

To: New Jersey Law Revision Commission
From: Renee Wilson
Re: Open Public Meetings Act N.J.S.A. 10:4-12(b) (8); N.J.S.A. 10:4-14
(*Kean Federation of Teachers v. Morell*, 448 N.J. Super. 520 (App. Div. 2017))
Date: February 5, 2018

MEMORANDUM

Executive Summary

In *Kean Federation of Teachers v. Morell*, the Court considered two issues.¹ The first was whether Kean University's Board of Trustees violated the Open Public Meetings Act (OPMA), by failing to make meeting minutes "promptly available," as required by the Act.² The second issue was whether the Board also failed to provide proper notice in violation of the OPMA regarding its decision to terminate the position of a faculty member.³

Background

The Plaintiffs in *Kean Federation of Teachers v. Morell* alleged that the Board of Trustees of Kean University violated OPMA when it failed to make the Board's minutes from the September 2014 and December 2014 meetings "promptly available," as required by the Act.⁴ Specifically, the September minutes were made available ninety-four days after the meeting and the December minutes were made available fifty-eight days after the meeting.⁵ Further, Plaintiffs also alleged that the Board terminated faculty member, Valera Hascup's position without sending her notice, as required in the Court's decision in *Rice v. Union County Regional High School Board of Education*, 155 N.J. Super. 64, 382 A.2d 386 (App. Div. 1977).⁶

The Trial Court found that the meeting minutes were not made "promptly available" as required by the OPMA, and suggested that the Board should adopt a meeting schedule which would enable it to make minutes "promptly available".⁷ The Board appealed the Court's determination on that basis. The Trial Court determined, however, that the Board was not in violation of the *Rice* notice requirements, which call for notification of the employee when a public body intends to act on matters "involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific prospective public officer or employee or current public officer or

¹ *Kean Federation of Teachers v. Morell*, 448 N.J. Super. 520 (App. Div. 2017).

² *Id.* at 524.

³ *Id.* at 525.

⁴ *Id.* at 525.

⁵ *Id.*

⁶ *Id.* at 524.

⁷ *Id.* at 545.

employee employed or appointed by the public body.”⁸ The plaintiffs appealed the Court’s determination on that basis.

The OPMA does not define “promptly available,” with regard to adhering to a specific time frame for releasing meeting minutes, nor does it specify that any form of notice must be sent to employees whose employment status would be affected by action of a public body at its meeting.

Issue One - Meeting Minutes

As noted above, the Trial Court agreed with Plaintiffs with regard to the meeting minutes and imposed a permanent injunction, requiring the Board to make the minutes of all future meetings available within forty-five days.⁹ The statute in question is N.J.S.A. 10:4-14, which states in pertinent part:

“Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.”¹⁰

On appeal, however, the Appellate Division reversed and vacated the permanent injunction imposed below, stating that “although OPMA expressly authorizes the Superior Court to issue injunctive relief as a means of enforcing its provisions...the forty-five day deadline...is inconsistent with the implicit, fact-sensitive approach the Legislature endorsed by using the words ‘promptly available.’”¹¹ The Appellate Division went on to say that the effect of a judicially imposed deadline is one that not only strips the Board of one of its managerial prerogatives, but is one that would also invite “continuous judicial involvement in the form of enforcement by motion practice.”¹² The Appellate Division further noted that the Legislature entrusted Boards to handle the “government, control, conduct, management, and administration” of our State’s public colleges and Universities, and in light of that, Judges are not suited to micromanage its internal affairs.¹³ The Court did, however, order the Board to reconsider its

⁸ *Id* at 526.

⁹ *Id* at 525.

¹⁰ N.J.S.A. 10:4-14

¹¹ *Kean Federation of Teachers v. Morell*, 448 N.J. Super. 520, 526 (App. Div. 2017).

¹² *Id* at 526.

