



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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June 13, 2007

Mr. Ken Kittleson  
Personnel Director  
Monroe County  
14345 County Highway B, Room 3  
Sparta, WI 54656-4509

Dear Mr. Kittleson:

Your March 14, 2007, letter to Attorney General J.B. Van Hollen has been forwarded to me for response. Please accept my apology for the delay in getting back to you.

Your letter alleges a "walking quorum" violation by the Monroe County Board. The analysis and conclusions contained in this response are based solely on the information you have provided or that can be located on the county's website. I have not conducted any investigation to determine the factual accuracy of the information you have provided. Based solely on the information I have considered and in the absence of any contravening information, I cannot conclude that you have alleged facts that would support prosecution of a "walking quorum" violation of the open meetings law, because there is no allegation that the alleged instigator of the walking quorum James Kuhn ("Kuhn") discussed the subject of the resolution with the supervisors who signed the petition to bring the resolution directly to the board, and there is no allegation that the signing supervisors shared any agreement other than agreeing that the resolution should be placed on the board's agenda for consideration by the board as a whole. If additional factual information were to be obtained about alleged instigator's contacts with the signing supervisors, that more complete factual record may or may not support the opinion expressed in this letter.

**Assumed facts.** It appears that you are the personnel director for the Monroe County Personnel Department ("Personnel Department"). You allege that on or about March 8, 2007, thirteen of Monroe County's twenty-four county board supervisors signed a petition directed to the Monroe County's Administrative Committee ("Administrative Committee") to bring a resolution to the Monroe County Board for consideration, pursuant to a county board rule which allows that procedure where the petition is signed by at least five county board members. The resolution which was the subject of the petition proposed a number of changes, including restructuring the Personnel Department, giving the Administrative Committee responsibility for

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all bargaining functions, contracting with the Wisconsin County Mutual Insurance Corporation for professional labor lawyer assistance, and eliminating the position of personnel director. You allege that board supervisor Kuhn hand carried the resolution and petition to the twelve supervisors who signed the petition, obtained their signatures, and then hand delivered the resolution and petition to the Monroe County Clerk. The resolution was to be placed on the agenda for the board's next meeting, scheduled for March 28, 2007. You allege that the circumstances by which Mr. Kuhn obtained the signatures of a majority of county board supervisors constituted a "walking quorum" violation of the open meetings law. You seek the following relief:

Remedy sought includes criminal charges and fines for the supervisors signing the resolution, and resignation or removal of perpetrator James Kuhn. Further, Complainant requests that the resolution or subsequent similar resolutions be vacated, and that the Complainant be afforded legal protections against any and all retaliation received pursuant to the filing of this Complaint.

The rules of the Monroe County Board, as printed in the 2006 Official Directory of Monroe County, Wisconsin, contemplate that, in general, resolutions intended for consideration by the board of supervisors first be considered by one of the board's committees. County Rule 14 provides that "[a]ny matter that comes before the Board without a committee recommendation or resolution shall be referred to the appropriate committee by the Chair without motion." The board's rules also provide a method for bringing resolutions to the board for consideration that does not require a matter to be recommended by a committee. Rule 21 provides:

Any member who wishes a particular resolution be brought before the entire Board shall do so by petitioning the appropriate committee, in writing, said petition to bear the signatures of at least five members. If said written petition is presented to the appropriate committee, the committee chair shall direct that a resolution be forwarded to the Board to be considered at the next scheduled meeting. Said resolution shall contain the position and/or request of the petitioning members and shall conform to all other requirements provided for in these Rules.

Minutes of the Administrative/Executive Committee from its March 20, 2007, meeting do not reflect that the resolution and petition were presented to that committee. Minutes from the March 15, 2007, meeting of the Personnel and Bargaining Committee contain the following entry related to the resolution and petition: "5. Personnel Department reorganization resolution. This item has been pulled and will not be discussed per Committee Chairman P. Peterson." The minutes of the county board's March 28, 2007, meeting do not reflect that the resolution was brought before the board at that meeting.

**Analysis and conclusions.** For purposes of the open meetings law, a “meeting” is defined as “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.” Sec. 19.82(2), Wis. Stats. The Wisconsin Supreme Court has held that such a meeting occurs whenever such a “convening of members” satisfies two requirements. First, there must be a purpose to engage in governmental business, which is broadly construed to refer to any formal or informal action, including discussion, deliberation, decision, or information gathering, on any matter within the scope of the governmental body’s authority. Second, the number of members involved must be sufficient to determine the governmental body’s course of action. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 102-03, 398 N.W.2d 154 (1987).

The Attorney General has consistently taken the position that the phrase “convening of members” in section 19.82(2) of the Wisconsin Statutes is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together. Whether such a situation qualifies as a “convening of members” depends on the extent to which the communications in question resemble a face-to-face exchange. A telephone conference call, for example, is very similar to an in-person conversation and thus qualifies as a convening of members. Accordingly, if the number of members participating in such a conference call is sufficient to determine the body’s course of action, then the call is a meeting of the body subject to the requirements of the open meetings law. 69 Op. Att’y Gen. 143, 144 (1980). Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a “convening of members” if the medium is used in a way that closely resembles an in-person discussion—*e.g.*, a rapid back-and-forth exchange of viewpoints among multiple members. As with a telephone conference, such an electronic conversation may constitute a meeting if it involves enough members to control an action by the body. *See* correspondence to Tom Krischan (October 3, 2000) (copy enclosed).

In addition, our Supreme Court has advised that certain kinds of “elaborate arrangements” taken to avoid the appearance of a quorum are also actionable under the open meetings law. In *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 687, 239 N.W.2d 313 (1976), the court stated:

It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum.

