

BEFORE THE OFFICE OF THE KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Shawnee County, Kansas

In the Matter of Jeff Fischer)
For Conduct as a Commissioner)
On the Board of County)
Commissioners for Bourbon County,)
A public body pursuant to)
K.S.A. 75-4318(a))
_____)

Case No. 2022-OG-0001

FINDING OF VIOLATION

NOW on this 21 day of July, 2022, this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 75-4320d(a)(2), which grants the Attorney General authority to issue a finding of violation.

The Attorney General gives notice of the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. The Board of County Commissioners of Bourbon County is a political or taxing subdivision of the state, and thus is a public body or agency. The Bourbon County Commission exercises the powers of the county as a body politic and corporate. *See* K.S.A. 19-103.

2. The Board of County Commissioners of Bourbon County is a public body that is subject to the requirements of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, and any meetings it holds must comply with the KOMA.

3. During the relevant period, the Board of County Commissioners of Bourbon County (“the commission”) was comprised of Commissioner Lynne Oharah, who is still a member of the commission, and Commissioners Jeff Fischer and Leroy “Nick” Ruhl. On or about August 26, 2020, Commissioner Ruhl resigned his position to accept a position with the Bourbon County Road and Bridge Department. Commissioner Fischer left office when his term expired on or about January 11, 2021.

4. On or about July 21, 2022, Commissioner Oharah and former Commissioner Ruhl individually admitted and agreed that they violated the KOMA based on the facts as described in this finding of violation, and entered into a Consent Order with the Attorney General to resolve these KOMA violations. Each also agreed to comply with the requirements of K.S.A. 75-4319(a) and (b). Commissioner Oharah and former Commissioner Ruhl have satisfied the requirements of the Consent Order.

5. The Attorney General offered former Commissioner Fischer the opportunity to enter into the same Consent Order, subject to the same terms and conditions as Commissioner Oharah and former Commissioner Ruhl and in lieu of further adjudicative proceedings or actions, but he declined this opportunity.

6. This finding of violation applies solely to Jeff Fischer for his conduct while a commissioner on the Board of County Commissioners of Bourbon County and not to Commissioner Oharah and then-Commissioner Ruhl or to the currently legally constituted commission.

7. On or about June 10, 2020, the Attorney General's Office received a complaint from Mary Pemberton alleging the commission comprised of Commissioners Oharah, Fischer and Ruhl violated the KOMA.

8. Following this reported violation, the Kansas Attorney General's Office conducted an investigation into several allegations, including that the commission failed to comply with the statutory requirements for recessing into executive session and for recording these motions in its minutes, and that it improperly recessed into executive session using the justification for consultation with an attorney when it was actually meeting for another purpose.

9. Investigation confirmed that between February 20 and June 9, 2020, the commission recessed into executive session 56 times, and its motions did not comply with the requirements of K.S.A. 75-4319(a); the commission also did not record the motions in its minutes as required by K.S.A. 75-4319(a). In its response to this office, the commission conceded that it did not state the place the open meeting would resume "because it is always in the same place as our general meeting." The motions also did not refer to the subject to be discussed or the time the open meeting would resume. The motions recorded in the minutes were also more of a mere summary than the "complete motion" the commission was required to record in its minutes because the recorded motions did not even contain all the statutorily required elements.

10. One of the commission's motions made on June 9, 2020, as recorded in its minutes demonstrates how most of the motions between February 20 and June 9, 2020, were stated: "[Commissioner] Jeff [Fischer] made a motion to go into a 15 minute executive session for confidential data relating to financial affairs or trade

secrets of corporations, partnerships, trusts and individual proprietorships, Nick seconded and all approved, (the session included the Commissioners and Jody Hoener). No action was taken.”

11. On October 30, 2020, this office notified the Bourbon County Counselor of Ms. Pemberton’s complaint, and provided a reference to Attorney General Opinion 2018-1. This opinion contains clear guidance on what is required to recess into executive session. Following that date, the commission held at least 25 executive sessions. Despite advising the commission of the statutory requirements and available guidance, its motions for executive session met some, but not all, of the statutory requirements for recessing into executive session.

12. For example, a December 8, 2020, executive session motion did not contain all the required elements: “[Commissioner] Jeff [Fischer] made a motion to go into a 10 minute executive session for personnel matters of individual non-elected personnel in another office and reconvene at the Commission room, Clifton seconded and all approved, (the session included the Commissioners and Patty Love). . . .” In an attempt to meet the statutory requirements, the commission added some language regarding the place where the open meeting would resume. The motion stated the length of the executive session, but not the time the open meeting would resume. This motion contained a justification, but did not include a statement describing the subjects to be discussed. Additionally, the meeting minutes did not record the “complete” motion.

13. Investigation also confirmed that on March 3, 2020 (one session) and March 10, 2020 (two sessions), the commission failed to use the proper justification for recessing into executive session as required by K.S.A. 75-4319(b), thus leaving the public unaware of the reason for the executive sessions. The commission recessed into executive session using the justification for consultation with an attorney, but included Alan Anderson, an attorney and representative of Jayhawk Wind, in the executive sessions. Mr. Anderson was not an attorney for the commission.

