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November 5, 2021

RE: *File No. 21-M-135; Fort Calhoun Community Schools Board of Education;
Multiple Complainants*

In September 2021, multiple complaints were registered with this office alleging violations of the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2020, 2021 Neb. Laws LB 83, §§ 11-14), by members of the Fort Calhoun Community Schools Board of Education ("Board"). We followed our normal practice and sent notice of all complaints received to the Board through the Board President, Michael Conrad, and requested a response. We subsequently received a response on October 15, 2021 from the Board's attorney, Karen Haase, who responded on behalf of the Board. We have now completed our review of the complaints and the response we received from Ms. Haase. Our findings and conclusion in this matter are set out below.

ALLEGED VIOLATIONS

Upon review of the complaints, we have identified two alleged violations of the Open Meetings Act, as follows:

1. The Board held a secret vote on mask mandates outside of a public meeting; and
2. The Board's September 13, 2021 meeting was not noticed and did not have an agenda available for inspection.

FACTS

Our understanding of the facts in this matter is based upon the complaints received and the Board's response, which included several attachments. Eight individuals filed complaints with our office. Complainants allege the Board implemented a mask mandate without first voting on it at a public meeting. Complainants allege they were notified via email on September 6, 2021 that a mask mandate would be in effect for all students. In its response, the Board states it was not the Board which implemented the mask mandate,

but rather the Superintendent. As such, it did not hold a meeting for the Board to vote on the mandate. The Board explained that a resolution called the "COVID-19 Resolution" was passed on March 18, 2020 and delegated certain authority, including the power to implement a mask mandate, to the Superintendent. The COVID-19 Resolution states "be it resolved that the superintendent, in consultation with the Board President, is authorized to pay all claims and take any other action authorized by law during the emergency and any resulting school closure, which the board will review and approve once the board resumes operations."¹ The Board further states that the Board President contacted, individually, each member of the Board prior to consulting with the Superintendent on the mask mandate. The Board President talked to Board members to assist him in advising the Superintendent on a mask mandate. These conversations were also held in preparation for the Board's September 13, 2021 meeting, which included agenda items related to COVID-19.

ANALYSIS

The primary purpose of the public meetings laws is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429 (1990). The Nebraska public meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158 (1984). The Nebraska public meetings laws are broadly and liberally construed so as to obtain the objective of openness in favor of the public. *Wasikowski; Grein, supra*.

We addressed the issue of serial communications by members of a public body outside of a meeting in File No. 10-M-107.² In that matter, it was alleged improper communications were made by Beatrice Public Schools Board of Education ("BPS Board") members during the process of hiring a new school Superintendent. Specifically, at a special meeting, the BPS Board President was tasked with contacting a candidate and inquiring whether he would accept the job for \$145,000 per year. The President was authorized to offer up to \$150,000 per year, but was not to negotiate any further. During the President's communications with the candidate, the candidate inquired into whether the BPS Board would consider a three-year instead of one-year contract. The President then proceeded to call several BPS Board members to discuss the terms of the contract. The President ceased calling BPS Board members once he gained a majority of the BPS Board's approval. The President then contacted the candidate and the two struck a "gentleman's agreement" for the hiring of the candidate. In this matter, we concluded the

¹ The Resolution references the emergency declarations of the President and Governor. The Governor's emergency declaration, issued on March 13, 2020, expired on June 30, 2021. Executive Order 21-09 (located at <http://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/21-09.pdf>). It appears the Superintendent, Board President, and Board members continued to operate under the Resolution despite the expiration of the Governors' emergency declaration.

² See File No. 10-M-107; *Beatrice Public Schools Board of Education; Patrick Ethridge, Editor, Beatrice Daily Sun, Petitioner* (June 3, 2010), accessible at <https://ago.nebraska.gov/disposition-letters>.

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BPS Board had violated the Act, reasoning that “[i]n essence, the informal consultation process became a substitute for a formal deliberative session of the Board, which is further illustrated by the lack of any additional public discussion of hiring the new superintendent at subsequent Board meetings.” Further, we determined that BPS Board members “acted in concert to discuss and decide on official Board business in private.”

While there are similarities between these two matters, the most notable difference is that here, the Board was not the decision maker. While the BPS Board came to a decision outside of a public meeting, this Board did not. The mask mandate was the decision of the Superintendent, not the Board. Another notable difference is that the Board President did not exceed the authority granted to him by the Board. At the March 18, 2020 meeting, the Board passed the COVID-19 Resolution. This resolution granted the Superintendent the power to take any actions authorized by law during the emergency “in consultation with the Board President.” Therefore, the President was not acting outside his scope of authority when he contacted other Board members because it was done in furtherance of his role as advisor to the Superintendent on COVID-19 matters. In sum, the Board could not have violated the Act by not holding a meeting to vote on a mask mandate because the mandate was not a decision of the Board.

While we have concluded the Board did not technically violate the Act, we note that its actions were questionable. The Board delegated authority to the Superintendent to handle matters related to COVID-19 in its COVID-19 Resolution. However, the Board then continued to be involved in COVID-19 related decisions when the Board President consulted all Board members prior to advising the Superintendent. These actions have the appearance of the Board making a decision on something it had delegated away, and outside of a public meeting. We would point out that a public body is not permitted to take actions in an effort to circumvent the Act. While the Board’s actions are problematic, we cannot say that it is a clear violation of the Act. However, we would advise against such action in the future.

Meeting Agenda and Notice

Complainants next allege the Board failed to provide notice of its September 13, 2021 meeting. They also allege there was no agenda available for inspection prior to the September 13, 2021 meeting. In its response, the Board states it properly noticed the meeting and the agenda was available for inspection. The Board’s response includes an “Affidavit of Publication” showing that a September 13, 2021 meeting notice was published in *The Pilot-Tribune* on September 7, 2021. The notice stated, “[t]he regular monthly meeting of the Fort Calhoun Board of Education will be held on Monday, Sept. 13, 2021, at 7:00 p.m., at the Fort Calhoun High School Library. A copy of the agenda, kept continuously current, is available for inspection at the office of the superintendent during regular business hours.” Further, in the Board’s response, it provided a two-page agenda from the September 13, 2021 meeting. Neb. Rev. Stat. § 84-1411(1)(a) provides that “[e]ach public body shall give reasonable advance publicized notice of the time and place of each meeting.” Neb. Rev. Stat. § 84-1411(1)(e) further provides that “[s]uch notice

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shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours." Evidence submitted by the Board shows the September 13, 2021 meeting was noticed in *The Pilot-Tribune*. The Board also states that the agenda for the September 13, 2021 meeting was available for inspection. Complainants have offered no evidence to show the agenda was not available. Accordingly, we cannot conclude the Board violated the Act with respect to this portion of the complaint.

CONCLUSION

For the reasons discussed above, we plan no further action with respect to these complaints, and we are closing this file. Any complainant who disagrees with our analysis may wish to discuss this matter with a private attorney to determine what additional remedies, if any, are available under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Laura A. Nigro
Assistant Attorney General

cc: Karen Haase

35-263-29