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20-OMD-072

May 8, 2020

In re: Sherri Springate/Woodford County Board of Education

Summary: Woodford County Board of Education (“Board”) violated the Open Meetings Act (“the Act”) when, after it excluded the public from the closed session, a quorum was present and a matter of public business was discussed that was unrelated to the purpose for which the closed session was called. The Board did not otherwise violate the Act.

Open Meetings Decision

By letter dated March 10, 2020, Sherri Springate (“Appellant”) submitted a written complaint to Board Chair Debby Edelen¹ pursuant to KRS 61.846(1), making 14 separate allegations that the Board had violated the Act and proposing remedies for each alleged violation. For the reasons that follow, the Board violated the Act.

This appeal is unusual because Appellant herself is a member of the Board. First, this Office must dispose of several of Appellant’s allegations over which it has no jurisdiction. Under KRS 61.846, this Office can only review the Appellant’s complaint and the Board’s response and issue a decision as to whether the Board violated the provisions of KRS 61.805 to KRS 61.850. Appellant’s allegations numbered as 4, 6, 11, and 12, however, object to the Board chair’s taking various types of unilateral action. But the Act does not govern the authority of a school

¹ Edelen was the Vice-Chair during the time of Appellant’s allegations.

board chair. Allegations 7 and 8 object to actions taken by the full Board during an open meeting, but the Act does not govern the legal authority or policy decisions of school boards or this Board's specific authority to take the actions Appellant would challenge. The Act only requires policy discussions and agency action to occur in open meetings that are accessible to the public. Therefore, allegations 4, 6, 7, 8, 11 and 12 do not assert cognizable violations of the Act over which this Office has jurisdiction.²

We turn now to the remaining allegations that arise under the Open Meetings Act and resolve each of them in turn.

Allegation 1.

Appellant alleges that during an open meeting on April 22, 2019, the Board "named members to a steering committee" for the design of a new high school, including the Superintendent. Following the open session, the Board entered a closed session to discuss the Superintendent's performance evaluation. Appellant alleges that during the closed session, "several board members expressed their displeasure with [the Superintendent] being named to the steering committee."³

Under KRS 61.810(1), "[a]ll meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times[.]" Once a quorum of an agency discusses "public business," the obligations of the Act attach unless an exception applies. *See Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998).

Public business is the discussion of the various alternatives to a given issue about which the board has the option to take action. Taking action is defined by [KRS 61.805(3)] as "a collective decision, a commitment or promise to make a positive or negative decision, or

² Appellant accepted the Board's response relating to Allegations 9 and 13 and has not appealed those issues.

³ Appellant also asserted that the Board chair later removed the Superintendent from the steering committee and that such action was illegal. Again, the Act does not govern the authority of a school board chair.

an actual vote by a majority of the members of the governmental body.”

Id.

A quorum of the Board could not discuss public business unless an exception to the Act applied. KRS 61.810(1)(k) exempts “[m]eetings which federal or state law specifically require to be conducted in privacy.” And KRS 156.557(6)(c) provides “[a]ny preliminary discussions relating to the evaluation of the superintendent by the board or between the board and the superintendent prior to the summative evaluation shall be conducted in closed session.” Therefore, the Board could discuss the Superintendent’s evaluation in closed session.

However, KRS 61.815(1)(d) prohibits discussion of any matter other than the matters publicly announced prior to entering closed session. *See Floyd County Bd. of Education v. Ratliff*, 955 S.W.2d 921, 924 (Ky. 1997). Discussions regarding the Superintendent’s placement on a steering committee are “public business,” because his inclusion or exclusion on that committee are “various alternatives to a given issue.” But determining whether to place the Superintendent on a steering committee to build a high school is not connected to his employment evaluation.

On appeal, the Board asserted that the only comment on the subject was made by one member “directly” to the Vice-Chair in the hallway before a quorum was assembled in the room where the closed session was to take place. Appellant, meanwhile, claimed to have heard two members make statements to the Vice-Chair. This factual discrepancy makes no difference. As a member of the Board, in whose presence the remark was made, Appellant supplied the necessary third member to constitute a quorum. In the presence of a quorum, a member of the Board discussed public business that did not relate to the purpose provided for excluding the public. As such, the Board violated the Act.

Allegation 2.

Appellant alleges that a high school teacher was permitted to address the Board “[t]en or fifteen minutes” before the start of a planning meeting on May 15, 2019, and that the meeting started late because of the teacher’s comments. She further alleges that public comment was not on the agenda for that meeting,

arguing that the Board had “conducted an unannounced meeting” by allowing the teacher to address the members. However, unlike the conversation in Appellant’s first allegation, here there is no allegation that the Board members discussed public business amongst themselves.

The Board admitted the teacher addressed the Board, but argued that it did not violate the Act because the members of the Board neither discussed public business nor took any action, but merely listened silently to the teacher’s presentation prior to the scheduled meeting. This type of passive attentiveness, where board members listen to a speaker, but do not discuss public business themselves, is what the Kentucky Supreme Court approved of in *Yeoman*. 983 S.W.2d at 474. Since the record on appeal does not establish that members of the Board discussed or took action on the matters addressed by the teacher on May 15, 2019, the Board did not violate the Act by passively listening to her presentation prior to the scheduled meeting.

Allegation 3.

