



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

March 27, 2013

Jason M. Potthoff
2458 S. 50 E
Winamac, Indiana 46996

*Re: Formal Complaint 13-FC-70; Alleged Violation of the Open Door Law by the
Pulaski County Board of Commissioners*

Dear Mr. Potthoff:

This advisory opinion is in response to your formal complaint alleging the Pulaski County Board of Commissioners ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Kevin C. Tankersley, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the Board violated the ODL by voting to terminate two county employees at an executive session held on February 25, 2013.

In response to your formal complaint, Mr. Tankersley provided the following facts as to Kenny Becker's termination:

During the week of January 7, 2013, a number of complaints were made to the Commissioner Tracey Shorter by employees of the County Highway Department ("Department"). On January 17, 2013, Commissioner Shorter contacted Mr. Tankersley about how she should investigate the complaints. Mr. Tankersley advised that the Board should contact an independent contractor who provides human resource services since Pulaski County ("County") did not maintain a Human Resource Department. On January 17, 2013, Mr. Tankersley, on behalf of the Board, contacted Ms. Paula Reimers of Wagner, Irwin, Scheele, & Associates, Inc. and discussed the situation.

On January 22, 2013, Mr. Becker was suspended with pay by Commissioner Larry Brady and human resource representative, Ms. Reimers, pending an investigation into the complaints. On January 22, 2013 and January 23, 2013, interviews of all employees of the Department were conducted. On January 24, 2013, a notice was given for an executive session to be held by the Board on January 30, 2013 pursuant to I.C. § 5-14-1.5-6.1(b)(9). The executive session was held on January 30, 2013 to discuss the job

performance evaluation of Mr. Becker. Mr. Reimers provided an oral report at the executive session with regard to the employee interviews that were conducted and her investigation into the Department.

On February 2, 2013, Ms. Reimers emailed her written investigation to the Board for review. At the Board's February 4, 2013 public meeting, Mr. Becker was demoted to general manager of the Department and Commissioner Brady was appointed as Department Head. The State Board of Accounts verified that Commissioner Brady would not violate any rule by serving as a member of the Board and the Head of the Department. As Department Head, Commissioner Brady was given the task of getting the Department in line with County policy. On his first day, Commissioner Brady observed new policy violations by a number of Department employees. Written reprimands were issued to some employees, including Mr. Becker. At the Board's February 19, 2013 public meeting, discussion was held regarding the changes in the Department.

Thereafter, Commissioner Brady, in his capacity as Department Head, requested an executive session to be held by the Board to discuss Mr. Becker's job performance. Notice of the executive session was posted on February 21, 2013. On February 25, 2013, the Board held an executive session wherein Commissioner Brady discussed with those present his evaluation of Mr. Becker over the past three weeks. Commissioner Brady recommended that Mr. Becker be terminated. Discussion was held on this issue and Mr. Becker was invited into the executive session. In the executive session, Commissioner Brady, in his capacity as Department Head, prepared and provided a notice of disciplinary action to Mr. Becker. No vote was taken at the executive session to terminate Mr. Becker. Mr. Becker was advised that Commissioner Brady, as acting Department Head, was recommending his termination. As acting Department Head, Commissioner Brady had the authority to suspend Mr. Becker pending a termination of employment. Pursuant to the Pulaski County Employee Policy Handbook ("Handbook"), a department head has the authority to terminate an employee. The Handbook provides that "The County Commissioners may approve the reasons for the temporary suspension and terminate the employee, overrule the temporary suspension remove the same thereby reinstating the employee to their position, or table the issue until further investigation on the conduct of the employee." Pursuant to I.C. § 5-14-1.5-6.1(b)(9), the Board only discussed the job performance evaluation of Mr. Becker at the February 25, 2013 executive session. At the Board's March 4, 2013 public meeting, the Board voted to ratify the decision of the department head regarding the termination of Mr. Becker.

Mr. Tankersley provided the following facts as to Mr. Maurice DeMarco's termination:

Mr. DeMarco was acting maintenance director for the County. A complaint was filed against Mr. DeMarco by a County employee, who was under the direct supervision of Mr. DeMarco. The Board requested that Ms. Reimers investigate the complaint. Upon completion of the investigation, Ms. Reimers requested the Board hold an executive session to discuss Mr. DeMarco's job performance evaluation. Mr. Tankersley

noted that Mr. DeMarco had already been given a four day suspension without pay less than thirty days prior to the current alleged incident. The Board held an executive session regarding this issue on February 25, 2013 pursuant to I.C. § 5-14-1.5-6.1(b)(9) and discussed the job performance evaluation of Mr. DeMarco. Ms. Reimers discussed with the Board her reasoning behind recommending that Mr. DeMarco be terminated. Mr. DeMarco was given a disciplinary form indicating the reasons for the recommended termination. At the March 4, 2013 public meeting, the Board voted to ratify the decision of Ms. Reimer regarding Mr. DeMarco's termination.

