SUPREME COURT CHAMBERS
SUITE 200 · 205 LAKE STREET
ELMIRA, NEW YORK 14901

CHARLES B. SWARTWOOD
JUSTICE

October 20, 1981

New York Educators Association
(Janet Axelrod, Esq., Assistant Counsel)
Attorneys for the Petitioner
107 Washington Avenue
Albany, New York 12210

Sayles, Evans, Brayton, Palmer & Tifft, Esqs.
(James F. Young, Esq., of counsel)
Attorney for the Respondent
One West Church Street
Elmira, New York 14901

Re: In the Matter of the Application of Chris Doolittle, individually and as second Vice-President of the Odessa-Montour Teachers Association v. The Board of Education of Odessa-Montour Central School District.

Chemung County Special Term - July 21, 1981.
Chemung County Index No. 81-1942
(Final Submission - August 31, 1981)

D E C I S I O N

This is a CPLR Article 78 proceeding commenced by the petitioner pursuant to Public Officers Law §§89[4][b] and 102 challenging certain actions taken by the respondent Board of Education as violating the provisions of the Freedom of Information Law and the Open Meetings Law (see:Articles 6 and 7 of the Public Officers Law).

The petitioner asserts that the respondent Board violated the provisions of Public Officers Law Article 7 (Open Meetings Law) in three specific ways at its regularly scheduled board meetings held on February 26, March 12, March 26, May 28 and June 11 of 1981. In addition, the petitioner claims that the Board violated the provisions of Public Officers Law Article 6 (Freedom of Information at the February 26, 1981 meeting. There is no question that a school board is a public body whose meetings are subject to the requirements of the Open Meetings Law and the Freedom of Information Law (see: Public Officers

Law 97[2] and 86[3]; Matter of White v. Battaglia, 79 A D 2d 880). The facts necessary for a determination of the issues raised by this proceeding are not in dispute.

The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed "executive session" as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law §100[1] a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting.

Although we find no reported court cases on this issue, the Committee on Public Access to Records (see: Public Officers Law §§89 and 104) has issued advisory opinions supporting the position of the petitioner that it is improper for a public body to schedule an executive session in advance of an open meeting (see, e.g., Clowe Opinion, April 29, 1980; Niemi Opinion, October 27, 1980; McFarland Opinion, December 18, 1980). It has been held that advisory opinions of the Committee interpreting the statutes in question should be upheld if not irrational or unreasonable (see: Miracle Mile Associates v. Yudelson, 68 A D 2d 176; Matter of Sheehan v. City of Binghamton, 59 A D 2d 808).

The theory of the advisory opinions, Clowe, Niemi and McFarland, supra, is that an executive session can not be scheduled in advance of a meeting because it must be voted on in an open meeting and the outcome of that vote can not be known before the vote is taken (Public Officers Law §100[1]). It is further argued that to list an executive session on the agenda could give the appearance that the Board met at a closed session in advance of the meeting and agreed at that time to hold an executive session. That, of course, would be improper (cf: Orange County Publication v. Newburg, 60 A D 2d 409, affd. 45 N Y 2d 947; Matter of White v. Battaglia, supra, 79 A D 2d 880). However, there is no evidence that there was any such advance agreement here.

On the other hand, where there is a large amount of business to come before a meeting it is necessary for the orderly disposition of that business to have an agenda and to schedule the manner in which the matters are to be taken up. If it is known to the person who makes up the agenda that, for instance, personnel problems with respect to an individual

employee or as to negotiations with respect to a collective bargaining agreement which are valid subjects for discussion in executive session must be dealt with, it would seem practical and proper to indicate the necessity of discussing and voting on the holding of an executive session in regard to those subjects on the agenda itself. It would be proper to indicate that taking such a vote would be considered at the meeting. This would be in keeping with the spirit of the statute in providing advance notice of what is likely to be considered and voted on at a meeting.

However, we agree that simply scheduling an "executive session" without more as was done here was a technical violation of the statute and the Board should desist from doing so in the future.

The petitioner's second contention is that the respondent Board has violated the Open Meetings Law at each of the designated meetings by failing to properly identify the matters to be considered in executive session at the time the motion was made to conduct such a session.

The transaction of business by a public body at an executive session is the exception to the rule that all meetings of public bodies shall be open to the general public (Public Officers Law §98[a]). Section 100[1] of the Public Officers Law sets forth specifically those areas the subject of which can be considered in an executive session. That section also requires that the "general area or areas of the subject or subjects to be considered ..." at the executive session be identified on the motion of a member of the public body to enter into executive session.

