



LOWER PLATTE SOUTH natural resources district

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Agenda Item #8

Memorandum

Date: August 20, 2020
To: Board of Directors
From: Paul D. Zillig, General Manager
Subject: Executive Subcommittee Meeting Minutes

The Executive Subcommittee met at 2:00 pm on Thursday, August 20, 2020 via video/teleconference. Directors participating were Larry Ruth, Deborah Eagan, Bruce Johnson, Ray Stevens, and Dan Steinkruger. Others participating included Luke Peterson, Steve Seglin, Corey Wasserburger, Kathy Spence, David Potter, and myself.

Chair Ruth called the meeting to order and welcomed those participating. Ruth reviewed with the Subcommittee his memo (attached) on the consideration of District Policies Related to Anti-Discrimination and a memo (attached) from Seglin & Wasserburger on the US Supreme Court's Decision on the Bostock case. The Subcommittee reviewed three District policies (Operating Policy G-18: Non-Discrimination in District Programs; and Personnel Policies #2: Equal Opportunity/Affirmative Action and #47: Anti-Harassment) and some potential changes. The Subcommittee reviewed and discussed all the changes and the end result was that they wanted to make sure we are following the law, keep the policies from getting into too much detail, and do what is right.

Attached is a copy of the three policies and the Subcommittee's suggested changes to add "gender identity" and a few other improvements in the wording. It was moved by Steinkruger, seconded by Stevens, and unanimously approved by the Subcommittee to **recommend the Board of Directors approve the changes to Operating Policy G-18: Non-Discrimination in District Programs, and Personnel Policy No. 2: Equal Opportunity/Affirmative Action, and Personnel Policy No. 47: Anti-Harassment.**

The next item on the agenda was to discuss limits on Board Meeting discussion. Ruth reviewed last month's interest in discussing an item that was part of a Subcommittee Report but not listed on the Board Meeting Agenda. Seglin reviewed the attached excerpts from the Nebraska Attorney General's Website on Board Meeting agendas and discussion. Legal counsel reported that the agenda must be specific and in enough detail to let the public know the topic to be discussed or acted upon. Any discussion beyond item listed on the Board Meeting agenda will need to be called out of order by the Chair. It was agreed that Subcommittee's will need to let the General Manager

and/or Chair know of any non-action items that they wish to add to the Board Meeting agenda for discussion.

There were several reports. The August Board Meeting will utilize a "Consent Agenda" for items that no Board Members wish to discuss and those items will be combined and considered with a single vote. Ruth reported that we did submit a resolution (Extreme Weather Event or Climate Change Action Plan) for consideration at the NARD Annual Conference in September. Zillig supplied copies of the 2017 email from Steve Seglin discouraging email conversations between Directors (a copy is attached), Zillig reported that due to scheduling and space limitations future Board Meetings will likely be held at the Lancaster County Event Center, 84th & Havelock Avenue, in Lincoln, and Wasserburger gave a quick update on the Deadmans Run gabion damage lawsuit.

There being no further business the meeting adjourned at 4:25 pm.

PDZ/pz

pc: Steve Seglin
Corey Wasserburger

TO: LPSNRD Executive Subcommittee

From: Larry Ruth

Re: LPSNRD Executive Subcommittee Consideration of District Policies Related to Anti-Discrimination

Our Executive Subcommittee meeting on Thursday will consider amendments to our Personnel and Operating Policies dealing with anti-discrimination. This subject arose several months ago and action has been deferred since that time because of the press of other matters. We will attempt to fashion a recommendation to the full Board on any appropriate amendments for its consideration at the August Board meeting on August 26. Here is a bit of a road map for our use.

1. A major development in the law of employment discrimination took place in June of this year when the U.S. Supreme Court decided *Bostock v. Clayton County, Georgia*. The *Bostock* case ruled that Title VII of the Civil Rights Act of 1964 prohibits discrimination against an employee because the employee was gay or transgender by the Title VII language prohibiting discrimination "because of such individual's ... sex."

Legal Counsel Seglin and Wasserburger have prepared a brief summary of the case and its effect on the District. I think that Paul is going to distribute the memo and I encourage you to read it.

2. The District's Personnel Policies touch on discrimination in several areas: Equal Opportunity/Affirmative Action (No. 2); Nondiscrimination in Services to the Public (No. 2); Anti-Harassment (No. 47). Additionally, our Operating Policy No. 18 deals with Non-discrimination in District Programs. It will be helpful to us in our analysis if we first focus on the Equal Opportunity Policy No. 2, and the other policies may flow relatively easily from that analysis.

