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Gift or Loan of State Money

GIFT OR LOAN OF STATE MONEY

N.Y. CONST. art. VII, § 11:

[N]o debt shall be hereafter contracted by or in behalf of the state unless such debt shall be authorized by law . . . . No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all votes cast for and against it at such election . . . .

N.Y. CONST. art. VII, § 8, cl. 1:

The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking . . . .

N.Y. CONST. art. VIII, § 1:

No county, city, town, village or school district shall give or loan any money . . . to or in aid of any individual, or private corporation or association . . . .

N.Y. CONST. art. X, § 5:

Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by . . . a public corporation heretofore or herafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof . . . .

COURT OF APPEALS

Schultz v. State[1]
(decided June 14, 1995)

Plaintiffs brought suit against the State of New York alleging that the state used public funds for private purposes,[2] in violation of Article VII, Section 8(1)[3] and Article VIII, Section 1[4] of the New York State Constitution. Additionally, plaintiffs alleged violations of the Due Process and Takings Clauses of the Fifth[5] and Fourteenth[6] Amendments of the Federal Constitution.[7]

A total of eight causes of action were dismissed by the supreme court and affirmed by the appellate division. Plaintiffs appealed the dismissal of the third, sixth and eighth causes of action.[8] The New York Court of Appeals affirmed the dismissal of the third cause of action, which arose under Article VIII, section 1, on the basis that the supreme court did not have subject matter jurisdiction under Education Law section 2037.[9] The court also

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1. 86 N.Y.2d 225, 654 N.E.2d 1226, 630 N.Y.S.2d 978 (1995).

2. *Id.* at 229, 654 N.E.2d at 1227, 630 N.Y.S.2d at 979.

3. N.Y. CONST. art. VII, § 8(1). This section provides in pertinent part: "The money of the State shall not be given or loaned to or in aid of any private corporation or association, or private undertaking . . . ." *Id.*

4. N.Y. CONST. art. VIII, § 1. This section provides in pertinent part: "No county, city, town, village or school district shall give or loan any money . . . to or in aid of any individual or private corporation or association, or private undertaking . . . ." *Id.*

5. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public uses, without just compensation." *Id.*

6. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of . . . property, without due process of law . . . ." *Id.*

7. *Schultz*, 86 N.Y.2d at 230, 654 N.E.2d at 1228, 630 N.Y.S.2d at 980.

8. *Id.* at 229, 654 N.E.2d at 1227-28, 630 N.Y.S.2d at 979.

9. *Id.* at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981; N.Y. EDUC. LAW § 2037 (McKinney 1994). Section 2037 provides in pertinent part: "All disputes concerning the validity of any district meeting or election or of any of the acts of the officers of such meeting or election shall be referred to the

affirmed the dismissal of the eighth cause of action, which asserted a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, because there was no allegation of "any actual appropriation of . . . individual property by the governmental action . . . describe[d]."[10] The sixth cause of action, however, was allowed to proceed because the publication complained of was found to be an "unequivocal promotion of a partisan political position" and, therefore, constituted an inappropriate gift or loan of state money in violation of the New York Constitution.[11]

Each of the three appealed claims involved political publications. First, in the third cause of action, the Commack Board of Education prepared and distributed materials urging a favorable vote on a bond proposal and upcoming public referendum.[12] The board allegedly used public funds for this purpose.[13] The plaintiffs sought an injunction against holding the referendum, which the supreme court granted.[14] The school board appealed and, despite the stay, held the referendum as scheduled.[15] The plaintiffs then sought to hold the board in criminal contempt.[16]

The court of appeals affirmed the appellate division and supreme court holdings that the supreme court did not have subject matter jurisdiction to hear this dispute.[17] In reaching its conclusion, the court held that the lower courts were correct in concluding that "under Education Law section 2037, exclusive original jurisdiction to determine that claim resided in the State

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commissioner of education for determination and his decisions in the matter shall be final and not subject to review. . . ."
Id. *See supra* note 4.

10. *Schultz*, 86 N.Y.2d at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981. *See supra* notes 5 and 6.

11. *Schultz*, 86 N.Y.2d at 236, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983. *See supra* note 3.

