**18-OMD-163**

August 21, 2018

In re: Katie Busroe/Kentucky Board of Pharmacy, Case Review Committee

***Summary:*** Case Review Committee (“CRC”) of the Kentucky Board of Pharmacydid not violate the Open Meetings Act when it held a special meeting on July 3, 2018. The undisputed facts establish that all three members of the “panel,” or CRC, as identified at 201 KAR 2:061 Section 3, were present and the complainant did not allege the CRC failed to comply with notice requirements for special meetings codified at KRS 61.823 or notice requirements for closed sessions codified at KRS 61.815.

***Open Meetings Decision***

The question presented in this appeal is whether the Case Review Committee (“CRC”) of the Kentucky Board of Pharmacy (“Board”) violated the Open Meetings Act in holding a special meeting on July 3, 2018, to allow the assigned pharmacy drug inspector to present his report concerning his investigation of Cases 18-0225A and 18A-0225B.[[1]](#footnote-1) By written complaint directed to Executive Director of the Board, Larry Hadley, on July 26, 2018, per KRS 61.846(1), Pharmacy Inspections and Investigations Supervisor Katie J. Busroe alleged the CRC “consists of nine members: the Board President, the Executive Director, the Board Attorney and the six members of the inspection staff.”[[2]](#footnote-2) However, Ms. Busroe also noted that 201 KAR [2:061] Section 3, states that a panel consisting of the assigned Board Member, the Executive Director and the Inspector “shall make a recommendation to the Board regarding any disciplinary action.” Ms. Busroe premised her complaint on the assumption that a meeting of the Board President, the Executive Director, the Board Attorney, and the Inspector, “four members of the [CRC],” did “not constitute a quorum of a committee of the Board.”[[3]](#footnote-3) She further questioned why a quorum of the CRC was not required in order to hold the July 3, 2018, special meeting, but was required on July 10, 2018, during the Board’s regularly scheduled meeting to approve the minutes of the CRC’s July 3, 2018, special meeting.[[4]](#footnote-4)

To remedy the perceived violations of the Act, Ms. Busroe requested that Cases 18-0255A and 18-0255B “be handled the same as every other case with a quorum of the [CRC] present for discussion and the decision be made in the form of a motion in the open meeting session on September 1, 2018.” On August 1, 2018, Executive Director Hadley informed Ms. Busroe, “There is no action to challenge pertaining to the meeting on 7/3/18 – no final decision was made.”[[5]](#footnote-5) Dissatisfied with Executive Director Hadley’s brief response, Ms. Busroe initiated this appeal. Ms. Busroe acknowledged, “the Attorney General’s Investigator had a conflict with the regularly scheduled [CRC meeting] on July 10, 2018, but this should not negate the requirement of a quorum.”

Upon receiving notification of Ms. Busroe’s appeal from this office, Executive Director Hadley responded on behalf of the CRC. Referencing 201 KAR 2:061 Section 3, regarding the composition of the “panel”[[6]](#footnote-6) known as the CRC, Director Hadley explained that approximately twenty years ago, the Board had a total of three inspectors. “Over time, the number of inspectors increased to six. Presumably, for the sake of efficiency, consistency, and education, all the inspectors were permitted to attend the panel discussion/meeting which became known as the CRC, even though decisions are always, and only, made by the required panel members.” Executive Director Hadley noted that Ms. Busroe did not cite any minutes or legal authorities in support of her contention that the CRC is comprised of nine individuals (or six when the Board employed three inspectors, or seven when the Board employed four inspectors, or eight when the Board employed five inspectors).” He further clarified that its attorney has “never acted as a member of the CRC; rather, the attorney has always attended CRC meetings to provide guidance with probable cause determinations.”

In summary, the CRC consists of the panel members identified at 201 KAR 2:061 Section 3 “with the Board’s other inspectors who are able to participate in discussion; however, the ‘additional’ inspectors have no vote in the options that the panel recommends to the Board.” Executive Director Hadley stated “the number of individuals who convened on July 3, 2018,” was adequate to make a final decision pursuant to 201 KAR 2:061 Section 3 or, in other words, a quorum of the CRC was present. In deference to a “process that has been developed over time,” the CRC adjourned the special meeting “with the expectation that the matter would be considered at the regularly scheduled CRC meeting on July 10, 2018.” Because Ms. Hamilton was unable to acquire the necessary additional information prior to July 10, 2018, the case was not presented on July 10, 2018, but will be presented at the next regularly scheduled CRC meeting on September 11, 2018. If Ms. Busroe is challenging whether a quorum was present on July 3, 2018, Executive Director Hadley stated, then 201 KAR 2:061 Section 3 is the only legal authority that provides guidance and there was no violation pursuant to it. Executive Director Hadley stated that insofar as Ms. Busroe is challenging the disciplinary process itself, her complaint is beyond the scope of the Open Meetings Act.[[7]](#footnote-7) When viewed in light of existing legal authority, the record on appeal does not substantiate Ms. Busroe’s complaint.

