

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 the)
Board of Education of) Case No. 2017-OG-0002
Unified School District 361,)
Anthony-Harper.)

CONSENT ORDER

NOW on this 14th day of April, 2017 this matter comes before the Attorney General for the purposes of resolving the above-captioned matter pursuant to the provisions of K.S.A. 2016 Supp. 75-4320(d)(a)(1), which grants the Attorney General authority to enter into consent orders.

In lieu of further legal proceedings concerning violation of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, the undersigned hereby knowingly and voluntarily agree as follows:

1. On or about June 24, 2016, the Attorney General’s Office received a complaint alleging the Unified School District (USD) 361 Board of Education (“the Board”), specifically, board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat, violated the KOMA. Following this reported violation, the Kansas Attorney General’s Office conducted an investigation into allegations that the Board reached a consensus during executive session to administratively transfer an elementary school principal to be the Chaparral High School principal, but did not hold a public vote approving their consensus decision. This action was in violation of K.S.A. 2016 Supp. 75-4319(c), which provides that “[N]o binding action shall be taken during closed or executive recesses.”

2. The Board is a public body that is subject to the requirements of the KOMA, and any executive sessions held by the Board, and any consensus decisions it reaches in executive session must comply with the KOMA.

3. Investigation and/or statements provided on behalf of the Board, as described in a letter dated March 8, 2017, to Board attorney Jim Forsyth, which is attached hereto and incorporated by reference as Exhibit A, confirm the following violation of the KOMA by a preponderance of the evidence:

- a. On April 11, 2016, board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna

Ruth Blanchat recessed into executive session a total of seven (7) times to discuss personnel matters of nonelected personnel. The motions for executive session did not comply with the requirements set forth in K.S.A. 2016 Supp. 75-4319(a). The motions were missing the justification for closure and the place at which the open meeting was to resume.

- b. During the April 11, 2016, executive sessions to discuss personnel matters of nonelected personnel, the Board reached a consensus to direct the superintendent to administratively transfer an elementary school principal to the Chaparral High School principal position, and did not hold a public vote to approve the transfer as required.

4. Based upon the above information, the Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat individually admit and agree that they violated the KOMA as set out in paragraph 3 above.

5. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat agree that they now fully understand and agree that for each executive session held, they intend to comply with the requirements of K.S.A. 2016 Supp. 75-4319(a), (b), and (c).

6. The Attorney General and Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat mutually desire to enter into this Consent Order in lieu of further adjudicative proceedings.

7. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat understand and waive all rights to further adjudication of facts and law that could be determined pursuant to other enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f concerning this matter.

8. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat waive any claim or assertion that the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, applies to agency actions that are governed by the provisions of K.S.A. 75-4317 *et seq.*, and amendments thereto, relating to open meetings (KOMA), and subject to an action for civil penalties or enforcement, and thus they do not have a right to appeal under the KJRA.

9. The Attorney General accepts the waivers and stipulations by Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat.

WHEREAS, the Attorney General finds that the above facts have been established by a preponderance of the evidence, and that it is proper that Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat be subject to this Order based on the provisions of K.S.A. 2016 Supp. 75-4320d(a)(1), which permits the Attorney General to impose conditions or requirements on a public body for violation of the KOMA in a Consent Order;

AND WHEREAS the Attorney General and Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat mutually desire to enter into a Consent Order in lieu of further adjudicative proceedings to resolve the violation.

NOW THEREFORE, Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat consent to the following terms and conditions, and the Attorney General orders that:

10. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat agree to and shall:

- a. Pay a civil penalty of \$50.00 each, individually and not from Board, USD 361 or other public funds. Such payment shall be made payable to the Office of the Attorney General pursuant to K.S.A. 2016 Supp. 75-760 within 30 days of the effective date of this Consent Order;
- b. Undertake a prompt review of Board policy BBBB-BK Board Responsibilities, BCBJ Executive Sessions of the Board of Education, make any necessary changes, and update the history section of the policy to reflect its review;
- c. Provide the Attorney General's Office with a written statement confirming that the Board has reviewed the policy as required in section 10.b. above, as well as a copy of the policy within 45 days of the date in the certificate of service; and
- d. Not engage in any future violations of the KOMA.

11. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat understand and agree that if they fail to

comply with the terms of this Consent Order, the Attorney General may take action to enforce its provisions as authorized by K.S.A. 2016 Supp. 75-4320d(c) and amendments thereto.

12. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat understand and agree that if they engage in any future violation of the KOMA, the facts and statements contained herein may be considered in determining the appropriate enforcement action and remedy.

13. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat agree and understand that this Consent Order does not resolve future and/or currently unknown unlawful conduct that may occur or be brought to the attention of the Attorney General or any other prosecutor, and any such alleged violations of the KOMA may be subject to investigation proceedings as provided by K.S.A. 2016 Supp. 75-4320b and/or enforcement proceedings conducted in accordance with K.S.A. 2016 Supp. 75-4320a(a), 75-4320d(a)(2), or 75-4320f.

14. In consideration of these admissions and agreements by Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat, and the above-agreed remedies, the Attorney General agrees to forgo further prosecution for the violations of the KOMA set forth herein.

15. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat agree that this Consent Order conforms to Kansas and federal law and that the Attorney General has the authority to enter into this Consent Order.

