IN THE IOWA DISTRICT COURT, IN AND FOR LINN COUNTY

KYLE SCHUMACHER, DIANA SCHUMACHER, and RICHARD SCHUMACHER, Plaintiffs, VS. LISBON SCHOOL BOARD, Defendant.	)	LACV 027142 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RULING

Trial was held pursuant to assignment. The Plaintiffs were represented by Attorney Scott C. Peterson. The Defendant was represented by its attorneys, Brian L. Gruhn and Brett S. Nitzschke. Testimony was received and the cause was submitted.

The Court now renders the following Findings of Fact, Conclusions of Law, and Ruling:

FINDINGS OF FACT

1. On the 2nd day of October, 1995, the son of Plaintiffs Diana and Richard Schumacher, Kyle Schumacher, was involved in a confrontation with a teacher's aide at the Lisbon, Iowa, High School. The teacher's aide, Deb Lord, had initiated the incident and, after the school's administration conducted an investigation, it was determined that, because of their participation, Kyle Schumacher should receive a one-day suspension from school and Deb Lord should receive a disciplinary letter which was to be placed in her personnel file.

2. On October 4, 1995, the parents of Kyle Schumacher were informed of their son's one-day suspension "for the use of profanity directed at a staff member."

cc: client 1-2-97

3. On October 5, 1995, Diana Schumacher met with the Superintendent, Robert Torrence, and questioned Kyle Schumacher's suspension in light of the conduct of the teacher's aide. She expressed her view that she did not think that her son had been treated fairly because, in her opinion, Deb Lord should have received at least equal or greater punishment than Kyle. Mr. Torrence indicated to Diana Schumacher that the decisions regarding punishment for Deb Lord and Kyle were administrative in nature and, although she could appeal the decision of Kyle's punishment, she could not challenge the verdict with reference to the punishment of Deb Lord.

4. On October 8, 1995, Diana Schumacher spoke with the School Board president, Mr. David Prasil, who also stated that Kyle's suspension could be appealed; however, he said that he would require a written appeal and then informed Diana Schumacher that the hearing on the appeal would probably be considered at a closed meeting pursuant to the Iowa Code.

5. Diana Schumacher subsequently delivered a written appeal to Superintendent Torrence within the next few days. Mr. Torrence asked Diana Schumacher twice whether she wanted the appeal heard in open or closed session and Diana Schumacher verbally notified the Superintendent that the Schumachers insisted that the appeal be heard in an open meeting forum.

6. Deb Lord learned of the Schumachers' appeal and the request that their appeal be heard in open session. She became concerned that her performance in the manner she handled the incident with Kyle Schumacher would be intentionally called into question by the Schumachers during the open appeal hearing. She expressed concern that the

Schumachers would use the open session to attack her by negative statements concerning her personally, as well as her performance, which would harm her reputation. She asked Superintendent Torrence if there was anything she could do to protect her rights in the situation. Superintendent Torrence informed her that he would consider the matter with the School District's attorney and respond to her.

7. On October 13, 1995, the School District's attorney wrote the administration a letter outlining the options available to the District and Deb Lord. Deb Lord reviewed this information, met with Superintendent Torrence, and orally requested a closed meeting of the Schumacher appeal.

8. On October 30, 1995, Diana Schumacher delivered a letter from her attorney to Mr. Torrence. The letter formally requested that the Schumachers' appeal be held in open session. Mr. Torrence then provided Diana Schumacher with a copy of the October 13, 1995, letter he had received from the School District's attorney.

9. On October 31, 1995, Deb Lord followed her previous oral request with a written request for a closed meeting.

10. On November 2, 1995, the attorney for the School District notified the Schumachers, through their attorney, that he had advised the District to hold a closed meeting in this matter pursuant to Deb Lord's request.

11. On November 8, 1995, the Schumachers' attorney advised the School District, through its attorney, that it remained the Schumachers' position that the appeal should not be restricted to a closed meeting. The Schumachers reiterated their request that the appeal be heard and considered in open session. The School District's attorney

responded on November 17, 1995, notifying the Schumachers that the School Board would be holding the appeal of Kyle Schumacher's suspension in closed session.

