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April 1, 2014

ATTORNEY GENERAL OPINION NO. 2014- 07

J.R. Behan, Chairman
Kansas Board of Emergency Medical Services
900 SW Jackson St., Room 1031
Topeka, KS 66612

Re: State Departments; Public Officers and Employees–Public Officers and Employees–Open Meetings Act; Meetings of State and Subdivisions Open to Public; Exceptions; Closed or Executive Meetings

Statutes; Administrative Rules and Regulations and Procedure–Administrative Procedure Act–Orders Affecting Licensure; Hearings

Synopsis: The Kansas Administrative Procedure Act (KAPA) applies to the activities of the investigations committee of a state licensing board only to the extent that the board's statutes expressly provide that proceedings under those statutes are governed by the KAPA. KAPA proceedings are not required to be open to observation by the public with the exception of an evidentiary hearing. Under the KAPA, an agency's decision is made in an order that is served on the parties; a public vote is not required.

If the KAPA does not apply, then the actions of an investigations committee must be held in accordance with the Kansas Open Meetings Act (KOMA). Under the KOMA, the investigations committee of a licensing board may consult with an attorney in a closed or executive session and it may recess to engage in quasi-judicial deliberations regarding a decision in a specific case. However, all other parts of an investigative or disciplinary proceeding and all policy or general discussions must occur in a public meeting, unless otherwise provided by law. Under the KOMA, binding decisions must be made by a vote in an open meeting. Cited herein: K.S.A. 2013 Supp. 65-6112; 65-6129c; 65-6132; 65-6133; K.S.A. 75-4317; K.S.A. 2013 Supp. 75-4317a; 75-4318; 75-4319; 77-201; K.S.A. 77-501; K.S.A. 2013 Supp. 77-503; K.S.A. 77-

508; K.S.A. 2013 Supp. 77-511; K.S.A. 77-512; K.S.A. 2013 Supp. 77-514; 77-523; K.S.A. 77-526.

* * *

Dear Mr. Behan:

On behalf of the Kansas Board of Emergency Medical Services (KSBEMS), you ask for our opinion on whether the investigations committee of a professional licensing board authorized to exercise quasi-judicial powers must conduct its affairs in a meeting open to the public. In your letter, you state that the KSBEMS Investigations Committee consists of five board members out of a 15-member board, and committee meetings may include any of the following activities:

- Staff reports on the status of pending investigations and findings from completed investigations;
- Discussions among Investigations Committee members, staff and board counsel to determine whether probable cause exists to file a disciplinary petition;
- Investigations Committee member review of documents and evidence from investigations to decide whether to impose discipline or offer a consent agreement to resolve the matter in question;
- Discussion and votes on whether to recommend that the Board adopt policies regarding investigations and reviews of applications for Board certification; and,
- Investigations Committee review of applications for certification from applicants with criminal histories.

Your question involves both the Kansas Open Meetings Act (KOMA)¹ and the Kansas Administrative Procedure Act (KAPA).² Before specifically addressing KSBEMS investigations, we first review these two acts.

KAPA Overview

The Kansas Administrative Procedure Act provides procedural rights and duties³ for decisions made by state agencies.⁴ The KAPA applies “only to the extent that other statutes expressly provide that the provisions of [KAPA] govern proceedings under

¹ K.S.A. 75-4317 *et seq.*

² K.S.A. 77-501 *et seq.*

³ K.S.A. 2013 Supp. 77-503(b).

⁴ *Denning v. Johnson County Sheriff's Civil Service Board*, 46 Kan. App. 2d 688, 702 (2011) (the definition of state agency under the KAPA expressly excludes “political subdivisions of the state”) and Attorney General Opinion No. 95-97 (city and county governments are not a state agency under the KAPA).

those statutes.”⁵ In other words, the KAPA does not apply to proceedings before a state licensing board unless a statute specifies that such proceedings must be held in accordance with the KAPA.

Under the KAPA, a licensing agency may take action regarding a license after giving notice and the opportunity for an evidentiary hearing.⁶ An evidentiary hearing provides the opportunity for “full disclosure of all relevant facts and issues,” and affords all parties “the opportunity to respond, present evidence and argument, conduct cross-examination and submit rebuttal evidence”⁷ In other words, a KAPA evidentiary hearing is an administrative version of a “trial” used to gather facts so that a licensing agency can decide a case in a fair and objective manner.

