July 2013 Vol. 50, No. 1

ILLINOIS STATE BAR ASSOCIATION

Local Government Law

The newsletter of the Illinois State Bar Association's Section on Local Government Law

A little more confusion from the PAC on closed sessions

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Two recent confusing opinions issued by the Public Access Counselor ("PAC") (Public Access Opinions No. 13-007 and No. 13-010) have the potential to limit a public body's ability to reach consensus and to plan future action in closed sessions. Both cases—decided about a week apart—involve the actions of the Springfield Public School District No. 186 and their decisions to approve a separation agreement with their Superintendent and to appoint an interim Superintendent. In one case the PAC found that decisions taken—but not finalized—in closed session and subsequently ratified in properly noticed public meetings violated the Open Meetings Act while in the other case, the actions taken in closed session were considered sufficiently non-final by the PAC to satisfy the Open Meetings Act requirements.

In the first matter, during a series of closed session meetings, the school board had discussed their superintendent's possible separation in a manner consistent with the employment exemption of the Open Meetings Act. However, at one of these closed meetings a majority of the board members agreed that separation was appropriate and most affixed their signatures (but not a date) to the separation agreement. Apparently, they deliberately did not date their signatures instead waiting until the contract was properly approved in open session.

These signatures proved to be sufficient to persuade the PAC that the action was a final one—not merely a "straw vote"—and that subsequent action taken in open session was insufficient to remedy this situation since it was only reiterating a decision that had already been finalized—inappropriately—in the closed meeting. The PAC did not fully articulate why the action taken later by the Board in a properly noticed, open session was not sufficient to ratify the agreement and satisfy the requirements of the Open Meetings Act. First, the item was clearly included on the public agenda and properly voted upon in open session before the agreement could take effect.[1] Second, as a purely legal matter, without such proper authorization, the agreement could not be binding in any event. Everyone involved seemed to acknowledge that public action was required in open session to make it binding. In fact, as stated above, the board members who signed the agreement did not even date their signatures because it seems they acknowledged that the execution date would have to be when the Board publicly approved the agreement and not the date they actually wrote their signatures. Yet the PAC dismisses these facts without satisfactory explanation.

By concluding that the final action took place in closed session and nothing the Board did in open session could fix that action, even if the board latter provided public notice of the contract and voted on it publicly, the PAC has created new questions for municipal practitioners. All of us who, in the past, have worked on the assumption that a body could ratify an agreement in open session and that might fix any previous defects in the approval process should no longer rely on that practice if this PAC opinion is any guide. In fact, the opinion explicitly states that a public body may not take final action in a closed session and then ratify it in open session. However, the PAC Opinion does not offer a road map to help us decide how much public notice or discussion is required to properly ratify an agreement.[2]

In contrast, the second decision involving the Springfield Public School District No. 186 Board of Education reaches very different conclusions. This matter involved the appointment of an interim superintendent for the district following the separation discussed in Opinion No. 13-007 above. In this case, the PAC found that the Board did not take final action in closed session to appoint an interim superintendent and that it complied with Section 2(e) of the OMA by adequately informing the public of the nature of the business to be conducted before they voted in open session.

Like it had in its decision in Opinion No. 13-007, the PAC found that the subject matter and discussions of hiring an interim superintendent were properly undertaken in closed session. However, unlike in No. 13-007 it found that the final appointment action took place in open session after the public had been adequately informed of the nature of the matter under consideration. What made the discussions in closed session in this case more acceptable than those in No. 13-007? In this case, in closed session it seems the Board did several notable things that made their action acceptable and not "final":

1. The Board authorized its attorney to ask the candidate if he would consider serving as the interim superintendent;
2. The Board agreed to issue a press release notifying the public that the Board had reached consensus and intended to vote on the appointment;
3. One Board Member suggested they could keep suggesting interim candidates, and

4. The Board agreed to put a resolution concerning the appointment on the open meeting agenda.

The PAC concluded that the Board had not made a final decision to appoint the candidate, but had only taken preliminary steps to do that by reaching consensus. It found that the board did not vote or informally agree in closed session. The PAC notes that a tentative consensus in closed session is acceptable in cases where additional information might still be needed before a final action can be taken or where a public body's individual strategic choices during a decision–making process are not final action (such as choosing mediation to reach an ultimate contract negotiation).

