

**OPEN RECORDS AND MEETINGS OPINION
2011-O-15**

DATE ISSUED: October 3, 2011

ISSUED TO: Valley City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Eugene Bjerke asking whether the Valley City Commission (Commission) violated N.D.C.C. § 44-04-20 by discussing a matter that was not specifically included on the agenda of a special meeting.

FACTS PRESENTED

A special meeting of the Commission was held on May 3, 2011. The purpose of the special meeting was to hear an appeal by the Valley City police chief, Dean Ross, who was appealing an oral reprimand he received from his direct supervisor, the city administrator.¹ The city of Valley City's employee policy provides that in such a situation, the appeal is heard by the Commission.² The mayor arranged for Sarah Andrews Herman, an attorney, to represent Valley City (City) at the appeal hearing.³ The city attorney, Jon Fitzner, was also present at the hearing.

The notice for the hearing stated:

¹ Many members of the public attended the grievance hearing and, in addition, it was broadcast live on the radio and on cable access television.

² City of Valley City Emp. Policy and Procedure Manual (adopted Mar. 23, 2001, revised Mar. 2010).

³ N.D.C.C. § 40-20-02 provides that the governing body of a city may employ and pay special counsel when it deems it to be necessary for the best interests of the city.

Special City Commission Meeting
Valley City, North Dakota
Tuesday, May 3, 2011
5:00 PM
Call to Order
Roll Call
New Business

1. Step 3 Grievance Hearing requested by Dean Ross, as specified in the City of Valley City Employee Policy and Procedure Manual, regarding oral reprimand received on February 22, 2011.
- RC 1. 2. 3. 4. 5.

Adjourn

At the beginning of the hearing, the attorney representing Chief Ross, Joseph F. Larson II, objected to the presence of Ms. Andrews Herman and questioned when she had been appointed as a special assistant city attorney for the City. In response to the objection, City Attorney Fitzner advised the Commission to affirm the employment of Ms. Andrews Herman as special counsel for the City so that the grievance hearing could proceed.⁴ Consequently, the Commission unanimously moved the appointment of Ms. Andrews Herman as special counsel for the purpose of the grievance hearing.⁵ The hearing then proceeded.

ISSUE

Whether the Commission violated N.D.C.C. § 44-04-20 by failing to include an agenda item in the notice for a special meeting.

ANALYSIS

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”⁶ A “meeting” is defined as any gathering of a quorum of the members of a governing body regarding the public business of the entity.⁷ A notice for a special meeting must contain the date, time, location, and topics to be considered.⁸ The topics that may be considered at an emergency or special meeting are limited to

⁴ Letter from City Attorney R. Jon Fitzner to Assistant Attorney General Mary Kae Kelsch (June 3, 2011).

⁵ Id. 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 political entity.

⁶ N.D.C.C. § 44-04-19.

⁷ N.D.C.C. § 44-04-17.1(9)(a)(1).

⁸ N.D.C.C. § 44-04-20(6).

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those included in the notice.⁹ The word “topic” can be defined as “[a] subject of discussion or conversation.”¹⁰ Notice of meetings must be provided in substantial compliance with N.D.C.C. § 44-04-20.

The hearing was noticed as a special meeting of the Commission because a quorum was present and the commissioners were presiding over a matter of public business.¹¹ The requester asks whether the Commission violated N.D.C.C. § 44-04-20 when it failed to list the Commission’s appointment of Ms. Andrews Herman as a special assistant city attorney as an agenda topic for the special meeting. The city attorney explained that the appointment was made in response to an objection by the employee’s attorney; therefore, the appointment was necessary and relevant to the stated and published purpose of the special meeting.¹² The city attorney further explained that the Commission affirmed the employment of Ms. Andrews Herman as special counsel for the City so that the grievance hearing could proceed.¹³

The purpose of an agenda is to provide sufficient “information to interested members of the public concerning the governing body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate.”¹⁴ The importance of identifying what will take place at a meeting is greater for special meetings because they are unpredictable and often scheduled on short notice.¹⁵ Consequently, the topics that may be considered are limited to those included in the notice.¹⁶

Here, the notice clearly identified the topic for the special meeting as a grievance hearing regarding Police Chief Dean Ross, but the notice did not include a detailed itemization of every step or procedural issue that may arise in the grievance hearing. To do so would have been unfeasible and unnecessarily speculative. Unlike a typical Commission meeting, the Commission cannot predict all possible objections,

⁹ N.D.C.C. § 44-04-20(6). But see N.D.C.C. § 44-04-20(2) (unlike a special meeting, as in this instance, departure from or an addition to the agenda at a regular meeting does not affect the validity of the meeting).

¹⁰ The American Heritage Dictionary 1450 (4th coll. ed. 2010). N.D.C.C. § 1-02-02 states that words used in any statute are to be understood in their ordinary sense.

¹¹ See N.D.C.C. § 44-04-17.1(9)(a)(1) (definition of “meeting”). See generally, N.D.A.G. 2011-O-05 (having supper at restaurant with another governing body was a meeting); N.D.A.G. 2008-O-10 (attending presentation at a luncheon was a meeting); N.D.A.G. 98-F-16 (onsite inspection was a meeting).

¹² See footnote 4.

¹³ See footnote 4.

¹⁴ N.D.A.G. 2009-O-03; N.D.A.G. 2008-O-23.

¹⁵ See N.D.A.G. 2011-O-01.

¹⁶ N.D.C.C. § 44-04-20(6); N.D.A.G. 2011-O-01.

responses, and issues that it must address during the course of a hearing because of the involvement of the grieving employee and, as in this case, his attorney. The Commission explained in its response to this office that the special meeting topic was based upon the information available at the time the notice was posted. It did not list a separate itemization for all objections and possible responses, including the appointment of Ms. Andrews Herman, because at the time the notice was posted, the Commission did not anticipate Mr. Larson's objection.

In order for the action taken by the Commission at the grievance hearing to be appropriate for this special meeting, the action taken had to be related or within the scope of the topic listed on the special meeting notice. Since the Commission's action was taken in response to an objection made during the hearing, it was within the scope of the topic listed.

CONCLUSION

It is my opinion that the appointment of Ms. Andrews Herman was related to the grievance hearing described in the notice and, further, that the notice of the grievance hearing substantially complied with N.D.C.C. § 44-04-20.

Wayne Stenehjem
Attorney General

mkk/vkk