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23-OMD-112

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In re: Danielle Bell and David Meyer/Kenton County Board of Elections

Summary: In appeals to the Office under the Open Meetings Act ("the Act"), the Office cannot make findings of fact based on disputed evidence. Accordingly, the Office cannot conclusively determine whether the Kenton County Board of Elections ("the Board") violated the Act when three of its four members submitted to the State Board of Elections a letter in opposition to the removal of its fourth member. However, the Board violated the Act when it failed to adequately explain the basis for its denial of a complaint.

Open Meetings Decision

Danielle Bell and David Meyer ("Appellants") submitted a joint complaint to the Board alleging it had violated the Act by sending to the State Board of Elections ("SBE") a letter in support of the current Kentucky Democratic Party representative on the Board. As a proposed remedy, the Appellants asked the Board to retract the letter of support, "publicly apologize for its flagrant violation of" the Act, and require its members to undergo training with respect to the Act's requirements. Allegedly, the question of the representative's removal from the Board was a matter before the SBE. A letter containing the names of three of the Board's four members was submitted to SBE in support of allowing the representative to continue her service on the Board.[1] In a timely response, the Board denied the complaint, claiming it lacks jurisdiction to remove any of its members, and therefore, had not discussed "public business" or "taken action" within the meaning of the Act. Nevertheless, the Board offered to discuss at its next meeting why three of its members supported the representative. This appeal followed.

[1] The letter was not signed by any member, but rather, concluded with the names of three of the four members.

Under the Act, "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." KRS 61.810(1). The Act 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." KRS 61.805(3). The Act does not, however, define "public business" as used in KRS 61.810(1). Rather, the Supreme Court of Kentucky has interpreted the term to mean "the discussion of the various alternatives to a given issue *about which the* [agency] *has the option to take action*." *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 474 (Ky. 1998) (emphasis added).

Here, the Board claims not to have discussed "public business," as defined in *Yeoman*, because it did not have authority to determine whether the Kentucky Democratic Party representative should be removed from the Board. The Board is correct that only the SBE has the authority to remove members representing the political parties from county boards of elections. *See* KRS 117.035(2)(d)6. The Appellants, however, argue that the question is not whether the Board had the authority to retain or remove the member. They argue that the Board took action by *sending* a letter opposing the question of removal before the SBE.

If the Board members intended to act in their capacity as the Kenton County Board of Elections to officially endorse the representative, then the Appellants would be correct that a violation occurred. The collective decision to commit the Board officially, as an entity, to endorse one of its members would constitute "action taken" within the meaning of KRS 61.805(3). But it is not clear from this record that the letter constitutes the Board's official endorsement or its collective decision. The letter does not carry the indicia of official agency action. It is not, for example, on Board letterhead. Nor is it actually signed, or purport to be the official action of the Board. The Board Chair's name appears as the Kenton County Clerk, not as the Chair of the Kenton County Board of Elections. Similarly, the Sheriff's name appears in his capacity as Kenton County Sheriff, not as a Kenton County Board of Elections member. Of course, both of those officials are on the Board by virtue of their offices. *See* KRS 117.035(2)(a). But the letter could just as easily be interpreted as three individuals expressing their personal beliefs about business before another public agency. Members of public agencies do not lose their First Amendment right to speak on matters of public concern, even if those matters could impact them in their official capacities.[2]

[2] For example, it would not be a "meeting" of a school board if three of its five members testified before the General Assembly about a bill impacting public school funding. That is because the school board would not have jurisdiction over the funding bill, and so, its members' discussions of whether to support or oppose the bill would not be "public business" as to the school board. *See Yeoman*, 983 S.W.2d at 474.

Moreover, it is not clear from this record how the Board members came to the decision to place their three names on this letter. If they discussed the matter on the telephone, through video teleconferencing equipment, or in-person, then that too would be a violation. *See, e.g., Fiscal Court of Jefferson Cnty. v. Courier-Journal and Louisville Times Co.*, 554 S.W.2d 72, 73 (Ky. 1977) (affirming the trial court's judgment voiding a public agency's votes taken by telephone); *see also* KRS 61.805(1) (including "video teleconferences" within the definition of "meeting"). But if the members reached this decision through email, then it is not clear how that could constitute a violation because the word "meeting" as defined under KRS 61.805(1) does not include written communications.[3] Simply put, the Office cannot answer questions of disputed fact in these types of appeals. *See, e.g.*, 23-OMD-103. Therefore, the Office cannot find that the Board violated the Act when three of its members' names appeared on a letter that was sent to another government agency.

Nevertheless, the Appellants also argue the Board's response to their complaint failed to adequately explain the basis for its denial. Under KRS 61.846(1), a public agency's denial of a complaint "shall include a statement of the specific statute or statutes supporting the public agency's denial and a brief explanation of how the statute or statutes apply." Here, the basis for the Board's denial was its claim that it did not have jurisdiction over the public business that was the subject of the Appellants' complaint. However, the Board did not cite to any statute or other legal authority in support of that claim. Accordingly, because the Board's response was devoid of any citations to authority for its claim that it lacked jurisdiction over the subject matter, it failed to adequately explain the basis for its denial. For that, it violated the Act.

At bottom, the record on appeal is unclear as to whether the Board members acted as individuals or as the Kenton County Board of Elections when three of them appended their names to the bottom of a letter that does not expressly purport to be the Board's official action. It is questionable whether the letter could serve as an official action of the Board, because the Board does not have the authority to remove

[3] Although this Office has previously found "no appreciable difference between non-public telephone meetings and non-public email meetings," 14-OMD-015, there is a glaring distinction between agency telephone calls and agency emails. Specifically, agency-owned emails are "public records" within the meaning of KRS 61.870(2) and are therefore subject to public inspection, unless an exception under KRS 61.878(1) applies. Telephone calls that are not recorded cannot be subject to inspection because the oral communication has not been reduced to a writing or other record. In other words, the General Assembly has enacted an entire statutory framework—the Open Records Act—to provide for public inspection of an agency's written communications. The Open *Records* Act should not be conflated with the Open *Meetings* Act, as the two Acts are entirely distinct and carry different statutory rights, agency obligations, and remedies. *See Univ. of Ky. v. Hatemi*, 636 S.W.3d 857, 868-69 (Ky. App. 2021) (discussing the differences in the Attorney General's authority to review appeals brought under the Open Records Act from those brought under the Open Meetings Act). Nevertheless, given the lack of clarity in this record as to how the Board members arrived at the decision to send a letter of support, the Office cannot determine whether the Board conducted a "meeting" as defined under KRS 61.805(1).

one of its members, which was the topic of the letter. If the letter was intended to be from "the Board," and carry the full weight and credibility that comes with acting within that capacity, then the Board violated the Act by taking action as an entity outside of a meeting that was open to the public. However, if the letter was intended to be the three independent voices of citizens who also happen to be on the Board, then those citizens have a First Amendment right to voice their beliefs to another government agency. Moreover, if the letter was indeed intended to be from "the Board," the record on appeal is not clear as to how such a decision was rendered. Accordingly, given the plethora of unanswered questions of fact, the Office cannot determine whether the Board violated the Act. *See, e.g.*, 23-OMD-103. But the Board did violate the Act when it failed to adequately explain the basis of its denial, because it failed to cite to any authority for its claim to have not violated the Act.

A party aggrieved by this decision may appeal it by initiating an 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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#180

Distributed to:

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