



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-OMD-056

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In re: Lisa Gannoe/Eastern Kentucky University

Summary: The Office lacks jurisdiction to consider a complaint alleging that Eastern Kentucky University (“the University”) violated the Open Meetings Act (“the Act”) because the complaint was not first submitted to the presiding officer of a “public agency” subject to the Act.

Open Meetings Decision

Lisa Gannoe (“Appellant”) submitted a written complaint to the University’s general counsel and Office of Legal Services alleging its Department of Applied Human Sciences (“the Department”) violated the Act by excluding her from its faculty committee meetings. The Appellant’s requested remedy was that she be permitted to attend the Department’s faculty committee meetings in the future. In a timely response, the University denied any violation of the Act. First, the University noted that the Appellant did not submit her complaint to the presiding officer of the public agency accused of violating the Act. *See* KRS 61.846(1). Further, the University denied that its Department faculty committee qualifies as a “public agency,” and therefore, its faculty meetings are not subject to the Act. This appeal followed.

As an initial matter, the Office must be assured of its jurisdiction to render a decision under KRS 61.846(2). A complainant’s request for the Attorney General to review an agency’s denial of a complaint submitted under the Act is a statutory proceeding created by the General Assembly as an act of legislative grace. As such, a complainant must strictly comply with KRS 61.846 before invoking the Attorney General’s jurisdiction to review the complaint. *See, e.g.,* 22-OMD-177.

To invoke the Attorney General’s review under KRS 61.846(2), a complainant “shall begin enforcement” under subsection (1) of the statute. KRS 61.846(1). That provision requires the complainant to “submit a written complaint to the presiding

officer of the public agency suspected of” violating the Act. *Id.* Accordingly, to begin enforcement, the complaint may not be submitted to just any person at “the public agency suspected” of committing the violation, but to the agency’s “presiding officer” specifically. In 22-ORD-177, the Office dismissed a complaint alleging the Jefferson County Public Schools Site Based Decision Making Council had violated the Act because the complainant failed to submit his complaint to the presiding officer of that agency. Rather, he submitted his complaint to the Superintendent of the Jefferson County Public Schools and the school district’s general counsel. Similarly, here, the complainant submitted her complaint to the University’s general counsel, not to any person who could arguably be considered to be “the presiding officer” of a public agency subject to the Act.

In addition, the Appellant cannot comply with KRS 61.846(1) because the Department’s faculty committee is not a “public agency” subject to the Act. The Act states, “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). Further, the Act defines “member” as “a member of the governing body of the public agency and does not include employees or licensees of the agency.” KRS 61.805(4). Thus, the Act is not implicated when several *employees* of a public agency gather to discuss public business. The University explains that the members of the Department’s faculty committee are faculty, *i.e.*, employees, of the University. Thus, their meeting could only be subject to the Act if the Department’s faculty committee *itself* qualifies as a “public agency.” Under KRS 61.805(2), “public agency” means:

- (a) Every state or local government board, commission, and authority;
- (b) Every state or local legislative board, commission, and committee;
- (c) Every county and city governing body, council, school district board, special district board, and municipal corporation;
- (d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;

- (e) Any body created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act in the legislative or executive branch of government;
- (f) Any entity when the majority of its governing body is appointed by a “public agency” as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a “public agency,” a state or local officer, or any combination thereof;
- (g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and controlled by a “public agency” as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection; and
- (h) Any interagency body of two (2) or more public agencies where each “public agency” is defined in paragraph (a), (b), (c), (d), (e), (f), or (g) of this subsection.

The Department faculty committee is not a “state . . . government board, commission, [or] authority.” KRS 61.805(2)(a). Nor does it serve any legislative functions. *See* KRS 61.805(2)(b) and (c). It has not been created by a statute, executive order, ordinance, resolution, or other legislative act. KRS 61.805(2)(e). And it is not an interagency body of two or more public agencies. KRS 61.805(2)(h).

KRS 61.805(2)(d) also does not apply because the Department’s faculty committee is not “the policy-making board of an institution of education.” Rather, the University correctly notes that its Board of Regents is its governing body, and thus, “the policy-making board of an institution of education” that qualifies as a “public agency” under KRS 61.805(2)(d). *See* KRS 164.321. In contrast to its Board of Regents, which makes policy for the University, the Department’s faculty committee meets as “an informal working group . . . for coordination of . . . respective duties and responsibilities’ of the various needs within the academic department.” *See* 95-OMD-71 (holding that “the President’s Cabinet and the President’s Leadership Team” of a local community college were not “public agencies” subject to the Act). As such, the Department’s faculty committee meetings can “be characterized as staff meetings, or

administrative personnel meetings,” which are not meetings of a public agency subject to the Act. *Id.*

The Department’s faculty committee also does not qualify as a “public agency” under KRS 61.805(2)(g) because it was not created or controlled by a public agency, as defined by KRS 61.805(2). Rather, it was created, and its members are selected, by the Chair of the Department and the Dean of the College of Education and Applied Human Sciences, neither of which are themselves the policy-making body of the University. Accordingly, the only subsection under which the Department’s faculty committee could arguably be considered a public agency is KRS 61.805(2)(f). That is because “[a]ny entity when the majority of its governing body is appointed by a ‘public agency’ as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member *or employee of a “public agency,”* a state or local officer, or any combination thereof” qualifies as a public agency. KRS 61.805(2)(f) (emphasis added). Thus, KRS 61.805(2)(f) could arguably be interpreted such that a mere employee of a public agency can create a “public agency” by appointing a majority of “governing members” of the entity. And here, the Chair and Dean are themselves employees of a public agency and they appoint all members of the Department’s faculty committee.

However, KRS 61.805(2)(f) has existed in its current form since the Act was amended in 1992. *See* 1992 Ky. ch. 162 § 2. Since then, the Office has held that routine faculty meetings are not meetings of public agencies that are required to be open to the public. *See, e.g.,* 04-OMD-082 (public school faculty meetings). At some point, the topics of discussion become so focused on the administrative functions of the agency, as opposed to the deliberative process of public policy formation, that the group cannot seriously be considered a “public agency” subject to all of the procedural requirements of the Act.¹ *See* 18-OMD-101 (the University’s Council of Academic Affairs was not subject to the Act, notwithstanding its members were appointed by the Provost, because it “merely functions to advise the Board of Regents, with no policy or decision-making authority”). The Office finds little difference between the Department’s faculty committee and the University’s Council of Academic Affairs, 18-OMD-101, or Western Kentucky University’s Budget Council, 17-OMD-264. As such, the Office concludes that the Department’s faculty committee is not a “public agency” subject to the Act.

¹ After all, if the Department’s faculty committee is a “public agency,” it not only would have to allow public attendance, but would also be required to have a regular schedule of meetings, KRS 61.820; be constricted in calling special meetings, KRS 61.823; and take formal minutes, KRS 61.835.

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.

Russell Coleman
Attorney General

/s/ Marc Manley
Marc Manley
Assistant Attorney General

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Distributed to:

Lisa Gannoe
Dana Daughetee Fohl