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13-OMD-057

April 17, 2013

In re: James L. Deckard/Murray State University Board of Regents

Summary: Murray State University Board of Regents violated KRS 61.810(1) when a quorum of the members discussed public business during a meeting held at the home of a Regent on the evening of March 14, 2013, for which proper notice was not provided; the Board also violated KRS 61.835 in failing to record minutes of that meeting.

Open Meetings Decision

The question presented in this appeal is whether the Murray State Board of Regents violated the Kentucky Open Meetings Act when a quorum of the members held an "informal social gathering" on the evening of March 14, 2013, at the home of Regent Sharon Green following a special meeting of the Board's Finance Committee. In a complaint directed to Board Chairperson Constantine W. Curris, attorney James L. Deckard alleged that "a quorum of the Board was present and Board business was discussed in violation of . . . Kentucky's Open Meetings Act." Mr. Deckard asserted that "Kentucky law prohibits the Board from discussing Murray State University business at such a meeting and further prohibits the Board from meeting without notice to the public." To remedy the alleged violation, he proposed that the Board "discuss at a future meeting, in an open and public session, those matters that were discussed at the meeting on March 14, 2013 at the home of Board Regent Sharon Green." Any final action taken by the Board as a result of that unlawful meeting, he concluded, must be declared null and void.



13-OMD-057

Page 2

In his March 28, 2013, response on behalf of MSU, General Counsel John P. Rall characterized the subject meeting as "an informal social gathering." Nevertheless, he advised that Dr. Curris would be glad to publicly address the conversations at the "March 14 social gathering" during an upcoming Board meeting. Mr. Rall interpreted the complaint as "concerned with the vote on the extension of the University President." Thus, he further advised that a motion to extend the contract was made during the Board's regular quarterly meeting on March 15, 2013, in open session but was unsuccessful. According to Mr. Rall, the motion did not result from any "collective decision made at the March 14th social. In fact, the motion to bring the contract extension before the Board was made by a Regent who was not present at the gathering." The Board maintained "there was no discussion on the 14th of how any vote should or would be cast, no attempt to persuade anyone to change a vote, and no type of straw vote." Mr. Rall advised Mr. Deckard that his second proposed remedy must be denied as it "requires that action taken during the meeting held on the 15th be 'as a result' of the gathering on the 14th and that 'condition is absent.'"¹

Quoting the broad statutory definition of "meeting" codified at KRS 61.805(1), Mr. Deckard subsequently initiated this appeal. He acknowledged that "a factual dispute concerning the secret meeting's relationship to the public meeting does exist" but is "beyond the scope of review by the Attorney General." Thus, Mr. Deckard sought a "limited review and decision" finding that the "secret meeting of a quorum of the Board of Regents of Murray State University" on March 14 violated the Open Meetings Act. Because the record on appeal supports a finding that a quorum of the Board was present during the March 14 meeting *and* that public business was discussed, this office concludes that the Board violated KRS 61.810(1) in failing to comply with public notice requirements codified at KRS 61.823 regardless of whether a vote of any kind was taken or there was any nexus between the improper discussion and the final action taken on March 15. The Board's failure to record minutes of that meeting also violated KRS 61.835.

¹ Citing KRS 61.810(1), Mr. Rall noted that the actions of the Board on March 15 complied with the requirements of the Open Meetings Act. In his April 1, 2013, letter of appeal, Mr. Deckard advised this office "need not address the actions of the Board on March 15, 2013, which should expedite the decision regarding the secret meeting of March 14, 2013." Inasmuch as the meeting held on March 14 was the focus of Mr. Deckard's complaint, our analysis proceeds accordingly.

13-OMD-057

Page 3

Upon receiving notification of Mr. Deckard's appeal from this office, Mr. Rall advised:

... The social took place after a special meeting of the Board's Finance Committee, which met in public session on the afternoon of the 14th. The meeting lasted approximately two hours and most members of the entire Board attended. The Board's regular quarterly meeting took place the following day, March 15.

