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Question Submitted by: The Honorable George Nigh, Governor, State of Oklahoma

1981 OK AG 214

Decided: 09/04/1981

Oklahoma Attorney General

Cite as: 1981 OK AG 214, __ __

¶0 The Attorney General has received your opinion request in which you ask, in effect:

1. **Do the-Job Content Evaluation Committees, established in Section 3 of Senate Bill No. 65, O.S.L. 1981, ch. 340, come within the purview of the Oklahoma Open Meeting Act, 25 O.S. 301 et seq. (1977) ?**
2. **If the Job Content Evaluation Committees come within the purview of the Open Meeting Act, should such Committees be required to hold a new series of meetings to review and reevaluate materials formerly considered by them in earlier meetings, held without complying with Open Meeting Act, if there was no intent to violate the Act?**

¶1 In S.B. No. 65, 1981 O.S.L., ch. 340, 3, p. 1185 (to be codified at 62 O.S. 7.9 et seq. (1981)), the Legislature adopted the State of Oklahoma Job Content Evaluation Salary Plan. The Bill requires the State Personnel Board to reclassify all classified employees of the State in accordance with the Job Content Evaluation Salary Plan.

¶2 To facilitate this reclassification, the Legislature, in Section 3 of the Bill, created Job Content Evaluation Committees. These Committees, appointed by the Administrator of the State Personnel Board and the Executive Director of the Oklahoma Public Employees Association, were created to review all classifications "whose members are scheduled to receive an average salary increase over thirty percent (30%) based on individual salaries as of January 31, 1981, of employees entering the classes due to the recommendation of Hay Association and those classifications for which evaluations are requested from an executive head of a state agency, board of commission due to possible improper evaluation."

¶3 Committee Members are selected from State employees. The Committees are required to approve or modify the "job content points" of those being reclassified. Committee recommendations on job content evaluation are subject to approval by the Contingency Review Board.

¶4 Whether these Committees come within the purview of the Oklahoma Open Meeting Act, can be determined by reviewing the definitional section of the Open Meeting Act, 25 O.S. 304 (1977). Subsection 1 of that section provides:

1. "'Public body' means the governing body of all municipalities located within the State of Oklahoma, boards of county commissioners of the counties in the State of Oklahoma, boards of public and higher education in the State of Oklahoma and all boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, public trusts, task forces or study groups in the State of Oklahoma supported in whole or in part by public funds or entrusted with the expending of public funds, or administering public property, *and shall include all committees or subcommittees of any public body.* It shall not mean the state judiciary or the State

Legislature or administrative staffs of public bodies, including, but not limited to, faculty meetings and athletic staff meetings of institutions of higher education, when said staffs are not meeting with the public body." [Emphasis added]

¶5 If Job Content Evaluation Committees fall within this definition, they come within the purview of the Act.

¶6 Prior to the enactment of the 1977 version of the Open Meeting Act, governing bodies of the State were required to comply with the provisions of Chapter 6 of Title 25 O.S. 1971, which defined all governing bodies required to comply with the Act. In pertinent part, it provided:

"All meetings of the governing bodies of all municipalities located within the State of Oklahoma, boards of county commissioners of the counties in the State of Oklahoma, boards of public and higher education in the State of Oklahoma and all of the boards, bureaus, commissions, agencies, trusteeships or authorities in the State of Oklahoma supported in whole or in part by public funds or entrusted with the expending of public funds or administering public properties, must be public meetings, and in all such meetings the vote of each member must be publicly cast and recorded...."

¶7 In construing this *former act*, the Oklahoma Supreme Court held that whether a subordinate entity came within the purview of the Act depended on the *authority* the subordinate entity exercises, and not upon the source of its financial support. *Sanders v. Benton*, 579 P.2d 815 (Okla. 1978), and *Carl v. Board of Regents of the University of Oklahoma*, 577 P.2d 912 (Okla. 1978). In both of these cases, the Supreme Court stated:

"If the subordinate entity in the performance of its assigned duties and responsibilities exercises actual or defacto decision making authority, it must comply with the open meeting law. Under such circumstances, the fact the subordinate entity may or may not be supported in whole or in part by public funds would not be controlling...." 479 P.2d 815 at 820, and 577 P.2d 912 at 915.

¶8 Thus, under the old open meeting law, a determination of whether a subordinate entity came within the Act was dependent upon the decision-making power of the entity. Such, however, is no longer the law. Under the new Open Meeting Act, the term "public body" was enlarged to include, ". . . all committees or subcommittees of any public body." The Job Content Evaluation Committees come within this expanded definition, for they are the subcommittees of a public body, the State Personnel Board.

