

July 11, 2005

State of South Dakota
Open Meetings Commission

In the Matter of Open Meeting)	FINDINGS OF FACT,
Complaint 05-01, Town of)	CONCLUSIONS OF LAW
Herrick.)	AND REPRIMAND

VINCENT A. FOLEY, Commission Chair

INTRODUCTION

As discussed in In the Matter of Open Meeting Complaint 05-03, Gregory School Board, 05-03 decision, complaints come before this board through referrals from local State's Attorneys. Those complaints to be addressed by this Commission can only include violations of the Open Meeting statutes, SDCL 1-25-6. Violations of these statutes can involve not only improper discussion in executive sessions, but also improperly called meetings, SDCL 1-25-1, and SDCL 1-25-2.

FINDINGS OF FACT

December 6, 2004, the Town of Herrick Board of Trustees entered into executive session to discuss personnel, a permitted topic. In that session, the qualifications of the Street Superintendent were discussed and a plan of action including a request for resignation was formulated, but that if such request was not honored, then termination would follow. That request was forwarded to the Street Superintendent. He requested a meeting with the Board of Trustees and a special meeting was organized and held. No notice of that meeting was given. Subsequent to that meeting, the Street Superintendent was terminated. The Town

Board explained that no notice was given to prevent embarrassment.

DISCUSSION

The initial action of the Town Board of Herrick to go to executive session and discuss the personnel matters was appropriate. The motion was duly made, and the purpose noted. However, when they then acted in unanimity after coming from executive session, a valid question about official action can be raised. As SDCL 1-25-2 states, ". . . any official action concerning such matters (in executive session) shall be made at an open official meeting" While the letter requesting resignation signed by all suggests official action, it may also be viewed as an ill-advised method to convey unity of purpose in a personnel matter. Sending the message of unanimous thought can be expected in a personnel action as serious as a termination. However, what the letter does illustrate is that the manner of handling a personnel action can stray into an area that at least raises the question about whether executive session protections should apply.

However, when the Town Board decided to return to discuss the issue in a special meeting, they clearly violated the requirement of the Open Meeting laws by failing to provide public notice. SDCL 1-25-1.1 requires that, "[a]ll public bodies shall provide public notice, with proposed agenda, at least twenty-four hours prior to any meeting, by posting a copy of the notice, visible to the public, at the principal office of the public body holding the meeting" An additional requirement not

applicable here is that such notice must be sent to media that had requested receipt, SDCL 1-25-1.1.

The rationale that the Board simply intended to protect the employee from embarrassment is disingenuous. Nothing more than an agenda with executive session with personnel matters indicated as the purpose for the session needed to be posted. If official action was expected, the agenda could reflect that possibility. When the meeting was followed up with minutes setting forth in detail the decision that was made, and options that were offered to the employee, the embarrassment saved the employee apparently was not a concern.

CONCLUSIONS OF LAW

The Town Board of Herrick violated the Open Meeting law by failing to provide the required notice of a special meeting. By failing to do so, they failed to afford the public the right to know official business may be transacted. For this violation, a REPRIMAND pursuant to statute is given.

The related issue of whether official action was taken in the first executive session is more problematic. On the present record, the facts are insufficient to find that a clear violation existed. Personnel actions, including terminations, are legitimate items of executive session discussions. Careless transition into activity that may be considered official action due to the manner of communication may remove that confidential protection. It is important to remember that the rule is open discussion of issues in a public forum, and that the exceptions are limited in scope. When, as here, the possible violation is

so intertwined in behavior that we have already found to be a violation, we will not separately find a violation where the purpose of the method of the communication has not been fully explored. We would note, however, that the signing of a communication by a Board, as a Board, on Town letterhead strongly suggests official action did occur in the executive session.

Commission members **STEELE, ROTHSCADL, BRENNER, and BECK** concur

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