KAPA proceedings include many stages other than the evidentiary hearing. The KAPA expressly provides that a hearing is not required for a decision on whether to issue or not issue a complaint, summons, or similar accusation, or to initiate or not to initiate an investigation, prosecution, or other proceeding.⁸ Agencies may issue summary proceeding orders without first holding a hearing, subject to the affected party’s right to request an evidentiary hearing on the order.⁹ When an evidentiary hearing is requested, agencies may hold prehearing conferences to address other preliminary matters.¹⁰

The only stage of a KAPA proceeding that KAPA requires to be open to public observation is the evidentiary hearing.¹¹ The KAPA explicitly states that a KAPA hearing is *not* a meeting for the purposes of the KOMA.¹² A prior Attorney General Opinion reached the opposite conclusion.¹³ However, that opinion was issued before the KAPA was amended in 2009 to clarify that a KAPA hearing is *not* a meeting under the KOMA.¹⁴

Under the KAPA, an agency’s decision in a particular case is made by written order.¹⁵ The KAPA does not require a public vote for a decision to be effective; rather, the

⁵ K.S.A. 2013 Supp. 77-503(a); *see also Heiland v. Dunnick*, 270 Kan. 663, 672 (2001) (“The Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.*, sets up a framework for administrative review. However, by its own terms, the KAPA applies only to the extent that other statutes expressly provide that its provisions govern proceedings under those statutes.”).

⁶ K.S.A. 77-512.

⁷ K.S.A. 2013 Supp. 77-523(b).

⁸ K.S.A. 77-508.

⁹ K.S.A. 2013 Supp. 77-537(a).

¹⁰ K.S.A. 77-517.

¹¹ K.S.A. 2013 Supp. 77-523(f). The presiding officer may close parts of a hearing pursuant to a provision of law requiring confidentiality or expressly authorizing closure.

¹² *Id.*

¹³ *See*, Attorney General Opinion No. 97-40 (“We believe the legislature intended the KOMA, including the quasi-judicial deliberations exception, to apply to KAPA hearings, which meet the definition of a meeting.”).

¹⁴ *See* L. 2009, Ch. 109, § 11; now codified in K.S.A. 2013 Supp. 77-523(f).

¹⁵ K.S.A. 77-526.

decision is effective upon service of the final order upon the party and the party's attorney, if any.¹⁶

KOMA Overview

The Kansas Open Meetings Act generally requires that meetings of governmental bodies subject to its provisions must be open to the public.¹⁷ A "meeting" is defined as any gathering in person or through a medium for interactive communication by a majority of the membership of the body "for the purpose of discussing the business or affairs of the body."¹⁸ Governmental bodies subject to the KOMA include state and local agencies, boards, and committees and subcommittees thereof.¹⁹ Thus, the KOMA has a much broader application than the KAPA.

The KOMA allows a public body to enter into a closed or executive session for specific purposes, such as to discuss matters related to non-elected personnel or for consultation with an attorney which would be deemed privileged in the attorney-client relationship.²⁰ A public body may not hold an executive session for matters that do not fall within the list of permitted subjects for executive sessions in K.S.A. 2013 Supp. 75-4319(b) unless some other law requires closure.²¹ "Exceptions to the requirement of openness are to be narrowly construed."²² It should be noted that the KOMA does *not* permit executive sessions for the purpose of receiving information regarding investigations of licensees from board staff.²³

The KOMA also expressly states that its open meetings requirement does not apply to "any administrative body that is authorized by law to exercise quasi-judicial functions *when such body is deliberating matters relating to a decision involving such quasi-judicial functions.*"²⁴ A "quasi-judicial function" is one that "requires a weighing of the evidence, a balancing of the equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues."²⁵ "[Q]uasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh

¹⁶ K.S.A. 77-530(a); 77-531.

¹⁷ K.S.A. 2013 Supp. 75-4318.

¹⁸ K.S.A. 2013 Supp. 75-4317a.

