



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

JACK CONWAY
ATTORNEY GENERAL

CAPITOL BUILDING, SUITE 118
700 CAPITAL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

12-OMD-118

June 28, 2012

In re: Kevin Brumley/Bardstown City Council

Summary: Bardstown City Council violated KRS 61.815(1)(a) regarding required notice for a closed session when a particular type of personnel action under KRS 61.810(1)(f) was not specified and where discussion in closed session actually pertained to the legal effect of an election on the office of fire chief and potential amendments to clarify an ordinance. Failure to make a timely response to the complaint violated KRS 61.846(1).

Open Meetings Decision

The question presented in this appeal is whether the Bardstown City Council violated the Open Meetings Act at its regular meeting on January 24, 2012. For the reasons that follow, we find that the Council violated the Act.

By letter dated June 4, 2012, Kevin Brumley submitted a written complaint to Bardstown Mayor William S. Sheckles, in which he alleged that at its January 24 meeting the City Council went into a closed session without following the procedures required by KRS 61.815(1) and discussed public business exceeding the scope of the cited provision, KRS 61.810(1)(f). Specifically, he alleged that the Council failed to specify what action it was contemplating concerning a public employee, and that while in closed session the Council in fact discussed possible amendments to the ordinances governing the Bardstown Fire Department. As a means of remedying the alleged violations, Mr. Brumley proposed that the Mayor declare null and void the ordinances that were discussed in closed

session, along with the closed session itself; make a public apology through local media; and require all city officials to be educated on the requirements of the Open Meetings Act. Having received no reply as required by KRS 61.846(1), he initiated this appeal on June 11, 2012.

The Mayor's response to this appeal was provided by attorney Thomas A. Donan on June 21, 2012. Mr. Donan makes no defense regarding the failure to make a timely response to Mr. Brumley's complaint, and thus we conclude that the Mayor committed a procedural violation of KRS 61.846(1).

As to the allegations of what took place at the January 24 meeting, Mr. Donan does not deny the conduct of the City Council, but argues that it complied with the Open Meetings Act. The minutes of the meeting, provided by Mr. Donan, recite as follows:

The Mayor announced that the Council needed to go into an Executive Session pursuant to KRS 61.801(1)(f), for discussions which might lead to the appointment, discipline, or dismissal of an individual employee without restricting that employee's right to a public hearing. ...

The minutes will reflect that no official action was taken during the Executive Session[.]

The Mayor announced that there would be a Special Council meeting held on Thursday, January 26, 2012 at 5:00 p.m. in the Council Chambers in order to hold an Executive Session pursuant to KRS 61.810(1)(f), for discussion which might lead to the appointment, discipline, or dismissal of an individual employee without restricting that employee's right to a public hearing, and to present a first reading of Ordinance No. B2012-01, which is an amendment to Chapter 36 of the Bardstown Code of Ordinances regarding the selection, appointment or hiring of a Bardstown Fire Chief.

Mr. Brumley makes four substantive complaints regarding the closed session. First, he asserts that the Mayor failed to state the reason for the closed

session. Secondly, he alleges that the general nature of the business to be discussed in closed session was not stated. These notices are both required by KRS 61.815(1)(a):

Notice shall be given in regular open meeting of the general nature of the business to be discussed in closed session, the reason for the closed session, and the specific provision of KRS 61.810 authorizing the closed session[.]

His fourth complaint, which he describes as related to these, is that the Mayor recited all three actions listed in KRS 61.810(1)(f) ("appointment, discipline, or dismissal of an individual employee") without specifying which of these applied. It has long been clear that a public agency invoking this subsection must "announc[e] in open session, that pursuant to KRS 61.810(1)(f) it is going into closed session to discuss either the appointment, or the discipline, or the dismissal of an employee of the agency, *indicating which of these particular actions is contemplated.*" 99-OMD-49 (emphasis added). Since the Mayor failed to indicate which action was contemplated, and there is no suggestion that all three could have been at issue, we find that the closed session was conducted in violation of the Open Meetings Act.