16. Except as provided in paragraphs 11 and 12, this Consent Order shall operate as a complete release of all claims Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat may have against the Attorney General, his agents or employees, arising out of the investigation of this matter. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat agree not to file, or cause to be filed, any litigation or claims in any federal or state court of law or federal or state administrative agency against the Attorney General, the Office of the Attorney General, its agents or employees, individually or in their official capacity. Such litigation or claims include, but are not limited to, any K.S.A. Chapter 60 or Chapter 61 civil action regarding negligence and/or a 42 United States Code action and/or any administrative petition for redress. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat agree that all actions in this matter were a bona fide use of discretion and authority granted to the Attorney General, the Office of the Attorney General, its agents and employees, which is a statutory exception to liability within the Kansas Tort Claims Act, K.S.A. 75-6104(b), (c) or (e).

17. Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat understand that this Consent Order shall be maintained and made available for public inspection pursuant to the provisions of K.S.A. 2016 Supp. 75-4320(e) and amendments thereto.

18. This Consent Order shall be a public record in the custody of the Office of the Attorney General.

19. This Consent Order constitutes the entire agreement of the parties and may only be modified by a subsequent writing signed by the parties. This Consent Order shall be interpreted in accordance with the laws of the State of Kansas.

20. This Consent Order shall become effective on the date indicated in the Certificate of Service.

WHEREFORE, the Attorney General and Board members Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat consent to these provisions.

IT IS SO ORDERED.

OFFICE OF THE ATTORNEY GENERAL



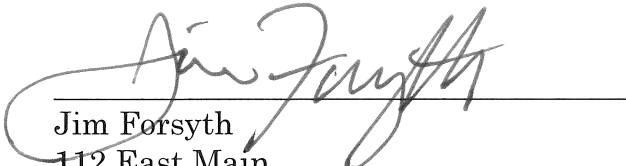
Derek Schmidt
Kansas Attorney General

Prepared By:




Lisa A. Mendoza, #12034
Assistant Attorney General
Director, Open Government Enforcement Unit
Office of the Kansas Attorney General
120 SW 10th Avenue, Second Floor
Topeka, KS 66612-1597


Approved By:


Jim Forsyth
112 East Main
PO Box 68
Anthony, KS 67003
Attorney for USD 361

The Board of Education, Unified School District 361, Anthony-Harper:


Kent Olds

3-13-17
Date


Sheri Francis

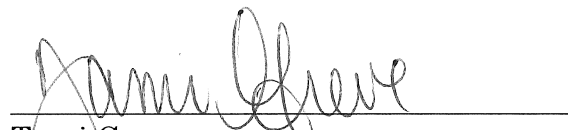
3/13/17
Date


Angie Higgs


3/13/17
Date


Kristie Clark

3-13-17
Date

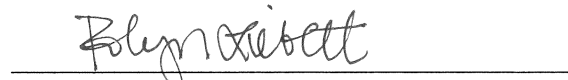

Tami Greve

3/13/17
Date


Anna Ruth Blanchat

3/13/17
Date

ATTEST:

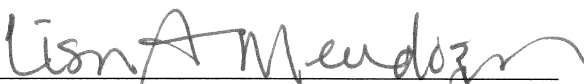

Shelly Ireland, Clerk
Robyn Liebelt

3/13/17
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2017, a true and correct copy of the foregoing Consent Order was deposited in the United States mail, first class postage prepaid, addressed to:

Jim Forsyth
112 East Main
PO Box 68
Anthony, KS 67003
Attorney for USD 361



Lisa A. Mendoza
Assistant Attorney General



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

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120 SW 10TH AVE., 2ND FLOOR
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March 8, 2017

Jim Forsyth
112 East Main
PO Box 68
Anthony, KS 67003

RE: KOMA Complaint – USD 361 Board of Education

Dear Mr. Forsyth:

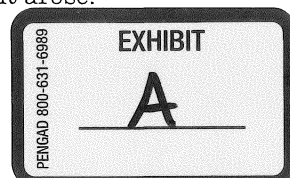
On June 24, 2016, we received a complaint from Scott Blubaugh, Debra Hatfield, Jan Misak and Doug Ricke (“the complainants”) alleging that the USD 361 Board of Education (“the Board”) violated the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.* Specifically, the complainants alleged that on April 11, 2016, the Board reached a consensus in executive session to hire Ken Henson to be the Chaparral High School (“CHS”) principal, but did not hold a public vote approving their consensus following a series of executive sessions. As a remedy, the complainants seek the following: “Other: . . . full blown sanctions be imposed upon the Superintendent Josh Swartz and the Anthony-Harper USD 361 Board members of Kent Olds; Sheri Francis; Angie Higgs; Kristie Clark; Tami Greve; and Anna Ruth Blanchat; for the violation of the Kansas Open Meetings Act [sic]”

The purpose of this letter is to inform you of the results of our review. We relied on the complaint, the Board’s responses, and information from the Board’s website in reviewing this matter. Additionally, we relied on the provisions of the KOMA, as well as relevant Attorney General Opinions and caselaw.

Following our review, it is clear that the Board is a public body subject to the KOMA,¹ and thus this office has jurisdiction to review any complaint that the KOMA has been violated.²

¹ K.S.A. 2016 Supp. 75-4318(a). Although we cite the 2016 version of the KOMA statutes throughout, they remain substantially unchanged from version of the statutes in effect at the time the complaint arose.

² See K.S.A. 2016 Supp. 75-4320(a), 75-4320b, and 75-4320d.



