SUPREME COURT, WESTCHESTER COUNTY

NYLJ, MARCH 10, 1999

MATTER OF GOETSCHIUS v. BOARD OF EDUCATION OF THE GREENBURGH ELEVEN UNION FREE SCHOOL DISTRICT *QDS:92414048* — Upon the foregoing papers it is ordered and adjudged that this petition and the motion for summary judgment are disposed of as follows:

The instant petition seeks a judgment pursuant to CPLR Article 78 declaring respondents' conduct of the Board of Education meeting on December 9, 1996, violative of the Education Law and the Open Meetings Law. Petitioners seek to permanently enjoin respondents from further violating the Open Meetings Law and to annul any and all actions taken by respondents during the aforesaid meeting, including the voting of disciplinary charges against several teachers and the termination of several teacher associates as well as revoting the matters raised at the annual meeting. Finally, petitioners seek a judgment declaring respondents' refusal to respond to petitioners' Freedom of Information Law request improper and illegal, ordering respondents to provide petitioner with the requested documents, finding respondents' fees for the reproduction of the audio and video tapes of the meeting to be improperly inflated and directing respondents to reproduce the tapes for petitioners at the rate of the actual cost of such reproduction. Petitioners also seek an award of the costs and fees arising from this proceeding pursuant to Public Officers Law section 107(2).

Respondents moved to dismiss the instant petition on the grounds that it fails to state a cause of action against respondents for violations of the Open Meetings Law.

By order dated January 11, 1999, this Court converted the respondents' motion to dismiss into a motion for summary judgment (CPLR 103(b), 3211 (C); Matter of Boces Central Council of Teachers v. Board of Cooperative Services of Nassau County, 63 N.Y.2d 100, 103; see Mihlovan v. Grozavo, 72 N.Y.2d 506, 508; Matter of Phillips v. Town of Clifton Park Water Authority, 215 A.D.2d 924, 926; Matter of Morey v. City of Gloversville, 203 A.D.2d 625, 626; Matter of Tozzo v. Board of Appeals on Zoning of City of New Rochelle, 179 A.D.2d 810, 811; Briedis v. Village of Tuxedo Park, 156 A.D.2d 744, 746). The parties were directed to submit to the Court whatever additional evidence they believed necessary for the Court to determine this matter on its merits on the basis of the factual sufficiency of the petition. Such additional evidence has now been submitted and considered by this Court.

Petitioners John Goetschius, James Carforo, Ken Cielatka, Thomas Dilworth, and David Demnitz collectively comprise the Executive Council of the petitioner Greenburgh Eleven Federation of Teachers, Local 1532, AFT, AFL-CIO (hereinafter the "Union"). Petitioners Reginald Skinner, Roy Polonio, Charles Manna, and Thomas Baldino are active members of the Union and serve either on committees or as floor representatives. These individual petitioners, and petitioners Deborah Kiely, Dennis Mosblech, Richard Rowlands, Heidi Broetz, and Kevin Burns are employed as teachers by the respondent Board of Education of the Greenburgh Eleven School District (hereinafter the "Board"). Petitioner James Brogan is employed by the Board as a guidance counselor for the Middle School. Petitioners Chris Satory and Matthew Magee were employed by respondent as teacher associates until they were summarily terminated during a meeting of the Board on September 12, 1995, which this Court has previously determined was illegal and annulled all of the actions taken thereat. Petitioner Janet Pagano retired from her position as a teacher associate with the District several years ago.

Respondent Greenburgh Eleven Union Free School District (hereinafter the "District") was created, pursuant to a special act of the State Legislature, for the sole purpose of operating schools to educate the special-needs boys who reside at Children's Village, a private, not-for-profit agency. The District is coterminous with the grounds of the Children's Village. Sandra G. Mallah is the Superintendent of Schools of the Greenburgh Eleven School District. Respondent Board, a municipal corporate body, is responsible for the superintendence, management, and control of the educational functions of the Greenburgh Eleven Union Free School District. The Board is comprised of seven members, all of whom are nominated and appointed by the Board of Directors of Children's Village.

