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1. *Ahern v. Board of Supervisors, 6 N.Y.2d 376*
   Client/Matter: -None-

Questioned
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Ahern v. Board of Supervisors

Court of Appeals of New York

May 26, 1959, Argued ; July 8, 1959, Decided

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Reporter
6 N.Y.2d 376 *; 160 N.E.2d 640 **; 189 N.Y.S.2d 888 ***; 1959 N.Y. LEXIS 1160 ****

In the Matter of William F. Ahern, Appellant, v. Board of Supervisors of the County of Suffolk, New York, Respondent

Prior History: [**1]** *Matter of Ahern v. Board of Supervisors of County of Suffolk, 7 A D 2d 538*.

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 20, 1959, which reversed, on the law and the facts, an order of the Supreme Court at Special Term (Bernard S. Meyer, J.; opinion ***17 Misc 2d 164***), entered in Nassau County, in a proceeding under article 78 of the Civil Practice Act, (1) denying a motion to dismiss the petition, (2) declaring null and void a resolution of the Board of Supervisors of Suffolk County appointing Arthur M. Weiss a Commissioner of Elections in Suffolk County, and (3) directing the Board of Supervisors of Suffolk County to refrain and desist from appointing any person to the Board of Elections of Suffolk County as a Commissioner of Elections belonging to and representing the Democratic party of Suffolk County to said Board of Elections unless such person has been duly certified and recommended to the Board of Supervisors by the Chairman of the Democratic party of Suffolk County, and dismissed the proceeding.

Disposition: Order affirmed, without costs, upon the ground that the Appellate Division acted within its discretion **[****2]** when it dismissed this petition (see *Matter of Andresen v. Rice, 277 N. Y. 271, 282)*. We pass upon no other question.

Core Terms

appoint, Elections, recommended, mandamus

Case Summary

Procedural Posture
Petitioner, a taxpayer, resident, and voter in the county, challenged the decision of the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which reversed the supreme court's order to declare a resolution of respondent, the county board of elections, null and void. Although the chairman of the Democratic Committee had not recommended a commissioner of elections, the board had appointed one.

Overview
Four times, the county chairman of the Democratic Committee recommended himself as a commissioner of elections. Four times, the county's board of supervisors refused to appoint him. State law required the chairman to submit names of potential candidates. Although the chairman had not submitted the name of anyone other than himself, the board appointed an enrolled Democrat as the new commissioner. A third Democrat in the county filed for an injunction against the Republican Commissioner of Elections, argued that the board had no legal existence, and filed a petition for mandamus to declare the board's action null and void. The supreme court granted the petition; but the appellate court reversed. The court cited the appellate court's decision, which addressed the merits and stated that the appellate court had exercised its discretion to strike the mandamus order. The court agreed that the consequences of holding the appointment invalid would undermine the board's service to the public and disenfranchise county voters. Because the court affirmed on the appellate court's exercise of discretion, it did not decide whether the appellate court's holdings on the law were correct.

Outcome
The court affirmed the appellate court's exercise of discretion when it held that the public interest would be damaged by allowing the supreme court to declare the board's action null and void. The court declined to consider whether the appellate court had ruled correctly on whether the board was required to appoint only candidates certified by the Democratic party.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Remedies > Mandamus

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

Governments > Local Governments > Administrative Boards

HN1[] **Remedies, Mandamus**

Mandamus is an extraordinary remedy, the issuance of which is to a great extent discretionary. The courts are reluctant to issue it if disorder and confusion in public affairs would result, even in cases where there might be considered to be a strict legal right to enforce.

Headnotes/Syllabus

Headnotes

Proceeding against body or officer -- mandamus -- Appellate Division dismissed, in exercise of discretion, proceeding for order directing Board of Supervisors to revoke appointment of Commissioner of Elections and to desist from appointing person to Board of Elections as representing Democratic party unless certified by County Democratic Committee -- order of Appellate Division did not constitute abuse of discretion -- question whether dismissal upon law was correct not reached.

