

Dick Heaton
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Bardstown, KY 40004
February 21, 2017

Hon. Jason P. Floyd
Fulton, Hubbard & Hubbard
PO Box 88
Bardstown, KY 40004

Dear Hon. Jason P. Floyd:

The undersigned is responding to your February 15, 2017 letter on behalf of all members of the Bardstown City Council.

KRS 61.846 requires that an open meeting complaint be sent to the "presiding officer of the public agency". KRS 83A.130(5) provides: "The mayor shall preside at meetings of the council." Mayor Royalty presided over the portion of the meeting that he now complains of. That portion of the meeting was the consideration of the motion to go into closed session.

The undersigned was appointed the presiding officer over the portion of the meeting that occurred after the closed session and it is for that reason that the undersigned is sending this response.

The apparent purpose of filing the complaint with the presiding officer is that the presiding officer controls the conduct of the meeting and is thus responsible if the meeting is not properly conducted. Mayor Royalty controlled the portion of the meeting when the motion to go into closed session was considered.

Robert's Rules of order provide: "It is the duty of the presiding officer to enforce the rules and orders of the assembly, without debate or delay." It is disingenuous for Mayor Royalty to be in charge of the meeting, fail to rule a motion out of order that he believes is improper, fails to object to the motion, not oppose the motion in any other way and then file a complaint that the presiding officer failed to properly conduct the meeting. Mayor Royalty has by inaction waived any right to now object to the conduct of the meeting.

In any event, it was proper for the council to go into closed session.

The City Council for the City of Bardstown rejects the Complaint and the remedies sought therein. On January 24, 2017, the City Council properly adjourned for a closed meeting under KRS 61.810(1)(f). The notion that the City Council's application of KRS 61.810(1)(f) was improper is a misstatement of Kentucky authority.

Because of the "confidential nature" of closed meetings under KRS 61.810(1)(f), the City Council may undertake deliberations that "might lead to the appointment, discipline, or dismissal of any individual employee, member, or student" in a closed meeting. Bell v. Bd. of Ed. of Harlan, Indep. Sch. Dist., 557 S.W.2d 433, 435 (Ky. Ct. App. 1977). The Attorney General directly addressed whether KRS 61.080(1)(f) may be applied to executive sessions implicating mayoral misconduct. See, 01-OMD-18, at 1 (January 30, 2001), available at <http://ag.ky.gov/civil/civil-enviro/orom/Pages/2001.aspx>.

Therein, the Attorney General opined that "KRS 61.810(1)(f) permits closed session discussion of allegations against the Mayor...that might result in disciplinary measures being taken against her." Id. To support his opinion, the Attorney General adopted the argument that reasoned:

"a city council, then, can quite clearly go into executive session to discuss specific matters of personnel involving *any* municipal employee, and not simply city council members. Such a holding is only common sense; certainly, the privacy concerns of a city council members are entitled to no greater protection than are those of any municipal employee." Id. at 4, 5.

The Attorney General affirmed this position, reasoning that a City Council, under KRS 83A.040(9), has authority to discipline (which the Attorney General equated to "removal") an elected official for "misconduct, incapacity, or willful neglect in the performance of...duties," and that a closed session discussion," under KRS 61.810(1)(f), "was proper because it might lead to a decision by the council to discipline" the elected official. 14-OMD-239, at 4 (December 4, 2014) available at <http://ag.ky.gov/civil/civil-enviro/orom/Pages/2014.aspx>.

Since KRS 83A.040(9) permits the City Council to take action against any elected official, the City Council has authority to discipline the mayor. Such discussions of allegations and investigations of the Mayor may be undertaken under KRS 61.810(1)(f) in closed sessions, as permitted by the Attorney General.

While KRS 83A.130(5) requires the Mayor to preside at open council meetings (KRS 61.130(5) was erroneously cited in the Mayor's complaint), no such requirement is present for closed sessions, especially where the session is to discuss potential disciplinary action against the Mayor. See, Smith v. Falk, 885 S.W.2d 702, 703 (Ky. 1994) (interpreting KRS 83A.130(5) as "reserving to the mayor in the city-council form of municipal government the power to preside at all council meetings *attended by the mayor*" (emphasis added)). Where the mayor is not present at a meeting, the mayor does not have authority to preside over the meeting. A presiding officer is not necessary in a closed meeting since no action can be taken.

Mayor Royalty also fails to point to procedural flaws in the City Council's notice of the properly called closed meeting. The Attorney General observed, "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," along with the reason for the closed session and the specific exception authorizing the closed session. 97-OMD-110, at 3, available at <http://ag.ky.gov/civil/civil-enviro/orom/1997/97OMD110.htm>.

The Attorney General has also stated:

In all cases, "the Open Meetings Act, in particular KRS 61.815(1)(a), contemplates more than agency recitation of the language of the exception authorizing the closed session, but less than a detailed description of the matter to be discussed." 00-OMD-64, p. 6, quoted in 11-OMD-114. In those cases in which the agency relies on KRS 61.810(1)(f), it must identify which particular action, possible appointment, possible discipline, or possible dismissal, it intends to discuss in closed session. 15-OMD-150 at 4, available at <http://ag.ky.gov/civil/civil-enviro/orom/2015/15OMD150.doc>.

Here, the City Council gave the requisite general and specific notice. The motion as stated was:

"I move that council members – six council members and Scott Crosbie that us seven people go into closed session pursuant to KRS 61.810(f) relating to discussions which might lead to discipline or dismissal of an individual employee without restricting that employees right to a public hearing if requested pursuant to the council's investigation. See, <https://www.youtube.com/watch?v=FX7a2DhngKw&t=3557s> at 58:43.

The motion complies with 15-OMD-150 as it limits the possible actions in KRS 61.810(1)(f) to "discipline or dismissal" and appropriately omits "appointment" as a possible outcome from the closed meeting discussion. The motion also refers to the council investigation which had been an ongoing topic in several previous meetings.

The City Council's notice was not unfairly vague, confusing, or misleading, and therefore, the notice was proper. Moreover, the notice given by the City comports with the notice upheld by the Attorney General's office.

Because the City Council was within its authority to conduct a closed meeting pursuant to KRS 61.810(1)(f) with respect to potential disciplinary action against the Mayor, permissibly conducted the meeting without the Mayor, and gave proper notice of the meeting, the Mayor's Complaint and the relief therein is denied.

Sincerely,



Dick Heaton
Bardstown City Council Member