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Administrative Law--Board of Supervisors Allowed to Appoint Election Commissioner Not Recommended (Ahern v. Board of Supervisors, 7 App. Div.2d 538 (2d Dep't 1959))

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RECENT DECISIONS

ADMINISTRATIVE LAW — BOARD OF SUPERVISORS ALLOWED TO APPOINT ELECTION COMMISSIONER NOT RECOMMENDED.—A county political chairman recommended and certified himself, pursuant to Election Law section 52, for the position of election commissioner, on three separate occasions. On each occasion defendant Board of Supervisors unanimously refused to make the appointment. In response to the chairman's public refusal to name anyone else, the Board designated an enrolled Democrat, not recommended by the chairman. Plaintiff, a taxpayer, voter, and enrolled Democrat, brought suit under Article 78 of the Civil Practice Act in the nature of mandamus to compel the Board to revoke the appointment and require defendant to hereafter appoint only persons recommended by the chairman.

The Supreme Court in granting the petition annulled the Board's appointment and ordered future appointments to be made only from those persons recommended by the county chairman. The Appellate Division reversed on the law and the facts asserting that the petition should have been dismissed as a matter of law or in the alternative, considering the facts disclosed and the legal issue presented, as a matter of judicial discretion. The Court of Appeals affirmed the reversal as a proper exercise of discretion and did not reach the merits. *Ahern v. Board of Supervisors*, 7 App. Div.2d 538, 185 N.Y.S.2d 669 (2d Dep't), *aff'd*, 6 N.Y.2d 376, 160 N.E.2d 640, 189 N.Y.S.2d 888 (1959).

Mandamus was designed to compel action or inaction by a body in the enforcement of duties specifically enjoined by law. The duty could be imposed by the common law or by statute.[1] Mandamus was a prerogative writ employed at common law and was issued in the name of the king.[2] New York at common law employed this writ as a method of control over administrative bodies and officers.[3]

The writ of mandamus as such was abolished in 1937, but the relief formerly obtained under the old writ was provided for under

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[1] *Proposed Simplification of the Remedies of Certiorari, Mandamus and Prohibition*, THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK 134-5 (1937) [hereinafter cited as THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL].

[2] People *ex rel.* Aspinwall v. Supervisors of Richmond, 28 N.Y. 112, 114 (1863); THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL 138.

[3] Goldstein, *Judicial Review of Administrative Action Through Article 78 of the Civil Practice Act (1937-1951)*, 2 SYRACUSE L. REV. 199-200 (1951).

Article 78 of the Civil Practice Act.[4] The legislature merely did away with the procedural formalism of the writ system and retained the substantive remedy which the old writ had afforded.[5] Hence today the courts issue orders in the nature of mandamus, whereas formerly writs were issued.[6]

Proceedings in the nature of mandamus pursuant to Article 78 of the Civil Practice Act can be employed to compel performance of duties specifically enjoined by law as well as to remedy improper administrative determinations decided otherwise than from a prescribed quasi-judicial hearing.[7] Since it is difficult to find clear-cut distinctions in cases of "mandamus," the courts generally do not indicate the specific category within which they feel an individual mandamus proceeding should lie.[8]

Mandamus must be brought by one having a clear legal right to the remedy[9] against a body or officer.[10] Although it will lie to compel action, the person or body charged cannot be told to exercise discretionary power in a particular way.[11] Mandamus is considered to be of an extraordinary character,[12] and even where it is established that a clear legal right to relief exists, the issuance of mandamus remains discretionary with the court.[13] Hence, mandamus will generally not be granted where the plaintiff has another adequate remedy at law.[14] Mandamus is considered to be a legal remedy, but

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[4] N.Y. CIV. PRAC. ACT § 1283.

[5] Toscano v. McGoldrick, 300 N.Y. 156, 161-62, 89 N.E.2d 873, 875 (1949).

[6] Coombs v. Edwards, 280 N.Y. 361, 364, 21 N.E.2d 353, 354 (1939).

[7] BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942). "Thus where a petitioner seeks to compel the issuance of a license which an administrative agency has determined not to issue, and where the petitioner contends that there is no proper basis (in fact, in law, or in the exercise of administrative discretion) for denying issuance of the license, it may properly be said either that the petitioner is seeking to compel performance of a duty specifically enjoined by law upon the agency, or that the petitioner is seeking to review the agency's adverse determination." *Id.* at 351.