Background

The governance of the USD 361 school district is vested in the Board.³ It has adopted policies that authorize the superintendent to act as “the chief administrative head of the school system. . . .”⁴ The superintendent acts as the chief administrator “under the direction of the board,” and he has “general supervision of all the public schools and of all the personnel and various personnel departments of the district. The superintendent is responsible for the management of the schools under board policies and is accountable to the board. . . .”⁵

Among the policies adopted by the Board is one titled “Executive Sessions of the Board of Education.”⁶ This policy provides that the Board “shall conduct executive sessions only as provided by law.”⁷ This policy establishes a template for the Board to follow to ensure that it meets the statutory requirements for recessing into executive session. It expressly provides that “NO BINDING ACTION SHALL BE TAKEN DURING CLOSED OR EXECUTIVE SESSIONS.”⁸ The history section of this policy reflects that it was “[A]pproved: KASB Recommendation – 6/99; 6/00; 1/01; 4/07; 10/14.”⁹

Another policy adopted by the Board is titled “Administrative Assignments.”¹⁰ This policy provides that, “[T]he assignment of administrative personnel shall be recommended by the superintendent *subject to approval of the board.*”¹¹ “The administrative staff membership includes the superintendent, assistant superintendent, *all building principals*, assistant principals, and those employees with district wide responsibilities. . . .”¹²

³ USD 361 Board Policies, AA-AG District Organization, A District Authority, [http://www.usd361.org/pages/Anthony-Harper/About Us/Policies/BOE](http://www.usd361.org/pages/Anthony-Harper/About%20Us/Policies/BOE), accessed February 25, 2017; see also K.S.A. 2016 Supp. 72-8205(e)(1); and see Kansas Const. Art. 6, § 5, Local public schools.

⁴ USD 361 Board Policies, CD-CMA General Administration, CE Superintendent, Responsibilities of the Superintendent of Schools, [http://www.usd361.org/pages/Anthony-Harper/About Us/Policies/BOE](http://www.usd361.org/pages/Anthony-Harper/About%20Us/Policies/BOE), accessed February 25, 2017.

⁵ USD 361 Board Policies, CD-CMA General Administration, CE Superintendent, Responsibilities of the Superintendent of Schools, [http://www.usd361.org/pages/Anthony-Harper/About Us/Policies/BOE](http://www.usd361.org/pages/Anthony-Harper/About%20Us/Policies/BOE), accessed February 25, 2017.

⁶ USD 361 Board Policies, BBBB-BK Board Responsibilities, BCBJ Executive Sessions of the Board of Education, [http://www.usd361.org/pages/Anthony-Harper/About Us/Policies/BOE](http://www.usd361.org/pages/Anthony-Harper/About%20Us/Policies/BOE), accessed February 25, 2017.

⁷ *Id.*

⁸ *Id.* Emphasis in the original.

⁹ *Id.*

¹⁰ USD 361 Board Policies, CD-CMA General Administration, CG Administrative Personal, Administrative Assignments, [http://www.usd361.org/pages/Anthony-Harper/About Us/Policies/BOE](http://www.usd361.org/pages/Anthony-Harper/About%20Us/Policies/BOE), accessed February 25, 2017.

¹¹ Emphasis added.

¹² *Id.*, General Administrative Responsibilities; emphasis added.

According to Superintendent Josh Swartz, in March 2016 the Board voted to extend Anthony Elementary School Principal Ken Henson's contract. Mr. Henson entered into this contract of employment with the Board on August 20, 2016, "as ratified by action of the Board on the 10th day of August 2015." This contract provides that Mr. Henson was "hired and retained as the Principal of the following building of Anthony-Harper USD 361, Harper County Kansas . . . Building: Anthony Elementary . . . The parties may be [sic] agreement, enter into subsequent contracts to replace the initial contract. . . ."

This complaint arises from a series of executive sessions held by the Board on April 11, 2016, to discuss personnel matters of nonelected personnel. Specifically, the executive sessions were held to interview Mr. Henson for the CHS principal position, and included specific conversations about his potential leadership abilities. Present during the executive sessions were Board members Kent Olds, Tami Greve, Kristie Clark, Anna Ruth Blanchat, Angie Higgs, and Sheri Francis. Also included in the executive sessions were the superintendent, and Mr. Henson. The superintendent was present to gain direction from the Board on matters that required research or to answer questions for the Board.

The Board states that during the executive session(s) held on April 11, 2016, it "did reach consensus to have the superintendent notify Mr. Henson that he could be transferred as the principal of Chaparral High School [sic]." "The board of education gave Mr. Swartz direction to transfer Mr. Henson with the understanding that the contract was already set for the 2016-2017 school year with action taken in open session at a board meeting in March. The transfer between buildings was viewed as an administrative action rather than board action." Following the conclusion of the executive sessions, the Board did not vote in open meeting to ratify or affirm its consensus decision made during executive session to transfer Mr. Henson to the CHS principal position. According to the superintendent, because Mr. Henson had already been offered a contract for the 2016-17 school year, "we are considering this a transfer from one building to the next. This is an administrative decision to move Mr. Henson to the high school."

