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October 16, 2015

Catharine Huddle
Lincoln Journal Star
926 P Street
Lincoln, NE 68508

RE: *File No. 15-M-124; Nebraska Board of Parole; Catharine Huddle,
Complainant*

Dear Ms. Huddle:

This disposition letter is in response to your complaint submitted to our office on May 19, 2015, in which you allege violations of the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014) (the "Act"), by the Nebraska Board of Parole ("Board"). Your complaint relates to three parole hearings scheduled on May 18, 2015. As is our normal practice with complaints alleging violations of the Act, we contacted the public body involved and requested a response. In the present case, we contacted Board chairperson Rosalyn Cotton, whose response we received on June 12, 2015. On July 10, 2015, the undersigned met with Ms. Cotton and staff to discuss the Board's response in greater detail. We have now had an opportunity to consider your complaint and the Board's response and documentation in detail. Our conclusion and future action in this matter are set forth below.¹

FACTS

Our understanding of the facts in this matter is based on your correspondence and the response/documentation we received from Ms. Cotton and staff.

The alleged violation at issue involves three parole hearings scheduled by the Board of Parole on May 18, 2015, at 9:30 a.m. at the Tecumseh State Correctional

¹ Before we begin, we note for the record that on May 10, 2015, a riot broke out at the Tecumseh State Correctional Institution ("TSCI"). Two inmates were injured and two other inmates were found dead by staff. There was considerable damage to the facility. It is our understanding that the TSCI was under lockdown on May 18, 2015, and remains in limited lockdown as of this date.

Institution. The inmates involved were Calvin D. Jones, Brandin D. Nelson, and Antonio A. Wooden. General notice of these hearings was posted on the Board's website at <http://www.pardonebraska.gov/schedule.html> under the link "Monthly Public Hearing Schedule." The Board also provided specific notice of each hearing by publishing notice in the county where each individual inmate was convicted. For inmates Jones and Nelson, convicted in Douglas County, notice of hearing was published in the Midlands Business Journal on May 8, 2015. For inmate Wooden, convicted in Lancaster County, notice of hearing was published in the Lincoln Journal Star on May 12, 2015. The Board also sent notices to the district court judge who presided over the criminal case, the county attorney, the county sheriff, and the chief of police. Generally, notice is also provided to victims of crimes and any other interested persons requesting notice by the Board.

On Friday, May 15, 2015, at 2:18 p.m., Kevin Wilken, an employee with the Nebraska Department of Correctional Services, contacted Ms. Cotton and others by email. Mr. Wilken indicated that the TSCI visiting room was being used as the CERT [Correctional Emergency Response Team] staging area. He indicated that the Board "could use the Special Management Unit video-conferencing equipment to do a deferral hearing on the two inmates who have not waived their appearance." He asked that the Board let him know what two inmates needed to be present on Monday, and he would make sure they were available.

On Monday, sometime prior to the start of the scheduled hearings, the Board decided to go ahead with the videoconference. The Board went on the record and indicated that inmate Jones had waived his appearance before the Board, and scheduled his next review for May 2016. The Board then moved and approved votes to defer the other two hearings until June 22, 2015. While an audio recording provided to this office is somewhat disjointed, it appears that the proceedings lasted no more than ten minutes.

In your initial inquiries to our office, submitted on May 18, 2015, you indicate that Lincoln Journal Star reporter, Lori Pilger, contacted the TSCI public information officer, Jessica Houseman, on Friday, May 15, 2015. Ms. Pilger informed Ms. Houseman that she would be in Tecumseh on May 18 for the Board parole hearings. She also requested interviews with Warden Brian Gage and inmate Jeffry Frank. You state that she received no response. You indicate that Ms. Pilger drove to Tecumseh on Monday morning "to cover the hearing." You state that "[s]he got as far as the reception area, from which the person working called PIO Houseman, then told Pilger there was no hearing, that it had been continued to June 22. Pilger went to her car and called the Parole Board and was told the hearing was, in fact, taking place at that moment via video teleconferencing." Ms. Pilger supplemented the complaint the following day. She indicates that she spoke with Ms. Cotton, who indicated that three members of the Board [a quorum] met briefly on May 18 to inform three inmates at TSCI that their parole hearings would be continued to June 22.

Ms. Cotton indicated to us that since the hearings were scheduled, she believed that it was only fair to defer action on the record. In her written response, she indicates that no offenders were released, no cases were discussed, and no official action was taken except to continue the hearings. Ms. Cotton concludes: "The Board regrets that due to these extenuating circumstances [relating to the prison riot], public notice was not updated. The Board will strive to ensure that this does not happen again."

