SUPREME COURT – STATE OF NEW YORK

Present: HON. BEATRICE S. BURSTEIN Justice.

TRIAL/SPECIAL TERM, PART I
NASSAU COUNTY

JOHN RUNYON, WILLIAM ASH,

Plaintiffs,

– against –

BOARD OF EDUCATION, WEST HEMPSTEAD UNION FREE SCHOOL DISTRICT NO. 27, DR. RICHARD VARRIALE, ALFRED VERPAULT, CONRAD FERRIGNO, ROBERT DECKER, JOHN GENEGA,

Defendants.

INDEX NUMBER 27156, 19...

MOTION DATE May 8, 19...

MOTION CAL. NUMBER .....

TRIAL CAL. NUMBER .....

mt - 4.28,

The following papers numbered 1 to ..... read on this motion .....

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause ..... | X |
| Answering Affidavits ..... | X |
| Replying Affidavits ..... | X |
| Pleadings – Exhibits – Stipulation ..... | |
| Briefs: Plaintiff's/Petitioner's ..... Defendant's/Respondent's ..... | |
| ..... | |

Motion by plaintiff to compel individual defendants to appear for a further examination before trial is granted.

The question involved here is whether discussions had at an executive session of a school board are privileged and exempt from disclosure under Article 31 of the CPLR.

This is an action to recover damages in connection with the alleged wrongful termination of the employment of plaintiffs by defendants. Defendants Alfred Verpault, Conrad Ferrigno, Robert Decker and John Genega are or were members of the Board of Education of West Hempstead Union Free School District No. 27 when plaintiffs were discharged and defendant Dr. Richard Varriale is and was at that time the Superintendant of Schools for the District. In the course of the examinations before trial of defendants Varriale, Decker and Genega many questions were asked concerning discussions between school officials and others relating to the incidents which allegedly precipitated the firing of plaintiffs. Each of these defendants, on the advice of counsel, refused to testify as to anything that transpired at an executive session of the Board of Education. Defendants assert that matters discussed in executive sessions are "totally confidential and may not be discussed outside the protective area of the executive session of the Board". Reliance is placed upon six federal cases and one Arizona case.

In the opinion of this Court the law does not support the position taken by defendants. Both the Education Law ( § 1708) and the Open Meetings Law (Public Officers Law § 105) authorize executive

[illegible] J.S.C.

120

sessions, i.e. meetings at which the general public may be excluded. The provisions of the Open Meetings Law spell out in detail the sole purposes for which such sessions may be conducted. The Education Law, on the other hand, does not in so many words limit the use of executive sessions. However, boards of education have been held to be subject to Article 7 of the Public Officers Law (see e.g. Matter of Sanna v Lindenhurst Board of Education, 58 NY2d 626; Matter of Kamlet v Board of Education of Plainedge Union Free School District, 91 Misc2d 1105; Matter of Leber, 19 Ed Dept. Rep 519). It is significant for the purposes of this motion that although the statutes define an executive session as a meeting or portion of a meeting not open to the general public (see Public Officers Law §102[3]; Education Law § 1708[3]) there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place. Furthermore, there is no statutory privilege afforded to participants of executive sessions (see e.g. CPLR 4502, 4503, 4504, 4505, 4507, 4508; Banking Law §§ 36, 64, 560, 646; Civil Rights Law § 79-h; CPL § 390.; Education Law §§ 1007, 6510; Insurance Law §§ 230, 2801-b, 2805-g). If the legislature had intended to do so it might have afforded confidential or privileged status to discussions at executive sessions. An example of such legislation can be found in the Arizona open meetings law. Arizona Revised Statutes § 38-431.03 authorizes executive sessions for purposes similar to those provided in our law. However, it goes on to provide that minutes or discussions made at executive sessions shall be kept confidential and directs the public body to instruct persons who are present at the executive session regarding the confidentiality requirements of the statute.

It is interesting to note that the confidentiality provision in the Arizona statute does not prevent employees who are the subject of discussions from obtaining those discussions. Similarly, the Massachusetts open meetings law authorizes executive sessions to consider, among other things, "the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual ***". The statute, however, goes on to provide that the individual involved must be notified in writing at least forty-eight hours prior to the proposed executive session and is entitled to be present, to speak in his own behalf and to have counsel present to advise him (see Ann Laws Mass GL c39 §23B).

As for the cases cited by defendants, this Court finds them not persuasive on the issue involved here. In the first place none of them dealt with an executive session held by a public agency. The cases Bredice v Doctors Hospital, Inc. (51 F.R.D. 187), Gillman v United States (53 F.R.D. 316) and Tucson Medical Center Incorporated v Misevch (545 P2d 958) involved proceedings of hospital review boards whose primary purpose was the improvement of future care. A qualified privilege was afforded to those proceedings based upon an

"overwhelming public interest" in preserving the confidentiality of those staff meetings designed to improve patient care. United States v Noall, (587 F2d 123) is a tax case. The case of Lloyd v Cessna Aircraft Co., (74 F.R.D. 518) in which a claim of confidentiality was made ultimately turned upon the question of necessity. The discussion in Wright v Patrolmen's Benevolent Association (72 F.R.D. 161) of the qualified privilege extended in the Gillman and other cases is dicta only, since the material sought was found not to be privileged. This Court does not consider Economou v Butz, (466 F. Supp 1351) to be pertinent.

In Perry v Fiumano (61 AD2d 512), the Appellate Division, Fourth Department, said at p. 516:

> Communications made in confidence are not protected purely because of their confidentiality, but may be kept secret only if premised upon a public policy expressed by statute or in furtherance of an overriding public concern of constitutional dimension (see, e.g., People v Doe, 61 AD2d 426, decided herewith). It was the rule at common law and remains the rule today, that it is everyman's duty to give evidence in a court of law.

Under the circumstances, it is the opinion of this Court that the individual defendants should be required to answer all questions and to produce all minutes or notes concerning discussions at executive sessions which are relevant to the issues involved in this action. Therefore, defendants Varriale, Decker and Genega are directed to appear for their further examinations before trial at Room 05 of this Court (lower level) on February 17, 1987 at 9:30 a.m. (or at such other time and place as counsel shall agree in writing). They shall produce for use upon the examination any minutes or other notes taken at executive session relating to the discharge of plaintiffs.

DATE 1/29/87

Beatrice S. Bernstein
J.S.C.