

**OPEN RECORDS AND MEETINGS OPINION  
2001-O-16**

DATE ISSUED: November 9, 2001

ISSUED TO: Roger Johnson, Commissioner of Agriculture

**CITIZEN'S REQUEST FOR OPINION**

On November 8, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Eric Aasmundstad asking whether the nominating committee for the member at large position on the North Dakota Wheat Commission violated N.D.C.C. § 44-04-21 by selecting three nominees to submit to the Governor by unsigned, written ballots.

**FACTS PRESENTED**

Section 4-28-03, N.D.C.C., appoints a nominating committee to submit to the Governor a list of three nominees for the member at large position on the North Dakota Wheat Commission.<sup>1</sup> On November 5, 2001, the nominating committee held a meeting to select three nominees from a field of seven individuals who were interested in the member at large position. In response to the request for this opinion, a committee member indicated a series of votes by unsigned, written ballot were held to narrow the field of potential nominees from seven to three. On the first ballot, two individuals received majority votes of the committee and were selected as final nominees. Four additional ballots were cast to select the third nominee from the remaining five candidates. After the three nominees were selected, a motion was passed by the committee by recorded roll-call vote to submit the three nominees to the Governor for consideration under N.D.C.C. § 4-28-03.

**ISSUE**

Whether the nominating committee violated N.D.C.C. § 44-04-21 by selecting the nominees for the member at large position on the North Dakota Wheat Commission by unsigned, written ballots rather than a roll-call vote.

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<sup>1</sup> The committee consists of the commissioner of agriculture, the president of the North Dakota crop improvement association, the director of the North Dakota state university experiment station, the director of the North Dakota state university extension service, the president of the North Dakota farm bureau, the president of the North Dakota farmers union, and the president of the North Dakota grain dealers association, or their duly authorized representatives.

## ANALYSIS

All "meetings" of a "public entity" must be open to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-19. The term "meeting" is defined, for purposes of N.D.C.C. § 44-04-19, as a formal or informal gathering of a quorum of the members of a "governing body" of a "public entity." N.D.C.C. § 44-04-17.1(8)(a). The phrase "public entity" includes entities created or recognized by a state statute. N.D.C.C. § 44-04-17.1(12). Section 4-28-03, N.D.C.C., creates the nominating committee for the public purpose of nominating three individuals to the governor for appointment to the member at large position on the North Dakota Wheat Commission. Accordingly, the nominating committee is a public entity and the November 5 gathering to select those three individuals was a "meeting" subject to N.D.C.C. § 44-04-19, the state open meetings law.

The procedures to be followed during a "meeting" of a public entity are generally left to the discretion of the public entity unless a specific procedure is required by law. Letter from Attorney General Nicholas Spaeth to Rod Larson (Sept. 19, 1989).

Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. . . . As used in this section, "nonprocedural" should be broadly interpreted and includes all votes that pertain to the merits of the matter before the governing body.

N.D.C.C. § 44-04-21(1) (emphasis added).<sup>2</sup> The votes of the committee members were cast by written ballot rather than by roll call vote, and were anonymous rather than announced at the meeting. The selection of the three nominees was the sole statutory function of the nominating committee and the ballots cast by the committee pertained to the merits of its decision regarding the nominations, notwithstanding the fact a final roll call vote was held to approve the three nominees.

Because the ballots cast by the committee to choose the three nominees were not procedural votes, the committee was required to vote by recorded roll call vote rather than by unsigned written ballots.

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<sup>2</sup> The minutes of an open meeting must include the results of all recorded roll call votes. N.D.C.C. § 44-04-21(2)(f).

### CONCLUSION

It is my opinion the nominating committee violated N.D.C.C. § 44-04-21 by selecting the nominees for the member at large position on the North Dakota Wheat Commission by unsigned, written ballots rather than a roll-call vote.

### STEPS NEEDED TO REMEDY VIOLATION

The nominating committee must hold a meeting, preceded by proper public notice, at which it reconsiders the votes it held on November 5. The committee must use the same process for selecting its three nominees, but must vote by recorded roll call vote rather than by unsigned, written ballots.

Failure to provide public notice within seven days of the date of this opinion of a meeting to take the corrective measure described in this opinion will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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