

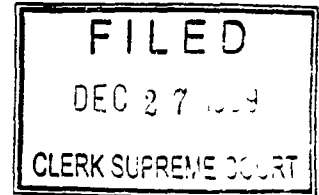
IN THE COURT OF APPEALS OF IOWA

No. 1999-462 (9-719) / 98-1992
Filed December 27, 1999

FRANK GRELL,
Plaintiff-Appellee,

vs.

CITY OF CORALVILLE BUILDING APPEALS BOARD,
HENRY HERWIG, JOHN WEIHE, DIANA LUNDELL,
JEAN SCHNAKE and WILLIAM POTTER,
Defendants-Appellants.



Appeal from the Iowa District Court for Johnson County, Thomas Koehner,
Judge.

The City of Coralville Building Appeals Board and its members (collectively "the Board") appeal the district court's order finding that the Board violated the Open Meetings Law, assessing penalties against the Board members, and awarding Grell \$14,736.06 in attorney's fees. The Board contends the district court erred in finding that it did not reasonably rely on the advice of counsel in deliberating on Grell's appeal in closed session and the trial court erred in its award of attorney's fees.

AFFIRMED AS MODIFIED.

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**Terry J. Abernathy and Stephanie L. Hinz of Pickens, Barnes & Abernathy,
Cedar Rapids, for appellants.**

**Edward J. Krug and Marsha M. Beckelman of the Krug Law Firm, Cedar
Rapids, for appellee.**

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Defendant-Appellants City of Coralville Building Appeals Board and its members Henry Herwig, John Weihe, Diana Lundell, Jean Schnake and William Potter appeal from a district court ruling (1) levying a fine against defendant board members for deliberating in closed sessions in violation of the Open Meetings Law Iowa Code section 21.6 (1997); and (2) awarding Plaintiff-Appellee Frank Grell attorney fees of \$14,736.06. Defendant board members contend they should not have been fined because they relied on the advice of their attorney in going into a closed session. All defendants contend the district court erred in the award of attorney fees. We affirm the imposition of fines. We affirm the award of attorney fees but modify the amount.

Plaintiff was charged with two building code violations based on a claim by the City of Coralville that a warehouse he owned failed to comply with city ordinances because it did not have the proper sprinkler system. Plaintiff appealed to the Board.

A hearing on the appeal was scheduled for March 13, 1997. Plaintiff and his attorney were present. The hearing was commenced and the Board heard evidence. The Board then adjourned to a closed session to deliberate but did not render a formal decision. There are no minutes or other recordings of this hearing or closed session.

A second hearing was held on May 21, 1997. It too was closed. There are minutes of the meeting where the Board voted to close the session. There are no minutes or recordings of the closed session.

On May 30, 1997, the Board issued a written decision denying plaintiff's appeal. On June 27, 1997, plaintiff filed a petition for a writ of certiorari challenging the constitutionality of the Board's decision.¹ Plaintiff on the same day filed this action seeking penalties and attorney fees for the Board's violation of the Iowa Open Meetings Law. The Board acknowledged they were in technical violation of the Open Meetings Law and voided the decision denying plaintiff's appeal.

After a hearing on plaintiff's petition seeking fines and attorney fees for the Open Meetings Law violation, the district court found five separate violations, assessed a \$200 penalty against each of the defendant Board members and awarded plaintiff attorney fees. Defendant Board members first contend the \$200 penalty against each of them should be reversed because they reasonably relied on the opinion of the city attorney in closing the meeting and thus, were exempt from penalties.

Review of actions to enforce the open meetings statute are ordinary actions at law. *Schumacher v. Lisbon Sch. Bd.*, 582 N.W.2d 183, 185 (Iowa 1998). The trial court's findings are binding if supported by substantial evidence. *Telegraph Herald Inc. v. City of Dubuque*, 297 N.W.2d 529, 533 (Iowa 1980); *Gavin v. City of Cascade*, 500 N.W.2d 729, 731 (Iowa App. 1993).

¹The Certiorari action was dismissed as moot on April 20, 1998.

The purpose of open meetings statutes is to require meetings of governmental bodies to be open and permit the public to be present. *Dobrovolny v. Reinhardt*, 173 N.W.2d 837, 840-41 (Iowa 1970). A lack of wrongful intent to violate the open meetings law cannot excuse non-compliance. *KCOB/KLVN, Inc. v. Jasper County Bd. of Sup'rs.*, 473 N.W.2d 171, 175 (Iowa 1991).

