Chalkboard

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Rolling, Walking Board Meetings: Practice Leads to Unenforceable Actions, Potential Criminal Consequences

by Brian M. Kester

On one particularly scorching July evening in Southeast Oklahoma, a school board member approached his neighbor to talk about their area's most recent drought. Clearly aggravated by this state's unyielding heat, the neighbor, a rather wealthy, elderly widow, threw up her hands in disgust and declared that she'd had enough and was moving to Minnesota to be closer to her grandchildren. In laying out her plans to her neighbor, she offered to sell a prime piece of real estate to the school district that it had been trying to buy from her for years. Having more than enough money to live comfortably the rest of her life, and feeling especially philanthropic on this sweltering summer night, she proposed to part with the land for a song, less than a third of its fair market value. There was one catch, though. Because she hated having people "know her business," she would only sell the land if the school board would buy it from her without ever disclosing the sale or the price to the public.

The school board member immediately recognized that this was a once in a lifetime opportunity and that buying this parcel of land would substantially improve the quality of education in the district. However, he also knew that keeping the sale or its terms secret could get him and the rest of the school board in hot water. Racking his brain to find a way to grab this land under the neighbor's conditions, the school board member finally came up with an inspired idea. He planned to meet with the other six board members individually or in pairs at his home the following Saturday night so that he could tell them about this remarkable real estate offer and secure their signatures on the land purchase contract. This way, the school board member reasoned, the board could purchase the land at this rock bottom price and the neighbor could keep her privacy.

Even though the scheme floated by the school board member looks promising on paper, taking this action will only lead to problems for him and the other board members. The proposed arrangement is known as a rolling or walking board meeting, and it violates Oklahoma's Open Meeting Act (the "Act"). Because such meetings violate the Act, any action taken pursuant to them will be null and void as a matter of

law. Additionally, those members who participate in these meetings could face potentially severe consequences including hefty fines, lengthy jail sentences, or both. Therefore, in order to avoid these potentially disastrous results, board members must refrain from engaging in board business via rolling or walking board meetings.

The Open Meeting Act, Okla. Stat. tit. 25 § 301 et seq., governs the manner in which public bodies must conduct their business. Public school boards fall within the definition of "public bodies," and therefore they must abide by the provisions of the Act. Okla. Stat. tit. 25 § 304(1). As part of the Act's requirements, public bodies are required to hold their "meetings" "at specified times and places which are convenient to the public" and which are "open to the public …." Okla. Stat. tit. 25, § 303. Failure to abide by this requirement constitutes a violation of the Act.

The term "meeting" pertains only to certain types of events. As defined by the Act, "'meeting' means the conduct of business of a public body by a majority of its members being personally together or, as authorized … , together pursuant to a videoconference." Okla. Stat. tit. 25, § 304(2). Though the Act does not define the word "business," the Oklahoma Attorney General has stated that this term includes "the entire decision making process including discussion, deliberation, decision or formal action." Okla. Atty. Gen. Opin. No. 82-212.

While the Act generally prohibits a majority of board members from getting together outside of public meetings, it specifically exempts "informal gatherings" from the definition of "meeting" when certain conditions are met. Okla. Stat. tit. 25, § 304(2). Namely, the Act permits a majority of board members to gather together informally without following the strictures of the Act's provisions so long they do not discuss board business. However, if a majority of the board members subverts this exception by using these informal gatherings to discuss board business or "to decide any action or to take any vote on any matter," then a court would find that these gatherings violate the Act. Okla. Stat. tit. 25, § 306. In practice, this means that it is lawful for a majority of the board to meet together at the school's stadium on Friday night to watch the varsity football game, but it is unlawful for that majority to gather together at the concession stand at halftime to discuss and decide how much of the upcoming year's budget they will allocate for a new state-of-the-art scoreboard.

In addition to exempting "informal gatherings" from the requirements of the Act, certain other gatherings involving board members also do not fall within the definition of "meeting." For instance, nothing in the Act prohibits individual board members from receiving information or discussing board business with non-board members outside of pubic meetings. Thus, as decided by courts in other states that have entertained this issue, the Act does not require board members "to inquire, question and learn about agency issues only at an open meeting." Sovich v. Shaughnessy, 705 A.2d 942, 945-46 (Pa. Commw. Ct. 1998). Installing such a requirement "would hamstring the progress of governmental bodies, and impose intolerable time burdens on unpaid officeholders." Tel. Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 534 (Iowa 1980).

When determining whether an information session regarding official business qualifies as an exception to the Act, board members must consider the decisions from courts in other states that have addressed this issue. See, e.g., Chanos v. Nevada Tax Comm'n, 181 P.3d 675, 680 (Nev. 2008); Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510, 518 (Minn. 1983). In general, board members should avoid, if possible, forming a quorum of the board by attending sessions together. If that is not possible, such as at national conferences, board members (1) should make clear that they are attending the event as private citizens, (2) should not sit with other board members, and (3) should not converse with other board members while at the session. By taking these preventive steps, board members will ensure that their attendance at these information-gathering events will not constitute a violation of the Act. See, e.g., Johnston v. Metro. Gov't of Nashville & Davidson Cnty., 320 S.W.3d 299, 312 (Tenn. Ct. App. 2009); Ward v. Bd. of Trustees of Goshen County Sch. Dist. No. 1, 865 P.2d 618, 621-22 (Wyo. 1993).