Seven of the Board members travel from out of town in order to attend meetings. ... The regular quarterly meetings of the Board of Regents usually last one day. Because the Finance Committee met on the afternoon of March 14, some Regents were in Murray earlier than they would have been if there was only a meeting on March 15.

Regent Sharon Green, of Murray, thought a visit to her home after a day of travel and meeting would be a way for the out of town Regents to relax away from their hotel rooms or before traveling back home. Thus, she invited those Regents into her home. Two Regents were unable to attend but five did visit. Light refreshments were provided and the social lasted for approximately 1 ½ hours. There is no question that a quorum of the Board was present but the gathering was not arranged for the purpose of conducting or discussing business.

"It is evident," Mr. Rall continued, that Mr. Deckard's complaint and the instant appeal "attempt to tie the vote on March 15 to the March 14 social." Quoting *Yeoman v. Commonwealth*, 983 S.W.2d 459, 474 (Ky. 1998), he noted "it is well established that, 'The mere fact that a quorum of members of a public agency are in the same place at the same time, without more, is not sufficient to sustain a claim of a violation of the Act.'" In his view, "the face of the appeal precludes a finding of the 'without more' referenced in *Yeoman*." The recognition of a factual dispute, Mr. Rall reasoned, "goes to the very nature of the March 14 social gathering, but no indication is given as to the nature of the dispute." Mr. Rall emphasized that the vote taken during the March 15 meeting was conducted

13-OMD-057

Page 4

in open session. Chairman Curris opened the floor and the motion was made by a Regent who did not attend the March 14 gathering but seconded by a Regent who attended the gathering and voted to extend the President's contract. He then called for discussion regarding the vote. A 17 page report, which has been released to the public, had been provided to the Regents, Mr. Rall noted. There was no limit imposed on the debate and the vote was taken during the open, public session. Because the appeal "currently seeks review only of the March 14 event," "all claims related to March 15 have been abandoned," the appeal facially acknowledges the existence of a factual dispute regarding the March 14 gathering, and the Board Chair has agreed to address the March 14 "event" as requested in the complaint, Mr. Rall asserted "there is nothing for the Attorney General to decide." This office respectfully disagrees.

The Attorney General is unable to resolve the admitted factual dispute surrounding the perceived causal relationship between the discussion held on March 14 and the action (vote) taken on March 15, in light of the conflicting narratives presented; however, the unrefuted evidence of record, namely the publicly available statement of the Board Chairman, establishes not only that a quorum of the Board was present on March 14 but also that public business was discussed. The Act "prohibits a quorum from discussing public business in private or meeting in number less than a quorum for the express purpose of avoiding the meetings requirement of the Act." *Yeoman v. Commonwealth*, 983 S.W.2d 459, 474 (Ky. 1998), citing KRS 61.810. Notwithstanding the parties' differing characterizations of March 14 and perceptions of the Regents' intent or purpose in holding the meeting, and the unresolved question of whether the improper discussion actually resulted in the March 15 vote, nothing more is required to find that violations of KRS 61.810(1) and 61.835 were committed.

Mr. Deckard subsequently clarified that he did not abandon or waive any issue but merely attempted to expedite resolution of this matter within the statutory framework in order to move forward in challenging the Board's refusal to nullify and void the action taken by the Board on March 15 following its unlawful meeting on March 14. In further support of his position that public business was discussed at Regent Green's home on March 14, Mr. Deckard then set forth an excerpt from the interview that WKMS conducted with Chairman Curris on March 16, 2013, *Curris: MSU Board Members Casually Discussed Business on Night Before Vote on Dunn's Contract*, WKMS 91.3, which is publicly accessible

13-OMD-057

Page 5

on its website at www.wkms.org/post/curris-msu-board-members-casually-discussed-business-night-vote-dunns-contract. Chairman Curris advised:

I recall discussing the events of the day, this was right after the committee hearing that went over all the finances. There was discussion on the impact on tuition, there was even discussion of the recommendation that WKMS be studied to be sold. There was discussion of the upcoming meeting the next day, but it was all in context of people talking over a glass of wine. I guess it was an hour or so.