¶9 In reaching this conclusion, the Attorney General notes that Job Content Evaluation Committees are not administrative staff members. These Committees are ad hoc committees created to perform a specific function, and certainly do not constitute the type of body ordinarily thought of as an administrative staff. Unlike ad hoc committees, administrative staffs are usually permanent fixtures chiefly responsible for the internal operations of an institution or business. Such staffs function through a body of assistants who normally are carrying out the will of a superior. See *Beta Nu Chapter, Delta Sigma Theta Sorority v. Smith*, 89 N.E.2d 722 (Ind. App. Ct. 1950). Also see "staff", Webster's New Collegiate Dictionary, G. & C. Merriam Company, Springfield, Massachusetts, 1979.

¶10 Having determined that Job Content Evaluation Committees come within the purview of the Open Meeting Act, it is necessary to respond to your second question which asks whether Job Content Evaluation Committees should be required to hold a new series of meetings to review and reevaluate material they considered in earlier meetings which were held in violation of the Open Meeting Act, assuming that there was no intent on the part of the Committees to violate the Act.

¶11 The Oklahoma Open Meeting Act at 25 O.S. 313 (1977), provides:

"Any action taken in *willful* violation of this act *shall be invalid*. [Emphasis added]

¶12 Thus, if the actions of the committee constituted "willful" violations of the Act, the actions taken by them are invalid. Recently, in defining "willful", the Oklahoma Court of Appeals in *In the Matter of The Appeal of The Order Declaring Annexation, Dated June 28, 1978*, ___ O.B.A.J. ___ (Okla. App. 1981), held that:

". . . The word "willful" in 25 O.S. 313 (1977), providing that actions taken in willful violation of the Open Meeting Act shall be invalid, does not require a showing of bad faith, malice, or wantonness, but rather, encompasses both conscious, purposeful violations of the law and *blatant* or *deliberate* disregard of the law by those who *know* or *should know*, the requirements of the Open Meeting Act." [Emphasis added]

¶13 The Court of Appeals also *rejected* the notion that the presence of "good faith" precludes a finding of willfulness, stating:

"Appellees seem to think that 'good faith' precludes a finding of willfulness.

"We cannot agree with this narrow interpretation....

"If willful is narrowly interpreted, if actions taken in violation of the Act could not be set aside unless done in bad faith, maliciously, obstinately, with a premeditated evil design and intent to do wrong, then the public would be left helpless to enforce the Act most of the time and public bodies could go merrily along, in good faith, ignoring the Act."

¶14 Finding that the goal of the Open Meeting Act was not simply to prevent or punish deliberate violations, the Court went on to hold that it discerned no bad faith, malice, or wantonness, and *while the officials may not have consciously broken the law*, the Court was "well-convicted that they [the officials] knew or should have known the Act's requirement and blatantly or deliberately disregarded the law."

¶15 In the situation involved in your question, the Administrator of the State Personnel Board was under a duty to (1), see that the Committee members were briefed and told of their responsibilities and duties and (2), see that the Committees were furnished with copies of statutes pertaining to their duties. See 74 O.S. 3101 (1973). Accordingly, the Committee members most likely knew or should have known of their duty to comply with the Open Meeting Act. Whether the Job Content Evaluation Committees' violations of the Act were willful is, however, a question of fact, which cannot be answered by the Attorney General.

¶16 If you have any doubt as to whether the violations were "willful", the Committees must reconsider those actions taken by them in violation of the Act. Such a procedure would avoid costly and time consuming litigation, which might arise because of the Committees' failure to comply with the Open Meeting Act. Lastly, the Attorney General would call your attention to the following language of the Oklahoma Court of Appeals in *In The Matter of The Appeal of The Order Declaring Annexation Dated June 28, 1978*, *supra*. In that cause, the Court stated:

"The Courts hold that subsequent events, such as 'ratifying' actions or decisions previously made in violation of Open Meeting laws, will not cure the violation, will not 'breathe life' into the prior illegal action".

¶17 Applying this principle to the facts presented, it would appear that any rehabilitative action taken by the Committee must include a *full reevaluation* of the matters considered in violation of the Open Meeting Act. Of course, meetings held to reconsider these matters must be held in compliance with the Open Meeting Act.

¶18 It is, therefore, the official opinion of the Attorney General that:

1. Job Content Evaluation Committee created in Section 3 of S.B. No. 65, 1981 Okla. Sess. Law Serv., ch. 340, p. 1185 (to be codified at 62 O.S. 7.9 et seq. (1981)), are "public bodies" within the meaning of the Oklahoma Open Meeting Act, 25 O.S. 301 et seq. (1977), and therefore must comply with the provisions of that Act.
2. Any action taken in "willful" violation of the Open Meeting Act is invalid. 25 O.S. 313 (1977). The word "willful" in 25 O.S. 313 (1977) does not require a showing of bad faith, malice, or wantonness, and includes unintentional violations.
3. Whether a particular violation is a "willful" violation of the Open Meeting Act is a question of fact which cannot be determined by the Attorney General.
4. If a public body concludes that it may have violated the provisions of the Open Meeting Act, in a "willful" manner, the public body must fully reconsider those matters acted upon in violation of the Act. Such reconsideration, of course, must be done in compliance with the Act.

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NEAL LEADER
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