At the conclusion of the executive sessions, the superintendent verbally notified Mr. Henson of the Board's direction to transfer him, and told him that he would "be the principal at Chaparral High School for the 16-17 school year." The Board intended that Mr. Henson have the opportunity to notify "his staff at the Elementary school first rather than hear [it] at a board meeting." The Board's decision to transfer Mr. Henson to the CHS principal position was confirmed by Board member Anna Ruth Blanchat in a text message to one of the complainants on April 12, 2016, at 3:14 p.m.:

Complainant Ricke [APR 12 AT 1:53 PM]: Hey, did I get right, Henson got the principal job at Chaparral last night? [sic]

Board member Blanchat [APR 12 AT 3:14 PM]: Yes, Mr. Henson has been extremely successful at Anthony Elementary in the short time he has been there. We are happy he agreed to move to Chaparral and believe he can make a positive impact.¹³

The superintendent also separately confirmed the Board's decision to transfer Mr. Henson in an email exchange with Ken Leu, Publisher and Editor of the *Harper Advocate*:

Wed, Apr 13 at 10:58 AM, Ken Leu <harperadvocate@sbcglobal.net> wrote:

Josh,

Word on street, over and over, is that Giesen announced to staff that Ken Henson is new CHS principal. That is a very good decision which should have been made prior to whatshisname and the whatshisname before him. Henson brings credibility.

Then I saw a text of a school board member confirming this. No mention in the minutes and it can't be done officially in executive session. I sure don't want to look like the only one in school district that didn't know when the paper comes out.

How can this situation be handled. Your thoughts!!!

ken

From: Josh Swartz <joshsw@usd361.org>
To: Ken Leu <harperadvocate@sbcglobal.net>
Sent: Wednesday, April 13, 2016 12:15 PM
Subject: Re: In quandary

We are considering this a transfer from one building to the next. Board action a couple of meetings ago extended his contract as an administrator in the district.

This is an administrative decision to move Mr. Henson to the high school. I apologize for not having a formal announcement out to get in the papers this week. . . .¹⁴

[Sic]

According to the Board's response, the superintendent "was under the impression that the Board policy allowed for this movement" or transfer without the Board taking further action. However, according to the Board's response, "Superintendent Swartz

¹³ KOMA Complaint, pp. 6-8.

¹⁴ *Id.* pp 9-10.

was incorrect in this action,” in light of its adopted policy on Administrative Assignments, which permits assignment of administrative personnel, such as principals, to be recommended by the superintendent *subject to approval of the Board*.

Although it appears that Mr. Henson accepted the Board’s decision to transfer him and agreed to move to the CHS principal position effective for the 2016-17 school year, he was not immediately presented with a new contract of employment or an amendment to his existing contract confirming his transfer to the position of CHS principal for the 2016-17 school year. It appears that such contracts are prepared and presented for the signature of the employee and the Board in August of each year, at the beginning of the school year. The decision to transfer Mr. Henson to the CHS principal position was not withdrawn after the April 11, 2016 meeting. Mr. Henson did become the CHS principal for the 2016-17 school year.¹⁵

Although the complainants allege that “[G]ossip around the two communities (Anthony and Harper) insinuate the elementary to high school change was a done deal weeks before the April 11, 2016 Board meeting,” they did not provide any information to support such allegations, and we did not identify any during the course of our review. Additionally, the Board reports that the purpose of the April 11, 2016, executive sessions for nonelected personnel was to interview Mr. Henson for the CHS principal position.

The complainants’ desired remedy is “full blown sanctions.” They did not provide a further explanation of what they meant by using this phrase.

We will discuss additional facts as necessary to an understanding of our discussion and conclusions.

Binding action taken during executive session

The purpose of the KOMA is to ensure that government business is conducted “in the sunshine.” It guarantees the public’s right to observe governmental policy makers, such as school boards, city councils, and county commissions, making decisions that affect Kansas citizens on a daily basis. As stated by the Legislature: “In 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.”¹⁶

While a public body’s meetings must be open to the public,¹⁷ the public body may hold “closed or executive meetings.”¹⁸ Such closed or executive meetings are also referred to

¹⁵ USD 361, Chaparral Schools, Contacts, http://www.usd361.org/pages/Anthony-Harper/About_Us/Contacts, accessed February 25, 2017.

¹⁶ K.S.A. 2016 Supp. 75-4317(a).

¹⁷ K.S.A. 2016 Supp. 75-4318(a).

¹⁸ K.S.A. 2016 Supp. 75-4319(a) and (b).

as “executive sessions.” An executive session may be held for the reasons identified in the statute.¹⁹ These reasons include the discussion of “personnel matters of nonelected personnel.”²⁰

Only members of the public body have the right to attend an executive session.²¹ Mere observers may not attend executive sessions.²² Staff, agents for the body or other non-public body individuals do not have an absolute right to be present during executive sessions.²³ However, persons who aid the body in its discussions may be discretionarily admitted by the public body.²⁴ Individuals may attend executive sessions upon the invitation of the public body only if each such person is present to provide information to the body on a permissible topic or participate in its discussion.²⁵

A public body may reach a “consensus” or general agreement on a matter requiring binding action during an executive session. However, “[N]o binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act.”²⁶ There is no exception to this provision, thus a majority of the Board must take formal binding action in an open meeting.²⁷ Under the KOMA, taking binding action means voting publicly to approve or deny a particular request.²⁸ A consensus may constitute binding action and violate the KOMA if a public body fails to follow up on a consensus reached during an executive session by taking a formal public vote on a decision that would normally require a vote by the public body.²⁹

Here, it is clear that on April 11, 2016, the Board entered into a series of executive sessions totaling 85 minutes for the purpose of discussing personnel matters of nonelected personnel so that it could interview Mr. Henson for the CHS principal position. Mr. Henson was, and is, an employee of the district, thus the subject matter for the executive session—discussion of personnel matters of nonelected personnel—was proper. According to the Board, the superintendent’s presence was requested to aid it

¹⁹ K.S.A. 2016 Supp. 75-4319(b)(1) through (16).

