

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on December 7, 2010.

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA**

In the Matter of DAVID ZEHNER,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT,

Respondent,

Pursuant to Civil Practice Law and Rules Article 78

DECISION AND ORDER

**Index No.: 2010-6515
RJ No.: 33-10-5183**

**APPEARANCES: STEPHEN CIOTOLI, ESQ., OF O'HARA, O'CONNELL & CIOTOLI
For Petitioner**

**FRANK W. MILLER, ESQ., OF THE LAW FIRM OF FRANK W. MILLER
For Respondent**

Petitioner Zehner brings his second combined Article 78 and declaratory judgment proceeding seeking declaratory relief as well as attorney's fees for alleged ongoing violations of the Open Meetings Law by the respondent Board of Education of the Jordan-Elbridge Central School District (hereinafter, "the Board"). Petitioner alleges that resolutions to enter into executive session that were adopted by the Board at six board meetings held immediately after this Court's Decision in the previous *Zehner* case were legally insufficient. The parties appeared

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before the Court for oral argument on December 7, 2010. Thereafter, the parties appeared for a conference concerning this and related matters on December 8, 2010. Additional time for settlement discussions was provided at the request of the parties. This Court was advised by letter dated January 5, 2011 that the matter had not been settled.

At issue are the meetings of October 4, 6, 19, 20 and 26, 2010 and November 3, 2010. The petition seeks, *inter alia*, a declaration that the resolutions to enter into executive session at those meetings were insufficient and a violation of Public Officers Law §105 (Open Meetings Law); a determination that the respondent is in contempt of court for violating its previous decision and attorney's fees pursuant to Public Officers Law §107(2).

First, with respect to petitioner's contempt application, the petitioner has failed to comply with the strict statutory requirements, which include that the application on its face contain a notice that a hearing will be held to punish the accused of contempt, the potential punishment and the requirement that a verbatim warning be included. *See, Judiciary Law §756*. This application is insufficient because it fails to contain the requisite language; as such, this Court is without jurisdiction to entertain that application. *See, P&N Tiffany Properties, Inc. v. William*, 302 AD2d 466 (2d Dept. 2003); *see also, Cappello v. Cappello*, 274 AD2d 538 (2d Dept. 2000). Nor does the petition show that the respondent violated a lawful order of the Court expressing an unequivocal mandate. *See, In re Glazer*, 168 AD2d 975 (4th Dept. 1990). As such, that relief is denied.

Counsel for petitioner has now conceded that no violations occurred at the November 3, 2010 meeting and as such, any relief sought in the petition with respect to that meeting is denied.

This includes the petitioner's claim that the Board's appointment of Interim Superintendent Lawrence Zacher during executive session is null and void.

With respect to the remaining meetings, the petitioner claims that he was present at each meeting and offers affidavits from two other individuals, Maureen Doyle and Jerrod Smith, who were present at some of the meetings. They contend that the Board failed to comply with this Court's previous order and instead continued to improperly regurgitate the statutory language with respect to the reasons for which it was entering executive session. *See, Public Officers Law* §105. The respondent Board in opposition has offered affidavits from Mary Alley, the Board President, and Diana Foote, the Vice President, who both claim that counsel for the Board previously had instructed the Board members to utilize the statutory boiler plate language for going into executive session and that the boiler plate language contained in the minutes at issue here did not accurately reflect all of the disclosures made by Alley.

With respect to the October 4th meeting, petitioner claims that the Board set forth two of the enumerated purposes under Public Officers Law for executive session: "discussions regarding proposed, pending or current litigation" and the employment matter of "a particular person or corporation or matters leading to appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." *Id.* Petitioner claims that no further specificity was provided, as is reflected in the minutes. Alley does not contest this and claims she "limited the reasons for entering into executive session to the matters with which the Board would confer with counsel about." *Alley affidavit, para 12.* She goes on to state that the Board discussed with counsel matters concerning proposed or pending and current litigation, as well as employee discipline issues pursuant to Education Law §3020-a and employment issues

