

SOUTH DAKOTA OPEN MEETING COMMISSION

MINUTES OF MEETING

November 21, 2014

Sioux Falls, South Dakota

Members participating: John Steele, Aurora County States Attorney (Chair); Emily Sovell, Sully County State's Attorney; Kevin Krull, Meade County State's Attorney; Mark Reedstrom, Grant County State's Attorney; and Lisa Rothschadl, Bon Homme County State's Attorney. Steve Blair and Jenna McFarlane, Office of the Attorney General, assisted the OMC.

Chairman John Steele called the meeting to order at 10:00 a.m. Reedstrom moved to approve the proposed agenda; Rothschadl seconded. The roll was called and all voted in favor.

**The following is a summary (not verbatim) of the matters discussed.**

August 29, 2013 minutes.

Krull moved to approve the minutes as distributed. Sovell seconded. The roll was called and all voted in favor.

In the Matter of Open Meeting Complaint 14-01, Lincoln Township

Attorney Benjamin Kleinjan appeared on behalf of Complainant Paul Tuntland. Mr. Tuntland also appeared. Attorney Douglas Deibert appeared on behalf of Lincoln Township. Ric Moren, chairman of Lincoln Township, also appeared.

Mr. Kleinjan stated this matter arose out of litigation and during the litigation process it was discovered that the Township had never used or posted an agenda. There had been one agenda posted for one meeting since the litigation started, but they didn't feel it was posted in a timely manner.

In addition, Mr. Kleinjan, was concerned that pursuant to SDCL 8-5-1 townships are required to hold October meetings and that the Lincoln Township had never held an October meeting, nor had they posted a notice that no October meeting would be held. Mr. Kleinjan felt the proper response would be to have a meeting and have it open to the public, so if there was someone that has business to bring before the township they would have the opportunity to do so.

Mr. Kleinjan proceeded that it was their position that Lincoln Township had never properly held elections for board members. He continued to state that he felt that the Township election procedures had never been properly followed.

Mr. Kleinjan continued by stating he believed a special meeting was held outside of the Township and mentioned that no agenda or notice was ever posted for that meeting. Mr. Kleinjan wondered whether or not there were consequences for holding a meeting outside of the township.

Finally, Mr. Kleinjan shared a March incident in which his client, Mr. Tuntland, arrived early at a meeting and was told he could not enter the meeting at that time. Mr. Tuntland understood that the agenda noticed an executive session at the very end of the meeting and not at the beginning. Mr. Tuntland was turned away from the door and ended up missing the beginning of the meeting.

Mr. Deibert stated the Township was not aware of the requirement to post an agenda until this year and that the Township had posted the agenda for their March meeting, and they planned on continuing to post in the future. Mr. Deibert also stated that the Township was unaware statutes required three meetings each year.

Mr. Deibert stated there is minimal interest expressed for board positions, and generally the same individuals remain on the Board for a number of years.

Mr. Steele inquired if the minutes reflected that there was a call for nominations or if there was some offer made from the chair at the March meeting to invite people to run for the Township's offices. Mr. Deibert stated that Mr. Moren had indicated yes, and that elections are open every year if someone wants to run.

Mr. Deibert stated nothing illegal or evil took place in this executive session and no action was taken in the litigation.

Mr. Steele inquired whether the meeting Mr. Tuntland complained of was called to order prior to the noticed time, and whether there was a proper motion to enter executive session made at that time. Mr. Deibert indicated the meeting was not called to order prior to the noticed time.

Mr. Reedstrom inquired if there was a proper closure motion made prior to going into executive session that not only announced the move into executive session, but also announced the statute for the reason for that executive session? Mr. Deibert stated that yes the meeting was called to order and a motion was made to go into executive session. Mr. Reedstrom continued stating the minutes of the meeting did not reflect the closure motion. Mr. Deibert stated that Mr. Reedstrom was correct, and acknowledged that the

Township minutes were rather brief. Mr. Reedstrom noted that the agenda of the meeting they were speaking of was in the form of an email, which carried the date and time of Monday, March 3, 2014 at 5:31 p.m. The meeting itself was set for March 4 at 1 p.m. Mr. Reedstrom had a concern that proper twenty-four hour notice was not given to the public for this meeting. Mr. Deibert stated that Mr. Reedstrom was correct, and the Township was unaware at that time an agenda had to be noticed.