²⁰ K.S.A. 2016 Supp. 75-4319(b)(1).

²¹ Attorney General Opinion 92-56, citing Attorney General Opinion 86-143, <http://ksag.washburnlaw.edu/opinions/1992/1992-056.pdf>, accessed February 25, 2017.

²² *Id.*, citing Attorney General Opinions 92-51 and 82-176.

²³ *Id.*, citing Attorney General Opinions 87-170 and 86-143.

²⁴ *Id.*, citing Attorney General Opinion 91-31.

²⁵ *Id.*, citing Attorney General Opinion 92-51 and 82-176.

²⁶ K.S.A. 2016 Supp. 75-4319(c).

²⁷ K.S.A. 2016 Supp. 75-4318(a) and 75-4319(c). See also Attorney General Opinion 1993-055, <http://ksag.washburnlaw.edu/opinions/1993/1993-055.htm>, accessed February 25, 2017.

²⁸ Attorney General Opinion 84-50, <http://ksag.washburnlaw.edu/opinions/1984/1984-050.pdf>, accessed February 27, 2017.

²⁹ *City of Topeka v. Watertower Place Development Group*, 15 Kan.App.2d 52, 805 P.2d 40, 65 Ed. Law Rep. 895 (1990).

Letter to Jim Forsyth

March 8, 2017

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by answering questions or researching matters as requested. Thus, the superintendent's presence was also proper.

During the executive sessions, the Board admits that it reached a consensus, or general agreement, to transfer Mr. Henson from his position as Anthony Elementary principal to the position as CHS principal. In their words, the "board of education gave Mr. Swartz direction to transfer Mr. Henson. . . ." The superintendent carried out the Board's directive by verbally conveying it to Mr. Henson at the conclusion of the April 11, 2016, executive sessions. Notwithstanding the adoption of a policy which required the Board to vote to approve any administrative assignments, it failed to hold a public vote to ratify or approve its consensus decision to direct that the superintendent transfer Mr. Henson to the CHS principal position. It appears the Board did eventually approve Mr. Henson's contract of employment for the position of CHS principal. However, this was *after* the superintendent conveyed the Board's direction to Mr. Henson and the transfer decision was publicly announced.

There are two instructive Kansas cases discussing situations where a public body reached a consensus in executive session. The first case is *O'Hair v. U.S.D. No. 300*.³⁰ The second case is *City of Topeka v. Watertower Place Development Group*.³¹

O'Hair v. U.S.D. No. 300 involved a situation where a board of education reached a consensus in executive session, but voted in open meeting to non-renew a tenured teacher's contract. It appears the public vote occurred immediately after the board returned to open meeting at the conclusion of the executive session. Unlike the present case, there was no intervening action to carry out the Board's consensus, and no delay in the public vote. Thus, the court found no violation of the KOMA.

City of Topeka v. Watertower Place Development Group involved a contract termination. In *Watertower Place*, the city attorney informed the city council in an executive session that Watertower "had breached the contract and he would terminate the contract unless one of the council members directed him not to. No council member objected. The city attorney sent the termination notice by letter the next day." The city council never voted in open meeting to terminate the contract. The court found that "the termination decision did occur during an executive session in violation of the KOMA."

Although the facts set forth in the complaint are not identical to *Watertower Place*, they are sufficiently similar to warrant further discussion. As in *Watertower Place*, the Board discussed a matter in executive session. Unlike *Watertower Place* where the city council essentially stood silent, the Board here discussed the matter and *reached a consensus* to transfer Mr. Henson to the CHS principal position. Additionally, the Board gave the superintendent "direction to transfer Mr. Henson." Immediately following the

³⁰ 15 Kan.App.2d 52, 805 P.2d 40, 65 Ed. Law Rep. 895 (1990).

³¹ 265 Kan. 148, 959 P.2d 894 (1998).

conclusion of the executive sessions, the superintendent verbally relayed the Board's consensus "direction to transfer Mr. Henson" so that he could tell his staff. The Board did not return to open meeting to vote on this consensus decision. The Board's decision to transfer Mr. Henson to the CHS principal position was publicly announced the next day, April 12, 2016, by Mr. Giesen, the Harper Elementary Principal, and also confirmed by a board member following a constituent inquiry. On April 13, 2016, the superintendent confirmed the Board's decision following a press inquiry. The Board took no action to withdraw its transfer decision, and Mr. Henson eventually became the CHS principal for the 2016-17 school year. Like *Watertown Place*, the Board did not hold a public vote to approve this transfer, even though it reached a consensus in executive session and its own policy on Administrative Assignments required such approval. Arguably this consensus was ultimately ratified when the Board voted to approve Mr. Henson's contract sometime in August 2016.

