Opinion No. 59-105

August 14, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Honorable Fabian Chavez, Jr., Senator, Santa Fe County 404 San Antonio Santa Fe, New Mexico

*{*165}* This is written in reply to your recent request for an opinion on the following questions:

1. Does "final decision" mean official act by the public-body?

2. Does the term "meeting open to the public" mean that all portions of the said meeting must be open to the public?

3. Does debate and discussions have to be open to the public?

4. What procedure should be followed to bring charges for violation of the act?

5. Who is qualified to bring such action?

6. Are final decisions made in closed meetings valid?

7. Would a meeting of a public body held in a place and time other than the conventional ones be considered a public meeting if said meeting was not announced in advance?

8. Are final decisions arrived at by telephone, mail or telegraph considered decisions in a public meeting?

9. Do public bodies which have as their sole function investigation to gather facts come within the purview of the act?

In answer to your questions, it is my opinion that:

1. Yes.

2. Yes.

3. Yes.

4. Regular criminal procedure, since the statute carries a criminal penalty.

5. Officers charged with the duty of enforcing criminal statutes.

6. Yes.

7. See analysis

8. No.

9. No.

The statute to which your questions refer is Chapter 120, Laws 1959 which is codified as Section 5-6-17 N.M.S.A., 1953 Comp. (PS), which reads in part as follows:

"A. The governing bodies of all municipalities, boards of county commissioners, boards of public instruction and all other governmental boards and commissions of the state or its subdivision, supported by public funds, shall make all final decisions at meetings open to the public; provided, however, meetings of grand juries shall not be included as public meetings within the meaning of this section."

1. While the intent of your first question is not clear, I assume you wish to know whether every official act of a board or commission is a final decision within the meaning of the act in question. My opinion is that: Yes, every official act is final in the respect that the body has acted on a set of facts or circumstances then before it, and as to those facts at that time, its action is final. In this respect, it might be said that almost, if not all acts of executive boards or commissions are final within the meaning of the act. This follows from the distinction between boards and hearings having the sole purpose for their existence *{*166}* rendering decisions on a given set of facts or circumstances then before them. (See further discussion under question number 9). It might even be said that postponement of action on a problem is final in this respect. This explanation of the word "final" is to be distinguished from the word as used by Courts in reference to judgments.

2. My opinion that all stages of the meetings must be open to the public is based upon the fact that if the body were allowed to conduct a closed meeting in the determination of a matter, and then merely open the meeting to the public and announce its decision, the clear intent of the legislature would be defeated. Many times the process by which the board or commission arrives at its decision is so closely akin to the final decision itself that the two cannot be separated, and to allow one part to be withheld from the public would be in effect, to withhold both from the public.

3. In light of my discussion in point No. 2, this question needs no further discussion.

4. Subsection "B" of the above quoted statute provides for a criminal penalty for violation of the statute. It reads as follows:

"B. Any person violating any of the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not to exceed one hundred dollars ($ 100) for each offense."

This provision has the effect of making this a penal statute and therefore the normal criminal procedure should be followed: that is, filing of a criminal complaint with an officer charged with the duty of enforcing the criminal statutes of this state.

5. The action would have to be brought by some officer charged with the duty of enforcing criminal statutes in this state. A violation could, of course, be brought to the officer's attention by filing a formal criminal complaint against the alleged violator.

6. My opinion that decisions of bodies made in closed meetings are valid is arrived at by virtue of the fact that the statute does not make such actions invalid. Had the legislature intended to invalidate any final decisions in closed meetings, it certainly could have done so. From the reading of the statute it is apparent that the legislature chose to provide only a criminal penalty for violation rather than invalidating the decision. It is an elementary rule of statutory construction needing no citation that the intention of the legislature controls. Applying this rule to the above statute, the only intention that can be ascertained from reading it is that only a fine is provided by the act. No invalidating intention can be found.

