

OPEN RECORDS AND MEETINGS OPINION

2005-O-07

DATE ISSUED: May 12, 2005

ISSUED TO: Rolla City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jason Nordmark of the Turtle Mountain Star asking whether the Rolla City Council ("Council") violated N.D.C.C. § 44-04-20 by failing to provide proper notice of a December 28, 2004, meeting of the Council's Employee Relations Committee due to its failure to list the meeting topics, and failing to file a copy of the notice with the city auditor as required by N.D.C.C. § 44-04-20(4). Mr. Nordmark also alleged that because a quorum of Council members attended the Employee Relations Committee's meeting, their action constituted a special emergency meeting of the Council for which proper notice was not given. It is also alleged that minutes of the Employee Relations Committee were not kept, as required by N.D.C.C. § 44-04-21(2), and that an unlawful telephone poll of Council members occurred in violation of N.D.C.C. § 44-04-20.

FACTS PRESENTED

The chairman of the Council's Employee Relations Committee called a special¹ committee meeting for Tuesday, December 28, 2004, at 5 p.m. in the Rolla City Hall. The deputy city auditor prepared and posted a notice at City Hall prior to December 28. The notice provided:

EMPLOYEE RELATIONS MEETING
5:00 P.M.
TUESDAY
DECEMBER 28, 2004
AT THE
ROLLA CITY HALL

Both the chairman and the city auditor prepared a set of minutes. After discussing, during the meeting, whether the deputy auditor's position was to be full or part-time and the effect of an extra pay period on the city's 2004 budget, the committee, without a

¹ According to the city auditor, the Employee Relations Committee does not hold regularly scheduled meetings. Rather, it meets on an as needed basis.

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vote, decided to recommend to the Council that the deputy auditor's time be shared by the municipal court, the city auditor, and the police department. This action is reflected in committee meeting minutes prepared by its chairman. According to minutes prepared by the auditor and the committee's chairman, there was a discussion regarding the extra pay period issue but no decision was made. Although certain members indicated support or agreement on how they thought the matter should be handled, they ultimately stated that the issue would be brought back to the full Council for further discussion. According to the Council, no telephone poll of any kind regarding these matters was conducted.

ISSUES

1. Whether the Council violated N.D.C.C. § 44-04-20(6) by failing to list the topics to be considered in a public notice of the Employee Relations Committee's special meeting.
2. Whether the Council violated N.D.C.C. § 44-04-20(4) by failing to file the December 28, 2004, Employee Relations Committee meeting notice with the city auditor.
3. Whether the attendance of five Council members at the December 28, 2004, committee meeting was a council "meeting" required to be preceded by proper notice.
4. Whether the Council violated N.D.C.C. § 44-04-21 by failing to prepare minutes of the Employee Relations Committee meeting held on December 28, 2004, and by failing to take roll call votes.
5. Whether the council conducted a secret telephone poll in violation of N.D.C.C. § 44-04-20.

ANALYSES

Issue One: Whether the Council violated N.D.C.C. § 44-04-20(6) by failing to list the topics to be considered in a public notice of the special meeting of the Employee Relations Committee.

The City of Rolla is a public entity. N.D.C.C. § 44-04-17.1(12)(b). Unless otherwise provided by law, meetings of a governing body of a public entity must be open and public notice must be given in advance of all meetings. N.D.C.C. §§ 44-04-19, 44-04-20. While the Council is the governing body of Rolla, "[g]overning body" also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body." N.D.C.C. § 44-04-17.1(6).

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As a result, committees created by a public entity's main governing body are also governing bodies subject to the open meetings laws, including the notice requirements. N.D.A.G. 2005-O-03; N.D.A.G. 2003-O-13 (meeting of the employee relations committee of a city council); N.D.A.G. 2003-O-15 (meeting of a committee of an airport authority).

Public notice of all meetings of a public entity's governing body must be given in advance unless otherwise provided by law. N.D.C.C. § 44-04-20(1). The notice of a special meeting must contain the date, time, location, and topics to be considered at the meeting. N.D.C.C. § 44-04-20(6). The governing body may not discuss a topic at a special meeting if it is not included in the notice. *Id.*; N.D.A.G. 2003-O-20 (by failing to include the topics to be discussed, the public is prevented from obtaining proper advance notice of the special meeting). The special committee meeting notice did not list any topics. The failure to include the topics of the meeting violated N.D.C.C. § 44-04-20(6).

