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22-OMD-258

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In re: Kurt Wallace/Jefferson County Board of Education

Summary: The Jefferson County Board of Education (“the Board”) violated the Open Meetings Act (“the Act”) when it imposed a condition of attendance in violation of the Act.

Open Meetings Decision

Kurt Wallace (“the Appellant”) submitted a complaint to the Board objecting to his inability to attend its meeting at the VanHoose Education Center on August 2, 2022. Specifically, he claimed various officers present to provide security for the meeting prevented him from attending unless he wore a face mask or a face shield, or he submitted to a test for Covid-19, which the Board’s agents would have administered immediately. The Appellant refused, and was therefore prohibited from entering the meeting. In a timely response, the Board denied any violation of the Act had occurred. This appeal followed.

The purpose of the Act is to ensure that “the formation of public policy is public business and shall not be conducted in secret.” KRS 61.800. It is for this reason that “[n]o condition other than those required for the maintenance of order shall apply to the attendance of any member of the public at any meeting of a public agency.” KRS 61.840. The Office has previously noted that KRS 61.840 “vests the public with a virtually unconditional right to attend all meetings of a public agency.” 00-OMD-169. Therefore, a “condition” for the “maintenance of order” means an agency action to remove a person who is disrupting a meeting to the point at which business cannot be done. *See, e.g.*, 14-OMD-022 (person was not so disruptive as to warrant his removal from the meeting).

On appeal, the Board does not dispute the Appellant's claim that its agents asked him to wear a face mask or face shield, or to submit to a Covid-19 test. However, the Board claims these conditions were conditions to enter its building—not its meeting inside its building. This is a distinction without a difference. The Board's policy prevented the Appellant from entering the Board's building to attend and observe a meeting of the Board. The Office has previously found that an agency can violate KRS 61.840 if it chooses as its location for meetings a building with entry conditions that are unnecessary to maintain order. *See, e.g.*, 18-ORD-132 (noting the Kentucky Board of Education would have violated KRS 61.840 if there had been sufficient proof in the record that a person was denied entry to the building for refusing to sign in with the front desk). Clearly a person cannot attend a meeting if he does not have the ability to enter the building in which it is held. And here, the Board's policy conditioned the Appellant's entry into the building, and thereby his attendance at the meeting within, on whether he would wear a face mask or face shield, or submit to a medical test.

KRS 61.840 does allow an agency to impose some conditions on attendance. However, those conditions must be "required for the maintenance of order." *Id.* Therefore, the question is whether face masks, face shields, or medical tests are conditions "required for the maintenance of order" within the meaning of KRS 61.840. The Board says that, at the time of the meeting, the community spread of Covid-19 in Jefferson County was "high," according to the Centers for Disease Control and Prevention. According to the Board, "[k]eeping public meeting participants healthy and, as to the required JCPS-employee participants able to continue working post hearing free of illness, as the COVID-19 health crisis continues is the very essence of taking necessary steps to maintain order." But the Board stretches the clear meaning of to "maintain order" too far. A public health measure such as a requirement to wear a face mask or shield, or to submit to Covid testing, is intended for maintaining public *health*, but it has nothing to do with maintaining *order*.¹

¹ In 22-OMD-177, the Appellant alleged the Board violated the Act at a meeting conducted by a different public agency because he was similarly denied entry at that meeting for not wearing a face mask. In dismissing the appeal on procedural grounds, this Office noted, "Whether the Board's face mask policy is supported by law or sound judgment is a wholly separate question from whether the Board violated the Open Meetings Act at a meeting *it did not conduct*." *Id.* (emphasis added). While the Office expresses no opinion on the validity of the Board's policy in other circumstances, this Office nevertheless must carry out its mandate to decide "whether the agency violated the provisions of KRS 61.805 to 61.850." KRS 61.846(2). And here, the Board placed a condition on the Appellant to attend its meeting that was not required to maintain order, in violation of KRS 61.840.

There is no evidence the Appellant would have disrupted the meeting at all, much less to the point public business could not occur, if he had attended the meeting without submitting to the Board's unauthorized requirements.² Accordingly, the Board violated the Act when it placed a condition on the Appellant that was unnecessary to maintain order and which prevented him from attending its meeting on August 2, 2022.

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.

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Distributed to:

Kurt Wallace
Tyson Gorman
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² Both parties agree that there was a large gathering of people outside the building protesting various things. Some may have been protesting in support of the Board's Covid-19 policies, while others may have been protesting against those policies. On appeal, the Board claims the existence of these protests proves it needed to maintain order. But the Act does not allow the Board to impose conditions on meeting attendance without those conditions having a direct nexus to maintaining order inside the meeting itself.