

November 12, 2008

STATE OF SOUTH DAKOTA

OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETING) FINDINGS OF FACT,
COMPLAINT 07-05, USD STUDENT) CONCLUSIONS OF LAW,
GOVERNMENT ASSOCIATION) AND DETERMINATION OF NO VIOLATION

INTRODUCTION

The South Dakota Board of Regents, which governs the University of South Dakota, hereafter “USD,” has charged each institution under its control to promote “extracurricular activities, encourage development of civic skills and responsibilities, and stimulate uninhibited and vigorous debate and discussion,” and it has authorized each institution to assess fees and to apply such proceeds “to support [student] activities that further the institution’s educational mission.”

In response to this charge, USD recognizes more than 100 student organizations and provides them with a wide array of support, ranging from office space and equipment to support from student activity fees. Such expenditures benefit USD in two principal respects. First, such investments contribute to student success; students who engage in such activities are more likely than others to continue and to complete their degree programs. Second, such investments advance the core University educational mission by providing students with means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall and thereby to acquire habits and skills needed by all who aspire to leadership roles in complex human institutions.

The USD Student Government Association, hereafter “SGA,” respondent in this matter, is one of the student organizations sponsored by USD. The complainant in this matter, Mr.

Justin Wolfgang, was at the time of the complaint, editor-in-chief of the *Volante*, the USD student newspaper, and another of the USD sponsored student organizations.

On November 12, 2007, at a public hearing, SGA took evidence relating to charges that its president engaged in certain impeachable conduct. SGA then dissolved into executive session to discuss the evidence and potential sanctions, and it voted to remove its president.

On December 12, 2007, pursuant to SDCL §§ 1-25-6 and 23A-2-1, Mr. Wolfgang filed a notarized complaint under oath with the Clay County State's Attorney. Assuming that the SGA was subject to SDCL § 1-25-1, Mr. Wolfgang alleged that the SGA unlawfully took official action in executive session to remove its president from office.

SDCL 1-25-1 not only regulates the state, its political subdivisions and all their related boards, commissions and other agencies, but it also governs "the official meetings of boards, commissions and agencies created by statute or which are nontaxpaying and derive a source of revenue directly from public funds."

The State's Attorney investigated the allegations but could not resolve the question whether the SGA is required to follow SDCL § 1-25-1. The State's Attorney noted that the SGA was not created by statute and that, while possibly nontaxpaying for purposes of SDCL § 1-25-1, it did not appear to derive its revenues directly from public funds.

The State's Attorney referred the matter to the Open Meetings Commission for disposition of three questions: Whether the SGA is subject to SDCL § 1-25-1; and if so, whether the president of the SGA could be deemed a public officer or employee for purposes of SDCL § 1-25-2(1); and if both foregoing questions were answered in the affirmative, whether a vote in executive session violated SDCL § 1-25-2.

The Commission scheduled a hearing for this matter on July 31, 2008. On July 28, 2008, the complainant, Mr. Wolfgang, submitted a written request to rescind his complaint and advised the Commission that he would be unable to attend the July 31, 2008, hearing due to other commitments and that he did not have an advocate to represent him in his absence.

On July 31, 2008, the Commission took up Mr. Wolfgang's request to rescind his complaint. It determined that Mr. Wolfgang did not have the authority to rescind the complaint once the State's Attorney had referred the matter to the Commission for a hearing.

The Commission considered the complaint on its merits and heard argument on behalf of the SGA.

DISCUSSION AND DECISION

The primary purpose of the Open Meetings Law is to protect the integrity of the political process by prohibiting government bodies from taking action "at secret meetings where it is impossible for the interested public to become fully informed and to detect improper influences."¹ Open meetings laws protect the right of citizens to participate in the parliamentary decision-making by government bodies. Open meetings laws assure that citizens can inform themselves of the actions being considered by government bodies and that they can communicate their views to the officials serving on such bodies before votes are taken.²

The Legislature was equally concerned to assure citizen participation in the deliberations of nongovernmental bodies in two situations, where the nongovernmental bodies were created by statute, and where the nongovernmental bodies pay no taxes and derive a source of revenue directly from public funds. The precise purposes that persuaded the Legislature to require public deliberation by certain nongovernmental bodies have been lost to history, but it must have

¹ *Olson v. Cass*, 349 N.W.2d 435, 437 (S.D. 1984).

² *Id.*

understood that the right of self-governance could be impacted by the deliberations of some nongovernmental boards, commissions or agencies as surely as it was by the deliberations of governmental boards, commissions or agencies.

