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13-OMD-078

May 20, 2013

In re: *The Kentucky New Era*/City of Hopkinsville Compensation Committee

Summary: City of Hopkinsville Compensation Committee violated the Open Meetings Act in discussing the continued employment of the City Budget Officer/Interim City Administrative Officer, the only candidate for permanent CAO, during a closed session held on April 2 under authority of KRS 61.810(1)(f); Committee has not sufficiently justified the presence of multiple non-members in the closed session.

Open Meetings Decision

The question presented in this appeal is whether the City of Hopkinsville Compensation Committee violated the Kentucky Open Meetings Act in holding a closed session during its April 2, 2013, special meeting for the purpose, in the words of complainant Carla Jimenez, of discussing a "[C]ity [A]dministrative [O]fficer contract for City Budget Officer" and Interim CAO Melissa Sellers Spurr¹ under authority of KRS 61.810(1)(f), pursuant to which "[d]iscussions or

¹ On March 13, 2013, Mayor Daniel Kemp announced that he was recommending to the Hopkinsville City Council that Mrs. Spurr be promoted to the position of CAO. Mrs. Spurr was apparently the only person to apply for the position that was left vacant following the departure of the previous CAO. She was previously named Interim CAO by Mayor Kemp. Mayor Kemp was "delighted to have such a high caliber person already working for the City who can be promoted to fill this very important position." Mayor Kemp apparently recommended a beginning salary of \$83,088.00 plus a car allowance in addition to various other city employee benefits. See <http://www.lite987whop.com/news/8121-hopkinsville-budget-officer-to-be>

hearings which might lead to appointment, discipline, or dismissal of an individual employee, member, or student . . ." may be held in closed session. The question presented is limited in scope; accordingly, our holding today is limited to its facts. By separate undated complaints directed to Committee Chairperson Charles G. Henderson and Mayor J. Daniel Kemp, respectively, Ms. Jimenez, a *Kentucky New Era* reporter, challenged the Committee's reliance on KRS 61.810(1)(f) because "Mrs. Spurr is already an employee of the city, and the proposed contract the committee was set to discuss is essentially a promotion." Ms. Jimenez noted that Mayor Kemp and the Committee "have repeatedly referred to her tentative appointment to the CAO position as a promotion, thus the discussion of her proposed contract is not an appointment and instead centers around retaining Mrs. Spurr as an employee."² She further alleged that in allowing Mayor Kemp, the Human Resources Officer, and five members of the City Council not appointed to the Committee to attend, Chairperson Henderson improperly permitted a meeting of a quorum of the City Council.³ To remedy the alleged error, Ms. Jimenez asked the Committee to "acknowledge this

promoted-to. Nothing in the record on appeal contradicts any of this publicly available information.

² *New Era* Editor Eli Pace has been quoted as indicating that "promotion" was never the newspaper's language; rather, "promotion" was the term used by the City "in more than one official announcement. Now, they're saying it's actually an appointment." While not dispositive in and of itself, the Committee has not refuted Ms. Jimenez's assertion regarding its characterization of the proposed action prior to receipt of her complaints although Chairperson Henderson and Mayor Kemp both described the discussion as one that "might lead to the appointment" of Mrs. Spurr in their written responses thereto.

³ Ms. Jimenez also claimed that the Committee "gave no reason and no explanation other than to cite the personnel exception" of the Open Meetings Act. Chairperson Henderson asserted that the Committee "announced its intention to go into closed session pursuant to this exception in order to have discussions which might lead to the appointment of Melissa Spurr as City Administrative Officer." The record on appeal is devoid of any objective proof to refute or substantiate either assertion. A review of existing legal authority confirms that "a public agency complies with the requirements of KRS 61.815(1)(a) and 61.810(1)(f) by announcing, during open session, the general nature of the business to be discussed in closed session (appointment, discipline, or dismissal of an individual employee(s)/member(s)), the specific reason for the closed session (which of these particular actions is contemplated), and which of the exceptions codified at KRS 61.810 is being invoked (KRS 61.810(1)(f)). If the Committee omitted any of the above prior to entering into closed session on April 2, it acted in contravention of *Ratliff*, above, KRS 61.800, and prior decisions of this office. See 12-OMD-102.

violation" and hold another meeting "to discuss in open those matters" that the Committee and the additional members of the City Council discussed privately on April 2.