Mr. Kleinjan brought up the election issue and Ms. Rothschadl inquired as to what authority the Commission had over the election process. Mr. Steele stated if a board or someone is acting in contravention of statute there are certain legal remedies for that which do not involve the Open Meetings Commission.

Mr. Steele inquired of Mr. Deibert about the agenda for the March 4 meeting starting at 1 pm, and asked if the meeting was called to order prior to 1 p.m. and when executive session started. Mr. Deibert stated the meeting was called to order at 1 p.m. or a little after, and the executive session started thereafter. Mr. Moren stated that the Township board moved the executive session up first before the agenda was approved.

The Commission went into deliberation. Mr. Steele inquired if any legal issues, other than the timeliness of the agenda and the agenda not being posted, were within the Commission's jurisdiction? None were found. Mr. Steele stated that they did have specific allegation in regards to the March 4 meeting, but that they did not have jurisdiction to reprimand them for history where there were no specific allegations. Ms. Rothschadl and Ms. Sovell agreed.

Mr. Krull moved to find that the Lincoln Township held a meeting March 4, 2014, and failed to post the agenda in a timely manner. Mr. Reedstrom seconded. Roll call vote was made with all ayes.

Steve Blair was directed to draft the findings and conclusions for the board.

#### In the Matter of Open Meeting Complaint 14-03, Freeman School Board

Attorney Tom Harmon appeared on behalf of the Freeman School Board. Ronda Rinehart, Freeman School Business Manager, also appeared. Mr. Chris Eisenbeis appeared as Complainant.

Mr. Eisenbeis stated the Freeman School Board failed to comply with SDCL 1-25-1.1, specifically, in that they failed to post a meeting agenda on the school website, and failed to post a meeting agenda at the school building in a location that is accessible any time within twenty-four hours preceding a board meeting. Mr. Eisenbeis further explained the School Board posted the agenda in the hallway inside the school, which was only visible during hours the

school is open. Mr. Eisenbeis felt the law is very specific; the agenda must be visible, readable, and accessible for the entire twenty-four hours before any meeting.

Mr. Harmon agreed that the facts as stated by Mr. Eisenbeis were correct. The agenda was posted on the inside window at the Superintendent's office and not visible from the exterior of the building. Mr. Harmon stated the Legislature did not make it clear on what an entire twenty-four hours meant, and nowhere in the statute is the word continuous used. Mr. Harmon stated it was the Freeman School Board's position that the posting of the agenda on the inside of the building satisfied the statute.

Mr. Harmon also stated that the School Board does in fact now post its agendas to its website. The School Board was unaware of the requirement prior to this complaint.

Mr. Steele clarified the agenda was posted several days before hand, but in a location that was only open to the public for a few hours each day. Mr. Harmon agreed that was the case.

Mr. Eisenbeis disagreed stating he felt that the Legislature would have worded the law differently and allowed for a total of twenty-four hours over a several day period before the meeting. Mr. Eisenbeis further said that there's really no question that it's the twenty-four hour period immediately before the meeting and that the agenda must be accessible for the full twenty-four hours.

Mr. Harmon inquired about how long the agenda needs to be posted on the website after the meeting has occurred. Mr. Steele and Mr. Krull indicated they were not aware of any rule on that issue.

Mr. Krull inquired regarding Mr. Harmon's opinion if the word "entire" in the statute does not mean continuous what does it mean? Mr. Harmon stated he felt it was ambiguous and thus it means at least twenty-four hours. Mr. Harmon continued to state that the Legislature could have been more clear.

Mr. Krull clarified with Mr. Eisenbeis that the area the agenda was posted was inside the school. Mr. Krull inquired if Mr. Eisenbeis had any dispute that the posting was at least three days prior to the meeting. Mr. Eisenbeis stated that he did not dispute that, but he was disputing the location of the posted agenda not being on the front door of the school building.

