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22-OMD-187

September 13, 2022

In re: J. Albert Harrison/Oldham County Ethics Commission

Summary: The Oldham County Ethics Commission (“the Commission”) violated the Open Meetings Act (“the Act”) when it failed to provide an agenda in its notice of a special meeting. Although the Commission did not give notice of the reason for a closed session or the specific provision of KRS 61.810 authorizing a closed session, and took final action in closed session, it did not thereby violate the Act because KRS 61.815(2) exempts deliberations of a quasi-judicial body from the requirements of KRS 61.815(1).

Open Meetings Decision

On August 8, 2022, in a written complaint submitted under KRS 61.846(1), J. Albert Harrison (“Appellant”) alleged that the Commission violated the Act when it failed to provide an agenda as part of the notice of its special meeting held on July 13, 2022, in violation of KRS 61.823(3). The Appellant further alleged that the Commission, at the same meeting, failed to give notice of the reason for a closed session and the specific provision of KRS 61.810 authorizing the closed session, in violation of KRS 61.815(1)(a). Finally, the Appellant alleged that the Commission had taken final action in closed session, in violation of KRS 61.815(1)(c), when it made a determination that an ethics complaint did not warrant further investigation. As a remedy for the alleged violations, the Appellant requested that the Commission convene a new meeting to dispose of the ethics complaint in compliance with the Act.

In a written response issued on August 16, 2022,¹ the Commission admitted it did not comply with the Act when it failed to include an agenda in its notice of the

¹ Under KRS 61.846(1), a public agency must make a written disposition of an open meetings complaint within three business days after receiving the complaint. Because the record on appeal does

special meeting and when it failed “to specifically identify KRS 61.810(1)(j) as the statutory authorization for the closed session.” The Commission further admitted it “determine[d] in its deliberations in closed session . . . that [the ethics] complaint did not rise to the level to warrant further investigation,” but did not admit that this conduct violated the Act. The Commission denied that it had failed to state the reason for the closed session, on the grounds that the reason was obvious because the preliminary inquiry into the ethics complaint “was the only reason for the special meeting . . . as well as the only agenda item for the meeting.” The Commission did not agree to the Appellant’s proposed remedy for the violations, but promised to correct its “deficiencies” by complying with the Act in the future. This appeal followed.

On appeal, the Commission again admits it committed an “omission” when it failed to include its agenda in the notice of the special meeting held on July 13, 2022, as required under KRS 61.823(3). However, the Commission argues it should not be found to have violated the Act because it “substantially complied” with the Act. Under KRS 61.848(5), “a court of competent jurisdiction” may void any formal agency action taken “without substantial compliance with the requirements of” the Act. By contrast, however, there is no standard of “substantial compliance” in an Open Meetings appeal under KRS 61.846(3), which provides only that “[t]he Attorney General shall review the complaint and denial and issue . . . a written decision which states whether the agency violated the provisions of” the Act. Because this Office is not a court authorized to void actions of a public agency, the only determination the Office can make is whether the agency violated the Act. *See* 16-OMD-227 n.1. Here, the Commission admits it failed to comply with the requirements of KRS 61.823(3).² Therefore, the Commission violated the Act.

The Commission further acknowledges it failed to cite KRS 61.810(1)(j), “[d]eliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments,” as the provision authorizing the closed session. The Commission does not, however, admit it failed to state the reason for its closed session. Under KRS 61.815(1)(a), “[n]otice shall be given in regular open meeting of the general nature of the business to be discussed in closed session, *the reason for the closed session*, and the specific provision of KRS 61.810 authorizing the closed session”

not reflect when the Commission received the Appellant’s complaint, this Office cannot determine whether the Commission’s disposition was timely.

² Alternatively, the Commission argues that it should not be found to have violated the Act because it did not have “intent to subvert the Act.” Here, again, the Commission relies on a provision of the Act that does not apply in this case. Under KRS 61.810(2), a public agency may be held responsible for noncompliance with the Act when it engages in “[a]ny 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” KRS 61.810(1). This appeal, however, concerns a single meeting of a quorum of the Commission, not a “series of less than quorum meetings.” Thus, it is irrelevant whether the Commission’s meeting was “held for the purpose of avoiding the requirements of” the Act.

(emphasis added). Thus, when KRS 61.815(1)(a) applies, “[t]here must be specific and complete notification *in the public meeting* of any and all topics which are to be discussed during the closed meeting.” *Floyd Cnty. Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 924 (Ky. 1997) (emphasis added). Here, the Commission argues the reason for the closed session was stated on its agenda. But even if the agenda item were sufficient notice under KRS 61.815(1)(a) —which it is not, according to *Ratliff*— the Commission admits that it did not include the agenda in the notice of its special meeting. Therefore, the Commission did not comply with the portion of KRS 61.815(1)(a) requiring an agency to state the reason for its closed session.

Under KRS 61.815(1)(c), “[n]o final action may be taken at a closed session.” See also *Carter v. Smith*, 366 S.W.3d 414, 422 (Ky. 2012). Although the Commission admits it “determined in its closed session” that it would take no further action on the ethics complaint, it claims that this was not “final action” under KRS 61.815(1)(c) because it did not determine whether an ethical violation was committed. However, the Act defines “action taken” 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). Here, the Commission admits it made a collective decision to discontinue its investigation. Thus, it took “action” within the meaning of the Act. And that action was clearly final, inasmuch as it terminated the Commission’s involvement in the matter.³ Furthermore, the Commission acknowledges it did not conduct a public vote or otherwise address the matter when it returned to open session. Therefore, the Commission took final action in closed session.

Although the Commission did not comply with KRS 61.815(1) when it failed to state the reason for its closed session or the specific provision of KRS 61.810 authorizing the closed session, and when it took final action in closed session, the agency’s noncompliance with these provisions did not violate the Act. Under KRS 61.815(2), “[p]ublic agencies and activities of public agencies identified in paragraphs (a), (c), (d), (e), (f), but only so far as (f) relates to students, (g), (h), (i), (j), (k), (l), and (m) of subsection (1) of KRS 61.810 shall be excluded from the requirements of” KRS 61.815(1). Here, the Commission’s activity in closed session, “deliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments” under KRS 61.810(1)(j), is one of the exemptions provided in KRS 61.815(2). In *Cunningham v. Whalen*, 373 S.W.3d 438, 441 n.12 (Ky. 2013), the Supreme Court of Kentucky stated that an exemption listed in KRS 61.815(2) relieves a public agency “from the requirements of announcement of a closed session and a public vote on holding a closed session, as well as the requirement that no final action

³ In the context of the Open Records Act, the courts and this Office have recognized that a public agency’s final decision to take no further action on a matter is a “final action.” See, e.g., *Palmer v. Driggers*, 60 S.W.3d 591, 596-97 (Ky. App. 2001); 10-ORD-075; 05-ORD-005. The same reasoning applies here.

be taken.” *See also* 22-OMD-057. In light of these authorities, this Office cannot find that the Commission violated the Act when it failed to comply with KRS 61.815(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. The Attorney General will accept notice of the complaint e-mailed to OAGAppeals@ky.gov.

Daniel Cameron
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s/James M. Herrick
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Distributed to:

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