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24-OMD-222

October 11, 2024

In re: Brian Mackey/Department of Fish and Wildlife Resources Commission

Summary: The Department of Fish and Wildlife Resources Commission (“the Commission”) violated the Open Meetings Act (“the Act”) when it failed to issue a written response to a complaint within three business days. The Commission did not violate the Act when it conducted a closed session to discuss the reappointment of an employee under KRS 61.810(1)(f).

Open Meetings Decision

On September 23, 2024, Brian Mackey (“the Appellant”) submitted a complaint by email to the Chair of the Commission alleging it violated the Act by (1) conducting a closed session meeting to discuss renewing the contract of the Commissioner of the Department of Fish and Wildlife (“the Department”) and (2) making a motion regarding the Commissioner’s contract renewal that was “vague and indefinite.” Having received no response from the Commission, the Appellant initiated this appeal on September 27, 2024.

To invoke the Attorney General’s review under KRS 61.846(2), a complainant “shall begin enforcement” under subsection (1) of the statute. KRS 61.846(1). That provision requires the complainant to “submit a written complaint to the presiding officer of the public agency suspected of” violating the Act. *Id.* The Commission argues that the Appellant’s complaint was not submitted to its presiding officer and, therefore, the Office does not have jurisdiction to consider the complaint.

The Appellant submitted his complaint by email to Commission member Josh Lillard, who is identified as the Commission’s Chair on its website.¹ The Commission asserts that the Commissioner of the Department is the presiding officer of the

¹ See “District Commission Members” available at <https://fw.ky.gov/More/Pages/District-Commission-Members.aspx> (last accessed Oct. 11, 2024).

Commission to whom open meeting complaints should be directed. As support for this claim, the Commission notes that it meets on “date[s] to be determined and fixed by the commissioner,” *see* KRS 150.023(1), and that the Commissioner “shall have general supervision and control of all activities, functions, appointments, and employees of the department,” KRS 150.061(4). Indeed, the Commission is correct that the Commissioner has general control of the Department. However, the Appellant alleges the Commission violated the Act, not the Department.

The Commission is composed of nine members from each commission district. KRS 150.022(1). Each member of the Commission is appointed by the Governor subject to confirmation by the Senate. KRS 150.022(2). The Commissioner of the Department is not a member of the Commission. Rather, the Commission has “the sole authority to appoint a commissioner of the Department.” KRS 150.061(1). Because the Commissioner is not a member of the Commission, he is not its *presiding officer*. *See* 22-OMD-177 (finding the complainant had not perfected his appeal regarding a school Site Based Decision Making Council by submitting his complaint to the superintendent of the school district). Here, the presiding officer of the Commission is Chair Josh Lillard. Accordingly, the Appellant did submit his complaint to the presiding officer of the Commission, and the Office therefore has jurisdiction to consider his complaint.

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.” KRS 61.846(1). On appeal, the Commission does not deny that it failed to respond to the Appellant’s complaint.² Thus, the Commission violated the Act.

Turning to the merits of the Appellant’s complaint, under KRS 61.810(1)(f), a public agency may enter closed session to hold discussions “which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student.” That exception, however, does not “permit discussion of general personnel matters in secret.” *Id.*

The Appellant maintains that the Commissioner is an independent contractor and not an employee. As proof that the Commissioner is an independent contractor, the Appellant points to the Commissioner’s lack of certain employment benefits and

² Instead, the Commission argues that a complaint alleging a violation of the Act does not comply with KRS 61.846(1) when submitted by email to an agency. That provision requires the complainant to “submit a written complaint” to the agency’s presiding officer. The Office has previously held that “the expansive meaning of the word ‘submit’ indicates that transmission of the written complaint can occur by email.” 20-OMD-035. Moreover, the Office routinely treats complaints that were submitted to an agency’s presiding officer by email as having satisfied the requirements of KRS 61.846(1). *See, e.g.,* 24-OMD-215; 24-OMD-191; 23-OMD-339; 21-OMD-134.

the fact that his contracts refer to him as a “contractor.” From this, the Appellant concludes that the Commission was not permitted to enter a closed session at its August 30, 2024, meeting to discuss reappointing the Commissioner and offering him a new four-year contract.³ *See Carter v. Smith*, 366 S.W.3d 414, 421 (Ky. 2012) (holding that public agencies may not rely on KRS 61.810(1)(f) to discuss an employee’s voluntary resignation and subsequent reemployment as an independent contractor).

