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FILE NO. S-799

COUNTIES:
Obligation of County Board to Appoint a County Assessor from the List Certified by the Department of Local Government Affairs

Honorable Martin Rudman
State's Attorney, Will County
Courthouse
Joliet, Illinois 60431

Dear Mr. Rudman:

I have your letter wherein you state in part:

"In December of 1973, the County Board of Will County, Illinois, voted not to renew the contract of the incumbent Supervisor of Assessments. The Department of Local Government Affairs in February of 1974, administered a test in order to qualify candidates for the vacancy. One person passed the test but was rejected for the appointment by the County Board. In April of 1974, the Department administered another examination and certified three candidates who successfully passed, including the incumbent to the Board.

On May 22, 1974, the Board rejected each of these candidates. Further, in response to an Opinion from our office that failure to appoint someone to fill the position might subject the Board to a Mandamus action, the Board passed a Resolution asking our office to request an Opinion from you on this matter. As of this writing, I have been unable to definitely ascertain whether or not the Department of Local Government Affairs would be willing to administer any more tests. Enclosed is a copy of the letter sent to them in an effort to clarify their position. The incumbent still remains in office on a holdover basis.

The statute which provides for the appointment of a Supervisor of Assessments is Chapter 120, Section 484a, Illinois Revised Statutes 1973. In pertinent part, it provides that the Department of Local Government Affairs 'shall certify to the County Board a list of persons who passed the examination' and that 'appointment shall be made of one of the three persons attaining the highest grades in the examination.'

Our questions are therefore as follows:

1. Is a County Board bound when given a choice of three candidates certified to it by the Department of Local Government Affairs as having successfully passed the examination, to appoint one of the three?

2. If the answer to question number 1 is yes, would a Mandamus be an appropriate remedy if the Board has failed to appoint one of the three candidates?"

Section 3a of the "Revenue Act of 1939" (Ill. Rev. Stat. 1973, ch. 120, par. 484a) provides in pertinent part:

> "§ 3a. In counties containing less than 1,000,000 inhabitants and not having an elected board of assessors, the office of supervisor of assessments or county assessor, shall be filled by appointment by the county board, as herein provided.
>
> To be eligible for appointment a person must have had at least 2 years' experience in the field of real estate sales, assessments, finance or appraisals and must have passed an examination conducted by the Department to determine his competence to hold such office. The examination shall be conducted by the Department at some convenient location in the county. The Department shall certify to the county board a list of the persons who passed the examination indicating the grade scored by each such person. Appointment shall be made of one of the 3 persons attaining the highest grades in the examination. * * * The term of office shall be 4 years from the date of appointment and until a successor is appointed and qualified. Vacancies shall be filled by the appointment for a full term."

In regard to your first question, it is my opinion, for the reasons which follow, that the county board is bound, when given a choice of three candidates certified by the Department of Local Government Affairs as having successfully passed the examination, to appoint one of the three. The cases interpreting section 3a of the "Revenue Act of 1939", supra, have not dealt with the issue raised by your letter. However,

there have been cases under the civil service laws which are relevant to the instant problem.

The statutory procedure for appointment to civil service positions is analogous to the appointment procedure set forth in section 3a of the "Revenue Act of 1939" supra. Under the civil service laws, there is a certifying body which certifies to the appointing authority a list of qualified candidates for a given position. The statutes commonly provide that the appointing authority shall appoint a person from those certified on the eligible list. The general rule under the civil service law is that one on an eligible list does not have a vested right to an appointment (Hurley v. Board of Education, 270 N.Y. 275, 200 N.E. 818; Graham v. Bryant, 123 Cal. App. 2d 66, 266 P. 2d 44), but does have a right to require that appointments be made from the list. Couch v. Stanley, 228 Iowa 790, 293 N.W. 482; Flynn v. Megaro, 112 N.J. Super. 148, 270 A. 2d 638.

The Illinois civil service cases are in accord with the general rule. In People ex rel. Baker v. Wilson, 39 Ill. App. 2d 443, the plaintiffs, who were on an eligible list, sought a writ of mandamus to compel the appointing authority

to appoint from the certified list. The writ was denied on the grounds of mootness since the eligible list had been cancelled as provided for by statute.

In People ex rel. Caslin v. Geary, 330 Ill. App. 172, the plaintiff, who was on the eligible list, sought a writ of mandamus to compel his certification and appointment to a civil service vacancy. The appointing authority had filled the vacancy by the temporary appointment of a person who was not on the eligible list. The court concluded that to allow the appointing officer to appoint persons not proved fit by examination in preference to persons on the civil service list would undermine the fundamental purpose of civil service. Thus, the court held that a writ of mandamus would issue to compel appointment from the eligible list.

In three more recent cases, the courts have made reference to a discretionary power in the appointing authority in regard to appointments from a certified list of eligible candidates. However, these cases are, in my opinion, distinguishable from the facts set forth in your letter.