12. *Id.* at 230, 654 N.E.2d at 1228, 630 N.Y.S.2d at 980.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981.

Commissioner of Education."[18] The court relied in part on *Finley v. Spaulding*,[19] which held that "the [New York State] Supreme Court has no jurisdiction to decide the [election issue] controversy; that duty is cast upon the commissioner of education."[20]

The court also pointed out that the office of the Commissioner of Education has heard complaints of illegal use of taxpayer funds to promote a school board position,[21] and that a judicial review of any unfavorable decision by the Commission of Education made pursuant to Education Law section 2037 would have been available.[22] Further, couching the complaint "in terms

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18. *Id.* at 231, 654 N.E.2d at 1228, 630 N.Y.S.2d at 980.

19. 274 A.D. 522, 85 N.Y.S.2d 116 (3d Dep't 1948). In *Finley*, the Commissioner of Education laid out a new school district and called a special meeting to adopt the resolution in which a dispute arose as to whether it passed. *Id.* at 523, 85 N.Y.S.2d at 117. The court held that the dispute "should have been referred to the commissioner of education." *Id.* at 525, 85 N.Y.S.2d at 118. *See* Markert v. Wilson, 284 A.D. 1086, 135 N.Y.S.2d 807 (3d Dep't 1954). In *Markert*, plaintiff contested the results of a school district vote. *Id.* at 1087, 135 N.Y.S.2d at 808. The court held that "section 2037 of the Education Law . . . vests in [the Commissioner of Education] exclusive jurisdiction over all disputes concerning the validity of any school district meeting and the acts of officers thereat." *Id.* at 1087, 135 N.Y.S.2d at 809; *see also* Summerville v. Roosevelt Union Free Sch. Dist., 128 A.D.2d 769, 513 N.Y.S.2d 252 (2d Dep't 1987). In *Summerville*, the plaintiff petitioned to set aside the results of a school board election. *Id.* at 769, 513 N.Y.S.2d at 252. The court held that "the Supreme Court . . . was without jurisdiction to entertain the action." *Id.*

20. *Finley*, 274 A.D. at 526, 85 N.Y.S.2d at 119.

21. *Schultz*, 86 N.Y.2d at 231, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981. *See* Matter of Chaplin [Newfane Cent. School Dist.], 29 Ed. Dept. Rep. 388 [No. 12,329]. In *Chaplin*, the Commissioner of Education ruled on the petitioner's contention that the school board expended district funds illegally when it prepared and mailed a brochure containing information regarding an upcoming budget vote. *Id.* at 390. *See* Matter of Weaver [Pine Plains Cent. School Dist.], 28 Ed. Dept. Rep. 183 [No. 12,076]. In *Weaver*, the Education Commissioner ruled on a challenge by the petitioner that the school board used district funds to "exhort the electorate to support a particular position" in a school board election. *Id.* at 184.

22. *Schultz*, 86 N.Y.2d at 231, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981. *See* Phillips v. Maurer, 67 N.Y.2d 672, 490 N.E.2d 542, 499 N.Y.S.2d 675 (1986). In *Phillips*, an advertisement that urged a "yes" vote for a proposed

of a constitutional violation did not obviate the statutory mandate to originate the matter before the Commissioner of Education[,] . . . [since a] constitutional claim . . . should initially be addressed to the administrative agency having the responsibility so that the necessary factual record could be established.[23]

Therefore, the plaintiff must "first [have] pursu[ed] administrative remedies that can provide the requested relief."[24]

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school budget, as well as disseminated information about the budget, "exceed[ed] the publication of information 'reasonably necessary' to educate the public." *Id.* at 674, 490 N.E.2d at 543, 499 N.Y.S.2d at 676 (citation omitted). Therefore, the court held that the Commissioner should have restrained the board from using district funds to purchase the advertisement. *Id. See also* Matter of Copobianco v. Ambach, 112 A.D.2d 640, 492 N.Y.S.2d 157 (3d Dep't 1985). In *Copobianco*, the court reviewed an action by the Commissioner of Education vacating the results of the school board election and ordering a new election. *Id.* at 641, 492 N.Y.S.2d at 159.