In a timely written response dated April 8, 2013, which Mayor Kemp subsequently incorporated by reference in his April 11, 2013, response, Chairperson Henderson denied the allegations made by Ms. Jimenez. He advised that the Committee "announced its intention to go into closed session pursuant to [KRS 61.810(1)(f)] in order to have discussions which might lead to the appointment of Melissa Spurr as City Administrative Officer." General personnel matters were not discussed, Chairperson Henderson continued, "and the Committee correctly relied upon this exception during the closed session on April 2, 2013." In addressing Ms. Jimenez's allegation regarding the presence of the Mayor, the Human Resources Officer, and five City Council members not serving on the Committee during the closed session, he acknowledged that none of the individuals were members of the Committee, and simply asserted that the Committee "requested their attendance during the closed session," which, in his view, did not violate the Open Meetings Act. Mayor Kemp further noted in his response that the Committee "requested the attendance of the Mayor, the City Human Resource[s] Officer, and other Council members in order to provide information to the committee." He emphasized that the Committee meeting was "properly noticed, a proper motion to go into closed session was made pursuant to KRS 61.810(1)(f), no action was taken during the closed session, and no action was taken after the committee came out of closed session." Without admitting that a violation was committed, Mayor Kemp noted that the Committee would reconvene on April 23, 2013, at which time a "public discussion and vote" on the matter was expected. This appeal followed.

In her undated letter of appeal (received on April 30), Ms. Jimenez advised that the Committee is comprised of five (5) City Council members appointed by the Mayor;⁴ the City Council is comprised of twelve (12) members. She reiterated that going into closed session to discuss Mrs. Spurr's contract was "an improper use of the exemption" because Mrs. Spurr is already a City employee, the proposed contract would "retain Mrs. Spurr as a city employee," and the Committee was therefore discussing her promotion. Additionally, the

⁴ The Compensation Committee is unquestionably a "public agency" per KRS 61.805(2)(f).

Hopkinsville City Council essentially "had an unofficial quorum in the guise of a Compensation Committee" when the Committee went into closed session but invited the Mayor, the Human Resources Officer, and five other members of the City Council to attend.

This office finds *The Kentucky New Era's* position largely persuasive. Although Mrs. Spurr's current employment by the City would not, standing alone, render KRS 61.810(1)(f) inapplicable, this office has long recognized that KRS 61.810(1)(f) authorizes closed session discussions only if there is a potential for reputational damage and little, if any such potential exists here given that Mrs. Spurr was the only candidate for the position and that was a matter of public knowledge. See 03-OMD-148; OAG 83-415; 08-OMD-040. In addition, the Committee has not established that each nonmember in attendance was invited for the purpose of making a permissible or necessary contribution, and/or that each member remained in the closed session "only so long as [was] necessary to make his [or her] contribution to the discussion." 01-OMD-181, p. 6 (citation omitted). For these reasons, the Attorney General must conclude that the Committee "expanded the scope of the [personnel] exception and improperly concealed matters otherwise appropriate to the view of the public," *Floyd County Board of Education v. Ratliff*, 955 S.W.2d 921, 924 (Ky. 1997), regardless of whether the Committee took any final action during its April 2 closed session. See 00-OMD-113 (the Open Meetings Act prohibits unauthorized discussions as well as final action); 06-OMD-113; 08-OMD-145.

Upon receiving notification of Ms. Jimenez's appeal on behalf of *The Kentucky New Era* from this office, Hopkinsville City Attorney H. David Willen responded on behalf of the City. Mr. Willen advised that Mayor Kemp appointed the Compensation Committee, "during a full council meeting," to consider the "proposed appointment of Melissa Sellers Spurr as City Administrative Officer." Pursuant to KRS 83A.080, Mr. Willen explained, "the City Administrator is a non-elected office, which shall be appointed by the Mayor and shall be approved by City Council." He argued that Mrs. Spurr "falls within the clear language" of KRS 61.810(1)(f) and her current employment by the City "has nothing to do with the need to discuss these matters in closed session." In response to Ms. Jimenez's claim that the City Council had "an unofficial quorum in the guise of a Compensation Committee," Mr. Willen noted that no action was taken during the closed session by the Committee nor is there