In Thornton v. Ramsey, 24 Ill. App. 2d 452, the plaintiff had been certified by the Civil Service Commission of the city of Chicago, but the appointing authority refused to appoint him as required by the applicable statute. The plaintiff sought a writ of mandamus to compel his appointment. At the time of the plaintiff's certification, there were charges pending before the civil service commission which alleged that plaintiff was guilty of conduct unbecoming an employee of the city of Chicago. The court indicated that there might be some discretion inherent in the appointing officer. However, as the court indicated, it was not clear whether it was a promotional appointment, in which case the appointing authority would have had statutory discretion as among the three persons certified, or an original appointment, in which case the appointing authority would have been required to appoint the one person certified to it. Moreover, the actual holding of the court was to remand the case and direct the lower court to defer further action pending a final resolution of the charges filed with the commission.

In People ex rel. Ryan v. Civil Service Commission, 117 Ill. App. 2d 50, which involved the Chicago Civil Service

Commission and an applicant for a position on the Chicago Police Department, the applicable statute provided that the appointing officer shall fill the position by appointment of a person certified to him by the commission. The court indicated that the appointing officer has some discretion in appointing persons certified to him by the commission and held that the appointing officer was not precluded from delaying appointment of a candidate for the position pending the outcome of a rehearing as to the candidate's qualification.

However, the Ryan case is clearly distinguishable from the instant problem. First, the rehearing on the candidate's qualifications concerned his physical fitness, a quality particularly important for police work. More importantly, the physical disability of the applicant was discovered subsequent to his certification. In reaching its decision, the court relied on the generally recognized power of certifying agencies to correct mistakes of certification. Consequently, this case is more properly viewed as a reconsideration of certification case rather than a case dealing with the discretionary power of appointing bodies. Moreover, as noted above, the court did not

say that the appointing authority could refuse to appoint but rather merely indicated that the appointing authority could delay appointment.

In People ex rel. Papworth v. Yung, 346 Ill. App. 304, the applicable statute provided that appointment shall be made from the three highest persons on the eligible list certified by the civil service commission. However, only two persons were on the eligible list. The court held that the commission was not required to certify those names, and the appointing officer was not required to appoint one of the two persons whose names appeared on the eligible list but could make a provisional appointment to fill the vacancy.

The Papworth case is likewise distinguishable from the facts set forth in your letter. The applicable statute in that case required that appointment be made from the three highest persons on the eligible list but only two names appeared on that list. The facts set forth in your letter indicate that three persons, the requisite statutory number, are on the certified eligible list. Consequently, People ex rel. Caslin v. Geary, supra, is still controlling where the statute requires

that appointments be made from a specified number of persons on the eligible list, and the requisite number of persons are certified by the certifying body.

As is true under the applicable civil service statutes in the above cited cases, section 3a of the "Revenue Act of 1939" provides that appointment "shall" be made of one of the three persons attaining the highest grades in the examination. The word "shall" may, depending on the legislative intent, be construed as meaning both "must" and "may". (Cooper v. Hinrichs, 10 Ill. 2d 269.) However, the word "shall" is generally construed as being imperative and imposing a duty which may be enforced, particularly where a public interest is involved. (People ex rel. Crowe v. Marshall, 262 Ill. App. 128) It is my opinion that the General Assembly intended, by the use of the word "shall", to impose a mandatory duty on the county board to appoint one of the three persons certified to it by the Department of Local Government Affairs.

In regard to your second question, it is my opinion that the mandamus would be an appropriate remedy should the county board fail to appoint one of the three candidates. In

the context of the problem raised by your letter, there are principally two problems in regard to mandamus.

First, there is a question as to whether mandamus would be the proper relief. Mandamus is a proper remedy where a public officer or body fails to perform a mandatory public duty or a mere ministerial act. (People ex rel. Sheppard v. Illinois State Board of Dental Examiners, 110 Ill. 180; People ex rel. Bartlett v. Busse, 238 Ill. 593; People ex rel. Ryan v. Civil Service Commission of City of Chicago, supra.) Thus, the question is whether the county board's appointment of a county assessor from the certified list is a mere ministerial act or whether the board has some discretion in this regard. Generally, the appointment of public officers involves the exercise of discretion which, unless abused, the court will not attempt to control. (People ex rel. Henderson v. Redfern, 48 Ill. 2d 100.) However, an established distinction in the Illinois cases is that mandamus will issue to compel the exercise of a discretionary duty or power, but not the way in which such officer shall exercise his discretion. Gustafson v. Wethersfield Township High School, 319 Ill. App. 255.

