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24-ORD-050

March 4, 2024

In re: Lawrence Trageser/Jeffersontown Fire–EMS District

Summary: The Jeffersontown Fire–EMS District ("the District") did not violate the Open Records Act ("the Act") when it did not provide records that do not exist.

Open Records Decision

Lawrence Trageser ("Appellant") submitted a two-part request to the District. First, he requested "the personnel file of [a specific] employee" including his "termination letters and resignation letters" as well as "documents pertaining to complaints, reprimands, disciplinary actions and internal investigation." Second, the Appellant requested the "complaint(s) that was/were filed, sent or brought to the attention of [the District] involving [a specific employee] falsifying a nurses [*sic*] signature" after "exchanging the possession of care for a patient at a healthcare facility during his employment." In response to part one of the request, the District stated it would make responsive records available for the Appellant's in-person inspection. In response to part two of the request, the District stated, "No responsive documents exist." This appeal followed.[1]

On appeal, the Appellant claims the employee was suspended, and therefore, the District should have produced a complaint against the employee and records listing "general or specific charges." In response, the District maintains that is possesses no additional records responsive to the Appellant's request. Once a public agency states affirmatively that a record does not exist, the burden shifts to the requester to present a *prima facie* case that the requested record does or should

[1] The District delayed the Appellant's access to the records under KRS 61.872(5) to redact personal information from the records responsive to part one of the request. The Appellant has not challenged the District's delay or the redactions it made. Rather, he asserts only that the District should have produced additional records.

exist. *See Bowling v. Lexington–Fayette Urb. Cnty. Gov't*, 172 S.W.3d 333, 341 (Ky. 2005). If the requester makes a *prima facie* case that the records do or should exist, then the public agency "may also be called upon to prove that its search was adequate." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 848 n.3 (Ky. 2013) (citing *Bowling*, 172 S.W.3d at 341).

The Appellant "believes through informant testimony" that a complaint was brought against the District employee. He also provides a copy of a suspension order signed by the District Chief and cites KRS Chapter 75 in support of his claim that formal charges must have been brought against the employee given his suspension. The Appellant's mere belief that records should exist, even if supported by "informant testimony," is not enough to establish a *prima facie* case that a written complaint was filed against the employee. However, the suspension order does support a finding that formal disciplinary measures were instituted against the employee.

KRS 75.130 establishes the procedure for disciplining fire protection district employees. KRS 75.130(1) states, "*Except as provided in* [KRS 75.130(5)] no member or employee of a fire protection district shall be . . . suspended . . . [until] charges are preferred and a hearing conducted as provided in this section." However, KRS 75.130(5) provides that a firefighter may be suspended if "the chief of the fire protection district has probable cause to believe a member or employee of a fire protection district has been guilty of conduct justifying dismissal or punishment." Thus, KRS 75.130(5) allows a chief of a fire protection district, even in the absence of a formal written complaint, to suspend an employee if he has probable cause to believe the employee is guilty of conduct justifying dismissal or punishment. Moreover, KRS 75.130(5) does not require a list of charges to be created and given to the employee before suspension is ordered, although the employee is ultimately entitled to a hearing on charges that presumably must be in writing.

Here, the suspension order specifically invokes the District Chief's authority under KRS 75.130(5) to suspend the employee. Further, the suspension order was entered on November 16, 2023, and the Appellant provides proof the employee resigned three weeks later, on December 6, 2023. Indeed, the Department has confirmed on appeal that the employee resigned before a formal complaint or charges against him were filed. Accordingly, to the extent the suspension order established a *prima facie* case that disciplinary action against the employee was initiated, the District has explained why it does not possess a written complaint or a list of "general or specific charges" brought against the employee. The Office, therefore, cannot find

that the District violated the Act when it claims it provided all records that were responsive to the request.[2]

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), 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/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

Lawrence Trageser
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Maurice A. Byrne, Jr.

[2] The Appellant has asked the Office to conduct an *in camera* review of the District's records and determine whether the disputed records exist. *See* KRS 61.880(2)(c). However, the Attorney General is not a "finder of documents," and cannot resolve factual disputes between parties about whether all responsive records have been provided. *See* 94-ORD-121. Thus, the Office declines the Appellant's request that it conduct an *in camera* review in order to confirm the District does not possess the requested records.