This Court has now twice addressed the manner in which Board meetings have been conducted in two prior Article 78 proceedings. In each instance the Court found respondents' improper conduct so flagrant and willful that it annulled the Board's actions taken at the illegal meetings, and awarded petitioners their costs and attorney's fees (see In The Matter of the Application of John Goetschius, et al. v. Board of Education of The Greenburqh Eleven Union Free School District, Index No. 2861/95 affirmed, 244 A.D.2d 552 and In The Matter of the Application of John Goetschius, et al. vs. Board of Education of the Greenburgh Eleven Union Free School District, Index No. 18348/96). Then, as now, the Court found that the history of respondent Board's violations of the Open Meetings Law as well as the history of labor relations in the District are a necessary part of the narrative essential to a reasoned determination of an appropriate remedy. Accordingly, the facts and conclusions of law set forth in the prior decisions and orders of this Court dated July 31, 1996, and March 13, 1997, are incorporated herein by reference and need not be restated.

Respondents' application to strike such allegations as irrelevant must, therefore, again be denied. It is simply of no moment that these allegations may also be pertinent to pending PERB proceedings or the subject of a pending federal civil rights action in the District Court, Southern District of New York. This Court has considered background and other data necessary for a complete understanding of the factual context.

Petitioners now challenge the actions of the respondent Board with respect to its meeting held on December 9, 1996. Respondents held no regular or special meetings of the respondent Board between July 3, 1996, which was annulled by this Court and December 9, 1996.

Petitioners here contend that all business conducted at the meeting of the board on December 9, 1996, was tainted by the illegality of the meeting, and, due to respondents' intentional violation of the law, should be deemed null and void. Petitioners assert that the continued disregard by the Board for both the letter and the spirit of the Open Meetings Law compels further judicial intervention. This Court must agree.

As this Court has repeatedly noted in the prior proceedings before it, where, as here, there is no electoral process by which the public may hold respondents accountable for their actions, it is imperative that petitioners and other interested members of the public are fully able to observe and participate in the public meetings. Such observation and participation is the only means available to petitioners and the public to ensure that respondents are properly conducting their business.

Indeed, as this Court has previously noted, it is well-settled that the provisions of the Open Meetings Law (Public Officers Law §§100-111) were intended to open the decision-making process of elected officials to the public while at the same time protecting the ability of the government to carry out its responsibilities. The Legislature had determined that "[i]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe, the performance of public officials" (Public Officers Law §100). In short, the purpose of the Open Meetings Law is to prevent public officials from debating and deciding in private what they are required to debate and decide in public (see Matter of Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 686; Matter of New York University v. Whalen, 46 N.Y.2d 737).

Thus, it is clear that the provisions of the Open Meetings Law are to be liberally construed in accordance with the statute's purposes (see e.g., Matter of Gordon v. Village of Monticello, Inc., 87 N.Y.2d 124, 126-127). Every meeting of a public body must be open to the general public, except that an executive session of such executive body may be called and business transacted thereat in accordance with Section 105 of the Public Officers Law (Public Officers Law §103(a)). However, such session may be convened only in the course of a public meeting held in compliance with all statutory mandates and the public body must identify with some degree of specificity beyond mere recitation of the statutory language the subject matter to be discussed (see Matter of Gordon v. Village of Monticello, Inc., 207 A.D.2d 55, 57, rev'd on other grounds 87 N.Y.2d 124; Matter of Sanna v. Lindenhurst Board of Education, 58 N.Y.2d 626, 627-628; Matter of Goodson Todman Enterprises, Ltd. v. City of Kingston Common Council, 153 A.D.2d 103, 106; Matter of Kloepfer v. Commissioner of Education, 82 N.Y.2d 974, aff'd 56 N.Y.2d 687). Concomitantly, the topics actually discussed must remain within the statutorily enumerated exceptions, and these exceptions in turn must be narrowly construed and carefully scrutinized (see Matter of Sanna v. Lindenhurst Board of Education, supra at 628; Matter of Gordon v. Village of Monticello, Inc., supra 207 A.D.2d at 58).

In the matter before this Court, the respondent Board does not dispute that it is a "public body", subject to the Open Meetings Law but maintains that it is in compliance therewith in the scheduling and conduct of this meeting. Respondents allege that notices of the reorganizational and regular board meeting to be held on December 9, 1996, were posted by the Acting District Clerk on December 5, 1996, in the District's attendance office and main office, and at the Greenburgh Town Hall at 3:00 p.m., admittedly more than seventy-two (72) hours prior to the commencement of said board meeting. Respondents admit that the announcement of the meeting included a notice that all persons attending the meeting would be required to pass through a metal detector. The notice purportedly also included a copy of the School Board's Meeting Guide prescribing the School Board's rules for the conduct of its meetings.

