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21-OMD-091

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In re: Larry Richards/Fish and Wildlife Commission

Summary: The Fish and Wildlife Commission ("the Commission") violated the Open Meetings Act ("the Act") on three occasions when it entered closed session without first providing sufficient explanation in open session. However, the exemptions cited by the Commission authorized its discussions in closed session at each meeting.

Open Meetings Decision

Larry Richards submitted two written complaints to the presiding officer of the Commission in which he alleged that the Commission violated the Act on January 31, 2020, April 1, 2021, and April 14, 2021. During these meetings, the Commission entered closed session to discuss the appointment of Richard Storm as Commissioner of the Department of Fish and Wildlife Resources. Briefly stated, the Appellant claimed that at each of these meetings, the Commission violated the Act when it failed to adequately explain the purpose for entering closed session. He also claimed that the Commission could not conduct its discussions about Commissioner Storm in closed session under KRS 61.810(1)(f). In a timely response, the Commission denied that it had violated the Act as alleged. This appeal followed.

When a quorum of members of a public agency discusses, or takes action on, public business over which it has jurisdiction, a "meeting" occurs and it shall be open to the public. KRS 61.810; *see also Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 475 (Ky. 1998). Under KRS 61.810(1), a public agency may discuss several enumerated topics in closed session without the public present. Prior to entering closed session to discuss some of these topics, the public agency must give notice in open session "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." KRS 61.815(1)(a). However, this notice is not required when a public agency is discussing pending or proposed litigation, KRS 61.810(1)(c). *See* KRS 61.815(2) (exempting discussions under KRS 61.810(1)(c) "from the requirements of" KRS 61.815(1)); *see also Cunningham v. Whalen*, 373 S.W.3d 438, 441 n. 12 (Ky. 2012) ("KRS 61.815(2) also exempts the litigation exception 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 be taken.").

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." A public agency must provide proper notice when it is entering closed session to discuss employees under KRS 61.810(1)(f). A public agency may not rely on this exception to discuss "general personnel matters in secret." *Id*. Because the statute expressly forbids the discussion of "general personnel matters in secret," this Office has found that a public agency must state more than "personnel matters" as the basis for relying upon KRS 61.810(1)(f) to enter closed session. *See, e.g.*, 97-OMD-110 (finding that, prior to entering closed session under KRS 61.810(1)(f), the agency must state at a minimum whether the discussions are likely to lead to appointment, likely to lead to discipline, or likely to lead to dismissal of an employee).

Regarding the types of discussions to which KRS 61.810(1)(f) may apply, Kentucky courts have held that public agencies may not rely on this exception to discuss an employee's voluntary resignation and subsequent reemployment as an independent contractor. *See Carter v. Smith*, 366 S.W.3d 414, 421 (Ky. 2012). That is because a voluntary resignation is not a "dismissal" as contemplated by the statute. *Id*. And although the individual would have been appointed to perform work on behalf the public agency, the individual was being appointed as an independent contractor—not as an employee. For that reason, the exception did not apply. *Id*. at 422.

No Kentucky court has held that KRS 61.810(1)(f) does not apply when a public agency "reappoints" an employee. This Office has previously found that the "purpose" of this exemption is to avoid "reputational harm" to current or prospective employees. *See* 11-OMD-066. Relying on this supposed purpose, instead of the text itself, this Office found that there are no "reputational harms" associated with "reappointing" an employee. The suggestion is that

