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School Boards--Discretionary Power--Appointment of Professors--Judicial Review (Kay v. Board of Higher Education, 193 Misc. 943 (1940))

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he may rely on it.[11] The general rule is: that one cannot rely on an agent's assumption of authority, but one must investigate and ascertain the nature and extent of the agent's powers.[12] Such an agent as defendant's is by no means a universal agent, but is restricted "to those acts and contracts usually exercised by other agents in the same line of business under similar circumstances, and must conduct the particular business of the principal in the manner usually employed by other agents of the same kind." [13] One dealing with an agent with knowledge of limitations on the agent's authority cannot hold the principal for acts of the agent outside those limitations.[14] A third person dealing with one known to be an agent is not relieved of all obligation in the matter, but is held to the exercise of reasonable prudence, and, if an agent, though a general one, departing from legitimate effort in his employer's interests, tenders a contract so unusual and remarkable as to arouse the inquiry of a man of average business prudence, the third party is not allowed to act upon assumptions which ordinarily obtain; he is put upon notice and must ascertain if actual authority has been conferred. Any substantial departure by an agent from the usual methods of conducting business is ordinarily a sufficient warning of lack of authorization.[15] The person dealing with the agent should ascertain the extent of his authority from the principal or from some other person who will have a motive to tell the truth in the interests of the principal, and he cannot rely upon the agent's statement or assumption of authority or upon the mere presumption of authority.[16]

R. E. B.

SCHOOL BOARDS—DISCRETIONARY POWER—APPOINTMENT OF PROFESSORS—JUDICIAL REVIEW.—The petitioner, a citizen and taxpayer of the City of New York, seeks an order under Article 78 of the New York Civil Practice Act [1] revoking the appointment of Dr. Bertrand Russell by the Board of Higher Education of the City of New York to the Chair of Philosophy in the College of the City of New York and discharging the appointee from said position. The

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[11] Hill v. James, 148 Minn. 261, 181 N. W. 577 (1921).

[12] W. W. Marshall & Co. v. Kirschbraun & Sons, 100 Neb. 876, 161 N. W. 577 (1917).

[13] A. H. Stephens v. John L. Roper Lumber Co., 160 N. C. 107, 109, 75 S. E. 933, 939 (1912).

[14] Southwestern Bell Telephone Co. v. Coughlin, 40 F. (2d) 349 (C. C. A. 5th, 1930).

[15] RESTATEMENT, AGENCY (1932) § 166a.

[16] Metropolitan Casualty Ins. Co. v. Potomac Builder's Supply Co., 61 F. (2d) 407 (App. D. C. 1932).

[1] N. Y. CIV. PRAC. ACT § 1283.

appointment is alleged to be illegal for three reasons: *viz.*, the appointee is not a citizen and has not applied to become a citizen as required by Education Law Section 550;[2] the appointment violates Article V, Section 6 of the Constitution of the State of New York,[3] as it was not based upon a competitive examination although it did not appear that such an examination was impracticable; and, lastly, the appointment was against public policy, because of Dr. Russell's teachings and immoral character. The Corporation Counsel moved to dismiss solely on the ground that the Board of Higher Education is not required to employ citizens. The other issues were not contested. *Held,* order granted revoking the appointment of Bertrand Russell, discharging him from his said position, and denying to him the rights and privileges and powers appertaining to his appointment. The decision of the court rests upon all three of the grounds alleged. *Kay* v. *Board of Higher Education,* 193 Misc. 943, 18 N. Y. S. (2d) 821 (1940).

The Board of Higher Education[4] was created to control and administer generally all public education in the City of New York beyond high school level.[5] Its powers, within its sphere, are comparable to those generally conferred upon school boards.[6] Thus, in the absence of constitutional or statutory restrictions the Board has the broad discretionary power which has long been recognized as an essential attribute of school boards, and with which the courts will not interfere in the absence of abuse of authority, arbitrary action, or a violation of law.[7] Where a particular matter is delimited by

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[2] N. Y. Ed. Law § 550 ("No person shall be employed or authorized to teach in the public schools of the state who is: * * * (3) Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen").

[3] N. Y. Const. art. V, § 6 ("Appointments and promotions in the civil service of the state, and of all the civil divisions thereof including cities and villages, shall be made according to merit and fitness to be ascertained so far as practicable, by examinations, which so far as practical, shall be competitive; * * *").

[4] N. Y. Ed. Law § 1142.

[5] N. Y. Ed. Law § 1143.

[6] *Ibid.*

[7] People v. Regents of University, 18 Mich. 469 (1869) (mandamus to compel appointment of professor denied); Tanton v. McKenney, 226 Mich. 245, 197 N. W. 510 (1924) ("The courts will not interfere with the exercise of discretion by school directors in matters confided by law to their judgment, unless there is a clear abuse of the discretion, or a violation of law * * * [but] * * * The reasonableness of regulations is a question of law for the courts"); Gleason v. University of Minnesota, 104 Minn. 359, 116 N. W. 650 (1908) (where regents of university refuse to perform their duty mandamus will lie although they are vested by law with exclusive management of educational affairs); Fanning v. University of Minnesota, 183 Minn. 222, 236 N. W. 217 (1931) (regents of state university held not subject to legislative, executive, or judicial control within their granted power); State *ex rel.* Keeney v. Ayers, 108 Mont. 547, 92 P. (2d) 306 (1939); Carnes v. Finley, 98 Misc. 390, 164

