# SOUTH DAKOTA OPEN MEETING COMMISSION MINUTES OF MEETING

### December 7, 2011

Sioux Falls City Library-Main Branch-200 N. Main Ave.

Members present in person: Mark Reedstrom, Grant County State's Attorney (Chairman); Lisa Rothschadl, Bon Homme County State's Attorney; John Steele, Aurora County State's Attorney. Members appearing by telephone: Glenn Brenner, Pennington County State's Attorney; Emily Sovell, Sully County State's Attorney. Diane Best assisted the Commission.

The meeting was called to order at 1:33.

Chairman Reedstrom explained that the agenda would be revised to handle the Willow Lake School District item first. Also the parties in the Aberdeen matter had consented to consolidate the two Aberdeen items into one set of presentations. He explained that the rest of the agenda would remain in order. Rothschadl moved to approve the revised agenda; Steele seconded the motion and it was approved.

# Matter of Open Meeting Complaint 11-05, Willow Lake School Board

Diane Best provided the Board with a letter received from Cheryl Hovde on December 6. This was after the OMC members had received copies of the rest of the file.

Scott Swier appeared on behalf of the Complainant, Marshall Edelman. He represents Mr. Edelman in his personal capacity. He explained that the complaint concerned three meetings of the Willow Lake School Board. The first was December 20, 2010. There was a meeting with the school staff and administration and all School Board members. There was no agenda and they had not provided the public with notice of the meeting. Swier stated that this constitutes a violation of SDCL 1-25-1.1 and 1-25-3.

The second meeting was on January 11, 2011. This was a second meeting with the school staff and administration and School Board members, but this time there were three of the five board members. There was no agenda and they had not provided the public with notice of the meeting. Swier stated that this constitutes a violation of SDCL 1-25-1.1 and 1-25-3.

The third meeting was on February 23, 2011. The School Board called an emergency meeting to discuss a student issue. Notice was given to the media. An agenda was posted. But the main door to the building was not open. Edelman came to the school for the Board meeting and someone from inside

the building let him in. He was told that the issue being discussed was a personnel issue and was already in executive session. Swier stated that this constitutes a violation of SDCL 1-25-1 in that the meeting was literally not open—the door was locked. Even though the School Board was in executive session, the public did not have the opportunity to observe the Board convene and vote to go into executive session.

Steele inquired whether other doors were open. Swier explained that there were other access doors; one was open on the side. But it was a cold night and the main door wasn't open. For regular meetings the School Board comes in this main door.

Steele further inquired whether the meeting was properly called to order and whether the School Board moved to go into executive session. Swier stated that the minutes reflect the School Board went into executive session at 8:24 pm and there was a motion to do so for personnel reasons.

Rothschadl stated that the written response from School Board member Sandra Hovde stated that the school had 12 doors. Was there a security concern? Swier stated that he didn't know the intent of locking the door. The agenda was posted on that the main door and yet it was not open.

Reedstrom stated that there was 2010 legislation requiring public bodies to cite the statutory basis for going into executive session. And there should be a reason stated. Here there may be an issue as to whether this was a personnel matter or a student issue.

Brenner inquired whether Edelman was waiving the issue of whether there was a proper emergency basis for the meeting –and whether the posting was proper for the meeting. Swier stated that the State's Attorney reviewing the matter had found that there was not a violation but that Edelman wants the OMC to independently find a violation occurred.

<u>Sandra Hovde</u>, a school board member, appeared pro se. She stated that the current School Board had voted to prohibit using Board Counsel to defend this matter.

Hovde stated that the date for the first matter in concern was December 21, not December 20. The regular School Board meeting was on the 20<sup>th</sup> and at that meeting the School Board stated that they would have a meeting with staff the next day to fill them in on the financial circumstances of the school. The meeting with the staff and administration was posted on wikispaces.com. The School Board meeting with staff was held on the 21<sup>st</sup>.

Sandra Hovde explained that the second item also involved a situation where the School Board addressed funding at its regular meeting and then met with staff at the school the next day as a follow up.

As for the third issue, Hovde explained that she and other School Board members entered the meeting room from outside the Superintendent's office. This is where executive sessions have typically been held.

Hovde explained that the agenda was on the main door of the building. Allegations were made that the School Board took down the agenda to use it for scratch paper during the meeting, but actually the School Board found that they needed a copy of the agenda to use to conduct their business and that is why it was taken down. She also explained that the executive session was for both personnel and student discipline issues. The issue was how to instruct a staff member on handling a student about participation in an extracurricular matter.

Reedstrom inquired as to whether other people were at the school to let people into the school at the third meeting in question. Hovde stated that cleaning staff would have been at the school.