[T]here was discussion on the next day's report of the ad-hoc contract committee.

Independent review of the interview (audio) and the referenced article confirmed the accuracy of the foregoing summary. Regardless of whether any nexus between the March 14 discussion and the March 15 action exists or can be conclusively established in this forum, or any discrepancies exist regarding the extent to which certain topics were discussed, the record on appeal establishes that a quorum of the Board impermissibly discussed public business.

Upon receipt of Mr. Deckard's supplemental correspondence, Mr. Rall argued that his original complaint was premised on the belief that the March 15 vote on President Dunn's contract extension was a result of the March 14 "social." Mr. Rall explained that the Board denied this claim in responding to his complaint and subsequently in public statements made by the Board Chair and a Regent who attended the gathering but voted to extend the contract. Mr. Rall quoted a *Murray State News* article dated April 5, in which Chairman Curris indicated, "'The board members did not sit around the table and say 'this is how I'm going to vote.'" He also noted that said Regent was quoted in a *Paducah Sun* article dated March 23, saying, "'While I was there, no one asked me how I was going to vote[....]' 'No one I heard discussed their vote. I did not hear anyone being asked to change their vote.'" According to Mr. Rall, "the references to WKMS and impacts on tuition are irrelevant to the appeal. All other considerations aside, both topics were addressed publicly at the special meeting of the Finance Committee on March 14 and were discussed in detail at the committee's regular public meeting on March 15." Said topics "have nothing to

13-OMD-057

Page 6

do with the vote on extending the President's contract, which is the focus of the appeal." While this assertion is correct, as far as it goes, and Mr. Rall was also correct in arguing that KRS 61.846(2) otherwise precludes a substantive analysis of issues regarding the March 15 meeting not raised in the original complaint, he did not dispute that such topics and the "report of the ad-hoc contract committee" were discussed at the March 14 "social," which prompted Mr. Deckard's complaint and is the focus of this appeal. Rather, Chairman Curris publicly confirmed as much. That fact is not only relevant, but is determinative when viewed in context.

As Mr. Deckard acknowledged, this office "is not empowered to declare void action taken at an illegal meeting, impose penalties for violations of the Act, or compel an agency to implement the remedial measures proposed." 08-OMD-005, p. 9. Nor is the Attorney General able to conclusively resolve factual disputes when presented with conflicting narratives. See 05-OMD-096; 07-OMD-253; 08-OMD-234; 09-OMD-014; 10-OMD-124. Our holding today is not a departure from these precedents; rather, this appeal is distinguishable insofar as the relevant facts are not in dispute. This office makes no finding on the question of whether the vote taken during the March 15 meeting resulted from the improper discussion of public business held on March 14.

The fundamental mandate of the Open Meetings Act is codified at KRS 61.810(1), pursuant to which "[a]ll 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." (Emphasis added.) This provision reflects the legislative statement of policy, codified at KRS 61.800, which declares that "the formation of public policy is public business and shall not be conducted in secret" By virtue of these provisions, the General Assembly "demonstrated [its] commitment to 'open government openly arrived at.'" 99-OMD-146, p. 4, quoting *Maurice River Board of Education v. Maurice River Teachers*, 455 A2d 563, 564 (N.J. Super. Ch. 1982).

In construing KRS 61.810(1) and KRS 61.810(2),² the Kentucky Supreme Court recognized that the Open Meetings Act "prohibits a quorum from

² KRS 61.810(2) provides:

13-OMD-057

Page 7

discussing public business in private or meeting in numbers less than a quorum for the express purpose of avoiding the open meeting requirement of the Act." *Yeoman* at 474. The Court further observed that the "mere fact that a quorum of members of a public agency are in the same place at the same time, without more, is not sufficient to sustain a claim of a violation of the Act. *Id.* In other words, even if a quorum of the members of the agency are present, "[f]or a meeting to take place within the meaning of the act, public business must be discussed or action must be taken by the agency." *Id.* (emphasis added). In the interest of absolute clarity, the Court explained that "[p]ublic business is not simply any discussion between two officials of the agency. Public business is the discussion of the various alternatives to a given issue about which the [agency] has the option to take action."³ *Id.* Because a quorum of the members of the MSU Board of Regents discussed "the various alternatives to a given issue[s] about which the [Board] ha[d] the option to take action," it violated KRS 61.810(1).

