

**OPEN RECORDS AND MEETINGS OPINION
2018-O-08**

DATE ISSUED: May 17, 2018

ISSUED TO: West Fargo School Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from *The Fargo Forum* asking whether the West Fargo School Board violated N.D.C.C. § 44-04-19 by holding an unauthorized executive session.

FACTS PRESENTED

The West Fargo School Board held a regular meeting on January 8, 2018.¹ After the regular meeting, the Board held what it considered to be a separate, special meeting with an executive session “for the purpose of discussing superintendent negotiations of salary and benefits as provided by section 9 of N.D.C.C. 44-04-19.1.”² At the time of the meeting, the Board was searching for its next school superintendent and was determining a salary range and benefits for the future superintendent’s contract.³ After reconvening in the open portion of the meeting, the Board announced it “reached consensus . . . to establish a starting salary of approximately \$200,000 inclusive of the superintendent’s share of retirement contribution.”⁴

ISSUE

Whether the executive session during the January 8, 2018, special meeting of the West Fargo School Board was authorized by law.

¹ See Meeting Schedule, West Fargo Sch. Bd.

² Minutes, Special Meeting, West Fargo Sch. Bd. (Jan. 8, 2018); see also Letter from Kara Gravley-Stack, President, West Fargo Sch. Bd., to Office of Att’y Gen. (Feb. 20, 2018).

³ Letter from Kara Gravley-Stack, President, West Fargo Sch. Bd., to Office of Att’y Gen. (Feb. 20, 2018).

⁴ Minutes, Special Meeting, West Fargo Sch. Bd. (Jan. 8, 2018).

ANALYSIS

School board meetings must be open to the public unless otherwise specifically provided by law.⁵ The Board closed its January 8, 2018, meeting pursuant to N.D.C.C. § 44-04-19.1(9), which provides:

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding . . . contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.⁶

This subsection does not authorize an executive session simply because a contract is being considered or discussed. The discussion must be in the context of negotiation strategy, or providing negotiation instructions to the governing body's attorney or negotiator, regarding contracts which are currently being negotiated or for which negotiation is reasonably likely in the future.⁷ In addition, the discussion is only protected if disclosure of the remarks to the public would have an adverse fiscal effect on the governing body's bargaining position.⁸

Past opinions recognized that school boards are authorized to hold executive sessions to discuss salary and benefit negotiations of teachers and employees when doing so in public would adversely affect their negotiation and bargaining position.⁹ However, when the school board makes a unilateral decision on a contract, without options for further negotiations, the elements of N.D.C.C. § 44-04-19.1(9) are not met and an executive session would not be appropriate.¹⁰

⁵ N.D.C.C. § 44-04-19; N.D.A.G. 2010-O-11; N.D.A.G. 2005-O-21; N.D.A.G. 2000-O-09; N.D.A.G. 2000-O-05.

⁶ N.D.C.C. § 44-04-19.1(9).

⁷ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2017-O-03; N.D.A.G. 2004-O-13; N.D.A.G. 2000-O-09; N.D.A.G. 2000-O-05.

⁸ N.D.C.C. § 44-04-19.1(9). This would result in increased costs to the public entity. N.D.A.G. 2017-O-03; N.D.A.G. 2016-O-01; N.D.A.G. 2010-O-11; N.D.A.G. 2004-O-13; N.D.A.G. 2000-O-09.

⁹ N.D.A.G. 2004-O-13, N.D.A.G. 2000-O-05; *but see* N.D.A.G. 2000-O-09.

¹⁰ N.D.A.G. 2010-O-11; N.D.A.G. 2005-O-21; *see also* N.D.A.G. 2017-O-03; N.D.A.G. 2016-O-01.