Mr. Reedstrom stated he wished the statute was more clear, and in this case there is no question that a notice was published in advance of the meeting, was visible and accessible for at least twenty-four hours or more, but not for the entire twenty-four continuous hours prior to the meeting.

Ms. Rothschadl was concerned that if you don't put the agenda in a window facing outward and an individual works the same hours as the school is open that individual has no opportunity to see the agenda. Mr. Reedstrom inquired about SDCL 17-3-1, which provides that each county have a bulletin board for posting legal notices, which are typically inside a courthouse and not open to the public twenty-four hours a day. Mr. Reedstrom wondered if open meeting statutes are contrary to that statute.

Mr. Steele stated he did not feel the Legislature meant you could post or have the agenda available for a few hours here each day and add them up to equal twenty-four hours. Chairman Steele felt the agenda should be visible and accessible for the entire twenty-four hour period immediately preceding the meeting. Mr. Steele stated his interpretation of the statute is that the notice should have been posted somewhere on the front door facing outwards so that anybody who came to the front door would be able to see it at any time of the day.

Ms. Sovell stated that some entities do not have an exterior window where an agenda can be posted, and the Legislature did not specifically require posting of an agenda facing outward on a glass window or door.

Ms. Sovell moved to find a violation for not posting the notice properly and timely on the school's website. Ms. Rothschadl seconded. Roll call vote was made with everyone voting aye.

Ms. Sovell moved to not find a violation regarding posting set forth in SDCL 1-25-1.1. Mr. Reedstrom seconded. Roll call was made with Ms. Sovell, Mr. Reedstrom and Mr. Krull voting aye. Mr. Steele and Ms. Rothschadl voting nay.

Steve Blair was directed to draft the findings and conclusions for the board.

#### In the Matter of Open Meeting Complaint 14-04, Plankinton School Board

Mr. Steele having referred this matter to the Commission excused himself from participating in the hearing. Lisa Rothschadl proceeded as Chairman for the hearing.

Attorney Rodney Freeman appeared on behalf of the Freeman School Board. Diana Spinar, Chairwomen of the Plankinton School Board (at the time of the complaint was the Vice-Chair), was also present. J.P. Studney, Jr. & Gayle Van Genderen appeared as Complainants.

Mr. Studney and Ms. Van Genderen stated that the complaint arose when the Plankinton School Board fired their Superintendent on May 14th. Mr. Studney

stated, however, the Plankinton School Board did not take official action upon that dismissal until June 9th. Mr. Studney felt there should have been a special meeting called to address the dismissal of the Superintendent. Mr. Stundey stated they were told by the Chairman of the Plankinton School Board that the vote was taken by phone without the Board calling an official meeting.

Ms. Rothschadl stated she was not a school attorney, but thought the law allowed relieving someone of their duties without an official board action. Mr. Reedstrom stated that had been his understanding as well.

Mr. Reedstrom inquired when it was that Mr. Studney was claiming there was an official meeting. Mr. Studney stated there was no official meeting and they were contending that the School Board took action without having a meeting. Mr. Studney alleged that the School Board Chairman or someone under his direction called around to the other School Board members to find out their opinion about the Chairman taking action against the Superintendent. Mr. Studney felt that a straw poll vote was taken to dismiss the Superintendent without an official meeting having been held.

Mr. Krull inquired how many of the seven School Board members were contacted. Mr. Studney stated he assumed that all of them were, but he did not know that for a fact. Mr. Reedstrom inquired regarding the time frame the School Board members contacted in. Mr. Studeny answered that he assumed it was between May 12 and 14 because the School Board had a meeting on May 12, at which they took no action to dismiss.

Mr. Freeman wanted to clarify a few matters and stated the Superintendent was not dismissed or fired on May 14, but that he was put on suspended leave with pay. The School Board then voted at the June meeting, which was properly noticed, to not renew the Superintendent's contract. Mr. Freeman stated that it was his opinion that the Superintendent was not entitled to any due process hearing before the School Board regarding the May action.

