



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 11, 1993

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Mr. Kenneth J. Merkel
3405 North Brookfield Road
Brookfield, Wisconsin 53045

Dear Mr. Merkel:

I am writing in response to your February 12, 1993, letter in which you expressed concern that the chairperson of the Wisconsin Conservation Corps Board may have acted contrary to the open meetings law in circulating a memo regarding the possible dismissal of the Conservation Corps' Executive Director. Based on the information in your letter, it appears that the chairperson was unhappy with the executive director's job performance and, as a result, felt that the Conservation Corps Board should dismiss the executive director. The chairperson sent a memo to each board member. The memo's subject heading was "REQUEST FOR BOARD MEMBER SUPPORT." The memo stated that "[a]s board chairperson I am asking each board member to support the immediate discharge of [the Executive Director]." On the second page of the memo, the chairperson requested that each board member sign and date the memo. The memo stated that "YOUR SIGNATURE WILL INDICATE YOUR SUPPORT!"

You question whether the chairperson violated the open meetings law in circulating the memo. This state's open meetings law applies to any "meeting" of a "governmental body." Sec. 19.83, Stats. There is no question that the Wisconsin Conservation Corps Board is a "governmental body." Thus, the answer to your question turns on whether circulating the memo to the members of the board and asking them to indicate their support for the chairperson's position by signing the memo constituted a "meeting" within the meaning of the open meetings law. In my opinion, it did not.

The open meetings law provides:

"Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does

not include any social or chance gathering or conference which is not intended to avoid this subchapter.

Sec. 19.82(2), Stats. The Legislature's use of the terms "convening," "present" and "gathering" in section 19.82(3) of the Wisconsin statutes suggests that the Legislature intended to limit the definition of "meeting" to situations in which members of a governmental body are assembled or brought together to conduct governmental business. See Webster's Third New International Dictionary 497 (1986) ("convene . . . 1 of persons : to come together, meet, or assemble in a group or body . . .").

The definition of "meeting" is not limited to situations in which members of a governmental body are physically present in the same location. In 69 Op. Att'y Gen. 143 (1980), for example, my predecessor concluded that a telephone conference call among members of a governmental body is a "meeting" subject to the Open Meetings Law. My predecessor observed:

It is true that in a telephone conference call participants do not convene in the traditional sense because they are not physically gathered together. But they are convened in the sense that they can effectively communicate and exercise the authority vested in the body. To hold otherwise would allow the intent and purpose of the law to be frustrated by resort to any one of a number of modern communication techniques that permit communication without the participants being physically gathered together.

Id. at 144. I think that a court would agree with my predecessor that a telephone conference call among members of a governmental body is a "meeting" subject to the open meetings law. I, however, think it unlikely that a court would conclude that communicating with members of a governmental body by memo would constitute a "meeting" of a governmental body. I reach that conclusion for two reasons. First, non-technical words in a statute must be construed according to their common and approved usage. Sec. 990.01(1), Stats. I do not believe that the common and approved usage of the terms "convening" and "gathering," which are used in section 19.82(2), includes communicating by memo. See Webster's Third New International Dictionary 497. Second, interpreting the definition of "meeting" to exclude communicating with members of a governmental body by memo will not work to deprive the public of information about the workings of government since the public can seek disclosure of written public documents under the public records law.

That is not to say that a board such as the one you serve on is free to conduct its business outside of the context of a

Mr. Kenneth J. Merkel
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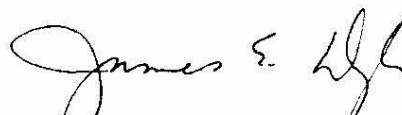
formally convened "meeting" that is subject to the open meetings law. A board created by state statute, and its members, have only those powers which are expressly given by statute or necessarily implied to carry out the board's statutory responsibilities. Kimberly-Clark Corp. v. Public Service Comm., 110 Wis. 2d 455, 329 N.W.2d 143 (1983). Thus, generally speaking, a board can only take action that requires the exercise of discretion and judgment at a duly convened meeting and members cannot vote by written or telephone proxy, unless otherwise provided by statute. See case law and other legal authority cited in the enclosed Informal Opinion, dated April 28, 1986. This restriction is a general, common-law restriction distinct from the requirements of the open meetings law.

Based on the limited information available to me, it appears that the signed responses that the chairperson of the Conservation Corps Board received to her memo were not treated as the actual votes of members of the board which formed the basis of any formal action by the board. Thus, it appears that the board did not run afoul of the general restriction on taking action outside of a formally convened meeting on a matter that requires the board's exercise of discretion and judgment.

For the above reasons, I am of the opinion that it is unlikely that a court would conclude that the chairperson of the Conservation Corps Board violated the open meetings law by circulating a memo requesting that other members of the board support her position with respect to the executive director. I, therefore, do not believe that further action by the attorney general's office is warranted.

Thank you for bringing your concerns to my attention. If my office can assist you in answering any other open meetings law questions in the future, please contact me.

Sincerely,


James E. Doyle
Attorney General

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