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24-OMD-096

April 11, 2024

In re: Miranda Geers/Northern Pendleton Fire District Board of Trustees

Summary: The Northern Pendleton Fire District Board of Trustees (“the Board”) violated the Open Meetings Act (“the Act”) when it conducted a closed session to discuss “personnel issues” because KRS 61.810(1)(f) does not authorize discussion of general personnel matters in secret. The Board also violated the Act by selectively admitting the fire chief to its closed session when it did not explain the reason for his presence.

Open Meetings Decision

On March 27, 2024, in a written complaint submitted under KRS 61.846(1), Miranda Geers (“Appellant”) alleged the Board violated the Act at its meeting on March 11, 2024, by conducting a closed session “to discuss a personnel issue” without “stat[ing] whether the discussion [would] relate to either the appointment of, the dismissal of, or the discipline of an individual employee, member, or student.” The Appellant further complained that the fire chief “was permitted to stay during the [closed] portion of the meeting” while the general public was excluded. As a remedy for the alleged violations, the Appellant requested that the matters discussed in closed session be discussed again at an open meeting. In a timely response to the complaint, the Board stated it had gone “into [closed] session for personnel and for discussion of proposed or pending litigation against on behalf of the district,” and further asserted its legal counsel had advised that the Board “can request the Chief to attend those [closed] sessions.” This appeal followed.

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.” That exception, however, does not “permit discussion of general personnel matters in secret.” *Id.* On appeal, the Board does not claim its discussions in closed session related to the possible appointment, discipline, or dismissal of any individual. Rather, the Board merely states it “need[ed] to discuss . . . a personnel issue.” Likewise, the agenda for the March 11 meeting states the

Board would enter closed session under KRS 61.810(1)(c) for “[d]iscussions of proposed or pending litigation against or on behalf of the Fire District along with *personnel issues*” (emphasis added). While KRS 61.810(1)(c) does permit the Board to discuss proposed or pending litigation, it, like KRS 61.810(1)(f), cannot be used to discuss general personnel matters in secret. *See, e.g., Carter v. Smith*, 366 S.W.3d 414, 419–20 (Ky. 2012) (a school board could not rely on the litigation exemption to discuss the superintendent’s resignation and contract renewal in closed session when no litigation had been threatened).

Further, although the Board claims on appeal that, prior to entering closed session, it stated the exemption it “was using and for what reasons,” the Board does not specify which exemption it announced or the reasons it gave. *See* KRS 61.815(1) (requiring a public agency to announce, before entering closed session, the exemption on which it relies, explain how it applies, and vote on a motion to enter closed session unless discussing an exemption enumerated in KRS 61.815(2)). As the Office has previously explained, an agency relying on KRS 61.878(1)(f) must specifically announce whether the discussion is about the potential appointment, discipline, or dismissal of an employee before entering closed session to ensure the agency is not engaging in “discussion[s] of general personnel matters in secret,” which the exemption expressly forbids. *See, e.g., 21-OMD-091; 13-OMD-086*. Therefore, the Board violated the Act when it held closed discussions of “personnel issues” that did not pertain to the possible appointment, discipline, or dismissal of individual employees or members.

The Appellant also claims the Board improperly allowed the fire chief to attend the closed portion of the meeting. She points out that, under KRS 75.160(1), “[t]he chief of the fire department in fire protection districts shall attend all sessions of the board, *except executive sessions*” (emphasis added). This statute clearly provides that the fire chief’s presence in an executive session of the Board is not legally required. However, “[i]t does not preclude him from attending executive sessions.” OAG 82-182.¹

Nevertheless, the Attorney General has consistently stated public agencies must give some justification for the presence of non-members in a closed session of the governing body. Indeed, shortly after the Act was enacted, the Attorney General opined:

“When an agency . . . goes into closed session[,] it may allow [other] persons in the closed session [only] as long as there is a reason for their being there. [A non-member] who is brought into a closed session for a

¹ A fire chief may also serve as a member of the board of trustees, but if a conflict of interest arises on a particular matter, he must remove himself from that portion of the meeting. *See* OAG 82-409. Here, however, nothing in the record suggests the chief is a member of the Board.

purpose should remain in the session only as long as the purpose is being served. [T]he agency has the duty to explain why such persons are invited into the session.” OAG 77-560.

This is because “a public meeting of a public body is either open to everyone under the [Act] or closed to everyone under a statutorily recognized exception to the [Act], and there is no principle of selective admission set forth in the [Act].” OAG 92-146. Accordingly, a public agency may not “invite certain people to be merely spectators in a closed session and at the same time bar certain other people from becoming spectators.” 18-OMD-091; *see also* 08-OMD-212; 01-OMD-152; 00-OMD-219. However, “[t]he standard to justify the presence of a non-member in a closed session is not excessively high.” 12-OMD-202. Rather, “[a]ny person who the [agency] believes can contribute information or advice on the subject matter under discussion may be invited into the executive session.” OAG 77-560. Similarly, “an agency clerk may be needed to take notes [or] an agency attorney may be needed to provide legal advice on proposed or pending litigation.” 13-OMD-006. But in any such case, the agency “must provide an explanation for the necessity of their presence and they must leave after their presence is no longer required.” 18-OMD-235.

Here, the Board asserts the fire chief was present in the closed session because he “asked if he was needed and due to the issues, it was requested, he stays in executive session with” the Board members. However, by stating the fire chief’s presence was requested in the closed session “due to the issues,” the Board has not meaningfully explained why the chief’s presence was necessary. Without some specific justification for his admission to the closed session, the fire chief stands in the same shoes as any other member of the public. Therefore, the Board violated the Act when it held a closed session in the presence of the fire chief while excluding the rest of the public.

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.

Russell Coleman
Attorney General

/s/ James M. Herrick
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Distributed to:

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