It appears there was some mistake or confusion about whether a public vote was necessary to carry out the Board's direction to transfer Mr. Henson to the CHS principal position after the Board had already voted to extend his contract as the Anthony Elementary principal. However, it is clear that the Board intended to transfer Mr. Henson to a different position, and reached the decision to give "direction" to the superintendent to make that transfer during an executive session. It is also clear that the superintendent did not have independent authority to approve such a transfer, as the Board did not delegate that authority to the superintendent in its Administrative Assignments policy. Thus, notwithstanding the Board's eventual ratification of Mr. Henson's contract of employment, the consensus "direction to transfer Mr. Henson" that it reached during the April 11, 2016, executive sessions became binding action because its decision was effectively carried out immediately when the superintendent communicated the transfer decision to Mr. Henson and it was announced publicly the next day. This is a violation of the KOMA.

Although we believe the Board violated the KOMA by taking binding action in executive session as described above, our analysis does not end there. We must consider whether this is more than a technical violation³² of the KOMA. "Technical violation" is a term of art adopted by courts in discussing KOMA violations. "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]."³³

Although the Board reached a consensus in executive session to direct the superintendent to transfer Mr. Henson to the CHS position, it appears that it relied on the superintendent's mistaken assumption that the Board had delegated to him the

³² See *Stevens v. City of Hutchinson*, 11 Kan.App.2d 290, 291, 726 P.2d 279 (1986).

³³ *Id.*

authority to make such transfers. Following the Board's consensus decision in executive session, the superintendent acted on its direction by verbally conveying to Mr. Henson that he would be transferred to the CHS principal position. This transfer was announced the next day. Mr. Henson had every expectation that he would become the next CHS principal, and in fact, he did. The complainants do not directly address whether there was any prejudice arising from the consensus reached in executive session, other than to state, "[T]his is just the TIP of the iceberg the Antony-Harper USD 361 Board and Superintendent are sailing our children into [sic]."³⁴ However, under the KOMA, the harm is to the public, especially considering the stated public policy that the transaction of governmental business be open to the public. While the public may not be entitled to know all the details leading to the decision to transfer an employee from one position to another, under the KOMA, the public does have a right to know about the transaction of governmental business, such as the decision to transfer a principal from one position to another, something acknowledged by the Board's own policies. This right to know was effectively denied when the Board reached a consensus in executive session to give direction to the superintendent to transfer Mr. Henson to the CHS principal position, and then failed to follow up with a prompt vote when it returned to the open meeting.

In mitigation, we note that the Board ultimately publicly approved a contract of employment for Mr. Henson for the 2016-17 school year. Additionally, we have no evidence that the Board routinely takes binding action in executive session. Likewise, we have no evidence that the Board's actions were meant as a subterfuge to avoid the transaction of business in the public eye. Finally, the Board has been cooperative and forthcoming in its responses to our inquiries.

Nevertheless, after considering the totality of the circumstances, we find that taking binding action in executive session impinges on the public right to know. Thus, we believe this is more than a technical violation of the KOMA. Because of this, remedial action is required.

Matters not identified in the complaint

We identified an additional matter during our review that merits further discussion.

The complaint identifies a series of executive sessions the Board held on April 11, 2016. The primary focus of the complaint is whether the Board took binding action in executive session. However, the use of these sessions, as well as a review of the official meeting minutes, prompted us to review the process the Board used to recess into executive session.

³⁴ Emphasis in the original.

At the risk of repetition, meetings for the conduct of government affairs and the transaction of governmental business must be open to the public.³⁵ A public body may, but is not required to, hold an executive session. If the public body decides to recess into executive session, the public body must follow a specific procedure in order to comply with certain statutory requirements.³⁶ “Upon formal motion made, seconded and carried, all public bodies and agencies subject to [the KOMA] may recess but not adjourn, open meetings for closed or executive meetings. Any motion for [executive session] shall include a statement of (1) the justification for closure, (2) the subjects to be discussed during the closed or executive meeting and (3) the time and place at which the open meeting shall resume.”³⁷ The public body must record the motion and the required statement in the minutes.³⁸

The “subject matter” refers to one of the topics identified in K.S.A. 2016 Supp. 75-4319(b)(1) through (16). This includes discussion of such things as personnel matters of nonelected personnel, preliminary discussions relating to the acquisition of real property, and the like. The “justification” is an explanation of *what* is to be discussed, without revealing confidential information. Typically, the justification is a brief explanation of the reason the public body believes the information needs to be protected. For example, when discussing the subject matter of nonelected personnel, the justification is usually reported to be to protect the privacy rights of the nonelected personnel subject to discussion.³⁹ The reason for stating the time and place at which the open meeting is to resume is simple—it allows members of the public to know when and where the public body will take up the public or open portion of the meeting.

During our review, we noted a clear problem with the Board’s motions for executive session. A discussion of the Board’s motions illustrates the problem:

Motion by Anna Ruth Blanchat, seconded by Angie Higgs, to approve to go into executive session with Mr. Swartz and the Administration as needed at 9:10 for 30 minutes. Meeting resumed to open session at 9:40 p.m.
Motion carried 6-0.⁴⁰

In this instance, the motion for executive session does state the time the open meeting is to resume as required by K.S.A. 2016 Supp. 75-4319(a). However, it fails to state the subject matter, justification or place where the open meeting will resume as required.

³⁵ K.S.A. 2016 Supp. 75-4317(a).

³⁶ See K.S.A. 2016 Supp. 75-4319(a).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *State v. USD 305*, 13 K.A.2d 117, 121, 764 P.2d 459, 50 Ed. Law Rep. 554 (1988) (“It seems logical to us that the privacy rights of non-elected personnel subject to discussion is sufficient justification for a closed session to meet the requirements of the KOMA.”)