12. The appeal was placed on the agenda as a closed session for the November 20, 1995, School Board Meeting. At the beginning of the meeting, the attorney for the School District advised the School Board that the meeting should be closed pursuant to Iowa Code Section 21.5(1)(I) and the attorney for the Schumachers argued that the meeting should be open pursuant to Iowa Code Section 21.5(1)(e). The School Board then voted 4-1 for a closed session pursuant to Iowa Code Section 21.5(1)(I). The Board afforded the Schumachers the ability to present their appeal, including any evidence and witnesses in support of their appeal, in the closed session. The Schumachers declined to attend or present their appeal in the closed session.

13. The School Board exited the closed session and voted 3-2 to deny the Schumachers' request that the appeal be heard in open session. The Board then voted 4 to 1 to stay the suspension in order to allow the Schumachers to litigate the issue.

14. The Schumachers have spent at least $3,000.00 in attorney fees attempting to secure an open meeting. The Court believes the testimony of Diana Schumacher that even though she questioned the competence of the teacher's aide, her principal objective in attempting to secure an open meeting was to question the punishment given to Kyle as a result of the incident. She simply wanted an open record for the general public to observe what had occurred between Kyle Schumacher and the teacher's aide on the day of the incident. The Superintendent of the Lisbon School believed that Diana Schumacher had, as one of her objectives, the termination of the teacher's aide; however,

as indicated above, the testimony of Diana Schumacher is credible that she simply wanted to question the discipline and what had occurred to their son as compared to what the Schumachers perceived to be disparate disciplinary treatment of the teacher's aide. The Superintendent was informed at one point that the Schumachers even desired a private meeting with Deb Lord, Kyle Schumacher, the Superintendent, and herself. The Schumachers have continued to contend that the teacher's aide had been shown favored treatment by the receipt of only a written reprimand and an open meeting would have been helpful in securing the facts as they had occurred.

15. It is significant that at the October 5, 1995, meeting between Diana Schumacher, Kyle, and Superintendent Torrence, Diana Schumacher was told that she could do nothing about the discipline provided to the school employee, but she was emphatic that, in her opinion, Deb Lord had demonstrated incompetence as a teacher's aide, and, after the discussion, Superintendent Torrence admittedly informed Diana Schumacher that they could have an open or closed meeting. It was not until after the Defendant's attorney advised the Superintendent that a closed meeting should be held that Deb Lord requested the closed meeting and the actual form for her signature was prepared for her by the Superintendent (using a form provided by the attorney for the District). The form was submitted to Deb Lord and she signed it, after which the Defendant School Board disallowed the open meeting to the Schumachers. The Court has had the opportunity to judge the credibility of the witnesses and finds that the Superintendent's opinion that the Schumachers intended to attempt to secure the

termination of the teacher's aide was an overreaction to what actually occurred and that the open meeting should have been provided to the Plaintiffs.

CONCLUSIONS OF LAW

1. Iowa Code Section 21.3 provides that meetings of governmental bodies shall be held in open session unless Iowa Code Section 21.5 expressly provides otherwise. Iowa Code Section 21.5 states that a governmental body may hold a closed session only to the extent a closed session is necessary for the reasons enumerated in the statute. The two provisions which are relevant to this proceeding are as follows:

> "e. To discuss whether to conduct a hearing or to conduct hearing to suspend or expel a student, unless an open session is requested by the student or a parent or guardian of the student if the student is a minor. . . .
>
> i. To evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless or irreparable injury to that individual's reputation and that individual requests a closed session."

Iowa Code Sections 21.5(1)(e) and (i.). The statute further provides "(n)othing in this section requires a governmental body to hold a closed session to discuss or act upon any matter." Iowa Code Section 21.5(5).

2. The open meetings act set forth in Iowa Code Chapter 21 applies to meetings of governmental bodies. Donahue v. State, 474 N.W.2d 537 (Iowa 1991). It requires that meetings of public bodies be open and that the public be permitted to be present. Id. at 539.

3. When procedures are imposed on county governmental bodies, the standard is substantial, rather than absolute, compliance with the statutory requirements. This is true

in an open meetings case. Iowa Code Sections 331.301(1), (5). KCOB/KLVN, Inc. v. Jasper County Bd. of Sup'rs, 473 N.W.2d 171 (Iowa 1991). Substantial compliance requires that the Commission's actions must have been consistent with the meaning and purpose of the open meetings provisions. Id at 176.