¹³ *Id* at 535.

meeting schedule, stating that it was now on notice that “five meetings per year will not allow it to make its meeting minutes ‘promptly available’ to the public.”¹⁴

In an effort to interpret the statute’s intent, the Court noted that in the absence of any published decisions addressing this issue from either the Supreme Court or the Appellate Division, it would “apply the well-settled principles of statutory construction our Supreme Court has reaffirmed numerous times.”¹⁵ The Appellate Division opted to interpret the statute by looking to the legislative intent, which involved looking at the plain language used by the Legislature. In defining “promptly available,” the Court stated that it “requires public bodies to approve and make their meeting minutes available to the public in a manner that fulfills the Legislature’s commitment to transparency in public affairs.”¹⁶ Further, the Appellate Division noted that making the minutes available should be a priority and not treated as a “ministerial function or technical annoyance.”¹⁷ Finally, the Court emphasized “in light of no specific statutory requirement, the custom and practice of a particular public body must be afforded some consideration, as long as they are reasonable.”¹⁸

While the suggestion that making minutes available to the public ninety days or more after a meeting does not meet the statutory requirement might meet with general acceptance, the statute itself provides no specific guidance, and the issue had not previously been addressed by case law in this State.

Issue Two - Rice Notice Requirement

With regard to the *Rice* notice, the Trial Court concluded that “absent any discussion of Hascup’s employment status during closed session, or any stated intention to engage in such discussion, the OPMA does not require a *Rice* notice.”¹⁹ The statute in question is the Open Public Meetings Act, N.J.S.A. 10:4-12(b) (8), which states in pertinent part:

b. A public body may exclude the public only from that portion of a meeting at which the public body discusses any:

* * *

(8) matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual

¹⁴ *Id.*

¹⁵ *Kean Federation of Teachers v. Morell*, 448 N.J. Super. 520, 531 (App. Div. 2017).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Kean Federation of Teachers v. Morell*, 448 N.J. Super. 520, 524 (App. Div. 2017).

employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting;²⁰

On appeal, the Appellate Division disagreed with the Trial Court's finding that such a notice was not required in this case because the Board did not discuss Hascup's reappointment in private session.²¹ Specifically, the Court noted that "the fact that the Board voted not to reappoint Hascup without discussion in order to avoid sending her a *Rice* notice obscured the decision-making process."²² In *Rice*, the Court held that the personnel exception listed in OPMA could only be waived "if all employees whose rights could be adversely affected decide to request a public hearing."²³ As articulated by that Court, the *Rice* notice imposed an obligation on the public body employer to "provide the affected employees with reasonable advance notice to enable them to (1) make a decision on whether they desire a public discussion; and (2) prepare and present an appropriate request in writing."²⁴

The statute does not specify that public bodies must provide any notice to individuals whose rights could be adversely affected. The Appellate Division, however, suggested that

[t]he OPMA is expressly intended to promote meaningful citizen participation in governmental affairs. When a public body acts on a personnel matter without prior discussion of any kind, the silent unexplained vote cast by the Board member reduces the event to a perfunctory exercise, devoid of both substance and meaning. That is the antithesis of what the Legislature intended when it adopted the OPMA. *N.J.S.A.* 10:4-7.²⁵

As this case illustrated, absent concrete statutory language, the issue is left open for courts to determine in what instances such notice should be provided. Here, there was some legislative history with regard to notices, as indicated in *Rice*, but the available guidance is limited and the Appellate Division explained

[w]e now hold that a public body is required to send out a *Rice* notice any time it has placed on its agenda any matters "involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body[.]" *N.J.S.A.* 10:4-12(b)(8). This approach will provide all of

²⁰ *N.J.S.A.* 10:4-12(b) (8)

²¹ *Id.* at 526.

²² *Id.*

²³ *Rice v. Union County Regional High School Board of Education*, 155 *N.J. Super.* 64, 73 382 A.2d 386 (App. Div. 1977).

²⁴ *Id.* at 73.

²⁵ *Kean Federation of Teachers v. Morell*, 448 *N.J. Super.* 520, 540 (App. Div. 2017).

the affected employees with the opportunity to: (1) decide whether they desire a public discussion, and (2) prepare and present an appropriate request in writing. *Rice, supra*, 155 N.J. Super. at 73...²⁶

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding the issues identified in *Kean Federation of Teachers v. Morell* to determine if any modification to the statute could be of use in achieving predictable and consistent outcomes in the cases that arise moving forward. To this time, no other cases have addressed this specific issue with regard to OPMA, as it relates to meeting minutes, though there is a case, as described in detail above, which addresses aspects of the issue of notice.

²⁶ *Id.* at 543.