, not ourselves.

Sincerely,

A handwritten signature in cursive script that reads "Robert M. Spire".

ROBERT M. SPIRE
Attorney General

RMS/hmt

cc: Mr. Patrick J. O'Donnell, Clerk of the Legislature