

7 Compliance Board Opinions 21 (2010)

Public Body – Boundary Study Committee appointed by Assistant School Superintendent as required under local Board of Education policy is a public body under §10-502(h)(1)

Public Body – §10-502(h)(2) has no application to entity appointed pursuant to local Board of Education policy

Meeting – Quorum not present or convened – Determined not to be a meeting

Notice – Quorum anticipated – Notice required even if, at time of session, quorum fails to attend

May 27, 2010

Jeannine Fay
Jason Decker

The Open Meetings Compliance Board has considered your complaints in connection with the West Towson Elementary School Boundary Study Committee. Specifically, you alleged that the committee violated the Open Meetings Act when it met on December 23, 2009, in a meeting that had not been announced to the public.

For the reasons explained below, we conclude that the committee is a “public body” as that term is defined for purposes of the Open Meetings Act. Because a quorum was not present December 23, the meeting itself did not violate that Act. However, if the organizers of the session intended that a quorum of the committee would attend, the failure to provide public notice of the meeting violated the Act.

I

Complaints and Response

A. Fay Complaint

According to Ms. Fay’s complaint, the Central Area Superintendent for the Baltimore County School System organized the West Towson Elementary School Boundary Study Committee, in accordance with Board of Education Policy 1280, to make school redistricting recommendations in anticipation of the opening of a new school. According to the complaint, it was announced

that the committee would meet on October 28, November 18, and December 2 and 16, 2009. Although the public would not have the opportunity to comment during these sessions, the meetings were to be open to the public. During the course of these meetings, various redistricting options were discussed and voted on by members of the committee.

On December 16, the committee voted to eliminate one option known as “Scenario G” under which Rodgers Forge Elementary School would serve only those homes that were part of the Rodgers Forge Community Association. The complaint indicated that this option was eliminated because most members of the committee felt that the boundaries appeared gerrymandered in that they curved sharply to exclude apartment complexes directly adjacent to the school. Thus, many people were surprised when Scenario G was included among the packet of redistricting scenarios presented at a public forum held on January 6, 2010.

According to the complaint, on January 13, 2010, Ms. Fay heard a member of the committee describe at a community association meeting how he had been instrumental in getting Scenario G reinstated. Following the December 16, 2009, meeting, the committee member determined that Scenario G could be justified in that “it followed the ‘historic district’ of Rodgers Forge.” The committee member then worked to convene an impromptu committee meeting to reconsider Scenario G. This meeting occurred on December 23, 2009, at which time the committee voted to approve the inclusion of Scenario G. The complaint alleged that the December 23 meeting was conducted in violation of the Open Meetings Act in that it was never announced to the public.

B. Decker Complaint

Mr. Decker’s complaint also focused on whether the Open Meetings Act was violated in connection with the December 23, 2009, committee meeting in that notice was not provided to the public. This complaint described the events leading to the formation of the committee and included a copy of the relevant Baltimore County Public Schools Policy. The committee was described as consisting of parents, teachers, administrators, and other representatives from the schools and communities in the region. It was noted that the dates of the other committee meetings were well publicized and that, to the complainant’s knowledge, whenever previous boundary study committees decided to hold additional meetings, notice to the public was routinely provided.

Mr. Decker requested that we review whether the committee’s December 23, 2009, meeting was subject to the Open Meetings Act and, if so, whether the Act was violated.

C. Response

When submitting the complaints to the committee for response, we informed the committee that we would treat both complaints in a single opinion. In a timely response on behalf of the committee, Margaret-Ann Howie, General Counsel for the Baltimore County Public Schools, asserted that the boundary study committee is not a “public body” subject to the Open Meetings Act.¹ The response stated that Board of Education Policy 1280 established the Board’s “boundary practices” to revise and create school attendance areas and reflects the importance of the community’s role in the process. The response noted that the Board of Education is legally mandated to determine schools’ attendance areas. The committee “existed solely to study the possible boundaries for the West Towson Elementary School which is scheduled to open for the 2010-2011 school year. Once a committee has determined possible options, the school system’s staff is to “[h]ost a community forum in which the boundary change options developed by the ... [c]ommittee will be presented...” The response explained, “[t]he community meetings, therefore, are the Area Assistant Superintendent’s, not the Committee’s.” The committee’s recommendations are recommendations to the Area Assistant Superintendent which are then reviewed by the public. The Area Assistant Superintendent, in turn, makes a recommendation to the Superintendent for final action by the Board of Education.

The response explained that, under the policy, it is the “Executive Director of Schools” – now titled “Area Assistant Superintendent” – who appoints a boundary study committee. Thus, the committee, while described in the Board’s policy, was not created by the Board. Here the committee, appointed by an Area Assistant Superintendent, included 16 community and school representatives and 7 school system staff members; ten of the members had voting rights.²

The response stated that, while the Board of Education policy is a “formal instrument” within the meaning of §10-502(h)(1)(ii)5,³ the policy merely provides the Area Assistant Superintendent the ability to name the group. The response further emphasized that the committee serves in an advisory role to the area assistant superintendent. It does not advise the Board of Education or the Superintendent of Schools.