any such allegation. According to Mr. Willen, the Act does not prohibit members of the City Council from attending meetings or closed sessions of the Committee. He asserted that allowing members of the City Council to "provide information and/or ask questions" of the Committee "serves a legitimate purpose." Because members of the City Council are not members of the general public, Mr. Willen concluded, but instead comprise "the actual body charged with the task of considering the City Administrative Officer contract," the actions of the Committee were not arbitrary. He reiterated that the Committee meeting was "properly noticed, a proper motion to go into closed session was made pursuant to KRS 61.810(1)(f), no action was taken during the closed session, and no action was taken after the committee came out of closed session." Mr. Willen further noted that a subsequent meeting was held at which time a public discussion and vote were held; a copy of the proposed Executive Order that resulted from the Committee's recommendation was attached to his May 3, 2013, response.

Even assuming that proper notice of the closed session was provided, neither the lack of any final action by the Committee nor the subsequent public discussion alters the relevant analysis or the result of this appeal. The Committee's reliance on KRS 61.810(1)(f) was misplaced on the unique facts presented. "Although the potential for reputational damage exists where several individuals apply for a position and some must be eliminated based on their lesser qualifications, such potential does not exist where the discussion relates to the continued employment of a current employee." 11-OMD-066, p. 6.

Fundamental to our analysis of the questions presented is the legislative statement of policy codified at KRS 61.800, declaring "that the basic policy of KRS 61.805 to KRS 61.850 is that the formation of public policy is public business and shall not be conducted in secret and the exceptions provided for by KRS 61.810 or otherwise provided by law shall be strictly construed." Acknowledging that extraordinary circumstances occur which might justify a public agency discussing public business during a closed session, the General Assembly created a number of exceptions to this general rule, which are codified at KRS 61.810(1)(a)-(n). Resolution of the instant appeal turns on the proper application of KRS 61.810(1)(f), pursuant to which public agencies may hold a closed session *only* for "[d]iscussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student. . . . This exception shall not be interpreted to permit discussion of

general personnel matters in secret[.]” Kentucky’s highest courts have recognized that “the failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good.” *Ratliff* at 24, citing *E.W. Scripps Co. v. City of Maysville*, 790 S.W.2d 450 (Ky. App. 1990). Consequently, “the courts of the Commonwealth must narrowly construe and apply the exceptions so as to avoid improper or unauthorized closed, executive or secret meetings.” *Id.* Adopting language from the Court of Appeals, the Supreme Court concluded that “the exceptions to the open meetings laws are not to be used to shield the agency from unwanted or unpleasant public input, interference or scrutiny.” *Id.* at 924.

In applying this provision, commonly referred to as the “personnel exception” of the Act, this office has consistently observed:

A public agency’s authority to go into a closed session relative to personnel matters is severely restricted. *General personnel matters cannot be discussed in a closed session.* The only personnel matters which can be discussed in a closed session by a public agency are those which might lead to the appointment, discipline, or dismissal of personnel of that particular agency. See 93-OMD-49[p. 3; OAG 90-125, p. 2].

Prior to going into closed session for one of the specific purposes authorized by KRS 61.810(1)(f), a public agency must state during the regular and open portion of the meeting the general nature of the business to be discussed and the reason for the closed session. While the public need not be advised as to the name of the specific person being discussed in connection with a possible appointment, dismissal, or disciplinary action, the public is entitled to know the general nature of the discussion which would be that it involves either a possible appointment, a possible dismissal, or a possible disciplinary matter relative to a specific unnamed person or persons.

