

Agenda Item: 12.B.

Recommendation that Option 4, provided by Paul Peters, be tabled until the September 14, 2006 Board Meeting.

2.1 Directors - Vacancies. Sec. 2-3215 R.R.S., 1943, governs when a vacancy exists in the office of director. Unless the Board elects to use a different procedure, Any any such vacancy shall be filled in the following manner: (1) Notice of such vacancy shall be given by the Chairperson to the Board at the first regular meeting of the Board after notification has been received by the Chairperson of the vacancy; (2) the General Manager then shall publish notice of such vacancy and in such notice request that persons interested in being considered for appointment to the position submit a letter of application to the Board no later than two weeks prior to the next regular meeting of the Board; and, (3) at such next regular meeting of the Board ~~and candidates~~ such applicants may appear before the Board, and, at such meeting, ~~from such slate of applicants,~~ the Board shall ~~nominate two persons by secret ballot, and by majority resolution either~~ elect one of such ~~nominees~~ applicants to fill such vacancy or order the General Manager to re-publish such notice of such vacancy.

| [December 5, 1986; September 14, 2006

Teer, Pat

From: Zippijd@aol.com
Sent: Wednesday, August 09, 2006 8:52 PM
To: Directors
Cc: paul.peters@mindspring.com; Petermann, Marlin; Teer, Pat
Subject: Informal poll on selection of vacancy positions...

In response to Director Lanphier's question at the subcommittee meeting on Tuesday on how other governmental bodies fill vacant spots, I gathered the following information:

Douglas County. The County Attorney, Treasurer and Clerk appoint the new County Commissioner.
Sarpy County. They also have the above individuals appoint the new Commissioner. It seems there is a State Law that governs this procedure on County Commissioners. The lady I talked to added that they accept resumes, interviews are held in a public setting, and the three individuals decide who "wins".
City of Omaha. Resumes are received for the vacant council position, the council reviews the list and interviews in public. A written ballot is taken, signed by each council member, and if the majority (4) decide on one candidate, a motion is made to appoint. The ballots of each voting member are available for public inspection, but apparently not read aloud.
City of Bellevue. There is a public notice of the vacant council position and those desiring the slot submit their names. The Mayor interviews and then appoints a person. The City Council then ratifies the appointment. If there are not enough votes for the Mayor's selection, then another name is submitted to the council.

The minor changes we need to make on our policy have to deal with the elimination of the secret ballot issue. It is my opinion that "option 4" that was passed by the subcommittee is quite acceptable. It eliminates the secret vote, yet gives the Board some flexibility on the exact procedures to be used if another vacancy occurs.

Jim Thompson
Chairperson

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To: Jim Thompson, Chairperson
Papio-Missouri River Natural Resources District

Date: July 28, 2006

Subject: draft Policy Manual changes

As you requested, following are a few possible alternative proposed revisions to the NRD's policy governing appointments of persons to fill vacancies on the Board of Directors.

Option 1 clarifies and extends most of the tenor of the present policy, but in actuality this may be more restrictive than the Board might desire in that it mandates that the Board fill a vacancy from the slate of applicants who both apply in time and appear at the appointed Board meeting. However, the Board may want the latitude to re-start the appointment process with a new notice of vacancy if for some reason it is unable to develop a majority favoring one applicant.

Option 2 provides that, in case of an impasse, for example, the Board can order that the notice of vacancy be re-published, re-starting the cycle at the application stage, thus enabling additional candidates to be enlisted.

Option 3 would be to cancel the existing policy and not attempt to devise a quasi-mandatory method for filling vacancies on the Board of Directors.

In all these revisions, the concept of a secret ballot is eliminated, thus foreseeably mandating considerable ingenuity in framing roll-call resolutions for various election scenarios.

Option 1

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~~slate of applicants, the Board shall nominate two persons by secret ballot, and by majority resolution elect one of such nominees~~applicants to fill such vacancy.

Option 2

2.1 Directors - Vacancies. Sec. 2-3215 R.R.S., 1943, governs when a vacancy exists in the office of directors. Any such vacancy shall be filled in the following manner: (1) Notice of such vacancy shall be given by the Chairperson to the Board at the first regular meeting of the Board after notification has been received by the Chairperson of the vacancy; (2) the General Manager then shall publish notice of such vacancy and in such notice request that persons interested in being considered for appointment to the position submit a letter of application to the Board no later than two weeks prior to the next regular meeting of the Board; and, (3) at such next regular meeting of the Board ~~and~~candidates~~such applicants~~ may appear before the Board, and, at such meeting, ~~from such slate of applicants, the Board shall nominate two persons by secret ballot, and by majority resolution either elect one of such nominees~~applicants to fill such vacancy or order the General Manager to re-publish such notice of such vacancy.

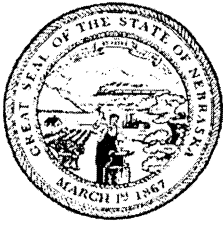
[December 5, 1986, August 10, 2007]

Provided by Paul Peters 8/8/06 at FEL Mtg.