> The purpose of Oklahoma's Open Meeting Act is to "encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems."

As the above examples show, board members can gather together outside of public meetings under certain circumstances without violating the Act. However, abusing these types of gatherings or participating in others that explicitly or implicitly violate the Act will lead to negative consequences for the board as a whole as well as for those individual board members who engage in the violation.

As explicitly stated in the Act, board members violate Oklahoma law when a majority gathers together to conduct board business without first complying with the provisions of the Act. Okla. Stat. tit. 25, § 306. This violation occurs whether the majority is actual or cumulative. For instance, a violation undoubtedly occurs when five members of a seven-member board meet together in the same office at the same time to deliberate on a topic and garner a consensus as to how they will vote on that topic during the upcoming public meeting. However, this same violation similarly occurs when one board member meets individually with four other members in a short period of time for the same purpose. This second example, known as a rolling or walking board meeting, violates the Act even though, pursuant to the design of this scheme, the board members never form an actual majority at any one time. This was the conclusion of the Oklahoma Attorney General in Okla. Atty. Gen. Opin. No. 81-69.

In that opinion, a county's district attorney asked whether one city councilman could lawfully meet with a majority of other council members individually to secure their signatures and take action on a matter that would otherwise be required to be presented at a public meeting. Stating that such meetings could not lawfully occur, the attorney general noted that this practice would utterly violate the Act because Okla. Stat. tit. 25, § 306 "is an absolute prohibition upon any attempt to circumvent the Open Meeting Act and obtain a consensus upon an item of business by informal meetings outside a public meeting." In essence, the attorney general determined that permitting this practice "would be to condone decision making by public bodies in secret, which is the very evil against which the Open Meeting Act is directed." In so deciding, he reasoned that the Act's "prohibition against this type of decision making is not dependent upon whether a majority of the members of a governing body gather together at the same place at the same time in the presence of each other." Instead, he concluded that the Act prevents board members from informally meeting as a cumulative majority if the purpose or effect of such meetings is to conduct official public business or to "take an action otherwise required to be considered and voted upon at an open meeting." This opinion makes clear that board members cannot lawfully conduct public business by means of rolling or walking board meetings.

Engaging in public business by holding rolling or walking board meetings can have extensive ramifications. These consequences extend not only corporately to the board that took actions pursuant to these unlawful meetings but also individually to those board members who participated in these meetings.

Considering the effect on the actions taken under this arrangement first, Oklahoma law is clear that any action taken pursuant to unlawful meetings, such as rolling or walking board meetings, will be deemed null and void as a matter of law. Okla. Stat. tit. 25, § 313. The Act requires full compliance by public bodies, and when a public body falls short of this requirement, those actions taken by the board in noncompliance of the Act lack legal effect. The only way an action taken in noncompliance can be transformed into a valid action is for the board to begin the whole process over again.

Since rolling or walking board meetings do not comply with the Act, any actions taken during them will be void, and the board would be required to undergo the reformatory process to rectify its noncompliance. Hence, not only would actions passed during these meetings lack legal effect, the board would also be required to expend additional time, effort and resources to properly enact the measures it improperly attempted during the unlawful meetings. This is to say nothing of cost associated with the board's loss of reputation and other potential damages such as the loss of contracts and potential lawsuits. In short, the board only loses when it engages in unlawful rolling or walking board meetings.

In addition to the board's actions being null and void, conducting public business via rolling or walking board meetings also exposes individual board members to potential criminal penalties. As stated in the Act, [a]ny person or persons willfully violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or

by imprisonment in the county jail for a period not exceeding one (1) year or by both such fine and imprisonment.

Okla. Stat. tit. 25, § 314. As this language shows, criminal penalties attach to the individual board members, not the public body itself. Indeed, if the court finds that a board member acted in willful violation of the Act, then that board member will pay.

"Willful," as used in the Act, does not necessarily mean that the person purposely acted to disobey or circumvent the Act. In fact, willfulness under the Act does not require that the board member act in bad faith, malice, or wantonness. Instead, "willful" includes any conscious, purposeful violation of the law or any blatant or deliberate disregard of the Act by any individual who knows, or should know of the Act's requirements. Because "willful" is so expansively defined, board members can violate the Act through ignorance or good faith just as easily as one who violates the Act purposely or maliciously. To be sure, the Act does not take into account the person's unique circumstances when it doles out punishment; penalties remain unchanged regardless of board member's intent.

Board members must be mindful that the consequences outlined for violating the Act are not written for the sake of appearance or to serve as a tactic to scare them into compliance. Oklahoma case law shows multiple examples of board members who have received substantial penalties for violating provisions of the Act. These cases show that courts can and do exercise their power to punish individual board members who engage in activities that violate the Act. Since conducting public business via rolling or walking board meetings constitutes willful violations of the Act, regardless of intent, those board members who engage in these meetings could face individual criminal penalties, including hefty fines, jail sentences, or both. Therefore, in consideration of the severity of the potential punishment, each board member should individually ensure that he avoids conducting public business under such meetings.

The purpose of the Oklahoma's Open Meeting Act is to "encourage and facilitate an informed citizenry's understanding of the governmental processes and governmental problems." Okla. Stat. tit. 25, § 302. Conducting board business via rolling or walking meetings circumvents this purpose and leaves the school board and its members exposed to potentially devastating penalties. Therefore, even though it might sound alluring at times, school boards must avoid this practice.

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