In keeping with prior decisions, the Attorney General has declared that “matters only tangentially related to the appointment, or the discipline, or the dismissal of an individual employee cannot be discussed in closed session [under authority of KRS 61.810(1)(f)] . . .” 00-OMD-86, p. 3, and KRS 61.810(1)(f) must be “interpreted by this office in a manner consistent with the rule of strict construction codified at KRS 61.800, . . .” 99-OMD-94, p. 6. By enacting KRS 61.810(1)(f), the General Assembly “specifically intended to close discussions only of these three subjects *due to the potential for reputational damage*. Closed session discussions of other matters are expressly precluded by KRS 61.810[(1)(f)].” OAG 83-415, p. 2 (emphasis added)(holding that public agency improperly relied upon KRS 61.810(1)(f) to conduct a closed session for the purpose of discussing an employee’s resignation); 03-OMD-148, p. 7. See 94-OMD-103 (holding that discussing possibility of creating a new position during closed session is not proper); 00-OMD-113 (holding that any discussion by the city commission that was not restricted to whether disciplinary measures needed to be imposed on the police personnel who participated in a raid was not authorized by KRS 61.810(1)(f) and thus discussion relating to executive order was not properly the subject of an executive session); 03-OMD-089 (discussions of reorganization proposals that might necessitate dismissal of a CEO were improperly held in closed session because his reputational interest was not directly implicated); 08-OMD-040 (dismissal of an employee “as a necessary consequence of eliminating his position” could not be discussed in closed session as privacy/reputational interests were not at stake); 10-OMD-100; 12-OMD-118.

“Consistent with the rule of strict construction codified at KRS 61.800, [the Attorney General] has narrowly read the terms appointment, discipline, and dismissal to ensure that the words are given their ordinary, and not a strained or overly expansive, meaning.” 10-OMD-023 (citing *Lynch v. Com.*, 902 S.W.2d 813, 814 (Ky. 1995)); 12-OMD-145. Neither party has referenced, nor has our independent research located, any prior decisions addressing the application of KRS 61.810(1)(f) in this precise factual context, *i.e.*, promotion of an existing agency employee. However, a review of the foregoing line of authority reveals common threads which are certainly instructive. In 94-OMD-63, for example, the Attorney General, in relevant part, established the basic principle that a closed session discussion of the terms and conditions of a public agency employee’s continued employment was improper. *Id.*, p. 5 (distinguishing OAG 91-144, an advisory opinion recognizing the propriety of closed session contract

negotiations regarding possible appointment of a new agency employee); 96-OMD-97 (noting that 94-OMD-63 “involved negotiations with an employee in an attempt to secure continuance of her employment,” a situation that is not included within KRS 61.810(1)(f)). Significantly, as indicated, this office has recognized in various contexts that KRS 61.810(1)(f) authorizes closed session discussions “only if there is a potential for reputational damage.” 03-OMD-148, p. 7; 11-OMD-066. That potential exists “where several individuals apply for employment and some must be eliminated from consideration based on their lesser qualifications.” 02-OMD-21, p. 6.

No evidence has been presented here to suggest that anyone other than Mrs. Spurr was even being considered for the CAO position. In other words, the April 2 discussion essentially focused on securing her continued employment with the City, rather than “the comparative qualifications of the competing applicants for the purpose of selecting the best qualified to fill the vacant position[].” *Id.* The *latter* situation, as compared to the situation which prompted this appeal, has long been recognized as being appropriate subject matter to discuss in a closed session held under authority of KRS 61.810(1)(f). See OAG 77-392; 02-OMD-21. More recently, the Attorney General found that a public agency’s reliance on KRS 61.810(1)(f) to discuss the “potential retention of the interim CEO” was inappropriate, reasoning as follows:

The Board acknowledges that the closed session discussion focused on securing the continued employment of the interim CEO and not on reviewing the comparative qualifications of competing applicants for the purpose of identifying the best qualified applicant to fill a vacant position. Although the potential for reputational damage exists where several individuals apply for a position and some must be eliminated based on their lesser qualifications, such potential does not exist where the discussion relates to the continued employment of a current employee. Consistent with the rule of strict construction codified at KRS 61.800, and the longstanding position that the terms “appointment” and “reappointment” are not synonymous when the latter term is used to describe the continued employment of a current agency employee, we find that the Board violated KRS 61.810(1) when it

conducted a closed session discussion of the retention of the interim CEO.

