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Administrative Law—Appeal of Dismissal under Feinberg Law

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the surrounding circumstances such as a retirement about to take effect.[15] In *Evans v. Monaghan* defendants refused to withdraw their pending retirement applications and the Court upheld expedition of the hearing in order to prevent their retirement from taking effect, thus making the hearing a nullity. The present case applies the same principle and does not allow an accused to thwart the purpose of the hearing by refusing to participate in it.

APPEAL OF DISMISSAL UNDER FEINBERG LAW

The Feinberg Law is New York's statutory provision for eliminating subversive teaching personnel from the public school system.[16] School officials in New York City attempted to enforce this law by demanding that teachers reveal names of co-workers who are or were members of the Communist Party. The officials dismissed or suspended those refusing to name other teachers.

The reprimanded teachers appealed to the Commissioner of Education. He decided that officials might not suspend or dismiss personnel for their refusal to inform on their co-workers.

Pursuant to Section 1283 of the Civil Practice Act, the school officials initiated court proceedings to review the Commissioner's determination. In affirming the lower courts' findings the Court of Appeals, by a six to one decision (Burke, J. dissenting) in *Board of Education of City of New York v. Allen*[17] held that the commissioner's ruling was within his power and was not arbitrary.

Section 310 of the New York Education Law, referring to appeals to the commissioner, states that "his decision . . . shall be final and conclusive, and not subject to question or review in any place or court whatever." In interpreting Section 310 the Court of Appeals has said that "decisions by the commissioner of education are final unless purely arbitrary."[18]

Without passing on the correctness of the Commissioner's determination in the instant case, the Court found reasonable grounds upon which his ruling could have been based. Among these grounds was the Commissioner's assertion that this type of interrogation engenders an atmosphere of suspicion and uneasiness among the educators, to the detriment of the students.

The argument that enforcement of the Feinberg Law was prevented by the Commissioner's ruling was refuted. The Court admitted that the means used by the officials were the easiest and most efficient, but pointed out that it was not the only reasonable means available. Unlike the courts, the Commissioner is empowered to substitute his judgment for that of the officers whose action he is reviewing. He could overrule one method without having to find that it was totally unreasonable. This, the Court felt, was the import of Section 310.

Judge Burke in his dissent felt that the commissioner did not have the

15. 306 N.Y. 324, 118 N.E.2d 452 (1954).
16. N.Y. EDUCATION LAW § 310.
17. 6 N.Y.2d 127, 188 N.Y.S.2d 515 (1959).
18. Ross v. Wilson, 308 N.Y. 605, 127 N.E.2d 697 (1955).

power to act as he did because no such power is conferred on him by the state constitution or any statute.

The majority felt that since the Feinberg Law did not point out the means to be used to accomplish its purpose and did not purport to stand outside the scope of the Commissioner's authority, the Commissioner of Education is empowered under Section 310 to regulate the execution of the Feinberg Law so long as his rulings are not purely arbitrary.

Teachers have a duty as citizens to cooperate in expelling subversive persons from our educational system, a duty which Judge Burke felt was superior to the speculative reasons for the Commissioner's ruling in this instance. If performance of that duty is to be enforced under the Feinberg Law without the Commissioner's discretionary intervention, the legislature and not the Court of Appeals must so direct.

FAILURE TO APPEAL FROM ARTICLE 78 PROCEEDING PREVENTS FURTHER RAISING OF ISSUE

On the review of an Appellate Division decision, the Court of Appeals is generally limited in its consideration to the issues raised in the Appellate Division. In *Berke v. Schechter*[19] the Court applied this rule to a petitioner in an Article 78 proceeding who did not appeal from a trial court order,[20] one portion of which was adverse to his interests. The Court held that he could not obtain review of the portion not appealed by contesting the Appellate Division's decision on a different point which had been appealed by the respondent in the original proceeding.

Petitioner sought review of the New York City Civil Service Commission's action in removing his name from the eligible list for patrolmen on the ground that he was not a person of good character.[21] The Trial Court tried only the issue of whether petitioner's name had been placed on the eligible list. However, it dismissed the proceeding on the merits and granted petitioner leave to apply to the Commission *de novo* and in the event of denial at that time, the right to reapply for judicial review.

The petitioner did not appeal the dismissal on the merits. The respondent Commission appealed the second portion of the order, and the Appellate Division reversed that portion,[22] holding that the leave to apply *de novo* amounted to judicial extension of the statute of limitations for an Article 78 proceeding.[23]

The majority (5) in the Court of Appeals affirmed the Appellate Division's

19. 5 N.Y.2d 569, 186 N.Y.S.2d 595 (1959).
20. N.Y. CIV. PRAC. ACT art. 78.
21. N.Y. City Civil Service Commission RULES, Rule III § 7:
Character: Whenever the Commission shall find that a candidate has an unsatisfactory character or reputation, he shall be marked "not qualified" and his name shall be withheld from certification. The burden of proving good character shall be upon the candidate.
22. Berke v. Schechter, 5 A.D.2d 350, 171 N.Y.S.2d 935 (1st Dep't 1958).
23. N.Y. CIV. PRAC. ACT § 1286.