“[A]n independent contractor is distinct from an employee, the former being someone who is hired to undertake a specific project and is free to choose the means and methods for completing the work, and the latter being someone who works under an express or implied contract for an employer who determines the means and methods by which the employee performs and completes the work.” *Id.* The Commissioner of the Department works under contract, KRS 150.061(1), his performance is subject to annual review by the Commission, KRS 150.061(1)(a), his salary is fixed and set by the Commission, KRS 150.061(2), he is advised by the Commission regarding actions to take to benefit the Department, KRS 150.023(2), and his reappointment or removal as Commissioner is controlled by the Commission, KRS 150.061(1)(b) and (c). Thus, it appears that the Commissioner is more like an employee than an independent contractor. Moreover, the Office has previously held that KRS 61.810(f) permitted the Commission to conduct discussions about the reappointment of the Commissioner in closed session. *See* 21-OMD-091. That decision was subsequently affirmed by the Franklin Circuit Court.⁴ The Office sees no reason to depart from its prior decision.⁵

In the alternative, the Appellant argues the Commission violated the Act by negotiating the Commissioner’s new contract in closed session. But the Office has previously found that “KRS 61.810(1)(f) authorize[s] the Commission to hold these discussions in closed session.” 21-OMD-091; *see, e.g.*, 96-OMD-097 (finding that a public agency properly relied on KRS 61.810(1)(f) to conduct contract negotiations with the agency’s preferred appointee when the contract had not yet been approved by the agency or prospective appointee). Accordingly, the Commission did not violate

³ The Appellant does not allege any deficiencies regarding the Commission’s notice 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.” *See* KRS 61.815(1)(a).

⁴ *See Richards v. Commonwealth, Fish & Wildlife Res. Comm’n*, No. 21-CI-00483, (Franklin Cir. Ct. July 14, 2022) (“[I]nsofar as the Closed Meetings dealt with ‘reappointing’ Storm to the position of Commissioner, they would be covered by the KRS 61.810(1)(f) exception.”).

⁵ Further, it appears that the General Assembly intended for the Commission’s discussions about the retention of its Commissioner to occur in closed session. *See* KRS 150.061(1)(a) (requiring the Commissioner’s annual review to be held in closed session). The fact that the General Assembly requires the Commissioner’s review to be conducted in closed session, and that the Commission is further authorized to “reappoint” its Commissioner, KRS 150.061(1)(c), supports the conclusion that the Commission was authorized by law to conduct these discussions in closed session.

the Act when it discussed the Commissioner's contract in closed session at its August 30, 2024, meeting.⁶

A party aggrieved by this decision may appeal it by initiating an 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 emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
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Distributed to:

Brian Mackey
Josh Lillard
Rich Storm

⁶ The Appellant also alleges the Commission's oral motion regarding approval of the Commissioner's reappointment differed from the motion as transcribed in the Commission's meeting minutes. The oral motion stated the Commission would "move forward with consideration for the" Commissioner's contract. The meeting minutes state, "The Commission unanimously approved the . . . Renewal of the personal service contract for" the Commissioner. Under KRS 61.835, "The minutes of action taken at every meeting of any such public agency, setting forth an accurate record of votes and actions at such meetings, shall be promptly recorded . . ." (emphasis added). In response, the Commission agrees that "the wording of the motion was somewhat ambiguous." But the Commissioner's new contract has yet to be executed, and the Commission states it will not execute it until after its next meeting, at which it will "include an action item to clarify the intent of the August 30th motion on the Commissioner's employment contract." Thus, the Commission will clarify any discrepancy between the oral motion and its meeting minutes.