¹⁹ K.S.A. 2013 Supp. 75-4318(a) (KOMA applies to "all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds").

²⁰ See K.S.A. 2013 Supp. 75-4319(b).

²¹ See, e.g., Attorney General Opinion No. 2008-22 ("if the topic [of a meeting of the board of trustees of a county hospital] regards an individual patient . . . a discussion could take place in executive session in order to protect personal privacy"); and Attorney General Opinion No. 89-42 (opining that discussions by a governing body of a public hospital concerning peer review and risk management reports are not required to be held in accordance with the KOMA).

²² Attorney General Opinion No. 2009-21. See also Attorney General Opinion Nos. 2008-22; 96-61; and 87-10.

²³ See K.S.A. 2013 Supp. 75-4319(b) (listing the subjects that may be discussed at a closed or executive session).

²⁴ K.S.A. 2013 Supp. 75-4318(g)(1) (emphasis added).

²⁵ *Golden v. City of Overland Park*, 224 Kan. 591, 597 (1978).

evidence, draw conclusions as a basis for official actions, and exercise discretion of a judicial nature.”²⁶ Deliberation means “[t]he act of carefully considering issues and options before making a decision or taking some action.”²⁷

Binding action may not occur during a recess for quasi-judicial deliberations under the KOMA; any formal vote on a matter deliberated under the KOMA must be conducted in an open meeting.²⁸

The KAPA and the KOMA are Mutually Exclusive

In our opinion, the KOMA and the KAPA are intended to be mutually exclusive. That is, when a statute states that a licensing board shall conduct administrative proceedings in accordance with the KAPA, it is the *KAPA*, not the *KOMA*, that governs such proceedings, and the *KOMA* is inapplicable. We find support for this opinion throughout both acts.

General Considerations

The purpose of each act is fundamentally different. The *KOMA* governs how a public body, exercising its policy-making functions, must conduct business that affects the general public and applies to both state and local governments. The public body holds a “meeting.” In contrast, the *KAPA* establishes administrative procedures and duties that affect the adjudication of *individual cases* and applies only to state agencies exercising quasi-judicial functions. The state administrative agency holds a “proceeding” or “hearing.” While *KAPA* hearings are open to the public, the public has a diminished interest in the stages of a *KAPA* proceeding other than the evidentiary hearing. In our opinion, it is consistent with the public interest to allow preliminary actions in a professional disciplinary case to occur outside the public view, because it is possible for an investigation to reveal that a complaint against a licensee is meritless, that no probable cause exists to determine that a violation occurred, or that private or confidential information, such as medical records or criminal history information, must be discussed.

Notice under the KAPA and the KOMA

Under the *KOMA*, whenever a majority of the membership of a state licensing board or any committee or subcommittee of the board meets to discuss the business of the board, it must provide notice of such meeting to any person who has requested notice. By contrast, when a licensing board or committee or subcommittee of the board meets to serve as the presiding officer in *KAPA* proceedings, the *KAPA* requires notice to be provided only to the parties to the *KAPA* proceeding and persons who have filed written

²⁶ *Thompson v. Amis*, 208 Kan. 658, 663 (1972).

²⁷ Black’s Law Dictionary (9th ed. 2009), accessed on March 28, 2014.

²⁸ K.S.A. 2013 Supp. 75-4318(a); Attorney General Opinion Nos. 97-41, 79-225.

petitions to intervene in the matter.²⁹ The KAPA does *not* require notice to be provided to the general public whenever a licensing board meets to conduct KAPA proceedings.

Only KAPA Evidentiary Hearings Open to the Public

The KOMA requires all meetings of a state licensing board and its committees, subcommittees and subordinate groups to be open to the public. By contrast, the only portion of a KAPA proceeding that the KAPA requires to be open to public observation is the evidentiary hearing, and even then the legislature explicitly provided that a KAPA hearing is *not* a meeting under KOMA.³⁰ Given the fact that an evidentiary hearing (despite being open to the public) is not a meeting for purposes of the KOMA, it seems unlikely that the legislature intended for the other stages of a KAPA proceeding (which KAPA does not require to be open) to be subject to the KOMA.

