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Correspondence Memorandum

Date: November 17, 2016
To: Employee Trust Funds Board
Teacher Retirement Board
Wisconsin Retirement Board
From: David H. Nispel, General Counsel
Subject: Open Meetings Law Update

This memo is for informational purposes only. No Board action is required.

On July 26, 2016, the Wisconsin Department of Justice (DOJ) sent a letter to the Winnebago County District Attorney's Office and the Winnebago County Corporation Counsel regarding possible violations of the Wisconsin Open Meetings Law. The letter focused on issues involving a quorum of one committee attending a meeting of a separate committee and required meeting notices. The issues and advice discussed in DOJ's letter to Winnebago County are pertinent to the boards attached to the Department of Employee Trust Funds (ETF) and the committees of the Employee Trust Funds Board. Consequently, we are bringing this matter to your attention.

As concerns ETF, there are five boards: Group Insurance Board, Deferred Compensation Board, Employee Trust Funds Board, Teachers Retirement Board, and Wisconsin Retirement Board. In addition, there are three committees of the Employee Trust Funds Board: Executive Committee, Budget and Operations Committee, and Audit Committee. The Deferred Compensation Board has one committee -- the Deferred Compensation Investment Committee.

Winnebago County Situation

For several years, meetings of the Winnebago County Judicial Courthouse and Security Committee (JCSC) have been regularly attended by a quorum of two subcommittees of the Winnebago County Board of Supervisors. The county places boilerplate language on its meeting notices that essentially says that any county board subcommittee may have a

Reviewed and approved by Robert J. Conlin, Secretary

Electronically Signed 11/28/16

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quorum attending any county meeting. The DOJ determined that under the Open Meetings Law, that boilerplate language was not sufficient notice for the public.

The JCSC is a courthouse security committee formed pursuant to Wisconsin Supreme Court rule. The Supreme Court has determined that such bodies are not governed by the Open Meetings Law. The two county board subcommittees were the Judiciary and Public Safety Committee and the Facilities and Property Management Committee. Both of those subcommittees are subject to the Open Meetings Law.

The JCSC considers matters that fall within the area of authority of each of the subcommittees. The facts of the situation demonstrated that attendance of a quorum of each of the two subcommittees at JCSC meetings satisfied the two requirements for the definition of a meeting (discussed below). Therefore, additional steps were necessary to notify the public about the meetings.

The Wisconsin Open Meetings Law

The Wisconsin Open Meetings Law appears in Wis. Stat. §§ 19.81 through 19.98. For purposes of this discussion, some of the significant provisions of the law concern the definition of a governmental body, definition of a meeting, what is meant by the phrase “convening of members,” what constitutes a quorum, and what are the necessary notice requirements.

A governmental body is defined in applicable part to be “a state or local agency, board, commission or committee” Wis. Stat. § 19.82 (1). A meeting is defined in pertinent part to be “the convening of members of the governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body” Wis. Stat. § 19.82 (2). The Wisconsin Supreme Court has determined that the definition of a meeting “applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business and (2) the number of members present is sufficient to determine the governmental body’s course of action.” *State ex rel. Newspapers v. Showers*, 135 Wis. 2d, 398 N.W.2d 154 (1987). A meeting does not include any social or chance gathering of members that is not intended to avoid the Open Meetings Law’s requirements.

As concerns the first requirement, a governmental body is engaged in governmental business when the members gather to hear information on a matter that is within the body’s area of authority. This also applies to a body that is simply advisory and has no power to make final decisions.

As concerns the second requirement, a quorum is considered to be the minimum number of a governmental body’s membership that is necessary to act. Typically, it is considered that a majority of the members of a governmental body constitutes a quorum. But, the minimum number of a body’s membership necessary to prevent action also satisfies this second requirement. Such a situation is called a negative quorum.

Wis. Stat. § 19.84 concerns the public notice requirements for meetings of a governmental body. The notice must set forth the time, date, place and subject matter of the meeting. Also, the notice must reasonably inform the public of that information.

When a quorum of the members of one governmental body attend a meeting of another governmental body for purposes of gathering information or otherwise engaging in governmental business, two separate meetings occur and notice must be provided for each meeting. The boilerplate notice used by Winnebago County simply stating that any county board subcommittee may have a quorum in attendance at the meeting of a governmental body was not sufficient notice to the public. Such a notice does not provide notice of an actual meeting, but rather of the possibility of a meeting.

The Open Meetings Law also requires that a separate public notice shall be given for each meeting of a governmental body. However, the Attorney General has advised that a single notice can be used, provided the notice clearly indicates that a joint meeting will be held and gives the names of each governmental body involved. (July 26, 2016 letter from the Department of Justice to Winnebago County District Attorney's Office and Winnebago County Corporation Counsel, p. 5.)

Recommendations

If a member of one of the five boards attached to ETF, one of the three committees of the ETF Board, or the one committee of the DC Board intends to attend a meeting of a separate board or committee, I recommend that the member inform the chair or Board Liaison of that separate board or committee well in advance of the meeting. Then, the chair or Board Liaison of that separate board or committee will be in a position to know whether or not a notice and agenda of that second meeting must be provided.

If there will be two or more boards or committees present at the same meeting, then a joint meeting agenda and notice should be provided. The Agenda/Notice for the joint meeting of the Employee Trust Funds Board, Teachers Retirement Board and Wisconsin Retirement Board is an example of such a notice. Then, the public will be sufficiently informed of that event.

I also recommend that the "Note" that currently appears at the end of the "Agenda/Notice" for Employee Trust Funds Board meetings be revised. The "Note" could be changed to read: "Members of the Wisconsin Retirement (WR) Board and/or Teacher Retirement (TR) Board may be in attendance at the ETF Board meeting. The WR and TR Boards will not be conducting business during the ETF Board meeting. However, if a quorum of the WR Board or TR Board will be present at the ETF Board meeting for purposes of gathering information or otherwise engaging in governmental business, a joint meeting Agenda/Notice will be provided to the public to replace this Agenda/Notice."

Staff will be at the Board meeting to answer any questions.