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New Jersey Appellate Division Increases Requirements Under the Open Public Meetings Act

By: Marie-Laurence Fabian and David L. Disler

On Wednesday, February 8, 2017, the Appellate Division released two companion opinions ("[Kean I](#)" and "[Kean II](#)")¹ that expanded the requirements under the Open Public Meetings Act ("OPMA") to include:

1. *Rice* notice be provided to employees any time matters involving their employment are placed on the agenda (even if the public entity has no intention of discussing the employee or personnel decision in executive session); and
2. Meeting minutes be released to the public within 45 days of the meeting (except for extraordinary circumstances).

Facts

The facts in *Kean I* and *Kean II* are rather straightforward. Kean University's Board of Trustees meets five times per year (the organizational meeting is held in September, plus meetings are scheduled in December, March, May, and June). Prior to the December meeting, the University President creates a list of his recommendations for the reappointment and non-appointment of faculty members. The Board's subcommittee then reviews this list and makes a recommendation to the Board. At its December meeting, the Board votes on the President's recommendations. Historically, the Board does not discuss or debate the list of recommendations. Rather, it simply votes on this list during the public session of its meeting. Because no discussion regarding the recommendations occurs, *Rice* notice is not provided. Instead, the President sends a letter prior to the meeting, which informs each faculty member of his recommendation for non-appointment.

Following the Board's December meeting, several employees requested the minutes from the Board's September and December meetings. The Board's practice is that its minutes are not approved until the Board's next full meeting. Since the Board only meets five times a year, the September minutes are not approved until December, and the December minutes are not approved until March. Based on this limited meeting schedule, it took 94 days for the Board to release its minutes for the September meeting and 58 days for the Board to release its minutes for the December meeting.

Rice Notice

The OPMA allows public entities to go into executive session to discuss matters involving the "employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining" of any public employee.² However, employees may request the public entity hold this discussion in public. To ensure employees can exercise this right, public entities must provide employees with

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reasonable notice, which informs them of their ability to request the discussion take place in public (typically referred to as "*Rice* notice").³

While it was commonly understood that public entities were only required to provide *Rice* notice when it intended to discuss a personnel matter in executive session, the Appellate Division was troubled by the Board's lack of discussion regarding the President's recommended personnel decisions. As such, it determined that the Board's actions went against the intent behind the OPMA by essentially acting as a rubberstamp.⁴

Therefore, the Appellate Division reversed the trial judge,⁵ and found that public entities must send *Rice* notices "any time it has placed on its agenda any matters" involving a public employee's employment or when a personnel decision involving an employee "may occur."⁶ Accordingly, even if a public entity simply intends to vote on the list of employees recommended for renewal and nonrenewal, without discussing the employees or their employment (which the Appellate Division seems to discourage), it must provide each of these employees with a *Rice* notice. Since Kean University only sent a letter informing certain employees that the President would not be recommending to the Board their reappointment (instead of notifying them of their right to have the matter discussed publically), the Court found that the employment actions taken at the December meeting were null and void.

Meeting Minutes

The OPMA also requires that meeting minutes be made "promptly available" to the public.⁷ However, prior to the Court's decisions in *Kean I/II*, "promptly available" had never been specifically defined. To provide clarity to this ambiguous language, the Court concluded that "promptly available" requires a public entity to release its minutes within 30 to 45 days of its last meeting, unless extraordinary circumstances (such as extreme weather, public emergencies, or other unforeseen circumstances) prevent the Board from meeting. To ensure the Kean University Board of Trustees complied with this requirement, the Court required it to adopt a meeting schedule for the 2017-2018 school year that would enable it to make its minutes publically available within this timeframe (even if doing so would require the Board to meet an additional five times per year).

Takeaways

To avoid unnecessary litigation that may invalidate its actions, public entities must become familiar with the more stringent requirements under the OPMA. Unfortunately, *Kean I and II* will likely have unintended consequences, including an increased burden being placed on administrative offices (due to the greater number of *Rice* notices that will need to be prepared) and requiring all public entities to hold a minimum of nine meetings per year that occur no greater than 45 days apart (as any fewer number would prevent a public entity from approving and making "promptly available" its meeting minutes).

[1] *Kean Fed'n of Teachers v. Ada Morell*, A-5481-14T3 (App. Div. Feb. 8, 2017); *Kean Fed'n of Teachers v. Bd. of Trs. of Kean Univ.*, No. A-2332-14 (App. Div. Feb. 8, 2017).

[2] N.J.S.A. 10:4-12(b)(8).

[3] *Rice v. Union Cty. Reg'l High Sch. Bd. of Ed.*, 155 N.J. Super. 64 (App. Div. 1977).

[4] Notably, the Appellate Division held that when "a public body acts on a personnel matter without prior discussion of any kind, the silent unexplained vote cast by the Board members reduced the event to a perfunctory exercise, devoid of both substance and meaning."

[5] The trial judge upheld the traditional interpretation of the OPMA that "absent any discussion of [the employee's] employment status during closed session, or any stated intention to engage in such discussion, the OPMA does not require the Board to issue a *Rice* notice." *Kean Fed'n of Teachers v. Ada Morell*, A-5481-14T3 (App. Div. Feb. 8, 2017) at *4.

[6] According to the Appellate Division, this will create "an environment in which the members of public bodies are free to carry out their responsibilities in a manner that guarantees to the public that their ultimate decisions are the product of a thoughtful and deliberative process."

[7] N.J.S.A. 10:4-14.