Option 4

2.1 Directors - Vacancies. Sec. 2-3215 R.R.S., 1943, governs when a vacancy exists in the office of director. Unless the Board elects to use a different procedure, ~~Any any~~ such vacancy shall be filled in the following manner: (1) Notice of such vacancy shall be given by the Chairperson to the Board at the first regular meeting of the Board after notification has been received by the Chairperson of the vacancy; (2) the General Manager then shall publish notice of such vacancy and in such notice request that persons interested in being considered for appointment to the position submit a letter of application to the Board no later than two weeks prior to the next regular meeting of the Board; and, (3) at such next regular meeting of the Board ~~and~~candidates~~such applicants~~ may appear before the Board, and, at such meeting, ~~from such slate of applicants, the Board shall nominate two persons by secret ballot, and by majority resolution either elect one of such nominees~~applicants to fill such vacancy or order the General Manager to re-publish such notice of such vacancy.

Board recommended that Option 4 be adopted.



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July 25, 2006

Mr. Paul F. Peters
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Re: *File No. 06-M-124; Papio-Missouri River Natural Resources District.*

Dear Mr. Peters:

This office has enforcement authority under the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (1999, Cum. Supp. 2004). We understand that you act as counsel for the Papio-Missouri River Natural Resources District (the "District"). As we informed you during our telephone conversation on July 19, 2006, we have received an Open Meetings complaint involving the District. Specifically, it has been alleged that the Papio-Missouri River Natural Resources District Board (the "Board") elected Richard W. Patterson to fill a vacancy on the Board by a secret ballot process at its meeting on July 13, 2006.

During our telephone conversation on July 19, you stated that the Board did, in fact, take a "straw vote" by secret ballot at its meeting on July 13 regarding a replacement board member to fill a vacancy on the Board. You subsequently sent us draft minutes for the Board meeting on July 13 which indicate that the Board first unanimously passed a motion which provided that "that the vacancy on the Board of Directors should be filled by ballot of directors taken between candidates Mark McColley and Richard Patterson." The Board then conducted a paper ballot election between Mark McColley and Richard Patterson. Mr. Patterson apparently won that election by a vote of 5 to 4, but the minutes do not indicate which Board members voted for which candidate in that election. After the paper balloting process, the Board conducted a roll call vote on adoption of a resolution which appointed Richard W. Patterson as a Director

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of the District for the unexpired term of Director Joe Neary. That resolution passed by a vote of 7 to 2.

The Open Meetings Act contains provisions regarding voting by members of public bodies in Nebraska. Section 84-1413 (2) provides, in pertinent part, that "[a]ny action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting." In addition, § 84-1413 (3) provides that "[t]he vote to elect leadership within a public body may be taken by secret ballot, but the total number of votes for each candidate shall be recorded in the minutes." As a result, the Act generally prohibits secret balloting and requires that votes be taken by roll call in open session. Those portions of the Open Meetings Act obviously call into question the Board's election of a new member by use of a secret paper ballot.

We believe that paper balloting process followed by the Board does constitute a violation of the Open Meetings Act. First of all, the Act specifically does not allow any form of secret balloting except to elect the leadership of a public body, and the current situation does not involve such an election. Moreover, the Open Meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (Neb. Ct. App. 2002). With that rule in mind, the obvious purpose of a roll call vote is to allow citizens to ascertain how various members of a public body voted on a given issue. However, the paper balloting procedure followed by the Board in this instance allowed its members to vote for a replacement member of the Board without ever making their votes public. After a secret paper vote to determine the winner, members of the Board subsequently voted for a resolution appointing that candidate, and interested persons could not determine who initially voted for whom, as the paper balloting apparently elected Mr. Patterson by a vote of 5 to 4, while the subsequent resolution which appointed him to the office of Director was passed 7 to 2. Such an anonymous voting process also leads us to conclude that the paper balloting procedure here violated the Act.

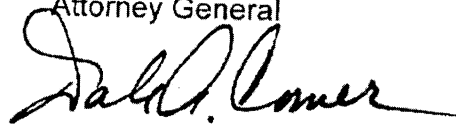
Since we have determined that there was a violation of the Open Meetings Act in this instance, we must also determine what, if any, additional action this office should take in that regard. We do not believe that this situation warrants criminal prosecution for a knowing violation of the Open Meetings Act. Nor do we believe that this situation warrants any action to void the Board's decision. The Nebraska Supreme Court has indicated that action by a public body which is proper under the Open Meetings Act may remedy defects in actions taken by the same public body. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). On that basis, the roll call vote on the resolution

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appointing Mr. Patterson to the Board could be seen as a remedy for any improprieties with the earlier secret vote by paper ballot. Therefore, we will admonish the Board, through this letter to you as its counsel, that the paper balloting procedure used in this case violated the Open Meetings Act and should not be used again in the future.

Sincerely,

JON BRUNING
Attorney General



Dale A. Comer
Assistant Attorney General