

August 2, 2008

STATE OF SOUTH DAKOTA

OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETING)	FINDINGS OF FACT,
COMPLAINT 05-07, LAWRENCE)	CONCLUSIONS OF LAW
COUNTY COMMISSION)	AND DETERMINATION
)	OF NO VIOLATION

Glenn Brenner, Commission Member

INTRODUCTION

Pursuant to SDCL § 1-25-1, the meetings of local governing bodies must occur in a public forum. SDCL § 1-25-1.1 further requires all public bodies to “provide public notice, with proposed agenda, at least twenty-four hours prior to any meeting . . .” A violation of either of these statutes is a Class 2 misdemeanor. The Complainant in this matter contends that the Lawrence County Commission violated both of these provisions on several occasions throughout 2005. We must now determine whether the Lawrence County Commission has committed any violations of the open meetings laws.

FINDINGS OF FACT

On May 10, 2006, the Open Meetings Commission heard oral presentations concerning allegations made by Greg Nepstad, Assistant Chief of the Nemo Volunteer Fire Department and former Vice-Chairperson of the Lawrence County Fire Advisory Board, against the Lawrence County Commission. Mr. Nepstad sent his complaint to Lawrence County State’s Attorney John Fitzgerald on June 9, 2005. Due to a conflict of interest, Mr. Fitzgerald referred the complaint to Lance Russell, the Fall River County

State's Attorney. After reviewing the allegations, Mr. Russell decided against prosecuting the case but sent the complaint on to the Open Meetings Commission for further review on December 22, 2005.

Essentially, Mr. Nepstad's complaint posits six allegations of open meetings law violations by the Lawrence County Commission. Mr. Nepstad first contends that at the Lawrence County Commission meeting on March 8, 2005, the Commissioners violated the open meetings law by proposing a new constitution and bylaws for the Lawrence County Fire Advisory Board without obtaining any input from the Fire Advisory Board or other interested parties when drafting the documents. According to Mr. Nepstad, the circumstances evidence that the Commission members had all reviewed and discussed the Constitution and bylaws before addressing the matter in a public forum.

The minutes of the March 8 meeting reflect that the County Commission discussed the proposed changes but took no further action regarding the proposed constitution and bylaws. Instead, a motion was passed allowing two weeks for interested parties to provide written comments on the matter. At the following meeting on March 22, 2005, the minutes show that the County Commission examined the proposed constitution and bylaws in detail prior to ratifying the documents and preparing to send them to the Fire Advisory Board for signatures and ratification before the April 26, 2005 meeting. The proposed agendas of both the March 8 and March 22 meetings provided the public with specific notice of these matters.

Mr. Nepstad asserts that another violation occurred when County Commission Chairperson Robert Ewing excluded television cameras from the March 8 meeting. When discussing this matter before the Open Meetings Commission, however, Mr.

Nepstad confirmed that although cameras were excluded, the media were allowed to be present for the entirety of the meeting. Further, during Lawrence County Deputy State's Attorney Bruce Outka's presentation to the Open Meetings Commission, he explained that Chairperson Ewing asked the camera crews to leave the room due to the amount of people in attendance at the meeting and that the media were not asked to leave the room at any time during the meeting. Only the camera crews were excluded.

Mr. Nepstad's next allegation concerns statements attributed to Chairperson Ewing regarding the redistribution of funds used for the Fire Advisory Board's budget in a newspaper article written by Scott Randolph, a reporter for the Black Hills Pioneer. The relevant portion of this article states as follows:

In an interview after the board meeting, County Commission Chairperson Bob Ewing said the intent of the board now is to distribute that money based on how much of it is raised from property tax on rural private lands in fire protection districts. The money would be distributed based on the amount raised in each district.

Scott Randolph, County Adopts New Fire Advisory Board Constitution, Black Hills Pioneer, Mar. 24, 2005. Mr. Nepstad asserts that because the distribution of these funds was never discussed at a public meeting, the County Commission must have discussed the matter and come to a decision outside a public forum.