The threshold question presented by the complaint in this matter is whether the activities of the SGA are such as to bring it within the purview of a statute that protects the right of self-governance. The question is not whether SGA should in any sense be accountable to USD students; it is whether any and all South Dakota citizens may rightfully inform themselves in its deliberations and make known their views to the SGA members prior to any vote.

The un-contradicted record before the Commission shows that SGA, the *Volante* and the 100 or so other student organizations recognized and supported by USD operate as components of the USD educational program. Student activities provide mechanisms to harness student emotion, intellect and social instincts in order to foster the development of leadership skills through practical learning. Such skills are best acquired through practice, and applying the lessons of the classroom in carrying out the activities of complex organizations provides such practice.

The particular objects or activities of student organizations are not crucial to the educational purpose of encouraging the development of leadership skills. Some organizations engage in activities that are very similar to the policy and administrative decision-making characteristic of governmental bodies or corporate boards. Some organizations engage in activities that are very similar to activities that publishers, broadcasters or other businesses carry out. Other organizations engage in activities that are very similar to charities, religious organizations, special interest advocacy groups or service clubs. Whatever the specific nature of the student organization's activities, all serve as living laboratories where students learn

collective responsibility, parliamentary procedure, debate and compromise, the essential skills of self-governance; where they practice the arts of creating, evaluating and administering budgets; where they learn how to plan and to carry out complex activities, such as publishing newspapers, presenting theatrical works or advocating students interests before government bodies.

In many respects, USD treats student organizations as though they were subunits of the university. All student organizations have access to USD facilities and services. All must adopt and adhere to certain organizational structures. All operate under the advisement of a USD employee. On the recommendation of SGA, a portion of general activity fees, hereafter “GAF,” revenues may be allocated to support activities of some student organizations.

All GAF revenues and expenditures, including revenues allocated to and expended on behalf of student organizations, are state funds and are administered in the same fashion as other state revenues. GAF revenues allocated to support student organizations are subject to all state regulations regarding the expenditure and audit of state funds. USD does not transfer general activity fee revenues to student organizations for custody and expenditure; rather, it creates budget entities within the institutional fund structure and issues payment warrants against available funds for expenditure after due authorization by university finance officers. Student organizations’ expenditure requests are also subject to bid law requirements. GAF revenues allocated to student organization support are not treated as student organization income for tax purposes; rather, they are aggregated with all other USD revenues and expenditures and reported to the Board of Regents for inclusion in the tax return filed by the State of South Dakota.

Student organizations, whatever their particular activities or emphases, operate as internal USD educational activities. SDCL § 1-25-1 cannot reasonably be construed to create a right for citizen involvement in the internal educational activities of state universities. The mere

happenstance that few of the university-sponsored extracurricular activities, such as the SGA, may adhere in some measure to the forms and practices of public, corporate or international entity governing boards does not alter the essential fact that these are merely a small range of the many forms of activities that serve to benefit students and to prepare them to assume leadership roles in businesses, charities and government.

While South Dakota law protects the rights of citizens to be involved in the deliberations of the Board of Regents and other state or local boards that determine educational policy, it does not contemplate citizen involvement at each step in the administration of such policies. The activities of the SGA, the *Volante* and the scores of other student organizations all involve some species of extracurricular learning activities that comprise the educational programs of the university. Student organization activities simply do not implicate the rights of self-governance that SDCL § 1-25-1 protects.

SGA was not subject to the requirements of SDCL § 1-25-1.

FINDINGS OF FACT

1. SGA is a student organization that is sponsored by USD in furtherance of its educational mission and treated, for financial purposes, as an internal unit of USD and of the State of South Dakota.

2. SGA is not a nontaxpaying board, commission or agency that derives a source of revenue directly from public funds within the meaning of SDCL 1-25-1.

CONCLUSIONS OF LAW

1. SGA is not an entity subject to the provisions of the Open Meeting Law.
2. Because it is not subject to SDCL § 1-25-1, SGA did not violate the SDCL § 1-25-1 when, on November 12, 2007, following a public hearing on charges of impeachment

brought against the SGA president, it dissolved into executive session to discuss the evidence and potential sanctions, and it voted to remove its president.

3. Because is not subject to SDCL § 1-25-1, the remaining issues referred to the Commission by the State's Attorney need not be addressed.

FINAL DETERMINATION

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

ALL COMMISSIONERS CONCUR.