3. Our Equal Employment Policy No. 2 reads:

The District will make all decisions regarding recruitment, hiring, promotions, and all other terms and all other terms and conditions of employment, without discrimination on the basis of race, color, religion, age, sex, sexual orientation, genetic information, national origin, disability, familial status, veteran status, marital status, or other factors, which lawfully cannot be the basis for employment decisions.

Our task is mainly to consider whether we should recommend any changes in the bases for prohibited discrimination. We will consider possible additional bases for prohibited discrimination as follows: (1) ethnicity, (2) gender identity, (3) military status, (4) political affiliation, (5) health status, and (6) any other proposed bases suggested by subcommittee members. Our analysis of support or opposition to any of these bases should be sound and articulation “crisp” because I would expect lively discussion from the full Board on the subject.

Paul will be distributing a draft of ways that these policies may be amended by inclusion of additional prohibited bases for discrimination, and he has suggested a number of other relatively minor amendments to the Affirmative Action part of Policy No. 2 and to Anti-Harassment Policy No. 47 related to procedure.

4. I note that *Bostock* addressed being “gay” and “transgender” as bases for discrimination that are prohibited. We will consider whether “gay” is already included in our current No. 2 by our current identification of “sexual orientation”, and whether “transgender” is more appropriately identified in the term “gender identity” if we are to add that concept. Please give this some further thought.

Thank you.

Memorandum

To: Paul Zillig

From: Steven Seglin and Corey Wasserburger

Subject: U.S. Supreme Court's Decision in *Bostock v. Clayton County, Georgia*

Date: August 7, 2020

Question

Does the U.S. Supreme Court decision on June 15, 2020 in *Bostock v. Clayton County, Georgia* (No. 17-1618) that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2(a)(1) ("Title VII") includes protection against discrimination in employment practices for gay and transgender persons, apply to Lower Platte South Natural Resources Districts ("NRD")?

Answer

Yes, under federal law, Title VII applies to a political subdivision if the political subdivision has 15 or more employees. Strictly speaking, *Bostock* does not apply to the NRD under the Nebraska Fair Employment Practices Act ("FEPA"); however, Nebraska courts have interpreted the scope of FEPA in the past by looking to the interpretation of Title VII by Federal courts because FEPA was patterned after Title VII. The present NRD policies include the prohibition of discrimination on the basis of sexual orientation but not transgender persons.

Analysis

The NRD presently has a policy (Policy No. 2) with regards to equal employment opportunity which provides:

The District will make all decisions regarding recruitment, hiring, promotions, and all other terms and all other terms and conditions of employment, without discrimination on the basis of race, color, religion, age, sex, **sexual orientation**, genetic information, national origin, disability, familial status, veteran status, marital status, **or other factors, which lawfully cannot be the basis for employment decisions.** (Emphasis added).

Section 48-1102(2) of the Nebraska Fair Employment Act applies to employers who have 15 or more employees. Section 48-1104 provides that "It shall be an unlawful employment practice for an employer:

- (1) To fail or refuse to hire, to discharge, or to harass any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin;
- (2) To limit, advertise, solicit, segregate, or classify employees in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect such individual's status as an employee, because of such individual's race, color, religion, sex, disability, marital status, or national origin.

Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

The Supreme Court in *Bostock* found that a decision to terminate an employee because the employee was gay or transgender fell within the scope of Congress' prohibition on discriminating against an individual "because of such individual's . . . sex." In short, an employer's decision to terminate an employee based on a personal characteristic, like sexual attraction to men, is a decision to discriminate against the employee because of the employee's sex because the characteristic is tolerated in one group of employees (heterosexual women), but not another (homosexual men).

In Nebraska, an employee who believes he or she has been discriminated against under Federal or State law may file a claim of discrimination under state law with the Nebraska Equal Opportunity Commission (NEOC), or federal law with the Equal Employment Opportunity Commission (EEOC). Both agencies have concurrent jurisdiction over such claims. The two agencies have what is called a "work sharing agreement," which means that the agencies cooperate with each other to process claims. Generally, it is not necessary to file a claim with both agencies, so long as a claimant indicates to one of the agencies that he or she wants to "cross-file" the claim with the other agency.

Conclusion

Since the NRD has 15 or more employees it is bound by both Title VII of the Civil Rights Act of 1964 and the Nebraska Fair Employment Practices Act, *Neb. Rev. Stat. § 48-1101 et seq.* The *Bostock* decision expands the scope of the word "sex" under Title VII to include gay and transgender individuals. Although Nebraska courts have yet to review a claim under FEPA similar to the claim presented in *Bostock*, FEPA is modeled after Title VII, so it is likely that the Supreme Court's decision in *Bostock* would compel Nebraska courts to similarly interpret the scope of FEPA.

