

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002823-MR

DON BIEK

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 98-CI-03103

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY,
a/k/a UNIVERSITY OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order dismissing Don Biek's action to compel the University of Kentucky Committee on the Status of Women to comply with the Kentucky Open Records Act on grounds that he lacked standing to bring the action. Because Biek has never filed a complaint with or requested a ruling from the University of Kentucky regarding compliance with the Open Records Act, and is in essence seeking to appeal a ruling sought by an individual not a party to this action, we agree that Biek did not have standing to bring the action herein. Hence, we affirm.

On June 27, 1998, John Sammons sent a letter to the University of Kentucky Senate Committee on the Status of Women (the "Committee") alleging the Committee's practice of declining to include topics that the Committee agreed to discuss during their meetings in the Committee's minutes constituted a violation of the Open Records Act. By letter dated June 30, 1998, the Committee took the position that it was not required to include topics designated for discussion in their minutes because it was not "action taken" pursuant to KRS 61.835. On July 9, 1998, Sammons sought review of the Committee's decision by the Attorney General pursuant to KRS 61.846. On July 27, 1998, the Attorney General rendered its decision, 98-OMD-119, in favor of the University of Kentucky. Sammons did not appeal the Attorney General's decision pursuant to KRS 61.846(4).

On August 26, 1998, appellant, Don Biek, filed an action in the Fayette Circuit Court pursuant to KRS 61.848 alleging that the University of Kentucky Committee on the Status of Women was in violation of the Open Records Act for failing to include topics designated for discussion in its minutes. Although Biek had never filed an Open Records complaint with the University of Kentucky, nor was he a party to any of the proceedings initiated by Sammons before the University of Kentucky or the Attorney General, Biek specifically alleged in his complaint that the Attorney General's opinion in 98-OMD-119 was erroneous and requested that it be overturned. The University moved to dismiss the action on grounds that Biek

lacked standing to bring the action. The court granted the motion on October 14, 1998. This appeal followed.

Biek argues that he had standing to bring the action under KRS 61.848(1) which provides as follows:

The Circuit Court of the county where the public agency has its principle place of business or where the alleged violation occurred shall have jurisdiction to enforce the provisions of KRS 61.805 to 61.850, as they pertain to that public agency, by injunction or other appropriate order on application of any person.

Biek maintains that because the above provision states that "any person" can invoke the jurisdiction of the circuit court to enforce the Open Records Act, he need not be the one who filed the Open Records complaint at issue in order to bring the action herein. We do not agree. Biek has overlooked the language in KRS 61.848(2) which provides:

A person alleging a violation of the provisions of KRS 61.805 to KRS 61.850 shall not have to exhaust his remedies under KRS 61.846 before filing suit in a Circuit Court. However, he shall file suit within sixty (60) days from his receipt of the written denial referred to in subsections (1) and (2) of KRS 61.846 or, if the public agency refuses to provide a written denial, within sixty (60) days from the date the written complaint was submitted to the presiding officer of the public agency. (Emphasis added.)

It is clear from the above language that the person bringing the action to enforce the Open Records Act must have first submitted a complaint before the agency pursuant to KRS 61.846(1) which was denied. While the person need not exhaust his administrative remedies through the Attorney General pursuant to KRS 61.846(2)

and (3), he must at least have submitted a written complaint with the agency.

Biek cites Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575 (1994) as authority for his position that he is not required to be the one to file the Open Records complaint in order to bring an action alleging an Open Records violation. In Beckham, the Courier-Journal requested certain employee records from the Jefferson County Board of Education, and those employees objected to release of the records on privacy grounds. The Kentucky Supreme Court held that the employees had standing to bring an action under KRS 61.848 to prevent disclosure of the records pursuant to KRS 61.878(1)(a), even though they were not the ones who requested the records. The Court's holding turned on the fact that the employees were seeking to prevent disclosure of the records on personal privacy grounds and that there were limited remedies in the Open Records Act for those who sought to contest disclosure. The Court stated:

We have recognized the personal privacy exclusion [in KRS 61.878(1)(a)] as an independent right of persons who were not even parties to the litigation and permitted their right to be asserted by the agency.

Beckham, 873 S.W.2d at 578. The Court specifically noted that there were extensive remedy provisions in the Act for those seeking access to records. Id.

In our view, Biek's reliance on Beckham in the case at hand is misplaced. Biek is not seeking to prevent disclosure of records, rather he is seeking to gain access to records. Nor

does the instant case involve any of the exclusions to the Open Records Act in KRS 61.878. Thus, under the remedy provisions in KRS 61.848, he must first file a complaint with the University alleging the Open Records violation. Clearly, in the instant case, Sammons is the real party in interest and Biek is simply attempting to stand in the shoes of Sammons and appeal his unfavorable decision. This he cannot do.

For the reasons stated above, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William C. Jacobs
Lexington, Kentucky

BRIEF FOR APPELLEE:

Stephen L. Barker
Robyn E. Miller
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