

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CHAUTAUQUA

BRUCE WHITE, INDIVIDUALLY AND
AS PRESIDENT OF ATU LOCAL 1054;
AND RANDY WOLEEN, INDIVIDUALLY
AND AS SECRETARY OF ATU LOCAL 1054

Petitioners,

vs

Index No. H-14830

RICHARD KIMBALL, MAYOR, CITY OF
JAMESTOWN; MICHAEL MISTRETTA,
WILLIAM GULLOTTI, ANDREW JOHNSON,
DEBBIE SMITH, PHILIP MORRIS,
VIVIAN TAYLOR, CAROL DERR,
ANTHONY LOGUIDICE, JAMES VENTURA;
AND ANTHONY RAFFA

Respondents.

FESSENDEN, LAUMER & DeANGELO
(Charles S. DeAngelo, Esq.
of Counsel) for Petitioners

CITY OF JAMESTOWN CORPORATE COUNSEL
(Donald E. Lynn, Esq.
of Counsel) for Respondents

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, LLP
Attorneys for Respondent City of Jamestown, Karl
W. Kristoff and Jeff Swiatek, of Counsel

DECISION AND ORDER
January 27, 1997

GERACE, J.

The petition seeks a judgment declaring that the
August 26, 1996 Resolution and vote of the City Council

terminating the City of Jamestown bus system was in violation of the Open Meetings Law and Municipal Home Rule Law and should be voided.

Petitioners claim the City of Jamestown violated the open meetings law when it considered, in private, and minutes later, voted in public, on a resolution closing down the City's bus system. Respondents claim discussions on the termination of the bus system were protected by attorney-client privilege, and, that the subject was so tied in with union negotiations that it was privileged and exempted from the Open Meetings Law.

Petitioners wear two hats. One hat bears the Union Label. Under that label, they seek a decision invalidating the termination of Local 1054 employees. Under the other hat, they proceed as private citizens and users of the bus system, interested in keeping bus service in Jamestown.

On Respondents motion to dismiss the petition, the Court invoked CPLR 3211(c) and treated the motion as one for summary judgment.

"Because of its res judicata impact, treating a 3211 motion as one for summary judgment is drastic. Before it can be done, therefore, the court must

notify the parties of its intention to make the treatment so as to enable them to submit whatever additional proof they may have to buttress their positions." David D. Siegel, New York Practice, Section 270.

Respondent's motion was adjourned to allow the parties the opportunity to submit additional proof by way of affidavits and/or depositions. On the adjourned date, the Court announced a bench decision declaring that the City had violated the Open Meetings Law, and again adjourned the motion to January 27, 1997, to determine whether the resolution should be invalidated; whether attorney fees should be awarded, and to consider alternative remedies suggested in petitioners' counsel.

BACKGROUND

At its August 26, 1996 meeting the Jamestown City Council considered two (2) resolutions regarding the Jamestown Area bus service.

The first resolution ratified and directed the Mayor to execute a memorandum agreement between the City of Jamestown and Algamated Transit Union, Local 1054. That resolution was approved by a vote of eight (8) to zero (0).

The Memorandum of Agreement dated August 20, 1996 required the City of Jamestown to make a Two Hundred Forty Thousand Dollar (\$240,000.00) payment to the Union and its members in satisfaction of outstanding grievances and improper labor practice charges. It also contained a provision whereby the City reserved the right to abolish the bus system.

Within minutes of the approval of the Agreement resolution and, without any debate other than brief comments by a one member, the Council voted to "terminate City sponsored bus service in the City of Jamestown no later than October 1, 1996."

During a recess called by the Council President, while Council awaited notification of the Algamated Transit Union, Local 1054 membership vote on the proposed Memorandum of Agreement, the City Council met in Executive Session and discussed privately a proposed printed resolution terminating the bus system.

The resolution abolishing the Jamestown Area bus system was introduced for the first time during that closed

door session. Because of concerns expressed during discussion on the resolution, the original proposed termination date of September 1st on the proposed resolution was crossed off, and October 1 was substituted.

Petitioners also argued that the City could not terminate the service by resolution, but, should have proceeded by use of a Local Law with the required Public Hearing because the Jamestown Bus System was first created by Local Law in 1962. Local Law #1 of 1962 dealt with the purchase of the Transit System and authorized the City to "acquire, own and operate transit facilities of any nature within its boundaries" and was adopted after a public hearing.

OPEN MEETINGS LAW

New York's "sunshine law", the Open Meetings Law, Public Officers Law Section 103(a) requires that:

"Every meeting of a public body shall be opened to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with Section 105 of this article."