Mr. Tankersley provided that case law from Indiana's Supreme Court and Court of Appeals has held that a determination whether a governing body has violated the ODL is a fact sensitive endeavor. Specifically, the Indiana Court of Appeals in *Baker v. Town of Middlebury*, 753 N.E. 2d 67 (Ind. Ct. App. 2001) held that previous case law did not stand for the premise that if a governing body conducts a properly noticed executive session, that the body cannot have discussions and make decisions short of taking a vote. The holding in *Baker* comported with the guiding principles of the ODL and with the public policy of protecting the privacy rights of individuals with respect to sensitive personnel matters. The private discussion of an employee's job performance evaluation does not significantly prevent or impair the public's knowledge or understanding of the people's business and it is in the public interest to promote efficient personnel management and maintain employee morale. Permitting employee evaluations to take place in private session prevents the employee from experiencing public embarrassment related to the critique of his work performance and avoids needless injury to the employee's reputation.

Mr. Tankersley maintains that the facts with regard to the Board's termination of Mr. Becker and Mr. DeMarco provide that the acting department head in Mr. Becker's case, and the acting human resource representative in Mr. DeMarco's case, both recommended termination. The department head and the human resources representative prepared the respective disciplinary forms notifying each individual that they were recommending termination. Pursuant to County policy, the Board brought the issue of termination up independently at its public meeting held on March 4, 2013. The Board voted at that time to ratify the decision to terminate Mr. Becker and Mr. DeMarco. Both employees were paid their full wages through March 4, 2013. No final action of the Board took place at the executive session held on February 25, 2013.

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). With regard to individuals over whom the governing body has jurisdiction, an executive session may be held to receive information regarding an individual's alleged misconduct or to discuss, before a determination, the individual's status as an employee. *See* I.C. § 5-14-1.5-6.1(b)(6)(A)-(B). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *Baker*, 753 N.E.2d at 71. "Final action" means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g).

The ODL does not instruct governing bodies as to what actions require the governing body to vote. *See Opinions of the Public Access Counselor 08-FC-136 and 12-FC-144*. The County's Handbook provides that all elected officials/department heads shall have the power to temporarily suspend any employee under their supervision. The temporary suspension shall be effective immediately upon verbal notification to the employee. The elected official/department head shall thereafter complete a Temporary Suspension Form. Upon receipt of the Temporary Suspension Form, the County Auditor shall schedule an executive session of the Board to review the temporary suspension and for the Board to determine the course of action to be taken. The Board may approve the reasons for the suspension and terminate the employee, overrule the temporary suspension and remove the same thereby reinstating the employee to their positions, or table the issue until further investigation may be conducted.

Here, you allege that the Board conducted final action on the employment of Mr. Becker and Mr. DeMarco at an executive session held on February 25, 2013. In response, the Board advised that while it discussed the status of each individual's employment at the February 25, 2013 executive session, no vote was taken by the Board at the executive session. All voting conducted by the Board terminating Mr. Becker and Mr. DeMarco's employment with the County was conducted at the Board's open, public meeting on March 4, 2013. This is further evidenced by the memoranda from the Board's March 4, 2013 public meeting that was provided with the Board's response to your formal complaint. Further the County Handbook provides the authority and process by which any elected official, department head, and the Board may suspend or terminate an employee of the County. It should be noted that I was not in attendance at any meeting held by the Board regarding this issue nor is public access counselor a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. Acknowledging the holding in *Baker* that the only official action that cannot take place in an executive session is final action, it is my opinion that the Board complied with the requirements of the ODL if all final action taken by the Board regarding the terminations of Mr. Baker and Mr. DeMarco was conducted at the Board's open public meeting held on March 4, 2013.

CONCLUSION

Based on the foregoing, it is my opinion that the Board did not violate the ODL if all final action taken by the Board regarding the terminations of Mr. Baker and Mr. DeMarco was conducted at the Board's open public meeting on March 4, 2013.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Kevin C. Tankersley