



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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October 7, 2005

Mr. Orville Seymer
P.O. Box 371086
Milwaukee, WI 53237

Re: *Alleged Open Meetings law Violation by Members of the Kewaskum
School Board*

Dear Mr. Seymer:

As you know, Attorney General Peggy A. Lautenschlager has assigned your referral to me for review. I have completed my inquiries. This letter reports on my findings and conclusions.

The facts as I understand them are as follows. The Kewaskum School Board consists of seven elected members. In an email dated May 6, 2005, to Board attorney Paul C. Hemmer, former Kewaskum School Board President Jean E. Goeden stated that "Neal and I have discussed the officer elections. We are giving Gordie the Presidency, Tammy the VP, Me as clerk . . . and Beth as Treasurer. I told them all we have to show unity" (ellipses in original). "Neal" apparently refers to Neal Weare and "Gordie" to Gordie Dickman, both School Board members. A short while later, Ms. Goeden forwarded this email to the other six members of the School Board.

The next morning, Ms. Goeden sent an email to Board members Beth Steiner and Tammy Weyer. In this email, Ms. Goeden asked that Ms. Weyer nominate her for clerk and that Ms. Steiner nominate Ms. Weyer for vice president. Ms. Goeden further reported that "Neal" will place "Gordie's" name in for presidency. This email also repeatedly urged "unity" and recounted a conversation with Mr. Dickman in which Ms. Goeden urged him that "we" (presumably the school board) "have to think of the School District and show the leadership team, we the board are UNITED. . . ." (emphasis and ellipses in original).

These emails also apparently include references to a pending personnel matter. These references are redacted from both emails. We are informed by the School Board's attorney that the calls for unity are in reference to the personnel matter. However, in our judgment, a reader

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of the emails could reasonably conclude that the call for unity applied as well to the upcoming officer elections, regardless of the sender's intent.

We understand that no further emails were exchanged between or among School Board members regarding the officer elections.

We are also informed that officer elections were discussed among some of the Board members in the weeks prior to the May 9, 2005, meeting. In particular, Ms. Goeden asked Mr. Dickman whether he would accept the office of president. Mr. Dickman asked whether Ms. Steiner would accept the presidency and she declined. Mr. Dickman also solicited Ms. Weyer's acceptance of the office of vice president and she agreed. Ms. Goeden made a separate inquiry of Ms. Weyer as well.

Each of these conversations, whether in person or by telephone, occurred one-on-one. No other Board member was present or participated. Nor is there any evidence that a quorum of the Board (at least four members) agreed to act uniformly with respect to officer elections in general or the election of any specific officer in particular.

According to the minutes of the May 9, 2005, School Board meeting, Mr. Weare nominated Mr. Dickman for president. Another Board member, John Kenworthy, nominated himself. Mr. Dickman won by a 5-2 vote. Mr. Weare also nominated Ms. Weyer for vice president, Ms. Weyer nominated Ms. Goeden for clerk and Ms. Goeden nominated Ms. Steiner for treasurer. Each of these nominees was elected on a unanimous vote.

The Open Meetings Law requires that public notice be provided of all meetings of a governmental body and that each meeting be held in open session unless a closed session is justified under one of several enumerated exemptions. Section 19.83(1) of the Wisconsin statutes; *see* section 19.85(1) of the Wisconsin statutes for a list of the exemptions. A "meeting" occurs whenever there is a gathering of members of a governmental body for the purpose of engaging in governmental business and the number of members present is sufficient to determine the body's course of action. Section 19.82(2) of the Wisconsin statutes; *see also State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102, 398 N.W.2d 154 (1987). "Governmental business" is broadly construed to refer to any formal or informal action, including discussion, deliberation, decision and information gathering, on any matter within the scope of the governmental body's authority. *Showers*, 135 Wis. 2d at 102-03.

There is no doubt that the election of School Board officers is a matter within the School Board's authority and therefore a gathering of Board members to discuss officer elections is for the purpose of conducting governmental business. Thus, the first element of a meeting is satisfied here.

The second element requires that a sufficient number of members be present to determine the governmental body's course of action. This is easy to determine where a discrete number of a governmental body's members are present at a single location. This determination may become more complicated where members are not physically located together but nevertheless are in communication with each other. Thus, the Attorney General has construed the phrase "convening of members" in section 19.82(2) of the Wisconsin statutes to include modern means of communication that effectively allow individual members to communicate and exercise the body's authority even though the members are not physically present together. For instance, a telephone conference call may qualify as a meeting subject to the requirements of the Open Meetings Law if enough members participate to determine the course of action. 69 Op. Att'y Gen. 143, 144 (1980). On the other hand, the Attorney General has opined that circulating a memorandum soliciting support among other members of the governmental body favoring a particular course of action (there, dismissal of a high ranking employee) did not constitute a meeting. *See* correspondence to Kenneth J. Merkel (March 11, 1993) (copy enclosed). This conclusion was based on the observation that "convening" or "gathering," terms used in section 19.82(2) of the Wisconsin statutes to define a "meeting," would not typically include communicating by memorandum. The Attorney General also relied on the fact that the public would not be deprived of information about the workings of government since the memorandum is subject to production under the public records law. Merkel correspondence at 2.

In more recent informal opinions, the Attorney General's office has addressed even more sophisticated means of communication such as instant messaging and email. Whether the use of these forms of communication qualifies as a meeting depends on whether the nature of the communication more closely resembles a conference call or a memorandum or letter. There is no hard and fast rule that governs this analysis and no court case has addressed the question. Factors to consider which this office has identified in deciding whether email communications resemble a meeting or mere correspondence include (1) the number of participants involved; (2) the number of communications on the particular subject matter; (3) the time frame within which the communications occurred; and (4) the extent to which the email communications resemble a conversation. *See* correspondence to Tom Krischan (October 3, 2000) at 4 (copy enclosed); *see also* correspondence to Dan Benson (March 12, 2004) (copy enclosed).

As noted, a meeting occurs when the number of members present is sufficient to determine the governmental body's course of action. By statute, a presumption that a meeting is taking place exists whenever at least half of the governmental body's members are present or participate. Section 19.82(2) of the Wisconsin statutes. However, Wisconsin's courts recognize two additional situations when a gathering of fewer members may still constitute a meeting under the Open Meetings Law. The most relevant of these exceptions is the "walking quorum." A walking quorum constitutes a series of gatherings among separate groups of members of a governmental body, each less than a quorum or majority, who agree, tacitly or explicitly, to take official action in a certain way (such as to all vote the same on a particular issue) in sufficient