NRD Policy No.2 already includes an explicit prohibition against discrimination based on an individual's "sexual orientation;" however, NRD Policy No. 2 does not include a similar prohibition against discrimination against "transgender" individuals. Nevertheless, the NRD is bound under Title VII and *Bostock* to not discriminate against transgender individuals. NRD policy No. 2 also states that the NRD cannot discriminate "under other factors, which lawfully cannot be the basis for employment decisions," which would cover discrimination against transgender individuals.

Even if the NRD does not amend its Policies to include prohibitions against discriminating against "transgender" individuals, such discrimination is illegal since the *Bostock* decision extended Title VII protections to gay and transgender individuals. Nevertheless, it may be advisable for the NRD to add "transgender" to its Policy No.2 in order to make its policy's standard conform with the new standard articulated under *Bostock* and to articulate the Board's priorities should the Board wish to affirm its commitment to not discriminate against transgender individuals.

11-16-11

G-18: NON-DISCRIMINATION IN DISTRICT PROGRAMS

The District, in determining eligibility for participation in all programs administered by the District, shall not discriminate because of race, color, religion, age, sex, sexual orientation, genetic information, national origin, disability, familial status, veteran status, or marital status.

gender identity,

Personnel Policy No. 2: EQUAL OPPORTUNITY/AFFIRMATIVE ACTION

The District declares and reaffirms a policy of equal employment opportunity, affirmative action in employment, and nondiscrimination in the provision of all of its services to the public.

Equal Employment opportunity

The District will make all decisions regarding recruitment, hiring, promotions, and all other terms and conditions of employment, without discrimination on the basis of race, color, religion, age, sex, sexual orientation, genetic information, national origin, disability, familial status, veteran status, marital status, or other factors, which lawfully cannot be the basis for employment decisions.

Affirmative Action in Employment

The District undertakes a program of affirmative action, to which good faith efforts will be directed to:

- a. Identify and eliminate employment practices that adversely impact minorities, women and others protected by applicable law unless these practices ~~can be validly~~ ^{are} related to occupational qualifications; ^{bona fide} ^{reasonably necessary to District Operations;}
- b. Replace such practices ^{with} by practices and policies based on merit and valid job qualification;
- c. Develop, through special recruitment and other measures, more representative proportions of minorities and women employees where their under-utilization has occurred.

Nondiscrimination in Services to the Public

The District reaffirms its policy of nondiscrimination on the basis of race, color, religion, age, sex, sexual orientation, genetic information, national origin, disability, familial status, veteran status, marital status, or other illegal grounds, in the provision of all services to members of the public.

Personnel Policy No. 47: ANTI-HARASSMENT

The District is an equal employment opportunity employer. Employment decisions ~~are~~ ^{shall be} made without regard to an individual's race, color, religion, age, sex, sexual orientation, ^{gender} identity, genetic information, national origin, disability, familial status, veteran status, marital status or other illegal grounds.

Any employee who believes that he/she is being mistreated ^{or otherwise discriminated against} because of minority or protected status should promptly bring such complaint to the attention of the General Manager, Assistant General Manager, or Chair of the Board. ~~In the event that it is difficult~~ ^{If} for an employee to bring up the subject of a complaint during office hours, the employee may contact these individuals at home.

^{finds it difficult} ~~As far as there may be reason to do so,~~ any complaint will be kept confidential.

^{Except as necessary for the purposes of addressing the complaint,} In the event that an employee believes that he/she is being discriminated against through conduct, which constitutes sexual harassment, and in the event that a complaint is brought to the attention of one of the above designated individuals, a full and complete investigation will be instituted immediately to the extent that is appropriate. However, such investigation will be kept confidential or limited to the persons involved in the situation.

Sexual harassment as defined by the Equal Employment Opportunity Commission is "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Any employee who brings a complaint to the attention of management shall suffer no retaliation or adverse employment decision as a consequence thereof.

EXCERPTS FROM THE NEBRASKA ATTORNEY GENERAL'S WEBSITE

PUBLIC MEETINGS; NOTICE AND AGENDA REQUIRED

Section 84-1411 sets out several requirements for the notice which must be given for a public meeting and for the agenda which must be prepared: (1) the public body must give reasonable advance publicized notice of the time and place of each meeting by a method designated by the body and recorded in its minutes, (2) that notice must be transmitted to all members of the body and to the public, (3) the notice must contain an agenda of subjects known at the time of the publicized notice, or a statement that such an agenda, which must be kept continually current, is readily available for inspection at the principal office of the public body during normal business hours.

