**18-OMD-162**

August 21, 2018

In re: Katie Busroe/Board of Pharmacy

***Summary:*** Evaluation Committee of the Kentucky Board of Pharmacy violated the Open Meetings Act by citing an exception to the Act to go into closed session that was not yet in effect at the time the committee invoked the exception. Board’s response to Open Meetings complaint was late by two days and so constituted a procedural violation of the Act.

***Open Meetings Decision***

The issue presented in this appeal is whether an Evaluation Committee of the Kentucky Board of Pharmacy (“Board”) violated the Open Meetings Act on June 6, 2018, when the Evaluation Committee went into closed session pursuant to KRS 61.810(1)(n), an exception to the Act that did not become effective until July 14, 2018. For the reasons that follow, we find that the Evaluation Committee violated the Open Meetings Act.

Katie Busroe (“Appellant”), filed an appeal with this office stating that the Evaluation Committee violated the Act by going into closed session at its June 6, 2018, meeting. Her complaint was that the Evaluation Committee cited KRS 61.810(1)(n)[[1]](#footnote-1) as the statutory exception under which it was going into closed session when that exception did not become effective until July 14, 2018. For the reasons stated below, we find that the Evaluation Committee violated the Act.

Appellant filed a complaint[[2]](#footnote-2) with the Board on July 25, 2018, stating that the Evaluation Committee went into closed session at a “Special Called Board Meeting” on June 6, 2018, pursuant to KRS 61.810(1)(n). Appellant stated that the minutes of the June 6, 2018, Board meeting reflect that the President of the Board, Cathy Hanna, selected three members of the Board (Ron Poole, Craig Martin, and Jody Forgy) as members of the “Evaluation Committee for RFP 2701800000341” (the “Evaluation Committee”). After appointing the Evaluation Committee members, President Hanna recused herself, and then, according to the minutes of the meeting:

Mr. Poole moved to go into closed session pursuant to KRS 61.810(1)(n) which allows an exemption of public meeting for the purpose of an evaluation committee to select a successful bidder for award of a state contract. Mr. Forgy seconded and the motion passed unanimously.

Mr. Poole moved to go back to open session. Mr. Forgy seconded and the motion passed unanimously.

President Hanna returned to the meeting.

Larry Hadley, Executive Director of the Board, responded to Ms. Busroe’s complaint on August 1, 2018, in part, as follows:

Having consulted counsel, I have learned that, historically, open meeting rules do not apply to evaluation committees formed to make a recommendation to the Secretary of the Finance Cabinet. In fact, KRS 45A.695(4) expressly prohibits disclosure of information contained in proposals to competing vendors, which would necessarily occur if the evaluation committee's deliberations are considered a meeting for purposes of the Open Meetings Act.

Appellant filed her appeal with this office August 7, 2018. Cheryl Lalonde, Board attorney, responded to the appeal on August 9, 2018. Ms. Lalonde stated that the three board members were appointed to a committee for the purpose of considering RFP 180000341.[[3]](#footnote-3) Each committee member had to submit a Confidentiality Statement, indicating they would not divulge information pertaining to the bid proposals, and an Evaluation Committee Member Agreement that only allowed them to discuss procurement with other committee members and Darla Sayre, Executive Staff Advisor, who served as the sole point of contact for the committee. As Ms. Sayre was the sole point of contact, the Board's General Counsel did not assist the committee during its meeting. Mr. Poole moved for the Evaluation Committee to go into closed session pursuant to KRS 61.810(l)(n), which Mr. Forgy seconded, and the motion passed unanimously. The meeting was closed, and upon return to open session, there was no final action announced since the Board does not make an award of a state contract. Ms. Sayre subsequently submitted the evaluation criteria to the Finance Cabinet, who chose the successful bidder and awarded the state contract.

Ms. Lalonde provided an email exchange between Ms. Sayre and Tracy Gritton, Executive Staff Advisor, Finance and Administration Cabinet. In the email Ms. Sayre explained that “Board Counsel” had advised that the evaluation of the bids must take place during an open meeting, unless there is an exception. Ms. Gritton responded with a reference to HB 302, passed in the 2018 General Session, which amended KRS 61.810 to allow: “Meetings of any selection committee, evaluation committee, or other similar group established under KRS Chapter 45A or 56 to select a successful bidder for award of a state contract.” The Board’s response stated that:

The closed session citation had an enactment date of July 14, 2018, and was not in effect at the time of the Board's special meeting, so the Board reconvened on August 9, 2018 to hold another meeting. The Minutes of that meeting will be available after they are approved at the Board's next meeting on September 12, 2018.

**Late Response by the Board.** Appellant stated that she sent her complaint letter to Executive Director Larry Hadley at 2:21 p.m. on July 25, but did not receive a written reply until August 1, at 9:49 a.m. Pursuant to KRS 61.880(1)[[4]](#footnote-4), a public agency must notify the complainant of its decision regarding the complaint, in writing, within three business days after receipt of the complaint. As the Board received the complaint on Wednesday, July 25, it was obligated to respond no later than Monday, July 30, 2018. The Board’s response of August 1st was two days late and constituted a procedural violation of KRS 61.880(1).