14. While present during the executive sessions, Mr. Anderson discussed data relating to the financial affairs and trade secrets of Jayhawk Wind with the commission then would leave the room to allow the commission to consult with County Counselor Justin Meeks about matters that would be deemed privileged in the attorney-client relationship.

15. The commission did not hold separate executive session(s) to discuss subjects concerning data relating to financial affairs and trade secrets or matters that would be deemed privileged in the attorney-client relationship. Instead, it combined everything into one executive session to discuss both areas, using only the justification for consultation with an attorney. This action left the public unaware

that the commission intended to discuss matters involving both of these separate justifications.

16. The individual members of a public body are responsible for ensuring compliance with the KOMA. The KOMA places the burden of compliance with the law on the individual members of the public body and not on its staff or employees. *See e.g.*, K.S.A. 75-4320(a) (acknowledging that “any member” of a public body is liable for violation of the law).

CONCLUSIONS OF LAW

17. K.S.A. 75-4317(a) provides that “[I]n recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.”

18. K.S.A. 75-4319(a) requires a public body to follow a specific procedure in order to comply with the statutory requirements for recessing into executive session: “[U]pon formal motion made, seconded and carried, all public bodies and agencies subject to the open meetings act may recess, but not adjourn, open meetings for closed or executive meetings. Any motion to recess for a closed or executive meeting shall include: (1) A statement describing the subjects to be discussed during the closed or executive meeting; (2) the justification listed in subsection (b) for closing the meeting; and (3) the time and place at which the open meeting shall resume. The complete motion shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the public body or agency. Discussion during the closed or executive meeting shall be limited to those subjects stated in the motion.”

19. K.S.A. 75-4319(b) provides in part that “[J]ustifications for recess to a closed or executive meeting may only include the following, the need: . . . (2) for consultation with an attorney for the public body or agency which would be deemed privileged in the attorney-client relationship; . . . [and] (4) to discuss data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships. . . .”

20. A “[T]echnical violation’ is a term of art adopted by courts in discussing KOMA violations. In a recent opinion of this court in a KOMA case, it is stated that ‘our courts will look to the spirit of the law, and will overlook mere technical violations where the public body has made a good faith effort to comply and is in substantial compliance with the KOMA, and where no one is prejudiced or the public right to know has not been effectively denied. [Citations omitted].’ *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

21. K.S.A. 75-4320d(a)(2) provides that a finding of violation issued by the Attorney General may require a public body or agency to cease and desist from further violation, comply with the provisions of K.S.A. 75-4317 *et seq.*, complete training, and pay a civil penalty in an amount not to exceed \$500.00 for each violation.

22. Based on a review of the commission's motions and information it provided during investigation of Ms. Pemberton's complaint, it is clear that the motions for executive session, including motions made by Commissioner Fischer, as well as the meeting minutes between February 20 and June 9, 2020, fell short of complying with the KOMA. Using the commission's June 9, 2020, motion as an example, it did not contain any statement describing *what* was to be discussed or *how* the subject(s) to be discussed related to the justification of the need to discuss data relating to financial affairs or trade secrets. Second, although the justification the commission used contained some outdated statutory language, it was still sufficiently clear so that the public knew it was one of the statutorily acceptable topics a public body may use to support its decision to recess into executive session pursuant to K.S.A. 75-4319(b)(4). Third, while the motion did state the length of time of the executive session, it is not evident from the motion itself where or at what time the open meeting would resume. Finally, the motion is at best a summary rather than the "complete motion" required to be recorded, since the motion itself did not even contain all the statutory elements.

23. Under these facts, the commission's motions, including any made by Commissioner Fischer, did not comply with the requirements of K.S.A. 75-4319(a), and thus violated the KOMA.

24. After due consideration, the Attorney General concludes that while the motions failed to comply with the statutory requirements for recessing into executive session, it is a technical violation of the KOMA. The commission had a longstanding pattern of deficient motions for executive session, and failed to record the complete motions in its meeting minutes. However, the commission substantially complied with the statutory requirements, even though its motions and recorded minutes were deficient. By making the motions, the public was aware that the commission was recessing into executive session, and of at least the justification and the length of time it would take. Moreover, the complainant did not identify any specific prejudice to the public's right to know, such as that the commission discussed matters in executive session that were required to be discussed in an open meeting.

25. The Attorney General also concludes that on March 3, 2020 (one session) and March 10, 2020 (two sessions), the commission failed to use the proper justification for recessing into executive session as required by K.S.A. 75-4319(b), thus leaving the public unaware of the true reason for the executive sessions. The commission recessed into executive session using as a justification the need for consultation with an attorney for the public body or agency which would be deemed

privileged in the attorney-client relationship as permitted by K.S.A. 75-4319(b)(2). While the commission, including Commissioner Fischer, did consult with its own attorney, it also used these executive sessions to discuss data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships with Alan Anderson, an attorney and representative for Jayhawk Wind. The commission did not hold separate executive sessions to consult with its attorney or to discuss data relating to financial affairs or trade secrets. Instead, it combined its discussions of matters involving separate justifications, leaving the public unaware that it intended to and did discuss matters involving these separate justifications.