4. The purposes behind the open meetings law are to "prohibit secret or 'star chamber' sessions of public bodies" and to permit the public to attend the meetings. Greene v. Athletic Council of Iowa State U., 251 N.W.2d 559, 560 (quoting Dobrovolny v. Reinhardt, 173 N.W.2d 837, 840 (Iowa 1970). The legislature enacted the statutes for the benefit of the public and they should be liberally construed in favor of openness. Id.

5. Meetings of state and local governmental bodies are to be held in open session except in a narrow and limited set of circumstances and only to the extent necessary. Iowa Code Section 21.5(1). (A public session "may" be closed only upon a proper showing.) The use of the word "may" in the statute confers a power and places discretion within the one who holds the power. Iowa Code Section 4.1(36)(c). Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent. Ashmead v. Harris, 336 N.W.2d 197, 199 (Iowa 1983). There is certainly no doubt that the Schumachers intended to complain in open session about the teacher's aide confronting a student concerning a "community problem" at school but there has been absolutely no showing that airing the complaint would have led to "needless and irreparable" injury to the aide. If the Defendant's rationale was accepted by the Court, a citizen's complaint of an employee of a public body could never be aired in public if the

employee simply executes a carefully worded form prepared by the employer's attorney. A public body should not be allowed to limit potential criticism of its employees by such devious methods. There has been a clear abuse of discretion by the Defendant.

6. The Plaintiffs have steadfastly desired an open record for the general public to observe what had occurred between Kyle Schumacher and Deb Lord. There is no credible evidence demonstrating that the Plaintiffs' objective was the termination of Deb Lord and, furthermore, the Defendant had already completed its disciplinary action against her. The Petition of the Plaintiffs should be granted.

RULING

IT IS, THEREFORE, ORDERED that the Plaintiffs' Petition is granted. The actions of the Defendant in closing the meeting are void. An injunction shall issue for one year restraining the Lisbon School Board from any further violations of the Iowa Open Meetings laws. Judgment is entered against the Defendant, in favor of the Plaintiffs, for the court costs as assessed by the Clerk of Court, which shall include attorney fees for Plaintiffs' counsel in the amount of $3,000.00.

Clerk to notify counsel.

Dated this 30th day of December, 1996.

MAILED/DELIVERED ON 12-31-96
BY TO: Scott Peterson
Brian Gruhn
Brett Nitzschke

THOMAS L. KOEHLER, Judge of the
Sixth Judicial District of Iowa

KYLE SCHUMACHER, DIANA SCHUMACHER, and RICHARD SCHUMACHER, Appellees, vs. LISBON SCHOOL BOARD, Appellant.

No. 157 / 97-375

SUPREME COURT OF IOWA

582 N.W.2d 183; 1998 Iowa Sup. LEXIS 191

July 29, 1998, Filed

PRIOR HISTORY: [**1] Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge. Appeal from ruling under open meetings law. Iowa Code ch. 21 (1995).

DISPOSITION: AFFIRMED.

COUNSEL: Brian L. Gruhn, Cedar Rapids, for appellant.

Scott C. Peterson of Maher & Nidey Law Firm, Cedar Rapids, for appellees.

JUDGES: Considered by Harris, P.J., and Larson, Lavorato, Snell, and Andreasen, JJ.

OPINIONBY: LARSON

OPINION: [*184] LARSON, Justice.

The principal issue in this case is whether a hearing on a student's proposed suspension, which the student requests to be an open meeting as authorized by *Iowa Code section 21.5(1)(e)*, may nevertheless be closed at the request of a third party, a teacher's aide. The defendant school board also raises issues concerning the attorney fees for the trial and appeal. The district court concluded the board had violated chapter 21 and granted attorney fees to the plaintiffs. We affirm.

I. *The Facts.*

Most of the facts of the case were stipulated by the parties. A teacher's aide, Deb Lord, initiated an incident with Kyle Schumacher, a high school student, in the Lisbon High School. Schumacher responded by calling Lord a vulgar name. School authorities investigated the incident and [**2] determined that Schumacher should be suspended for one day and that Lord would be disciplined by placing a letter in her personnel file.

