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Administrative Law—Tolling of Statute of Limitation in Article 78 Proceeding

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missioners' power to examine independent nominating petitions to determine whether the required number of qualified voters have affixed their signatures thereto,[40] is reviewable under the summary jurisdiction of Section 330, and also reviewable in a proceeding initiated under Article 78. Thus, mandamus *can* be directed to the Commissioners of Election, since their power of examination of independent nominating petitions has been held to be ministerial,[41] and mandamus will issue to compel such ministerial acts.[42]

The Court, however, affirmed the denial of the relief sought because the same factual determination controlled in either a Section 330 or Article 78 proceeding. The lower court had found that the petitions had not been validly signed by a sufficient number of qualified voters as required by Section 138 of the Election Law.[43] Therefore, the appellants had failed to show a clear legal right to the relief sought,[44] and the invalidation of the nominating petitions was proper.

TOLLING OF STATUTE OF LIMITATIONS IN ARTICLE 78 PROCEEDING

Proceedings to review actions by administrative agencies must be commenced within four months after the matter to be reviewed becomes final and binding on the petitioner.[45] It has been held that such action does not become final and binding until the petitioner has received notice that he is aggrieved by the agency's action.[46]

In *O'Neill v. Schechter*[47] the Court faced the problem of when examinees in a civil service examination for patrolmen had such notice of the official key answers as to commence the four month period for challenging the answers. Petitioners brought this action seven months after the publication of the official answers. They claimed that they did not have notice that they were aggreived until they were allowed access to their own answer papers and that this action was started within four months of that time. In opposition, the respondent commission argued that statements contained on the examination paper informed petitioners of the necessity for making copies of their answers to enable them to challenge the official answers.[48]

The Court of Appeals reversed the dismissal of the petition by the Special

40. See N.Y. ELECTION LAW § 138.
41. Wicksel v. Cohen, 262 N.Y. 446, 187 N.E. 634 (1933).
42. Small v. Moss, 279 N.Y. 288, 18 N.E.2d 281 (1938); Schaffner v. Dooling, 258 App. Div. 735, 14 N.Y.S.2d 911 (2d Dep't 1939).
43. N.Y. ELECTION LAW § 138.
44. Combs v. Edwards, 280 N.Y. 361, 21 N.E.2d 353 (1939); Leitner v. New York Telephone Co., 277 N.Y. 180, 13 N.E.2d 763 (1938).
45. N.Y. CIV. PRAC. ACT § 1286.
46. Adamson v. Comm'r of Educ., 1 A.D.2d 366, 370, 371, 150 N.Y.S.2d 270, 276 (3d Dep't 1956) and cases cited therein.
47. 5 N.Y.2d 548, 186 N.Y.S.2d 577 (1959).
48. The examination made reference to copying answers at two places. The first page contained the statement "you may, for future reference, make a record of your answers in the question booklet and take the question booklet with you." The last page contained five paragraphs of directions for protesting answers. These instructions, however, were preceded by instructions implying that the protest instructions could be read after leaving the examination.

Term,[49] which had been affirmed by the Appellate Division.[50] The majority (5) held that the statements on the examination when viewed in the light of the circumstances and excitement surrounding the examination did not sufficiently appraise the petitioners of the necessity of copying their answers. For this reason it held that the petitioners did not have notice that they were aggrieved until they were allowed access to their papers.

The right of examinees to challenge as arbitrary answers promulgated as correct by an administrative agency has been upheld.[51] Until this case the statute of limitations pertinent to such challenges has been held to run from the official publication of the answers.[52] The minority in the Court of Appeals (2) felt that the examination paper contained sufficient notice of the need for copying answers and for that reason this case presented no grounds for departing from the established rule.

Since the official answers promulgated by the respondent were merely the letter answers to the examination questions, the petitioners could not know that they were aggrieved until they compared the official answers with their own answers. If the right to challenge arbitrary action on the part of administrative agencies is to be more than illusionary, the short statute of limitations provided by Article 78 should be tolled until an aggrieved party has real notice that he is aggrieved.[53] The holding of this case tends to promote such a result.

FAILURE TO BRING ARTICLE 78 PROCEEDING BARS ACTION FOR DAMAGES

In an action to recover back salary in *Austin v. Board of Higher Education of the City of New York*,[54] the Board of Higher Education appealed from an order of the Appellate Division, which reversed, on the law, the Supreme Court's dismissal of the complaint.

Plaintiffs, six discharged members of the staff of defendant Board, commenced an action at law to recover damages allegedly resulting from their wrongful dismissal. All of the aggrieved parties were summarily discharged, without a hearing, after they had claimed their Fifth-Amendment privilege against self-incrimination, during a United States Senate investigation. The Board defended upon the ground that plaintiffs' exclusive remedy was in an Article 78 proceeding governed by a four-month statute of limitations, and that plaintiffs were precluded from commencing action under Article 78, since this period had elapsed. Plaintiffs had never sought reinstatement through an Article 78 proceeding, but entered into a stipulation with the Board whereby

49. 12 Misc. 2d 67, 173 N.Y.S.2d 719 (Sup. Ct. 1958).
50. 6 A.D.2d 781, 175 N.Y.S.2d 556 (1st Dep't 1958).
51. Gruner v. McNamara, 298 N.Y. 395, 83 N.E.2d 850 (1949); Fink v. Finnigan, 270 N.Y. 356, 1 N.E.2d 462 (1936).
52. Lennox v. McNamara, 16 Misc. 2d 9, 99 N.Y.S.2d 867, *aff'd* 275 App. Div. 1023, 91 N.Y.S.2d 826 *motion for leave to appeal denied* 276 App. Div. 757, 92 N.Y.S.2d 918 (1st Dep't 1949); Robinson v. McNamara, 16 Misc. 2d 10, 99 N.Y.S.2d 840, *aff'd* 275 App. Div. 918, 90 N.Y.S.2d 674 (1st Dep't 1940); Goldberg v. Municipal Civil Serv. Comm'n, 16 Misc. 2d 11, 128 N.Y.S.2d 51 (Sup. Ct. 1954).
53. N.Y. CIV. PRAC. ACT art. 78.
54. 5 N.Y.2d 430, 186 N.Y.S.2d 1 (1959).