Petitioners by contrast assert that the notice was posted only in one (1) location on the school campus, on a "cluttered" bulletin board in a room that is locked during the lunch hour.

It is not disputed, however, that the meeting was held on December 9, 1996, at 6:30 p.m., at the Greenburgh Town Hall in Greenburgh, New York. Nor is it disputed that the respondent Board instituted a number of "security measures" at the meeting, including the use of a bomb-sniffing dog prior to opening the meeting to the public, the hiring of a number of plain-clothed security guards, and the installation of metal detectors at the meeting entrance. Greenburgh Town police in uniform were present as were more than twenty (20) security personnel, including both the District's regular security guards and additional personnel hired to provide "security" for this particular meeting. The security personnel and police officers remained present in and about the meeting, interspersed among the public, circling the public seating area throughout the meeting and stationed at the front and rear of the Town Hall. The District also hired a "sergeant at arms" to preside over the meeting. Finally, it is admitted that video cameras trained on the audience were used to "record" the meeting.

[illegible] the meeting had to pass through metal detection devices, leased and installed by the Board at the entrance to Town Hall. While the meeting was noticed to begin at 6:30 p.m., the Board did not open the doors to the Greenburgh Town Hall to the public until 6:30 p.m., and members of the public, including petitioners, were not permitted to enter the building until after 6:30 p.m.

Nevertheless, the respondent Board called the meeting to order at 6:35 p.m. while admittedly members of the public had not yet been permitted entry and were waiting to pass through the screening devices. Then in less than one (1) hour the Board proceeded to ratify the actions originally taken at its July 3, 1996, reorganizational meeting. At 6:56 p.m., the Board opened the "Reorganizational Meeting." By 7:15 p.m., the Board convened an executive session to discuss the "numerous" personnel matters with respect to particular District employees, including the voting of probable cause determinations, from the meetings of July 3, 1996, November 11, 1995 and September 12, 1995. At 10:04 p.m., the Board reconvened the public session at which time it summarily approved ninety-two (92) resolutions, without any discussion among the board members, or questioning of the Superintendent or other administrators, and then adjourned at 10:45 p.m.

The Board disingenuously asserts that it conducted all of its remaining business in public session, with its discussions and deliberations open to the public, and that all votes were taken in public session, with the exception of the preferral of disciplinary charges which must be acted upon in executive session pursuant to Education Law Section 3020-a(2). However, the minutes of the meeting reflect that the Board elected and appointed officers, approved several other appointments, and, among other business that it conducted, voted to terminate the employment of thirteen (13) teacher associates and voted to prefer thirteen (13) sets of disciplinary charges pursuant to Education Law Section 3020-a against several tenured teachers. These were the very same personnel actions previously annulled by this Court in its decision and order dated July 31, 1996.

In accordance with its established policy, the members of the Board refused to permit public participation or entertain any questions from the public.

On or about December 30, 1996, petitioner Goetschius requested production of audio and video tapes of the December 9, 1996, meeting and of "records/documents demonstrating the costs of and respondent's expenditures for the 'security' measures implemented by respondents for the December 9, 1996, meeting" pursuant to the Freedom of Information Law. By memorandum dated January 27, 1997, the District business office informed petitioner Goetschius that the audio and videotapes would be forwarded to a private vendor for reproduction upon receipt of payment therefor. The cost of copies was set forth as follows:

Minutes—104 pages X.25/pages $26.00
Copies of audio tapes $41.25
Copies of video tapes $299.85
Total Cost: $367.10

Petitioner was also advised that security costs for the meeting were paid from private funds and that the District was not in possession of any documents regarding these expenditures.

A "Verified Notice of Claims" dated March 7, 1997, was thereafter filed by petitioner Goetschius on behalf of the abovenamed petitioners with the District, demanding that the School Board annul and void all actions taken at the December 9, 1996, meeting, make available the audio and videotapes at the rate of actual cost of reproduction and disclose documentation reflecting expenditures for security personnel and equipment. The instant Article 78 petition was commenced in April, 1997.