Mr. Freeman continued stating the School Board Chairman called him on May 13, specifically, asking if he could suspend the Superintendent and if he could call the others to let them know. Mr. Freeman told his client he could call individual School Board members. The Plankinton School Board Chairman called three board members and Ms. Spinar called the other two board members. Mr. Freeman stated that the Vice-Chair asked the Chairman if he wanted to call a special meeting.

Ms. Spinar stated at no point did the School Board Chairman ask what her opinion was or how should the suspension of the Superintendent be handled. Ms. Rothschadl inquired if a School Board Chairman needs approval to suspend. Mr. Freeman stated not to suspend with pay. Mr. Freeman stated

that approval was not needed he informed his client that it is not a violation of open meetings laws to individually inform the School Board members of the Chairman's decision.

Mr. Studney commented saying that the information presented to the Commission was contrary to what the School Board Chairman told him on the phone. According to Mr. Studeny, the School Board Chairman stated that the School Board took a vote and a majority of the School Board agreed that the Superintendent should be terminated. Mr. Studney stated that when the action came about no meeting had been held and that the Plankinton School Board did not take official action until six weeks later at the June meeting. Mr. Freeman clarified that a vote was taken at the June meeting not to renew the contract of the Superintendent, which was up at the end of the month.

Ms. Van Genderen inquired why there wasn't a special meeting held, which could have very easily happened since all the School Board members reside in the area. Ms. Van Genderen felt the School Board's action in June was retroactive to the May vote. Ms. Van Genderen inquired what the codify law was that gives the Chairman authority to dismiss a Superintendent without action by the full board.

Ms. Sovell inquired if Mr. Freeman knew what authority there was for a School Board Chairman to act without the action of the full board, and asked for Mr. Freeman's response to the allegation of the retroactive effect. Mr. Freeman answered that the June vote and meeting were completely different than what took place in May. The June vote was for non-renewal or to not offer the Superintendent another contract. Mr. Freeman continued stating the School Board Chairman had the authority to suspend the Superintendent with pay and that in that event the School Board didn't need to provide a due process hearing because they were not depriving him of his property which would be his salary. Mr. Freeman stated the School Board Chairman has that authority with every employee, but particularly with the Superintendent who answers directly to the School Board and the School Board Chair.

Mr. Krull inquired if Ms. Spinar was present when the School Board Chairman made the phone calls to the other School Board members. Ms. Spinar stated she was not, but that she had made some of the phone calls herself. Mr. Krull inquired what she said when she made those phone calls. Ms. Spinar stated she told the individuals she called what the School Board Chairman had told her and that the School Board Chairman wanted her to call to inform these other members of his decision. Mr. Krull inquired if Ms. Spinar had any knowledge of the conversation that the School Board Chairman had with the School Board members he called. Ms. Spinar stated she was not present when those phone calls were made.

Deliberation started and Mr. Reedstrom voiced his opinion that the Commission was without jurisdiction to find a violation if there was no meeting that took place. Mr. Reedstrom's understanding of the facts of the complaint was that there was never a quorum, and he disagreed with the idea that board members cannot do things outside of meetings.

Ms. Sovell agreed with Mr. Reedstrom and felt there was not enough proof to say that the School Board was in fact having a meeting and that it failed to provide proper notice.

Ms. Rothschadl inquired to Ms. Spinar for clarification if the Chairman of the Plankinton School Board had asked her to call him back and tell him what the two people she contacted had said. Ms. Spinar stated the School Board Chairman did call her back and wanted to know if she had informed them and she stated that she had.

Emily Sovell motioned to not find a violation in light of the fact that a meeting was not held. Mr. Reedstrom seconded. Roll call was called and all voted ayes.

Steve Blair was directed to draft the findings and conclusions for the board.

#### Election of OMC Chairman.

Rothschadl nominated Sovell. Krull seconded. A roll call was conducted and all members voted in favor. Ms. Sovell will serve starting January 1, 2015, for next year.


#### Scheduling.

After discussion the OMC agreed to hold off on scheduling a meeting until there are one or more cases to be heard.

#### Adjournment.

A motion to adjourn was made at approximately 12:15 p.m. All voted in favor and the Commission adjourned.

Approved on Mar 5, 2015.

  
Emily Sovell, Chairman  
On behalf of the Open Meeting Commission