The expansive definition of the term "public business" that appears in *Yeoman*, above, coupled with the expansive definition of the term "meeting" that appears at KRS 61.805(1),⁴ and the statement of policy found at KRS 61.800, import a legislative commitment to ensuring the broadest possible access to meetings at which public business is discussed or acted upon. KRS 61.810(1) must be construed with a view toward effectuating the intent of the General

Any series of less than quorum meetings, where the members attending one (1) or more of the meetings collectively constitute at least a quorum of the members of the public agency and where the meetings are held for the purpose of avoiding the requirements of subsection (1) of this section, shall be subject to the requirements of subsection (1) of this section. Nothing in this subsection shall be construed to prohibit discussions between individual members where the purpose of the discussions is to educate the members on specific issues.

³ KRS 61.805(3) defines "Action taken" as "a collective decision, a commitment or promise to make a positive or negative decision, or an actual vote by a majority of the members of the governmental body[.]"

⁴ The term "meeting" is defined at KRS 61.805(1) as:

"Meeting" means all gatherings of every kind, including video teleconferences, regardless of where the meeting is held, and whether regular or special and informational or casual gatherings held in anticipation of or in conjunction with a regular or special meeting.

The location of the March 14 meeting is not legally relevant nor is the intention of the Regents even assuming that we could resolve that question; the Act applies to casual or informational gatherings regardless of the agency's intention or where the gatherings occur.

13-OMD-057

Page 8

Assembly since "the failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good." *E. W. Scripps Co. v. City of Maysville, Ky.* App., 750 S.W.2d 450 (1990) cited in *Floyd County Board of Education v. Ratliff, Ky.*, 955 S.W.2d 921, 923 (1997). See 07-OMD-100 (discussion by a quorum of Graves County Board of Education members regarding the rejection of a waiver of Department of Education regulations governing school construction during a return trip from Frankfort constituted a violation of KRS 61.810(1)); 03-OMD-192; 10-OMD-169.

Our conclusion is not altered by the fact that no discussion was held "on the 14th of how any vote should or would be cast, no attempt to persuade anyone to change a vote, and no type of straw vote." A violation was committed regardless of whether the March 15 motion resulted from any "collective decision" by the Regents present on March 14. See 07-OMD-100 (violation of KRS 61.810(1) found notwithstanding the fact that "none of [the Board's] members made any formal or informal commitment, promise, or decision concerning any public business"). This office rejected a similar argument in 98-OMD-94 as follows:

KRS 61.810(1) requires that any meeting at which public business is discussed *or* action is taken must be open to the public. We attach significance to the use of the disjunctive particle "or" rather than the conjunction "and." Since a quorum of the members of the [agency] was apparently present and public business was discussed, the [agency] violated the Open Meetings Act by failing to notify the public about the meeting and by excluding the public from that meeting.

98-OMD-94, p. 5; see also 99-OMD-117; 02-OMD-153; 03-OMD-187; 05-OMD-117; 06-OMD-211. Compare 05-OMD-096; 08-OMD-234; 12-OMD-229. "Clearly, the requirements of the Open Meetings Act were triggered when a quorum of the members of the Board discussed public business [on March 14 at the home of Regent Sharon Green], and the violation of the Act . . . postulated on their failure to do so in a public forum [is] not mitigated by the fact that the members did not take action." 07-OMD-100, p. 5.

13-OMD-057

Page 9

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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#101

Distributed to:

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