Respondents contend that there has been no violation of the Open Meetings Law. First, respondents assert that the use of security measures during the December 9, 1996, School Board meeting does not constitute a violation of the Open Meetings Law since "the Open Meetings Law does not prohibit the use of security measures such as metal detector, a bomb-sniffing dog, or security personnel, at open meetings." Respondents contend that the intrusion involved was no greater than that necessary to satisfy the governmental interest in assuring a safe and secure environment for the meeting, that advance notice was given and notice of such metal detection was duly posted outside the meeting, and that the metal detector was uniformly applied to all persons seeking entrance to the meeting.

The Court finds the respondents' contentions unsupportable in law or in fact and unacceptable and patently offensive and once again in direct contravention of the letter and spirit of the Open Meetings Law. The actions of respondents are tantamount to a deliberate and intentional exclusion of members of the public from its meetings through intimidation and invasion of the constitutional right to be free from unreasonable search of the person. Respondents have failed to provide this Court with any persuasive authority to conclude otherwise. As altruistic as their concerns for safety of themselves and members of the public may be, the respondents have failed to set forth any factual predicate to justify these actions.

Respondents' reliance on two (2) isolated incidents unrelated to any meeting of the Board and patently remote in time is woefully miscast. Indeed, the peaceful picketing by petitioners, albeit in violation of an order of this Court, which occurred on March 10, 1994, at a location equally remote not only in time but in distance as well from the District or any meeting thereof, cannot provide a basis for these actions by the board. Nor can an incident involving a discharged employee — not one of the above-named petitioners — who had been found on a road leading to the school property with a gun in his possession at some unspecified time well prior to March 3, 1995, when he was scheduled to be sentenced.[1] Indeed, it is noteworthy that respondents can point to no security measures that were instituted subsequent to either of these so-called "incidents" but prior to the decision and orders of this Court finding violations of the Open Meeting Law.

The Fourth Amendment to the United States Constitution provides that the government may not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Thus, the ultimate measure of the constitutionality of a governmental search is "reasonableness." Whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests, and to be reasonable under the Fourth Amendment a search must be based on individualed suspicion of wrongdoing (Chandler v. Miller, 520 U.S.305; Vernonia School District 47J v. Acton, 515 U.S. 646; see also Skinner v. Railway Labor Executives Assn., 489 U.S. 602, 624). Exceptions to that requirement have been upheld only in certain limited circumstances, where the search is justified by special needs, beyond the normal need for law enforcement (Chandler v. Miller, supra).

Where the government asserts such special needs, defined as concerns other than crime detection, as justification for suspicionless search, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties (id.) The search will be upheld only where the government's interests in conducting the search are substantial and important enough to override the individual's acknowledged privacy interest and sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion (see e.g., Camara v. Municipal Court, 387 U.S.523; Skinner v. Railway Labor Executives' Assn., supra at 630-31, 109 S.Ct. 1402). However, where a search is undertaken by officials to discover evidence of criminal wrongdoing, reasonableness generally requires the obtaining of a judicial warrant upon showing of probable cause (Skinner v. Railway Labor Executives Assn., supra at 619).

Nevertheless, as heretofore noted, special needs, beyond the normal need for law enforcement may make the warrant and probable cause requirement impracticable (see Griffin v. Wisconsin, 483 U.S.868, 873). Such "special needs" exist for example in the public-school context where the warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed, and strict adherence to the requirement that searches be based upon probable cause" would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools (see New Jersey v. T.L.O., 469 U.S.325, 340-341). However, such a search must be based on an individualized suspicion of wrong doing (id.).

Concomitantly, to uphold the right to conduct a suspicionless search and seizure, a searching inquiry must be conducted. Among the factors to be considered is the nature of the privacy interest upon which the search at issue intrudes. It is well-settled that the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate" and what expectations are legitimate varies with geographic context, within which it is asserted, for example, at home, at work, in a car, or in a public park (New Jersey v. T.L.O., supra at 337-338). In addition, the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State (see Vernonia School Dist. 47J v. Acton, supra at 654).