23. *Schultz,* 86 N.Y.2d at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981. *See* Matter of Roberts v. Coughlin, 165 A.D.2d 964, 561 N.Y.S.2d 852 (3d Dep't 1990). In *Roberts*, prisoners who wished to engage in prayer during a class break were not permitted to appeal an unfavorable ruling because they had failed to exhaust their administrative remedies. *Id.* at 965, 561 N.Y.S.2d at 853; Matter of Fichera v. City of New York, 145 A.D.2d 482, 535 N.Y.S.2d 434 (2d Dep't 1988). In *Fichera*, landowners were denied a building permit and, therefore, alleged a taking of their property without due process of law, a federal constitutional violation. *Id.* at 483, 535 N.Y.S.2d at 435. The court held that the landowners' "failure to pursue established administrative remedies" could not be excused and dismissed the proceeding. *Id.* at 484, 535 N.Y.S.2d at 435-36 (citation omitted); Dozier v. New York City, 130 A.D.2d 128, 519 N.Y.S.2d 135 (2d Dep't 1987). In *Dozier*, probationary civil service employees challenged their termination, which was based on drug test results. The court reiterated its position that "[a] constitutional claim that hinges upon factual issues reviewable at the administrative level must first be addressed to the agency so that a necessary factual record can be established." *Id.* at 135, 519 N.Y.S.2d at 141 (citations omitted).

24. *Schultz,* 86 N.Y.2d at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981. *See* Patterson v. Smith, 53 N.Y.2d 98, 423 N.E.2d 23, 440 N.Y.S.2d 600 (1981). In *Patterson*, a prisoner's due process claim was not allowed to proceed because he failed to pursue the administrative remedies available to him. *Id.* at 100, 423 N.E.2d at 24-25, 440 N.Y.S.2d at 601-02.

Thus, the court dismissed this issue for lack of subject matter jurisdiction.[25]

The plaintiffs had also sought to hold the Commack Board of Education in criminal contempt for failing to follow the supreme court's order to stay the referendum.[26] The court held that since there was no jurisdiction, there was no contempt.[27]

Second, the court addressed the eighth cause of action, which asserted that the use of public funds for political publications was unconstitutional.[28] The plaintiffs claimed that this use of public funds amounted to a taking of property without due process of law, in violation of their rights under the Fifth and Fourteenth Amendments of the United States Constitution.[29] Because the plaintiffs merely alleged that lawfully acquired government revenues were misused or misapplied and did not contend that

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25. *Schultz*, 86 N.Y.2d at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981.

26. *Id.* at 230, 654 N.E.2d at 1228, 630 N.Y.S.2d at 980.

27. *Id.* at 232, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981. *See* Matter of Fish v. Horn, 14 N.Y.2d 905, 200 N.E.2d 857, 252 N.Y.S.2d 313 (1964). The *Fish* court held, in the case of a juvenile wrongly placed in a correctional institution, that "[s]ince the Family Court had no power to make the order initially, it was void ab initio . . . to hold the Superintendent . . . in contempt . . . ." *Id.* at 906, 200 N.E.2d at 858, 252 N.Y.S.2d at 314; People *ex rel.* Lower v. Donovan, 135 N.Y. 76, 31 N.E. 1009 (1892). In *Donovan*, the plaintiff applied to hold voting inspectors in contempt for refusing to obey a preliminary writ issued by a justice of the supreme court. *Id.* at 78, 31 N.E. at 1010. The New York Court of Appeals held that the judge had no jurisdiction to issue the writ, and therefore there was no contempt. *Id.* at 82, 31 N.E. at 1011; DiFate v. Scher, 45 A.D.2d 1002, 358 N.Y.S.2d 215 (2d Dep't 1974). In *DiFate*, the plaintiff challenged the promotions of police officers from a list of those who passed a civil service test. *Id.* at 1002, 358 N.Y.S.2d at 216. The plaintiff sought to enjoin the making of any new appointments from the list. *Id.* The defendants did make two appointments from the disputed list and DiFate sought to have the defendants held in contempt. *Id.* at 1002-03, 358 N.Y.S.2d at 217. The court held that the restraining order "was void on its face because the issuing court was without authority to grant it and, therefore, need not have been obeyed by the respondents." *Id.* at 1003, 358 N.Y.S.2d at 217 (citation omitted).