[8] *Id.* at 351-52.

[9] Toscano v. McGoldrick, 300 N.Y. 156, 160, 89 N.E.2d 873, 874 (1949).

[10] "The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person or aggregation of persons, whose action may be affected by the proceeding under this article." N.Y. CIV. PRAC. ACT § 1284.

[11] Gimprich v. Board of Educ., 306 N.Y. 401, 406, 118 N.E.2d 578, 580 (1954).

[12] Andresen v. Rice, 277 N.Y. 271, 282, 14 N.E.2d 65, 70 (1938).

[13] Frazier-Davis Constr. v. Gerosa, 6 App. Div.2d 112, 113, 175 N.Y.S.2d 765, 767 (1st Dep't 1958); Toscano v. McGoldrick, *supra* note 9; Andresen v. Rice, *supra* note 12.

[14] Towers Management Corp. v. Thatcher, 271 N.Y. 94, 97, 2 N.E.2d 273, 274 (1936). *But see* State *ex rel.* Bond v. Register of Conveyances, 162 La. 362, 110 So. 559, 560 (1926): "Code Prac. art. 831 provides that a judge may, in his discretion, issue a writ of mandamus even when the complainant has other means of relief, if the slowness of an ordinary proceeding would be likely to cause a delay which would hamper the administration of justice"; *cf.* People *ex rel.* Frost v. New York Cent. & H.R.R.R., 168 N.Y. 187, 195,

is said to be governed by equitable principles.[15]

From a procedural viewpoint, mandamus is denominated a special proceeding and not an action.[16] Therefore, it must be applied for in a distinct and separate way,[17] and will not be available in an ordinary action.[18]

In the instant case the Appellate Division questioned the plaintiff's legal right to bring a mandamus-like proceeding. The Court felt that the plaintiff had not sustained any special private injury nor shown any danger or peril to the public interest.[19] It has, nevertheless, been held that a citizen-voter has a sufficient interest to apply for mandamus to compel a public officer to perform his public duty.[20]

The New York State Constitution guarantees the right of franchise to its citizens.[21] The plaintiff, it would seem, is only trying to protect that right. If bipartisan control of election administration is not maintained, there is great danger that its function might be perverted and the free vote imperiled. The legislature saw the necessity of bipartisan control over the election commission and passed a

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61 N.E. 172, 175 (1901): "[When] . . . an action for damages . . . would be inadequate . . . the existence of an equitable remedy is no bar to the writ although it may influence the court in the exercise of its discretion."

[15] Coombs v. Edwards, 280 N.Y. 361, 364, 21 N.E.2d 353, 354 (1939); see, *e.g.*, MacKechnie v. Board of Educ., 11 Misc.2d 926, 927, 173 N.Y.S.2d 888, 889 (Sup. Ct.), *aff'd*, 6 App. Div.2d 1052, 179 N.Y.S.2d 659 (2d Dep't 1958), where the court considered *hardship* to the defendant and interests of third parties in granting mandamus. In Fiorini v. Parkhurst, 198 Misc. 796, 798, 100 N.Y.S.2d 569, 572 (Sup. Ct. 1950), petitioner, improperly dismissed from the fire department because of the commission of a crime, was denied mandamus to compel a technically proper hearing because he did not come into the court with *clean hands*. Public Serv. Comm'n v. International Ry., 224 N.Y. 631, 632, 120 N.E. 727, 728 (1918) (per curiam), held that where plaintiff sued for a writ of mandamus, it was reversible error to grant judgment on the pleadings and not try as an issue of fact, defendant-railroad's alleged inability to pay or borrow sufficient funds to meet a retroactive wage scale being demanded. "The courts will not command the defendant, under pain of punishment for contempt, to do what it cannot." *Ibid.* In People *ex rel.* Hunter v. National Park Bank, 122 App. Div. 635, 641, 107 N.Y. Supp. 369, 374 (1st Dep't 1907), the court held that where the facts justified an inference that the application for mandamus was made in *bad faith* and to effectuate undisclosed schemes against a corporation, mandamus did not lie to force the corporation to show its stockbook to plaintiff-shareholder.