Mr. Brumley's third complaint is that the Mayor and the Council discussed improper matters in closed session. There seems to be no material dispute as to the facts. The discussion in closed session concerned an ambiguity in an ordinance which raised uncertainty as to the effect of a recent election by members of the Bardstown-Nelson County Volunteer Fire Department (BNCVFD) upon the Mayor's powers and duties with regard to appointing a chief for the Bardstown Fire Department (BFD). As Mr. Donan describes the situation:

Prior to the election held by the BNCVFD on January 16, 2012, Anthony Mattingly was serving as Chief of the BFD and the BNCVFD. ... Arguably, the Ordinance in effect at the time of the election had the effect of appointing a different employee, Marlin Howard, as the Chief of the Bardstown Fire Department and dismissing Anthony Mattingly as the Chief of the BFD. Both Marlin Howard and Anthony Mattingly were long time employees

of the City of Bardstown Fire Department. [Another] issue related to both employee[s'] positions is who are the "members" of the Bardstown Fire Department. Are "members" only City employees or are volunteers included in that phrase? Volunteer firefighters are clearly members of the BNCVFD and they voted on January 16. ... The City of Bardstown has a contract with the BNCVFD relating to use of City property and facilities by the BCDVFD and the employment by the City of Bardstown of additional paid fire fighters in exchange for funds contributed by the BNCVFD.

None of these matters are mentioned in the minutes of the meeting, which leads us to the conclusion that these matters were part of the discussion in closed session.

Mr. Donan essentially agrees with Mr. Brumley's assertion that the ambiguities of the existing ordinance and possible ways to amend the ordinance were discussed in the closed session:

Mr. Brumley claims that Mayor Sheckles violated the requirements for a closed meeting by providing background to the City Council about circumstances leading to the possible appointment or dismissal of an individual employee. Any discussion by the Mayor along those lines was appropriate so the City Council would be fully aware of the background leading up to the Mayor's dilemma in light of the ambiguous then existing Ordinance and potential amendments in [*sic*] the existing Ordinance to attempt to remedy the appointment-dismissal dilemma for the current Chief. The key to resolution of this Complaint is that the discussion did relate to the possible appointment or dismissal of an individual employee and that no final action was taken concerning these matters.

The Supreme Court of Kentucky has recently noted:

A public agency's authority to go into a closed session relative to personnel matters is severely restricted. Under the personnel exception, a public agency may enter closed session only for "discussions or hearing which might lead to the appointment,

discipline, or dismissal of an individual employee, member, or student.” KRS 61.810(1)(f). These three topics are the only personnel matters a public agency may discuss in closed session. Discussions of any other matters are expressly precluded. The statute itself underscores the specific nature of the exception by explicitly stating the exception does not “permit discussion of general personnel matters in secret.” *Id.*

Carter v. Smith, ___ S.W.3d ___, 2012 WL 1889697, *4, No. 2010-SC-000295-DG (May 24, 2012). “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 insure 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)). This office has held that the underlying reason for this “personnel” exception is to protect employees’ interest in their reputations when their personal or professional merits are under consideration for hiring, firing, or discipline. *See, e.g.*, 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 because privacy and reputational interests were not at stake).


It is well established that “matters only tangentially related to the appointment, or the discipline, or the dismissal of an individual employee cannot be disclosed in closed session under authority of KRS 61.810(1)(f).” 00-OMD-86. Thus, we held that a decision whether to make occupational tax officer a full-time position was not a proper matter for closed session even though it “could entail the employment of a different person.” 11-OMD-115. Similarly, general discussion about terms of members of a city power board was outside the lawful scope of a closed session whose purpose was to discuss potential discipline or removal of board members. 12-OMD-102. In the present appeal, a discussion of how an election affected the office of city fire chief and how to draft amendments clarifying a city ordinance was at best “only tangentially related to the appointment ... of an individual employee.” Nor was there any reputational interest at issue for either employee when the sole issue was the legal effect of an

election on the position of fire chief. The situation, therefore, was not within the purview of KRS 61.810(1)(f).

Discussion by the City Council of potential amendments to city ordinances is the epitome of activity intended by the legislature to be the subject of the Open Meetings Act. "[T]he formation of public policy is public business and shall not be conducted in secret." KRS 61.800. We conclude that the Bardstown City Council substantively violated the Act, by failing to state the reason for and general nature of the business to be discussed in the closed session, including specifying what action was contemplated under KRS 61.810(1)(f); and by conducting discussions which were outside the scope of that exception.

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.

Jack Conway
Attorney General


James M. Herrick
Assistant Attorney General

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Distributed to:

Kevin Brumley
Hon. William S. Sheckles
Thomas A. Donan, Esq.