

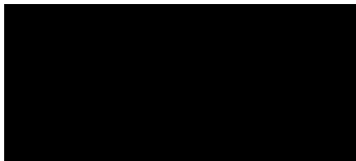


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 16, 2018

Via electronic mail



Via electronic mail

The Honorable Frank Haney
Chairman
Winnebago County Board
Administration Building
404 Elm Street, Room 533
Rockford, Illinois 61101
BoardOffice@WINcoIL.us

RE: OMA Requests for Review – 2017 PAC 50091; 2017 PAC 50285;
2017 PAC 50414

Dear [REDACTED] and Mr. Kurlinkus:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). This office has consolidated three Requests for Review in this determination because they contain similar allegations. For the reasons explained below, the Public Access Bureau concludes that the Winnebago County Board (Board) violated the requirements of OMA during its October 12, 2017, October 26, 2017, and November 9, 2017, meetings by enforcing an unreasonably restrictive rule to prevent [REDACTED] from addressing the Board during the public comment portions of the meetings.

BACKGROUND

On October 16, 2017, this office received a Request for Review from [REDACTED] alleging that during the public comment period of its October 12, 2017, meeting, the Board informed him that he could not speak about racial issues for the remainder of 2017 because he

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had previously spoken about racial issues three times in 2017.¹ ██████████ further contended that he proceeded to speak about racial issues and the Board interrupted his comments and prevented him from using all of his allotted three minutes of speaking time. On October 30, 2017, this office received a Request for Review from ██████████ alleging that the Board prevented him from speaking on racial issues during its October 26, 2017, meeting.² On November 10, 2017, ██████████ filed another Request for Review alleging that the Board prevented him from speaking on racial issues during its November 9, 2017, meeting.³

On October 20, 2017, November 1, 2017, and November 14, 2017, this office sent copies of the Requests for Review to the Board and requested that it provide a written response to ██████████ allegations. This office asked the Board to provide a copy of its established and recorded rules regarding public comment, the agenda, the open session minutes, and any audio or video recordings of the October 12, 2017, October 26, 2017, and November 9, 2017, meetings. On November 20, 2017, this office received the requested materials and the Board's answer. On December 5, 2017, ██████████ replied.

DETERMINATION

The intent of OMA is to "ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly" and to ensure that individuals are "given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2016); *see also Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989) ("the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly.").

Section 2.06(g) of OMA provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." Under the plain language of section 2.06(g), a public body must establish and record rules and may restrict public comment only pursuant to those rules. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 2, 2014 at 7. Although OMA does not specifically address the types of rules that a public body may adopt, public bodies may generally promulgate reasonable time, place, and manner regulations that are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *See, e.g., I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 923 (N.D. Ill. 2009) (examining whether the application of city council's rules for public comment violated plaintiffs' rights).

¹Request for Review 2017 PAC 50091.

²Request for Review 2017 PAC 50285.

³Request for Review 2017 PAC 50414.

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"[Public bodies] have legitimate reasons for having rules to maintain decorum at public meetings[]" and "to ensure that the meetings can be efficiently conducted." *Timmon v. Wood*, 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008). For example, a public body may legitimately prescribe reasonable time limits for public comment. *See Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984) (finding that because a time limit for speakers at a public hearing served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak, the time limit did not violate the speaker's rights under the first amendment to the United States Constitution). However, such rules must tend to accommodate, rather than unreasonably restrict, the right to address public officials. *See Ill. Att'y Gen. Pub. Acc. Op. No. 14-012*, issued September 30, 2014, at 6 (rule requiring members of the public to sign up to comment five days in advance of meetings imposed an unreasonable restriction on public comment).

In response to this office's request for a copy of the Board's established and recorded rules regarding public comment, the Board submitted a copy of section 2-65 of the Winnebago County Code of Ordinances, which addresses the "Limitation of Debate" as follows:

- A. No Member shall speak a total of more than twice on the same question, unless permitted to do so by the Chair.
- B. No Member shall speak longer than three (3) minutes upon recognition, unless permitted to do so by the Chair. Any Member called to order shall immediately cease speaking, unless permitted to explain.
- C. Non-Members may address the Board if written request is submitted to the County Board office by noon on the day of the County Board meeting for which recognition is sought. The written request must identify the name of the speaker, specify the subject matter the speaker will address, and indicate the speaker's interest in the subject. Comments shall be limited to three (3) minutes. Speakers may not address zoning matter[s] which are pending before the ZBA, Zoning Committee or the County Board. Personnel matters or pending or threatened litigation may not be addressed in open session. ***An individual may speak a maximum of three times per calendar year on the same topic.*** This prohibition shall include the repetition of the same topic in a statement on what is purported to be a different topic. Personal attacks or inappropriate language

of any sort will not be tolerated.