1. The Appellate Division dismissed a proceeding brought by petitioner against the Board of Supervisors of Suffolk County for an order directing the board to revoke an appointment of a Commissioner of Elections for the county, and directing the board to desist from appointing any person to the Board of Elections as representing the Democratic party of that county unless such person had been duly certified and recommended by the Chairman of the Suffolk County Democratic Committee. In dismissing the proceeding, the Appellate Division indicated that it was exercising the court's **[****3]** discretion because of the damage to the public interest which might result from a mandamus order, and also because the record does not fully set forth all the facts that might be pertinent to a determination of the question whether it would be possible for the Supervisors to appoint an Election Commissioner not recommended by the County Chairman. The Appellate Division's order did not constitute an abuse of discretion.

2. Since the reversal of the order at Special Term and dismissal in the exercise of discretion were proper, the question whether the determination insofar as it was on the law is correct is not reached.

Counsel: *George W. Percy, Jr.*, for appellant. I. In the County of Suffolk, the Board of Supervisors cannot appoint an individual to the Board of Elections of Suffolk County as a Commissioner of Elections belonging to and representing the Democratic party on the said Board of Elections, unless that individual has been certified and recommended by the *Chairman of the Suffolk County Democratic Committee. (Matter of Thomas v. Wells, 288 N. Y. 155*; *Matter of Kane v. Gaynor, 144 App. Div. 196, 202 N. Y. 615*; *People ex rel. Woods v. Flynn, 81 Misc.* ***[****4]*** *279*.) II. Where the facts are not in dispute, mandamus, rather than a proceeding in the nature of quo warranto, is the proper action to try title to public office. (*People ex rel. Sulzer v. Sohmer, 211 N. Y. 565*; *People ex rel. McLaughlin v. Police Comrs., 174 N. Y. 450*; *People ex rel. Wren v. Goetting, 133 N. Y. 569*; *Matter of Gardner, 68 N. Y. 467*; *Matter of Teeple v. McKeon, 273 App. Div. 936*; *People ex rel. Lewis v. Brush, 146 N. Y. 60*; *People ex rel. Dolan v. Lane, 55 N. Y. 217*; *Matter of Bailey v. Berry, 240 App. Div. 771*; *People ex rel. Howard v. Board of Supervisors of Erie County, 42 App. Div. 510, 160 N. Y. 687*; *People ex rel. Kelly v. Common Council, City of Brooklyn, 77 N. Y. 503*; *Matter of Lenc v. Zicha, 223 App. Div. 158, 250 N. Y. 541*; *Matter of Sylvester v. Mescall, 277 App. Div. 961*; *Matter of Rivette v. Baker, 265 App. Div. 89*; *Matter of Schlobohm v. Municipal Housing Auth. for City of Yonkers, 270 App. Div. 1022, 297 N. Y. 911*; *Matter of Felice v. Swezey, 278 App. Div. 958*; *Matter of Mapes v. Swezey, 199 Misc. 997, 278 App. Div. 959*.) III. **[****5]** Petitioner has standing to question the appointment made by the *Board of Supervisors. (People ex rel. Daley v. Rice, 129 N. Y. 449*; *Matter of McCabe v. Voorhis, 243 N. Y. 401*; *McGovern Trucking Co. v. Moses, 277 App. Div. 758*; *Matter of Andresen v. Rice, 277 N. Y. 271*; *Matter of New York Post Corp. v. Leibowitz, 2 N Y 2d 677*.)

Pierson R. Hildreth, County Attorney (*Pierre G. Lundberg* and *Edward Le Vanda* of counsel), for respondent. I. Upon the conceded facts of this proceeding the Democratic party Chairman waived, renounced and forfeited any privilege or right to recommend a person for appointment as *Commissioner of Elections. (People ex rel. McLaughlin v. Police Comrs., 174 N. Y. 450*; *Matter of Mullen v. Heffernan, 193 Misc. 334, 274 App. Div. 972, 298 N. Y. 785*; *People ex rel. Woods v. Flynn, 81 Misc. 279*.) II. The sole appointing authority is the Board of Supervisors. Faced with the refusal of the party Chairman to recommend, the appointment by the board without such recommendation was valid. (*People ex*

