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Administrative Law—Mode of Selection to the Board of Education Held to Be Within the Power And Discretion Of The Legislature

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MODE OF SELECTION TO THE BOARD OF EDUCATION HELD TO BE WITHIN THE POWER AND DISCRETION OF THE LEGISLATURE

Prior to the summer of 1961, the New York Education law provided for a nine member Board of Education for New York City, the members to be appointed by Mayor Wagner. In the summer of 1961, during a hotly contested mayoralty campaign, charges were made of corruption and malfeasance in the school construction and maintenance program which led the Mayor to ask for the nine members' resignation; he received only six. The New York State Legislature met on August 21, 1961, and enacted a statute that terminated the offices of the present board members and provided for a new method of selection.[1] It set up a committee, comprised of the heads of various schools and organizations, to name at least eighteen candidates for the Board of Education from which the Mayor would pick nine. The plaintiffs, two of the three Board members who refused to resign, brought an action to declare the statute unconstitutional and to enjoin the mayor from making appointments to replace the plaintiffs. The Special Term dismissed the complaint,[2] and the Appellate Division affirmed.[3] The plaintiffs appealed as of right on constitutional grounds. *Held*: that the judgment should be modified to the extent of directing judgment in favor of defendants (1) declaring the statute constitutional and (2) adjudging that it was proper for the Mayor to appoint in accordance with the statute. Two Judges dissented in part. The statute was held to be constitutional because the Board of Education members were not city officers and, therefore, do not fall within the home rule provisions of the constitution; the statute is not an illegal delegation of legislative power because the appointment to public offices is not a duty imposed upon the legislature by the constitution. *Lanza v. Wagner*, 11 N.Y.2d 317, 183 N.E.2d 670, 229 N.Y.S.2d 380 (1962).

With the exception of new offices created subsequent to the constitutional provisions, the Legislature is prohibited from providing for the selection of local officers other than through local elections or through appointment by local authorities.[4] This prohibition comes within the home rule provisions of the constitution, which are designed to preserve the principle of home rule (local self-government) for municipalities by continuing the right to select local officers.[5] However, under the exception of creating new state offices, the Legislature has the authority to confer a power of appointment upon some

1. N.Y. Educ. Law § 2553(2).

2. 30 Misc. 2d 212, 220 N.Y.S.2d 477 (Sup. Ct. 1961).

3. 15 A.D.2d 552, 222 N.Y.S.2d 1019 (2d Dep't 1961).

4. People ex rel. Wood v. Draper, 15 N.Y. 532 (1857).

5. People ex rel. Metropolitan St. Ry. Co. v. State Bd. of Tax Comrs., 174 N.Y. 417, 67 N.E. 69 (1903). This case states that "the Constitution of 1777 recognized local self government as already existing, and continued and protected it, so that it could not lawfully be departed from without changing the Constitution itself." The right of home rule was not created; it was preserved. The case follows the provision through three subsequent constitutions with the same result.

individual or association other than a public officer or body.[6] This legislative power is not in any way restricted, and it embraces all offices of every description, both local and general;[7] it has, in fact, been conferred upon such bodies as the Chamber of Commerce and upon such persons as the presidents of marine insurance companies. The legislature must be careful not to delegate any powers conferred upon it by the constitution, but appointment to public office is not one of those powers.[8] Nonetheless, the Legislature has the authority, if not the duty, to make appointments. Lawmaking is a power the constitution has vested in the Legislature, and every law must be executed by someone charged with the duty. The Legislature may vest such power in a board or commission and allow it to carry out the legislative intent.

In order to insure that public education is beyond the control of municipalities and local politics, the State has retained it as a state function. Therefore, Board of Education members are state officials and, unlike city officials, do not fall within the home rule provisions of the state constitution.[9] The Legislature has complete control over any office, in the absence of constitutional restrictions, and may regulate duties, shorten or lengthen terms, or otherwise regulate as the public interest may require.[10] A public officer is not a contracting party and has no vested interest in the office, and is, therefore, subject to the will of the Legislature if it should decide that changes are necessary for the public good.[11]

In the instant case, the Court had little problem in overcoming the appellant's arguments of violation of home rule and bill of attainder. It is said that Board of Education members are state officials, not city officers, and since the constitution has not placed restrictions upon the Legislature in regard to them, the Legislature has complete control over the office and may terminate the term of the incumbent. In regard to the alleged bill of attainder, the statute did not bar the Board members from being hired by other government agencies or from being nominated and selected for the Board again. The state action was not aimed at the incumbent, but at the office, in an attempt to remedy defects in the school system. Upon the subject of whether the statute constituted an impermissible delegation of legislative authority by setting up a selection panel, comprised of eleven people who represented "a knowledgeable cross section of city interest, either active or vitally interested in the educational life of the city,"[12] the Court was divided. The majority held that the Legislature

6. Sturgis v. Spofford, 45 N.Y. 446 (1871); Kane v. Gaynor, 144 App. Div. 196, 129 N.Y. Supp. 280 (2d Dep't 1911), aff'd, 202 N.Y. 615, 96 N.E. 1117 (1911).

7. Sun Printing Ass'n v. Mayor of New York, 8 App. Div. 230, 40 N.Y. Supp. 607 (1st Dep't 1896); Sturgis, supra note 6.

8. Reed v. Dunbar, 41 Or. 509, 69 P. 451 (1902).

9. Divisich v. Marshall, 281 N.Y. 170, 22 N.E.2d 327 (1939); Emerson v. Buck, 230 N.Y. 380, 130 N.E. 584 (1921); Gunnison v. Bd. of Ed., 176 N.Y. 11, 68 N.E. 106 (1903).