- D. Each person from the public will be limited to three (3) minutes.
- E. A maximum of twenty-one (21) minutes shall be allowed for non-members to speak at each meeting. If a particular item is deemed by the Chair to be controversial, the Chair shall strive to allow all sides an equal amount of time within which to speak at each meeting, subject to the twenty-one (21) minute time limit. The Chair shall determine the sequential order in which non-members will be allowed to address the Board.^[4] (Emphasis added.)

The Board explained that the version of the rules in place at the time of [REDACTED] comments was adopted in December 2016. Language similar to section 2-65C, which is at issue in this matter, has been adopted as part of the Winnebago County Code of Ordinances (Code) every two years since 2014. The Board also provided this office with a copy of section 2-62 of the Code, which provides that "[t]he Chairman shall preserve order and decorum and shall determine all questions of Order."⁵

The Board does not dispute that the Chairman interrupted [REDACTED] public comments at the Board's October 12, 2017, October 26, 2017, and November 9, 2017, meetings. This office has reviewed the recordings of [REDACTED] public comments at those meetings and confirms that the Chairman interrupted [REDACTED] comments on the basis of section 2-65C of the Code because [REDACTED] had spoken on the topic of race at least three previous times in 2017. At the October 12, 2017, meeting, [REDACTED] spent most of his time speaking about a law enforcement tactical unit. When [REDACTED] started to speak about race, the Chairman interrupted him to state that [REDACTED] had spoken more than three times on that topic. [REDACTED] redirected his comments back to the subject of the tactical unit and appeared to indicate that although he was not supposed to address the topic of race, the tactical unit was "harassing

⁴Letter from David J. Kurlinkus, Chief of Staff and Civil Bureau, Winnebago County State's Attorney's Office, to Laura S. Harter, Assistant Attorney General (November 20, 2017), Exhibit A, Winnebago County Ordinance, ch. 2, div. 3, §2-65 (approved December 5, 2016).

⁵Letter from David J. Kurlinkus, Chief of Staff and Civil Bureau, Winnebago County State's Attorney's Office, to Laura S. Harter, Assistant Attorney General (November 20, 2017), Exhibit E, Winnebago County Ordinance, ch. 2, div. 3, §2-62 (approved December 5, 2016).

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one kind of people."⁶ The Chairman ended ██████████ comments shortly after that statement, but it is unclear whether he ended the comments because the three minutes permitted by section 2-65D had elapsed or because of the content of ██████████ comments. In any event, although the Chairman did not completely prohibit ██████████ October 12, 2017, comments, it appears that the enforcement of section 2-65C caused ██████████ to refrain from fully expressing his views and required him to adopt indirect language to make his point. On October 26, 2017, ██████████ Public Participation sign-up sheet indicated that he would be speaking on the "ju[s]tice system."⁷ Less than one minute after he began speaking, ██████████ stated that "Rockford, Illinois has a race problem,"⁸ and the Chairman interrupted him by enforcing section 2-65C. ██████████ chose to end his speech rather than redirect his comments. On November 9, 2017, the Chairman enforced section 2-65C approximately 90 seconds after ██████████ began speaking about a newspaper article regarding the racial implications of an economic policy. ██████████ ended his speech.

This office has also reviewed the Public Participation sign-up sheets and video recordings from the other five occasions on which ██████████ addressed the Board in 2017. At each meeting, some of ██████████ comments generally concerned the racism he perceived in Rockford, but he also raised specific issues. On March 9, 2017, he spoke about racial discrimination in a public construction project and the racial inequality in school discipline. On March 23, 2017, he spoke about the high unemployment rate among black children, inequality in education, and the discipline of black children. On April 27, 2017, he spoke of discrimination in the justice system, employment, the political system, education, and housing. On August 10, 2017, and September 7, 2017, he spoke about the racial implications of a school board election that had been decided by a card draw.

The Board cited section 2-65C of the Code as authority to restrict ██████████ comments on racial issues. As quoted above, section 2-65C provides that "[a]n individual may speak a maximum of three times per calendar year on the same topic. This prohibition shall include the repetition of the same topic in a statement on what is purported to be a different topic." The Board asserted that this rule is a reasonable time, place, and manner restriction designed to prevent repetitive content that wastes the Board's time.