The PAC's decision in this second opinion appears to rely not only on the absence of a final vote in closed session, but also upon the nature of the subsequent open meeting discussion. In open session, the Board discussed the motion to appoint the candidate for at least 15 minutes and they answered questions about salary. Apparently this also satisfied the requirement of putting the public on notice of the final action.

This discussion in open session in the second case should be contrasted with the PACs discussion about the open session consideration in the first case (No. 13-007) which creates new questions about what and how much notice and discussion is required before a vote can be taken. The PAC suggests that the motion in open session in the first case was not sufficient to put the public on notice of the general subject matter being considered as required by the OMA (and presumably neither was the agenda item). They state that "the public was given no specific information concerning the separation agreement or its terms. In particular, the public was not informed that the separation agreement included a substantial lump sum payment of public funds." However, the agenda item clearly identified the subject matter of the vote and it is not customary nor has it ever been expected that more detail about the contents of a specific agreement are required to be announced or discussed before a vote is taken. In fact, many votes are based on material contained in a packet and are not discussed at a meeting in any detail. The PAC's opinion did not say that the Board had not seen the agreement and it specifically mentioned that in response to a FOIA request they provided a copy of the agreement for review.

Instead, reading between the lines, it appears that the PAC's real problem in the first case may have been that the details of the separation agreement were not discussed publicly at the meeting. Perhaps the contract was not even available before the meeting—but the opinion does not make that clear. If that is the case, then in spite of the PAC's language about final action in closed session and failure to give notice, perhaps the real problem was that they concluded that no one was terribly forthcoming about the actual contents of the separation agreement. The opinion seems to suggest that some information was withheld that should—at some point—have been made public. However, the opinion does not make plain the basis for its conclusion that somehow information was withheld.

Comparing the second decision to that in the first decision, we need to ask what guidance we have received from the PAC about what does and does not constitute final action in closed session. When does reaching consensus in a closed meeting constitute a binding vote that cannot be remedied by a subsequent public vote and when is consensus sufficiently vague that it is not final action? It seems that signing but not dating a document goes too far, even if the document was subsequently voted upon in open session. Further while the PAC's guidance in the second case regarding the types of things that make a decision sufficiently tentative to avoid being final action is helpful, many questions remain. For instance, why is it acceptable to agree in executive session to notify the public via press release that the Board had reached consensus and would vote on it in open session while approving an agreement in closed session but waiting to formalize it in open session unacceptable?

Moreover, the PAC's language from the first case to the effect that notice was insufficient to inform the public of the action being taken may leave practitioners scratching their heads without more details explaining why the agenda description was insufficient and explaining what other detail needs to be given to the public on a specific matter. Without more, these decisions call into question many long-standing practices of many municipal bodies including conducting straw polls in executive session, the use of consent agendas for public meetings (even if authorized by state law), the nature of required disclosure to the public of every item being discussed, and the ability to ratify actions through duly noticed, public meetings. ■

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1. Specifically, the agenda for the open meeting at which the agreement was to be voted on was listed on the agenda as: "Approval of a Resolution Regarding the Separation Agreement and Release Between Superintendent Dr. Walter Milton, Jr. and the Board of Education." The motion on that item at the meeting also clearly identified the agreement that was to be the subject of the vote as: "approval of a resolution regarding the separation agreement. The Board President recommends that the Board of Education of Springfield School Dist No. 186 vote to approve the separation agreement and release between Dr. Walter Milton Jr. and the Board of Education."

2. As an aside in this matter, the PAC seems to object to the contents of the executive session board minutes which stated the superintendent's name and a vague reference to a personnel matter and did not summarize discussions concerning this employment and separation agreement. For those bodies that keep relatively sparse executive session minutes indicating that a discussion took place and the subject matter without much more detail, this opinion suggests the PAC may not consider that sufficient.