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In re: The Eastern Progress/Board of Regents of Eastern Kentucky University

Summary: Meeting of the Eastern Kentucky University Board of Regents violated the Open Meetings Act in discussing multiple potential layoffs in a session closed to the public under KRS 61.810(1)(c) and KRS 61.810(f). The Board violated the Act when it allowed non-members to remain in the closed session beyond the time in which their attendance was necessary.

Open Meetings Decision

The question presented in this appeal is whether the Eastern Kentucky University Board of Regents ("Board") violated the Open Meetings Act while discussing multiple potential layoffs in a closed session. We find that the Board violated the Open Meetings Act when it discussed the potential layoffs in a session closed to the public under the 'appointment, discipline, or dismissal of an individual employee' exemption stated in KRS 61.810(1)(f)¹, and the 'proposed or pending litigation' exemption stated in KRS 61.810(1)(c)². We further find that

¹ KRS 61.810(1)(f) states: "(1) All meetings of a quorum of the members of any public agency at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times, except for the following: (f) Discussions or hearings which might lead to the appointment, discipline, or dismissal of an individual employee, member, or student without restricting that employee's, member's, or student's right to a public hearing if requested. This exception shall not be interpreted to permit discussion of general personnel matters in secret."

² KRS 61.810(1)(c) exempts: "(c) Discussions of proposed or pending litigation against or on behalf of the public agency."

the Board violated the Act when it allowed witnesses to remain in the closed session beyond the time in which their attendance was necessary.

Jennifer Perkins, News Editor, *The Eastern Progress* ("Appellant") filed her appeal to this Office on April 17, 2018. Appellant alleges that the Board violated the Kentucky Open Meetings Act at its March 19, 2018 special meeting. The meeting minutes show that, pursuant to a voice vote, the Board entered into closed session at 10:15 a.m. The minutes also show that the Board returned to open session at 3:19 p.m., after approximately five (5) hours of discussion. The minutes state that "[n]o action was taken or decisions made in closed session, wherein we discussed the possible termination of employees and/or litigation." The minutes reflect that the meeting was adjourned at 3:22 p.m.

Appellant argues in her appeal that the Board "entered closed session using the KRS 61.810(1)(c) and KRS 61.810(1)(f) exceptions, but during the meeting the Board of Regents discussed the dismissal of multiple employees." Appellant also argues that the Board "admitted non Board members into the closed session, including Barry Poynter, Kristi Middleton, David McFaddin and Tanlee Taulbee Wasson." Appellant alleges that these individuals never exited while the meeting was in closed session. Regarding the use of KRS 61.810(1)(c) as a basis for the closed session, Appellant states that "[n]o current litigation has been located, and no immediate pending litigation can be found."

The Board responded to the appeal through counsel, Dana Daughetee Fohl, Esq., on April 24, 2018. Ms. Fohl provides pertinent background regarding the purpose of the meeting and the issues addressed in closed session. The response states:

The University had estimated a near \$25 million shortfall in the FY 19-20 budget due to the continued cuts to higher education by the Governor and Legislature, as well as increased pension obligations, and slightly decreased tuition revenue. To proactively address that projected shortfall, on November 29, 2017, University President Michael T. Benson announced the creation of a University Budget Advisory Committee (Committee) to deliver strategic recommendations to the President, for recommendation to the Board, to capture \$25 million in savings.

The work of the Budget Advisory Committee concluded on March 9, 2018, when the Budget Advisory Committee passed its recommendations on to President Benson. Those recommendations included the elimination of over 120 current University employees' positions, identified through a set of priorities and criteria. Those recommendations were unanimously supported...and were sent to the President and the Board for consideration.

Regarding the application of the KRS 61.810(1)(f) exemption, the Board argues that the "closed session discussions impacted the appointment or dismissal of individual employees." The response states that the Board, in closed session, "engaged in discussion and questioned University personnel as to application of the budget reductions to specific positions in evaluating the impact of these reductions on University operations as well as the individuals impacted by them." In addition, "the Board reviewed a memo from University Counsel regarding any unintended disparate impact of the eliminations of positions and the individual employees therein." The response notes that during these discussions, "individuals were discussed by name and position." The Board addressed the application of the KRS 61.810(1)(c) exemption, stating that, "[t]he University is most certainly embroiled in current litigation." Specific to the closed session, the Board argues that "the closed session most definitely involved discussion of litigation that either was pending or reasonably imminent depending on what positions might ultimately be eliminated."

Regarding the non-board members present during the closed session, the Board notes that "[t]hese four (4) individuals were necessary to certain discussions occurring in closed session regarding the specific employees whose positions were proposed to be terminated" and provides detailed explanation of the significance of their participation. The Board also notes that "Kristi Middleton, Chief External Affairs Officer, was not present for the entire closed session." The Board notes that "[s]he was asked to enter towards the end of the closed session, after a majority of the discussions had occurred, and her presence was necessary as she had specific information requested by the Board related to a handful of employees who had been identified for termination."

We find that the Board discussion of the Budget Advisory Committee recommendations was a general personnel matter. It is important to note that

the recommendations were preliminary, and the Board had not yet taken formal action to dismiss any of the faulty members or employees at issue. The Board response states that it "was presented with a draft, preliminary document which represented the Budget Advisory Committee's initial recommendations for staff and faculty position reductions." The executive session was used to review those preliminary recommendations and discuss the potential impacts on the university. Further, "[w]hile the Budget Advisory Committee's work only focused on positions (and they were not privy to employee names in positions), when this information was conveyed to the Board, the individuals holding each of these positions were identified." Therefore, the Committee report itself was a general personnel matter. By implication, the Board engaged in discussion of general personnel matters in secret when the committee recommendations were the subject of discussion in closed session. The general nature of the report cannot be changed by merely supplementing it with individual names after the fact.