Kyle Schumacher's parents, Diana and Richard, met with the school superintendent and questioned Kyle's suspension in light of Lord's conduct. Diana stated that she did not believe that Kyle and Lord had received equal punishments and that Lord should receive equal or greater punishment. The Schumachers learned that the meeting to consider Kyle's proposed suspension would probably be closed to the public. Diana verbally notified the superintendent that the Schumachers wanted an open session. The Schumachers' attorney later made the same request in writing.

When Lord found out about the Schumachers' appeal and their request for an open session, she became concerned that the Schumachers would call into question her performance in handling the incident. She also feared that the Schumachers would use the open meeting to attack her in a way that would harm her reputation. Lord asked the superintendent how she could protect her rights, and he advised her that he would discuss the issue with the school board's attorney. The board's attorney notified the [**3] Schumachers that the appeal of Kyle's suspension would be held in closed session.

At the beginning of the meeting, the school district's attorney advised the board that the meeting should be closed pursuant to *Iowa Code section 21.5(1)(i)*, but the Schumachers' attorney had a different view; he contended that the meeting should be open pursuant to section 21.5(1)(e) because the student requested it. The board voted four to one to go into closed session pursuant to *Iowa Code* [*185] *section 21.5(1)(i)* (1995). The board afforded the Schumachers the opportunity to present their appeal in closed session, but they declined.

The board came out of the closed session and voted three to two to deny the family's request to hold the appeal in open session. The board then voted four to one to stay the suspension in order to permit the family to liti-

gate the issue. Kyle never did serve his suspension because the board's stay of the suspension remained in effect. Kyle has now graduated.

The Schumachers filed a petition in district court pursuant to *Iowa Code section 21.6*, alleging that the school board violated chapter 21 by refusing to hold the appeal hearing in an open proceeding. The Schumachers requested [**4] damages and attorney fees as well as an order voiding the actions taken at the closed session and an injunction requiring the board to refrain from further violations of the open meetings law. *See Iowa Code § 21.6.*

The district court ruled in favor of the plaintiffs and found that the board's action in closing the meeting was void. It issued an injunction for one year restraining the board from any further violations of the open meetings law. It entered judgment in favor of the plaintiffs for court costs and attorney fees in the amount of $ 3000. The school board appealed.

II. *The Application of the Open Meetings Law.*

A. *Scope of review.* Review of actions to enforce the open meetings statute are ordinary actions at law. *See Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 533 (Iowa 1980)* (discussing the 1979 version of the open meetings law, chapter 28A); *Gavin v. City of Cascade, 500 N.W.2d 729, 731 (Iowa App. 1993)* (discussing chapter 21, the open meetings law). The trial court's findings are binding if supported by substantial evidence. *Telegraph Herald, 297 N.W.2d at 533; Gavin, 500 N.W.2d at 731.*

B. *Interpretation of the* [**5] *statute.* The relevant portion of our open meetings law provides:

1. A governmental body may hold a closed session only by affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting. A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons:

. . . .

e. To discuss whether to conduct a hearing or to conduct hearings to suspend or expel a student, *unless an open session is requested by the student or a parent or guardian of the student* if the student is a minor.

. . . .

i. To evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

. . . .

5. Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter.

Iowa Code § 21.5 (1995) (emphasis added).

The "Intent -- declaration of policy" section of this chapter is important:

This chapter seeks to assure, through a requirement [**6] of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. *Ambiguity in the construction or application of this chapter should be resolved in favor of openness.*

Iowa Code § 21.1 (emphasis added).

The school board essentially concluded that the rights of an employee who requests a closed meeting are superior to the rights of a student who requests that it be open. The district court disagreed, and we believe properly so.

While *Iowa Code section 21.1* provides that ambiguity in the construction or application of that chapter should be resolved in favor of openness, the Schumachers need not rely on that principle here. *Iowa Code* [*186] *section 21.5(1)(e)* clearly provides that a student may request an open hearing. Lord relies on section 21.5(1)(i) in claiming her right to a closed meeting, but that section is inapplicable. It applies only if (1) the meeting is to evaluate the professional competency of an individual (2) for the purpose of deciding issues of "appointment, hiring, performance or discharge." Lord failed to meet either of these requirements. The meeting was [**7] not for the purpose of evaluating her; it was for the purpose of considering a proposed suspension. In addition, the issue was what to do about *Schumacher*, not *Lord*. Lord's performance had already been evaluated and discipline imposed--according to the stipulated facts, Lord received an incident letter for her personnel file.