The petitioner's claim that the Board failed to identify with the necessary specificity the matters to be discussed at the executive sessions is based upon the minutes of the meetings in question together with affidavits of those present who have stated that the Board minutes of these meetings accurately reflect what was said when the Board determined that it would enter into executive session. The respondent's answer, verified by its attorney, admits that the minutes of the respondent Board do not specify the matters which the Board planned to discuss in executive session but denies that there was no mention of these matters because there may have been a failure to accurately record what was said. However, the supporting affidavit of the attorney indicates that he was not present at any of the Board meetings. Therefore, based upon the reply affidavits of individuals actually present at the meetings in question, we find that the minutes do accurately reflect what was stated at the time the Board determined to enter into executive session.

At the February 26, 1981 and March 12, 1981 meetings, no reasons were given by the Board for adjourning to an executive

session. This clearly violates Public Officers Law §100[1]. The minutes of the March 26, 1981 meeting indicate that the Board voted on two separate occasions to enter executive session to discuss "personnel" and "negotiations" without further amplification. On May 28, 1981 the Board again entered into executive session on two occasions. The reasons given for doing so were to discuss a "legal problem" concerning the gymnasium floor replacement and for "personnel items". Again, on June 11, 1981, the Board voted to enter executive session for "personnel matters".

We believe that merely identifying the general areas of the subjects to be considered in executive session as "personnel", "negotiations", or "legal problems" without more is insufficient to comply with Public Officers Law §100[1].

With respect to "personnel", Public Officers Law §100[1][f] permits a public body to conduct an executive session concerning certain matters regarding a "particular person". The Committee on Public Access to Records has stated that this exception to the open meetings law is intended to protect personal privacy rather than shield matters of policy under the guise of privacy (Clowe Opinion, 4/29/80; Quackenbush Opinion, 2/14/80). Therefore, it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person (cf: Petersen Opinion, 6/30/81; McWilliams Opinion, 4/24/80). When entering into executive session to discuss personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a "particular" person (cf: Clowe Opinion, 4/29/80; McFarland Opinion, 12/18/80).

Concerning "negotiations", Public Officers Law §100[1][e] permits a public body to enter executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term "negotiations" can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law (cf: Quackenbush Opinion, 2/14/80; Petersen Opinion, 6/30/81; Dynko Opinion, 10/11/79).

Lastly, Public Officers Law §100[1][d] permits executive sessions for the purpose of discussing proposed, pending or current litigation. At its May 28, 1981 meeting, the respondent Board indicated that it was entering into executive session to discuss a "legal problem" with the replacement of the gymnasium floor. We believe that the Board should make it clear that "proposed, pending or current litigation" is to be discussed in executive session in order to fulfill its duty to keep the public informed (cf: Dynko Opinion, 10/11/79; Snyder Opinion, 6/20/79).

The petitioner asserts that there is some indication that matters concerning lay-offs and abolition of positions are being discussed in executive session. The respondent Board agrees that these are not included under Public Officers Law §100[1] as specifically enumerated exclusions to open meetings. To the extent that such discussions involve general policy rather than particular individuals, any such discussions should be conducted in open meetings.

The petitioner's final contention is that the respondent violated Public Officers Law §87.2 at its February 26, 1981 meeting by refusing to make public a copy of the agenda which it had prepared for its executive session after being requested to do so. However, we find this issue to be moot as the petitioner has obtained this information. There is no requirement under Public Officers Law Article 6 that information requested be turned over immediately. Section 89[3] envisions compliance within five business days of the receipt of a written request. Further, there is no indication in this case that the administrative remedies for obtaining such information under Public Officers Law §89[4] were exhaused prior to seeking relief by this proceeding (cf: Matter of Cosgrove v. Klingler, 58 A D 2d 910; Matter of Floyd v. McGuire, 108 Misc 2d 536; Matter of Polansky v. Regan, 81 A D 2d 102). In light of these events, we decline to decide whether the executive session agenda comes within one of the specific exceptions of Public Officers Law §87[2] and was therefore privileged.

The petition is granted to the extent of directing the respondent to desist from listing "executive sessions" as an item on its agenda in advance of the public meeting in the future; directing the respondent to conduct executive sessions for only those purposes enumerated in Public Officers Law §100[1] and only after informing the public of the reason for such session with the necessary specificity and is otherwise denied.

The petitioner to submit judgment on approval of the respondent. No costs.

JUSTICE OF SUPREME COURT

cc: Chemung County Clerk

enc: Chemung County Clerk -
Notice of Petition and Petition; Respondent's Affidavit; Answer; Affidavit (J. Burris); Reply.