Insofar as the CRC, “standing alone, constituted a public agency for purposes of the Open Meetings Act, this office considers the total composition of the [CRC] itself, rather than the total composition of the [Board], in determining whether a quorum of the [CRC] was present.” 06-OMD-211, pp. 4-5; 15-OMD-155. A quorum is the “minimum number of members (usu. a majority of all the members) who must be present for a deliberative assembly to legally transact business.” Black’s Law Dictionary (9th ed. 2009). Pursuant to 201 KAR 2:061 Section 3(1), “A panel consisting of the assigned board member [Board President Cathy Hanna], the executive director [Director Hadley], and the pharmacy drug inspector [Ms. Rhonda Hamilton] shall review the conclusions and recommendation relating to an investigation.” The undisputed facts establish that all three of these individuals, or the CRC in its entirety attended the July 3, 2018, special meeting and, therefore, a quorum was, by definition, present.

When a quorum of the CRC came together to discuss public business, a meeting occurred within the meaning of KRS 61.805(1). 06-OMD-211, p. 5. “At a minimum,” on any such occasion “there [should have been] a determination that a quorum [was] present and a commencement of proceedings prior to the beginning” of any discussions properly held in closed session. 12-OMD-140, p. 7; 15-OMD-155. The minutes of the July 3, 2018, special meeting indicate that a quorum of the CRC was present and Ms. Hanna, Board President (the “assigned member” of the CRC) commenced the proceedings. Ms. Busroe’s complaint is premised on the flawed assumption that a quorum of the CRC was not present (which, if true, would not have constituted a violation of the Act). *See* KRS 61.810(1); 16-ORD-065. The presence of Cheryl Lalonde, General Counsel, Detective Michael Koenig (exited the closed session after giving his report), and Shan Dutta, Office of the Attorney General (did not attend the closed session), does not change that determinative fact.

The fundamental mandate of the Open Meetings Act, codified at KRS 61.810(1), provides that “[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[.]” This provision reflects the legislative statement of policy, codified at KRS 61.800, which declares, “The formation of public policy is public business and shall not be conducted in secret . . . .” Accordingly, in a series of decisions dating back to 1978 the Attorney General has recognized that even a casual gathering of a quorum of the members of a public agency triggers the requirements of the Open Meetings Act *if* a quorum discusses public business[[8]](#footnote-8) *or* takes action.[[9]](#footnote-9) 01-OMD-30 (gathering of a quorum of the agency held for the purpose of discussing public business violated the Act even though it was informational and informal)(citing OAG 78-411). *Compare* OAG 78-634; 00-OMD-147; 14-OMD-183.

KRS 61.820 provides that all meetings of all public agencies, “and any committees or subcommittees thereof, shall be held at specified times and places which are convenient to the public.” It further mandates that all public agencies “provide for a schedule of regular meetings by ordinance, order, resolution, bylaws, or by whatever other means may be required for the conduct of business of that public agency.” The term “meeting” is broadly defined at KRS 61.805(1) as “all gatherings of every kind . . . regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting.”[[10]](#footnote-10) Thus, all gatherings of a quorum of the CRC at which it discussed public business *or* took action, such as the special meeting it held on July 3, 2018, were meetings of a public agency subject to provisions of the Open Meetings Act, including KRS 61.820 and 61.823, regardless of whether the CRC took action. *See* 99-OMD-77; 06-OMD-068; 11-OMD-060; 14-OMD-246; 15-OMD-142. However, “[i]n the absence of any evidence that a quorum of the members of the [CRC] was present at a single meeting *from which the public was excluded*, or that the members engaged in a series of less than quorum meetings for the purpose of avoiding the requirements of the Act, this office has no basis upon which to conclude that the [CRC] violated the Open Meetings Act.” 13-OMD-142, p. 4; 16-OMD-030.

