UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HERBERT MILDNER, Plaintiff, -against- FRANK A. GULOTTA, etc., et al., Defendants.	:	74 Civ. 1101
MILTON LEVIN, Plaintiff, -against- FRANK A. GULOTTA, etc., et al., Defendants.	:	74 Civ. 1668
JULIUS GERZOF, also known as JULIUS M. GERZOF, Plaintiff, -against- FRANK A. GULOTTA, etc., et al., Defendants.	:	74 Civ. 1684

AMICUS CURIAE BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR PERMANENT INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

NICHOLAS C. COOPER
Chief Counsel
Judicial Inquiry on
Professional Conduct
Amicus Curiae
Office & P.O. Address
16 Court Street
Rm. 810
Brooklyn, New York 11241
Tel. No. 624-7851

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

HERBERT MILDNER,

Plaintiff,

-against- : 74 Civ. 1101

FRANK A. GULOTTA, etc., et al.,

Defendants.

- x

MILTON LEVIN,

Plaintiff,

-against- : 74 Civ. 1668

FRANK A. GULOTTA, etc., et al.,

Defendants.

- x

JULIUS GERZOF, also known as JULIUS M. GERZOF,

Plaintiff,

-against- : 74 Civ. 1684

FRANK A. GULOTTA, etc., et al.,

Defendants.

- x

AMICUS CURIAE BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR PERMANENT INJUNCTION AND IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Preliminary Statement

The above captioned actions have been instituted by the plaintiff attorneys all of whom have been suspended from the practice of law by the Appellate Division, Second Judicial Department upon findings by that Court that they were respectively guilty of "professional misconduct" within the meaning of Section 90 of the Judiciary Law of the State of New York. These actions were commenced following the denial by the New York Court of Appeals of the plaintiffs' respective motions for leave to appeal and in addition, in Gerzof's case only, the vacating of his notice of appeal by the New York Court of Appeals. All three attorneys contend that the procedures in force in the State of New York resulting in their respective suspensions from the practice of law deny them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

The undersigned, who prosecuted the disciplinary proceeding as counsel to the petitioner both before the

the motions for leave to appeal on behalf of Gerzof and Levin, has been granted permission to appear in these actions as *amicus curiae* by orders of the Hon. Jack B. Weinstein dated November 22, 1974 and January 6, 1975, respectively.

Consideration by the three-judge court of the contentions raised by these plaintiffs is limited exclusively to questions of law and constitutional interpretation. All three plaintiffs, however, have alluded in their moving papers and briefs to factual issues which are completely beyond the competence of this court to determine.

Suffice it to say that the statement by Mildner's counsel appearing at page 5 of his brief that "on January 28, 1974 the Appellate Division on per curium opinion disaffirmed the referee's report" is misleading, since the petitioner contended both before the Appellate Division and Court of Appeals that the "findings" of the referee were totally inconsistent with his conclusion that none

of the charges against Mildner had been sustained by the proof. The Appellate Division in suspending Mildner granted the petitioner's motion which prayed only that the conclusions of the referee be disaffirmed.

In Gerzof's case the Appellate Division sustained the findings of Mr. Justice Silberman that the charges against Gerzof had been sustained. Gerzof contended in the New York Court of Appeals that the failure of the Appellate Division to grant his motion to reopen the hearings on the basis of "newly discovered evidence" was a denial to him of due process of law. The Court of Appeals in denying Gerzof's motion for leave to appeal and in granting the cross-motion to vacate his notice of appeal on alleged constitutional grounds found implicitly that this contention was frivolous.

Levin's contention that the charges sustained against him were based upon "no evidence", conveniently ignores the fact that the reporting referee, Mr. Justice Silberman, whose report was disaffirmed by the Appellate Division, reported that the evidence was "insufficient" in his opinion; a finding with which the Appellate Division

clearly disagreed.

The within *amicus curiae* brief is submitted in opposition to the respective plaintiffs' motions for permanent injunctions and in support of the defendants' motions to dismiss the complaints.

POINT ONE

The New York State Procedures Resulting in the Respective Plaintiffs' Suspensions from the Practice of Law do not Constitute a Denial to Them of Due Process or Equal Protection of the Laws.

All three plaintiffs make the following basic contentions:

(1) All other litigants, particularly all other professionals are afforded one appeal as of right from the original "tribunal" of determination,

(2) "Attorneys involved in disciplinary proceedings are afforded an appeal as of right to the Court of Appeals ... only with respect to constitutional issues", and

(3) This is tantamount of denial of due process and equal protection of the laws.

