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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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BERNARD M. MITZNER,

Petitioner,

- against -

THE GOSHEN CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION and SUPERINTENDENT COLISTRA,

Respondents.

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DECISION/ORDER
JUDGMENT
Index # 513-93

JOHN CAREY, J.

Petitioner's CPLR Article 78 proceeding was begun by a pro se notice of motion asserting violations of the Open Meetings Law (OML), Article 7 of the Public Officers Law (POL), but asking for no relief. Under a heading "RELIEF" of the pro se petition, the language most clearly setting forth what petitioner wants states that, "The Supreme Court has the obligation and responsibility to enforce the Sunshine Laws. * * * The Petitioner wants his Board of Education to be law abiding."

In his pro se amendment to petition (filed in response to the court's invitation by letter dated March 8, 1993, to "specify what relief he is asking for other than nullification of the actions complained of"), petitioner disclaims any desire for financial relief, expresses "a desire that the Goshen School District obeys the Sunshine Laws," and asks for a "stern admonition" which the court should order "be read into the minutes at a regular Board of Education meeting . . . to embarrass the Board of Education, since the Decision and Order will be a permanent

record in the minutes." However, petitioner requests the court to grant "whatever it sees fit as to relief for the Petitioner."[1]

In their verified answer, respondents seek dismissal as against Superintendent Colistra on the ground that he has no duty to advise of or enforce the OML. However, respondents' memorandum of law concedes that "a superintendent of schools is an ex-officio, non-voting member of a board of education [Education Law, Section 1711(5)(a)]," with the consequence that he, like any member of this Board, has a responsibility to carry out the OML.

Respondents also raise in their answer the four-month statute of limitations on Article 78 proceedings, so as to bar consideration of any act or omission preceding September 25, 1992, the date four months before service of the notice of petition. Petitioner complains of actions during the preceding two years, e.g., failure to keep executive session minutes (see paragraphs 14 and 15 of the petition), but his main focus is on events beginning in November 1992, to which the court will confine its consideration. However, it should be noted in this connection that any executive session for which minutes were required to be kept under section 106(2) of the POL can, under section 107(3), be the subject of suit within four months of the date when minutes finally are filed.

The answer asks dismissal "for failure to state a claim

[1] In a letter dated January 26, 1993, to Orange County Justice Miller, from whom the case was transferred to the undersigned Westchester County Court Judge (herein Acting Orange County Supreme Court Justice), petitioner referred to a related proceeding before the State Commissioner of Education.

since the Respondents have complied with the requirements of the Open Meetings Law, including correcting a technical deficiency prior to the service of the Petition herein." In the attached affidavit of Board President Ronald Purcell, it is conceded that draft responses to ten separate complaints from petitioner were considered in executive sessions of the Board, which was unanimous in agreeing to issue the responses as drafted. Purcell explained that the Board, "in its haste to provide Petitioner with his requested determinations, issued such determinations without undertaking a prior vote in open session to authorize such determinations." Purcell continued:

> 5. Shortly after the issuance of the eight (8) determinations, our legal counsel was made aware of the lack of an open meeting vote upon such determinations. The Board was immediately advised of its inadvertent error and at its next meeting adopted a resolution in open session to ratify the prior action. Such ratification motion was undertaken prior to the service of the instant Petition and was intended only to formalize in open session the action that was authorized by consensus at the meeting of November 9, 1992.

Respondents' attorney affirms that he advised the Board to "review the draft responses in an executive session, since the matters concerned discipline of particular personnel" and to have the Superintendent available "since the complaints concerned the actions and conduct of the Respondent Superintendent." He also stated that he "inadvertently omitted to advise the Respondent Board of Education that a formal vote in open session regarding the issuance of the determinations should be made prior to the mailing of the determinations" and that no such vote was taken. The ratification vote taken on December 7, 1992, in his view

"cured the inadvertent previous omission of an open meeting resolution authorizing the issuance of the determinations." He disputes petitioner's claim that minutes of executive sessions were required. He states that determinations after November 9, 1992, are supported by "duly adopted resolutions at open meetings." However, these bare-bones resolutions do not qualify as a "record or summary of the final determination" as required by POL section 106(2).[2] If communications with members of the public with whom the body disagreed merited less complete coverage in the public record than those with whom the body agreed, then the public record could be sanitized so as to make it appear that the body's performance was universally applauded, a degree of popularity virtually without precedent in a free society.