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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Distributed to:

Katie Busroe

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1. In 04-OMD-148 (copy enclosed), the Attorney General conclusively resolved the question of whether the CRC is a “public agency” for purposes of the Open Meetings Act, finding that because the Kentucky Board of Pharmacy is a public agency within the meaning of KRS 61.805(2)(a), any committee established, created, and controlled by the Board is a public agency pursuant to KRS 61.805(2)(g). 04-OMD-148, p. 6. Because the CRC is grounded in a regulation, 201 KAR 2:061 Section 3, it may also be properly characterized as a “public agency” within the meaning of KRS 61.805(2)(d) and (e). *See* 04-OMD-148, p. 6, n. 1. [↑](#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 CRC 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. If a quorum of the CRC had actually not been present on July 3 when a discussion of public business occurred, Ms. Busroe’s complaint would have failed to “state the circumstances which constituted an alleged violation” of the Act per KRS 61.846(1). In the absence of a quorum of a public agency such as the CRC at a single meeting, or collectively at a series of meetings, there “was not a public meeting under the Open Meetings Act.” 00-OMD-200, p. 6 (quoting 93-OMD-63; 13-OMD-166; 10-OMD-210; 16-OMD-065. *Compare* 13-OMD-057. Ms. Busroe did not challenge the propriety of the closed session held on July 3, 2018, nor did she allege the CRC failed to comply with all of the notice requirements codified at KRS 61.815(1)(closed sessions) and 61.823(3) and (4)(special meetings). Accordingly, this office makes no finding relative to either of those provisions.

   [↑](#footnote-ref-3)
4. This allegation implicates KRS 61.835, pursuant to which minutes of “action taken” at every meeting (as defined at KRS 61.805(1)) of any public agency (as defined at KRS 61.805(2)), “setting forth an accurate record of votes and actions taken at such meetings, shall be promptly recorded and such records shall be open to public inspection at reasonable times no later than immediately following the next meeting of the body.” However, it does not state circumstances that constitute a violation. In addressing KRS 61.835 relative to ad-hoc committees that were serving a strictly advisory function, the Attorney General determined that minutes must be maintained, even if those minutes reflect only that the public agency convened, approved the minutes of the last meeting, and adjourned. *See* 00-OMD-96; 95-OMD-64.

   The record establishes the CRC complied with KRS 61.835 in recording minutes of its July 3, 2018, special meeting and ultimately made necessary corrections to reflect what actually occurred. *Compare* 10-OMD-017. A quorum of the CRC later voted to approve the minutes; Ms. Busroe did not contend the CRC failed to make the minutes publicly available.

   [↑](#footnote-ref-4)
5. Executive Director Hadley’s position that no violation was committed merely because “no final decision was made” is contrary to KRS 61.810(1). This office rejected a similar argument in 98-OMD-94 as follows:

   KRS 61.810(1) requires that any meeting at which public business is discussed *or* action is taken must be open to the public. We attach significance to the use of the disjunctive particle “or” rather than the conjunction “and.” Since a quorum of the members of the [agency] was apparently present and public business was discussed, the [agency] violated the Open Meetings Act by failing to notify the public about the meeting and by excluding the public from that meeting.

   98-OMD-94, p. 5. *See also* 99-OMD-117; 02-OMD-153; 03-OMD-187; 05-OMD-117; 13-OMD-057. Here, Ms. Busroe did not allege the CRC failed to give proper notice of the special meeting and this office makes no finding in that regard. [↑](#footnote-ref-5)
6. *Taylor v. Bowling Green Municipal Utilities*, No. 2011-CA-00592, 2012 WL 5371994 (Ky. App. Nov. 2, 2012 (citing 95-OMD-71)(“It is not the name which a group is given that is determinative, but its function.”). [↑](#footnote-ref-6)
7. The Attorney General is not empowered to “adjudicate a dispute relating to interpretation of, and compliance with, a public agency’s bylaws [or city ordinances, unrelated statutory provisions, etc.]” in this forum. 02-OMD-22, p. 4; 12-OMD-080. Rather, the role of this office in adjudicating disputes arising under the Open Meetings Act, is defined at KRS 61.846(2), pursuant to which the Attorney General “shall review the complaint and denial and issue within ten (10) days, excluding Saturdays, Sundays, and legal holidays, a written decision which states whether the agency violated the provisions of KRS 61.805 to 61.850.” This office has declined, for example, to “decide whether the procedures relative to the termination of a [public] employee were properly interpreted or administered.” 10-OMD-023, p. 5. [↑](#footnote-ref-7)
8. In *Yeoman v. Comm. of Ky., Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998), the Kentucky Supreme Court defined the term “public business” as “the discussion of the various alternatives to a given issue about which the [agency] has the option to take action.” [↑](#footnote-ref-8)
9. KRS 61.805(3) 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[.]” [↑](#footnote-ref-9)
10. On many occasions, the Attorney General has recognized that “[t]here are only two kinds of meetings – regular meetings and special meetings.” 94-OMD-50, p. 4. Accordingly, “[t]he public has a right to expect a public agency . . . to follow its regular schedule or to call special meetings following the required notice, delivery, and posting provisions pursuant to KRS 61.823.” 92-OMD-1677, p. 3. [↑](#footnote-ref-10)