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City's Recent Appellate Practice: Key Cases

THE LAW Department's appeals division, led for the past 23 years by my colleague, Leonard Koerner, includes approximately 40 attorneys who brief and argue hundreds of cases each year — among them many cutting-edge issues — in New York state and federal appellate courts.

The appeals division provides appellate representation in cases initially handled by other divisions of the Law Department as well as in cases originating in other city agencies. Attorneys in the appeals division work on tort cases, commercial litigation, juvenile delinquency and child protective proceedings commenced in the Family Court, and personnel and labor law matters.

In this article, I will review some of the most noteworthy cases handled by the division, beginning with the controversy over a proposal for a charter commission that would study amendments relating to class size in public schools, which was discussed in the last "Municipal Law" column (The New York Law Journal, Sept. 22, 2003, at p. 3).

The Class-Size Ballot Proposal

A charter revision commission assembled by Mayor Michael Bloomberg proposed three questions for voter consideration at last month's general election. (The proposals, the most prominent of which would have provided for non-partisan elections, went down in defeat at the polls.) When a coalition led by the United Federation of Teachers presented a petition for a charter commission to study class size, the city clerk declined to place the proposition on the ballot, citing Municipal Home Rule Law §36(5)(e), which provides that all other local ballot questions are displaced when a charter commission that was appointed by the mayor places questions before the voters. This was the result in 1998, when the Appellate Division, First Department, said that such displacement permits "voters [to] give their full attention to the important task of reviewing the City Charter." *Council of the City of New York v. Giuliani,* 248 AD2d 1, 3 (1st Dept.), appeal dismissed and appeal denied, 92 NY2d 938 (1998).

The union president and other proponents of the petition sued to have their proposal placed on the ballot, arguing that the displacement of their initiative violated their constitutional rights to free speech and ballot access. The lower court agreed and declared the challenged portion of the statute unconstitutional. *Weingarten v. Robles,* Index No. 116585/03 (Sup. Ct., N.Y. Co., Oct. 2, 2003). The Appellate Division, First Department, reversed and dismissed the petition, saying that the lower court had "misconstrued various decisions by the United States Supreme Court." 2002 N.Y. App. Div. LEXIS 10901 at *3 (1st Dept., Oct. 20, 2003). Numerous federal appellate courts have read these cases to say that states have "considerable leeway" to define the right of voter initiative as they think best. First Amendment rights are violated only when states "impose restrictions that significantly inhibit communication with voters." Id. at *4. Petitioners immediately appealed as of right to the Court of Appeals, which dismissed the appeal for want of a substantial constitutional question. 2003 N.Y. LEXIS 3359 (Oct. 23, 2003).

Term Limits for Council Members

Earlier this year, several current and former elected officials attempted unsuccessfully to invalidate a local law refining the two-term limit placed on City Council members in a 1993 local law adopted by voter initiative. Council members normally serve four-year terms, but every 20 years, there are two elections where members are chosen for two-year terms. This permits speedier seating of a City Council elected after districts are redrawn to reflect population changes reported in the federal census. Members were elected for two-year terms in 2001 and 2003 and will be again in 2021 and 2023.

The 1993 local law limited Council members to two terms of consecutive service, one of which had to be a four-year term. Under this law, some members could serve only six consecutive years. In 2002, the Council eliminated the six-year limit by providing that single two-year terms would be ignored in determining the maximum consecutive years of service for Council members. This change created the possibility of 10 years of service for a Council member initially elected to a two-year term. The mayor vetoed this enactment, saying that the City Council should not tamper with term limits adopted by the voters. The Council overrode the veto and the Law Department, together with Cravath, Swain & Moore, defended the local law.

The Appellate Division, Second Department, reversed a lower court decision invalidating the local law. *Golden v. New York City Council,* 305 AD2d 598 (2d Dept.), appeal denied, 100 NY2d 504 (2003). The court rejected the argument that voter approval was needed by virtue of Municipal Home Rule Law §23, which requires that a local law be approved by the voters in a referendum under certain circumstances. In the court's view, amending term limits neither changed the length of any term of office nor curtailed the powers of the Council or its members, two of the circumstances triggering a referendum under §23. 305 AD2d at 600. The court also turned aside petitioners' claim that voter approval of the original term limits gave them special status. The court ruled that local laws adopted by the voters have the same status as local laws adopted by the Council itself and may be amended the same way. Moreover, the court said that voter-created exceptions to the standard eight-year limit on consecutive service showed that the limit was not intended to state an unvarying public policy against service beyond eight years.

Client Responsibility in Homeless Shelters

New York City shelters approximately 38,000 homeless adults and children every night. In the decades since this program began, shelters have changed dramatically. Originally barebones facilities offering meals and a place to sleep, shelters now provide an array of services intended to address underlying causes of homelessness, such as

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substance abuse or insufficient education, so that the affected individuals can resume independent living as quickly as possible.

Over the years, government officials responsible for homeless policy decided there must be some means of requiring that individuals seeking shelter services follow shelter rules and work with service providers towards self-sufficiency. In 1995, the State Department of Social Services adopted a regulation requiring temporary suspension of shelter eligibility for residents engaging in serious misconduct or refusing to take steps to eliminate their need for shelter, such as looking for permanent housing or accepting offered apartments. Eligibility is not suspended when noncompliance results from physical or mental impairment. Moreover, a shelter recipient can demand a full administrative hearing to review a sanction, staying suspension of eligibility pending completion of the review process.