The next two allegations in Mr. Nepstad's complaint concern similar issues arising from actions taken by the County Commission at the April 26, 2005 meeting. First, Mr. Nepstad avers that the Commission dissolved the Fire Advisory Board without providing the public with proper notice. Both parties agree that at this meeting, the Commission voted to dissolve the Fire Advisory Board under the agenda heading of "Vouchers, Travel Requests, Pending Matters,

General Business.” Similarly, Mr. Nepstad contends that another notification violation occurred when the County Commission effectively terminated the Bear Ridge Volunteer Fire Department under the same agenda heading at the same meeting. The Lawrence County Commission maintains that, under the circumstances, the actions it took regarding the Fire Advisory Board and Bear Ridge Volunteer Fire Department at the April 26 meeting violated no open meetings laws.

The final contention in Mr. Nepstad’s complaint alleges that the County Commission also failed to properly notify the public of a special meeting held on May 17, 2005. However, because Mr. Nepstad withdrew this portion of his complaint during his oral presentation before the Open Meetings Commission on May 10, 2006, no further discussion of this allegation is necessary.

In response to Mr. Nepstad’s allegations, Lawrence County Deputy State’s Attorney Bruce Outka sent a letter to the Open Meetings Commission on behalf of the Lawrence County Commission dated January 27, 2006. This letter refutes all of Mr. Nepstad’s allegations and argues that the County Commission has not committed any violation of the open meetings law. We will discuss the relevant portions of Mr. Outka’s letter in further detail below.

DISCUSSION AND CONCLUSION

As a public entity, the Lawrence County Commission must comply with the requirements of the open meetings laws. Applicable to the present matter are SDCL §§ 1-25-1 and 1-25-1.1. SDCL § 1-25-1, in pertinent part, sets forth the general requirement that meetings must take place in a public forum. SDCL § 1-

25-1.1 further mandates that the Commission “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”

Mr. Nepstad’s first contention is that the Lawrence County Commission somehow violated the open meetings law by proposing a new constitution and bylaws for the Fire Advisory Board at its March 8, 2005 meeting. However, an application of the law to the facts of this case belies this contention. The law required that the meeting be open to the public, which it was, and that the public receive notice of the meeting, with a proposed agenda, at least twenty-four hours in advance of the meeting. As Mr. Nepstad confirmed during his presentation before Open Meetings Commission meeting on May 10, 2006, he learned about the proposed changes to the bylaws and constitution from the agenda that the County Commission provided prior to the March 8 meeting.

Although Mr. Nepstad may be offended that the County Commission did not invite the Fire Advisory Board to participate in drafting the new constitution and bylaws presented at the March 8 meeting, the open meetings laws do not require such an invitation. Further, as Mr. Outka’s response letter points out and the meeting minutes reflect, the County Commission did nothing more at the March 8 meeting than discuss the proposed changes and pass a motion allowing two weeks for interested parties to provide written comments concerning the new constitution and bylaws. As a public body, the Lawrence County Commission had the burden of holding the meeting in a public forum and providing notice of

the meeting through a proposed agenda twenty-four hours in advance of the meeting. The County Commission met both of these requirements at the March 8 meeting.

Mr. Nepstad's second allegation is that a violation of the open meetings law occurred when Chairperson Ewing excluded television cameras from the March 8 meeting. However, during his presentation to the Open Meetings Commission, when asked if media were allowed into the room at the March 8 meeting, Mr. Nepstad responded, "Absolutely, yes." Mr. Nepstad also clarified that the media were never asked to leave the meeting. During Mr. Outka's presentation to the Open Meetings Commission, he explained that Chairperson Ewing asked the camera crews to leave the room due to the amount of people in attendance at the meeting. Mr. Outka also added that the media were not asked to leave the room at any time during the meeting; only the camera crews were excluded. These facts evidence that the County Commission did not violate any open meetings laws by asking the camera crews to leave the room at the March 8 meeting. Because Mr. Outka did not actually exclude the media or any other member of the public, no violation occurred.