The preamble to the Statute recites:

"It 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 and listen to the deliberations and decisions that go into the making of public policy... ." See Public Officers Law Section 100.

The City argued that the Executive Session exception applies here.

The purpose of the Executive Session exception is to enable a public body to discuss pending litigation and sensitive personnel matters privately. See comment, New York Open Meetings Law: A Critical Evaluation, 41 Albany Law Review 329,343.

The resolution here did not fall within the exception in the Open Meetings Law.

Termination of a bus system involved public business that should have been addressed in public. It affected the bus riders, city businesses, and the general public in and around the City of Jamestown.

Because the closure was discussed by the mayor and

city council during 8 months of private meetings only, the August 26, 1996 public enactment of the termination resolution introduced and discussed at its closed session only minutes before its adoption permitted the public to know the result, but, not the basis for the decision of City Council.

The Court held in its bench decision and confirms now that the City Council could terminate the bus system by resolution rather than a local law. However, the fact that the council proceeded by resolution, without notice or debate instead of local law that would require a hearing, while at the same time, scheduling a public hearing on a local law dissolving the Municipal Transit Commission, gives credence to the accusation that there was an intent to avoid public debate on the sensitive public issue of termination.

The Public Hearing with regard to the Transit Commission was limited to the abolition of the Transit Commission. It obviously was related to, but did not deal with, City Council's Resolution concerning termination of the bus system.

"Courts are empowered, in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the mandate of the Open Meetings Law."

Matter of Gernatt Asphalt Products, Inc. 208 A.D. 2nd 139, 147, 622 N.Y.S. 2nd 395, rev'd on other grounds, 87 N.Y.2d 668, 692 N.Y.S. 2nd 164, 175

(19996) (citations omitted).

Taking into account the manner in which the public was kept in the dark with regard to the closing of the bus system on the night the resolution was adopted, together with the fact that the topic had been discussed by the Mayor and council in several private meetings over an 8 month period, this Court confirms its bench decision that the Open Meetings Law and the Municipal Home Rule Law was violated.

This Court declares void the action taken by the City Council. Both the letter and spirit of the Open Meetings Law were violated on the issue and resolution of the closing of the bus system.

The depositions clearly establish that the City Council and the Mayor discussed the closure of the city's bus system over an eight (8) month period in sixteen (16) separate private executive sessions from January of 1996

to August of 1996. Kimball Affidavit at 68; Kimball EBT, pages 52 and 83.

As a result of those many private discussions he held with the council, the Mayor advised the assistant corporation counsel to draft a Resolution closing down the bus system. Kimball EBT, page 84-85. The Mayor testified he viewed the closure as evolving from a "possibility to a probability," but this evolution was never disclosed to the public. Kimball Affidavit, para 8, Kimball EBT, pages 70-71, and 76.

The Mayor testified that the City Council allowed the public an opportunity to debate the issue. However, that debate took place five weeks after the termination resolution was adopted. Kimball EBT, pages 99-100. Giving the public an opportunity to express opinions 5 weeks after the resolution closing the system was brought out of the closet and adopted is not an appropriate response to the open meetings law.

Petitioners contend that during the 8 months the City Council was engaged in private discussions leading to the closure resolution, the public, was lulled to believe that

public transportation would be continued in the City of Jamestown.

The Mayor indicated that several alternative plans for the delivery of transportation services were being discussed. Kimball Affidavit, pages 76-79. One of these plans included the County's RTPCAP Committee efforts towards an integrated or consolidated system.

Kept from the public was the fact that "as time evolved, the one option that the City Council focused on more than any other, as we said in the affidavit, was moving from a possibility to a probability, and that was the one of closing the bus system primarily for financial reasons." Kimball EBT pages 82-83.

For eight months the public was kept in the dark instead of in the sunshine of open meetings. They were not privy to the Mayor's and Council members' evaluations of appropriate alternatives, the financial impact on the City, the impact on the public, the issue of what would happen with the future of the bus system.

During the August 26, 1996 executive session, concerns

and objections were expressed about the actual closure of the bus system, the failure to provide alternative service and to the short notice provided. See Johnson EBT page 155. During the executive session, the closure date in the resolution was changed from September 1 to "no later than October 1." See Johnson Transcript at page 155.

Petitioners established that there was no way for the public to know what was being discussed in the Executive Session on August 26, 1996; there were no pre-filed Resolutions or pre-filed Local Laws dealing with the closure of the bus system; no agenda of issues to be presented or topics to be discussed. See Shirley SanFilippo Transcript at page 10,11.

