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## Administrative Law—Failure to Appeal from Article 78 Proceeding Prevents Further Raising of Issue

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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*<sup>19</sup> the Court applied this rule to a petitioner in an Article 78 proceeding who did not appeal from a trial court order,<sup>20</sup> 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.<sup>21</sup> 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,<sup>22</sup> holding that the leave to apply *de novo* amounted to judicial extension of the statute of limitations for an Article 78 proceeding.<sup>23</sup>

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

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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.

reversal, but did not consider the dismissal on the merits because that issue had not been before the Appellate Division. The minority (2) dissented on the ground that the Appellate Division's reversal of the leave to apply *de novo* altered the effect of the dismissal by making it conclusive of the entire matter, which it had not been previously. Because of the change in the effect of the dismissal the minority felt that that issue was before them and that the case should have been remanded for a full hearing on the merits, which hearing had not been given on the original trial.

Both in New York and in other jurisdictions, it is clear that a party must raise an issue in an intermediate appellate court in order to preserve that issue for determination in a higher court.<sup>24</sup> On its face the minority's contention that the Appellate Division decision effected the dismissal on the merits and thus brought that issue before the Court of Appeals, is appealing. However, at the time of the Commission's appeal the petitioner could have foreseen the effects of a reversal on the question of reapplication. At that time by choosing not to appeal the dismissal on the merits, he waived his right to litigate the issue further. Such a result may seem unduly technical, but it is historically accepted and probably necessary to an orderly system of appellate review.

#### MANDAMUS—A DISCRETIONARY REMEDY

Mandamus is an extraordinary remedial device which is granted only after the exercise of sound judicial discretion.<sup>25</sup> Since it is a discretionary remedy, it is difficult to set out any definitive standard wherein its issuance is assured. However, there appear to be two circumstances that will cause the Court to deny the remedy: (1) first, where the order would cause disorder and confusion in public affairs;<sup>26</sup> (2) and second, where there is a more appropriate remedy available.<sup>27</sup>

In *Ahern v. Board of Supervisors*,<sup>28</sup> the Board of Supervisors of Suffolk County appointed a Democratic Election Commissioner without the appointee having been recommended by the Chairman of the Democratic Committee as required by Subdivision 2 of Section 52 of the Election Law.<sup>29</sup> The Chairman

24. *Stack v. Nat'l City Bank*, 278 N.Y. 388, 394, 16 N.E.2d 376, 378 (1938); *In re 43d Ave.*, 282 N.Y. 42, 47, 24 N.E.2d 841, 842 (1939); *In re Segall's Will*, 287 N.Y. 52, 60, 38 N.E.2d 126, 130 (1941); *Bank of Ariz. v. Thomas Heavy Co.*, 232 U.S. 106, 110 (1913); *Automobile Supply Co. v. Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930); *Stafford v. Stafford*, 299 Ill. 438, 132 N.E. 452 (1921); *Cline v. Niblo*, 117 Tex. 474, 8 S.W.2d 633 (1928).

25. *Andresen v. Rice*, 277 N.Y. 271, 14 N.E.2d 65 (1938); *Duncan Townsite Co. v. Lane*, 245 U.S. 308 (1917).

26. *Andresen v. Rice*, *supra* note 25.

27. *Walsh v. LaGuardia*, 269 N.Y. 437, 199 N.E. 652 (1936); *In re Gardner*, 68 N.Y. 467 (1877).

28. 6 N.Y.2d 376, 189 N.Y.S.2d 888 (1959).

29. N.Y. ELECTION LAW § 52(2) provides that:

At least five days before the first day of January in each odd numbered year . . . the respective chairman of the county committees of each of the two political parties . . . shall certify the name of a person who is recommended as a fit and proper person to be appointed a commissioner of elections.