Mr. Nepstad's third allegation concerns statements attributed to Chairperson Ewing in a newspaper article regarding the County Commission's intent to redistribute fire levy funds that had previously been allocated to the Fire Advisory Board. According to Mr. Nepstad, these statements show that the County Commission discussed the matter and made a decision regarding how these funds would be allocated outside a public forum. This allegation is also

untenable. As Mr. Outka points out in his response letter, Nepstad's supposition that the County Commission improperly decided how these funds were to be allocated based solely on the reported statements of Chairperson Ewing is not logically sound. It is much more likely that these statements, made after the March 22 County Commission meeting and not encapsulated in quotes, were nothing more than a characterization of Commissioner Ewing's opinion on the matter. The newspaper article, by itself, falls far short of providing sufficient evidence of an open meetings violation. Because the newspaper article is the only evidence offered in support of this allegation, we find that no violation occurred.

Mr. Nepstad's remaining allegations are interrelated and stem from actions taken at the County Commission meeting on April 26, 2005. Mr. Nepstad contends that the County Commission dissolved the Fire Advisory Board and effectively terminated the Bear Ridge Volunteer Fire Department without properly including either matter in the proposed agenda for this meeting. According to each party, the Commission voted to act on both matters under the heading entitled "Vouchers, Travel Requests, Pending Matters, General Business." While Mr. Nepstad argues that dissolving the Fire Advisory Board and eliminating the Bear Ridge Volunteer Fire Department under such a heading violated the notice requirements set forth in SDCL § 1-25-1.1, Mr. Outka and the County Commission maintain that proper notice was given under the circumstances.

In In the Matter of Open Meeting Complaint 04-01, City of Lead, this Commission, applying SDCL § 1-25-1.1, stated that "items of official action must

be preceded by public notice through the agenda process.” We then went on to find that the City Commission violated this requirement by approving a Special Permit for a performance by Williams and Ree without including the matter in its agenda. In In the Matter of Open Meeting Complaint 05-01, Town of Herrick, we also found a violation of SDCL § 1-25-1.1 when the Town Board of Herrick held a special meeting without providing notice of the meeting.

The instant matter differs significantly from both City of Lead and Town of Herrick. Here, the County Commission did not simply decide to take action without ever providing notice to the public through the agenda process. Rather, the County Commission acted to eliminate the Fire Advisory Board and Bear Ridge Volunteer Fire Department under the general heading of “Vouchers, Travel Requests, Pending Matters, General Business” only after previously discussing the issues concerning both entities in several public forums. To provide context for the matter in question, we will consider the relevant circumstances leading up to the April 26 meeting below.

As Mr. Outka correctly states in his response letter, “specific discussion of Bear Ridge was a subset of the discussion of the constitution and bylaws” for the Fire Advisory Board. In 2004, the County Commission ratified a Fire Response Boundary Map, which had been developed and recommended by the Fire Advisory Board. On this map, Bear Ridge was given no designated fire district in the county. Because the new constitution and bylaws promulgated that the Fire Advisory Board’s membership would include only those fire departments with a

designated fire district in Lawrence County, Bear Ridge's future was necessarily put in jeopardy.

Not surprisingly, then, discussion of the Fire Advisory Board's new constitution and bylaws precipitated discussion of Bear Ridge's future from the outset. At the March 8 meeting, the minutes reflect that while discussing the new constitution and bylaws, Fire Advisory Board Chairperson Charles Nicholas "expressed concerns that Bear Ridge would not be part of the Fire Advisory Board because they are not a designated fire protection area in the County." Further, Lawrence County Auditor Connie Atkinson's handwritten notes from the March 8 County Commission meeting show that someone at the meeting, likely Mr. Nicholas, requested that a Commission member discuss the new constitution and bylaws and their effect on Bear Ridge at the Fire Advisory Board meeting that evening. According to Mr. Outka's letter, Commission Chairperson Ewing, Commissioner Seward, and he all attended the March 8 Fire Advisory Board meeting to discuss these matters, and the minutes of the March 8 Fire Advisory Board meeting state that the County Commission requested written comments before its March 22 meeting.

After further discussion at a special meeting on March 13, the Fire Advisory Board sent the County Commission a letter, dated March 14, 2005, recommending "that the Bear Ridge Fire Department continue to operate as an organized fire department with a wildland fire response area." Mr. Nicholas sent an additional letter to the County Commission on March 20, 2005, stating that "[y]our proposed elimination for the Bear Ridge Fire Department leaves us

speechless.” Before its March 22 meeting, the County Commission also received letters and emails from other interested parties, including Mr. Nepstad and his wife, Virginia Clark, as well as the Brownsville Fire Department.

