

New Jersey Law Journal

Open Public Meetings Act Remedy Can Be Based on History of Transgressions

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08-20-2009

A state appeals court on Thursday made it easier for plaintiffs to obtain injunctive relief to redress violations of the Open Public Meetings Act.

When a plaintiff alleges a pattern of misconduct, a trial court should consider violations occurring outside the statute's 45-day limitation period to decide whether an injunction is warranted, the Appellate Division ruled in *Burnett v. Gloucester County Board of Chosen Freeholders*, A-6131-07.

The panel reinstated a complaint charging the Gloucester County Freeholders with repeated violations of OPMA, N.J.S.A. 10:4-6 et. seq.

Plaintiff David Burnett charged that between January 25, 2006 and November 20, 2007, the seven-member board improperly discussed 61 matters and acted on 17 of them at meetings closed to the public.

The freeholders denied any violations. Burnett sought to void actions taken by the board in four instances, as allowed by N.J.S.A. 10:4-15. He also cited a multitude of other instances in support of his request for an injunction to prevent future wrongful conduct. Under N.J.S.A. 10-4:16, individuals may apply to Superior Court for an order requiring compliance with the act.

The subjects discussed in the non-complying closed sessions, according to the complaint, ranged from approving the removal of deer carcasses from roadways to adoption of a policy barring employees from accepting gifts from vendors. In several cases the board authorized settlement of litigation and payment of bonuses to outside counsel, according to the complaint.

In the two-year period covered by the complaint, the board members took over 1,600 votes in public sessions but never exhibited any dissension. "Essentially the freeholder board was conducting its work sessions in closed session," says plaintiff's lawyer Mark Cimino, a Deptford solo.

Burnett's suit was moved to Camden County, where Assignment Judge Francis Orlando determined the board violated OPMA at its Nov. 20, 2007, meeting when it established a new position of Superintendent of Elections. Orlando voided that action, but he granted the defendant summary judgment on the remaining counts of the complaint, finding the plaintiff's other motions were time-barred for missing the statute's 45-day deadline.

Orlando also dismissed the motion for injunctive relief, finding 11 of the instances cited as justification were "clearly on the face meritless" because they discussed subjects such as personnel matters and settlement of litigation that are exempt from OPMA. Orlando also found the remaining instances were remote and time-barred by R. 4:69-6, which bars an action in lieu of prerogative writs to review a board of freeholders' action 30 days after it is filed.

On appeal, Burnett disputed whether Orlando properly applied the exemptions to OPMA. He also claimed on appeal that Orlando should have granted injunctive relief because the board's pattern of conduct violating the act.

The appellate panel of Anthony Parrillo, Marie Lihotz and Carmen Messano agreed, finding Burnett had raised factual questions about whether the board's failure to ratify its actions in an open meeting violated the law.

On six occasions, the freeholder board appeared to have held discussions about settlements of lawsuits, as well as approving settlements and authorizing the release of funds in those cases. "The OPMA is violated when formal action is taken in the closed session and never ratified or even discussed in a public session," Lihotz wrote. "Our review of the public session minutes in the record unearthed only one instance, unrelated to the instant litigation matters, when the closed session discussions were ratified in a public session. If that occurred, the conduct flies in the face of the requirement for open government in pursuit of the cherished ideal of government of the people."

The panel also said Orlando erred in his analysis of whether prospective relief was warranted.

"[A]lthough plaintiff may be out-of-time to void the unwarranted actions taken, any pattern showing a public body repeatedly ignores the OPMA requirements necessitates imposition of prospective injunctive relief to assure the public that its government will operate in the open," Lihotz wrote.

The appeals court remanded the case to determine whether the board violated the OPMA, and if so, whether a pattern of non-compliance was demonstrated that would warrant imposition of prospective injunctive relief to curb future violations.

On appeal, the county, represented by Assistant County Counsel Matthew Lyons, claimed the instances the plaintiff cited were merely "reports" by the county administrator, which did not require board action. The appeals court, while noting it was not required to consider a defense not raised below, said that claim was "disingenuous." The administrator has no statutory authority to create new positions or pay bonuses to outside counsel, Lihotz wrote.

Plaintiff's lawyer Cimino says the ruling not only clarifies what can and cannot be done in closed session but also strengthens OPMA's injunctive remedy.

"It makes it clear, as the Legislature intended, that not only is the law intended to fix past violations [but] the law is clearly intended to prospectively prevent it from occurring again. This decision should reinvigorate that portion of the act," Cimino says.

County Counsel Samuel Leone says the court did not find the county in violation of OPMA or void any actions taken by the freeholders but merely ordered further "analysis." He says the county welcomes the opportunity to rebut the plaintiff's bid for injunctive relief.

Leone also says the board had "implemented strengthened and more specific controls"

following the Appellate Division's ruling in *In re Casino Simulcasting Special Fund*, 398 NJ Super 7 (2008). That case said a public body may not reach a decision based on a closed-session discussion without a public meeting. "It is important to note that this is an ever-changing area of the law," Leone says.