Thus, there was no advance public notice, no hearing, no public discussion by council, no discussion by the public on this resolution. See Kimball Transcript at page 68.

Petitioners state that even if people attending the city August 26, 1996 council meeting wanted to voice an opinion or concern on the proposed closure, they were effectively deprived an opportunity to make any comment

because the public comment period during that meeting had expired without any notice to the public that the Council would later be voting on this Resolution. See Ventura Transcript at pages 17-18.

Whether the City of Jamestown bus system should be closed is a decision to be made by council, and not the Court, but, it is a decision that should have been made in the sunshine of open meetings; it is a decision that should have been debated and made in public. The public is entitled to have its elected leaders address public issues in a public dialogue.

Petitioners say: "City Council and the Mayor by engaging in extensive use of the Executive Session vehicle, effectively deprived the public from meaningful participation in the democratic processes of the City of Jamestown. This unprecedented abuse of the use of Executive Sessions should not be condoned." This Court and the authors of the Open Meetings Law agree.

The City justifies its secret discussion on bus system closure with the claim that the "contract negotiations" exception applies to this topic because it was related to a

proposed union-management contract. The city's rationale is misplaced. The closure of the City Bus System was a separate issue from the approval of proposed agreement with the Union settling grievances and improper practice charges.

Counsel for petitioner puts it apply, "The exception, like all exceptions, should be carefully scrutinized and limited so that the exceptions do not swallow the rule." See also Gordon v. Village of Monticello, 620 N.Y.S.2nd at 575. See Exhibit C - Open Meetings Law Advisory Opinion #2595 at page 3, April 6, 1996 ("Section 105(1) specif[ies] and limit[s] the subjects that may appropriately be considered during an Executive Session.

A public body may not conduct an Executive Session to discuss the subject of its choices.

Counsel for petitioner correctly states:

"To now, after the fact, attempt to argue that they are similar, related, or otherwise inextricably linked such that they are one in the same in order to try to force the closure decision under the umbrella of the contract negotiations exception to the Open Meetings Law is at best strained."

Mayor Kimball conceded that the development of an integrated system was not directly related to whether the City Council approved or did not approve the Memorandum of Agreement; that the bus closure Resolution could have been dealt with separately by tabling or postponing consideration of that Resolution; that they were separate issues. See Kimball Transcript at page 139; page 83-84.

The City has rationalized that the Memorandum of Agreement and closure of the system had to be done simultaneously because they felt that if the Union had advance notice the city was closing the bus system, it might cost the city more money to settle with the Union.

This argument buries the fact that the Union already knew that closure was a possibility because the City reserved that right in the Memorandum of Agreement. See Kimball Transcript at page 100 and Exhibit B of Order To Show Cause.

The Mayor admitted in this depositions that the Council's private executive session discussions included the following public policy issues:

1. "The continued viability of the bus system."
2. "The continued provision of bus service."
3. "Integration of all countywide transportation."
4. "Operations costs" for the bus system.
5. "Ridership in the City bus system."
6. "Differing impacts on taxpayers generally versus the taxpayers who use the bus system."
7. "Concern over the financial operation of the bus system."
8. Concern over the fact that monies were not budgeted for the bus system for 1996) on the Mayor's recommendation.
9. The idea of getting medicaid income for transporting riders.
10. Disposition of the bus assets.
11. "The approximate value of the assets."

Thus, important public policy issues were debated in the private Executive Sessions instead of in the broad daylight of public sessions. The discussion on August 26, 1996 alone lasted approximately thirty (30) minutes with approximately fifteen (15) devoted to the closure issue. See Kimball EBT pp. 89,90. The Counsel did not spend that much time voting on the issues in its public session.

As noted earlier, the Amendment with regard to the date for closing was discussed in Executive Session and a "concensus" reached on the October 1st date. Kimball EBT pp. 67-68.

Asked if he recalled any of the debate occurring in public at anytime in any of the eight (8) months of Executive Sessions in 1996, Mayor Kimball answered: "I don't recall any of that in public discussion." Kimball EBT p. 70.

The facts are undisputed, the financial, ridership, disposition of assets, impact on the public, integration of bus services, and all other issues regarding closure of the bus system were presented in private executive session, not before the public.

The Court of Appeals stated in Orange County Publications vs. Council of the City of Newburgh, 45 N.Y.2d 947, 950:

"We believe that the legislature intended to include more than the mere formal act of voting or the formal execution of an official document.

Every step of the decision making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been aware of how its officials have voted on an issue. There would be no need for this law if this was all the legislature intended. Obviously every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision making process that the legislature intended to affect by the enactment of this statute...".