Of course, suspicionless searches under the formal entry-search programs at airports and sensitive facilities such as courthouses have been uniformly upheld by the lower courts. (see e.g., United States v. Epperson, 454 F.2d 769; United States v. Edwards, 498 F.2d 496; Downing v. Kunzig, 454 F.2d 1230; United States v. Davis, 482 F.2d 893). However, respondents' contention that the searches here were a comparable form of area-entry search at a sensitive facility that should be upheld on the same basis is simply untenable under a Fourth Amendment analysis.

Whether the airport and cojrthouse programs have been upheld as an "administrative search" or pursuant to fact-specific balancing inquiry into their "reasonableness," the courts have emphasized aspects of those programs that distinguish them in a critical manner from the search procedure here employed. Specifically, under a balancing analysis, the courts have repeatedly emphasized the following factors as critical to the constitutionality of the airport and courthouse searches: First, those searches were conducted under programs formally promulgated by responsible federal agencies for nationwide application under agency oversight (see United States v. Davis, supra at 896-904; Downing v. Kunzig, supra at 1231). The programs addressed on-going risks or threatened risks of violence at these particular facilities whose serious consequences and nationwide scope were fully and indisputably documented in the public records (see e.g., United States v. Pulido-Bacguerizo, 800 F.2d 899, 901; Downing v. Kunzig, supra at 1231). The violence experienced or threatened at those facilities was by conduct whose very unpredictability made specific advance identification of its likely perpetrators impossible and blanket searches of all persons seeking entry to the facility therefore the only feasible means of intercepting weapons and explosives (see e.g., United States v. Moreno, 475 F.2d 44, 48-49). Finally, under those programs physical searches, either of persons or their effects were conducted after electronic screening devices had raised individualized suspicion by indicating the possible presence of weapons or explosives. In consequence, the search procedures involved no more intrusion than was necessary to achieve their limited purpose of preventing entry rather than detecting and apprehending criminals (see United States v. Davis, supra at 908).

Thus, upholding airport/courthouse blanket search procedures required recognizing a new exception — spawned by a new national exigency — to the probable cause requirement (see e.g., United States v. Davis, supra at 908-912; Albarado, 495 F.2d 799, 803-804). What emerged was a carefully constrained special exception of quite narrow scope which permits blanket suspicionless searches of all persons and their effects at the entry points to particular areas only where: (1) the purpose is the administrative one of preventing the entry of weapons or explosives rather than the detection and apprehension of criminals; (2) the risk of violence from the introduction of weapons or explosives is reliably established as a significant possibility; (3) because of the impossibility of identifying possible carriers by any other practical means, blanket searches of all seeking entry is the only feasible way to achieve the administrative purpose and is demonstrably an efficacious way of achieving it and (4) the procedure employed is one of which advance notice is given and which, by permitting physical searches only after electronic screening has created individualized suspicion, insures that the means are not more intrusive than required to achieve the purely preventive purpose.

While it is apparent that respondents would have this Court extend the propriety of such blanket search procedures to the facts at bar, a critical factor is here lacking: there simply is no reliable established significant possibility of the risk of violence. Respondents' reliance on an isolated incident involving a single, former employee is simply miscast. Similarly unavailing are respondents allegations as to the peaceful picketing of the WAY Dinner held at a hotel in Westchester County. Indeed, subsequent to these events and until this Court found the above-noted violations by respondents of the Open Meetings Law and annulled the actions taken by the Board thereat, the Board took no action whatsoever to employ these so-called security measures. This inaction during what would be such a critical period of time is indicative of the absence of any, much less a compelling, need for such a program important enough to justify the particular intrusion.

It is simply beyond cavil that in determining whether a seizure and search is unreasonable, the Court must be satisfied that the governmental intrusion was justified at its inception and was reasonably related in scope to the circumstances which justified the interference in the first place (People v. Quakenbush, 88 N.Y.2d 534, 541, citing Terry v. Ohio, 392 U.S. 1, 20). This Court finds that the instant intrusion by respondents was wholly unjustified in its inception and evidenced respondents deliberate, ongoing and intentional attempts to evade and avoid public scrutiny. The chilling effect of this "screening" practice was then exacerbated by the presence of an equally unwarranted number of uniformed police officers and plain-clothed security personnel as well as the ever present surveillance of video cameras trained on an audience comprised of members of the public who had been repeatedly apprised of the practice of the Board to not allow any public participation. Thus, the cameras were never intended, and not utilized, to record and preserve public comment but were yet another weapon in respondents' chilling arsenal. Once again, this Court simply will not, indeed can not, approve of such willful and patent disregard of the basic underpinnings of the Open Meetings Law, a law designed to insure accountability of public officials in a democratic society.

