

PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Anthony R. Gray,

Petitioner(s),

-against-

JUDGMENT

Index No.: 867-02

RJI No.: 01 02 068864

University Auxiliary Services at Albany, Inc.,
and Julia Filippone, in her Capacity as Executive
Director,

Respondent(s).

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Anthony R. Gray, Pro Se
13 Benson Street
Albany, New York 12206

Paul M. Collins, Esq.
Hinman Straub, P.C.
(Attorneys for respondents)
121 State Street
Albany, New York 12207

McNamara, J.

Petitioner instituted this combined proceeding pursuant to CPLR article 78 and an action for declaratory judgment (Public Officers Law § 107), adjudging and declaring that the respondent University Auxiliary Services at Albany, Inc. (UAS) is a "public body" with the meaning of Public Officers Law §97(2).

Petitioner, a student at the State University of New York at Albany (University at Albany), alleges respondent violated the Open Meetings Law (Public Officers Law Article 7) by refusing him

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access to meetings of the UAS Board of Directors. UAS is a not-for-profit corporation (see, Not-For-Profit Corporation Law §102) whose purpose is to aid the students and faculty of the University at Albany by assisting them in every way possible in their study, work, living and extracurricular activities (Certificate of Incorporation). In December 1997 respondent and the State University of New York (SUNY) entered into an agreement whereby respondent was to provide, either directly or through a sub-contractor, certain services to the University at Albany as set forth in the contract. Subsequent agreements extended the period covered by the contract which now runs through December 31, 2002. The agreement allows respondent to provide an array of services including operation of the residence hall food services. Petitioner contends that by reason of its relationship with SUNY, as expressed in the agreement, respondent is subject to the provisions of the Open Meetings Law.

In enacting the Open Meetings Law the Legislature declared that public business should be performed in an open and public manner (Public Officers Law §100). To that end, the statute provides that "[e]very meeting of a public body shall be open to the general public," except for executive sessions (Public Officers Law § 103 [a]). A "public body" is defined as: "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, ... or committee or subcommittee or other similar body of such public body" (Public Officers Law §102 [2]).

The essential factor in determining the applicability of the Open Meetings Law is whether

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the entity is performing a governmental function, not simply conducting public business (*Matter of Poughkeepsie Newspaper Div. v Mayor's Intergovernmental Task Force on N. Y. City Water Supply Needs*, 145 AD2d 65, 69). In determining whether an entity is a public body performing a governmental function an examination should be made of “the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies” (*Smith v City Univ. of New York*, 92 NY2d 707, 713).

The only purpose for which UAS exists is to aid the University at Albany in carrying out its educational mission. The University at Albany is part of the State University system and is without argument a public body subject to the Open Meetings Law. All of the authority by which UAS conducts operations on the University at Albany campus is derived from its contract with SUNY. The power that UAS possesses under that contract is substantial. UAS not only controls the residence hall food service but all food services on campus, it controls the campus book store, computer store, hair styling salon, banking services window, agency accounts, SUNYCard, soda, merchandise and food vending, laundry machines, ATM machines, cleaning contracts and refrigerator rentals. Respondent also has the power to set the costs of those services either directly, or through negotiated contract and in addition, controls the use of university marks or logos.

The contract between UAS and SUNY does not provide for any financial consideration to be paid by UAS for these rights and UAS by-laws provide that all assets and funds of the corporation

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shall be owned exclusively by the corporation. In the past the earnings derived from services provided by UAS have been used to fund a variety of programs and projects including partial funding of the construction of a new library on the University at Albany campus and to advance funds for payment of the \$250,000 initiation fee for entry into the Division I America East Conference. The only limitation on UAS power to set the costs of services and to disburse funds is the requirement in the contract that the UAS annual budget, including program funding, be approved by the Chief Administrative Officer of the University at Albany. That reservation, however, does not include the power to direct in the first instance how funds belonging to UAS should be disbursed. Thus, UAS has unfettered control in determining that a particular program or project is not worthy of funding from its substantial earnings (see, *Smith v City Univ. of New York*, 92 NY2d 707, 713) and substantial control over how the funds are spent.