Iowa Code section 21.5 provides the requirements for closing a session and in relevant part it says:

1. A governmental body may hold a closed session only by affirmative vote of either two-thirds of the members of the body or all of the members present at the meeting. . . .
2. The vote of each member on the question of holding the closed session and the reason for holding the closed session . . . shall be announced publicly at the open session and entered in the minutes.

* * *

4. A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session. . . .

Defendants have conceded there were technical violations of the Open Meetings Law and they do not challenge on appeal the district court's findings on this issue. While acknowledging the violations, defendants contend the damages provided for under Iowa Code section 21.6(3)(a) are not applicable to them because they acted in reasonable reliance on the advice of counsel.

Defendant Board members were fined under the provisions of Iowa Code 21.6.

Iowa Code 21.6(3)(a) provides in relevant part:

A member of a governmental body found to have violated this chapter shall not be assessed such damages if that member proves that the

member did any of the following: . . . (3) Reasonably relied upon a . . . formal opinion of . . . the attorney for the governmental body.

The attorney who represented the Board at the first meeting testified. He related that defendant Herwig and possibly one or two other defendants turned and asked him, "Can we retire and go into chambers to deliberate this?" He then testified that he answered, "Yes, you can."

The attorney who represented the Board at the second meeting testified. She said defendant Herwig asked her a question, the gist of which was, "[A]re we doing the same thing as we did the last time?" She further testified "and -- and my answer was, 'yes, we will follow the same procedures that we followed at the earlier meeting'." She said it was at this point that defendant Herwig made a motion to go into closed session. Though there were minutes of this meeting, the attorney admitted there were no express references in the minutes to her advice. The minutes do contain the sentence "Council Member Herwig said he had a question on procedural details." On cross-examination the attorney stated she did not issue a formal written opinion on the subject of going into executive session.

Defendant Herwig testified he asked at the March meeting if they could deliberate in closed session and the attorney answered in the affirmative. He said there were no similar questions raised at the May 20th meeting but rather it was simply that they were in the same process and doing the same thing. He said he believed in his mind they were doing it right but he did recall saying, "We're doing the same thing, correct?" and receiving an affirmative answer.

The district court rejected the argument that the defendants relied on the opinion of their attorney and specifically said:

“The court does not believe that even if the question was asked regarding the closed sessions, the individual defendants can be said to have ‘reasonably relied’ upon the attorney’s advice, let alone a ‘formal opinion.’ The Defendants appear to insinuate that they have no responsibility whatsoever for their lack of understanding of the Iowa Open Meetings Law even though they are elected City Council officials. Their attempt to shift their responsibilities by blaming the City Attorney to avoid an assessment against them only exacerbates their actions and is clearly contrary to the objectives of the Open Meetings Law.”

Without deciding if the attorney at either meeting did in fact give a “formal opinion” as defined by the statute, we find there is substantial evidence to support the district court’s determination that the Board did not reasonably rely on the attorney’s advice or a formal opinion in closing the meeting. The defendants, in addition to being the Building Appeals Board, also are members of the Coralville City Council. There was evidence they were knowledgeable about the Open Meetings Law. They failed to follow the simple procedures set forth in section 21.5 to close a meeting and made no effort as directed by that section to record the closed meeting. We affirm on this issue.

Defendants next challenge the award of attorney fees as well as the amount thereof. Iowa Code Section 21.6(3) provides:

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)(b).

In considering the attorney fees issue we review for an abuse of discretion. *Schumacher*, 582 N.W.2d 186-87. Although a trial court has considerable discretion in fixing attorney fees, the crucial issue is not discretion but statutory interpretation. *See Telegraph Herald*, 297 N.W.2d at 536 where the court said, "In view of the statutory language and policy considerations involved, we hold the award for costs and attorney fees should be confined to those costs and fees incurred in successfully establishing a chapter 28A violation."²

Plaintiff contends that the fees awarded should be affirmed as the defendant admitted the fees were fair and reasonable. We agree that there is no challenge to the fees claimed being unreasonable. Yet that does not answer the question of whether the fees awarded were confined to those costs and fees incurred in establishing the statutory violation. The billings submitted show charges made for legal services rendered that were not specifically directed to the statutory violation. The actual charges made for open meeting violations are \$5,734.70. We modify the attorney fees award to that amount.

²Iowa Code section 21.6 was formerly section 28A.6.

AFFIRMED AS MODIFIED.