Because *Iowa Code section 21.5(1)(e)* allowed Schumacher the right to an open meeting, and section 21.5(1)(i) is inapplicable, the district court correctly ruled that the board acted illegally in closing the hearing.

III. *Attorney Fees.*

The school district challenges the award of attorney fees to the plaintiffs at both the trial and appellate court levels.

A. *Trial attorney fees.* The district court awarded the plaintiffs $ 3000 in attorney fees under this statutory authority:

Upon a finding by a preponderance of the evidence that a governmental body has violated any provision of this chapter, a court:

. . . .

b. Shall order the payment of all costs and reasonable attorneys fees to any party successfully establishing a violation of this chapter.

Iowa Code § 21.6(3).

The defendant contends there was insufficient evidence [**8] to support the district court's award of attorney fees. The only evidence concerning fees, it complains, is the "self-serving" testimony of the plaintiffs that the fees were about $ 3000. Their objection is that the plaintiffs had failed to provide fee affidavits at the trial. (The fee affidavits were furnished, after the trial but before the court's fee order was entered, showing $ 3380 in fees and $ 100 in costs.) The defendant does not contend that it was deprived of an opportunity to challenge the amount of fees before the court entered its order allowing them. We believe that the procedure for setting fees was appropriate. In fact, a fee affidavit filed after the trial would most accurately reflect the hours actually spent by the attorneys in the trial.

We find no abuse of discretion in the fee award and therefore affirm on that issue.

B. *Appellate attorney fees.* The plaintiffs request appellate attorney fees under the authority of *Iowa Code section 21.6(3)(b)* (court "shall order the payment of all costs and reasonable attorneys fees" for establishing a violation). The defendant resists, claiming that chapter 21 does not allow appellate attorney fees and that we have rejected [**9] such fees in an open meeting case. *See Telegraph Herald, 297 N.W.2d at 537.* The plaintiffs rejoin that, since *Telegraph Herald,* this court has accepted the notion of appellate attorney fees in another context, even in the absence of express statutory authority.

The case on which the plaintiffs rely is *Lehigh Clay Products, Ltd. v. Iowa Department of Transportation, 545 N.W.2d 526 (Iowa 1996).* In a five-to-four decision, we decided that appellate attorney fees could be awarded in a condemnation case. In so holding, we overruled *Wilson v. Fleming, 239 Iowa 918, 32 N.W.2d 798 (1948).* In overruling *Wilson*, we relied on language in *Iowa Code section 6B.33* (1993), which stated that "the applicant shall . . . pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court . . . ."

We interpreted the language "occasioned by the appeal" to accommodate an interpretation that would encompass the allowance of fees for any appeal that was necessary. *Lehigh, 545 N.W.2d at 529.* In *Lehigh* we also pointed to the underlying rationale of the eminent domain law, which was to make a party whole. To deny the property owner appellate attorney [**10] fees would not be consistent with that goal. *Id. at 528-29.*

[*187] In contrast to the goal of the eminent domain statute, we believe that the underlying purpose of chapter 21 is to provide access to public meetings. The legislature has seen fit to allow reasonable attorney fees, at least at the trial court level, in order to vindicate the plaintiffs' rights. We find in chapter 21 no language comparable to the provision for appellate attorney fees "occasioned by the appeal," as in the case of the eminent domain statute, and the goal of chapter 21, we believe, is not basically aimed at making a plaintiff whole. In fact, in *Telegraph Herald* we pointed to language in our open meetings statute that suggests just the opposite: that only trial attorney fees would be allowed. We said:

Under section 28A.6(3) [predecessor to present statute], the court that orders payment of costs and reasonable attorney fees is the same court that makes the prior "finding by a preponderance of the evidence that a governmental body has violated any provision of this chapter." We think both references are to the district court, and there is no statutory authority for this court to assess attorney fees [**11] for appellate services.

Telegraph Herald, 297 N.W.2d at 537. We believe that the present case must be distinguished from *Lehigh*, and we therefore reject the plaintiffs' application for appellate attorney fees.

AFFIRMED.