there is no risk of reputational harm because there are no other prospective applicants who would be denied employment, and no inference could be drawn that those nonexistent applicants were denied for possessing lesser qualifications. *Id*. Of course, even if this reasoning were supported by the text of the Act, such reasoning ignores the fact that a public agency may require frank discussions with the employee that the agency is reappointing about that employee's past performance and areas that the public agency expects the employee will improve if given the reappointment. It also ignores the fact that the decision *not* to reappoint an employee could be considered a dismissal, depending on the terms of that employee's contract. *See*, *e.g.*, *Gibson v. Bd. of Educ. of Jackson Cty.*, 805 S.W.2d 673 (Ky. App. 1991) (the failure to renew a teaching contract operated to dismiss the teacher without due process). Thus, one can imagine circumstances in which the decision to reappoint or dismiss an employee might not be made until after the public agency has had its frank discussion with the employee about ways to improve. If the employee agrees to improvement, he may be reappointed, but it does not mean that his reputation would not be harmed if the discussions were conducted in public. Therefore, if the supposed "purpose" of KRS 61.810(1)(f) is to protect individuals from reputational harm, that purpose is not always served by a bright-line rule that discussions leading to reappointment are not exempt under KRS 61.810(1)(f).

This Office need not engage in this "reputational harm" analysis because the text here controls. Simply put, KRS 61.810(1)(f) permits public agencies to discuss the "appointment" of an employee in closed session. When applying statutes, this Office must apply the plain meaning of the words chosen by the General Assembly. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). The word "appoint" means "to choose or designate (someone) for a position or job, especially in government." *Black's Law Dictionary* (11th ed. 2019). So long as "someone" has been chosen or designated to fill the position, that person has been "appointed." It does not matter if the person had been appointed previously. And it does not matter if the conversation about that person will or will not harm his reputation because KRS 61.810(1)(f) says nothing about reputation. Instead, KRS 61.810(1)(f) plainly applies in *any* instance in which the discussions may lead to the "appointment" of an employee, regardless of whether that employee had been previously appointed.

With these principles in mind, we turn to the Commission's challenged conduct.

First, the Appellant alleges that during open session at its meeting on January 31, 2020, the Commission notified the public of its intent to enter

closed session to discuss "a personnel matter."[1] The Commission cited KRS 61.810(1)(f), and the privacy of the employee, as grounds for entering the closed session. Upon returning to open session, the Commission unanimously voted to "support" Commissioner Storm.[2] The Commission further voted to pursue its option to extend Commissioner Storm's contract, following review of certain benefits that would be offered under the contract.

Here, the Commission discussed a topic that was not exempt under KRS 61.815(2) from the notice requirement of KRS 61.815(1), and therefore the Commission was required to provide notice of the reason for entering closed session. But the Commission only stated that it was discussing "a personnel matter." It did not state whether the discussion would lead to the potential appointment, discipline, or dismissal of an employee. KRS 61.810(1)(f) forbids the discussion of general personnel matters in closed session, so the Commission was required to affirmatively state in open session whether the discussions would be about appointing an employee, disciplining an employee, or dismissing an employee. *See, e.g.,* 97-OMD-110. Because it failed to do so, it violated the Act. Nevertheless, it was clear that the Commission discussed the "reappointment" of the Commissioner. For the reasons already explained, a "reappointment" is an "appointment" within the meaning of KRS 61.810(1)(f) and the Commission was justified in conducting discussions about the reappointment of the Commissioner in closed session.[3]

Despite the Commission's unanimous support for Commissioner Storm on January 31, 2020, the Tourism, Arts, and Heritage Cabinet ("Cabinet") refused to proceed with executing the contract. That ultimately left the Commission without a Commissioner, and it resulted in litigation between the Cabinet and the Commission regarding the Commission's authority to appoint its Commissioner. Then, on April 1, 2021, with litigation between the Cabinet

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[1] All three disputed meetings were recorded. The recordings are accessible on the Commission's website. *See* https://fw.ky.gov/More/Pages/Commission-and-Committee-Meeting-Archive.aspx (last accessed May 10, 2021).

[2] During the meeting, the Commission did not identify the employee to which it was referring. Based on the parties' statements on appeal, it is clear that "the employee" to which the Commission was referring was Commissioner Storm.