26. A motion to recess into executive session may only utilize one justification, but a public body may discuss multiple subjects if those subjects fall within the justification cited in the motion for executive session. Here, K.S.A. 75-4319(b)(4) provided an alternative basis on which to recess into executive session to discuss financial affairs and trade secrets of Jayhawk Wind with Mr. Anderson. However, the commission never made a motion for executive session using this alternative basis. Moreover, a public body may only use one justification for each executive session; the KOMA does not recognize executive session “sub-sessions.” Each executive session must comply with the statutory requirements and stand on its own merits. This means that the commission was required to hold a separate executive session each time it needed to communicate with or receive financial data or trade secret information from Mr. Anderson, and then hold a separate executive session to consult with its attorney.

27. While perhaps cumbersome, the KOMA’s process for recessing into executive session is designed to meet the ultimate public policy goal of ensuring an informed electorate by holding meetings for the conduct of governmental affairs and the transaction of government business that are open to the public.

28. Under these facts, Jeff Fischer, then-commissioner on the Board of County Commissioners of Bourbon County, violated the KOMA by recessing into executive session on March 3, 2020 (one session) and March 10, 2020 (two sessions) using the justification for consultation with an attorney and then including Mr. Anderson in those executive sessions to discuss data relating to financial affairs and trade secrets of Jayhawk Wind.

29. This is more than a technical violation. While the commission, including Commissioner Fischer, made and recorded its executive session motions on these occasions, the motions failed to comply with all the statutory requirements. The KOMA provided a basis for the executive sessions that included discussions with Mr. Anderson, but the commission did not make a motion using the proper justification for those discussions. The motions it did make showed some effort to comply with the KOMA by ensuring that the public knew generally that the commission was going to

discuss matters with its attorney and that they would take place outside of public view, as well as who would participate in the executive sessions. Moreover, the public did not have a right to hear what the commission discussed during any of the executive sessions.

30. Notwithstanding these considerations, by failing to use the proper justification when discussing financial data and trade secrets with Mr. Anderson, the public was ultimately not aware of the reason for the executive sessions or for including Mr. Anderson.

31. The KOMA grants the Attorney General broad authority to remedy violations. The purpose of this authority is to ensure public bodies and agencies recognize and comply with the public policy set out in K.S.A. 75-4317(a). Meetings for the conduct of governmental affairs and the transaction of governmental business must be open to the public subject to the specific provisions that permit a public body to discuss some matters outside of public view. A public body and its members are responsible for ensuring that they do not ignore these specific provisions.

32. The Attorney General finds that formal action is warranted in order to resolve the KOMA violations by Jeff Fischer as Commissioner on the Board of County Commissioners of Bourbon County. After due consideration of the facts of this case, the Attorney General determines that a Finding of Violation is the proper sanction to remedy this violation and deter any future violations. Accordingly, the Attorney General imposes the following requirements on former Commissioner Fischer:

- a. Cease and desist from any further violation of the KOMA;
- b. Comply with the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto;
- c. Identify and complete at least one hour of training on the KOMA;
- d. Provide a written certification of attendance within ten days of the training; and
- e. Pay a civil penalty of \$50.00 individually and not from commission, county, or other public funds. Such payment shall be made payable to the Office of the Attorney General pursuant to K.S.A. 75-760 on or before September 1, 2022.

33. This Finding of Violation and the remedial action it requires serve as a warning that the actions of Jeff Fischer, as a Commissioner on the Board of County Commissioners of Bourbon County, fell below the expected standards for a public

body or agency in complying with the KOMA. It also serves as a reminder that the individual members of a public body bear the burden to comply with the law and safeguard the public policy embodied by the KOMA.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Attorney General finds that Jeff Fischer, for his conduct as a Commissioner on the Board of County Commissioners of Bourbon County, be and is hereby sanctioned by the imposition of this Finding of Violation and the actions it requires.

Jeff Fischer shall submit to the Office of the Attorney General his written certification and payment required by paragraph 32.d. and e. on or before Monday, September 19, 2022, by sending it to Attorney General at 120 SW 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597.

IT IS SO ORDERED.



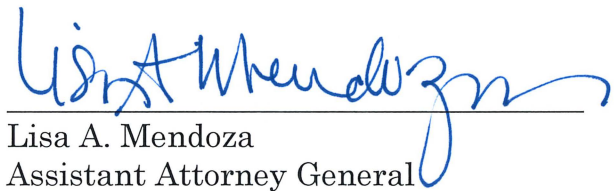
Derek Schmidt
Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Finding of Violation was served on this 21st day of July, 2022, by United States mail, first class postage prepaid, to:

Justin Meeks
Bourbon County Counselor
221 S. Judson Street
Fort Scott, KS 66701
*Attorney for the Board of County Commissioners
of Bourbon County*

Cline Irvin Boone
750 Ann Avenue
Kansas City, KS 66101
*Attorney for Jeff Fischer, former Commissioner on
the Board of County Commissioners of Bourbon County*



Lisa A. Mendoza
Assistant Attorney General