



STATE OF INDIANA

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August 26, 2008

Leslie Barton
701 South Monticello Street
Winamac, Indiana 46996

*Re: Formal Complaint 08-FC-186; Alleged Violation of the Open Door Law
by the Pulaski County Board of Commissioners*

Dear Mr. Barton:

This advisory opinion is in response to your formal complaint alleging Pulaski County Board of Commissioners ("Commissioners") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by providing insufficient notice for an executive session. A copy of the Commissioners' response to the complaint is enclosed for your reference. It is my opinion that the Commissioners violated the ODL by holding an executive session during a meeting and by not allowing the public to observe and record a meeting held to carry out an administrative function. Further, it is my opinion the Commissioner did not violate I.C. § 5-14-1.5-6.1(c) since the final action regarding your employment was taken at a public meeting.

BACKGROUND

You filed a complaint on August 4, 2008, alleging the Commissioners violated the ODL by failing to provide notice for a July 21 executive session. You allege that the Commissioners held an executive session immediately following the regularly scheduled July 21 public meeting. You contend that you were not provided notice and did not know of the meeting until a telephone call the afternoon of July 21. You further allege that final action was not taken in a public meeting.

You also make an allegation that your termination was based on hearsay. Because the reason for termination of an employee by a public agency is a matter outside the purview of this office, I decline to address this issue.

The Commissioners responded to the complaint by letter dated August 20 from attorney Liberty Roberts. The Commissioners indicate they met in a regularly scheduled meeting on July 21 at 8:00am. During the meeting, the Commissioners received information from the County Emergency Management Agency ("EMA"). The Commissioners expressed concern over the seemingly "constant turmoil" and advised the

EMA director that something or someone at EMA needed to change to avoid further problems. Later in the meeting, the Commissioners received a report from Sandy Hurd regarding the County Home. The Commissioners contend that prior to the meeting, Ms. Hurd had advised the Commissioners she believed an employee was improperly dispensing medications to patients. Ms. Hurd requested an emergency meeting with the Commissioners to discuss the alleged misconduct of the employee. The basis for the emergency was the threat of injury or continued injury to the patients.

The Commissioners then entered into an emergency executive session to receive information about the employee's alleged misconduct. The session lasted approximately thirty minutes. The Commissioners concede that written notice of the executive session was not posted. The Commissioners indicate that they verbally announced the executive session to those in attendance at the regular meeting.

The Commissioners contend that as the executive session was ending, they briefly discussed whether they were prepared to vote on your continued employment. The Commissioners contend this was an administrative function and the brief inquiry was not an extended discussion but was only for the purpose of determining whether the issue would be addressed later in the meeting. The Commissioners contend no "formal action" was taken in executive session regarding your employment. The Commissioners reconvened the public meeting and during the "New Business" portion of the meeting discussed the EMA. During the public meeting, the Commissioners voted to terminate your employment.

The Commissioners contend that while it did not meet the technical requirements for giving notice of the emergency executive session, the Commissioners substantially complied with the ODL. Further, the Commissioners contend they did not engage in deliberations or discussions about your employment or take any other official action with regard to your employment during the executive session. The Commissioners contend the verbal notice that the Commissioners were conducting an executive session to receive information about the alleged misconduct of an employee at the County Home substantially complied with the ODL and in fact provided more information to the public than required by the ODL.

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. I.C. § 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. I.C. § 5-14-1.5-3(a).

Executive sessions, which are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Notice of an executive session must contain, in addition to the date, time and location of the meeting, a statement of the

subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). The Commissioners acknowledge that written notice of the executive session was not provided but contend that by providing verbal notice they substantially complied with the ODL.