⁶Winnebago County Board, Meeting, October 12, 2017, Digital Audio Recording (on file with author).

⁷Letter from ██████████ to Ms. Laura Harter (October 27, 2017), Winnebago County Board Public Participation Sheet (October 3, 2017).

⁸Winnebago County Board, Meeting, October 26, 2017, *available at* <http://www.ustream.tv/recorded/109292595>.

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The Board argues that this issue should be resolved based on the reasoning of the summary judgement order entered in *Castronovo v. County of Winnebago*, No. 11-C-50046 (N.D. Ill. November 5, 2012). In *Castronovo*, a Federal district court examined the Board's decision to prevent an individual from addressing the Board on the topic of a traffic median after he had spoken on the subject at four previous Board meetings. The *Castronovo* court considered whether the Board's restriction was a proper use of the Chairman's authority to "preserve order and decorum" at Board meetings. Winnebago County, Ill., Code ch. 2, div. 3, §62. The court concluded that the Board's action was a reasonable time, place, and manner restriction. The court explained that "[a] number of courts have found that the government has a significant interest in the orderly and efficient conduct of its business. [Citations omitted] The rule against permitting repetitive speeches is narrowly tailored to meet this interest—it prevents individuals from wasting the Board's time by revisiting issues time and again the Board has already **heard and decided.**" *Castronovo*, No. 11-C-50046, at 3. (Emphasis added.) The court concluded that "the government has a significant interest in efficient Board meetings and Castronovo's speech was only regulated to the point it was repetitive with several previous speeches while still leaving open adequate alternative means to address the same issue[.]" including through letters, telephone calls, and conversations with Board members. *Castronovo*, No. 11-C-50046, at 4.

The Board asserts that, like the speaker in *Castronovo*, ██████████ spoke on the same topic at three Board meetings in 2017. However, the court in *Castronovo* reviewed only the Board's application of the section 2-62 rule regarding the Chairman's authority to preserve order and decorum—it did not address section 2-65C of the Code, which is at issue here and was not adopted until 2014. Nevertheless, even considering the Board's use of section 2-62 to restrict ██████████ speech, *Castronovo* is distinguishable from the instant case in two respects. First, the *Castronovo* court's holding was based not only on the fact that the speaker had commented on the same topic more than four times, but also that the Board had already addressed the issue that was the subject of the speaker's comments. Here, there is no indication that the Board has taken action or considered any measures to address the various issues that ██████████ has raised. While in *Castronovo* the court found that it was an inefficient use of the Board's time to hear comments more than four times on an issue it had already decided, the same finding cannot be made here.

Second, the topic of the speaker's comments in *Castronovo* focused on one specific issue: "the median or lane construction near his property." *Castronovo*, No. 11-C-50046, at 1. ██████████ by contrast, sought to comment on a variety of topics within the expansive subject of racial relations. As explained above, ██████████ comments have covered a range of different topics including education, employment, an election, and the criminal justice system. By restricting all of ██████████ comments simply because they had a common element, that being "racial issues," the Board prevented him from speaking on specific topics he had not addressed more than three times previously: on October 12, 2017, racial violence; on October 26,

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2017, the justice system; and on November 9, 2017, economic policies that disadvantaged minorities.

Designating all comments on different subjects that concern race as the "same topic," for purposes of section 2-65C of the Code, is unduly restrictive. Under the Board's interpretation of the rule, an individual would be prohibited from speaking more than three times on categories such as education, crime, and public health, all of which, like race, include many separate subtopics. Accordingly, this office concludes that the Board's reliance upon section 2-65C of the Code to restrict [REDACTED] comments on various social issues simply because they touched upon the common element of racial relations was not reasonable.

Consequently, this office concludes that the Board violated the requirements of OMA by prohibiting [REDACTED] from participating in public comment during the October 12, 2017, October 26, 2017, and November 9, 2017, meetings on the basis that he could not speak on racial issues more than three times in a year. This office requests that the Board amend its rules governing public comment to ensure that any restrictions on the public's statutory right to address the Board are narrowly tailored to further a significant governmental interest.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (217) 524-7958 or LHarter@atg.state.il.us. This letter serves to close this file.

Very truly yours,

[REDACTED]
LAURA S. HARTER
Assistant Attorney General
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cc: *Via electronic mail*
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