[16] Deleyer v. Britt, 212 N.Y. 565, 106 N.E. 57 (1914) (memorandum decision).

[17] Youmans v. Terry, 32 Hun 624, 625 (Sup. Ct. 1884); see N.Y. CIV. PRAC. ACT §§ 4, 5, 1288.

[18] People *ex rel.* Dunphy v. Chaney, 171 App. Div. 303, 307, 156 N.Y. Supp. 1035, 1038 (3d Dep't 1916); People *ex rel.* Doran v. Harwick, 48 App. Div. 559, 560, 62 N.Y. Supp. 897, 898 (2d Dep't 1900).

[19] Ahern v. Board of Supervisors, 7 App. Div. 538, 185 N.Y.S.2d 669 (2d Dep't 1959).

[20] McCabe v. Voorhis, 243 N.Y. 401, 411, 153 N.E. 849, 851 (1926); People *ex rel.* Daley v. Rice, 129 N.Y. 449, 454, 29 N.E. 355, 356 (1891).

[21] N.Y. CONST. art. II, § 1.

law to implement this policy.[22] It is difficult to think of a subject of greater public interest, than keeping voting rights unhampered and free from partisan control.

The Appellate Division based its decision in large measure upon the nature of mandamus as an extraordinary and discretionary remedy. The courts are "chary to issue it so as to cause disorder and confusion in public affairs, even though there may be a strict legal right." [23] The Court suggests that there might be a complete breakdown in election administration with a resulting disfranchisement of the voters if a political squabble were permitted to thwart the purposes of effective government.[24] In *Kane v. Gaynor,*[25] however, the court realistically overruled an analogous contention on the grounds that "self-interest" would require a person such as the county chairman to propose an acceptable person. Further, since the former election commissioner continues in office until a qualified person has been appointed,[26] it does not seem likely that election administration will fail from lack of proper supervision.

The law appears to be well settled that a Board of Supervisors cannot appoint a person to the position of Commissioner of Elections who has not been recommended by the county political chairman.[27] In *Kane v. Gaynor* the petitioner brought a writ of mandamus to compel his appointment to the position of election commissioner. The majority opinion of the Appellate Division in affirming the Special Term construed a statute substantially identical [28] with the one in the instant case and held that the petitioner could not by a writ of mandamus force the mayor to appoint him to the position of election commissioner, and further that the scope of appointment was not limited to persons merely recommended by the chairman. Judge Burr concurred in the result, but disagreed with the majority in stating that the power of appointment was limited in selection to those persons duly recommended by the chairman. The Court of

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[22] See N.Y. ELECTION LAW § 52.

[23] Ahern v. Board of Supervisors, 7 App. Div. 538, 545, 185 N.Y.S.2d 669, 676 (2d Dep't 1959).

[24] *Id.* at 544-45, 185 N.Y.S.2d at 676.

[25] 144 App. Div. 196, 207, 129 N.Y. Supp. 280, 288 (2d Dep't), *aff'd mem. on concurring opinion of Burr, J.,* 202 N.Y. 615, 616, 96 N.E. 1117 (1911).

[26] N.Y. PUB. OFFICER'S LAW § 5; Furk v. Board of Supervisors, 1 App. Div.2d 794, 148 N.Y.S.2d 872 (3d Dep't 1956) (memorandum decision); People *ex rel.* Woods v. Flynn, 81 Misc. 279, 286, 142 N.Y. Supp. 230, 234 (Sup. Ct. 1913). For an interesting corollary of this problem, where it is stated that a hold-over is entitled to full salary, see 7 OPS. STATE COMPT. 125 (1951).

[27] Kane v. Gaynor, 144 App. Div. 196, 207, 129 N.Y. Supp. 280, 288 (2d Dep't), *aff'd mem. on concurring opinion of Burr, J.,* 202 N.Y. 615, 616, 96 N.E. 1117 (1911).

[28] *Compare* N.Y. ELECTION LAW § 52 *with* N.Y. CONSOL. LAWS 1909, ch. 17, § 194, *amended,* N.Y. SESS. LAWS 1911, ch. 649, § 194, making obsolete provisions wherein the appointive power resided in the mayor.