In McDevitt v. Finn, 248 Ill. App. 339, which involved a situation analogous to the instant problem, the court recognized the distinction between being compelled to exercise a discretionary power and being compelled to exercise the discretionary power in a particular manner. The applicable statute in that case provided that the civil service commission certify a list of the three highest names for each promotion and that the appointing officer appoint one from the list. In regard to a particular vacancy, the plaintiff was third on the certified list but was not appointed. Consequently, plaintiff sought a writ of mandamus to compel the appointing officer to appoint him to the vacant position. The court said at pages 342, 343:

> "[W]e think it clear, in view of the provisions of the act above mentioned, that the commission properly certified a list of three names for one promotion, and, an appointment having been made of one of the three submitted, properly certified another list of three names for another promotion, and so on. And we think that of each list submitted the commissioner of public works was clothed with the discretion of choosing from the list for appointment any one of the three persons named. Having such discretion, while he may be compelled to act, he cannot by mandamus be compelled to act in a particular manner. * * * "

In an opinion issued by a previous Attorney General, (1908 Op. Atty. Gen. 547), the question was whether mandamus would lie to compel the county board to appoint a county inspector of mines. In that opinion, the applicable statute provided that the county board "shall appoint" a county mine inspector and that no person shall be eligible for such appointment who does not hold a certificate of competency from the State Board of Mine Examiners. The opinion held that the statute was mandatory so that the county board was bound to appoint a person certified as eligible and that mandamus would lie to compel the board to act.

In a subsequent opinion (1909 Op. Atty. Gen. 472) involving the same question and factual setting, the holding of the earlier opinion was followed. However, the opinion noted that, while the county board could by mandamus be compelled to act, this did not mean that it could be compelled to appoint any particular person by name.

A second problem in regard to mandamus involves the question of who is entitled to relief through a writ of mandamus. In mandamus to enforce a private right, the person interested in having the right enforced is the real party in interest

(Pike County Com'ers v. People ex rel. Metz, 11 Ill. 202; Murphy v. City of Park Ridge, 298 Ill. 66) and must have some personal interest in the matter involved. (People ex rel. Walker v. Aurora E.N.C. Ry. Co., 141 Ill. App. 82; McCormick v. Statler Hotels Delaware Corp., 55 Ill. App. 2d 21.) However, where the object of mandamus is the enforcement of a public right, the People are regarded as the real party in interest, and the relator need not show that he has any legal interest in the result, since it is enough that he is interested as a citizen in having the laws executed and the right in question enforced. (City of Ottawa v. People ex rel. Caton, 48 Ill. 233; Retail Dealers Protective Ass'n. of Illinois v. Schreiber, 382 Ill. 454.) Consequently, regardless of whether one of the three certified candidates for appointment could or would seek a writ of mandamus, it is clear that a citizen seeking the enforcement of a public right could institute mandamus proceedings.

In People ex rel. Sanaghan v. Swalec, 22 Ill. App. 2d 374, a writ of mandamus was sought by a citizen, who did not claim to be an actual or potential member of a police or fire department, to compel the trustees of a village to appoint a

board of fire and police commissioners pursuant to statute. While that case is distinguishable from the instant problem in that there was no certified list of candidates from which to appoint, it is relevant in that the applicable statute provided that the village trustees "shall appoint" a board of police and fire commissioners. The court held that a citizen could bring mandamus proceedings because there was a public interest, i.e., the quality of policemen and firemen. In regard to the discretion issue, the court said at pages 377, 378:

> "Furthermore, we believe that the writ of mandamus was properly issued. The statute is clear. It states that a board of fire and police commissioners 'shall' be appointed. The language is mandatory, and no exception is made for voluntary fire departments or part-time police departments. If the legislature had intended to give the defendants discretion or had intended to provide exceptions, it would have done so. Therefore, the defendants have the obligation to appoint a board of fire and police commissioners."

It should be noted that the Illinois rule on this question is in accord with the rule in other jurisdictions. The general rule is that where it is a mandatory duty of an officer or board to make an appointment to office to fill a certain position, mandamus will lie to compel the making of

an appointment. (LaMar v. City Counsel of City of South San Francisco, 53 Cal. App. 2d 387, 127 P. 2d 1022; State ex rel. Hall v. Bratsberg, 65 S.D. 84, 271 N.W. 218; State ex rel. Sawyer v. Mangni, 231 Minn. 457, 43 N.W. 2d 775; State ex rel. Evans v. Kennedy, 145 W. Va. 208, 115 S.E. 2d 73.) However, the writ will not lie to compel the appointment of a particular person where the appointing power is vested with discretion in this respect. Thomas v. Wells, 288 N.Y. 155, 42 N.E. 2d 465; State v. Brown, 114 Ohio St. 395, 151, N.E. 193; Hollman v. Warren, 32 Cal. 2d 351, 196 P. 2d 562.

In your letter, you make reference to the possibility that a situation might arise where the three certified candidates would be convicted felons. Since such a situation is not indicated by the facts set forth in your letter, no opinion is expressed on this point.

Thus, it is my opinion that the county board is bound, when given a choice of three candidates certified to it by the Department of Local Government Affairs as having successfully passed the examination for county supervisor of assessments, to appoint one of the three. In answer to your second question,

it is my opinion that, should the county board fail to appoint one of the three candidates, mandamus would lie to compel such appointment.

Very truly yours,

ATTORNEY GENERAL