

December 12, 2005

Mary Frances Bessignano
1473 W. Country Club Road
Peru, IN 46970

Re: Formal Complaint 05-FC-233; Alleged Violation of the Open Door Law by the Miami County Commissioners

Dear Ms. Bessignano:

This is in response to your formal complaint alleging that the Miami County Commissioners (“Commissioners”) violated the Open Door Law by deciding to terminate you during an executive session and not posting proper notice. I find that the Commissioners did not comply with the Open Door Law.

BACKGROUND

You allege in your formal complaint, which you filed on November 14, 2005, that the Commissioners met in executive session on October 24, 2005. Shortly after the executive session, on October 24, you were contacted by one of the Commissioners and informed that you had been relieved of your duties as the Miami County Health Nurse. The Commissioner Gary Hawley told you that you were terminated and that your discharge had been decided by all the Commissioners that morning.

You allege that the executive session notice had not been posted 48 hours in advance of the executive session, and further that the notice does not comply with the provisions of IC 5-14-1.5-6.1(d). You also requested priority status. However, you did not allege any circumstances for which priority status may be granted. *See* 62 IAC 1-1-3; IC 5-14-5-10. This advisory opinion is issued within 30 days of the date that you filed your complaint.

I sent a copy of your complaint to the Commissioners. I spoke by telephone with Commissioner Chairman Craig Boyer, and with Miami County Auditor Brenda Weaver, who is responsible for posting the executive session notices. Commissioner Boyer assured me that the

notice had been posted 48 hours before the meeting. He also told me that following the executive session, there was a public meeting at which the Commissioners voted to terminate your employment. Commissioner Boyer also stated that there was a legal question regarding whether the Commissioners could effectuate your termination; therefore, there will be further proceedings by the Miami County Health Department to determine your employment status. Auditor Weaver assured me after checking her files that she had posted the notice for executive session by 3:00 p.m. on Wednesday, October 19.

ANALYSIS

Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. Ind. Code 5-14-1.5-3(a). An executive session means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f).

Executive sessions may be held only in the instances enumerated in IC 5-14-1.5-6.1(b). Notice of all meetings or executive sessions must be posted at least forty-eight (48) hours in advance of the meeting, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). The notice must state the date, time and place of the meeting. IC 5-14-1.5-5(a). In addition, public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). IC 5-14-1.5-6.1(d). A final action must be taken at a meeting open to the public. IC 5-14-1.5-6.1(c). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. IC 5-14-1.5-2(g).

The Auditor has averred that the executive session notice was posted on October 19. Because the executive session was held on Monday, October 24, it was necessary to exclude Saturday, October 22 and Sunday, October 23 in calculating the 48 hours in advance of the meeting within which notice must be posted. The Commissioners posted the notice in sufficient time prior to the Monday meeting; hence, the Commissioners did not violate the Open Door Law with respect to the time that they posted the notice of the October 24 executive session.

However, the notice does not conform to the explicit requirements of the Open Door Law with respect to executive session notices. The notice recites the date, time and place of the executive session. However, it states that the topic, "as prescribed in (IC 5-14-1.5-6.1)" was "Personnel Issues." This office has stated on many occasions that "personnel issues" is wholly inadequate under the Open Door Law. First, there are several enumerated instances involving personnel-related matters that are permissible for an executive session. Accordingly, "personnel Issues" lacks the required specificity, because the Open Door Law states that notice of an executive session must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. IC 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee, pursuant to IC 5-14-1.5-6.1(b)(9)," for example, would satisfy the notice requirements. The notice also lacks a specific citation to the specific instance. Because all the executive session instances are enumerated at IC

5-14-1.5-6.1, this citation does not specify the enumerated instance for which the Commissioners met.

Although you do not specifically allege that the Commissioners violated the Open Door Law by taking final action in an executive session, your complaint states “the decision to terminate employment was made as a result of the decision in executive decision [read, session] October 24, 2005.”

The Open Door Law prohibits a governing body from taking final action in an executive session. IC 5-14-1.5-6.1(c). Commissioner Boyer denies that the Commissioners took a vote at the executive session. He states that the Commissioners met in a public meeting immediately following the executive session to vote on your dismissal. He also states that the Commissioner’s authority to dismiss you is now in some doubt. I do not conclude whether the Commissioners could dismiss a county health nurse, as that question is not within my authority to determine. If the Commissioners met in a public meeting to take final action, their actions would comport with the Open Door Law; if no public meeting occurred and you were dismissed following the executive session, the Commissioners would have violated the Open Door Law.

I also observe that the Commissioners’ authority to act on your employment may impact whether the Open Door Law was violated, because a meeting under the Open Door Law means a gathering of a majority of the governing body for the purpose of taking official action upon public business. IC 5-14-1.5-2(c). “Public business” means any function upon which the public agency is empowered or authorized to take official action. IC 5-14-1.5-2(e). If the Commissioners were not empowered or authorized to take official action, their actions may not have violated the Open Door Law. Because I cannot determine whether the Commissioners were empowered to act, I opine here that the Open Door Law was violated under the assumption that the Commissioners had the power to act on your dismissal.

CONCLUSION

For the foregoing reasons, I find that the Miami County Commissioners violated the Open Door Law because the October 24 notice of executive session did not specify the enumerated instance for which the Commissioners met.

Sincerely,

Karen Davis
Public Access Counselor

cc: Chairman Craig Boyer