



STATE OF INDIANA

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December 15, 2010

Mr. Stanley L. Klotz
1800 Dogwood Rd.
Bremen, IN 46506

Re: Formal Complaint 10-FC-285; Alleged Violation of the Open Door Law by Bremen Public Schools

Dear Mr. Klotz:

This advisory opinion is in response to your formal complaint alleging Bremen Public Schools ("BPS") violated the Open Door Law ("ODL") I.C. § 5-14-1.5-1 *et seq.* BPS's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that BPS accepted the resignation of BPS Board member Jordan Bender during a regular meeting on September 20, 2010. Thereafter, the Board advertised that it was accepting applications for a replacement Board member until September 30th. As of September 30th, one applicant submitted an application: Bill Daily. On October 1st, the BPS superintendent advised Mr. Daily that the application deadline had been extended until October 5th. On October 5th, the Board met in executive session to receive information about and interview prospective employees and to discuss collective bargaining strategy.

You further allege that the Board informed Mr. Daily that he and one other candidate would be interviewed by the Board at its October 14th executive session. BPS posted a notice of that meeting and listed as its purpose receiving information about and interviewing prospective employees. The executive session occurred and the Board interviewed Mr. Daily and the other applicant. At the Board's regular meeting on October 19th, the Board approved the minutes of the October 14th executive session and appointed Chuck Klockow, the other candidate, to the Board position. It was noted in the minutes that Mr. Klockow would be seated and take his oath at the November 2nd regular Board meeting, but you claim that at that time the Board members and Mr. Klockow signed and approved the minutes from the October 14th executive session on October 19th. You argue that this violated the ODL because it constituted final action that occurred outside of a public meeting.

You note that all of the notices issued for the Board's October 14th executive session listed as its purpose "[t]o receive information about and interview prospective employees" under I.C. § 5-14-1.5-6.1(b)(5). You argue, however, that an individual appointed by the Board to take an oath of office and to fill a vacancy on the Board is an appointee rather than an employee. You further argue that under I.C. § 5-14-1.5-6.1(b)(10), interviews of prospective appointees must be conducted at a meeting that is open to the public, but no such meeting took place.

In response to your complaint, Mark Wagner, attorney for BPS, states that the superintendent of BPS, Russ Mikel, acknowledges that he posted the wrong notice for the October 14th executive session. Mr. Mikel had no previous experience with replacing a member of the Board, and he had not yet consulted with Mr. Wagner regarding the appropriate procedure. Mr. Mikel believed that Board members were employees of BPS due to the fact that they received payment for serving and taxes were withheld from those payments as if they were any other employee of BPS. Citing to I.C. § 20-26-4-4 and I.C. § 20-23-4-30(d), Mr. Wagner notes that applicable state law provides for how school board vacancies are to be filled, but it does not describe the appropriate procedures in detail. Mr. Wagner thus avers that although Mr. Mikel admits that the improper citation to the ODL was included in the notice, BPS did not intend to violate the ODL.

Mr. Wagner acknowledges that the applicable provision of the ODL is I.C. § 5-14-1.5-6.1(b)(10), and that interviews of the prospective appointees should have been conducted in a public meeting. He argues that the Board did not violate the ODL by reviewing the applications in executive session, however, because that is permitted by I.C. § 5-14-1.5-6.1(b)(10). Further, he notes that Mr. Klockow was appointed to the Board at the public meeting on October 19th.

Mr. Wagner claims that the Board did not approve its minutes from the October 14th executive session until its regular meeting on November 2nd. Mr. Klockow signed the minutes at that time because he had already been sworn in as a member of the Board.

ANALYSIS

The General Assembly enacted the ODL with the intent that the official actions 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. Accordingly, except as provided in section 6.1 of the ODL, 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).

Regarding notice, the ODL provides the following:

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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. . .

* * *

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). . .

I.C. §§ 5-14-1.5-5(a); 5-14-1.5-6.1(d).

Here, BPS acknowledges that it improperly cited to I.C. § 5-14-1.5-6.1(b)(5). The Board should have cited to I.C. § 5-14-1.5-6.1(b)(10). That provision allows a public agency to meet in executive session to consider the appointment of a public official. A “public official” means a person who is a member of a governing body of a public agency or whose tenure and compensation are fixed by law and who executes an oath. I.C. § 5-14-1.5-6.1(a). Because the Board members are members of the governing body of BPS, they are public officials within the meaning of the ODL. Consequently, subsection (b)(10) is applicable rather than (b)(5). After an initial exclusion of prospective appointees, a governing body is required to make available for inspection and copying identifying information concerning the prospective appointees not initially excluded from further consideration, and interviews of prospective appointees must be conducted in a public meeting. *Id.*

As to the issue of when Mr. Klockow approved the October 14th meeting’s minutes, it appears from the minutes of the November 2nd meeting that the Board approved both the October 14th and October 19th meeting minutes at the November 2nd meeting. Signatures of the Board members and Mr. Klockow are on the October 14th executive session, but those signatures do not appear to have been intended to approve the minutes. Rather, it appears that the signatures were certifications by those in attendance at the executive session that “[n]o topics were discussed other than those allowed by law and properly advertised.” Such a certification is required by I.C. § 5-14-1.5-6.1(d), which provides that a “governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.” *Id.* In my opinion, inserting such a statement in the executive session’s minutes is not final action, which the ODL defines as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.” I.C. § 5-14-1.5-2(g). Consequently, it is my opinion that BPS did not violate the ODL in this respect.

CONCLUSION

For the foregoing reasons, it is my opinion that the BPS failed to comply with the ODL because the notice of its October 14th executive session cited to the incorrect provision of the ODL and because the interviews of prospective appointees should have occurred at a public meeting. BPS did not otherwise violate the ODL.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Mark Wagner