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A member of my staff reviewed the recording of the January 8, 2018, executive session.¹¹ During the executive session, the Board discussed what to offer as a base line salary and benefits in its search for a superintendent. The Board ultimately determined, as confirmed to the public after the executive session, that it would offer a base salary of \$200,000, including retirement benefits.¹²

Although it would appear that the Board in this case made a unilateral decision of a baseline salary, the executive session recording revealed a discussion by the Board about various negotiation strategies it would utilize to secure employment with a desirable candidate.¹³ The Board considered what other school districts offer as salary and benefits and what they should offer to stay competitive and attract the best applicant. In this context, the Board discussed various salary ranges and benefits that it could negotiate based on an applicant's experience and qualifications.¹⁴ To have such a discussion in public would affect the Board's bargaining position as the applicant would be able to demand the top dollar amount and certain benefits based on his/her qualifications, undermining the Board's future negotiations.

However, during the executive session, the Board decided to not "vote," but rather say it "reached a consensus" to offer a baseline salary, with retirement benefits, of \$200,000. This was announced to the public upon reconvening in the open meeting.¹⁵

"Final action" on topics discussed during an executive session must occur during the open portion of the meeting unless final action is otherwise required by law to be taken

¹¹ The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5).

¹² Minutes, Special Meeting, West Fargo Sch. Bd. (Jan. 8, 2018).

¹³ See *generally* N.D.A.G. 2016-O-12 (executive session was proper when the discussion could not have taken place without revealing closed or confidential information).

¹⁴ The Board engaged in various discussions involving the qualifications for the position in the context of how the qualifications would relate to different salary ranges and benefit packages. At one point, however, the Board deviated off topic to discuss why it chose the minimum qualifications for the position in the first place. Recognizing this discussion was getting off topic, one member brought the discussion back to salary and benefits. The brief discussion did not violate open meeting laws as the Board, in recognizing the mistake, brought the conversation back to the topics authorizing the executive session. See N.D.A.G. 2014-O-01 (brief reference to an item not on a special meeting agenda was not a violation of open meetings law when, in recognizing the potential violation, the governing body abandoned its consideration and moved on to properly noticed topics for discussion).

¹⁵ Minutes, Special Meeting, West Fargo Sch. Bd. (Jan. 8, 2018).

during the executive session.¹⁶ “Final action” means “a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy.”¹⁷ Some decisions a governing body makes during an executive session, however, are not treated as final action: “[final action] does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.”¹⁸ For example, when a governing body provides guidance to its negotiator on salary or contract price range, it is not considered “final action” and if this range was revealed, it would undermine the bargaining position of the public entity.¹⁹

Reaching a consensus is the same as taking a vote. Thus, this “consensus” was a final decision made by the Board that should have been voted upon during the open portion of the meeting.²⁰

It is my opinion that the Board discussed negotiation strategy during its executive session so it was authorized under N.D.C.C. § 44-04-19.1(9). However, it is further my opinion that the Board did violate open meetings law when it took final action during the executive session.

CONCLUSION

Although the executive session discussing negotiation strategy was authorized pursuant to N.D.C.C. § 44-04-19.1(9), the West Fargo School Board took “final action” in the executive session in violation of open meetings law, N.D.C.C. § 44-04-19.2(2)(e).

STEPS NEEDED TO REMEDY VIOLATION

In reviewing the executive session, I recognize it was the full consensus of the West Fargo School Board to offer the baseline salary. The meeting minutes of the January 8, 2018, special meeting should be updated to reflect that all Board members attending the executive session were in favor and approved of the decision to offer a baseline salary of \$200,000, with stated benefits.

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

¹⁶ N.D.C.C. § 44-04-19.2(2)(e); N.D.A.G. 2015-O-15; N.D.A.G. 2005-O-21.

¹⁷ N.D.C.C. § 44-04-19.2(2)(e).

¹⁸ N.D.C.C. § 44-04-19.2(2)(e).

¹⁹ N.D.A.G. 2015-O-15; N.D.A.G. 2013-O-13; N.D.A.G. 2004-O-13.

²⁰ See N.D.A.G. 2005-O-21 (motion authorizing a unilateral issuance of a contract goes beyond negotiation strategy and instruction and was considered “final action”).

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reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.²¹ It may also result in personal liability for the person or persons responsible for the noncompliance.²²

Wayne Stenehjem
Attorney General

sld

cc: Matthew Von Pinnon (via email only)

²¹ N.D.C.C. § 44-04-21.1(2).

²² *Id.*