28. *Schultz*, 86 N.Y.2d at 230, 654 N.E.2d at 1228, 630 N.Y.S.2d at 980. The specific uses of public funds that the eighth cause of action asserted were unconstitutional and were not enumerated by the court. *Id.*

29. *Id. See supra* notes 5 and 6.

there was any taking of their property, either actual or indirect,[30] the court quickly dismissed the claim.[31]

Third, the appeal of the sixth cause of action asserted that the publication and mailing by the Governor's Office of Economic Development of a newsletter, which was entitled "The Voice of the New, New York," constituted "the use of State moneys to serve the private political purposes of the Governor, his campaign committee and the State Democratic Committee, in violation of Article VII, section 8(1) of the New York Constitution,"[32] which prohibits the use of public funds for private purposes. The plaintiffs alleged "that such use of public funds for the partisan political purposes of and advantages to" Governor Cuomo, the New York Democratic State Committee and Mario Cuomo's campaign committee was unconstitutional.[33]

The court of appeals first discussed the history of the prohibition, which was originally incorporated in the New York State Constitution in reaction to the prior practice of subsidizing canal companies and private railroads in the 1800's.[34] This practice left the state holding long-term debt obligations when those "enterprises failed during the depression of 1837-1842."[35]

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30. *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In *Lucas*, a landowner was denied the right to build on his property. *Id.* at 1007. The Supreme Court held that such a restriction on use amounted to a taking of his property without just compensation. *Id.* at 1019.

31. *Schultz,* 86 N.Y.2d at 232-33, 654 N.E.2d at 1229, 630 N.Y.S.2d at 981.

32. *Id.* at 230, 654 N.E.2d at 1228, 630 N.Y.S.2d at 980. *See supra* note 3.

33. *Id.* at 233, 654 N.E.2d at 1230, 630 N.Y.S.2d at 982.

34. *Id.*

35. *Id. See* Wein v. State, 39 N.Y.2d 136, 347 N.E.2d 586, 383 N.Y.S.2d 225 (1976). *Wein* lays out the history of the prohibition against lending money or extending credit to private enterprises, including the problems encountered when the state gave mortgages to the railroads. *Id.* at 142-43, 347 N.E.2d at 588-89, 383 N.Y.S.2d at 228-29. Public funds were dissipated without any hope of reimbursement. *Id. See also* People v. Ohrenstein, 77 N.Y.2d 38, 565 N.E.2d 493, 563 N.Y.S.2d 744 (1990). The *Ohrenstein* court also traced the history of this provision of the New York Constitution. The court noted that the state constitution was twice amended, first after the depression of 1837-42, and next after the Great Depression. *Id.*

The practice was banned and the prohibition remains in effect, even though it can be argued that the use of state funds might often be beneficial or desirable.[36]

The court noted that there is a "constitutional line of demarcation under Article VII, section 8(1)."[37] While it is permissible to distribute election literature at public expense to "educate, to inform, to advocate or to promote voting on any issue . . . , it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be."[38]

With that line of demarcation in mind, the court looked at the document in question, "The Voice of the New, New York." The document, issued by the State Office of Economic Development at the direction of then-governor Mario Cuomo and Commissioner of Economic Development Vincent Tese, was printed and distributed at state expense.[39] It contained a "substantial amount of factual information which would have been of assistance to the electorate in making an educated decision on whose position to support on th[e] issue [of welfare

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at 50-51, 565 N.E.2d at 499, 563 N.Y.S.2d at 750. In each case it became more restrictive, so that now it prohibits lending money or extending credit to either public or private entities. *Id.*

36. *Schultz,* 86 N.Y.2d at 233-34, 654 N.E.2d at 1230, 630 N.Y.S.2d at 982. The *Ohrenstein* court noted that "[m]any of the acts declared improvident are arguably in the public interest and beneficent." 77 N.Y.2d at 51, 565 N.E.2d at 499, 563 N.Y.S.2d at 750. *See* People v. Westchester County Nat'l Bank of Peekskill, 231 N.Y. 465, 132 N.E. 241 (1921). In *Westchester County Nat'l Bank*, the legislature proposed to issue bonds, the proceeds of which would go to benefit military veterans. *Id.* at 468, 132 N.E. at 241. The court held that '[h]owever important, however useful, the objects designed by the Legislature, they may not be accomplished by a gift or a loan of credit to an individual or a corporation." *Id.* at 475, 132 N.E. at 244.

