

November 1, 2005

STATE OF SOUTH DAKOTA
OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETING) FINDINGS OF FACT,
COMPLAINT04-01, CITY OF LEAD) CONCLUSIONS OF LAW
) AND REPRIMAND

VINCENT A. FOLEY, Commission Chair

INTRODUCTION

This matter comes before the commission on the complaint of Paul Holtsclaw, a concerned citizen, on the use of the executive session by the City of Lead. He identifies three issues that have been investigated by the Lawrence County State's Attorney John Fitzgerald. First, he complains that the executive session process was used to discuss departmental reorganization of the City of Lead. Second, he complains that executive session was used to discuss equipment purchases. Finally, he complains that the City failed to properly agendaize the consideration of a special permit for the Opera House establishment.

FINDINGS OF FACT

City Reorganization

June 28, 2004 Mayor Tom Nelson appointed Patrick Milos to the position of City Administrator. The City of Lead held executive sessions on July 12, 2004, July 19, 2004, August 16, 2004, August 23, 2004, and August 30, 2004. September 7, 2004 City Administrator Patrick J. Milos reported that when he was hired, he was asked by the Commission to think of a plan to reorganize the city. At that meeting, he recommended that an individual be hired as Public Safety Administrator, and one individual be in charge of the Parks, Public Buildings and Grounds, Streets, and Water. Commissioner O'Grady noted that "[t]he board has deliberated about this change for many hours and are very comfortable that it will work." (September 7, 2004 City Commission Minutes). Shortly before the September 7, 2004 meeting, city employees were informed of the plan. September 13, 2004, complainant Holtsclaw asked the City Commission when the discussions had taken place and was told that it was during Executive Sessions. Those comments were not reflected in the minutes of the meeting. Subsequently, his statements were noted in the minutes of the September 20, 2004 meeting. City Attorney Michelle Percy noted to the Open Meetings Commission, in a letter dated December 7, 2004, that the City Commission spoke very generally (and repeatedly) in open session on the topic of consolidating all departments into three departments. The very comprehensive minutes generated by the City of Lead after its meetings supplied to this Commission do not reflect any discussions referring to job assignments or consolidation related to the above except for a notation on July 12, 2004, that Mr. Milos identified himself as the individual in charge of the

Parks Department.

Fire Equipment Discussion

In the week before the Commission meeting on September 7, 2004, the City of Lead received by shipment 21 breathing apparatus' for the Fire Department. City Administrator Milos inspected the shipment and noted that five had actually been ordered. This matter was considered by the City Commission on September 7, 2004 in an executive session with Assistant Fire Chief Jerome Harvey from the City of Lead Fire Department. In an interview with Lawrence County State's Attorney John Fitzgerald, and after admonitions against discussing personnel matters, Harvey related the non-personnel aspects of the discussion. City Attorney Michelle Percy, in her letter of February 25, 2005, related that several aspects of the discussion related to potential misconduct related to the receipt of the equipment.

Opera House Special Permit

June 21, 2005, the City Commission approved a Special Permit for the Opera House for a performance of Williams and Ree. The agenda for the meeting did not mention the permit, and no use of the late addition to an agenda permitted by SDCL 1-25-1.1 occurred.

DISCUSSION

City Reorganization

The statements by the City Commission detailed above belie the fact that the plan of reorganization was discussed in executive session. As Attorney Percy noted in a letter on November 12, 2004, to the Commission, "[t]he discussions held on reorganization of the City necessarily involved specific employees." While the appropriate person to fill a position is clearly a personnel matter that can be discussed in Executive Session, a discussion about how the City Departments are organized and supervised contains elements that may be appropriate for Executive Session, and other elements that are not. From the comments received by the Commission, part of the discussions in Executive Session necessarily involved the organizational structure of the plan proposed by Mr. Milos.

That component of the plan is not a personnel issue. It is not about an individual's behavior, or qualifications. Instead, the structure of the organizational chart is about how city government and services will operate, and who will be responsible. Mr. Milos' comments in the September 7, 2004, minutes are instructive. He noted he was asked to think of a plan. He then identifies that part of the plan is to have a Public Safety Administrator to whom the Police Department, Fire Department, Ordinances and Inspections would answer. The discussions leading up to the creation of the position were not covered by the personnel exception.