[3] 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 Commission did not cite this statute prior to entering closed session. But 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.

and the Commission pending, the Commission held a special meeting. During the open portion of the meeting, the Commission notified the public of its intent to enter closed session under KRS 61.810(1)(c) and (f).[4] The Commission's stated reason for entering closed session was to discuss "a personnel matter, including ongoing litigation, and the session will be closed to protect the privacy of affected personnel and to maintain attorney-client confidentiality." A representative of the Cabinet objected to the Commission conducting discussions without a Cabinet representative being present. The Commission noted that the litigation to be discussed involved litigation against the Cabinet, and that the Cabinet's presence during discussions could affect the Commission's ability to discuss the litigation with its attorney. The Commission resolved to permit the Cabinet's attendance during the portion of closed session in which the "personnel matter" was being discussed, but the Cabinet would not be permitted to remain in closed session during the discussion of the pending litigation. Upon returning from closed session, the Commission unanimously approved the appointment of Commissioner Storm with one member abstaining. The Commission authorized the presiding officer to negotiate the terms of the contract and to return with a proposed contract for approval at a future meeting.

Similar to its first meeting, the Commission did not state whether the "personnel matter" was a discussion that would lead to the appointment, discipline, or dismissal of an employee. KRS 61.810(1)(f) forbids discussions of general personal matters in secret. Therefore, to assure the public that the public agency is discussing a specific employee, and that the discussion will be limited to one of the three subject matters authorized by the exception, the public agency must provide more detail before entering closed session under KRS 61.810(1)(f). Because the Commission did not provide that detail, it violated the Act. But for the reasons previously stated, KRS 61.810(1)(f) authorized the Commission to discuss the appointment in closed session.[5]

The Appellant also claims that the Commission improperly relied upon KRS 61.810(1)(c), the litigation exemption, to conduct closed session discussions at this meeting. He claims that the Commission did not specifically

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[4] In entering closed session, the Commission relied on a script prepared by its counsel, a Cabinet attorney.

[5] The Commission argues that the Commissioner position was vacant at the time of this meeting. It therefore argues that it "appointed" Commissioner Storm to fill the vacancy, and thus it could not have "reappointed" him. But for the reasons explained, this Office finds that there is no distinction, for the purposes of KRS 61.810(1)(f), between an "appointment" and a "reappointment."

identify the litigation that was pending prior to entering closed session, and it did not state whether the discussion would involve litigation preparation or strategy. However, the notice requirements under KRS 61.815(1) do not apply to discussions being conducted under KRS 61.810(1)(c), the litigation exemption. KRS 61.815(2); *see also Cunningham*, 373 S.W.3d at 441 n. 12. Moreover, when the Commission responded to the Cabinet's objection to entering closed session, it made clear that it was planning to discuss litigation in which the Cabinet was an adverse party. Accordingly, the Commission provided notice of the litigation that it would be discussing and it did not violate the Act in this regard.

On April 14, 2021, the Commission again held a special meeting. Prior to entering closed session at this meeting, the Commission stated that it would be discussing "a personnel matter" and that such discussion would be closed under KRS 61.810(1)(c) and (f). The Commission did not specify what litigation it would be discussing, but the Commission again engaged in an exchange with the Cabinet similar to that which occurred on April 1. Like its previous meetings, the Commission did not specify that the "personnel matter" would involve discussion of an appointment. On returning from closed session, the Commission voted in open session to approve the contract and further voted to amend the contract from a term of one year to two years.

Here, the Commission violated the Act in the same way that it did previously – by failing to affirmatively state whether the "personnel matter" was one of potential appointment, discipline, or dismissal. Of course, it is apparent that the Commission intended to discuss the "appointment" of Commissioner Storm. But even though that fact was apparent, KRS 61.815(1) required the Commission to state whether the discussions would be about appointment, discipline, or dismissal. Its failure to do so violated the Act. Nevertheless, for the reasons previously explained, KRS 61.810(1)(f) authorized the Commission to hold these discussions in closed session. *See, e.g.*, 96-OMD-97 (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). Thus, aside from its technical violation, the Commission did not otherwise violate the Act at its April 14, 2021 meeting.

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.

Daniel Cameron
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/s/Marc Manley
Marc Manley
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Distributed to:

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