Under all the circumstances at bar, the Court finds that the use of electronic screening devices was a per se violation of the Fourth Amendment and, necessarily, the Open Meetings Law in both its letter and spirit. So viewed the use of other "security" methods employed by respondents, which while standing alone may arguably not have provided a sufficient predicate for such a conclusion, can lead this Court to no other conclusion but grant the petition and to impose the most severe of sanctions as hereinafter set forth.

This Court is empowered, in its discretion and upon good cause shown, to declare void any action taken by a public body in violation of the Open Meetings Law (Public Officers Law §107). Of course, it is well-settled that not every violation of the Open Meetings Law automatically triggers its enforcement sanctions. Purely technical and nonprejudicial infractions or wholly unintentional violations will not support the aiding of the action taken at the meeting or support an award of attorney's fees (see e.g. Matter of New York University v. Whalen, supra at 735; Matter of Sanna v. Lindenhurst Board of Education, 85 A.D.2d 157, aff'd 58 N.Y.2d 626; Matter of Kloepfer v. Commissioner of Education, supra). However, where, as here, the respondents have again violated both the letter and the spirit of the Open Meetings Law and have acted with intent to circumvent its provisions there exists good cause to void the actions taken pursuant to Public Officers Law Section 107(1). Further, where, as here, there is a history of repeated violations and obvious prejudice to the petitioners and members of the public in general as a result of respondents' intentional, deceitful and indeed, unlawful conduct, an award of counsel fees pursuant to Public Officers Law Section 107(2) is justified (see Matter of Gordon v. Village of Monticello, Inc., supra, 87 N.Y.2d at 127-128).

Respondents, as heretofore noted, are not elected. Thus, there is no electoral process by which respondents may be held accountable to the public for their actions. Under such circumstances, this Court must agree that it is imperative that the public be able to observe and participate in the mandated public meeting to ensure that respondents are properly conducting their business. Concomitantly, the remedy fashioned by this Court must be one which will deter respondents from any future violations of the Open Meetings Law.

Accordingly, and in light of respondents' pattern of numerous violations of the Open Meetings Law and the irrefutably willful and flagrant manner in which they continued to do so, the remedy must be the most severe allowed to this Court and the Court hereby declares any and all actions taken by the respondent board at the meetings held on December 9, 1996, to be null and void.[2]

Respondents are hereby permanently enjoined from engaging in any future conduct violative of the Open Meetings Law including the use of electronic screening devices and/or the utilization of an excessive number of security personnel at any meeting of the Board.

Finally, petitioners are hereby awarded costs and fees pursuant to Section 107(2) of the Public Officers Law.

Under such circumstances, this Court need not determine whether respondents have violated the notice requirements of the Open Meetings Law. Pursuant to Section 104(2) of the Public Officers Law, notice of the time and place of meetings scheduled less than one (1) week beforehand must be given "to the extent practicable" to the news media and shall be conspicuously posted in one or more designated locations at a reasonable time prior thereto. However, pursuant to Section 104(1), notice of the time and place of the meetings scheduled for more than one (1) week thereafter, must be given at least one (1) week prior thereto and must be given to the news media and conspicuously posted in one (1) or more designated public locations at least seventy-two (72) hours prior to the meeting. Of course, whether abbreviated notice is "practicable" or "reasonable" in a given case depends on the necessity for the same and the particular "urgency" of the situation. Here, there are issues of fact which would necessarily entail a hearing with respect to the adequacy of the notice given were this Court not otherwise granting the petition on the grounds heretofore set forth.

Finally, the petition insofar as it seeks a declaration that the respondent Board violated the Freedom of Information Law by charging excessive fees for reproduction of audio and video tapes and by refusing to make available the documents demonstrating the costs and source of funds for the security measures employed on December 9, 1996, must be denied. Respondents are entitled to a declaration that there has not been a violation of the Freedom of Information Law under the facts at bar.

