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23-OMD-103

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In re: Larry G. Bryson/Laurel County Board of Education

Summary: In appeals to the Office under the Open Meetings Act ("the Act"), the Office cannot resolve factual disputes or determine the credibility of witnesses. Accordingly, the Office cannot find that the Laurel County Board of Education ("the Board") violated KRS 61.810(2) by holding a series of less-than-quorum meetings.

Open Meetings Decision

Larry G. Bryson ("the Appellant") submitted a complaint to the presiding officer of the Board alleging it had violated the Act by holding a series of less-than-quorum meetings to discuss replacing him as the Board's attorney. Specifically, the Appellant alleged that three of the Board's five members had met in secret prior to its regularly scheduled meeting on January 9, 2023, and before a subsequent meeting on January 23, 2023, to discuss replacing him as counsel to the Board. In a timely response, the Board denied the three members discussed that subject outside of those two public meetings. This appeal followed.

Under KRS 61.810(1), "[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," except in certain situations not relevant here. Moreover, under KRS 61.810(2), "[a]ny series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of [KRS 61.810(1)], shall be subject to" KRS 61.810(1). In other words, a public agency may not intentionally avoid the Act's requirement to discuss or take action on public business in a meeting open to the public by holding smaller meetings that, when those

in attendance are combined, would result in a quorum of the members having discussed or taken action on such public business.

Before proceeding to the merits of the Appellant's complaint, the Office must first address its limitations. While the Attorney General recognizes his duty to review complaints and agencies' responses thereto to determine whether a violation of the Act has occurred, KRS 61.846(2), the Office cannot resolve competing factual claims about events that may or may not have transpired. *See, e.g.*, 00-OMD-169. The Act does not permit the Office to issue subpoenas, take testimony, or judge the credibility of witnesses. Nor could it, even if authorized to do so, in the short time frame provided for this Office to render a decision. *See* KRS 61.846(2) (requiring the Attorney General to issue a decision within ten business days). Disputes that turn heavily on competing evidence are better suited for review in circuit court. *See* KRS 61.848. This is one such case.

Here, the Appellant provides evidence that, he argues, supports his claim that three Board members violated KRS 61.810(2) when they discussed replacing him as Board attorney. First, in response to his requests to inspect the Board's records, he obtained text messages between multiple Board members and the Board's new attorney. These text messages include text messages solely between individual Board members and the new attorney, as well as some "group text" messages that included group conversations among multiple Board members. The text messages between the new attorney and individual Board members, however, do not demonstrate that a violation of KRS 61.810(2) occurred. Rather, those text messages show three Board members supported the new attorney, but the new attorney, who was the only nexus between these three independent conversations, was not himself a Board member. The new attorney's text messages with individual Board members does not constitute a series of less-than-quorum meetings because those conversations did not occur *among the Board members.*[1]

[1] The Office notes that it is questionable whether such conversations would have violated KRS 61.810(2) even if the new attorney was a Board member. While the Office previously may have considered written communications, such as emails, among a quorum of members to be subject to the Open Meetings Act, *see, e.g.*, 14-OMD-015, that interpretation lacks textual support from the Act. It also lacks any basis in what the word "meeting" means. It is not necessary to decide that question here, however, because none of the text messages provided on appeal document three Board members discussing the replacement of the Appellant. The closest the Board came to engaging in such a conversation is documented by texts the Board provides in response to the appeal. There, one Board member asked to place the topic of the Appellant's replacement as counsel on the agenda because he believed the Board needed new counsel. A second member expressed his disagreement with that belief. A third member then stated he believed such a conversation should be held in closed session rather than open session at the meeting, but he did not express an opinion as to the merits of the proposal. Thus, the group text shows two members discussed whether to retain the Appellant, but the third member did not discuss the merits of such a proposal and limited his statements to whether and where to place the topic on the agenda. This Office has previously found that discussions that merely relate to the administrative function of placing matters on the agenda do not constitute discussions of "public

Regarding the group text messages the Appellant provides, none involve discussions of his replacement. Rather, one is a discussion about placing an athletics policy on the agenda, in which it appears all five members and the new attorney were in the group text, but only one member discussed his opinion about the policy. The remaining members who engaged in the discussion limited their statements to whether the matter should be addressed in open or closed session at a regularly scheduled meeting. Because discussions about placing a matter on the agenda do not constitute "public business," *see, e.g.*, 13-OMD-086, this conversation did not result in a quorum discussing public business by text messages.[2] The other group text message involved three members noting the Chief of Police for Laurel County Public Schools had resigned, but did not include any discussions about what the Board should do about it, other than one member mentioning a name for a potential interim replacement. As such, this type of message was limited to educating the members about that Chief of Police's resignation. *See* KRS 61.810(2) ("Nothing in [KRS 61.810(2)] shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues"). Therefore, it did not constitute a series of less-than-quorum meetings under KRS 61.810(2).

The Appellant also offers as evidence the affidavits of two Board members, the Superintendent, and himself. However, these affidavits can be summarized generally as the affiants' *beliefs* that three Board members must have met or discussed replacing the Appellant previously because they believed "the decision" had already been made. None of the affiants state they observed the three Board members discussing that topic. In response, the Board offers the affidavits of two members who swear they did not engage in such conversations. Rather, they claim to have each independently come to the decision to replace the Appellant. The Board further provides the minutes of the January 9 meeting, in which the first full discussion of replacing the Appellant occurred and which documents a 2-2 vote to replace the Appellant, with one member abstaining. According to the Board, if the three members who ultimately decided to accept the Appellant's resignation on January 23 had already decided to replace him before the January 9 meeting, then one of them would not have abstained from the vote to replace him on January 9. According to the Board, this is proof that the decision had not been secretly made *ex ante*. The abstaining member, who submitted an affidavit in support of the Board, swore that he did not have any conversations about replacing the Appellant with a new attorney, and his

business," and therefore, do not trigger KRS 61.810(1) or (2). *See, e.g.*, 19-OMD-123; 13-OMD-086; 00-OMD-171. Accordingly, the third member's limited statements about whether to place the subject on the agenda for open or closed session did not constitute the necessary third member to establish a quorum.

[2] Nor were they for "the purpose of avoiding" the Acts requirements, KRS 61.810(2), as the very purpose of those statements was clearly to move the discussion from text messages to a properly noticed and scheduled meeting.

reason for switching from an "abstain" to an "aye" on January 23 rested on statements the Appellant made at the public meeting on January 9.

Thus, the record here contains affidavits in support of the Appellant, in which the affiants swear they *believe* secret meetings occurred, and affidavits in support of the Board, in which the affiants swear no such secret meetings occurred. The mere stated belief that secret meetings occurred is not evidence that they did occur, especially not when rebutted by the Board members, who swear such meetings did not occur. *See, e.g.*, 18-OMD-060 (mere speculation that secret meetings must have occurred is insufficient). In terms of the Appellant's argument, these affidavits demonstrate, at best, a factual dispute turning on the credibility of witnesses. The Board members swear they did not meet, and the Appellant's affiants swear to a belief that they did, but they do not swear to have observed or been a party to any secret meeting. Accordingly, this Office cannot find the Board conducted a series of less-than-quorum meetings in violation of the Act.

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 emailed to OAGAppeals@ky.gov.

Daniel Cameron
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s/ Marc Manley
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Distributed to:

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