The regulation, which applies to residents of both family and adult shelters, was challenged by family shelter residents and upheld by the Appellate Division, First Department. *McCain v. Giuliani,* 252 AD2d 461 (1st Dept. 1998), appeal dismissed, 93 NY2d 848 (1999). Meanwhile, residents of shelters for adults had launched their own attack, arguing that, even if otherwise lawful, the regulation was inconsistent with a 1981 consent decree in which the city and state agreed that homeless men would receive shelter. That decree settled a lawsuit based on the theory that state constitutional provisions mandating aid to the needy required the city to provide shelter for each homeless person who needs it. The city argued that while the decree assured homeless men that there would be a sufficient supply of decent shelter to meet demand, it did not guarantee that homeless individuals could stay in these shelters indefinitely, without any obligation to follow rules or take steps to lessen their need for this expensive service.

Last June, the Appellate Division reversed a lower court ruling and upheld the sanction rule for homeless adults, concluding that the "boundless and unprecedented entitlement" claimed by plaintiffs was not embodied in the consent decree. *Callahan v. Carey,* 307 AD2d 150, 151 (1st Dept.), leave to appeal denied, No. 1040, 2003 N.Y. LEXIS 2549 (Sept. 26, 2003). Noting that consent decrees are akin to contracts, the appellate ruling said that the lower court "went beyond the clear, unambiguous text of the consent decree and created an obligation to provide shelter without regard to financial need, regardless of the conduct of any individual and without reference to any particular person's actual need for such aid." Id. at 153. The court observed that when the decree was negotiated, it was already "settled law ... that the State Constitution does not compel aid to be furnished to individuals who, though able, refuse to help themselves." Id. at 154.

State Financial Assistance

Another significant appellate case being handled by the Law Department involves a portion of the fiscal-year 2004 state budget that is of great importance to the city's financial plans. A key part of the package of spending reductions, state aid and tax increases that closed the multi-billion-dollar gap in this year's city budget was a state agreement under which five annual $500 million city payments to retire bonds issued during the fiscal crisis of the 1970s will be replaced with smaller annual state payments to be made over a longer time period. The Legislature approved this aid over Governor George Pataki's veto, and the state board charged with making the bond payments sued in Albany County to have the law declared unconstitutional.

The lower court upheld the statute, rejecting arguments that the enactment impermissibly added to state debt without voter approval and bypassed the requirement that state expenditures be authorized only in annual appropriations. *Local Government Assistance Corp. v. Sales Tax Asset Receivable Corp.,* NYLJ, Sept. 23, 2003 at 24 (Sup. Ct., Albany Co.). The court agreed with the city that the arrangement did not increase state debt nor did it constitute future appropriation of funds. On appeal, Corporation Counsel Michael A. Cardozo recently argued the city's case before the Appellate Division, Third Department, where the matter is now pending.

Zoning, Adult Use Businesses

In 1995, the city sought through rezoning to minimize the adverse neighborhood impacts of adult businesses. The zoning change was upheld against a constitutional attack. *Stringfellow's of New York Ltd. v. City of New York,* 91 NY2d 382 (1998). An adult bookstore or video outlet was defined for zoning purposes as one where at least 60 percent of the space was devoted to adult materials. Numerous adult bookstores started keeping nonadult materials in more than 40 percent of their space, arguing that they were not adult businesses even though the vast majority of their income was derived from adult materials. The Court of Appeals agreed with the owners. *City of New York v. Les Hommes,* 94 NY2d 267 (1999). Courts also applied the 60:40 standard to adult entertainment establishments, not just bookstores, rather than looking at the nature of the entertainment. Here, again, the Court of Appeals agreed with the owners. *City of New York v. Dezer Properties,* 95 NY2d 771 (2000).

In 2001, the city redrafted its definitions to define adult businesses by the extent of their adult materials and focus on sexually oriented entertainment. Floor space devoted to adult materials is one criterion in the new definition of an adult bookstore, but it is not dispositive. Owners launched a new attack and prevailed in the New York County Supreme Court. *Ten's Cabaret, Inc. v. City of New York,* Index No. 121197/02, 2003 N.Y. Misc. LEXIS 1163 (Sept. 9, 2003). The court invalidated the zoning change because the city did not undertake a new study to meet the requirement that zoning changes affecting First Amendment activity be supported by evidence providing a rational basis for the restrictions. The city maintained that its earlier studies are sufficient because the current amendment is simply a refinement of prior enactments, designed to give the 1995 zoning changes their intended effect. The city has appealed directly to the Court of Appeals pursuant to CPLR §5602(b)(2), which allows appeals from trial courts to the Court of Appeals when the constitutionality of a statute is the only question involved.

The matters discussed above are only a small part of the case load of the appeals division. Among the other matters being briefed or prepared for argument by appeals division attorneys are: *Henrietta D. v. Bloomberg,* a petition seeking review by the U.S. Supreme Court of an appellate ruling that the city's services to HIV positive homeless individuals violate the Americans with Disabilities Act; *Krimstock v. Kelly,* a challenge to a court-ordered hearing procedure for persons seeking to recover vehicles seized by the city when their drivers were found to be intoxicated; *Handberry v. Thompson,* an appeal from a federal district court ruling regarding the city's obligation to provide education to young adults incarcerated at Rikers Island; and *In re K.L.,* the city's defense of Kendra's Law, allowing the institutionalization of mentally ill individuals who fail to take necessary medications on an outpatient basis.