At its March 22 meeting, the County Commission discussed the new constitution and bylaws in detail before approving both. The minutes from this meeting reflect that a motion was then passed to send copies of the constitution and bylaws to the fire departments eligible for membership on the Fire Advisory Board to sign and ratify prior to the April 26 County Commission meeting. In his response letter, Mr. Outka states that the County Commission announced at this meeting that those fire departments eligible for membership on the Fire Advisory Board had to ratify the new constitution and bylaws before the April 26 County Commission meeting “as a prerequisite for membership,” and Mr. Nepstad, who was present at the March 22 meeting, acknowledged during his oral presentation to this Commission that “the County Commission said the Board had until April 26 to sign the new constitution and bylaws.”

Ms. Atkinson’s handwritten notes from the March 22 meeting also show that Mr. Nicholas “asked when Bear Ridge would be done.” These notes further reflect that after first responding that Bear Ridge’s elimination would be “effective immediately,” Chairperson Ewing withdrew his statement and stated that the status quo would be in effect until the April 26 County Commission meeting.

Additionally, Ms. Atkinson’s notes from the March 22 meeting evidence that Mr. Nicholas requested the presence of a County Commission member at the

next Fire Advisory Board meeting on April 12, 2005. The minutes from the April 12 Fire Advisory Board meeting reflect that Chairperson Ewing was in attendance and led a discussion regarding the new constitution and bylaws. These minutes also state that the “new By-Laws [sic] must be signed by April 26, 2005.”

After the County Commission meeting on March 22, Mr. Nepstad sent an email to a number of interested parties stating that the “Bear Ridge Fire Department will be eliminated” and asking “every fire department not to sign these proposed Constitution and By-Laws [sic]” Later, on March 31, 2005, after holding a special meeting on March 30, the Fire Advisory Board sent a letter to the County Commission in regard to the new constitution and bylaws stating that “[a] consequence of the proposed changes by the Lawrence County Commission will eliminate an existing certified South Dakota Fire Department that provides a much needed service to Lawrence County. We will not support any action to this end.”

With this backdrop, the County Commission addressed matters concerning the Fire Advisory Board at its April 26 meeting under the agenda heading entitled “Vouchers, Travel Requests, Pending Matters, General Business.” The minutes from this meeting state that because “the Board of County Commissioners have [sic] not received any signed agreements, by-laws, [and] constitutions, the Fire Advisory Board is hereby dissolved” Thereafter, the County Commission effectively eliminated the Bear Ridge Volunteer Fire Department by passing a motion to cancel “all state contracts the County has signed on behalf of Bear

Ridge” and to cease providing Worker’s Compensation coverage to Bear Ridge on April 30, 2005.

In his response letter, Mr. Outka points out that only one fire department was represented at the April 26 meeting, which happened to be the only fire department to vote against sending the March 31 letter to the County Commission. Mr. Outka explains the situation as follows:

Based upon the letter from the Fire Advisory Board dated March 31, 2005 . . . and owing to the absence of all but one fire department, the Commission took action to dissolve the Fire Advisory Board. For what is the point of a board with no membership?

Mr. Outka also suggests that the presence of only one fire department at the meeting was not due to a lack of notice, but rather occurred because the Fire Advisory Board “intended to include a message to the Commission that its anticipated action that day was objectionable.”

Although Mr. Nepstad acknowledges that the County Commission had previously stated at the March 22 meeting that the Fire Advisory Board had until April 26 to sign the constitution and bylaws, he maintains that he and other members of the Fire Advisory Board were unaware that the Board would be dissolved if its constitution and bylaws were not signed and ratified by the April 26 deadline. During his presentation to the Open Meetings Commission on May 10, 2006, Mr. Nepstad explained that the Fire Advisory Board had assumed “that there would be more discussion on this matter rather than just dissolving the board.”

