



STATE OF INDIANA

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March 2, 2010

Ms. Nancy K. Walsh
1819 McClarney Ct.
Indianapolis, IN 46217

Re: Formal Complaint 10-FC-28; Alleged Violation of the Open Door Law by the Board of Education of the Metropolitan School District of Perry Township

Dear Ms. Walsh:

This advisory opinion is in response to your formal complaint alleging that Board of Education of the Metropolitan School District of Perry Township ("Board") violated the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*, by holding an "illegal executive session" on January 19, 2010. The Board's response to your complaint is enclosed for your review.

BACKGROUND

In your complaint, you allege that the Board held a "line-by-line discussion of . . . proposed changes in the Superintendent's compensation" at a January 19, 2010, executive session. At that meeting, the superintendent provided the Board with annotated copies of his employment contract. He also advised the Board that he was repaying the school district for certain expenses he submitted for reimbursement. The Board's purported purpose for holding that executive session, as identified in the posted notice of the same, was for discussion of strategy with respect to collective bargaining under I.C. § 5-14-1.5-6.1(b)(2)(A) and to receive information regarding an individual's misconduct where the Board has jurisdiction over that individual under I.C. § 5-14-1.5-6.1(b)(6)(A). At the Board's next meeting on January 25th, the subject of the superintendent's compensation was discussed in public. However, you claim there were "substantial differences" between the presentation given by the superintendent at the executive session and the "truncated presentation" addressing his compensation in the January 25th public meeting. Moreover, the version of the superintendent's employment contract that Board members received at the executive session was different than the version distributed at the public meeting.

My office forwarded a copy of your complaint to the Board. Attorney David R. Day, general counsel for the school district, responded to your complaint on behalf of the Board. Mr. Day states that the discussion of the superintendent's compensation occurred in the context of a broad discussion of collective bargaining strategy. Mr. Day asserts that "the size and scope of the superintendent's salary and benefits is almost always a subject raised by teachers' associations in collective bargaining," so the Board discussed the superintendent's compensation due to the expectation that it would need to be considered as part of the overall collective bargaining strategy. Mr. Day further states that the superintendent reviewed his contract in preparation for addressing their effect on the collective bargaining process. The superintendent brought several compensation-related items to the attention of the Board so that the Board could consider whether such information would be an appropriate part of the negotiations. Mr. Day claims that no vote was taken by the Board on those items.

ANALYSIS

The General Assembly enacted the ODL with the intent that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. §5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. I.C. §5-14-1.5-3(a).

The exception to the general rule that a meeting of the governing body must be open to the public is the executive session. An executive session is defined as a meeting "from which the public is excluded, except the governing body may admit those person necessary to carry out its purpose." I.C. § 5-14-1.5-2(f). "Executive sessions are governed by Indiana Code 5-14-1.5-6.1, and may only be conducted under very limited circumstances." *Opinion of the Public Access Counselor 03-FC-64*. The purposes for which executive sessions may be held are limited to the twelve situations listed at Indiana Code section 5-14-1.5-6.1(b). The governing body of a public agency bears the burden of showing that its gathering is an executive session within one of several strict statutory exceptions. *Opinion of the Public Access Counselor 00-FC-12*.

The ODL permits a governing body of a public agency to meet in executive session for "discussion of strategy with respect to . . . [c]ollective bargaining." I.C. § 5-14-1.5-6.1(b)(2)(A). "However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries." *Id.*

Here, the Board argues that because a discussion of the superintendent's compensation occurred in the context of collective bargaining strategy, it was a permissible subject of discussion under I.C. § 5-14-1.5-6.1(b)(2)(A). If this matter proceeds to litigation, the Board will bear the burden of proof to demonstrate that its discussion was indeed within the context of competitive bargaining strategy and that such

a discussion was “necessary for . . . bargaining reasons.” *Id.* I note that courts liberally construe the ODL in favor of the ODL’s intent that the official action of public agencies be conducted and taken openly. I.C. § 5-14-1.5-1.

Within this legal framework, it is my opinion that if the Board’s discussion of the superintendent’s compensation was confined to the aspects of his compensation that were necessary to discuss for collective bargaining reasons, the Board will likely be able to sustain its burden. However, if the Board discussed elements of the superintendent’s compensation for purposes other than its collective bargaining strategy, it is my opinion that the Board violated the ODL. Because I am not a finder of fact (and because I lack sufficient information about the content of the Board’s discussion to make such a determination), I express no opinion on the issue of whether or not the Board’s discussion exceeded the scope permitted by the ODL. I note, however, that if a complainant believes that a public agency continues to violate the ODL following the issuance of an advisory opinion from this office, that complainant may file an action in any court of competent jurisdiction to obtain a declaratory judgment; enjoin continued, threatened, or future violations; or declare void any policy, decision, or final action. I.C. § 5-14-1.5-7(a).

CONCLUSION

For the foregoing reasons, it is my opinion that if the Board discussed the superintendent’s compensation for any reason other than that which was necessary for its collective bargaining strategy, the Board violated the ODL.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: David R. Day, Church, Church, Hittle & Antrim