KAPA Presiding Officer vs. KOMA Majority

The KAPA permits a licensing board to designate one or more board members to serve as the presiding officer for a KAPA proceeding.³¹ In addition, the KAPA allows a licensing board to refer a proceeding to the Office of Administrative Hearings to be decided by a hearing officer that is not a board member.³² Thus, the KAPA permits a single person — not necessarily a board member — to hear and decide a proceeding.

By contrast, the KOMA requires decisions by a majority of the body to be made in a public meeting.³³ Even if a licensing board by a majority vote in a public meeting delegates the task of deciding licensure and/or disciplinary matters to a committee of the board, that committee must also decide cases by majority vote in a public meeting.³⁴

Service of Order vs. Public Votes

The KAPA does not require presiding officers to cast a public vote. This is because decisions made under the KAPA are rendered in written orders that are served on the parties.³⁵

Under the KOMA, a public body must take formal action to issue a binding decision by a vote of the majority of members in an open meeting.³⁶

²⁹ K.S.A. 77-516(b); 77-518(a).

³⁰ K.S.A. 2013 Supp. 77-523(f).

³¹ See K.S.A. 2013 Supp. 77-514(g) and K.S.A. 77-516(a).

³² K.S.A. 2013 Supp. 77-514(a).

³³ K.S.A. 2013 Supp. 75-4318(a) (“ . . . no binding action by such bodies shall be by secret ballot”); see also K.S.A. 2013 Supp. 75-4319(c) (“No binding action shall be taken during closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act.”).

³⁴ Whether a licensing board has the authority to delegate such matters depends upon its statutes. We assume for the purposes of this opinion that the KSBEMS has such authority.

³⁵ See K.S.A. 77-526(c) and (g); see also K.S.A. 77-529(b).

³⁶ See K.S.A. 75-4318(a) and K.S.A. 2013 Supp. 75-4319(c).

The KAPA and the KOMA Cannot be Reconciled

In our opinion, the above provisions of the KAPA and the KOMA cannot be reasonably read as requiring simultaneous compliance with both acts. Therefore, it is our opinion that where a statute requires a licensing board to conduct a proceeding in accordance with the KAPA, that board is not required to comply with the KOMA during any stage of the proceeding.

KSBEMS Disciplinary Proceedings

Having reviewed the provisions of the KAPA and the KOMA, we turn now to your specific question about KSBEMS licensure and disciplinary proceedings. K.S.A. 2013 Supp. 65-6133(b) provides that the KSBEMS “may limit, modify, revoke or suspend an attendant’s or instructor-coordinator’s certificate or the board may refuse to renew such certificate in accordance with the provisions of the Kansas administrative procedure act.”³⁷ The KSBEMS may also revoke, limit, modify, suspend or refuse to renew an ambulance operator’s permit or training officer’s certificate in accordance with the KAPA.³⁸ Therefore, these proceedings must be held in accordance with the KAPA, not KOMA.

KSBEMS statutes are silent on whether the KAPA applies to proceedings to *grant or deny* an original or reinstatement application. Therefore, the KAPA does not govern these proceedings and they must be held in accordance with the KOMA.³⁹ This important distinction affects the extent to which Investigations Committee proceedings must be open to public observation.

KSBEMS Proceedings under KAPA

When the KSBEMS Investigations Committee is operating under the KAPA, it can conduct proceedings without notice or public observation on matters such as receiving staff reports on the status of pending investigations and findings from completed investigations; determining whether probable cause exists to impose discipline; determining whether sufficient grounds exist to refuse to renew a certificate; and deciding whether adverse action such as the modification, suspension, or revocation of a certificate is warranted under the facts of a particular case. The only stage of the proceeding that must be open to public observation is the evidentiary hearing. Any decision by the Investigations Committee in a particular case should be rendered in a written order that is served upon the party and the party’s attorney.

³⁷ K.S.A. 2013 Supp. 65-6133(b).

³⁸ K.S.A. 2013 Supp. 65-6129c and 65-6132.

³⁹ Not every application must be decided by the professional licensing board itself. A board may delegate to staff the authority to approve or deny applications that do not require the exercise of discretion. See, e.g., Attorney General Opinion No. 90-36.