Whatever the Fire Advisory Board’s assumptions may have been, the County Commission’s actions at the April 26 meeting did not violate any open

meetings laws. Pursuant to SDCL § 1-25-1.1, the County Commission was obliged to “provide public notice, with proposed agenda, at least twenty-four hours prior to any meeting” As we stated in City of Lead, this statute requires that “items of official action must be preceded by public notice through the agenda process.” In the instant matter, the Lawrence County Commission fully complied with SDCL § 1-25-1.1 by posting a proposed agenda twenty-four hours before the meeting in question and addressing each item of discussion under one of the agenda headings.

In reaching our decision, it is important to note that the circumstances presented here do not evidence that the County Commission attempted to mislead the public or circumvent actual compliance with the law by acting on these matters under the heading of “Vouchers, Travel Requests, Pending Matters, General Business.” Moreover, the County Commission did not simply put an end to the Fire Advisory Board and Bear Ridge Volunteer Fire Department under this general heading without any previous discussion in a public forum. Rather, the issues concerning the Fire Advisory Board, and, consequently, the Bear Ridge Volunteer Fire Department, were addressed and specifically agendized at both the March 8 and March 22 meetings. Members from the County Commission also attended at least two Fire Advisory Board meetings to further discuss the Fire Advisory Board’s new constitution and bylaws and the future of the Bear Ridge Fire Department after these documents went into effect.

In light of the County Commission’s actions concerning these matters, as well as the reactions from members of the Fire Advisory Board, the assertion that

interested parties had no notice that issues concerning the Fire Advisory Board and the Bear Ridge Volunteer Fire Department would be taken up at the April 26 meeting is untenable. Furthermore, anyone in the general public who had been following these matters closely could have learned that issues concerning the Fire Advisory Board would be addressed at this meeting without much difficulty. While the Lawrence County Commission's proposed agenda for the April 26 meeting certainly could have been more specific, the law does not require that agendas meet the highest possible level of specificity. The law simply requires that public notice be provided through a proposed agenda twenty-four hours in advance of any meeting of a public body. See SDCL § 1-25-1.1. Under the circumstances, the County Commission's proposed agenda met this requirement.

Based on the foregoing Findings of Fact and Conclusions of Law, this Commission determines that the Lawrence County Commission has committed no violation of the open meetings laws.

Commissioners Rothschadl and Beck, concur.

Commissioner Reedstrom does not participate in this decision, having not been a member of the Open Meeting Commission when this matter was heard.

Commissioner Steele dissents, as follows:

I have reviewed the Lawrence County decision. I concur with most of it, but I am not quite comfortable with the treatment of the last issue, whether the elimination of the

Bear Ridge Fire Department and the Fire Advisory Board should have been a specific agenda item or could properly go under "general business." I am almost, but not quite, persuaded by the points that (1) the elimination of the department and board was implicit in other actions that the commission had taken earlier (eliminating its service territory, , e.g. for the department, and giving it a deadline to approve a constitution, in the case of the board) and (2) that the whole issue had been aired in properly noticed public forums which makes it seem as if the decision to eliminate the department/board was a housekeeping measure that could well be under general business; a formality to give effect to substantive decisions that had already been made, and (3) that the principal players in the controversy had actual notice that the issue was going to be decided, whether it was listed as an agenda item or not.

It could just as well, however, have been viewed by those who opposed the elimination, if it had been on the agenda, as their last chance to mobilize opposition and get the citizenry to show up *en masse* at the court house to tell the commissioners that they did not want it done. That makes me think that it should have been an agenda item and I do not think that we should speculate on who would have been there or not if it had been properly on the agenda. Moreover, I don't know of any reason why it could not have been on the agenda if it was going to be acted on. Perhaps it was just overlooked when the agenda was prepared. If that is the case, and there was no urgency in considering it, it should have been postponed to the next meeting and properly listed on the agenda for that meeting.

It seems to me that the fact that this issue was a fairly high profile issue which had been aired at previous public meetings is not a reason for dispensing with notice but, on the contrary, a reason for thinking that it should NOT be treated under "general business." The opinion as drafted is correct that the law does not require that "agendas meet the highest level of specificity," and its implicit assertion that some things should be subject to being handled under "general business" or some other "catch all" category. I am unconvinced that the elimination of the fire department and advisory board in this case fell into that category. I think that they should have been listed as agenda items.