Issue Two: Whether the Council violated N.D.C.C. § 44-04-20 by failing to file the December 28, 2004, Employee Relations Committee meeting notice with the city auditor.

Among other things, city council meeting notices must be filed in the office of the city auditor. N.D.C.C. § 44-04-20(4). According to the city auditor, she generally prepares meeting notices for the city which are posted on a bulletin board at the entrance of city hall. The meeting notices are also posted on cable access television. The meeting notice was not filed in the auditor's office. "File" is defined by Black's Law Dictionary as "[t]o deliver a . . . document to the . . . record custodian for placement into the official record" or "[t]o record or deposit something in an organized retention system or container for preservation and future reference." Black's Law Dictionary 642 (7th ed. 1999). The requirement to "file" the notice requires something more than its preparation.² The purpose of requiring the notice to be filed with the auditor is to have a central location for people to find out about public meetings affecting the city. Cf. N.D.A.G. 98-O-04. It is my opinion the notice was not filed with the auditor as required by N.D.C.C. § 44-04-20(4).

Issue Three: Whether the attendance of five out of seven Council members at the December 28, 2004, committee meeting was a "meeting" of the Council required to be preceded by proper notice.

All meetings of a public entity must be open to the public. N.D.C.C. § 44-04-19. A "meeting" means a formal or informal gathering of a quorum of the members of the

² The notice need not be kept indefinitely but may be disposed of in accordance with the city's record retention policy.

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governing body of a public entity regarding public business. N.D.C.C. § 44-04-17.1(8)(a)(1). "Meeting" includes work sessions, but does not include chance or social gatherings where public business is not considered. N.D.C.C. § 44-04-17.1(8)(b); N.D.A.G. 2004-O-08. A "quorum" means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity. N.D.C.C. § 44-04-17.1(14).

Mr. Nordmark alleged that when two additional members of the Council attended a meeting of the Employee Relations Committee, a quorum of the Council was present and because public business was discussed, the Council was required to issue a notice of a Council meeting. When a quorum of members of a governing body attends a meeting at which public business is discussed, the gathering is a "meeting" for which notice must be provided, even if the attendance of a quorum at that meeting is unplanned and unexpected. N.D.A.G. 98-O-08; N.D.A.G. 98-O-10; N.D.A.G. 98-O-18.

In this case, a quorum of the full council was present at the committee meeting. The city's attorney indicated that when the non-committee members arrived at the committee meeting, they took their seats at the council table. The non-committee members also participated in the discussion. One non-committee member asked at least one question related to the deputy auditor's salary. According to the city auditor's minutes of the meeting, another non-committee member was heavily involved in the discussion regarding the extra pay period. Her minutes also reflect that members of the committee and the two non-committee members agreed with one of the committee member's statements regarding the extra pay period issue. It is therefore my opinion when two non-committee members attended the committee meeting, a meeting of a quorum of the full Council occurred.

It is not clear from the information provided to us whether the non-committee members had been invited to the meeting. If it was reasonable to suspect beforehand that a quorum might attend the committee meeting, public notice should have been provided when the members learned of the gathering. N.D.A.G. 98-O-10. If it was a surprise, notice must be provided immediately after the meeting. N.D.A.G. 98-O-10. No notice was given. Therefore, it is my opinion that the Council violated N.D.C.C. § 44-04-20 by failing to provide notice of its meeting.

Issue Four. Whether the Council violated N.D.C.C. § 44-04-21 by failing to prepare minutes of the Employee Relations Committee meeting held on December 28, 2004, and by failing to take roll call votes.

Section 44-04-21, N.D.C.C., provides:

Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section

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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. (Emphasis added.)

The section also requires minutes to be kept of all open meetings. N.D.C.C. § 44-04-21(2); N.D.A.G. 2003-O-13. Minutes must include, among other things, the vote of each member on every roll call vote. N.D.C.C. § 44-04-21(2)(f). In this case, both the chairman and the city auditor prepared minutes of the Employee Relations Committee December 28, 2004, meeting. A copy of both sets of minutes was supplied to this office.