Any concern that a declaration that UAS is subject to the Open Meetings Law will lead to all contractor vendees of the State being subject to the provisions of the statute is unfounded. The royalty and sponsorship agreement between UAS and The Coca-Cola Company and The Coca-Cola Bottling Company of New York (Coca-Cola) is useful in illustrating the point. The royalty and sponsorship agreement with Coca-Cola provides that no competitors products will be sold, distributed, dispensed, served or sampled on the campus during the term of the agreement. Coca-Cola is also awarded a license to use university marks. In consideration of these rights Coca-Cola

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agrees to pay substantial royalties and other funds to UAS.¹

The contract between Coca-Cola and UAS is easily distinguished from the agreement between UAS and SUNY. Coca-Cola paid for the rights it received with UAS retaining authority over how those payments are used. By contrast, SUNY transferred its significantly valuable commercial rights to UAS without receiving any specific financial return and with minimum control over how those rights were to be valued and the earnings from them utilized. In doing so, SUNY ceded to UAS an important aspect of decision making regarding the operation of one of its educational institutions. Inasmuch as the operation of the University at Albany is a governmental function, the transfer of significant power over that operation with minimum control over its exercise, leads to the conclusion that UAS performs a governmental function (see, *Holden v Bd of Trustees of Cornell University*, 80 AD2d 378, management of public moneys is public business). Therefore, UAS is subject to the mandates of the Open Meetings Law.

Under Public Officers Law §107 a court may, in its discretion, and upon good cause shown, declare any act taken by a public body in violation of the Open Meetings Law void in whole or in part. Petitioner has requested that the court exercise the discretion afforded by the statute to invalidate actions taken by the UAS Board of Directors at those meetings to which he was refused entry. However, not every violation of the Open Meetings Law automatically triggers its enforcement

¹The copy of the agreement provided to the court has been redacted to obscure the amounts of royalty payments due. However, in the agreement the parties acknowledge that the "Upfront Royalty will be used to fund the completion of construction of University's new library." The agreement also provides for an "annual royalty", "other royalty" and "vending royalties" as well as "other payments/consideration".

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provisions (*Gordon v Village of Monticello*, 87 NY2d 124) and the circumstances, here, do not warrant the imposition of such a drastic remedy. Respondent is a not-for-profit corporation involved in providing auxiliary, albeit essential, services which would not commonly be viewed as a governmental function. Thus, without some showing that its belief concerning the applicability of the Open Meetings Law was not made in good faith, invalidating decisions made by the UAS Board would amount to an abuse of discretion (see, *Canandaigua Messenger, Inc. v Wharmby*, 292 AD2d 835, reasonable belief of entity that it was not a public body; cf. *Gordon v Village of Monticello*, supra at 126, patently illegal actions; *Goetschius v Board of Educ.*, 244 AD2d 552, persistent pattern of deliberate violations of the Open Meetings Law). For the same reason an award of attorneys' fees, even if available to this self-represented petitioner, is not justified.

Petitioner is awarded judgment declaring UAS to be a public body performing a governmental function and therefore, subject to the provisions of the Open Meetings Law. The request to invalidate actions taken by the UAS Board of Directors is denied as is the request for attorney's fees. To the extent the petition may be read as requesting a declaration that UAS is subject to the provisions of the Freedom of Information Law (Public Officers Law Article 6), that application is denied. Presently, there is no dispute between the parties over a request for documents and thus, no justiciable controversy regarding the applicability of the Freedom of Information Law.

This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

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Dated: Saratoga Springs, New York
July 24, 2002


Thomas J. McNamara
Acting Supreme Court Justice

Papers Submitted:

1. Notice of Petition dated February 1, 2002
2. Verified Petition sworn to the 1st day of February, 2002 with exhibits annexed
3. Notice of Motion dated February 25, 2002
4. Affirmation of Paul M. Collins, Esq. dated February 25, 2002 with exhibits annexed
5. Memorandum of Law of Paul M. Collins, Esq. dated February 25, 2002
6. Affidavit of Julia M. Filippone sworn to the 25th day of February, 2002
7. Affidavit of Ginger Latourrette sworn to the 25th day of February, 2002 with exhibits annexed
8. Petitioner's Memorandum of Law in Support dated February 28, 2002
9. Verified Answer of Respondent dated May 24, 2002 with exhibits

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McNamara, J.

Respondents have moved to dismiss the petition in this proceeding brought pursuant to CPLR Article 78.¹

The petitioner, a student at the State University of New York at Albany, seeks a declaratory judgment that the respondent University Auxiliary Services (UAS) is a public body within the

¹This amended Decision and Order replaces the Decision and Order of the court dated April 23, 2002 and is the result of further consideration of the issues by the court undertaken at its own initiative.