¹ We granted Ms. Howie a brief extension of time in which to respond.

² The roster included with the response identified a total of 22 members.

³ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

While committee meetings were held on October 28, November 18, and December 2 and 16, 2009, and on January 20, 2010, the response stated that there were no public announcements of these meetings. Rather, individual schools notified their respective communities. In contrast, the community forum hosted by the area assistant superintendent were announced by each school and the Baltimore County Public Schools Office of Communication, consistent with the Board's policy.

In summary, the response argued that when the committee met on December 23 to consider additional information regarding the Rodgers Forge neighborhood, no public notice was required since the committee is not a public body under the Act. However, the response further argued that, if the committee was determined to be a public body, the Act was not violated in that a quorum was not present; therefore, no meeting, as defined under §10-502(g), occurred. Only two voting members attended. While four school system members and one co-chair attended, they lacked authority to vote on the boundary change. Therefore, in the respondent's view, a quorum of the committee had not convened.

II

Analysis

Before considering the complainants' allegation relating to notice, we must first consider whether the boundary study committee's meeting was subject to the Open Meetings Act. Application of the Act involves a three-part analysis: (1) Is the entity a "public body" subject to the Act? (2) If it is a public body, did the particular session constitute a "meeting" for purposes of the Act? (3) And finally, if a meeting occurred, was the topic of discussion subject to the Act? 6 *OMCB Opinions* 17, 20 (2008). If the answer to any of these questions is no, our evaluation would ordinarily end, because the Open Meetings Act would not apply. However, assuming the committee qualifies as a public body, the issue of notice must still be addressed.

A. Public Body

Because all the requirements of the Act are framed in terms of the meeting practices of a "public body," the initial question we must consider is whether the boundary study committee is a "public body" as defined by the Act. 2 *OMCB Opinions* 70, 72 (1999). Stated otherwise, if an entity is not a "public body," no violation of the Act's notice requirements could have occurred. 6 *OMCB Opinions* 140, 143 (2009).

The Open Meetings Act defines a “public body” in part as:

- (1) ... an entity that:
 - (i) consists of at least 2 individuals; and
 - (ii) is created by:
 - 1. the Maryland Constitution;
 - 2. a State statute;
 - 3. a county or municipal charter;
 - 4. an ordinance;
 - 5. a rule, resolution, or bylaw;
 - 6. an executive order of the Governor; or
 - 7. an executive order of the chief executive authority of a political subdivision of the State.
- (2) “Public body” includes:
 - (i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least 2 individuals not employed by the State or the political subdivision;
 - (ii) any multimember board, commission, or committee that:
 - 1. is appointed by:
 - A. an entity in the Executive branch of State government, the members of which are appointed by the Governor, and that otherwise meets the definition of a public body under this subsection; or
 - B. an official who is subject to the policy direction of an entity described in item A of this item; and
 - 2. includes in its membership at least 2 individuals who are not members of the appointing entity or employed by the State; and
 - (iii) The Maryland School for the Blind.

§10-502(h)(1) and (2).⁴ Thus, the Act prescribes three distinct ways in which an entity might constitute a public body. In considering the boundary study committee, we shall consider each scenario in the reverse order from which they are listed in the statute.

⁴ Section 10-502(h)(3) excludes certain entities from the definition of “public body,” but these exclusions are not relevant to the matter before us.

Both §10-502(h)(2)(i) and (ii) cover multi-member entities appointed without any formal legal instrument listed in §10-502(h)(1). Section 10-508(h)(2)(ii), the latest expansion of the term “public body,” extends to a multi-member entity that is appointed either by a public body in the executive branch of State government, the members of which are appointed by the Governor, or by an official subject to such a public body’s policy direction, provided that its membership includes at least two individuals who are neither members of the appointing entity nor employed by the State. However, this provision would not extend to the boundary study committee. Although the Baltimore County Board of Education is appointed by the Governor, neither the Board nor its staff are considered part of the executive branch of State government. *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 136-137, 747 A.2d 625 (2000) (While local boards of education are generally considered State agencies, they are not normally regarded for structural purposes as units within the Executive Branch.)

Nor would the boundary study committee constitute a public body under §10-502(h)(2)(i). To be sure, it is a multi-member entity that includes individuals unaffiliated with the school system. But it was not appointed by the Governor or the chief executive authority of a political subdivision of the State or by an official subject to the Governor or chief executive authority’s policy direction. It was appointed by an Area Assistant Superintendent of schools. Given that a local board of education generally is viewed as a State entity, it would not be viewed as a political subdivision of the State.

A more difficult question is whether the boundary school system constitutes a public body under §10-502(h)(1). In responding to the complaint, counsel for the school system concedes the Board of Education policy is a formal instrument within the meaning of the statute. But according to the response, it is neither the Board of Education nor the Superintendent of Schools that appoints a boundary study committee under the policy. Rather, the committee is appointed by an Area Assistant Superintendent. Furthermore, the response states that the committee serves as an advisor to the Area Assistant Superintendent rather than to the Board of Education or the Superintendent.