According to the Council, the committee, without a vote, decided to recommend to the Council that the deputy auditor's position be full-time and that the deputy's time be shared with other city departments. This decision pertained to the merits of the deputy auditor matter before the committee and should have been made upon a roll call vote. N.D.A.G. 2005-O-02. Therefore, it is my opinion that the committee violated N.D.C.C. § 44-04-21 by failing to take a roll call vote on a nonprocedural matter before the committee and by failing to include in the minutes the vote of each member on the roll call vote it should have taken.

It does not appear, however, that a decision was made regarding the extra pay period issue. The chairman's minutes state that "[t]here were many questions and discussions, however no solution was put forth for a vote." The auditor's minutes also reflect much discussion and, although three council members stated they agreed with a statement made by another member, they also stated they would bring the issue to the next meeting for further discussion. In addition, at the next meeting of the full council, an employee relations committee report was presented only with regard to the deputy auditor issue. The extra pay period issue was not discussed or presented as a committee report. Therefore, it is my opinion that because no decision was made on this matter, a roll call vote was not required.

Issue Five. Whether a secret telephone poll was conducted by members of the Council in violation of N.D.C.C. § 44-04-20.

Mr. Nordmark stated in his request that there were indications a subsequent telephone poll of the Council members would take place in violation of the open meetings laws. Meetings of a quorum of a governing body such as the Council must be open and preceded by public notice. N.D.C.C. §§ 44-04-17.1(8), 44-04-19, 44-04-20. Meeting means a formal or informal gathering, whether in person or through other means such as telephone. N.D.C.C. § 44-04-17.1(8). It includes not only simultaneous gatherings of a quorum of the members of a governing body, but also a series of smaller

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gatherings, including multiple telephone conversations, collectively involving a quorum if the members hold the gatherings for the purpose of avoiding the open meetings law. N.D.C.C. § 44-04-17.1(8)(a)(2); N.D.A.G. 2005-O-04; N.D.A.G. 98-O-05. In its response, the Council denies there was a telephone poll. In any opinion issued under N.D.C.C. § 44-04-21.1, “the attorney general shall base the opinion on the facts given by the public entity.” N.D.C.C. § 44-04-21.1(1). Accordingly, it is my opinion the Council did not violate N.D.C.C. § 44-04-20 by taking a telephone poll.

CONCLUSIONS

1. The Council violated N.D.C.C. § 44-04-20(6) by failing to list the topics to be discussed at the December 28, 2004, special meeting of the Employee Relations Committee.
2. The notice was not filed with the auditor as required by N.D.C.C. § 44-04-20(4).
3. The Council violated N.D.C.C. § 44-04-20(6) by failing to give notice of a special meeting when a quorum of Council members attended a meeting of the Employee Relations Committee.
4. The Council violated N.D.C.C. § 44-04-21(2) because its Employee Relations Committee failed to take a roll call vote on a nonprocedural matter and failed to include in the minutes the vote of each member on the roll call vote it should have taken.
5. The Council did not conduct a telephone poll regarding the business of the committee meeting in violation of N.D.C.C. § 44-04-20.

STEPS NEEDED TO REMEDY VIOLATIONS

A revised notice of the Council’s Employee Relations Committee’s December 28, 2004, meeting and a notice of the full Council’s special meeting needs to be prepared and filed with the city auditor and posted at the city’s main office. N.D.C.C. § 44-04-20(4). Both notices must also be provided to the city’s official newspaper and any person who had previously requested to receive notice. N.D.C.C. § 44-04-20(5), (6). The notices must contain the date, time, and location of the meeting and the topics that were considered at the meeting. N.D.C.C. § 44-04-20(2). A joint notice may be prepared in lieu of separate notices. In the future, the Council and its committees must take recorded roll call votes on all nonprocedural matters before them. The notices must specify that the minutes prepared by both the chairman and the city auditor are available from the city auditor to any member of the public who wants a copy, free of charge. In the future, the city must file its meeting notices with the city auditor.

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Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued 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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