1. **Agenda.** Under § 84-1411(1), an agenda maintained at the office of a public body for public inspection must be kept continually current and may not be altered later than 24 hours before the scheduled commencement of the public meeting (or 48 hours before commencement of a meeting of a city council if that meeting is noticed outside the corporate limits of the municipality). A public body may modify an agenda to include items of an emergency nature only at such public meeting.

2. **Specificity of the Agenda.** LB 898 from 2006 added language to § 84-1411(1) which states that agenda items shall be “sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” That statutory change arose out of a sense that lack of specificity in meeting agendas was a major issue of concern around the state. Government, Military and Veterans Affairs Committee Hearing on LB 898, 99th Nebraska Legislature, Second Session (2006) at 19. The intent of the change was to require public bodies to include sufficient detail in their agendas regarding issues to be discussed or acted upon so as to provide information and notice to the public. Floor Debate on LB 898, 99th Nebraska Legislature, Second Session, March 28, 2006 at 11701 (Statement of Senator Preister). The change was also intended to require sufficient detail in an agenda so that members of the public are not forced to look at past agendas in order to understand the issue to be discussed and/or the action to be taken. *Id.*

3. The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979); *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735

N.W.2d 399 (Neb. Ct. App. 2007). In *Pokorny*, the agenda at issue, considered with all the previous records of the city council involved, was sufficient to satisfy the open meetings statutes. *Pokorny* also indicates that posting notice at 10 p.m. on March 15 before a meeting at 10:30 a.m. on March 16 does not constitute reasonable notice. Posting notice one week ahead does.

4. In *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999), the Court of Appeals considered whether an agenda item which simply stated "Work Order Reports" was sufficient to give adequate public notice of a decision to approve a work order which involved expenditure of over \$47 million for the construction of a 96-mile power transmission line across privately held property to connect two power substations. The court held that the agenda item was insufficient under the Open Meetings Act. The court also seemed to suggest, based upon the *Pokorny* case, that the sufficiency of an agenda item might be measured, at least to some degree, in the context of the other meetings of the public body immediately prior to the public meeting in question.

5. A member of the public should not be required to hunt up and read the documents underlying an agenda of a public body to determine what is actually on that agenda. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999).

6. If a public body uses or publishes its agenda to give the required notice for a particular meeting, then the notice contained in the agenda must comport with the law for giving notice of what is to be considered at the meeting. *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd*, 256 Neb. 1, 588 N.W.2d 589 (1999).

Group Email Conversations: Emails are public records. NRD Board business is required to be conducted in open session at a public meeting with a quorum present. To determine what email communications are ok and what are crossing the line can only be realized after it's too late. For this reason the guidance from NRD Legal Counsel is "as a general rule don't have an email conversation amongst Board Members about the business of the NRD".

Paul Zillig

From: Steve Seglin <sgs@crosbylawfirm.com>
Sent: Monday, January 9, 2017 2:00 PM
To: Paul Zillig
Subject: RE: Board member email communications

Paul, I think the question of emails among board members is more complicated than whether it is sent to a majority of the members. As a general rule, the business of a public entity including a NRD should be conducted in open session at a public meeting with a quorum present. That being said there are exceptions, subcommittees can discuss NRD business without a quorum, but only to make recommendations. Closed session may also be conducted during a public meetings under certain circumstances, but votes on matters have to occur in open session.. The Public Meetings Law provides:

1. Telephone conference calls, e-mails, faxes, or other electronic communication shall not be used to circumvent any of the he public government purposes of those laws. 84-1411(3)(h).
2. Video-conferencing, telephone conferencing, or conferencing by other electronic communication shall not be used to circumvent any of the public government purposes established in the Open Meetings Act. 84-1411(3)e).
3. No closed session, informal meeting, chance meeting, social gathering or electronic communication shall be used for the purpose of circumventing the requirements of the open meetings law. 84-84-1410(4).

As you will note, electronic communication is referred to in each of the three sections above.

Circumventing the requirements of the open meetings law involves the element of intent. See Attorney General's OP 04007 dated March 8, 2004. The number and contents of the emails can help prove intent to circumvent. My advice would be to keep any emails between directors to a minimum and certainly should not be sent to a majority, unless it is for information purposes only [minimal responses]. Any discussion of business of the District should be kept to a minimum. A dialogue between directors discussing business of the District may in certain circumstances be found to be circumventing the requirements of the open meetings law, even if a majority of the directors do not participate.

Perhaps we should discuss this along with the per dium question.

Steve



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