concerning the Board's former attorney. However, she provides no reason for the lack of specificity, nor does she indicate that the meeting minutes do not accurately reflect the grounds she cited. Nor is Foote's argument of other area boards' failure to comply with the law persuasive. In addition, respondent's counsel concedes that "at the meeting of October 4, 2010, the Board, which had not yet had an opportunity to fully digest this Court's decision..." *Miller affidavit, para. 19*. As this Court has previously ruled, while a motion to go into executive session must identify the general area to be considered, it is insufficient to "merely regurgitate the statutory language...this boiler plate recitation does not comply with the intent of the statute." *Zehner v. Board of Educ.*, 29 Misc3d 1026(A) (10/1/10), quoting *Daily Gazette Co. Inc. v. Town Board, Town of Cobleskill*, 111 Misc.2d 303 (1981); see also, *Brander v. Town of Warren Board*, 18 Misc3d 477 (2007). Instead, to validly convene an executive session for discussion, the public entity must identify with particularity the topic to be discussed, since only through such identification will the purposes of the Open Meetings Law be realized. See, *id.* As such, a violation of the Open Meetings Law occurred.

The same is true of the October 6, 2010 meeting, where the minutes indicate that the Board adjourned to executive session with two enumerated purposes; "collective negotiations pursuant to Article fourteen of the civil service law" and "the medical, financial, credit or employment history of a particular person..." *Public Officers Law §105*. Alley claims that the Board spoke to its counsel about the same matters as discussed on October 4th, as well as matters related to negotiations with an employee union, but does not refute that only boilerplate language was utilized.

With respect to the October 19th meeting, petitioner indicates that the stated reasons for the executive session merely repeated verbatim four of the eight statutory reasons, the same four the Board had used for its July 21, 2010 meeting, a subject of this Court's previous Order. Alley contests this, as does respondent's counsel, who was also present, contending that the Board entered into executive session for a very specific reason: to interview a number of candidates for the job of Interim Superintendent. The meeting minutes (provided by Alley and not made available to the petitioner prior to the filing of this petition) reflect that the language used to enter executive session was refined to state simply that the Board was entering for the purpose of discussing matters related to the appointment or employment of a particular person. By respondent's own admission it failed to identify the Superintendent search specifically, although there was no reason not to inform the public of this. As such, a violation of the Open Meetings Law occurred here.

With respect to the October 20, 2010 meeting, petitioner relies on "unofficial" minutes issued by the Board and he contends that the Board again recited verbatim four of the enumerated grounds. Petitioner contends the same four sections were cited by Alley on October 26th, for which there are no minutes. The Doyle and Smith affidavits make the same claim. Alley states that with respect to October 20th, she announced that the Board was entering into executive session for a very specific reason: to interview a number of candidates for Interim Superintendent. Alley claims that the October 20th meeting minutes relied upon by the petitioner are marked "unofficial" because they had not been finalized and that the four statutory reasons recited therein do not accurately reflect the language actually used during the meeting. According to Alley, the boilerplate language used for a number of years by the Secretary in

meeting minutes was erroneously carried into these minutes. She indicates that the reasons actually recited were those related to civil service negotiations, possible employce discipline charges, which incorporated current, pending or proposed litigation in state court and before the Commissioner of Education as well as HIPAA issues. The Court, however, has not been supplied with corrected minutes. While it is clear that a public body's meetings need not consist of a verbatim account of what is said, at a minimum the minutes must contain a record or summary of motions, proposals, resolutions, action taken and the vote of each member. *See, NY State Comm. Open Govt. AO 2877.* Likewise, with respect to the October 26th meeting, Alley contends that she limited the reasons to the topics actually discussed, matters concerning appointment or employment of a particular person and proposed, pending or current litigation and relies upon a newspaper article which supports this claim. She claims that only discussions occurred regarding the Superintendent search and litigation pending in both state court and before the Commissioner of Education. However, no minutes were provided. Therefore, as to the meetings of October 20th and 26th, the petitioner has failed to meet his burden to show a violation of the Open Meetings Law.