Reedstrom asked whether the doors that were locked were the logical place to go. Hovde stated that the front doors are the main entrance, but that other doors were next to it and were open on the same side of the school.

Rothschadl inquired whether the doors had glass panels so people could see which areas were dark and which were not? Hovde stated that they did have glass panels.

Brenner asked about the need for an emergency meeting. Hovde explained that the issue was how to instruct a staff member on handling a student who was due to participate in an extracurricular matter the next day.

<u>Jessica Michalski</u>, another School Board member, testified. She reiterated that the current School Board had denied the ability to use Board Counsel to respond to the OMC and had voted to admit the allegations in the complaint. The Complainant, Edelman, is now on the School Board and he and other new board members voted this way.

Michalski stated that the two School Board meetings with the staff were when the school was under financial stress. No motions or decisions were made.

She further stated that the OMC complaint was the subject of an article in the local newspaper in March 2011 and that the Sheriff's office had gone to her house three times to see her on this and she wasn't home but her children were. The children were concerned that their mother was under investigation

for a crime by being on the School Board. She stated that if the OMC believes violations have occurred, no reprimand should be issued—the newspaper articles and the Sheriff's visits should be enough action against her.

Brenner stated that the process is formed to provide an alternative to criminal complaints. Usually the complaints don't involve malicious acts. There have been reprimands for unintentional failures in the past.

Michalski stated that the State's Attorney had sent the Sheriff to her home when he knew she wouldn't be at home.

Steele asked Michalski how she knew the February meeting in question would be in the superintendent's office. Michalski stated that she got a call stating that the meeting would be in that office.

Steele asked whether the agenda specified the meeting would be in that particular room. Hovde stated that she didn't think it did.

Steele asked if the superintendent door was the only one that was unlocked. Hovde and Michalski responded that they didn't know.

Swier waived rebuttal comments.

The Board deliberated. Chairman Reedstrom stated that the first two items were essentially admitted. There was no notice posted. There were reasons the School Board met with staff, but there was still an open meeting violation. He further stated that as to the third item, the locked door might have been an oversight. Some doors were open. The main door should have been open, but he wasn't convinced that constitutes a violation.

Steele said that the ideal would have been for the doors to be open. The minimum standard was met. A door was open to the building. Steele also stated that as for the first and second meetings, the School Board's intentions were commendable in keeping staff and the administration informed. But where there is a quorum and business is discussed there must be notice under the open meeting law.

Rothschadl agreed that a reprimand was in order on the first and second items, but noted that the matter was not intentional. She stated that she was baffled by the door issue on the third item. Edelman was let into the building; other people were in the building. She stated that she would not find a violation on the third issue.

Brenner concurred. He stated that the first and second allegations were somewhat admitted. There were good intentions, but not the proper notice.

The door issue appeared to be an inadvertent issue stemming from the emergency nature of the meeting. He also stated that he does not condone the actions of Edelman. Brenner stated that if it was his county commission, he'd find that there was a conflict of interest. However, the OMC has no ability to address the conflict issue.

Sovell concurred, including the conflict of interest comment.

Steele moved to find that the School Board violated the open meeting law on two occasions and to issue a reprimand on them, but to find that there was no violation on the third. Rothschadl seconded. A roll call vote was made and all members voted in favor of the motion.

The OMC asked Diane Best to draft findings.

Matter of Open Meeting Complaints 11-06 and 11-07, Aberdeen City Commission and Aberdeen Planning Commission.

Complaint 11-06 involves two counts for conduct on September 15 and 16, 2008. Complaint 11-07 involves two counts for conduct on July 27 and September 8, 2009. Betty Breck filed both complaints.

Betty Breck asked that the allegations in the first count in Complaint 11-07 be considered according to the Board's summary procedure. Chairman Reedstrom told her to go ahead and address all counts.

Ms. Breck stated that she would rely on the record for the first count of 11-07, which was admitted.

Breck stated that the other three counts for both 11-06 and 11-07 relate to the issue of whether agenda must be visible for 24 hours in advance of a meeting. She asked the Board to overrule its' previous decision in *In the Matter of Open Meeting Complaint 08-03, Brown County Commission.* 

Breck stated that she was relying on a commonsense interpretation of SDCL 1-25-1 which requires that "public bodies shall provide public notice, with proposed agenda, at least 24 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." She also relied on the 2007 Attorney General Report on the Status of Open Government and also on prior decisions of the OMC and the brochure distributed by the Attorney General's office.

She also stated that the OMC prior reliance on SDCL ch. 17-3 was flawed in the *Brown County* decision. She pointed out that in other states where this type of issue has come up, posting on a bulletin board inside a building was found appropriate only where there was also other notice to the public. She further

stated that the *Brown County* decision relied heavily on SDCL ch. 17-3-2 and it applies only to county bulletin boards, so it should not apply to these city cases.

