



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 21, 2005

Mr. Edward L. Michael
980 Huron Trail
Sheboygan Falls, WI 53085

Dear Mr. Michael:

I am responding to your May 16, 2005, letter raising concerns about the manner in which the Sheboygan Falls School Board ("Board") conducted an April 21, 2005, special meeting to interview, discuss and appoint a candidate to fill a Board vacancy created by a resignation in January 2005.

You state that some time prior to April 21, 2005, the Board posted a meeting notice for a special meeting to be held April 21, 2005. The notice provided, in relevant part:

4. Discussion of Interview Process
5. Interview Candidates to fill School Board Vacancy
6. Adjourn into Executive Session per Wis. Stats. 19.85(1) (f) to consider the applicants for a Board Vacancy
7. Return to open session
8. Selection of New School Board Member

You state that residents of the school district applied for the vacant position, but that only two candidates were available for interviews during the time frame established by the Board's action during its regularly scheduled meeting on April 18, 2005.

The minutes of the April 21 Board meeting reflect that the Board interviewed Kim Schmidt, who gave a brief background of herself, and responded to six Board questions. The minutes reflect that Board member Tom Bigler, seconded by Board member Dianne Gatzke, moved to adjourn to executive session pursuant to section 19.85(1)(f) of the Wisconsin Statutes, "to consider the applicants for a Board Vacancy," at the close of the interview. The minutes reflect that the motion passed unanimously; *i.e.*, that all five Board members present at the meeting voted in favor of the motion. The minutes further reflect that the Board approved a motion allowing two newly-elected Board members, Kelly Fintelmann and Dan Setzer, to join the Board in the closed session to consider the applicants.

Mr. Edward L. Michael
June 21, 2005
Page 2

You state that you believe the Board acted unlawfully by convening into closed session to discuss the qualifications of the two candidates to fill the vacancy on the Board. Under the circumstances you have described, I agree.

My predecessor addressed the circumstance you describe in 74 Op. Att'y Gen. 70 (1985), a copy of which I enclose for your reference. In that opinion, the Attorney General stated, in relevant part, 74 Op. Att'y Gen. at 70-72:

In my opinion a governmental body cannot reconvene in closed session to interview potential candidates unless the information solicited and discussions involve "financial, medical, social or personal histories or disciplinary data of specific persons ... which, if discussed in public, *would be likely* to have a *substantial adverse effect upon the reputation* of any person referred to in such histories or data" Sec. 19.85(1)(f), Stats. As I stated in OAG 9-76 in discussing section 66.77(4)(e), Stats. (1975):

To justify considering individual qualifications in closed session, it is not sufficient that personal information is the subject of discussion, even if public discussion of that information *might result in some damage to reputations*. The exception applies only where such discussion in open session might *unduly damage* reputations. *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 685, 137 N.W. 2d 470, held that, in determining whether public disclosure might *unduly damage* reputations, the interest of the public in being informed on public matters must be balanced against harm to reputations which would likely result from public airing.

It would be extremely unusual that a general discussion of qualifications of potential candidates for a school board position might involve undue damage to reputations or even danger of possible undue damage. It would appear to me, that before a board could legally convene in closed session in reliance upon the exception, at least one board member would have to have actual knowledge of information which he or she reasonably believed would *unduly damage* reputations if divulged in open session and that there was probability that such information would be divulged.

The present test, under section 19.85(1)(f), requires a determination that the information involved "*would be likely to have* a substantial adverse effect upon the reputation" involved. This is a much more demanding test than was applicable under the predecessor statute, section 66.77(4)(e), Stats. (1975), which

Mr. Edward L. Michael
June 21, 2005
Page 3

used language "which *may* unduly damage reputations." And *see State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965).

A governmental body should utilize a closed session only in the exceptional case. The purpose behind interviewing potential appointees is often to ascertain how such persons stand with respect to policy and political issues, rather than to inquire into "financial, medical, social or personal histories or disciplinary data of specific persons" Furthermore, although closure might be warranted as to some part of an interview of a specific person seeking appointment, it would not be warranted with respect to all discussion with said person. With respect to certain other persons seeking appointment, closure would not be warranted at all. . . . Even where closure is permissible, discussion must be limited to matters which relate to the exempt area. . . .

In addition to the meeting notice and minutes, you have provided an electronic copy of a newspaper article from the *Sheboygan Falls News* summarizing a reporter's interviews with the Board members and members-elect, following the closed session discussion of the candidates qualifications. I enclose a copy of that message for your reference.

The news article quotes Board president Scott Vollbrecht, clerk Mark Melger and clerk pro-tem Tom Bigler as follows:

"We discussed all four candidates - the two we interviewed and the two we were unable to interview," Vollbrecht said. "We were unable to get them to be available for an interview."

"The [interviews] we didn't have, we discussed what we knew of them," Vollbrecht said. "The things they shared with me, I shared with the board."

"We talked about everything pretty well," Melger said. "It's real tough to look at the different ways we looked at this and all the scenarios about it."

....

"We spent a lot of time commenting on the two that did show up," Bigler said. "We discussed the two we gave opportunities to that couldn't show up - I was getting worried how long we were going to be because we were discussing the two that didn't show up."

Bigler said they discussed all the candidate's strengths and weaknesses, noting that the two that did show up were both good candidates.

Mr. Edward L. Michael
June 21, 2005
Page 4

If the closed session discussion on April 21, 2005, was accurately described by the Board members quoted above, that discussion included matters far beyond the proffered justification for the closed session; *i.e.*, a discussion of the reputationally sensitive financial, medical, social, personal or disciplinary history of one or more of the five applicants for the vacant position, pursuant to section 19.85(1)(f). Indeed, if *any* portion of the closed session discussion involved matters that were *not* reputationally sensitive, the Board violated the open meetings law by discussing that portion of the applicants' qualifications in closed session.

The Wisconsin Department of Justice and the Sheboygan County District Attorney have concurrent jurisdiction to prosecute violations of the open meetings law. In addition to seeking forfeitures against each of the Board members who voted to go into closed session and then participated in the discussion, pursuant to section 19.96, the Department of Justice or the district attorney may ask a reviewing court to void any action taken in violation of the open meetings law. Sec. 19.96(3), Wis. Stats. Though not strictly relevant to the open meetings analysis, you point out that Board Policy 133 requires the Board to interview each of the candidates for a vacancy, which the Board failed to do.

Because your letter indicates that you have filed your complaint with the Sheboygan County District Attorney as well as with this office, and because this office as a matter of practice tends to defer to local prosecution efforts, I am providing a copy of this letter to the Sheboygan County District Attorney, and I encourage you to work with that office in the investigation of your complaint. I also am asking that Mr. DeCecco advise me at the point he decides whether a prosecution or other disposition is appropriate.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

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Enclosures

c: Joe R. DeCecco
District Attorney
Sheboygan County