⁴⁰ Board Meeting Minutes, April 11, 2016, p. 2,

<https://docs.google.com/document/d/1OsYFNNrKljTyHPiwSct6V-ogWUuWiuMCv8x2TUCxHhA/edit>, accessed February 25, 2017.

In another example, the motion for executive session is stated in the minutes as follows:

Motion by Sheri Francis, seconded by Angie Higgs, to go into executive session at 9:40 p.m [sic] for 15 minutes to discuss non elected [sic] personnel with Mr. Swartz and Administration as needed. Meeting resumed to open session at 9:55 p.m.. [sic]

Motion carried 6-0.⁴¹

In this instance, the motion properly states the subject matter and the time the open meeting will resume, but fails to state the justification and the place the open meeting will resume as required.

One element the Board has added to its motions is the inclusion of the names of those individuals who will be present during the executive session in addition to the Board members. Although not required by the KOMA, this is a helpful addition, and lets the public know with whom the Board is consulting during the executive session.

Each of the executive session motions made on April 11, 2016, is missing the justification and the place the open meeting will resume. With the exception of the one instance identified above, the remainder of the April 11, 2016, executive session motions to discuss personnel matters of nonelected personnel each state the subject matter, and the time the open meeting will resume, as well as who made and seconded each motion.

In reviewing the available meeting minutes for executive sessions held by the Board from June 14, 2014, through July 11, 2016, we noted that they are all written in a similar fashion. This is despite the fact that the Board first adopted a policy in June of 1999 that spelled out each of the elements for properly recessing into executive session.

Since the time we brought this issue to the Board's attention, it has taken steps to comply with the requirements of K.S.A. 2016 Supp. 75-4319(a). For example, on July 22, 2016, the Board made the following motion:

Motion by Tami Greve, seconded by Anna Ruth Blanchat, to go into executive session at 12:37 p.m .for [sic] 15 minutes to discuss non elected [sic] personnel matters in order to protect the privacy interests of the individuals to be discussed with Josh Swartz and Ken Henson present. We shall return to session in the room at 12:52 p.m.

Motion carried 5-0.

This motion meets the statutory requirements. The justification is "to protect the privacy interests of the individuals to be discussed." The subject matter is "to discuss

⁴¹ *Id.*

non elected [sic] personnel matters.” Finally, the time and place the open meeting shall resume are also stated: “We shall return to session in the room at 12:52 p.m.”

In its response, the Board concedes that for the nonelected personnel executive session motions on April 11, 2016, “there was no stated justification for the executive session [sic] which needed to be to ‘protect the privacy interests of the individuals to be discussed,’” and that the motions should have also indicated the location where the open meeting would resume “would be in the board room.”

We appreciate the Board’s acknowledgment that its motions on April 11, 2016, fell short of meeting the statutory requirements for recessing into executive session. It appears the Board’s shortcomings in making motions for executive session are more the result of careless practices and ignorance of its own adopted policies than an intent to circumvent the KOMA. Nevertheless, it is clear that on at least seven (7) occasions during the April 11, 2016, Board meeting, it failed to comply with the requirements of K.S.A. 2016 Supp. 75-4319(a) when making motions for execution session for the discussion of personnel matters of nonelected personnel. Thus, we find that the Board violated the KOMA.

However, that is not the end of our inquiry on this issue. The Board’s longstanding pattern of deficient motions certainly merits consideration as an aggravating factor. However, in mitigation, the Board substantially complied with the statutory requirements, even though their motions were technically deficient. Additionally, the Board recorded the motions in its meeting minutes as required. By making the motions, the public was aware that the Board was recessing into executive session and the subject to be discussed. The complaint does not specifically raise this issue. Rather, we identified this issue during the course of our review of the Board’s April 11, 2016, meeting. Because of this, we have no evidence of prejudice resulting from these actions, or that the public’s right to know was effectively denied. Likewise, we have no evidence that the Board’s failure to meet the required elements for recessing into executive session was an effort to circumvent or thwart the purposes of the KOMA. We have no other complaints raising the failure of the Board’s executive session motions to meet the statutory requirements. Finally, it appears the Board took prompt corrective action with regard to its motions for executive session, even before the issuance of this report.

In light of the foregoing, we believe the failure to comply with the statutory requirements for recessing into executive session is a technical violation of the KOMA. Notwithstanding our conclusion that the deficient motions for executive session are a technical violation of the KOMA, we believe the well-established pattern of deficient motions requires remedial action.

Penalties under the KOMA

The KOMA provides civil penalties in an amount not to exceed \$500.00 for each violation of the act.⁴² Additionally, completion of training concerning the requirements of the KOMA may be required.⁴³ Any member of a public body subject to the KOMA who knowingly violates any provisions of the act, or intentionally fails to furnish information as required by K.S.A. 2016 Supp. 75-4318(b) concerning notice, may be subject to these penalties. “To ‘knowingly’ violate the act means to purposefully do the acts denounced by the Kansas Open Meetings Act and does not contemplate a specific intent to violate the law.”⁴⁴ In other words, the violation need not be willful or intentional. Rather, if the KOMA prohibits the action or conduct, and the public body engages in the conduct, that is a knowing violation of the law.⁴⁵ “Ignorance of the law is no excuse.”⁴⁶

The number of identified violations in this case suggests the Board has been, at the very least, inattentive in meeting the requirements of the KOMA. The Board’s well-established pattern of failure to observe the requirements for recessing into executive session suggests a deliberate and purposeful disregard of the KOMA, especially when considering it has in place a long standing policy that would have easily allowed it to meet these requirements.