Breck also stated that the *Brown County* decision was based on inaccurate information. Brown County itself did not have a designated bulletin board at the time.

Breck stated that posting under SDCL 17-3-2 is not applicable and notice must be done under SDCL ch. 1-25. Buildings need not be open to make agendas visible; posting can be outside or on windows. Lighting is not required; flashlights can be used if necessary.

She further stated that posting inside buildings during business hours is inconvenient and the public should be able to see agendas at night. Also many public entities are required to meet on Mondays. The doors are locked and bulletin boards cannot be viewed over the weekend. She stated that in some cases agendas are in the newspapers, but that is not adequate notice under SDCL ch. 1-25 and the OMC has held that to be so in an earlier case.

Ms. Breck asked Keith Jensen to testify as to legislative intent.

Keith Jensen testified. He was the manager of the South Dakota Newspaper Association from 1980 to 1986. In 1987 the law was passed requiring posting agendas. In 1990 it was amended to require the posting 24 hours in advance. It was the intent that a citizen should have the full 24 hours in advance of a meeting to find out the material in the agenda. It was always intended that the agenda should be visible for the full 24 hours. Jensen stated that the law is unambiguous. He submitted affidavits from prior legislators who explained that the intent of the law was to make the agenda visible for the full 24 hours.

Reedstrom inquired whether the currently pending cases involve a situation where the agendas were actually posted 24 hours in advance. Breck stated that she does not dispute that. They were likely posted on Friday and were posted on a bulletin board inside city hall. This would have allowed the public to view the agendas on Monday during the day. And, for one of the complaints, there was a holiday, so the only viewing would have been about 1.5 hours.

Adam Altman, Aberdeen City Attorney, appeared on behalf of the city.

He stated that if there was an objection to the OMC decision in *Brown County 08-03* Ms. Breck should have sought review then such as a writ of certiorari. There was no review. Public bodies ought to be able to rely on this former OMC decision.

Altman stated that the City currently posts agendas so they are visible outside the building and has done so since 2009. However, if they were unable to post in front of the building, then they would have to post inside and do it three business days in advance (3 days x 8 hours) to meet the 24 hour requirement.

Altman stated that he doesn't know Ms. Breck's motives, but she should have contacted the city. The city should be able to rely on the OMC's prior decision in the Brown County matter 08-03.

The City not only posts agendas on the glass exterior door, but also posts online.

As to the other count that is at issue, the City realized there was a clerical error on the posting and called the press. They suspended the meeting until the press could come. He said that that the OMC reprimands typically go to the public body as a whole, but noted that the Mayor and one of the city council members were not present at this particular meeting.

## Keith Jensen presented rebuttal.

Jensen was not aware of the *Brown County* decision at the time it was issued. He stated that the issue can now be decided in the current matter since it involves violations of making the agenda visible 24 hours in advance.

Steele referred to townships, stating that it is difficult for them to comply. They sometimes meet in private homes.

Reedstrom stated that requiring the agendas to be visible 24 hours in advance of meetings would require notice to be on the outside of buildings. The law may be 24 hours in advance, but it doesn't say "continually."

Ms. Breck stated that she is asking for a change in the OMC stance on visibility.

Reedstrom asked Ms. Breck if the OMC should reprimand City of Aberdeen if the OMC overturns the Brown County decision—realizing that the city relied on OMC precedent in the Brown county case. Ms. Breck stated that she is mainly concerned about precedent and that she doesn't necessarily think the City ought to be reprimanded if it relied on the *Brown County* decision.

#### OMC took a break.

Diane Best put email correspondence in the record that she had had with Ms. Breck. Ms. Breck had asked about the procedure for bringing the Brown County 08-03 matter itself back for reconsideration and the Best response explained there was no process for bringing the Brown County Commission

back before the OMC to respond to the same allegations again. Best explained that here email explained to Ms. Breck that she can ask the OMC can overrule its decisions in new cases--without needing to bring the original party back to the OMC. However, Best stated that she did not take a position on whether the OMC should actually overrule its prior decision.

The OMC deliberated.

Brenner stated that the OMC need not overturn the *Brown County* decision. The agenda does not need to be posted on glass doors.

Steele stated that he was concerned about situations where the agenda is posted on a Friday at 5 pm and the meeting is Monday at 8 am. There is technical compliance, but the public is not informed.

Brenner stated that maybe a legislative change is necessary.

Rothschadl stated that to make a notice visible for 24 hours, if would have to be made three days in advance if it was posted on an inside bulletin board.