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The quoted language is the source of the concept of a "walking quorum;" *i.e.*, a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient numbers to determine the body's course of action. Whatever form those separate gatherings might take, the essential feature of a walking quorum is the element of agreement among the members on some uniform course of action. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

The Department of Justice recently considered a complaint of a walking quorum violation in circumstances similar to the ones your correspondence describes. *See* correspondence to Kevan Kay (April 25, 2007) (copy enclosed). The Village of Howard apparently has a village ordinance that allows members of the village board to jointly request additions to meeting agendas. It appears that if a sufficient number of members sign a form requesting the addition of agenda items and deliver that written request to the clerk, the requested items are to appear on the meeting agenda. Four of the Village of Howard's nine board members signed a form requesting the addition of agenda items that proposed discussion and action on votes of confidence or no-confidence motions regarding two village officials, and a fifth member of the board (who did not sign the form) transmitted the signed request to the clerk's office electronically. The Department of Justice concluded that the facts presented to it did not describe a walking quorum, stating (*id.* at 3-4):

That element of agreement [required to establish a walking quorum] is missing when an individual member of a governmental body simply endorses a written document. Even if a quorum of members sign the document one after another, a walking quorum has not occurred unless the members have effectively engaged in discussion and debate outside the context of a properly noticed meeting, and have agreed with each other to act in some uniform fashion. Accordingly, this office has previously concluded that, where a set of resolutions was circulated to members of a body prior to a meeting and a majority of those members signed onto the circulated resolutions as co-sponsors, there was no "walking quorum" violation, as long as the contact among co-sponsors did not involve discussion or debate about the substance of the resolutions or agreements to later vote uniformly for or against them. *See* correspondence to Melanie Kirsch (July 28, 1998) (copy enclosed). Similarly, at least one court construing another state's open meetings law has found no walking quorum violation where members of a body who conferred by telephone had only discussed what they needed to put on the agenda for future meetings without discussing policy or substantive public business and without conducting a poll of members' positions on any issue. *Harris County Emergency Service Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 169 (Tex. App. 1999).

Applying these principles to the facts alleged in your complaint, it is clear that there was no walking quorum because the five Board members are not alleged to have reached any agreement to vote uniformly for or against the proposed no-confidence motions or to have engaged in any substantive discussion of those proposals. Similar to the co-sponsorship situation discussed above, the four Board members who signed the request form are not alleged to have engaged in any discussion beyond the bare indication of support for having the items placed on the future agenda. And the fifth member, Mr. Crouch, whose participation would be needed to establish a quorum, is not alleged to have communicated about the no-confidence motions with Ms. Hughes or any of the others who signed the form. Rather, based on Mr. Crouch's email to the Village Administrator, it appears that Ms. Hughes simply asked him to scan and forward the document because she did not possess a scanner. Nothing you have submitted suggests that Mr. Crouch ever discussed the contents of the document with any other Board members or reached any explicit or implicit agreement with them on any uniform course of future action. Under these circumstances, it is very unlikely that a court would find a walking quorum.

The facts alleged in your complaint present a closer question than was presented by the Village of Howard situation on the existence of a walking quorum. You allege that Mr. Kuhn signed the petition to bring the Personnel Department resolution to the county board, then personally contacted twelve more members of the twenty-four member board, and then obtained their signatures on the petition. Thus, there is no question that a majority of supervisors acted identically to request that the Personnel Department resolution be considered by the board.

However, here as in the Village of Howard situation, there is no allegation that any of the thirteen board members who signed the petition have reached any agreement to act uniformly for or against the proposed resolution. Nor is there any allegation that any of the thirteen members engaged in substantive discussion about the resolution. The only uniformity reflected by the thirteen signatures is a shared view that the substantive issues presented by the resolution should be considered by the full board membership at a duly noticed meeting. An agreement that a subject should be considered is not the same as an agreement about what course of action is to be taken. The facts you allege are not materially different from the ones the Department of Justice responded to in the April 2007 letter to Kevan Kay and the July 1998 letter to Melanie Kirsch. On the basis of those facts, I cannot conclude that Mr. Kuhn or any of the other Monroe County supervisors violated the open meetings law. As evidenced by your complaint and the newspaper articles and editorials on the subject that you have provided, however, members of governmental bodies subject themselves to close scrutiny and possible prosecution whenever a majority of a body's total membership is involved in any action connected to government business that takes place outside the context of a duly noticed meeting. For that reason, a better method for submitting agenda requests would be for a single member to send such a request to the village

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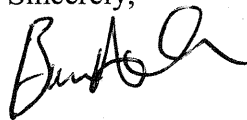
administrator, who would then provide all other members with written notice that they could independently communicate their support of that request directly to the office of the village administrator. Such a procedure would reduce any possible appearance of impropriety by minimizing inter-member communications.

I am providing a copy of this correspondence to the Monroe County Corporation Counsel with a request that she distribute copies to all members of the county board for their benefit.

Finally, please be advised that if you disagree with this opinion, you also have the right under section 19.97(1) to submit a verified open meetings law complaint to the Monroe County District Attorney. If you file such a complaint and the district attorney refuses or otherwise fails to commence an enforcement action within 20 days, then you can initiate your own action pursuant to section 19.97(4). If you prevail in such an action, the court may award your actual attorney fees and other necessary costs.

Thank you for your interest in assuring compliance with the open meetings law.

Sincerely,



Bruce A. Olsen  
Assistant Attorney General

BAO:ajw

Enclosure

c: Kerry Sullivan Flock  
Corporation Counsel  
Monroe County