10. Burke v. Kern, 287 N.Y. 203, 38 N.E.2d 500 (1941).

11. People v. Vilas, 36 N.Y. 459 (1867); L'Hommedieu v. Bd. of Regents, 276 App. Div. 494, 95 N.Y.S.2d 443 (3d Dep't 1950), aff'd, 301 N.Y. 476, 95 N.E.2d 806 (1950).

12. Lanza v. Wagner, supra, at 333, 183 N.E.2d at 679, 229 N.Y.S.2d at 393 (1962).

has a constitutionally granted power to provide for a method by which offices not within the constitution may be selected or chosen. The panel was upheld by saying that the actual appointments were still being made by the Mayor and that this was not a delegation of legislative authority because this duty was never conferred upon the Legislature by the constitution. There is no constitutional bar to the designation of a nominating panel, whether it be "public" or "private" in nature, that could reasonably be expected to be objective and nonpartisan in its nominations. The two dissents, however, believed that this is a delegation of legislative power. Judge Dye, concerned over the infringement upon democratic processes by the committee system, thought that the organizations represented could not represent the people of New York City and that without any accountability for the action taken, the panel was a quasi-executive committee with the power to limit the Mayor's appointive prerogative. The fact that the members could be non-citizens also was a factor in his decision. Judge Froessel concurred with Judge Dye that the statute is constitutional except insofar as it delegates power to unnamed private individuals. However, the majority observed that this statute is entitled to every presumption in its favor because it has been designed to secure eminent men who possessed keen judgment for the performance of these duties.

The statute in question was designed to remedy defects in the school system and was passed in a good faith attempt to meet a genuine problem. The nominating panel was set up with the idea of obtaining some of the people who are most informed, most experienced, and most vitally interested in the educational system. The fact that the panel is made up of private individuals cannot be argued against on any constitutional ground except impermissible delegation of authority, and not strongly on that ground. The argument is made, in the dissents, that the presidents of these organizations could change and that the members of the panel could be unknown until they meet. Certainly the Legislature would have the power to accept each new president as he was appointed, and by naming the organizations, it is merely continuing to accept each one, without going through the formality every time a change is made. This would be an unnecessary burden upon the Legislature. The argument is then made that this panel restricts the Mayor's appointment prerogative. Since the Mayor is acting as an agent for the state when selecting Board members, the Legislature would have the power to restrict his selections to any number of nominees. Rather than have the panel "advise" the legislature as to their nominees and have it approve them and convey the choices to the Mayor, the formality has been done away with and the constant burden diminished. Therefore, this is not a delegation of legislative power, but it is a continued policy of acceptance of the panel members and the panel's nominations. The question of whether the Legislature could set up a panel that would ultimately appoint officers is not dealt with in this case, thus limiting it. Furthermore, it is obvious from the comments of the majority that this statute "is entitled to every presumption

in its favor," and that the utility of a panel made up of these experts would far outweigh any infringements upon the public's voice in the selection of a Board of Education.

B. D. K.

PERMANENT STATE BOARD OF EQUALIZATION AND ASSESSMENT HELD PROPERLY CONSTITUTED

In 1949 the Legislature created a temporary State Board of Equalization and Assessment. It consisted of three members who were appointed by the Governor and was empowered to review and revise State equalization rates. This board was continued in existence by subsequent acts of the Legislature until April 1, 1960, when there was created a permanent State Board of Equalization and Assessment. This permanent board consisted of the Commissioner for Local Government and four others to be appointed by the Governor. The Governor, however, failed to make any appointments to the permanent board until January 1961, when the three persons who had been on the temporary board were appointed to the permanent board. These were the only appointments made. In August 1960, the three men who had constituted the temporary board made a determination reducing the equalization rate for the Town of Smithtown. One month later, petitioner (town) instituted an article 78 proceeding pursuant to section 760 of the Real Property Tax Law to annul the determination. The petitioner argued that the permanent board could not be properly constituted until the Governor appointed its full complement of five members, and since at the time the determination was made no one had been appointed to the permanent board, the action taken by the respondents was void. Additionally, petitioner claimed that in any case, the rate fixed was arbitrary, capricious, and unreasonable. The lower court dismissed the petition, and the intermediate court affirmed the dismissal. On appeal by permission to the Court of Appeals, *held,* affirmed, one judge dissenting. The permanent board was properly constituted at the time the determination was made since a reading of the statute which created that board showed that the three respondents were empowered to act as the majority of the permanent board. Furthermore, despite the fact that certain erroneous material was used by the board in making its determination, the rate fixed was not arbitrary because this material was furnished by local assessors, and the overall methods used by the Board in determining the rate were adequate. *Town of Smithtown v. Moore,* 11 N.Y.2d 238, 183 N.E.2d 66, 228 N.Y.S.2d 657 (1962).[1]

In New York, when a problem of statutory construction arises, the courts will attempt to determine the intent of the Legislature from the language of the statute,[2] and effect will be given, when possible, to the plain meaning of

1. 14 A.D.2d 229, 218 N.Y.S.2d 802 (3d Dep't 1961).
2. Dept. of Welfare of City of New York v. Siebel, 6 N.Y.2d 536, 161 N.E.2d 1, 190 N.Y.S.2d 683 (1959), appeal dismissed, 361 U.S. 535 (1960).