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Miscellaneous—Militia

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practices to the extent that he was guilty of at least one unfair labor practice himself;[30] this made difficult the showing of clean hands which equity requires. Had any damages been alleged, or had the employer come into court with clean hands, the tenor of *all* the majority opinions suggests that the result might have been different, and that the Court might have looked a little harder to find recognitional picketing if no other pathway to an injunction had presented itself. It is suggested that management visions of a return to the unhappy days of *Thornhill v. Alabama*[31] are unduly pessimistic.

Militia

In *Nistal v. Hausauer*,[32] a former national guardsman brought a proceeding under Article 78 of the Civil Practice Act[33] against the commanding general of the National Guard, to compel issuance of an honorable discharge in place of the "discharge without honor," which had been given under the signature of the commanding general, as Chief of Staff, with the accompanying recital that the action was "By the Command of the Governor." The Special Term[34] dismissed the proceeding on the ground that the relief demanded was beyond the jurisdiction of the court, and in the power of the Governor only. The Appellate Division[35] reversed, seeing the act of discharge by the officer as judicial rather than executive in quality, and therefore reviewable by certiorari.[36] The Court of Appeals reversed the Appellate Division, basing its decision on lack of jurisdiction over the subject matter, since a purely executive function was involved.[37]

The commanding general is also head of the State's Division of Military and Naval Affairs. By statute, it is provided that the Governor may perform his duties as Commander in Chief through that Division.[38] The kind of discharge to be given an enlisted man is not controlled by statute and "must necessarily be left in the

30. N. Y. LABOR LAW § 704 (10).

31. *Thornhill v. Alabama*, 310 U. S. 88 (1940), in which picketing was equated with speech and therefore protected, was soon drastically limited by a long line of cases. See Comment, *op. cit. supra* note 20.

32. 308 N. Y. 146, 124 N. E. 2d 94 (1954).

33. Proceeding against a body or officer.

34. 203 Misc. 89, 115 N. Y. S. 2d 75 (1952).

35. 282 App. Div. 7, 121 N. Y. S. 2d 712 (1st Dep't 1953).

36. Article 78 was enacted in 1937. Prior thereto, the Civil Practice Act contained provisions separately governing the special proceedings theretofore known as certiorari to review, mandamus and prohibition. The old terms live on.

37. A proceeding against a body or officer does not lie to review a legislative or executive function. *Neddio v. Schrade*, 270 N. Y. 97, 200 N. E. 657 (1936); *Matter of Long Island R. R. v. Hylan*, 240 N. Y. 199, 148 N. E. 189 (1925). A decision made by the Governor, or by his order, is not subject to review. *People ex rel. Broderick v. Morton*, 156 N. Y. 136, 50 N. E. 791 (1898).

38. See N. Y. CONST. art. IV, § 3; N. Y. MILITARY LAW §§ 3, 10, 11; N. Y. EXECUTIVE LAW § 190.

discretion of the executive officer having power to grant some kind of discharge."[39] Since the Governor as Commander in Chief had power to discharge, and since the commanding general was the Governor's subordinate, the Court of Appeals refused to go back of the document to determine whether or not the Governor in fact commanded the action.[40]

The Appellate Division had relied heavily on *People ex rel. Smith v. Hoffman*,[41] which had held that a determination by a military board as to a National Guard *officer's* fitness was a judicial finding, subject to civil court review. The Court of Appeals distinguished the case, on the ground that the State Constitution requires a trial and findings (that is, a judicial process) for removal of an officer,[42] but there is nothing similar in the Constitution or statute as to enlisted men, and the regulations provide only for a "recommending" board, saying nothing about hearing or findings. A second ground of distinction was that the officer's case involved an involuntary separation while this case involved a voluntary application for discharge, with discretion in the military authorities as to the kind of a discharge to be granted.

While distinguishing *Smith v. Hoffman*, the Court of Appeals did support the rule of law expressed therein. If the board, dealing with the discharge has the duty not of advising the Governor but of making an adjudication, certiorari will lie.[43] However, if the board is merely "an agency created to advise the governor as commander in chief," and the Governor can act regardless of the recommendation, then certiorari will not lie.[44] Since the latter part of the rule was found applicable here, there could be no judicial review of the discharge.

A contrary decision would open the door of the Court to review of all National Guard discharges. This could become a sizeable undertaking, especially in the light of new compulsory military reserve legislation. The case does point out a need for safeguards for part time soldiers against arbitrary action by the Guard which will unjustly affect the civilian part of their lives. However, this would seem to be an administrative problem and not a judicial one.

Husband and Wife As Joint Tenants

In re Polizzo's Estate[45] involved an assignment of a bond and mortgage by a

39. *Reid v. United States*, 161 F. 469, 472 (S. D. N. Y. 1908), *appeal dismissed* 211 U. S. 529 (1909).

40. The Court concedes that the Governor probably did not actually order the particular discharge, but nevertheless the power to discharge is the Governor's power and therefore free from review.

41. 166 N. Y. 462, 60 N. E. 187 (1901).

42. N. Y. CONST. art. XII, § 6.

43. 166 N. Y. 462 at 471, 60 N. E. 187 at 189.

44. *Id.* at 468, 60 N. E. at 188.

45. 308 N. Y. 517, 127 N. E. 2d 316 (1955).