The Indiana Court of Appeals has addressed substantial compliance with the ODL in *Turner v. Town of Speedway*, 528 N.E.2d 858 (Ind. Ct. App. 1988). The court said the following:

. . . substantial compliance with the Open Door Law may in some circumstances be sufficient. Other jurisdictions have reached the same result. [*Citation omitted*] In a 1987 amendment to *IC 5-14-1.5-7*, our legislature confirmed Judge Neal's use of "substantial compliance" as the proper standard to review violations under the Open Door Law. Several factors are considered, including the extent to which the violation denied or impaired access to a meeting, and prevented or impaired public knowledge or understanding of the business conducted in the meeting. *IC 5-14-1.5-7(d)* (Supp. 1987).
Id. at 862.

Here, though, further issues must be addressed beyond whether the Commissioners substantially complied with the ODL by providing verbal notice of the executive session.

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. I.C. § 5-14-1.5-5(a). The Commissioners contend the executive session could be held without forty-eight hours notice because the executive session was conducted to deal with an emergency. The ODL provides the following:

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under this section shall not apply, but:

- (1) news media which have requested notice of meetings must be given the same notice as is given to members of the governing body; and
- (2) the public must be notified by posting a copy of the notice according to this section.

I.C. § 5-14-1.5-5(d).

Here, the Commissioners convened the executive session to address allegations that an employee of the County Home was improperly dispensing medications to patients. Certainly improperly dispensing medication to patients constitutes actual or

threatened injury to person, and as such an emergency meeting was appropriate under I.C. § 5-14-1.5-5(d). Because the meeting was held to discuss the alleged misconduct of an individual over whom the Commissioners have jurisdiction, the subject matter was appropriate for executive session pursuant to I.C. § 5-14-1.5-6.1(b)(6).

The issue of substantial compliance relative to the notice, though, is a point that is moot in this instance, because the executive session should not have been conducted during the regular meeting:

A governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. A meeting may not be recessed and reconvened with the intent of circumventing this subsection.

I.C. § 5-14-1.5-6.1(e).

The Commissioners have indicated they recessed into executive session at 11:05am, and the executive session lasted about thirty minutes. After that time, the Commissioners reconvened the regular meeting and proceeded on to the remainder of the agenda set for the 8:00am regular meeting. It is my opinion the Commissioners violated I.C. § 5-14-1.5-6.1(e) of the ODL by recessing and reconvening the regular meeting so they could conduct an executive session during a meeting.

Further, the Commissioners contend the discussion at the end of the executive session to determine whether the Commissioners were prepared to vote regarding your employment was an administrative function. The requirements for posting notice do not apply when the executive of a county meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. Administrative functions do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town. I.C. § 5-14-1.5-5(f)(2). Even though notice is not required, the “administrative function” meeting must be held in the public, since the notice provision of the ODL is the only provision that does not apply to an “administrative function” meeting. *See* I.C. § 5-14-1.5-5(f)(2).

I do not necessarily agree that discussing whether the Commissioners were ready to vote on an issue was an administrative function. Even if it were an administrative function, though, the administrative function portion of the meeting was not appropriate for executive session. Even though notice is not required for a meeting to carry out an administrative function, the public must be allowed to attend the meeting. The public was not permitted to observe and record this conversation since it occurred behind closed doors at the end of an executive session. As such, it is my opinion this discussion, which does constitute official action (*See* I.C. § 5-14-1.5-2(d), defining “official action”), was held in violation of the ODL.

Finally, you allege that final action related to your employment was not taken at a public meeting. I.C. § 5-14-1.5-6.1(c) provides that a final action must be taken at a meeting open to the public. The Commissioners contend that after the regular meeting reconvened, a motion was made and vote was taken regarding your employment. This vote, or final action, was taken during a meeting open to the public. *See* I.C. § 5-14-1.5-2(g) defining final action. As such, it is my opinion the Commissioners did not violate I.C. § 5-14-1.5-6.1(c).

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners violated the ODL by holding an executive session during a meeting and by not allowing the public to observe and record a meeting held to carry out an administrative function. Further, it is my opinion the Commissioner did not violate I.C. § 5-14-1.5-6.1(c) since the final action regarding your employment was taken at a public meeting.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Mike Tiede, President, Pulaski County Board of Commissioners
Liberty L. Roberts, Collier-Magar & Roberts