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November 15, 2011

Audra Hamaker
3 Lakeshore East
Lewellen, NE 69147-2137

Re: *File No. 11-M-126; Ogallala Pubic Schools Board of Education; Complainant Audra Hamaker*

Dear Ms. Hamaker:

This letter is in response to your correspondence received by us in which you requested that this office investigate an alleged violation by the Ogallala Public Schools Board of Education (the "Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008; Cum Supp. 2010; Supp. 2011) on May 26, 2011. 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 Steve Williams, attorney for 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, along with the response from the Board. Your Open Meetings Act concerns relate to a meeting of the Board held on May 26, 2011, and a so-called "meeting after the meeting." Your allegation is that the Board held an improper meeting after the adjournment of its May 26, 2011 meeting, with a quorum of the Board present, and discussed issues related to the buildings and grounds of the school district. However, building and ground matters were not on the agenda for this meeting, and no minutes were taken or produced of the "meeting after the meeting." While the Board admits some discussion was had as to facilities and/or the "building issue" after the May 26 meeting, it denies they have violated the Open Meetings Act. The Board defends its discussion by explaining it was only to have included the members of the "Building and Grounds Committee," additional members of the Board were only present for a short period of time, and no action was taken following any of the discussion.

ANALYSIS

Over time, our office has consistently taken the position that two things must occur for a public body to hold a meeting that is subject to the requirements of the Open Meetings Act. First, we have indicated that a quorum of a public body must be present to constitute a "meeting." Second, we believe that a meeting of a public body only occurs if that public body engages in some of the activities set out in the statutory definition of "meeting" found at Neb. Rev. Stat. § 84-1409(2) (2011), i.e., the public body must engage in "briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." In our view, when both of these elements have been satisfied, a "meeting" of a public body has occurred under the Open Meetings Act.

It is our understanding that the Board is composed of six members, and that a majority of the members constitute a quorum.[1] In other words, a quorum is reached by the attendance of four Board members. It appears on May 26, 2011, five members of the Board were present at the Special Meeting. Thus a quorum of the Board was present on May 26, 2011.

Two items were on the agenda for the Special Meeting: Bid Approval for Stadium Lighting and Surplus Equipment Sale. Action was taken on these two items. The Board meeting then adjourned, and according to the Board, the Building and Grounds Committee ("Committee") had previously arranged to meet immediately following the Special Meeting. Three members of the Board are also members of the Committee. However, discussion ensued as to "the building situation" with five members of the Board present and participating, including the two members of the Board who were present for the Special Meeting, but are not members of the Committee.

Thus, a quorum of the Board continued to be present following the special meeting, for discussion as to "the building situation," and the first factor as to whether a meeting occurred was satisfied.

The other element that must be met is that the quorum of the public body engaged in briefing, discussion of public business, the formation of tentative policy, or the taking of any action. The Board does not deny discussions occurred. The Board's president, in a June 22, 2011 newspaper article, is quoted as saying "we were discussing things" and "we were having a conversation about facilities." Bond issues, school consolidations, and the need for a gymnasium were all topics the Board admits to discussing following the special meeting.

When the Board discussed school facilities immediately following the May 26, 2011 special meeting, it engaged in the discussion of public business. None of the items discussed were on the agenda for the May 26 meeting, although the Board rationalizes that since "stadium lighting" was on the agenda, that item may have served

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1 *See* Neb. Rev. Stat. § 17-105 (2007).

as sufficient notice as to the discussion of other school improvement issues. The Board states that "despite the fact that another school improvement issue was on the agenda – stadium lighting – not a single patron from the school district attended the meeting." However, the "stadium lighting" agenda item does not allow for discussion of other matters of school improvement. The Board cannot justify the discussion of a non-agenda item after the adjournment of a meeting by stating that the public was not interested in "building issues" because there was no attendance at the meeting for "stadium lighting." Issues relating to a bond, school consolidation, and a new gymnasium are very different from stadium lighting. The Board's argument is not persuasive.

Neither is the Board's characterization of the post-meeting discussion as a "chance meeting" under § 84-1410(5) (2011) which states that the Open Meetings Act "does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the public body has supervision, control, jurisdiction, or advisory power." This discussion was held immediately following a meeting that was "intentionally convened." We do not believe the Board's discussions qualify as a "chance meeting."

The Board argues that there was no "secret" meeting, and that the discussion occurred in the open. We agree with this, however, the test is not whether the meeting was "secret" or not. It is whether a quorum was present and public business was discussed, without public notice, an agenda, and the preparation of minutes. In this case, there was.

Finally, the Board states that the "building issue" was only discussed for 2-3 minutes following the special meeting. The length of time that the issue may have been discussed is not significant; only that a discussion was had. The Open Meetings Act makes no distinction as to whether a meeting lasts for one minute, or one hour. The requirements as to the Act are the same.

It appears to us that a discussion of public business was held, with a quorum of the Board present, following the May 26 Special Meeting. The "meeting after the meeting," therefore, was a "meeting" in and of itself, subject to the provisions of the Open Meetings Act; however, advanced notice was not given, an agenda was not provided, and minutes were not prepared for this meeting. Nevertheless, we do not believe that the Board conducted this meeting deliberately, or had the intent to circumvent the Open Meetings Act in the after-meeting discussions. Because of this, we believe that a minimal violation of the Open Meetings Act occurred.

As this violation is *de minimis*, and the Board did not engage in a vote, only discussion, this situation does not warrant further action by this office. As there was no formal action by the Board, there is nothing that can be void or voidable under the Open Meetings Act. We will simply caution the Board not to discuss public business outside the confines of a properly convened public meeting when a quorum is present. The

Board has already assured us that it will "proceed with greater caution in the future." We trust that they will.

CONCLUSION

For the reasons stated above, we believe that the Board technically violated the Open Meetings Act on May 26, 2011. However, as explained above, no further action is necessary by this office. If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General

Natalee J. Hart
Assistant Attorney General

Cc: Steve Williams

02-268-30