Appeals affirmed the Appellate Division on Judge Burr's opinion.[29]

Although the holding in the *Kane* case was that the court would not force the mayor to appoint a particular person, it would appear that Judge Burr's opinion has nevertheless been regarded as the law.[30] Even if it were not, this in and of itself would not prevent a mandamus-type proceeding.[31]

It only serves dangerous precedent to permit the Board at its caprice to appoint persons who have not been duly recommended. The possibilities of partisan control of the election administration run greater risk of effectuating disfranchisement of the voters than does the possibility that the election machinery itself will fall apart.

Perhaps it is the concern of the majority in the instant case, that if the appointment is construed as being illegal, the official acts of the appointee may be deemed void. There is no doubt that such a determination would tend to disrupt local government. Nevertheless it would seem better to arrest such a situation rather than encourage its subsistence. If the official acts of the appointee are void, his continuance in office cannot be said to nurture stable government.

Procedurally, where title to an office is in dispute, the proper remedy lies in the nature of a quo warranto proceeding.[32] This general rule has been held inapplicable, however, where only questions of law are in issue and not questions of fact.[33] Where the facts are undisputed and there is a clear legal right to the remedy to be enforced with only a question of law involved, relief can be granted in a proceeding in the nature of mandamus and therefore, quo warranto *is not* the sole remedy.[34]

Although the Appellate Division painstakingly pointed out that a quo warranto-like proceeding was probably the proper remedy, there is serious doubt as to its availability because no facts appear to be in dispute.[35]

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[29] Kane v. Gaynor, *supra* note 27.

[30] Haynes v. McGrath, 16 Misc.2d 76, 79, 103 N.Y.S.2d 889, 893 (Sup. Ct. 1951); People *ex rel.* Woods v. Flynn, 81 Misc. 279, 286, 142 N.Y. Supp. 230, 234 (Sup. Ct. 1913); [1919] NEW YORK ATT'Y GEN. ANNUAL REP. 131.

[31] See note 34 *infra*.

[32] People *ex rel.* McLaughlin v. Board of Police Comm'rs, 174 N.Y. 450, 459-60, 67 N.E. 78, 80 (1903).

[33] Lenc v. Zicha, 223 App. Div. 158, 160, 227 N.Y. Supp. 704, 706-07 (1st Dep't 1928), *aff'd mem.*, 250 N.Y. 541, 166 N.E. 317 (1929); THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL 159 (1937).

[34] See Schlobohn v. Municipal Housing Authority, 297 N.Y. 911, 912, 79 N.E.2d 742, 743 (1948) (memorandum decision).

[35] Ahern v. Board of Supervisors, 7 App. Div.2d 538, 545, 185 N.Y.S.2d 669, 676 (2d Dep't 1959) (dissenting opinion). "Where . . . no issues of fact are involved and only questions of law arise, mandamus is the proper remedy. . . . Otherwise the plaintiffs would be without remedy, since the remedy of quo warranto *only* lies where the facts are in dispute." Lenc v. Zicha, 223 App. Div. 158, 160, 227 N.Y. Supp. 704, 707 (1st Dep't 1928), *aff'd mem.*, 250 N.Y. 541, 166 N.E. 317 (1929) (emphasis added).

Petitioner in this case seems to have a clear legal right to be enforced.[36] There were no facts in dispute[37] and, as pointed out in the dissent, even the law appears settled that the Board can appoint only persons recommended by the county chairman.[38] Nevertheless, the Appellate Division reversed the lower court partially on the factual situation presented. One is forced to ask what additional facts the Court felt were necessary to make its determination.

Perhaps the Appellate Division felt that it was necessary to make the appointee a party to the present proceeding. Section 193 of the Civil Practice Act provides that a person is an indispensible party if his absence will prevent an effective determination of the controversy or where his interests by non-joinder will be inequitably affected by a judgment.[39] It does not seem that the appointee is indispensible to the determination of whether or not the Board of Supervisors has performed a duty that has been specifically enjoined by law. But whether the appointee's position as election commissioner was adversely affected by a non-joinder presents a more serious question. The law seems settled that where a Board of Supervisors appoints someone not recommended by the county political chairman, the appointment is illegal.[40] If this result is reached the contention that the position of the appointee will be inequitably affected by a non-joinder appears to lose substance. If the appointment was illegal, as a matter of law, there seems little to be gained by joining him as a party to the proceeding.[41]

Legislative action could probably remedy the difficulties the case presents. The necessity of bipartisan control of the election commission is manifest. To insure this fundamental policy, perhaps the county political chairman should be given the power to appoint the commissioner who is to represent his party, by and with the consent of the Board of Supervisors. Self interest should thereafter impel the chairman to respond properly to serve the interests of his party and the public interest as well.