**KRS 61.810(1)(n**). In the 2018 General Session, House Bill 302 amended KRS 61.810(1) to add a new exception to the Open Meetings Act:

(n) Meetings of any selection committee, evaluation committee, or other similar group established under KRS Chapter 45A or 56 to select a successful bidder for award of a state contract.

The legislature passed the bill and the Governor signed it on April 26, 2018.[[5]](#footnote-5) The effective date of legislation, other than general appropriation bills and acts containing emergency or delayed effective date provisions, passed during the 2018 Regular Session of the Kentucky General Assembly, was Saturday, July 14, 2018.[[6]](#footnote-6) The copies of KRS 61.810, prior to July 14, 2018, and copies of KRS 61.810 after July 14, 2018, provided by Appellant in her appeal, are copies from the Kentucky Legislative Research Commission website[[7]](#footnote-7) and also reflect an effective date of July 14, 2018, for the amendment to the statute.

KRS 61.815(1)(a)[[8]](#footnote-8) requires that “[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*.” (Emphasis added). As KRS 61.878(1)(n) was not yet effective on June 6, 2018, the Committee erred in citing it as the “specific provision of KRS 61.810 authorizing the closed session” for the Committee.[[9]](#footnote-9), [[10]](#footnote-10), [[11]](#footnote-11) From the Board’s response to the appeal, it appears that it attempted to correct the Evaluation Committee’s error at its meeting of August 9, 2018, but, as we do not have the approved minutes of that meeting, we decline to speculate on whether the Board has corrected its error.

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.

Andy Beshear

Attorney General

Gordon Slone

Assistant Attorney General

#328

Distributed to:

Katie Busroe

Larry Hadley

Cheryl Lalonde

1. KRS 61.810(1) states, in pertinent part:

   All 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, except for the following:

   …

   (n) Meetings of any selection committee, evaluation committee, or other similar

   group established under KRS Chapter 45A or 56 to select a successful bidder

   for award of a state contract. [↑](#footnote-ref-1)
2. Ms. Busroe submitted her complaint via electronic mail. Although KRS 61.846(1) provides that a “person shall submit a written complaint to the presiding officer of the public agency suspected of” the violation, a public agency can waive this requirement expressly or by a course of conduct, and the Board did so here (assuming that Executive Director Hadley is the “presiding officer”) by responding via e-mail without objection. Accordingly, further discussion of this procedural requirement is unwarranted. [↑](#footnote-ref-2)
3. “RFP” stands for “Request for Proposal.” [↑](#footnote-ref-3)
4. KRS 61.880(1), in pertinent part, states: “The public agency shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, 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.” [↑](#footnote-ref-4)
5. http://www.lrc.ky.gov/record/18RS/HB302.htm (Last visited Aug. 21, 2018). [↑](#footnote-ref-5)
6. *See*, OAG 18-007, an advisory opinion of the Attorney General, determining the effective date of legislation passed by the 2018 Regular Session of the Kentucky General Assembly to be July 14, 2018, except for general appropriation measures and those containing emergency or delayed effective date provisions. [↑](#footnote-ref-6)
7. Legislative Research Commission website, http://www.lrc.ky.gov/statutes/statute.aspx?id=

   48229 (Last visited Aug. 9, 2018). [↑](#footnote-ref-7)
8. KRS 61.815 states, in pertinent part:

   (1) Except as provided in subsection (2) of this section, the following requirements

   shall be met as a condition for conducting closed sessions authorized by KRS

   61.810:

   (a) Notice 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… [↑](#footnote-ref-8)
9. The Board did not contest whether the Evaluation Committee was a “public agency” for the purposes of the Open Meetings Act, and it is clear from the facts of the appeal, that the Committee qualifies as a “public agency” for the purposes of the Act pursuant to KRS 61.805(2)(f) and (g) which state that a “public agency” means:

   (f) Any entity when the majority of its governing body is appointed by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a "public agency," a state or local officer, or any combination thereof;

   (g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and controlled by a "public agency" as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection[.] [↑](#footnote-ref-9)
10. KRS 61.815(1)(a) also required the Evaluation Committee to give notice “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[.]” The June 6, 2018, meeting minutes do not disclose whether the Evaluation Committee provided notice in open meeting of the general nature of the business to be discussed in closed session, or the reason for the closed session. Neither the Appellant’s complaint to the Board, nor her appeal of the Board’s response, assert that the Evaluation Committee failed to give notice of the general nature of the business to be discussed in closed session, or the reason for the closed session. As such, we decline to decide if the Evaluation Committee violated these requirements of the Act. [↑](#footnote-ref-10)
11. The Court of Appeals, in *Bd. of Regents for Western Kentucky Normal School v. Engle*, 224 Ky. 184, 5 S.W.2d 1062, 1063 (Ky. 1928), pointed out that the courts would not consider a statute in any way where the statute was not yet in effect. As the courts would not consider a statute that was not yet in effect, neither can the Evaluation Committee. [↑](#footnote-ref-11)