Granted, when a body discusses whether a particular individual would serve a position well, then personnel discussions occur. That happened here, and Milos' further comments in the minutes note his recommendation to hire an individual in the position. The discussions

involving the person's qualification to serve in the capacity of Public Safety Administrator do fall within the personnel exception.

However, where an issue to be resolved is not covered by an exception to the open-meetings law, then it should not be discussed behind the closed doors even if the issue is closely related to an item that falls within an exception. In Davison County, we found that a discussion in executive session of a list of items, some of which were proper executive session materials, and some of which were not, violated the open meetings laws. Here, one issue once concluded, then logically led to the second discussion. Even though the discussion of who would best fill the new position was properly discussed in Executive Session, the prior deliberations approving the creation of the position were not.

It is important to note that Open Meetings Commission is not charged with passing on the appropriate exercise of executive and legislative authority. This opinion should not be interpreted to require all discussions concerning organizational structure by the executive branch (such as mayor, president, responsible commission member, or supervisor) of a local government to be held in open session. However, when that discussion is taken to a quorum of a local government's board, council or commission, the rules governing open meetings must be considered.

Fire Equipment Discussion

It is undisputed that the issue of the fire equipment was the central issue in the discussion in the Executive Session with Assistant Chief Harvey on September 7, 2004. Mr. Holtsclaw suggests the use of the executive session to discuss the protective equipment was an improper use of the privilege. While we have noted that all materials in Executive Session must be covered by an exception for the closed discussion to be appropriate, Davison County, that restriction is met if the matters to be discussed are the factual circumstances which give justification for the exception to be applied. Here, the City found itself with an order in excess of that approved, of that which could fall within the bid exception, and or of that which City personnel expected. Those facts were settled among city staff before the executive session occurred?. Answering the question of whether anything improper was done by city personnel in the incident is a valid subject of inquiry in Executive Session. When the personnel issue was resolved, and the City decided to complete the purchase of the equipment, the matter returned to open session. Later, the City resolved the matter of the equipment through discussion and action in open session.

Opera House Special Permit

As this commission noted in Town of Herrick, items of official action must be preceded by public notice through the agenda process. Late additions can be made through SDCL 1-25-1.1. In this instance, the Special Permit for the Opera House was not identified on the agenda, nor was it later added as allowed by law. In Attorney Percy's letter of December 7, 2004, she notes other apparent instances had been addressed in previous meetings and they had passed without discussion. Such standard operating procedures do not allow for bypassing the provisions of the statutes. While standard operating procedures may allow for abbreviated

parliamentary conduct of meetings, compliance with the statutes such as the open meetings law may not be side-stepped with the rationale that it was always just done this way, and no one complained.

CONCLUSIONS OF LAW

City Reorganization

Although a matter once resolved may then lead to discussions about personnel issues, the underlying matter may not fall within an exception. If that is the case, the discussion and decision on the predicate matter may not be discussed in executive session. Here the City chose to consider the reorganizational plan before the entire commission. The discussion concerning the organizational structure did not fall within the personnel exception to the open meetings law even though the discussion on who would fill the position which naturally followed, did. Considering that part of the plan that involved the structure in executive session violated the open meetings laws. Pursuant to statute we reprimand the City of Lead for that violation.

Fire Equipment Discussion

Although a matter standing alone should be considered in open session, when the facts are so intertwined with employee performance, those specific items as evidence of the performance are appropriately discussed as facts surrounding the performance issue. So long as the question remains the performance of the employee, and not whether the item itself should be approved or disapproved, executive session is a proper venue. Here, the City was considering an employee's performance concerning the delivery of additional equipment. Thus, no violation occurred and we find in favor of the City.

Opera House Special Permit

Items of official business such as the approval of permits should be agendaized. The agenda provides notice to all, that an item will be considered. When, as here, an item is acted upon without having been on the agenda initially, or later through the additional process, a violation occurs. The Special Permit for the Opera House should have been agendaized so all that may be interested would know it was up for consideration. When it wasn't, the City of Lead violated SDCL Chap. 1-25. Pursuant to statute, we reprimand the City of Lead for that omission.

Commission members STEELE, ROTHSCHADL, BRENNER, AND BECK concur