Steele stated that he was not aware of a situation where it could not be posted 24 hours and that a mistake was made in the earlier *Brown County* decision.

Reedstrom stated that this is a matter of statutory construction. One way of construing the statute is that it requires posting 24 hours in advance and the agenda should be visible the whole time. The proposed interpretation would interpret the law in the most restrictive way and accuse people of wrongdoing if they did not comply with that this interpretation. This would create an issue when notices are posted at 5 pm for the Monday am meetings. But the process here is one that involves proof of accusations of wrongdoing and stems from criminal complaints. This would be adopting the most restrictive interpretation and it would be adding language to the law.

Steele stated that he was being persuaded to think the initial decision in the Brown County matter was wrong. The statute uses the words "publicly visible." But it would be manifestly unfair for the City of Aberdeen to rely on the prior OMC decision and then for the OMC to find them wrong for their reliance. The OMC should find that the actions of the City did not comport with the open meeting law, but that no reprimand is required due to the good faith reliance on the Brown County decisions.

Brenner stated that if meetings are regularly held on Mondays the OMC could adopt a requirement of 24 "business hours," but that is not what the legislature requires. Brenner further stated that the current law was not intended to require the notices to be visible for the full 24 hours and that he was not going to overturn the OMC prior decision.

Sovell concurred with Brenner. Changes should go to the legislature if necessary.

Rothschadl stated that the legislature should be asked to make changes if necessary.

Reedstrom stated that any changes should be legislative changes.

Brenner moved to find no violations on three of the four counts alleged in the two complaints and to issue a reprimand for the third count (the first count of the second complaint). Reedstrom seconded the motion.

A roll call vote was made and all members voted in favor of the motion.

Steele moved to include language in the OMC's order finding that the Brown County decision was wrong, but that Aberdeen acted in good faith and should not be reprimanded. This motion died for lack of a second.

Brenner noted that the legislative fix is to insert the word "business" in the law between the words "twenty-four" and "hours."

Adam Altman stated that he would prepare findings if the OMC wished. Chairman Reedstrom asked him to do so.

Matter of Open Meeting Complaint 11-04, Silver Creek Township (Mark Snedeker and Robert Davis)

Rothschadl moved to approve the draft Findings of Fact and Conclusions of Law. Brenner seconded the motion.

Brenner commented that the draft Findings reflect that inquiry had been made on the issue raised at the last meeting.

Diane Best explained that the issue at the last meeting involved township authority. Mr. Snedeker and Mr. Davis had claimed that the two members of a township board may meet for purposes of undertaking maintenance activities of less than \$2500 without conducting an official meeting of the township. They relied on the Township Association Manual.

Best explained that the OMC had delayed a decision, directing her to obtain a copy of the Township Manual and review the issue further. She stated that she had obtained a copy of the Manual and reviewed the statutes. She also contacted the parties and asked them if they had any more authority on this issue and they did not respond. She stated that there was no statute on this particular matter but noted that there is an exemption from the bid laws for

Township snow removal of under \$3500, and there must have been a misunderstanding. This exception does not apply to the open meeting requirements. She drafted a proposed set of Findings of Fact and Conclusions of law accordingly.

Chairman Reedstrom conducted a roll call vote and Rothschadl, Reedstrom, Sovell, and Brenner voted in favor. Steele abstained, having been absent from the August 1, 2011 meeting when this matter was heard.

Matter of Open Meeting Complaint 11-01, City of Parkston and Parkston Board of Adjustment.

At the previous meeting attorney Paul Tschetter was directed to file proposed Findings of Fact and Conclusions of Law on behalf of the Complainant, Jim Weiss. He filed a proposal and there were no objections filed by the City of Parkston or the Parkston Board of Adjustment.

Brenner moved to approve the proposed Findings of Fact and Conclusions of Law. Rothschadl seconded. A roll call vote was conducted and Rothschadl, Reedstrom, Sovell, and Brenner voted in favor. Steele abstained, having been absent from the August 1, 2011 meeting when this matter was heard.

## Election of OMC Chairman

Steele nominated Rothschadl. Reedstrom seconded. A roll call vote was conducted and all members voted in favor. Ms. Rothschadl will serve for next year.

<u>August 1, 2011 minutes.</u> Rothschadl moved approval. Brenner seconded. A roll call vote was conducted and Rothschadl, Reedstrom, Sovell, and Brenner voted in favor. Steele abstained, having been absent from the August 1, 2011 meeting.

#### Adjournment.

Steele moved to adjourn. Rothschadl seconded. A roll call vote was made and all voted in favor. The OMC was adjourned at approximately 4:30 pm.

Approved on March  $\frac{1}{2}$ , 2012

Lisa Rothschafil, Chair

Open Meeting Commission