The Board argues that the purpose for the closed session "was to maintain the privacy of the identified individuals impacted until the list was final and the terminations had been carried out in a more individualized, appropriate, and considerate manner." However, the record before us shows that these recommendations were only preliminary "until the list was final." The process for removing faculty members is in KRS 164.360(3)³, and there is no indication that these preliminary recommendations had been used to initiate the formal removal process for any employee or faculty member. Additionally, the meeting minutes note that "[n]o action was taken or decision made in closed session, wherein we discussed the possible termination of employees[.]" It appears that there was no intent to use these preliminary recommendations as the basis for

³ KRS 164.360(3) states: "(3) Each board may remove the president of the university or Kentucky Community and Technical College System, and upon the recommendation of the president may remove any faculty member or employees, but no president or faculty member shall be removed except for incompetency, neglect of or refusal to perform his duty, or for immoral conduct. A president or faculty member shall not be removed until after ten (10) days' notice in writing, stating the nature of the charges preferred, and after an opportunity has been given him to make defense before the board by counsel or otherwise and to introduce testimony which shall be heard and determined by the board. Charges against a president shall be preferred by the chairperson of the board upon written information furnished to him, and charges against a faculty member shall be preferred in writing by the president unless the offense is committed in his presence."

removing any individual employee, and as such, reputational damage was not an issue at the time. The Board misapplied the KRS 61.810(1)(f) exemption.

The closed discussions regarding the impact of the reductions on the University operations and the unintended consequences of the position reductions on the University was a violation of the Open Meetings Act. These impacts are only tangentially related to the individual personnel actions. 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. Furthermore, KRS 61.800 declares 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 for by law shall be strictly construed." The public had a right to attend the discussions regarding the impact of the recommendations on the University. The Board violated the Act in its application of KRS 61.810(1)(f).

The preliminary nature of the Budget Advisory Committee's recommendations also supports a finding that the litigation exception of KRS 61.810(1)(c) does not apply. The Board argues that, "the closed session most definitely involved discussion of litigation that either was pending or reasonably imminent depending on what positions might ultimately be eliminated." However, the mere threat that an employee or faculty member may bring suit against the Board for a personnel action does not justify the use of the exception. Though exception may be invoked when litigation is not currently pending but is only threatened or proposed, it does not apply...where the possibility of litigation is remote or unsubstantiated. *Floyd County Bd. Of Educ. v. Ratliff*, 955 S.W.2d 921, 924 (Ky. 1987). There must be a direct suggestion of litigation conditioned on the occurrence or nonoccurrence of a specific event. *Carter v. Smith*, 366 S.W.3d 414, 420 (Ky. 2012). In this case, the possibility that an individual would be terminated based on these preliminary recommendations becoming final in the future is too "remote and unsubstantiated" to serve as a basis for closing the discussion to the public.

The Board highlights a mass of pending litigation involving employees at the time of the meeting, but it is not clear whether those cases were pertinent to all 120 positions. As such, the exception was over-extended to cover the duration

of the closed meeting. Courts have determined that this exception would apply to matters commonly inherent in litigation, such as preparation, strategy or tactics. *Ratliff*, 955 S.W.2d at 923-24. However, this executive session was closed to the public for approximately five (5) hours, during which all 120 individual employees were subject to discussion. We do not know from the record whether or not every one of the 120 individual employees discussed are litigants in the pending litigation listed by the Board. However, it is clear that the Board did not discuss pending or proposed litigation throughout the duration of the executive session. "These exceptions...must be construed so as to avoid improper or unauthorized closed, executive or secret meetings." See *Carter*, 366 S.W.3d at 419 (quoting *Ratliff*, 955 S.W.2d at 923). The executive session was only justified when the Board specifically discussed "preparation, strategy or tactics" in proposed or pending litigation. See *Ratliff*, 955 S.W.2d at 924. As such, we find that the Board erroneously applied the litigation exception.

The Board permitted the presence of non-members in the closed session. We find that the Board permitted non-members to remain in the closed session in excess of the time that their presence was necessary. This Office has consistently condemned the practice of "selective admission" to closed sessions. 12-OMD-202 (citing OAG 77-560, p. 2). A public agency should not invite certain people to be merely spectators in a closed session and at the same time bar certain other people from being spectators." 01-OMD-152 (quoting 00-OMD-219). See also 07-OMD-094; 08-OMD-212. In order to avoid arbitrariness and to conform to reasonable standards, a person who is brought into a closed session for a purpose should remain in the session only as long as the purpose is being served. If a person is a witness on a certain matter, he should leave the closed session after he has testified. In inviting non-members into a closed session, we believe that the agency has the duty to explain why such persons are invited into the session. 00-OMD-219; 12-OMD-202 (citing OAG 77-560, p. 2).

The standard to justify the presence of a non-member in a closed session is not excessively high. The essence of our decisions has been that "[a]ny person who the board believes can contribute information or advice on the subject matter under discussion may be invited into the executive session but should remain only so long as is necessary to make his contribution to the discussion." OAG 77-560. In this case, the Board sufficiently explained why the presence of these additional individuals was necessary. However, the record shows that

some of these individuals were permitted to remain throughout the five (5) hour duration of the closed session. The record does not provide evidence that the Board restricted their attendance to the time necessary. Under these facts, we find that the Board violated The Open Meetings Act.

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

Andy Beshear
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Distributed to:

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