In an earlier opinion, we addressed the application of the Act to an entity established in accordance with a statute that required the Critical Area Commission to appoint a panel of 5 of its members to conduct a public hearing on a proposal to amend a local critical area program. *5 OMCB Opinions* 189 (2007). Among other things, the statute addressed a panel’s quorum requirements and prohibited certain actions absent a quorum. *Id.* at 191. Although the statute stopped short of actually establishing the panel, we concluded that the panel was nevertheless a public body under the Open

Meetings Act. *Id.* at 192. However, whether the boundary study committee is a public body presents a closer question.

Unlike the law governing the hearing panel, the Board of Education policy provides little detail prescribing the committee's governance. As we understand the policy, it simply required that an Area Assistant Superintendent establish a boundary study committee, one aspect of developing redistricting recommendations, before the Area Assistant Superintendent's could offer recommendations for presentation to the Board of Education. The policy only required that certain stakeholders be represented and offered an advisory framework and suggestions of matters that might be considered. Much of the detail appears to have been left to the Area Assistant Superintendent's discretion. If the statute was construed narrowly, it might be said the policy did not create the boundary study committee that would qualify as a public body under §10-502(h)(1).

However, in considering the application of the Act to a nonprofit corporation known as the Salisbury Zoo Commission, the Court of Special Appeals strongly suggested that the definition of public body found in §10-502(h)(1) should not be read this narrowly. *See Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 143, 724 A.2d 717, *cert. denied*, 353 Md. 473, 727 A.2d 382 (1999). Although the Court decided the matter under an alternative provision, the Court suggested that had the City adopted a resolution requiring the City Attorney to file articles of incorporation establishing the Zoo Commission, §10-502(h)(1) would have likely applied. 125 Md. App. At 145. Here the policy adopted by the Board of Education clearly required that the Area Assistant Superintendent appoint the boundary study committee. While the actual composition was left to the discretion of the Area Assistant Superintendent, including the number of members necessary to calculate a quorum, the board's policy mandated the Area Assistant Superintendent's action. Under these circumstances, we find that the boundary study commission, required under the Board of Education policy, was a public body for purposes of the Act. To the extent there was any gap in the policy prescribing sufficient detail necessary to determine a quorum, the gap was addressed by action of the Area Assistant Superintendent naming 22 members to the committee.⁵

⁵ While the role of the boundary study committee apparently is limited to making recommendations to the area assistant superintendent, in carrying out that role, the committee's activities would appear to be an "advisory function" under the Act. The term "advisory function" is defined, in part, as "the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by ... formal action by or for a public body that exercises an administrative, judicial, legislative,

(continued...)

B. Meeting

The response argued that, even should it be determined that the boundary study committee was a public body, the session held December 23, 2009, was not a meeting governed by the Act in that a quorum was not present. The Open Meetings Act only applies when a public body is holding a “meeting.” A meeting requires the presence of a quorum - - in most cases, a simple majority of the membership. §10-502(g) and (k); 3 *OMCB Opinions* 242, 43 (2002). In appointing the boundary study committee, the Area Assistant Superintendent named 22 members. Thus, 12 would normally constitute a quorum. Given that only seven members were apparently present on December 23, we agree with the respondent’s counsel that no meeting actually occurred.⁶

C. Notice

The question remains whether the boundary study committee nevertheless violated the Act’s notice requirements even though a quorum did not materialize on December 23, 2009. Based on the record before us, all we can offer is a qualified response.

We assume that, at the time the meeting was scheduled, the organizers had either anticipated, or had at least hoped, that a quorum would be present so that the inclusion of Scenario G could be revisited. If that assumption is correct, notice of the meeting was required. *See, e.g., Community and Labor United for Baltimore Charter Comm. (CLUB) v. Baltimore City Bd. of Elections*, 377 Md. 183, 195, 832 A.2d 804 (2003); 3 *OMCB Opinions* 92, 95 (2001). And failure to provide any form of notice to the public would have violated §10-506 even though no meeting ever actually occurred.

On the other hand, if that assumption is not correct, no violation of the Act’s notice requirements would have occurred. Of course, had a quorum nonetheless materialized, and had the group proceeded with a meeting, the

⁵ (...continued)

quasi-judicial, or quasi-legislative function.” §10-502(c). Thus, the facts that the boundary study committee lacks final decision-making authority and advises only the Area Assistant Superintendent do not affect our decision.

⁶ In reaching this conclusion, the response distinguished between voting members and nonvoting members of the committee. We do not necessarily agree with this conclusion in that it appears to mix the requirement for a quorum versus ability to take action. *Cf.* 3 *OMCB Opinions* 78, 82 (2001) (supermajority voting requirement did not alter number necessary to constitute a quorum). However, we need not dwell on this point because counting either all the members in attendance or only members entitled to vote would fall short of a quorum.

meeting would have been in violation of the Act in that notice to the public was never provided.

III

Conclusion

We find that the boundary study committee appointed by an Area Assistant Superintendent pursuant to a policy of the Baltimore County Board of Education requiring the appointment is a “public body” under the Open Meetings Act. But because a quorum was not present December 23, 2009, the meeting itself did not violate that Act. However, if the organizers of the session intended that a quorum of the committee would attend, the failure to provide public notice of the meeting violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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