

From Barbara Gref
(914) 794-6711

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

AFFIRMED

207 AD 2d 55

VICTOR W. GORDON, ALEXANDER CHERVIOK,

Petitioners,

-against-

VILLAGE OF MONTICELLO, INC., THE BOARD
OF TRUSTEES OF THE VILLAGE OF MONTICELLO,
INC., JOHN DIUGUID, MARK SCHULMAN, ROBERT
FRIEDLAND, DAVID ROSENBERG, EVELYN
VANDERMARK, GLORIA CAHALAN, GLADYS WALKER,

Respondents.

SUPREME COURT, SULLIVAN COUNTY SPECIAL TERM, RJI# 52-10205-93,
Orig. ret. date: 6/8/93

JUSTICE VINCENT G. BRADLEY, PRESIDING

APPEARANCES:

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BRADLEY, J:

In this Article 78 proceeding, the petitioners challenge
a determination made by the Village of Monticello Board of

Trustees to create a full-time position of Village Attorney. The petitioners also challenge what they refer to as a "musical chairs" switching of offices by the Mayor, the Village Justice and the Village Board which, petitioners argue, resulted directly from the Board's decision to create the full-time Village Attorney position.

The petitioners seek to invalidate these actions on the grounds that they were undertaken in an executive session of the Village Board on February 17, 1993 which was held in violation of the "Open Meetings Law (Public Officers Law, Article 7). Specifically, petitioners allege that respondents violated Section 105 of the Public Officers Law which permits a public body such as a Village Board to discuss in executive session only the matters specifically enumerated in paragraphs a. to h. of Section 105(1) (see, e. g. Sanna v. Board of Education, 107 M2d 267, mod. on other grounds, 85 AD2d 157, affd, 58 NY2d 626).

The Court has reviewed the parties' submissions and concludes that the petition must be granted. At its February 17, 1993 meeting, the Village Board, voted to go into executive session pursuant to Section 105(1) to discuss "personnel, a

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contract and legal issue." The Board argues that this decision was properly made under paragraph f. of Section 105(1) which provides that in executive session a public body may discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

The Court rejects this argument. First, the reason stated on the record by the Board for conducting an executive session was insufficient to properly notify the public of the purpose of the executive session. If the Board members intended to discuss the employment status or history of a particular person as they claim in this proceeding that they did, when they voted to pass the motion for executive session, they should have stated that they were doing so to "discuss the employment, promotion, demotion (etc.) of a particular person" (see, e.g. Comm on Open Gov't OML-AO-1358).

Second, it is readily apparent from the submissions, particularly the affidavits of respondents Friedland, Rosenberg, Malloy, Cahalan and Vandermark and the Village Manager's transmittal dated February 26, 1993, that the Board

decided to create the Village Attorney position while in executive session. As to the former, in each of the affidavits (which are essentially identical), the individual respondents deny that they discussed or voted on a proposal to create this position while in executive session and claim that the discussion was largely devoted to the issue of growing dissatisfaction with the Village's attorneys. Given the fact, however, that this was the Board's final meeting until March 1, 1993 and that the creation of the Village Attorney position was the first action taken by the Board at its March 1, 1993 meeting, their claim stretches credulity.

In fact, the averment made in each of the affidavits that "prior to the March 1, 1993 meeting" none of the affiants met "with the Mayor or any other Trustees with a quorum present" is, in effect, an admission that discussions took place on this issue among the Board members in such a manner as to circumvent the Open Meetings Law quorum requirement (Section 102(2)). As to the Village Manager's transmittal which states in part, in regard to the Village Attorney position, "[r]esolution terminating current position effective immediately (Monday, March 1, 1993 board meeting) and creation of new position by resolution", it speaks for itself. Once again, respondents

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strain believability in claiming that the transmittal, which also contains the salary range and a detailed description of the position, was merely an evaluation of the position by the the Village Manager rather than the embodiment of the Board's decision.

Accordingly, as the Board in creating this position made a policy decision this was a policy decision which was well outside any of the categories of discussion set forth in paragraphs a. - h. of Section 105(1), the decision was clearly in violation of the Open Meetings Law (1986 Comm on Open Gov't OML-AO-1335).

Furthermore, the actions taken by the Board on March 1, 1993 in accepting Mr. Schulman's resignation as Village Justice to assume the newly created Village Attorney position, in appointing Mayor Diuguid to succeed Mr. Schulman as Village Justice, in appointing Trustee Friedland to succeed Mr. Diuguid as Mayor, and in appointing Trustee Rosenberg as Deputy Mayor and Assessor Walker as Trustee were also improper as they were a direct consequence of the Board's actions taken in executive session. A review of the minutes of the Village Board's March 1, 1993 meeting, shows that the Board's actions in accepting the various resignations and in making the various

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appointments, were taken without discussion and immediately after the vote to create the Village Attorney position. It is clear from such circumstances that the Board was merely ratifying decisions made earlier and away from the public.

In reaching this conclusion, the Court finds that respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the "appointment... of a particular person..." is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny.

Accordingly, the petition is granted in all respects. Because the evidence shows that the Board undertook the challenged actions with the intention of avoiding public participation, these actions must be invalidated (see, e. g. Previd: Hirsch, 138 M2d [1958]). Ms. Shlevin shall submit

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a single order consistent herewith.

Dated: Kingston, New York
January 7, 1994

All papers to attorney for petitioner GORDON upon execution of
the order entered hereon.