rel. Balcom v. Mosher, 163 N. Y. 32; *Matter of Thomas v. Wells, 288 N. Y. 155*; **[****6]** *People ex rel. Woods v. Flynn, 81 Misc. 279*; *Matter of Kane v. Gaynor, 144 App. Div. 196, 202 N. Y. 615*; *People ex rel. Mullarkey v. Board of Supervisors, 180 App. Div. 125*; *People ex rel. Chadbourne v. Voorhis, 236 N. Y. 437*; *Matter of Moore v. Walsh, 286 N. Y. 552*; *Matter of Koenig v. Flynn, 258 N. Y. 292*; *Matter of Meyer, 209 N. Y. 386*; *Matter of Reynolds, 202 N. Y. 430*; *Macrum v. Hawkins, 261 N. Y. 193*; *Matter of Burns v. Wiltse, 303 N. Y. 319*; *Matter of Berger v. Walsh, 291 N. Y. 220*.) III. The petition was properly dismissed by the Appellate Division upon the objections in point of law, and upon the facts admitted on the pleadings. (*Matter of Carp, 221 N. Y. 643*; *Matter of Metz v. Maddox, 189 N. Y. 460*; *People ex rel. Sulzer v. Sohmer, 211 N. Y. 565*; *Matter of Teeple v. McKeon, 273 App. Div. 936*; *Matter of Gardner, 68 N. Y. 467*; *People ex rel. McLaughlin v. Police Comrs., 174 N. Y. 450*; *People ex rel. Wren v. Goetting, 133 N. Y. 569*; *Matter of Andresen v. Rice, 277 N. Y. 271*; *Matter of Walsh v. LaGuardia, 269 N. Y. 437*.)

Monroe Goldwater **[****7]** and *Robert Conrad* for Democratic State Committee of the State of New York, *amicus curiae*. I. The challenged action of the Suffolk County Board of Supervisors was violative of the *New York State Constitution and of the Election Law of the State of New York. (Matter of Kane v. Gaynor, 144 App. Div. 196, 202 N. Y. 615*; *People ex rel. Woods v. Flynn, 81 Misc. 279*.) II. This article 78 proceeding is the proper one in which to obtain the relief sought, and the proceeding is properly brought by petitioner. (*Matter of Schlobohm v. Municipal Housing Auth. for City of Yonkers, 270 App. Div. 1022*; *Matter of Rivette v. Baker, 265 App. Div. 89*; *Matter of Sylvester v. Mescall, 277 App. Div. 961*; *Matter of Felice v. Swezey, 278 App. Div. 958*; *Matter of Lenc v. Zicha, 223 App. Div. 158, 250 N. Y. 541*; *People ex rel. Kelly v. Common Council, City of Brooklyn, 77 N. Y. 503*; *People ex rel. Howard v. Board of Supervisors of Erie County, 42 App. Div. 510, 160 N. Y. 687*; *Matter of Smith v. Dillon, 267 App. Div. 39*; *Matter of Pansmith v. Williams, 201 Misc. 759*.) III. Petitioner is a proper party to bring this **[****8]** proceeding. (*Matter of Rivette v. Baker, 265 App. Div. 89*; *Matter of Kornbluth v. Rice, 250 App. Div. 654, 275 N. Y. 597*; *Matter of Andresen v. Rice, 277 N. Y. 271*; *Matter of New York Post Corp. v. Leibowitz, 2 N Y 2d 677*.)

Henry M. Zaleski and *Reginald C. Smith* for William J. Leonard, Supervisor of the Town of Riverhead, *amicus curiae*. I. Neither the Constitution nor section 30 of the Election Law provides for the nomination of a Commissioner by a party Chairman. II. The function of the Board of Supervisors was either governmental, legislative or quasi-judicial. (*Matter of Thomas v. Wells, 288 N. Y. 155, 263 App. Div. 759*; *Matter of Cary v. Binghamton City Council, 265 App. Div. 83, 290 N. Y. 247*; *Matter of Murphy v. Britt, 163 App. Div. 734, 212 N. Y. 582*; *Matter of Felice v. Swezey, 278 App. Div. 958*; *Matter of Mapes v. Swezey, 278 App. Div. 959*.) III. The law abhors a vacancy. (*People ex rel. Kingsland v. Palmer, 52 N. Y. 83*.)