First, however, this Court cannot agree with respondents that this portion of the petition must be dismissed upon petitioners' failure to exhaust their administrative remedies. Pursuant to Section 89(4) of the Public Officers Law, an individual who wishes to appeal the denial of access to a record must appeal such denial within thirty (30) days to the head, chief, executive, governing body or designee of the agency in question (see e.g., Bentley v. Demskie, 250 A.D.2d 886; Newton v. Police Dept., 183 A.D.2d 621, 623-624; Kurland v. McLaughlin, 122 A.D.2d 947, 949). However, the failure to advise said individual of the availability of an administrative appeal precludes any such reliance on the failure to exhaust administrative remedies (Barrett v. Morgenthau, 74 N.Y.2d 907). Here, there is nothing before this Court to demonstrate that petitioner Goetschius was so advised. Nor have respondents demonstrated that procedures for an appeal had, in fact, even been established as required by Section 87(1)(b) of the Public Officers Law (see Barrett v. Morgenthau, supra; cf. Murphy v. New York State Ed. Dept., Office of Professional Discipline, 148 A.D.2d 160, 165). Under such circumstances, respondents may not raise as a procedural bar, the alleged failure by petitioner to exhaust his administrative remedies.

Nevertheless, the Court here finds that respondents have complied with the applicable provisions of the Freedom of Information Law which requires that the respondent Board shall generally make available records of its proceedings, and records of financial undertakings and/or agreements (Public Officers Law §87). The fees for copies of records is not to exceed twenty-five (25) cents per photocopy or the actual cost of reproducing any other record, except when a different fee is prescribed by statute (Public Officers Law §87(1)(b)(iii)).

Petitioners' protestations to the contrary notwithstanding, there are no facts before this Court which establish that respondents seek to charge petitioners more than the actual cost of reproduction of the audio and videotapes of the December 9, 1996, meeting. Any claim of surcharges, over and above respondents' actual cost of reproduction, are at best conclusory and unsupported. Past practice and costs fail to raise any cognizable issue with respect thereto.

Moreover, while it is beyond cavil that pursuant to section 87(2) of the Public Officers Law, respondents are required to disclose records relating to the disbursement of their funds, it is equally well-settled that there is nothing in the Freedom of Information Law that can be here construed to require respondents to prepare any records not possessed or maintained by them (Public Officers Law §89(3); see DiRose v. New York State Dept. of Correctional Services, 216 A.D.2d 691, 692; O'Shaughnessy v. New York State Division of State Police, 202 A.D.2d 508, 509; Reuben v. Murray, 194 A.D.2d 492). Accordingly, petitioners are not entitled to any relief with respect to those documents as to which respondents assert that they are not in possession of since private funds were utiized. There is simply nothing before this Court which would cause it to further question respondents with respect thereto or warrant any further inquiry.

Accordingly, to the extent the documents exist, petitioner may obtain copies by his complying with the memorandum dated January 27, 1997, from the District business office to him in which he was informed that such audio and videotapes would be forwarded to a vendor for reproduction upon receipt of payment therefor. Since it is apparent that payment has not been tendered, no rights of the petitioner have been here violated.

Submit judgment on notice in accordance herewith which shall provide for an award of attorneys fees in an amount to be set by the Court together with counsel's affidavit of services.

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(1) Indeed, this Court takes judicial notice that this former employee, one Renee Williams, was arrested on August 10, 1994, for the crime of criminal possession of a weapon third degree. On March 3, 1995, he pleaded guilty as charged under a superior court information and was sentenced in the Westchester County Court (Lange, J.) to five (5) years probation.

(2) Of course, and once again, to the extent that the confidential educational placement of students, a matter exempt from the Open Meetings Law pursuant to Section 108(3), was included in the voting, the decision and order of this Court is not directed thereat and such proceedings shall be specifically excluded in the judgment to be submitted herein.

AMERISOURCE CORP. v. McLean Drug Co., Inc. *QDS:92414042*; PERLMAN v. St. Joseph's Medical Center *QDS:92414043*; THE TYREE ORGANIZATION, LTD. v. Ramada Contracting, Inc. *QDS:92414044*; DAVIDISON v. Fasanella *QDS:92414045*; McCULLAGH v. McCoy *QDS:92414046*; BERGER v. Greenhouse, M.D. *QDS:92414047*—See memorandum on file.