Also, by way of background, the Board has informed us that all parole hearings are conducted in open session and in person. The Board may go into executive session if it so chooses to deliberate privately on a matter. The Board's decision as to a committed offender's release on parole is made publically and on the record. To the best of their recollection, Board staff indicates that there has never been an instance where a parole hearing was conducted by videoconferencing.

DISCUSSION

The basis for your complaint is Ms. Pilger's inability to gain access to the scheduled parole hearings on May 18 at the TSCI. You allege that videoconferencing or not, it was still a public meeting, and that the Board website stated "that the public hearing is at 9:30 a.m. on May 18 in Tecumseh." You believe the Board's action constituted a violation of the Open Meetings Act.

For purposes of the Act, a "meeting" is "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body" Neb. Rev. Stat. § 84-1409(2) (2014). The Nebraska Board of Parole is an independent board created by statute and, therefore, is a public body subject to the Act. Neb. Rev. Stat. § 84-1409(1)(a)(iii) (2014); Neb. Rev. Stat. § 83-188 (Supp. 2015). Neb. Rev. Stat. § 84-1409(1)(b)(ii) further expressly provides that "[p]ublic body does not include . . . (ii) entities conducting judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders"

The first question we must determine is whether the Board of Parole is conducting judicial proceedings when it conducts parole hearings pursuant to Neb. Rev. Stat. § 83-1,111 (2014). That statute provides, in pertinent part:

(1) Every committed offender shall be interviewed and have his or her record reviewed by two or more members of the Board of Parole or a person designated by the board within sixty days before the expiration of his or her minimum term less any reductions as provided in section 83-1,110. *If, in the opinion of the reviewers, the review indicates the offender is reasonably likely to be granted parole, the Board of Parole shall schedule a public hearing before a majority of its members. At such hearing the offender may*

present evidence, call witnesses, and be represented by counsel. If, in the opinion of the reviewers, the review indicates the offender should be denied parole, the offender may request an additional review by a majority of the members of the board. A review by the majority of the members of the board may be conducted not more than once annually. *Any hearing and review shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.*

(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing or review. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall include the opinion of the person who conducted the review. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

(Emphasis added.)

In *Ditter v. Nebraska Board of Parole*, 11 Neb. App. 473, 655 N.W.2d 43 (2002), the Nebraska Court of Appeals discussed whether a petition in error was the appropriate means to appeal a decision made by the Board of Parole following a review conducted under § 83-1,111. In determining that no such means of appeal was available for a Board review, as opposed to a Board hearing, the court stated:

The question then becomes whether a decision by the Board after a review constitutes the exercise of a "judicial function" under the petition in error statutes such that the decision can be appealed to the district court. A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. . . . Adjudicative facts are facts which relate to a specific party and are adduced from formal proof. . . . Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case. . . . Whether a board or tribunal is required to conduct a hearing and receive evidence may be considered in determining whether the inferior board or tribunal exercised judicial functions. . . . Where an inferior board or tribunal decides no question of adjudicative fact and no statute requires the board or tribunal to act in a judicial manner, such orders are not reviewable by error proceedings. . . . While § 83-1,111 provides that an offender may present evidence, call witnesses, and be represented by counsel at a parole hearing, no such rights are provided at a review by the Board.

Id. at 481, 655 N.W.2d at 49 (internal citations omitted).

In Neb. Op. Att'y Gen. No. 93065 (August 11, 1993), we addressed a series of questions relating to the duties of the Board in the context of the Public Meetings Statutes.² We indicated that the Board was clearly a “public body” subject to the Public Meetings Statutes, but recognized that the statutes do not apply when the public body is conducting “judicial proceedings.” In this regard, we stated:

Generally, a parole board performs a judicial function when it acts on matters relating to parole. 67A C.J.S. Pardon & Parole § 43. In addition, in *Inmates of the Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F. Supp. 432, 437 (D. Neb. 1976), the United States District Court for the District of Nebraska indicated that, “[t]he [Parole] Board members, in considering which inmates should be granted a discretionary parole, were performing a quasi-judicial function and are clothed with quasi-judicial immunity.” On the basis of this authority, we believe that the Board is acting in a judicial capacity when it conducts a parole hearing. Therefore, those proceedings are not strictly subject to the Public Meetings Statutes.