Judges: Judges Dye, Fuld and Van Voorhis concur with Judge Desmond; Judge Froessel dissents in an opinion in which Chief Judge Conway and Judge Burke concur.

Opinion by: **[****9]** DESMOND

Opinion

[*379] **[**641]** **[***889]** Petitioner, alleging that he "is a resident, taxpayer and voter in the County of Suffolk, State of New York, and an enrolled member in the Democratic Party", brought this mandamus-type (Civ. Prac. Act, art. 78) proceeding against the Board of Supervisors of Suffolk County for an order to direct the board to revoke the appointment of Arthur M. Weiss as a Commissioner of Elections for the county. He prayed also that the court command the board to desist from appointing any person to the Suffolk County Board of Elections as representing the Democratic party of that county on said Elections Board, unless and until such person shall have been duly certified and recommended to the Supervisors by the Chairman of the Suffolk County Democratic Committee. The petition shows that on December 30, 1958, the day before the expiration of his term, one Havens, the incumbent Election Commissioner representing **[*380]** the Democratic party in Suffolk County, resigned, creating a vacancy. On February 16, 1959 the Board of Supervisors appointed or attempted to appoint Arthur M. Weiss to the Board of Elections as the Democratic member although the **[****10]** name of Weiss had never been certified to the Board of Supervisors by the County Chairman of the Democratic Committee. The answering papers show -- and it is undisputed -- that prior to January 2, 1959 the Chairman of the Suffolk County Democratic Committee, Adrian Mason, had certified and recommended himself to the Board of Supervisors pursuant to section 52 of the Election Law as a fit and proper person to be appointed a Commissioner of Elections representing the Democratic party. On January 2, 1959 the Board of Supervisors voted on this recommendation but unanimously rejected it. On three later occasions County Chairman Mason resubmitted his name and three times the Board of Supervisors unanimously rejected it. Chairman Mason stated publicly that he would continue to **[***890]** recommend himself and no one else for

the position of Commissioner of Elections. On February 16, 1959 the Board of Supervisors, on motion of a Democratic member, appointed Arthur M. Weiss, an enrolled Democrat, to fill the vacant position although the name of Weiss had not been submitted by the Chairman of the Democratic County Committee as required by subdivision 2 of section 52 of the Election Law. **[****11]** Meanwhile, William F. Ahern, the same citizen and enrolled Democratic party member who later brought this present proceeding, had brought an injunction action against the other (Republican) Commissioner of Elections and against other county officials alleging, in substance, that the Board of Elections had no legal existence and could not function and was not authorized to function since one member only was in office. In that injunction action, on January 22, 1959, a Supreme Court Justice granted a temporary stay which was afterwards vacated (see *7 A D 2d 546*).

This present article 78 proceeding came on for argument at Special Term on the petition, answer and various exhibits. That court wrote an opinion in which it held: first, that mandamus was an appropriate remedy since there were no disputed facts; second, that the Board of Supervisors had acted without power in appointing Weiss without a recommendation from the Democratic County Chairman, and, third, that the resolution appointing Weiss was void.

[*381] The Board of Supervisors appealed to the Appellate Division, Second Department, which by a divided vote reversed the order below on the law and facts and dismissed the **[****12]** proceeding. The Appellate Division order refers to and incorporates the court's opinion. That opinion says that the petition should be dismissed "as a matter of law or, in view of the nature of the legal questions presented and the factual situation disclosed, as a matter of discretion." The point of law on which the Appellate Division reversed was that petitioner, in **[**642]** his individual capacity as a taxpayer, resident and voter, had no clear legal right to enforce and that, accordingly, he had no right to bring a mandamus proceeding. The Appellate Division majority refrained from passing on the underlying legal question as to whether the Board of Supervisors can under any circumstances appoint an Election Commissioner not recommended by the County Chairman. The dissenters in the Appellate Division were of the opinion that mandamus was an appropriate remedy, that the Board of Supervisors acted beyond its powers and that the mandamus order was validly granted by the court below.

