



COMMONWEALTH OF KENTUCKY  
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**12-OMD-139**

July 31, 2012

In re: Kevin Brumley/City of Bardstown Safety Committee/Selection Committee

*Summary:* City of Bardstown Safety Committee/Selection Committee violated KRS 61.815(1) by failing to state the general nature of the business to be discussed in closed session at its February 20, 2012, meeting, and the reason for the closed session, but did not violate the Open Meetings Act by discussing the qualifications of the candidates for fire chief, under authority of KRS 61.810(1)(f), even though its function was advisory.

*Open Meetings Decision*

The question presented in this appeal is whether the City of Bardstown Safety Committee/Selection Committee violated KRS 61.815(1) by failing to properly observe the requirements for conducting a closed session at its February 20, 2012, meeting. The record on appeal supports the allegations of the open meetings complaint only in part.

On July 2, 2012, Kevin Brumley submitted a written complaint to Committee Chairman Bobby Simpson in which he alleged that the committee violated the Open Meetings Act at its February 20 meeting by:

- failing to conduct a vote on the motion to conduct a closed session;
- failing to identify which of the three permissible topics for a closed session codified at KRS 61.810(1)(f) would be discussed;
- failing to state the reason for the closed session;



- failing to state the general nature of the business to be discussed in the closed session;
- discussing an unauthorized topic in closed session insofar as KRS 61.810(1)(f) permits discussion of "an individual employee" and the committee discussed twelve separate applicants; and
- discussing an unauthorized topic in closed session insofar as the committee had no power to appoint or dismiss an individual employee.

As a means of remedying these alleged violations, Mr. Brumley proposed that the committee "rule the February 20, 2012, closed session null and void," publicly apologize to the public and the press, cease conducting illegal closed sessions, and agree to undertake specified efforts to better understand the Open Meetings Act.

In a timely written response, Bardstown city attorney Thomas A. Donan responded to Mr. Brumley's complaint. He focused on the fact that the complaint was "premised on the unofficial minutes of the Safety Committee meetings," suggesting that the committee provide him with a copy of the minutes, after they are approved, at which time he can "determine whether or not you wish to pursue your open meetings complaint." Mr. Brumley thereafter submitted his open meetings appeal to this office. He, too, focused on the minutes of the February 20, 2012, meeting, alleging a number of improprieties with respect to the minutes that were not raised in his original complaint. Because Mr. Brumley did not identify these alleged violations in his July 2 complaint, this office cannot properly review them in this decision.<sup>1</sup> We focus on

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<sup>1</sup> KRS 61.846(1) provides:

If a person enforces KRS 61.805 to 61.850 pursuant to this section, he shall begin enforcement under this subsection before proceeding to enforcement under subsection (2) of this section. The person shall submit a written complaint to the presiding officer of the public agency suspected of the violation of KRS 61.805 to 61.850. *The complaint shall state the circumstances which constitute an alleged violation of KRS 61.805 to 61.850 and shall state what the public agency should do to remedy the alleged violation.* The public agency shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of the complaint whether to remedy the alleged violation pursuant to the complaint and shall notify in writing the person making the complaint, within the three (3) day period, of its decision. . . . An agency's response denying, in whole or in part, the complaint's requirements for remedying the alleged violation 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. The

Mr. Brumley's allegation that the committee violated KRS 61.815(1) at its February 20 meeting which he raised in his July 2 complaint.

In supplemental correspondence directed to this office after Mr. Brumley initiated his appeal, Mr. Donan amplified on the committee's position. On behalf of the committee, Mr. Donan acknowledged violation of KRS 61.815(1) and KRS 61.810(1)(f) based on the committee's failure to identify which of the three permissible topics for a closed session authorized by KRS 61.810(1)(f) were discussed. He denied Mr. Brumley's allegation that the committee lacked authority to screen the candidates for the position of fire chief in closed session because it lacked authority to appoint the chief. Mr. Donan analogized the committee's role to that of the superintendent screening committee whose closed session discussion of candidates for the position was approved in OAG 80-247. He did not address the remaining allegations of Mr. Brumley's July 2 complaint.

The committee acknowledges that it violated KRS 61.810(1)(f) by failing to state in open session that it was retiring to closed session for discussions which might lead to the appointment of an individual employee, namely, a new fire chief. It erred, as Mr. Donan concedes, by indicating that the purpose of its closed session was to discuss "the appointment, discipline, dismissal" of an individual employee. The requirement that the public agency identify which of these three topics will be discussed in closed session is firmly entrenched in the law.<sup>2</sup> Thus, in 97-OMD-110 the Attorney General 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,

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response shall be issued by the presiding officer, or under his authority, and shall constitute final agency action.

(Emphasis added.) Pursuant to 40 KAR 1:030 Section 1, the Attorney General "shall not consider a complaint that fails to conform to KRS 61.846(2), requiring the submission of a written complaint to the public agency and the public agency's written response." With respect to the alleged deficiencies in the meeting minutes, Mr. Brumley did not "state the circumstances which constitute an alleged violation" in his original complaint.

<sup>2</sup> We acknowledge that a discussion that begins as one that might lead to discipline of an employee may progress to a discussion that might lead to the dismissal of an employee if the allegations of misconduct are more serious than originally thought.

discipline, or dismissal of personnel of that particular agency. See 93-OMD-49, at page three, and OAG 90-125, at page two.

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.


97-OMD-110, p. 3. The committee's failure to identify which particular type of discussion it intended to conduct constituted a violation of KRS 61.815(1)(a). So too did its apparent failure to describe the reason for the closed session, namely to protect the reputational interest of the candidates for fire chief it did not recommend. The committee does not refute this allegation and its silence precludes a contrary finding.

The committee did not, however, violate the Open Meetings Act by discussing an unauthorized topic in closed session. The Act has long recognized that a search committee, screening committee, or selection committee may properly discuss the various qualifications of competing applicants for public employment in closed session, for the reason identified above, even if they are only tasked with making recommendations or advising the appointing authority. See, e.g., *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*, 732 S.W.2d 884 (Ky. 1987); OAG 80-247; 10-OMD-146. Public agencies regularly establish advisory committees whose sole purpose is to narrow the field of qualified candidates for appointment to public office, and this practice was expressly approved in OAG 80-247. It is counterintuitive to suggest that such advisory bodies lack authority to conduct closed session discussions of the candidates' qualifications because they are not empowered to make the appointment. Although their role is to make recommendations, they enjoy the same right to conduct closed session discussions "that might lead to the appointment . . . of an individual employee" as the agencies that created them, and for the same reasons, namely the protection of the reputational interests of

unsuccessful candidates. Mr. Brumley's allegation that the committee conducted an unauthorized closed session discussion is therefore without merit.

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:

Kevin Brumley  
Bobby Simpson  
Thomas A. Donan