



COMMONWEALTH OF KENTUCKY
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21-OMD-134

July 26, 2021

In re: J. Albert Harrison/Oldham County Fiscal Court

Summary: The Oldham County Fiscal Court (“Fiscal Court”) violated the Open Meetings Act (“the Act”) when it failed to issue a written response to a complaint within three business days. However, the Fiscal Court did not violate the Act when its members attended and spoke at a meeting of a professional trade association. Furthermore, insufficient evidence exists to find that the Fiscal Court violated the Act by holding a series of less-than-quorum meetings by telephone with the intent to avoid the requirements of the Act.

Open Meetings Decision

On June 21, 2021, in a written complaint to the presiding officer of the Fiscal Court, J. Albert Harrison (“Appellant”) alleged that the County Judge/Executive, on unspecified dates, had violated the Act by “conduct[ing] telephone polls of selected magistrates . . . to determine how each of them [would] probably vote” on particular agenda items, sometimes including “every member of the court.” The Appellant further alleged that the Fiscal Court had violated the Act when “more than five members” of the Fiscal Court had attended a meeting of the Building Industry Association of Greater Louisville (“Association”), a professional trade association, and participated in the discussions held at that meeting. Lastly, the Appellant alleged that on unspecified occasions, a quorum of a committee of the Fiscal Court had held “private discussions about issues to be decided later by the full committee.”

On July 1, 2021, in response to the complaint, the Fiscal Court stated that the Association’s meeting was not a meeting of the Fiscal Court. As to the other allegations, the Fiscal Court denied any violation of the Act and noted

that the Appellant had provided no specifics as to the dates of the alleged violations, the magistrates involved, or the subjects discussed. This appeal followed.

Upon receiving a complaint alleging a violation of the Act, a “public agency shall determine within three (3) [business] days . . . after the receipt of the complaint whether to remedy the alleged violation pursuant to the complaint and shall notify in writing the person making the complaint, within the three (3) day period, of its decision[.]” Here, the Appellant submitted his written complaint by e-mail on June 21, 2021, but the Fiscal Court did not respond until July 1, 2021. Therefore, the Fiscal Court violated the Act when it failed to timely respond to the Appellant’s complaint.

However, the attendance of Fiscal Court members at a meeting of the Association did not violate the Act. “The mere fact that a quorum of members of a public agency are in the same place at the same time, without more, is not sufficient to sustain a claim of violation of the Act.” *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998). The complainant in *Yeoman* alleged that a public agency violated the Act when it attended a healthcare policy conference in New Jersey. *Id.* at 474. But the Kentucky Supreme Court disagreed, and explained:

For a meeting to take place within the meaning of the act, public business must be discussed or action must be taken by the agency. Public business is not simply any discussion between two officials of the agency. Public business is the discussion of the various alternatives to a given issue about which the [agency] has the option to take action. Taking action is defined by the Act as ‘a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body.’ KRS § 61.805(3). The Act prohibits a quorum from discussing public business in private or meeting in number less than a quorum for the express purpose of avoiding the open meeting requirement of the Act. KRS § 61.810(2).

Id.

Here, the Appellant did not allege that a majority of the magistrates took any action or discussed any Fiscal Court business, but merely that they participated in unspecified discussions at the Association’s meeting. Without

more, there is no basis to conclude that the Fiscal Court violated the Act when its members attended the Association's meeting. *See id.*

The Appellant next alleges that the County Judge/Executive conducted "telephone polls" of the Fiscal Court members' anticipated votes. 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[.]" Furthermore, KRS 61.810(2) provides:

Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section, shall be subject to the requirements of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.

On appeal, the Fiscal Court asserts that there is "no evidence that the County Judge or any of the magistrates acted intentionally to subvert the Act by conducting and concluding [public business] in private outside the forum of a properly noticed open meeting." The Fiscal Court also argues that the Appellant's complaint did not specify when the alleged conduct took place, which magistrates allegedly took part in it, or what public business they allegedly discussed.¹

Under 61.846(1), a complaint under the Act "shall state the circumstances which constitute an alleged violation of KRS 61.805 to 61.850." A public agency is unable to meaningfully respond to an allegation that it violated the Act when the complainant fails to sufficiently explain the specific circumstances that gave rise to the complaint. *See, e.g.*, 13-OMD-079 (finding that a complaint that "failed to identify a specific meeting date on which a specific violation occurred" did not conform to KRS 61.846(1)). However, even

¹ The Fiscal Court also argues that the Appellant failed to "state what the public agency should do to remedy the violation," as required under KRS 61.846(1). In his complaint, however, the Appellant "ask[ed] that the appropriate corrective measures be taken so that [the] Fiscal Court is brought into full compliance with the Open Meetings Act." This language was sufficient to comply with the Act. *See* 13-OMD-012 (finding that "the failure to ask for a specific remedy is not a failure to ask for any remedy at all").

if the Appellant's complaint had sufficiently explained the circumstances of the alleged violation, there is insufficient evidence here to find that the Fiscal Court violated the Act.

Although polling of Fiscal Court members about their voting intentions would constitute a discussion of public business, to violate the Act, 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*, No. 2005-CA-002079, 2007 WL 3228090 *5 (Ky. App. 2007) (unpublished). This Office has not hesitated to find a violation of the Act when there is evidence that the members of a public agency intended to circumvent the Act. See, e.g., 18-OMD-153; 94-OMD-106. However, when evidence of the members' intent is lacking, this Office has acknowledged its inability to conclusively determine that the public agency violated KRS 61.810(2). In those circumstances, this Office has found that the meetings "otherwise fell within the zone of conduct prohibited by KRS 61.810(2)" to advise agencies that similar conduct should not recur. See, e.g., 13-OMD-067; 09-OMD-093; 05-OMD-026. Here, the Appellant has not specified when the alleged conduct occurred, or which members allegedly participated in that conduct. Moreover, there is insufficient evidence in the record for this Office to conclude that any members intended to avoid the requirements of the Act. KRS 61.810(2).

Finally, the Appellant claims that certain committees of the Fiscal Court also violated the Act. The Fiscal Court claims that the Appellant did not address these complaints to the presiding officer of the committee, but instead addressed these complaints to the presiding officer of the Fiscal Court itself.

Under KRS 61.846(1), an open meetings complaint must be submitted "to the presiding officer of the public agency suspected of the violation." Furthermore, under KRS 61.805(2)(g), a "public agency" may include "[a]ny . . . committee . . . established, created, and controlled by a 'public agency'." Thus, a committee of the Fiscal Court is a public agency in its own right. Accordingly, to make a proper complaint against any such committee, a complainant must identify the committee in question and submit his complaint to the presiding officer of that committee. Because the Appellant's complaint was not submitted to the proper public agency, this Office cannot issue a decision on this allegation. See 40 KAR 1:030 § 1 ("The Attorney General shall not consider a complaint that fails to conform to KRS 61.846(2), requiring the submission of a written complaint to the public agency and the public agency's written response").

In sum, the Fiscal Court violated the Act when it failed to issue a written response to the Appellant's complaint within three business days. However, the Fiscal Court did not violate the Act when members attended and spoke at a meeting of the Association. Furthermore, there is insufficient evidence to find that the Fiscal Court violated the Act by holding a series of less-than-quorum meetings by telephone. Finally, this Office cannot consider an allegation against a committee of the Fiscal Court when the allegation has not first been submitted to the presiding officer of that committee, as required under KRS 61.846(1).

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.

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/s/ James M. Herrick

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Distributed to:

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