In the majority Appellate Division opinion there are set forth the reasons which inclined the court to say that, aside from questions of law, the situation was such as to move the court to exercise **[****13]** its discretion in striking down the mandamus order. The Appellate Division majority **[***891]** pointed out that if the appointment of Weiss were held invalid there would be in office in Suffolk County a single Election Commissioner without any right or power to perform the board's duties and that this situation might "result in a complete breakdown of the public service performed by the Board of Elections, and the consequent disenfranchisement of the voters of Suffolk County." The Appellate Division went on to say that ***HN1***[↑] mandamus is an extraordinary remedy, the issuance of which is to a great extent discretionary and that the courts are reluctant to issue it if disorder and confusion in public affairs would result, even in cases where there might be considered to be a strict legal right to enforce. That latter language and thought were taken from *Matter of Andresen v. Rice (277 N. Y. 271, 282)*, where our court, although holding that noncompetitive appointment of State police officers was unconstitutional, refused to remove the officers theretofore illegally appointed or to go further than to declare that future appointments must be from competitive examination lists.

[*382] **[****14]** In another part of the majoriity opinion in the present case, the Appellate Division held that the question as to whether the Board of Supervisors could ever under any circumstances appoint a person not certified by the party Chairman should not be decided on a record like the present one but "may be better decided after all the facts are presented and determined".

It is completely clear here that the Appellate Division not only said but meant that its reversal was not only on the law (that is, that petitioner had no standing) but was, in addition and alternatively, an exercise of the court's discretion because of the damage to the public interest which might result from a mandamus order and, also, because this record does not fully set forth all the facts that might be pertinent to a determination of the question of whether the circumstances were such as to make it possible for the Supervisors to appoint an Election Commissioner not recommended by the County Chairman. This reversal and dismissal of the petition may not be held by us to have been an abuse of discretion. The Appellate Division was at pains to point out that the underlying questions of law and perhaps of fact could **[****15]** be determined in a quo warranto action in which the claimant Weiss could be made a party. He has not been made a party in the present mandamus proceeding.

Since, therefore, the reversal in the exercise of discretion was a proper one, we do not reach the question as to whether the Appellate Division's reversal, insofar as it is on the law, is likewise correct.

The order should be affirmed, without costs.

Dissent by: FROESSEL

Dissent

Froessel, J. (dissenting). I dissent and vote to reverse and reinstate the order of Special Term. For the reasons hereinafter stated, it seems clear to me that the **[***892]** power to appoint rests only in the Board of Supervisors, which must, however, exercise **[**643]** such power within the statutory limitation that the appointee must be recommended by the party Chairman. The attempt to appoint Weiss was, therefore, a nullity and a violation of the constitutional and statutory scheme for a truly bipartisan Election Commission.

Petitioner, as is any citizen, is a legitimate party in interest, since the public interest is involved and interference with the regular, constitutional and statutory election processes is clearly **[*383]** taking place. In **[****16]** these circumstances it was an abuse of discretion to deny relief to petitioner. Quo warranto does not seem to be in order, since there are no rival claimants to the office. Moreover, Weiss does not claim office under color of right since his appointment was on its face violative of statute.

The argument that there was no alternative to the action taken by the board is without substance, since the party Chairman in making the statutory recommendation is performing a public duty. Accordingly, he too can be compelled to carry out such duty. If he, by his refusal to recommend any other person, is frustrating the process of appointment in an arbitrary and capricious manner, he may be compelled to perform his statutory duty properly. If, on the other hand, the board should continue to reject additional recommendations, it may be held to be arbitrary. It cannot, however, disregard the plain provisions of law and make appointments as it sees fit. The public interest requires that such illegal procedure be disapproved.

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