Id. at 2. We further indicated that while the Act does not apply when the Board conducts a parole hearing, § 83-1,111 requires the proceedings to be open to the public, which necessarily implicates some requirements for notice and agenda. We also stated that the provision in subsection (2), which requires the Board to make its decision by majority vote, should be done in public as required by the Public Meetings Statutes. *Id.*

In *McQuinn v. Douglas County School District No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2000), the Nebraska Supreme Court discussed whether a school board violated the Open Meetings Act when it conducted an informal hearing under Neb. Rev. Stat. § 79-834 on the question of the nonrenewal of a probationary certificated teacher’s contract. At the request of McQuinn, the school board held the hearing in open session, but deliberated privately in another room at the conclusion of the hearing. *Id.* at 730, 612 N.W.2d at 205. While McQuinn made no objection at the time, on appeal she claimed that the private deliberations violated § 79-834 and the Open Meetings Act. The court concluded that no violation of the Act occurred, stating:

[T]he public meetings laws specifically provide that they shall not apply to “judicial proceedings unless a court or other judicial body is exercising rulemaking authority, deliberating, or deciding upon the issuance of administrative orders.” . . . The issue we must address in determining the applicability of the public meetings laws to the Board’s proceedings on May 6, 1997, therefore, is whether the Board exercised judicial functions when it conducted the hearing pursuant to § 79–834 and deliberated immediately

² The “Public Meeting Statutes” were officially titled the “Open Meetings Act” with the passage of 2004 Neb. Laws LB 821, § 34, codified at Neb. Rev. Stat. § 84-1407 (2014).

thereafter. . . . A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. . . . “Adjudicative facts” are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party.

The hearing on May 6, 1997, and the deliberations which immediately followed pertained solely to disputed adjudicative facts bearing upon whether the school district had performed the procedural prerequisites and had a sufficient basis for its decision not to renew McQuinn's contract. The proceedings pertained only to McQuinn and did not involve the exercise of rulemaking authority or the deliberation or decision upon the issuance of administrative orders. . . . Accordingly, we conclude that because the Board's actions during the May 6, 1997, proceedings were limited to the exercise of a judicial function, the public meetings laws were inapplicable to such proceedings.

Id. at 731-732, 612 N.W.2d at 206-207 (internal citations omitted.)³

Based on the foregoing, it appears to us that the Board of Parole acts in a quasi-judicial nature when it conducts parole hearings pursuant to § 83-1,111. During these hearings, the offender may present evidence, call witnesses, and be represented by counsel. Each proceeding pertains only to the committed offender. While the hearings may be informal, a complete record of the proceedings must be made and preserved. The proceedings do not involve the exercise of rulemaking authority or the deliberation or decision upon issuance of administrative orders. Consequently, the provisions of the Open Meetings Act do not apply to parole hearings generally, or to the specific proceedings which took place on May 18, 2015.

CONCLUSION

By statute, parole hearings are required to be public. However, since the hearings are quasi-judicial in nature, the provisions of the Open Meetings Act do not apply. Thus, no violation of the Act could have occurred as alleged, and we are closing this file.

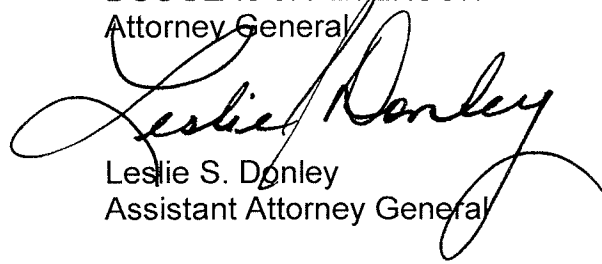
³ In a disposition letter issued earlier this year, Special Assistant Attorney General William Austin discussed whether the Oil and Gas Conservation Commission (“Commission”) violated the Open Meetings Act during a meeting and hearing held on March 24, 2015. The subject matter of each proceeding was an application to convert an existing well in Sioux County to a Class II-D disposal well. Mr. Austin began his analysis by identifying what portions of the day’s proceedings fell under the Open Meetings Act. With respect to the afternoon hearing, Mr. Austin determined that a hearing on the application was authorized under state law, and that certain rules and regulations of the Commission relating to practice and procedure clearly contemplated that the hearing on the application would be quasi-judicial. Mr. Austin concluded that since the hearing constituted a contested case under the Administrative Procedure Act [Neb. Rev. Stat. §§ 84-901 through 84-920 (2014)], and was quasi-judicial in nature, the Open Meetings Act did not apply to it. Disposition Letter to Kenneth C. Winston, Jane Kleeb, April 23, 2015, at 1-4.

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If you disagree with our analysis 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,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in black ink, appearing to read "Leslie Donley", written over the typed name and title of the Assistant Attorney General.

Leslie S. Donley
Assistant Attorney General

c: Rosalyn Cotton, Chair
Nebraska Board of Parole

49-1427-29