The phrase "officially transacting public business," extends not only to the taking of an official vote, but also to peripheral discussions surrounding the vote (see Transcript of the Assembly Debate, Assembly Bill 7501-b, May 30, 1976, pp. 6267-6268). 401 N.Y.S.2nd at 89.

The golden thread in cases interpreting the Open Meetings Law is that matters involving public policy, financial affairs, and public impact issues, do not fall within an exception but rather are covered by the rule that municipal government issues must be reviewed and discussed in public. See Gordon v. Village of Monticello, 620 N.Y.S.2nd at 573.

Efforts to apply the Executive Session exceptions for private "discussions" of public issues by legislative

bodies have been universally rejected. See Sciolino v. Ryan, 440 N.Y.S.2nd at 798, (4th Dept); See also Buffalo News v City of Buffalo Common Council, 585 N.Y.S2nd at 277-278.

The City concedes that alternate proposals with regard to the delivery of bus services were not "publicly debated." See Kimball Transcript p. 79, nor was the closure of the bus system ever placed on a public agenda. See Kimball Transcript p. 72.

While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open Government at page 4:

"I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing

services in which the expertise of an attorney is needed and sought. Further, after at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting."

As noted by the Court in Gordon v. Village of Monticello, 620 N.Y.S.2nd at 575....:

"Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ., Div of Ottaway Newspapers v. City of Plattsburgh, 185 A.D.2nd 518, 586 N.Y.S.2nd 346), and these exceptions, in turn, "'must be narrowly scrutinized, lest the references to the areas delineated thereunder'" (Weatherwax v. Town of Stoney Point, 97 A.D.2nd 840, 841, 468 N.Y.S.2nd 914, quoting Daily Gazette Co. v. Town Board, Town of Cobleskill, Supra, 111 Misc. 2nd at 304, 444 N.Y.S. 2nd 71, lv. dismissed, 68 N.Y.2nd 807, 506 N.Y.S.2nd 1037, 498 N.E.2nd 437).

This Court concludes that during its executive session the City Council did in fact discuss and then opt to

abolish the bus system, and, within minutes after returning to the open meeting, voted to close the bus system.

The rules for application of Executive Sessions are very well delineated in the case law.

1. "Any motion to go into executive session must [identify] the general areas to be considered. It is insufficient to merely regurgitate the statutory language...boiler plate recitation does not comply with the intent of the statute." Daily Gazetter Co. v. Town Board, Town of Cobleskill, 444 N.Y.S.2nd at p. 46; See Previdi v. Hirsch, 524 N.Y.S.2nd at 645 ("to discuss personnel matters and negotiations" held to be insufficient).
2. An Executive Session cannot be utilized until the Appropriate Motion is made and adopted at an Open Meeting of Public Entity Involved (Public Officers Law Section 100). Oneonta Star Division of Ottaway Newspapers v. Board of Trustees of Oneonta School District. 412 N.Y.S.2nd at 927

There was no motion made and adopted even remotely suggesting moving into Executive Session to discuss the close-down of the bus system.

3. "Minutes Shall Be Taken At Executive Sessions Which Shall Consist of a Record or Summary of the Final Determination of Such Action" Previdi v. Hirsch, 524 N.Y.S.2nd 645.

As noted in Previdi v. Hirsch:

"The fact that the respondents characterized the vote as taken by 'consensus' does not exclude the recording of the same as a 'formal vote' to hold otherwise would invite circumvention of the statute". 524 N.Y.S2nd at 646 (emphasis added)

The City did not comply with the statutory requirements record for maintaining records regarding executive sessions. No notes of Executive Sessions was maintained; no record was kept as to when City Council went into Executive Session; no record of motions made to go into Executive session, and no minutes have been recorded at anytime for Executive Sessions for the City of Jamestown. See Shirley SanFilippo Transcript at page 15, 25; Kimball Transcript at pages 52-54, and 108. Here, it is virtually uncontested that the final decision to close the bus system was reached by a "consensus", see Councilman Johnson Transcript at pages 167-168 ("it was just voted up or down"); See also Ms. SanFilippo EBT, page 37, (agreement [was] reached in Executive Session to terminate); and see Kimball Transcript at page 103 the "sense of the body".

The City takes the position that they never really "act" in Executive Session. The facts in this case rebut this declaration. The amendment to the previously undisclosed Resolution to close the bus system was

formulated in Executive Session. See Shirley SanFilippo EBT, pages 29-30. This supports the conclusion reached by the Court that the Mayor and City Council reached an agreement in Executive Session to close the bus system. See Shirley SanFilippo EBT, page 37.