A direct proceeding against the county chairman to make him effectively fulfill his statutory duty, would probably be to no avail.

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[36] See Rivette v. Baker, 265 App. Div. 89, 91, 37 N.Y.S.2d 912, 914 (3d Dep't 1942); *cf.* McCabe v. Voorhis, 243 N.Y. 401, 411, 153 N.E. 849, 851 (1926); People *ex rel.* Daley v. Rice, 129 N.Y. 449, 454, 29 N.E. 355, 356 (1891).

[37] Ahern v. Board of Supervisors, 7 App. Div.2d 538, 545, 185 N.Y.S.2d 669, 676 (2d Dep't 1959) (dissenting opinion).

[38] *Ibid.*

[39] N.Y. CIV. PRAC. ACT § 193.

[40] Kane v. Gaynor, 144 App. Div. 196, 129 N.Y. Supp. 280 (2d Dep't), *aff'd mem. on concurring opinion of Burr, J.*, 202 N.Y. 615, 616, 96 N.E. 1117 (1911); Haynes v. McGrath, 16 Misc.2d 76, 79, 103 N.Y.S.2d 889, 893 (Sup. Ct. 1951); People *ex rel.* Woods v. Flynn, 81 Misc. 279, 286, 146 N.Y. Supp. 230, 234 (1913); [1919] NEW YORK ATT'Y GEN. ANNUAL REP. 131.

[41] See Rivette v. Baker, 265 App. Div. 89, 91, 37 N.Y.S.2d 912, 914 (3d Dep't 1942).

Although a court could possibly order him to appoint someone, it could not tell him whom to appoint.[42] Therefore, it seems the chairman could continue to recommend only himself for the position.

The Appellate Division probably could have aided in the effectuation of stable county government to a greater extent by sustaining the petition, rather than by dismissing it. The Board of Supervisors should not be permitted to ignore what is undoubtedly the clear mandate of the law to appoint only persons recommended by the county political chairman. "The public interest requires that such illegal procedure be disapproved." [43]

ADMINISTRATIVE LAW—CIVIL SERVICE COMMISSION—ATTEMPT TO ADJUST REQUIRED PASSING GRADE OF EXAMINATION WITHOUT ADVANCE NOTICE TO CANDIDATES OF SUCH CHANGE HELD INVALID. —Petitioners brought an Article 78 proceeding to annul the determination of the New York City Civil Service Commission affecting the grading of a promotion examination. Candidates were required to obtain a grade of seventy per cent in both parts of the written test to qualify for the rest of the examination. Determining that Part I had been too difficult, the Commission without advance notice applied a conversion formula in accordance with a civil service rule, which did not become effective, however, until two weeks after the examination was held. Petitioners claimed that employment of the conversion formula resulted in a greater number passing the entire examination, thereby placing petitioners lower on the list. Reversing the Appellate Division, the New York Court of Appeals *held* that the Civil Service Commission may not lawfully adjust the required passing grade of an examination unless it notifies the candidates in advance of the examination by duly promulgated rule that such an adjustment may be made. *Hymes v. Schechter,* 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959).

Regulation through the administrative process has been effectuated on both the state and federal levels since the founding of our country.[1] As a result of the steady growth of administrative law "the state has extended its controls into every aspect of our individual and collective activities." [2] The reasons for the increase of

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[42] Gimprich v. Board of Educ., 306 N.Y. 401, 406, 118 N.E.2d 578, 580 (1954); People *ex rel.* Harris v. Commissioners, 149 N.Y. 26, 30, 43 N.E. 418, 419 (1896).

[43] Ahern v. Board of Supervisors, 6 N.Y.2d 376, 383, 160 N.E.2d 640, 643, 189 N.Y.S.2d 888, 892 (1959) (dissenting opinion).

[1] See GELLHORN & BYSE, ADMINISTRATIVE LAW 1-7 (1954).

[2] Kramer, *The Place and Function of Judicial Review in the Administrative Process,* 28 FORDHAM L. REV. 1, 3 (1959).