Plaintiffs' first contention fails to take into account the nature of the proceeding in the original tribunal of determination. "The power to discipline like the power to admit an applicant to membership of the bar rests exclusively with the court" *Theard v. United States* 354 U.S. 278, 77 S.Ct. 1274, 1L Ed.2d 1342 (1952). Pursuant

to Section 90 of the Judiciary Law, the Appellate Division of the Supreme Court of the State of New York is the Court in which this authority is vested. Disciplinary proceedings by the Appellate Division are judicial and are not administrative in nature (*Erdman v. Stevens*, 458 F.2d 1205, 1209 [2nd Cir. 1972]). Thus, in the first instance an attorney in New York is afforded the right to a judicial determination in the form of a Section 90 disciplinary proceeding.

Other professionals do not have immediate recourse to a court of law in their disciplinary proceedings. An administrative determination by the Board of Regents is made in proceedings to discipline physicians, dentists, pharmacists, nurses, accountants and psychologists (*Education Law* Section 6520, 6600, 6800, 6900, 7400, 7600). Likewise, tenured teachers are subject to an administrative determination in the first instance (*Education Law* Section 3020A). The Board of Education ultimately makes the determination. Procedurally Section 3020A provides that before any disciplinary action may be taken against a teacher, the latter must be afforded a hearing before an impartial panel, which then submits its recommendations to the school board (*Education Law* 3020A, 2, 3 & 4). The

board is not bound by these findings and may disregard them in making its decision (*Board of Education Huntington v. Teachers* 30 N.Y.2d 122 [1972]). Disciplinary action is, therefore, taken against the tenured teacher without any determination by a court of law.

Education Law 3020A(5) does provide for judicial review of the administrative determinations involving tenure teachers in the form of a proceeding under Article 78 of the Civil Practice Law and Rules. Education Law 6510(4) provides for similar review for the other groups of professionals above mentioned. This proceeding, however, is the only instance by which these professionals can have a judicial determination of the charges preferred against them. Further, there is no factual determination made by a court in the Article 78 proceeding. The Court is severely limited as to what it may or may not do. As stated by the New York Court of Appeals in *Matter of Tompkins v. Board of Regents* 299 NY 469, "Insofar as the Court below (Appellate Division) has reversed the determination of the board upon the facts, its action is inconsistent

with the well settled principal of law that the courts may review such decisions for errors of law alone .... Properly stated the question before the court was not whether the record would 'convince' one of the facts found by the board, as indicated in the opinion, but whether a reasonable man *might* so find". Without an error of law the Appellate Division was without power to reverse (*Matter of Friedel v. Board of Regents*, 296 NY 347 [1947]). Similarly in reviewing acts of the school board, "[T]he court is limited to a consideration of whether on the entire record, there was substantial evidence to support the board's findings. If such is presented, the board's determination cannot be upset even though a court may have acted differently" (*Le Tarte v. Board of Education of Lake Pleasant School Dist. 65* Misc. 2d 147 [1970]). Again this limited review (Article 78 proceeding) is the only judicial determination available to these professions. The judicial determination afforded attorneys in the Appellate Division in the first instance is hardly so limited.

It is by reason of the administrative nature of the proceedings involving these other classes of professionals

that limited judicial review is afforded.

As stated by Judge Stanley Fuld in *Long Island Hospital v. Catherwood* (23 N.Y.2d 20 [1968]), "It is today an established principle of jurisprudence that judicial review of a final agency action will not be cut off unless there is persuasive reason to believe such was the purpose of Congress." In fact, in the absence of some procedure for the review of final administrative agency action, a serious constitutional question might arise. The Supreme Court, per Justice Fortas, has stated "[T]here must be some type of effective judicial review of final substantive agency action which seriously affects personal or property rights" *Gardner v. Toilet Goods Assn.* 387 U.S. 167, 177 [1966]. The New York courts have adopted the policy that "[A]n administrative body cannot at its own discretion, destroy vested rights of others without according them recourse to a court of law" *Calzaretti v. Mulrain* 132 NYS 2d 704 [1954]. The fundamental principles of our jurisprudence dictate the policy that recourse to a court of law must be extended to one aggrieved by an administrative determination in the absence of contrary legislative direction.

The aforementioned principles applied to administrative law do not apply to appeals from judicial determinations. It is fundamental that due process of law has never been held to require that a state provide appellate courts or a right to appellate review (*Ortwein v. Schwab* 440 US 656, 660(A73); *Lindsay v. Normet* 405 US 56, 57 [1972]; *McKane v. Durston* 153 US 684 [1894]; *Griffen v. Illinois* 351 US 12, 18 [1956]). "Thus, even if New York provided no review whatsoever of (attorney) disciplinary proceedings, that procedure would be constitutuionally valid", (*Javits v. Stevens*, 73 CIV 5339-LFM, Sept. 24, 1974). In fact, in New York there are instances where no right to appeal exists. Section 22 of Article VII of the New York Constitution establishes the Court on the Judiciary and sets forth its powers and procedures to be followed in the proceedings to remove members of the State judiciary. "[N]owhere in that section is a right of appeal provided for and no general constitutional or statutory provision exisits for an appeal from the Court on the Judiciary," (*Friedman v. State of New York* 24 NY2d 528 [1969]).