37. *Schultz,* 86 N.Y.2d at 235, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983.

38. *Id.* (citing Matter of Phillips v. Maurer, 67 N.Y.2d 672, 673, 490 N.E.2d 542, 543, 499 N.Y.S.2d 675, 676 (1986)). *See* Stern v. Kramarsky, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. New York County 1975). In *Stern*, the court articulated that "public moneys may be used for the purpose of adequately informing the Public concerning a proposed . . . issue; but not to urge a 'yes' or a 'no' vote." *Id.* at 452, 375 N.Y.S.2d at 239.

39. *Schultz*, 86 N.Y.2d at 235, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983.

reform]."[40] It was distributed on the eve of the 1992 Presidential campaign, and urged the public to vote and to study the candidates.[41] However, "it also sought to enlist the public's support in opposition" to a political position on election issues, and urged a vote against the Republican party.[42] In addition, it also contained a tear-sheet, which readers were encouraged to use to send a message of support to Governor Cuomo.[43] Because of this, the court found that the newsletter went "well beyond simply conveying information[,] . . . [it] is an unequivocal promotion of a partisan political position."[44] It was also indisputably prepared and disseminated at public expense.[45] Therefore, the court found that it was in violation of New York Constitution, Article VII, Section 8(1).[46]

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40. *Id.*

41. *Id.*

42. *Id.* at 235-36, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983.

43. *Id.* at 236, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983.

44. *Id.*

45. *Id. See supra* note 3.

46. *Schultz*, 86 N.Y.2d at 236, 654 N.E.2d at 1231, 630 N.Y.S.2d at 983. Judge Ciparick's dissenting opinion concluded that "the newsletter constitute[d] proper and permissible government speech," which is a political function of a legislator. *Id.* at 237, 654 N.E.2d 1232, 630 N.Y.S.2d at 984. *See* United States v. Brewster, 408 U.S. 501 (1972). The *Brewster* court noted that "it is well known . . . that [elected officials] engage in many activities . . . includ[ing] preparing . . . 'newsletters.'" *Id.* at 512. Judge Ciparick also relied on *Ohrenstein* for the proposition that legislators perform additional functions in the community, including distributing newsletters. *Schultz,* 86 N.Y.2d at 237, 654 N.E.2d at 1232, 630 N.Y.S.2d at 984 (Ciparick, J., dissenting) (discussing People v. Ohrenstein, 77 N.Y.2d 38, 47, 565 N.E.2d 493, 497, 563 N.Y.S.2d 744, 748 (1990)). The dissent read the newsletter as "educational, focusing on statistics . . . in an attempt to dispel . . . myths. [A]lthough [it] urges the recipient to vote, the decision on which platform to support remains with the voter." *Id.* (Ciparick, J., dissenting). He noted that no money was solicited, and that no particular vote on any specific proposition was urged. *Id.* (Ciparick, J., dissenting). *See* Hoellen v. Annunzio, 468 F.2d 522 (7th Cir.), *cert. denied*, 412 U.S. 953 (1972). In *Hoellen*, the court noted that an "overt plea for financial support in a partisan election - would plainly reveal an unofficial purpose." 468 F.2d at 525. Judge Ciparick also characterized the aforementioned tear-sheet as "a convenient follow-up for the voter who seeks further information." *Schultz*, 86 N.Y.2d at 237, 654 N.E.2d at 1232, 630 N.Y.S.2d at 984 (Ciparick, J.,

dissenting). Judge Ciparick thereby dissented from the majority and stated that "the Governor and his executive agency must be permitted to perform legitimate political activities without the threat of a [constitutional] challenge." *Id.* at 238, 654 N.E.2d at 1232, 630 N.Y.S.2d at 984.