7. A definite answer to your seventh question is impossible without having a specific set of facts upon which to render an opinion. It is possible to conceive of a situation where a public board or commission does not meet at its usual time and place which would be termed a public meeting. By the same token, it is possible to conceive of a situation where a board or commission holds a meeting at such a place and at such a time so as to be tantamount to a closed or secret meeting. An opinion as to which situation would violate the provisions of this act will have to await a specific factual situation.

8. It is my opinion that final decisions made by telephone, mail or telegraph are not made at a meeting open to the public within the meaning of the act. A clear intention of the words "meeting open to the public" is to provide a situation where all of the attending members of the board or commission assembled together arrive at final decisions and determinations in such a manner as to allow the press and the general public to be present. Any other interpretation would defeat the legislative intent of the statute.

*{*167}* 9. Before dealing with your ninth question, it would be well to point out a distinction between a board or commission which makes a decision at a meeting or hearing and a committee which has as its sole purpose, investigation. The conduct of an investigation has as its goal only the collection of facts and gathering of data. It does not in any way involve decision making either interim or final. Such a function is performed by an interim legislative investigating committee which, by its very nature, cannot make any final decisions. The sole purpose for its existence being to collect information and report to the legislature so that the legislature can enact remedial legislation to correct any existing wrongs. An executive board or commission on the other hand is almost entirely concerned with decision making and policy planning from the facts which are before it. Such a board or commission, by its very nature, does not function to investigate or obtain facts but to act within its discretion on the facts which it

has before it. This distinction has generally been accepted in the law. See **Lindsay et al v. Allen, Judge,** 113 Tenn. 517, 82 S.W. 648; **In Re Edwards,** 44 Idaho 517, 225 P. 906; **In Re Securities & Exchange Commission,** 84 F.2d. 316.

In view of this distinction, it is my opinion that public boards, commissions, or committees which have as their sole purpose the assembling and evaluation of facts for presentment to another authority for action are not included within the purview of the section in question. This decision is grounded in sound public policy as well as the legal distinction. In investigating public areas of government which require remedial action, situations can arise where if certain information confidential in its nature, was required to be released, great harm could be done to innocent individuals as well as the public general. The effectiveness of the investigation would in many instances be greatly hampered.

Before concluding this opinion, one very serious problem must be solved. In view of the very broad and sweeping coverage of Section 5-6-17 N.M.S.A., 1953 Comp. (PS), conflict arises between that section and the provisions of the Uniform licensing Act. Section 67-26-7 N.M.S.A., 1953 Comp. (PS), reads in relevant part as follows:

"All board hearings under the Uniform Licensing Act shall be open to the public, **Provided that, in cases in which the reputation of an applicant or licensee may be irreparably damaged, a board may hold a closed hearing if it so desires and states the reasons for its decision in the record . . ."** (Emphasis Supplied)

The section of the Uniform Act makes an exception to the general rule that board meetings and hearings must be made public. The new public meeting section does not make this exception. The problem then is to reconcile them if possible; if no reconciliation is possible, then to hold that the latest enactment of the legislation prevails over the former. No implied intent can be found to exclude the boards under the Licensing Act from the provisions from the 1959 Act. To so imply would be reading something into the section which patently is not there. The only other course left open is repealed by implication. It is therefore my opinion that Sec. 5-6-17 N.M.S.A., 1953 Comp. (PS), repeals by implication that portion of Sec. 67-26-7 N.M.S.A., 1953 Comp. (PS), which begins:

". . . Provided that, . . ."

and ends:

". . . licensee to do so."

In so doing, I am well aware that repeals by implication are not favored in New Mexico. **James v. Board of County Commissioners of Socorro County,** 24 N.M. 509, 174 P. 1001; **In Re Martinez's Will,** 47 N.M. 6, 132 P. 2d 422, but where there is an irreconcilable conflict *{*168}* between two statutes, the latter is termed to repeal the

former by implication. **Territory v. Digneo,** 15 N.M. 517, 103 P. 975; **Stokes v. New Mexico Board of Education,** 55 N.M. 112, 230 P. 2d 243.