New York does, however, provide for review of disciplinary proceedings. Judiciary Law, Section 90(8)

affords to either the petitioner or respondent in a disciplinary proceeding the right to appeal to the Court of Appeals from a final order of the Appellate Division in such proceedings upon questions of law involved therein, subject to the jurisdictional limits of the Court prescribed by Article 6 Section 3 of the New York Constitution. That section allows appeals as of right where there is a valid constitutional question involved or where there is a dissent in the Appellate Division. It can be argued then that the merits of plaintiffs' cases and not the categorical denial of a right to appeal, precluded review by the Court of Appeals. The scope of review by the New York Court of Appeals--once leave to appeal has been granted--is limited to the single consideration of whether there is any evidence to sustain the Appellate Division's determination (*Matter of Flannery*, 212 N.Y. 610, 611).

The contrasting policies of judicial review of administrative determinations and appellate review of a judicial determination should again be emphasized. The former presumptively grants recourse to a court of law in the absence of contrary legislative direction. The latter presumes no right of review in the absence of statutory

authority granting such right.

It is conceded then that New York has chosen to employ different disciplinary procedures for attorneys as opposed to other professions. One of these differences involves the right to appellate review. Quoting from Judge McMahon's opinion in *Javits v. Stevens (infra)*:

> "...Once a state affords an appellate process, however, the equal protection clause forbids it to deny an appeal capriciously or arbitrarily to some litigants while granting it to others (citing *Lindsey v. Normet, supra,* 405 U.S. at 77; *Griffin v. Illinois, supra,* 351 U.S. at 18). This does not mean that the equal protection clause requires different classes of people to be treated alike. Rather, equal protection requires only that a legislative classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (citing *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920); *Reed v. Reed,* 404 U.S. 71 (1971); *Morey v. Doud,* 354 U.S. 457 [1957).

Further, Judge McMahon states.

> "And it is clear that a Legislature may regulate different professions in different ways where appropriate. (*Pordum v. Board of Regents of the State of N.Y.,* 491 F.2d 1281 (2d Cir. 1974). Thus, in *Semler v. Oregon State Bd. of Dental Examiners,* 294 U.S. 608 (1935), where the Supreme Court sustained a statute prohibiting certain types of dental advertising, it said:

> 'Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each.'

"We think that under the above standard, the denial of Article 78 proceedings to attorneys does not violate equal protection."

In a footnote to his opinion Judge McMahon makes the following additional observation:

> "In a case involving disciplining of tenured teachers, under N.Y. Education Law Section 305 (7) (16 McKinney 1969), it was held that the Legislature's failure to detail procedural safeguards or to define with precision 'professional misconduct' with regard to teachers, in contrast to its promulgation of clear procedural standards and a precise definition of misconduct with regard to other professions, did not violate equal protection. *Pordum v. Board of Regents of the State of N.Y., supra,* 491 F.2d at 1286. The Court of Appeals said: '[T]he teaching profession differs from these other professions in many respects, including the special vulnerability of the client population, the high duty of care owed by the state to that group, and the unique responsibility which the state has to provide an effective system of education. These distinctions justify the legislative determination that different treatment with respect to the disciplining of the different professionals is required.'

Judge McMahon concludes his opinion in the *Javits* case as follows:

> "The intimate and delicate relationship between courts and lawyers has long justified the judiciary's careful scrutiny of the integrity and qualifications of those who practice before it. (citing *Theard v. United States*, 354 U.S. 278, 281 (1957); *Erdmann v. Stevens*, *supra*). Thus, it would be peculiar, if not unreasonable, for the New York Legislature to place responsibility for discipling attorneys and review of disciplinary proceedings elsewhere than in the courts. No other body is as well qualified or as interested in determining whether an attorney is qualified to practice law.
>
> "We find no violation of equal protection in the procedure for review of disciplinary proceedings adopted by New York and, therefore, grant summary judgment to defendants...."

CONCLUSION

The New York procedures resulting in plaintiffs' respective suspensions from the practice of law do not constitute a deprivation of due process or equal protection of the laws. The defendants' motion to dismiss the complaints should be granted.

Dated: Brooklyn, New York
February 27, 1975

Respectfully submitted,

NICHOLAS C. COOPER
Chief Counsel
Judicial Inquiry on
Professional Conduct
Amicus Curiae