Appellant alleges that at a special meeting on July 24, 2019, the Board voted to authorize the Chair “to solicit potential attorneys to advise him in matters related to the superintendent,” a subject which was not on the special meeting agenda. In its response, the Board stated that the members had conducted no such vote, but merely discussed “whether this subject of interviewing potential attorneys should be placed on the agenda” for a special meeting on August 6, 2019. The Board noted that the minutes of the July 24 meeting reflected no vote as described by Appellant.⁴

KRS 61.823(3) limits the topics for discussion at a special meeting to those appearing on the agenda for the special meeting. However, the provisions of the Act only apply to meetings where public business is discussed. KRS 61.810(1); *see also Yeoman*, 983 S.W.2d at 474. A discussion about whether to place an item on the agenda is a scheduling discussion, not a discussion of “various alternatives to a given issue.” *See Yeoman*, 983 S.W.2d at 474. The Board could discuss which topics appear on the next agenda, without substantively discussing the topics

⁴ On appeal, Appellant attempted to argue that the meeting minutes violated KRS 61.823(3) because they did not reflect the alleged vote. That argument is not within the scope of this appeal because it was not included in Appellant’s original complaint.

themselves, at any time. The fact that this scheduling discussion occurred during a special meeting does not mean the Board violated KRS 61.823(3).

Allegation 5.

Appellant alleges that between August 12 and November 30, 2019, various Board members conducted 44 conversations with an independent Board counsel⁵ to which she was not privy. She claims that the Board “held individual or two person meetings with the attorney to exclude [Appellant] from conversations with [him].”⁶

To constitute a violation, a series of less-than-quorum meetings must be held “for the purpose” of avoiding the obligations of the Act. KRS 61.810(2). In essence, KRS 61.810(2) contains a *mens rea* requirement. See *Elm Street/McCracken Pike Preservation Alliance, Inc. v. Siegelman*, 2007 WL 3228090 *5 (Ky. App. 2007) (unpublished). Appellant does not allege that any of the discussions between counsel and one or two Board members were on the same topic or occurred “for the purpose” of avoiding the requirements of the Act. She merely alleged that the discussions were held to exclude her personally. On the other hand, the Board argues that these discussions occurred between the Chair, Vice-Chair, and the Board’s attorney to advise these officers of potential legal issues that pertained to items on upcoming Board agendas. There being no evidence that these meetings included members other than the Chair and Vice-Chair, and no evidence these members intended to avoid the requirements of the Act, this Office finds the Board did not violate KRS 61.810(2) as alleged.

Allegation 10.

Appellant alleges that on January 21, 2020, the Board went into closed session purportedly to discuss pending litigation, but rather than discussing any pending litigation, the first thirty minutes of that discussion related to the Superintendent. Appellant considers the discussion about the Superintendent to

⁵ The record indicates that the Board has two attorneys – a general counsel and a separately retained law firm providing services for discrete issues.

⁶ Appellant further alleged that the attorney had “sat in the audience” at Board meetings, and been compensated for it, “without authorization from the full board.” But the Act does not regulate agency policy decisions or an agency’s ability to contract with or compensate third parties.

be more in the nature of a discussion exempt under KRS 61.810(1)(f), which permits discussions regarding the appointment, dismissal, or discipline of an employee to be conducted in closed session.

Under KRS 61.815, a public agency is required to give notice during open session of the reason for entering closed session and cite the specific provision of KRS 61.810 authorizing the closed session. A public agency is not permitted to discuss any matter other than those that were announced in the open session. KRS 61.815(1)(d). Like all exemptions, the pending litigation exemption under KRS 61.810(1)(c) is to be construed narrowly. *See* KRS 61.871. The pending litigation exemption “covers discussions of strategy, tactics, possible settlement and other matters pertaining to the case.” *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). The litigation exemption “does not apply ‘any time the public agency has its attorney present’ or where the possibility of litigation is remote or unsubstantiated.” *Id.* (citation omitted). The *Carter* Court held that a school board could not use the pending litigation exemption to discuss a superintendent’s resignation and consulting contract because the superintendent’s ability to sue the board was too remote a possibility.

Here, the parties dispute what exactly was discussed during the closed session. Appellant, a member of the Board who was present, states that the Board’s closed session discussion focused on the Superintendent and statements he made during the course of an ongoing lawsuit, rather than on the pending litigation. Appellant states that the provisions of KRS 61.810(1)(f), the “appointment, dismissal, or discipline” exemption, more accurately describe the nature of the conversation. The Board’s attorney (who was not in the room during the closed session), however, argues that the members were discussing the Superintendent’s deposition testimony, which is inherently a discussion about pending litigation.

This Office is unable to resolve such conflicting factual accounts regarding the subject matter of discussion. *See, e.g.*, 00-OMD-169. But any closed-session discussion on whether to terminate the Superintendent for cause would have required that the Board invoke KRS 61.810(1)(f) prior to entering closed session. In light of the factual dispute, however, this Office is unable to find that the Board violated the Act in this regard.

Allegation 14.

Appellant alleges that on October 25, 2019, a Board member added an item to the agenda, relating to the restriction of funds, for the regular Board meeting on October 28, 2019. She also alleges that a different Board member proposed a similar agenda item at an earlier public meeting, but agreed to table that item until the Board could hold a public forum on the matter. Appellant argues that “[t]he late addition of this agenda item coupled with the lack of discussion in the open meeting clearly indicates outside conversations related to this agenda item had occurred prior to the meeting” because the members who originally requested the agenda item voted in favor of it.

KRS 61.823 requires public notice of an agenda for a special meeting, but no provision of the Act requires a public agency to adopt an agenda for a regular meeting. If the Act does not require a formal agenda for a regular meeting, adding an item to the agenda late does not violate the Act. Additionally, there is no evidence in the record that supports Appellant’s speculation that three Board members substantively discussed the proposed restriction of funds outside of an open meeting. Without additional evidence, this Office cannot find that the Board violated KRS 61.810.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.846(4)(a). The Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings.

Daniel Cameron
Attorney General

/s/ James M. Herrick

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Distributed to:

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Ms. Debby Edelen

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