

June 8, 2007

Charles W. Schlesinger
395 N. 400 East
Valparaiso, IN 46383

*Re: Formal Complaint 07-FC-128; Alleged Violation of the Open Door Law by the
Lake Station Police Merit Board*

Dear Mr. Schlesinger:

This is in response to your formal complaint alleging that the Lake Station Police Merit Board (“Board”) violated the Open Door Law by taking final action in an executive session. I find that the Board did not post proper notice of executive session, and may not have met for a purpose provided in the Open Door Law. I further find that if the Board voted in the executive session, the Board violated the Open Door Law in that respect as well.

BACKGROUND

You allege that you were offered employment to the Lake Station police department on January 24, 2007 by police chief Michael Stills. This offer was extended after a meeting of the Board on January 22, 2007. Following an executive session on May 3, 2007, the Board members sent you a letter dated May 3, 2007, signed by the Board president, informing you that the Board had made the decision to withdraw the offer of employment to you. This decision, the letter recited, was made by majority vote of the Board on May 3, 2007 during a meeting which had previously been scheduled and advertised.

You enclosed a copy of the meeting notice. The notice stated that an executive session of the Police Merit Board was scheduled for May 3 at 4:30 p.m. in the Council Chambers, regarding “police personnel matters.” The notice states that a special meeting would follow the executive session. According to your complaint, the special session opened to discuss the appointment and training of another applicant to the police department.

I sent a copy of your complaint to the Board. The Board sent me the enclosed response. The Board enclosed a copy of the memoranda of the executive session. City attorney Ray

Szarmach explains that “the personnel matter regarding Charles Schlesinger was discussed as outlined in the memoranda. The Board was reminded that they cannot take any final action at an executive session. No action was taken and the executive session was adjourned.”

According to the memoranda, the executive session was held to discuss current Indiana state law with regarding to rescinding an offer to hire. Certain circumstances regarding the information on your application were discussed. In addition, the memoranda recite that Mr. Szarmach advised the Board that Indiana is an “at will” state, discussed an appellate decision concerning grounds for termination, discussed the non-existence of a collective bargaining agreement, and advised the Board that it could not take action in executive session. The memoranda recite that no other matter was discussed. Absent from the memoranda is any indication that a vote occurred.

ANALYSIS

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code 5-14-1.5-1. 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. IC 5-14-1.5-3(a).

Section 6.1 of the Open Door Law provides the specific purposes for which an executive session may be held. IC 5-14-1.5-6.1(b). An executive session is 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). A final action must be taken at a meeting that is 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).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. Ind. Code 5-14-1.5-5(a). 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 [IC 5-14-1.5-6.1(b)]. IC 5-14-1.5-6.1(d).

Although you do not raise the adequacy of the notice, I find that the notice of executive session fails to set forth the specific exemption for which an executive session may be held, in contravention of the clear mandate of IC 5-14-1.5-5(d). It is not sufficient for the notice to state that it was for “police personnel matters.” I also find that the memoranda show that much of the discussion was for purposes of the attorney explaining the law in Indiana concerning discharge of employees who are not covered by collective bargaining agreements. There are no exceptions for attorneys to apprise Board members of the law in executive session. Public agencies may not seek legal advice from their attorneys in private about matters which are not related to litigation. *Simon v. Auburn*, 519 N.E.2d 205 (Ind. Ct. App. 1988).

Finally, the Board was not permitted to vote during the executive session. The memoranda recite that the Board was advised during the executive session that it could not take a vote in executive session, and that if the Board wished to take any action it must do so at a public meeting. The attorney Mr. Szarmach stated that he drafted the memoranda. Mr. Szarmach does not address the contents of the letter to you stating that the Board voted to withdraw the offer of employment to you at a May 3 meeting, nor does Mr. Szarmach state affirmatively that the vote occurred during the public meeting that followed the executive session.

If the Board voted in the executive session of May 3, 2007, the Board violated the Open Door Law.

CONCLUSION

For the foregoing reasons, I find that the Lake Station Police Merit Board violated the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Ray L. Szarmach