**AMENDED
DECISION and ORDER**
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meaning of Public Officers Law §97(2) and therefore, is required to comply with the provisions of the Open Meetings Law (Public Officers Law Article 7). In addition, petitioner would have the court invalidate certain actions taken by the UAS Board of Directors at meetings held on February 7, 2001, October 24, 2001 and December 13, 2001 to which he alleges he was refused admittance.

The motion to dismiss is based on claims that some or all of the relief sought is barred by the applicable statute of limitations and that petitioner lacks standing to pursue some or all of the relief sought. In addition, respondents maintain that petitioner has failed to join necessary parties, that the petition fails to state any cause of action against respondent Julia M. Filippone and that the petition fails to state, in whole or in part, a cause of action against UAS.

Insofar as petitioner seeks to have the court rescind the actions of the UAS Board taken at meetings to which he was refused entry, the four month period of limitation applicable in an Article 78 proceeding is measured from the date the minutes of the meeting were released (Public Officers Law §107[3]; see, *Smith v City Univ. of New York*, 92 NY2d 707). This proceeding was commenced on February 2, 2002 within four months of both the October 24, 2001 and December 13, 2001 meetings. The minutes of the February 7, 2001 meeting were released in May 2001 well more than four months before the action was commenced. Thus, the portion of the petition which seeks to have the court invalidate the actions taken at the February 7, 2001 meeting is untimely and must be dismissed.

The challenge to petitioner's standing to bring this proceeding must be rejected. Public Officers Law §107[1] confers upon any "aggrieved person ... standing to enforce the provisions of

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[the Public Officers Law] against a public body...". As a member of the public denied entry to meetings of what he maintains is a public body, petitioner is an aggrieved person and therefore, has standing to bring this proceeding (see, *Matter of Sanna v Lindenhurst Bd. of Educ.*, 85 AD2d 157, affd 58 NY2d 626, action under Open Meetings Law is designed to remedy an injury to the public).

UAS has also moved to dismiss the petition on the basis that petitioner failed to join as necessary parties students whose rights would be affected by a determination to invalidate actions of the UAS Board taken at meetings to which he was denied entry. Respondent also maintains that members of the UAS Board whose elections as officers petitioner seeks to have invalidated are also necessary parties who have not been joined. Inasmuch as a determination that UAS is a "public body" is a prerequisite to consideration of whether actions of the Board should be invalidated, and given that the issue has not been determined, it would be premature to dismiss the action for failure to join necessary parties. In the event that UAS is determined to be a "public body", the appropriateness of voiding the actions will be addressed upon consideration of all relevant circumstances including the presence of necessary parties.

The motion to dismiss the petition as against respondent Julia M. Filippone for failure to state a cause of action should be granted. Petitioner has alleged that Ms. Filippone in her role of Executive Director of UAS prohibited him from attending Board meetings. That assertion, however, is contradicted by other allegations in the petition wherein petitioner maintains that the decision not to allow for public attendance at meetings was made by the Board. In her affidavit, submitted in support of the motion, Ms. Filippone avers that she is not a member of the Board of UAS and did

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not vote to exclude petitioner from meetings. Her only role was to inform petitioner that the Board had determined that its meetings would not be open to members of the public. Inasmuch as the only allegation of wrongdoing against Ms. Filippone is clearly at odds with the facts, the motion to dismiss the petition as against her is granted.

The motion to dismiss for failure to state a cause of action as against UAS should be denied. The petition is based on allegations that UAS is a public body subject to the Open Meetings Law and that the refusal of the Board to allow public attendance at its meetings is a violation of that law. Accordingly, the motion to dismiss as against UAS is denied.

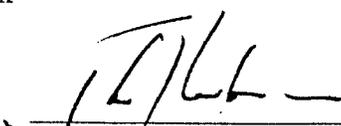
That portion of the motion to dismiss based upon the statute of limitations is granted with respect to allegations concerning the February 24, 2001 meeting of the UAS Board and is in all other respects denied. The portion of the motion to dismiss based upon lack of standing, failure to join necessary parties and failure to state a cause of action as against UAS is denied. The motion to dismiss by respondent Julia M. Filippone is granted.

This memorandum shall constitute both the Decision and Order of this Court.

SO ORDERED.

ENTER.

Dated: Saratoga Springs, New York
July 25, 2002



Thomas J. McNamara
Acting Supreme Court Justice

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