Petitioners ask the Court to take into account the fact that the Mayor had extensive experience in city government, e.g., three (3) years as the Mayor, fifteen (15) years in City Council and fourteen (14) years with the Municipal Transit Commission, as well as experience with Executive Sessions and minutes being kept in the Jamestown Urban Renewal Agency and Jamestown Local Development Corporation, see Kimball Transcript at pages 50,51,55-58. The City of Jamestown abused the Executive Session exception and the spirit and intent of the Open Meetings Law:

"Democracy, like a precious jewel, shines most brilliantly in the light of an open government. The Open Meetings Law seeks to preserve this light". Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 444 N.Y.S.2nd at 46.

Like the Daily Gazette Co., inc. case "it is not controverted that the subject to be considered during the

Executive Session was not revealed, and thus, it was not properly convened". See Daily Gazette Co., In. v. Town Board, Town of Cobleskill, 444 N.Y.S.2nd at page 46.

The court hereby declares that the Respondents conducted Executive Sessions in 1996 (and especially on August 26, 1996) on the public issue of the closure of the bus system in violation of the Open Meetings Law.

Petitioners have shown good cause to void the resolution adopted August 26, 1996, which authorized closure of the Jamestown City bus system.

The standard for review by this court is best stated in Previdi v. Hirsch, 524 N.Y.S.2nd at 646:

"Whether to declare void any action taken by a public body in violation of the Open Meetings Law is a matter left to the court's discretion to be exercised upon good cause shown (see Matter of Sanna v. Lindenhurst Board of Education, 58 N.Y.2d 626, 627, 458 N.Y.S.2d 511, 444, N.E.2d 975; In the Matter of New York University v. Whalen, 46 N.Y.2d 734, 735, 413 N.Y.S.2d 637, 386 N.E.2d 245). As in White, supra, the record at bar strongly suggests that respondents' violations were not 'unintentional' [see POL section 107(1)] but were calculated to minimize public awareness of respondents' sensitive political decision to attempt settlement of a highly publicized matter. Such ongoing awareness is important in that it may well play a significant role in the degree of public concern about, and attendance at, future public sessions to approve a settlement. It may

also influence the public's future choices in the Board. The public's awareness, therefore, should be fostered through compliance with the Open Meetings Law. Accordingly, any actions voted upon by respondents at the March 23, and June 18, 1987, executive sessions with respect to said litigation are voided [POL Section 107(1)]. See also Gordon v. Village of Monticello, 620 N.Y.S.2nd at 575-576 (Court invalidated Board's action which resulted in a series of appointments of individuals based on the Board's improper action in private sessions.); Daily Gazette Co. Inc. v. Town Board, Town of Cobleskill, 444 N.Y.S.2nd at 46 (The Court issued an Order "declaring that the respondent conducted an executive session on August 10, 1981 in violation of the Public Officers Law"); Oneonta Star Division of Ottaway Newspapers, Inc. v. Board of Trustees of the Oneonta School District, 412 N.Y.S.2nd at 930 (The Court held that the newspapers allegations that a closed meeting was conducted by the Board concerning possible sale of a junior high school and applications for federal funds stated a cause of action based on a violation of the Open Meetings Law).

The Courts clearly have evaluated the underlying actions of the subject bodies to decide whether their conduct suggests that the Court should exercise its discretion in voiding the Boards and/or in this case the Council's actions. A review of the record in this clearly supports the finding that petitioners have shown good cause for this Court to declare void the action taken by the City Council.

The findings of the Court in Previdi v. Hirsch, supra, are applicable here, word for word:

"The record in this case strongly suggests that respondents' violations were not unintentional [see POL section 107(1)] but were calculated to minimize a public awareness of respondents' sensitive political decision to attempt settlement of a highly publicized matter. Such ongoing awareness is important in that it may well play a significant role in the degree of public concern about, and attendance at, future public sessions to approve a settlement."

"The public's awareness, therefore, should be fostered through compliance with the Open Meetings Law."

Accordingly, the Court declares that the actions of the Jamestown City Council at its August 26, 1996, executive session and open meeting with respect to the resolution to close the bus system violated the Open Meetings Law; that the resolution is hereby declared void and of no effect. See POL Section 107(1).

The Court determines that petitioners are entitled to attorney fees after proper application, notice to respondents, and a hearing.

The Court retains jurisdiction of this proceeding, pending resolution of remaining questions.

The signing, filing, and mailing of a copy by the