KSBEMS Proceedings under KOMA

When operating under the KOMA, a meeting of a majority of members of the KSBEMS Investigations Committee for the purpose of discussing the business or affairs of the Committee must generally be open to the public. However, the Investigations Committee may vote to enter into an executive session for the purpose of consulting with the Board's litigation counsel on matters such as whether to offer a consent agreement to an applicant for certification, whether sufficient grounds exist to deny an application for certification, or on any other matter for which the Investigation Committee's litigation counsel may provide legal guidance.

The Investigations Committee may also recess an open meeting to engage in quasi-judicial deliberations.⁴⁰ With two exceptions, all of the activities of the Investigations Committee described on page 2 constitute quasi-judicial functions because they involve the weighing of evidence, the application of statutes and Board regulations to the facts, and the exercise of discretion in resolving specific issues. The first exception is discussion related to the adoption of Board policies. Because adoption of Board policies does not involve a specific quasi-judicial matter, any such discussion must be held in an open meeting. The second exception is staff reports to the Investigations Committee. When staff is reporting information or evidence in a case, the Committee is not yet deliberating on that case and is subject to the KOMA.⁴¹

When the Investigations Committee has concluded its quasi-judicial deliberations, it must resume the open meeting and take a formal vote to render a binding decision. If the Committee cannot form a consensus and is not yet ready to make a decision, the Committee must reconvene the open meeting and announce that no consensus was reached and thus there will be no formal vote on a decision. Thereafter, the Investigations Committee may continue their deliberations at any regularly scheduled or special meeting. At such a meeting, the Committee may recess from the open meeting to engage in quasi-judicial deliberations, but any binding decision must be made by public vote in an open meeting.

Conclusion

The extent to which the investigations committee of a professional licensing board may conduct licensing and disciplinary matters outside of an open meeting depends on the

⁴⁰ When an open meeting has been recessed to conduct quasi-judicial deliberations, the public body should not allow the presence of another person to present additional evidence. *Loewen v. U.S.D. No. 411*, 15 Kan. App. 2d 612, 620-21 (1991) ("When acting as a quasi-judicial body, the Board is not empowered to gather additional information beyond that presented to the hearing committee. It must comport with the requirements of due process. . . [T]he presence of antagonistic or unnecessary parties to the [deliberations is] questionable under our open meetings concept, and it smacks of unfairness to the [licensee] whose rights are being considered.").

⁴¹ See Attorney General Opinion No. 97-41 ("When exercising a judicial function, the distinction is made between the gathering of information to be considered during deliberations and the actual act of deliberating over the information. The former must be conducted during an open meeting while the later is exempt from an open meeting.")

board's licensing statutes. In the case of the KSBEMS, all proceedings to limit, modify, revoke, suspend or refuse to renew an attendant, instructor-coordinator or training officer certificate or an operator's permit shall be in accordance with the KAPA. Other than evidentiary hearings, no other stage of KAPA proceedings is required to be held publicly. In a KAPA proceeding, the Investigations Committee does not need to take a vote in an open meeting for its decision in a case to be effective; the Committee's decision is rendered by written order that is served upon the parties.

The KAPA only applies to the extent that other statutes expressly provide that the provisions of the KAPA govern proceedings under those statutes. Therefore, in the case of the KSBEMS, decisions to grant or deny an original or reinstatement application for an attendant, instructor-coordinator or training officer certificate or an operator's permit are not pursuant to the KAPA, but instead must occur in accordance with the KOMA. Such decisions must occur in a meeting open to the public. However, the Investigations Committee may recess into a closed or executive session for the purpose of consultation with an attorney that would be deemed privileged in the attorney-client relationship. In addition, the Investigations Committee may recess for quasi-judicial deliberations for a specific case, but the Investigations Committee's decision in the case must be made by a vote in a meeting open to the public.

To the extent that Attorney General Opinion 97-40 reaches a different conclusion concerning the applicability of the KOMA to the KAPA, it is withdrawn.

Because the applicability of the KOMA and the KAPA depend on each licensing board's statutes and the facts of each circumstance, a licensing board should consult with the board's general counsel for further guidance on this issue.

Sincerely,

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