However, in mitigation, we note that the Board has already taken corrective action concerning its motions for executive session. Additionally, in its response, the Board acknowledged its shortcomings in meeting these requirements. The Board also proactively sought and received KOMA training from the Kansas Association of School Boards on August 31, 2016.⁴⁷ We have not identified any prior substantiated violations of the KOMA by the Board. The Board has acknowledged it wrongly believed Mr. Henson’s transfer did not need Board approval, and that it simply wanted him to have the opportunity to notify “his staff at the Elementary School first hand rather than hear at a board meeting. . . .” However, the Board had not delegated the authority to the superintendent to transfer principals from one building to another. Mr. Henson’s transfer to the CHS position required Board approval, meaning a public vote was required. It did not return to open session and vote to approve its consensus decision to transfer Mr. Henson reached in executive session. The Board’s consensus became binding action during executive session when it failed to return to open session to approve or ratify its consensus, and the superintendent carried out its directions. Thus,

⁴² K.S.A. 2016 Supp. 75-4320(a).

⁴³ See K.S.A. 2016 Supp. 75-4320a(a); see also K.S.A. 2016 Supp. 75-4320d(a)(1)(A)(ii); and see K.S.A. 2016 Supp. 75-4320f(b).

⁴⁴ K.S.A. 2016 Supp. 75-4320(a); see also *State el rel. Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 10, 646 P.2d 1091

⁴⁵ *Id.*, 231 Kan. 536-37.

⁴⁶ *Id.*, 231 Kan. 536.

⁴⁷ Board Meeting Minutes, August 31, 2016, p. 1,

<https://docs.google.com/document/d/19Im3PvQMr4G6m5NWKzCjMaNjad1p4hEAZYtq66j9haE/edit>, accessed February 25, 2017.

the fact that binding action was taken during executive session cannot be ignored. But for a constituent and the local newspaper editor questioning whether the Board had made a decision to transfer Mr. Henson to the CHS principal position, the decision might not have become known.

Conclusion

In light of the foregoing, we find by a preponderance of the evidence that the Board knowingly violated the KOMA when it reached a consensus during executive session, then failed to affirm or ratify its decision by a public vote, thus turning its consensus into binding action taken during executive session, and by failing to meet the statutory requirements for recessing into executive session.

After due consideration of all the available facts, we decline to pursue the complainants' suggested remedy of "full blown sanctions." However, as indicated earlier, we believe remedial action is required to ensure the Board's compliance with the KOMA. On the facts of this case, including that the Board ignored its own policies, which would have prompted it to conduct a public vote to approve the administrative assignment of a principal at another school, as well as how to properly recess into executive session, we have determined the imposition of a civil penalty⁴⁸ as authorized by the KOMA is warranted. Because the Board promptly acknowledged that it fell short of complying with the KOMA in at least some regards, and undertook corrective action, including seeking remedial training before the issuance of this report, we have determined not to impose the maximum amount permitted by the KOMA. However, we believe that the imposition of a civil penalty is an important reminder to the Board of the significance of both the KOMA and its obligations under the act.

In light of the foregoing, we are seeking the Board's voluntary compliance through the means of a Consent Order as provided for by the KOMA.⁴⁹

We have enclosed the Consent Order for the Board's review. The Consent Order requires the Board to acknowledge the KOMA violations, pay a civil penalty in the amount of \$50.00 per Board member to be paid individually and not from Board, USD 361 or other public funds, and agree to comply with the KOMA in the future. Because the Board proactively sought and has already received KOMA training, we decline to impose an additional training requirement in this Consent Order. However, we strongly urge the Board to undertake periodic refresher training so that the importance of meeting the KOMA's requirements remains uppermost in the minds of current and future Board members. Finally, the Consent Order requires the Board to promptly review its policy on executive sessions, make any necessary changes, and update the history section to reflect its review.

⁴⁸ K.S.A. 2016 Supp. 75-4320d(a)(1)(A)(ii).

⁴⁹ K.S.A. 2016 Supp. 75-4320d(a)(1).

Letter to Jim Forsyth
March 8, 2017
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Our offer of a Consent Order as authorized by K.S.A. 2016 Supp. 75-4320d(a)(1) is effective up to **5:00 p.m. on Friday, April 7, 2017**. Because it meets regularly, we believe this will offer you sufficient time to confer with the Board about this matter. If additional time is needed to discuss this matter, the Board may wish to call a special meeting.

If the Consent Order is approved, please secure the necessary signatures and return it to me. I will obtain the necessary signatures from our office and provide a copy for your files.

If we do not receive the signed Consent Order by **5:00 p.m. on Friday, April 7, 2017**, we will consider our offer of settlement to be declined, and proceed as authorized by K.S.A. 2016 Supp. 75-4320a, 75-4320d, and/or 75-4320f.

We look forward to hearing from you. Please feel free to contact me at (785) 296-2215 or lisa.mendoza@ag.ks.gov with any questions or concerns.

Sincerely,

OFFICE OF KANSAS ATTORNEY GENERAL
Derek Schmidt



Lisa A. Mendoza
Assistant Attorney General
Director, Open Government Enforcement Unit

Enclosure (Consent Order)