11-OMD-066, p. 6; 12-OMD-145 (partially relying upon 11-OMD-066 in holding that discussion in closed session of new contract for current superintendent did not relate to "appointment" of agency employee); compare 10-OMD-023 (acknowledging that "appointment" is not synonymous with "reappointment" when the latter term is used to describe renegotiation of a contract with a current agency employee, but holding that said terms were synonymous "for all practical purposes," in that case as the individual was a former employee, rather than a current employee, and the discussion thus focused on his possible appointment).

This reasoning applies with equal force on the facts presented. When viewed in light of the statutory mandate of strict construction set forth at KRS 61.800, the judicial directive to narrowly construe all of the statutory exceptions codified at KRS 61.810(1), and the foregoing line of decisions construing KRS 61.810(1)(f) in particular, the facts presented compel the conclusion that discussion by the Committee of Mrs. Spurr's "appointment," was, in fact, a discussion of her tentative promotion, or securing of her continued employment by the City, and specifically in the position that she was filling on an interim basis, a subject which falls beyond the narrow scope of that exception. See 11-OMD-115 (record on appeal contained no indication that other candidates for appointment were discussed in the closed session or that "individual reputational interests were at stake" and the discussion concerning the salary and benefit package associated with new position was impermissible). Even assuming, for the sake of argument, that KRS 61.810(1)(f) was otherwise properly invoked, the presence of individuals who were indisputably *not* members of the *Committee* itself was inconsistent with its reliance on that exception, and served "to defeat the protection it might otherwise have afforded." 01-OMD-152, p. 6.

In addressing the presence of nonmembers in a closed session, the Attorney General has recognized a limited exception for nonmembers who "can contribute information or advice on the subject matter under discussion," but emphasized that the nonmember "*should remain only so long as is necessary to make his [or her] contribution to the discussion.*" 01-OMD-181, p. 6, citing OAG 77-560, p. 3 (emphasis added). It appears from the record on appeal that the Mayor, the Human Resources Officer, and the 5 additional City Council members were not

only permitted to attend the April 2 closed session, but remained for the duration of the discussion. The Committee has not established that each nonmember in attendance was invited for the purpose of making a permissible contribution or that each nonmember stayed only as long as necessary. Chairperson Henderson simply confirmed that "the Committee requested their attendance" while Mayor Kemp subsequently advised that said nonmembers (including himself) were invited "to provide information" to the Committee. On appeal the Committee again stated that "no action was taken" during the closed session, which, to reiterate, is not dispositive, and generally asserted that allowing members of the City Council to "provide information and/or ask questions" served a legitimate purpose.

Selective admission contravenes the fundamental mandate of the Open Meetings Act found at KRS 61.810(1), pursuant to which "[a]ll meetings of a quorum of the members of a public agency at which any public business is discussed or at which action is taken, shall be public meetings, open to the public at all times[.]" See OAG 92-146 (holding that "a public meeting of a public [agency] is either open to everyone under the Open Meetings Act or closed to everyone under a statutorily recognized exception to the Open Meetings Act[, and t]here is no principle of selective admission set forth" in the Act); 00-OMD-219; 01-OMD-181. Because the public agency in 01-OMD-152 "offered no explanation for the presence of nonmembers in a closed session conducted under authority of KRS 61.810(1)(c)," this office found that it had improperly "engaged in the practice of selective admission in contravention of the requirements of the Open Meetings Act." *Id.*, p. 9; 08-OMD-212. If the presence of the Mayor, the City Council members, and the Human Resources Officer was "required for a *particular* purpose, such as . . . sharing information that *they alone possessed*," their presence cannot be said to have violated the Act. 13-OMD-006, p. 8 (emphasis added). Conversely, those individuals did *not* have a right to attend the closed session if their presence was not absolutely required or necessary as opposed to merely being convenient or desirable. *Id.* Regardless of their intention, the fact that a quorum of the members of the City Council did, in fact, hold a meeting within the definition of KRS 61.805(1) on April 2, at which it discussed public business beyond the view of the public as well as the remaining members of the City Council, not only makes the need for specific justification particularly compelling but also contravenes the mandatory language of KRS 61.810(1). In the absence of any specific justification, "their status was no different than any

other member of the public and they, too, [should have] left the meeting room" when the closed session commenced. Id.

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 should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

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Distributed to:

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