Respondents' memorandum argues that, besides eight responses to complaints of petitioner which were wrongly sent out and later ratified, "as regards the two (2) other determinations, rendered by the Respondent Board of Education, dated December 7, 1992 and January 5, 1993, on the complaints of Petitioner, the determinations were issued only after a duly approved resolution was adopted in open session." However, the memorandum admits that:

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[2] Omission of a record or summary can hardly be justified on grounds related to privacy if paragraph 7 of the Board President's affidavit of February 11, 1993, is to be given substantive significance when it states: "The Petitioner's complaints and the Respondent Board of Education's determinations both constitute public documents and may be available for public inspection subject to the requirements of the Freedom of Information Law, including the protection such statute affords for matters of personal privacy."

> again, the Board of Education first met in executive session to review the complaint and the draft determination. After a consensus was reached, at each such meeting, to issue a formal determination based upon the draft determination presented, the Respondent Board of Education acted in open session to authorize the determination and its issuance under the signature of its President.

Resolutions on the Board's December and January determinations appear in certified minutes filed by respondents pursuant to CPLR 7804(e), as does the December 7, 1992, resolution ratifying eight November 9 responses to petitioner.

Respondents' memorandum asserts that their minutes comply with the OML's requirement in POL section 106(1) for minutes of open meetings, but nothing is said about minutes of the executive sessions required by 106(2) whenever action is taken "by formal vote," to be made public per 106(3) within one week. Nor is any reference made to section 105, which requires, before an executive session may be started, "a majority vote of [the body's] total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered."

Whether or not the unanimity reached in executive session amounted to a "formal vote," it is evident that no such advance public decision was reached to go into executive session in the first place. This failure infects not only the November 9th executive session but also those admittedly held on December 7th and January 5th. It is clear that a body subject to the OML may not go into executive session if a vote in an open meeting, pursuant to POL section 105(1), has not first been held. See

Daily Gazette Co. v. Town Board of Cobleskill 111 Misc.2d 303 (Sup.Ct. Schoh. Co. 1981). In addition, respondents make no adequate showing that their customary executive sessions are held for the purpose of discussing any of the permitted subjects set forth in section 105(1). The simple assertion by respondents' attorney that "the matters concerned discipline of particular personnel" is not borne out by all the responses he drafted and petitioner received, and does not foreclose the issue of whether "matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person" were involved in every case.

It is clear that respondents have misunderstood or disregarded their responsibilities under the OML. Their actions respecting petitioner's ten complaints have been, in one way or another invalid. The question remains what remedy is called for. Petitioner disclaims any desire for financial gain; otherwise, costs if any might be awarded under section 107(2), as could legal fees if petitioner had not acted pro se. Section 107(1) gives the court "the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part." Petitioner evidently would rather see respondents mend their ways in regard to the OML than cause them any such difficulty. That outcome would be preferable for all concerned.

Accordingly, based on the notice of petition and petition, the verified answer, respondents' memorandum of law, petitioner's

reply, petitioner's amendement to petition, and the certified record, the court reserves decision on any voiding of respondents' actions pending any further submissions by the parties, and it is:

ORDERED, ADJUDGED and DECLARED, that the determinations of respondents relating to the complaints of petitioner referred to above have failed in the respects described to conform to the requirements of the Open Meetings Law (Article 7 of the Public Officers Law), this proceeding being to such extent converted under CPLR 103(c) into an action for declaratory judgment.

Dated: White Plains, New York
April 15, 1993

JOHN CAREY
Acting Supreme Court Justice

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