statute or constitutional provision the Board's discretion must give way to the law,[8] and even acts of the Board which have received the express sanction of the legislature are void if contrary to a constitutional requirement.[9] Whenever a school board does an act in violation of a statutory requirement that it appoint only citizens, or aliens who have evidenced an intention to become citizens, or in violation of an express constitutional provision that teachers be appointed on the basis of competitive examinations, the courts may intervene upon proper application to restrain a violation of the law;[10] hence, there is no doubt as to the soundness of the first two points on which the court has rested its decision in the instant case. The third point upon which the court relied in its decision, *i.e.*, the failure of the Board of Higher Education to dispute the question of the immoral character and teachings of the appointee, is in the realm of controversy because frequent intervention by the courts upon slight pretext would result in substituting the judgment of the court for that of the body entrusted with educational affairs.[11] The case of *Epstein* v. *Board of Education*,[12] which was largely relied on by the court, did not involve the morals of a teacher, but it contained a strong *dictum* that courts may interfere to protect the community's safety and welfare when a school board's acts are inimical to it.[13] Although courts of equity usually are concerned with property rights, they may exercise their injunctive

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N. Y. Supp. 305 (1917) (courts will not interfere with constitutional exercise of discretion); Hysong v. Gallitzian School District, 164 Pa. 629, 30 Atl. 482 (1894); Foley v. Benedict, 122 Tex. 193, 55 S. W. (2d) 805 (1932) (courts will not interfere with rules of board of regents of university in absence of showing of abuse of authority or arbitrary action).

[8] Matter of Sloat v. Board of Examiners, 274 N. Y. 367, 9 N. E. (2d) 12 (1937) ("Disobedience or evasion of a constitutional mandate may not be tolerated even though such disobedience might, perhaps, promote in some respects the best interests of the public. Arbitrary decision that in a given case it is not practicable to ascertain merit and fitness by competitive examinations may be challenged and is subject to review by the courts").

[9] Matter of Keymer, 148 N. Y. 341, 42 N. E. 667 (1896) (a mere arbitrary declaration by the legislature that competitive examinations of veterans are impracticable plainly violates N. Y. CONST. art. V, § 6); Matter of Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921); Matter of Carow v. Board of Education, 272 N. Y. 341, 6 N. E. (2d) 47 (1936).

[10] N. Y. CONST. art. V, § 6 (see note 3, *supra*); Matter of Becker v. Eisner, 277 N. Y. 143, 13 N. E. (2d) 747 (1938) (unless the legislature or some other body finds it impracticable to give teachers competitive examinations N. Y. CONST. art. V, § 6 must apply to the Board of Higher Education).

[11] See note 7, *supra*.

[12] 162 Misc. 718, 295 N. Y. Supp. 796 (1936).

[13] Matter of Epstein v. Board of Education, 162 Misc. 718, 295 N. Y. Supp. 796 (1936) ("A person is not to be denied a license to teach in the public schools solely because of his economic or political views, nor because he has theretofore given lawful expression to those views. A different situation would be presented if one advocated the overthrow of the government by force, or when such utterances were such as tended to bring such person into conflict with the Penal Law of the State, or were beyond that limit of freedom of speech guaranteed by our fundamental law").

power to secure the public health, morals, safety and welfare.[14] To appoint one whose teachings and whose example tend to destroy the very institutions which form the basis of a well ordered society is clearly not within the limits of a school board's discretionary power.[15] In the instant case, as has been stated, no defense was offered by the Corporation Counsel of the appointee's character, nor did he make any attempt to justify or explain passages which the court has quoted from writings of Russell. These passages standing alone and unexplained clearly establish that the appointee has subscribed to theories, which if implemented, would result in a lowering of the community's morality and in violations of the Penal Law. The appointment of a person with such views to instruct the young in a public university would certainly constitute an abuse of discretion which, consistent with the principles of law applicable, would warrant an exercise of the court's injunctive power.

A. J. G.

SHERMAN ANTI-TRUST ACT—"RESTRAINTS OF TRADE"—APPLICATION TO LABOR UNIONS.—Petitioner, a Pennsylvania corporation, is engaged in the manufacture of hosiery, a substantial part of which is shipped in interstate commerce. In April, 1937 it was operating a non-union shop. A demand of the respondent Federation at that time for a closed shop was refused. Upon continued refusal of the petitioner to sign a contract for a closed shop respondent Leader ordered a sit-down strike. Immediately acts of violence against the plant were commenced. The strikers were, however, forcibly ejected pursuant to an injunction.[1] Shipments were prevented by the occupation of the factory by the strikers. This action is brought to recover treble the amount of damage inflicted in the conducting of the strike alleged to be a conspiracy in violation of the Sherman Anti-Trust Act.[2] A judgment for petitioner was reversed by the Circuit Court of Appeals.[3] Upon *certiorari*[4] to the Supreme Court of the

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[14] Matter of Badger, 286 Mo. 139, 226 S. W. 936 (1920); People *ex rel.* Bennett v. Laman, 277 N. Y. 368, 14 N. E. (2d) 439 (1938).

[15] Pierce v. Society of Sisters, 268 U. S. 510, 45 Sup. Ct. 571 (1925) ("* * * that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare"); Matter of Epstein v. Board of Education, 162 Misc. 718, 295 N. Y. Supp. 796 (1936).

[1] Apex Hosiery Co. v. Leader, 90 F. (2d) 155, 159 (C. C. A. 3d, 1937), *rev'd and dismissal ordered sub nom.*, Leader v. Apex Hosiery Co., 302 U. S. 656, 58 Sup. Ct. 362 (1937).

[2] 26 STAT. 209, 15 U. S. C. A. § 1 (1927).

[3] 108 F. (2d) 71 (C. C. A. 3d, 1939) (reversal on ground that interstate commerce restrained was unsubstantial for it was less than three per cent of total output of industry in country).

[4] 310 U. S. 469, 60 Sup. Ct. 589 (1940).