The essence of the petitioner's contention is that the Board had intentionally ignored this Court's previous Decision and Order, by repeatedly violating the law and willfully withholding information from the public. It is important to note that the only resultant action that the petitioner had previously challenged, the appointment of Interim Superintendent Zacher at the November 3rd meeting, has subsequently been conceded by the petitioner and no violation has been found. As such, there is no board action the petitioner seeks to overturn and this Court is limited to the enforcement provisions of the statute. *See, Public Officers Law §107.* The law is

well settled that fixing the appropriate remedy for a public body's actions in violation of the Open Meetings Law is expressly a matter of judicial discretion. *See, Goetschius v. Board of Education of the Greenburgh 11 Union Free School District*, 281 AD2d 416 (2d Dept. 2001). The inclusion by the Legislature of language vesting in this Court, discretion to grant remedial relief makes it clear that not every breach of the Open Meetings Law automatically triggers all of the enforcement sanctions. *See, New York University v. Whalen*, 46 NY2d 734 (1978). It is clear the Board has repeatedly failed to comply with the clear and simple requirements of the law both in the present matter and in the previous matter decided by this Court (*see, Zehner, supra*) and its reticence is perplexing. Many of the noncompliance issues relate to the Superintendent search, a process of great public concern and not within the exceptions to the requirement of the Open Meetings Law but for narrow circumstances. As such, given the violations discussed herein and the Board's acknowledgment as to its difficulty understanding the procedures contained in the Open Meetings Law¹, this Court grants the petition to the extent that it finds that the respondent Board violated the Open Meetings Law on more than one occasion. Therefore, this Court directs the members of the respondent Board to participate in a training session concerning the obligations imposed by the Open Meetings Law, conducted by the staff of the Committee on Open Government. *See, Public Officers Law* §107(1). The Board must provide proof of completion of its training within ninety (90) days of the date of this Order.² This Court also

¹ According to both Alley and Foote, in an effort to determine the correct procedures to employ in calling and conducting an executive session, the Board has obtained guidance from counsel and reviewed minutes from other school boards. *See, Alley affidavit, para. 6, 11; see also, Foote affidavit, para. 8.*

² Nothing in this Decision should be interpreted to detract from the rights of the respondent Board to hold an orderly meeting free of abusive language, profanity or allusions to threats to members' personal safety. The Court is greatly troubled by reports as presented to it during conference concerning

finds that the petitioner is entitled to attorney's fees based on the record in this case and the Board's previous violations of the Open Meetings Law. Counsel for petitioner is directed to submit an affidavit detailing legal fees for this matter no later than fifteen (15) days from the date of this Order and this Court will determine the reasonable attorney's fees to be awarded.

NOW, therefore, for the foregoing reasons, it is

ORDERED, ADJUDGED AND DECLARED, that the respondent Board of Education of the Jordan-Elbridge Central School District violated the Open Meetings Law on October 4, 2010 and October 6, 2010, and October 19, 2010, and it is further

ORDERED, that the portion of the petition seeking contempt of court is denied, and it is further

ORDERED, that the request for attorney's fees is granted as set forth above, and it is further

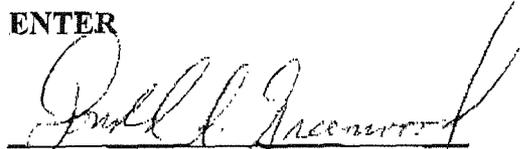
ORDERED, that the members of the respondent Board of Education of the Jordan-Elbridge Central School District are to participate of its completion of its training session concerning the obligations of Article 7 of the Public Officers Law conducted by the staff of the Committee on Open Government and provide and proof of same to this Court within ninety (90) days of the date of this Order, and it is further

references made during Board meetings to the attack against a Florida School Board that could be viewed as threats to the safety of Board members. While citizens should be encouraged to attend and participate in Board meetings, and the Board must at all times observe the Open Meetings Law, the tone from those addressing the Board may be passionate but should remain civil and never threaten the personal safety of Board members. Those who feel aggrieved have remedies at law with the Commissioner of Education and ultimately at the ballot box.

ORDERED, that any further relief sought by the petitioner is denied.

Dated: January 20, 2011
Syracuse, New York

ENTER


DONALD A. GREENWOOD
Supreme Court Justice