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## Administrative Law—The Public Authority and Sovereign Immunity

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The religion of an engineer is not relevant to his professional qualifications, but only becomes relevant as the result of the domestic policies of the place of employment. There is no evidence that the Legislature of New York intended the exemption to be used to allow discrimination on this basis.

It will be conceded that the Court might have been justified in finding for Aramco, and that the result of this decision will place Aramco in a predicament. In the event that Aramco cannot produce a more compelling justification, it is doubtful that SCAD on reinvestigation will allow the exemption. The amount of harm resulting to Aramco will then depend entirely on the number of applications for employment it receives from members of the Jewish faith. Against this we can balance the social benefit derived from terminating a policy of discrimination which is contrary to the letter and spirit of New York law. New York is not a province of Saudi Arabia and owes no allegiances to it. New York should not be forced to violate its principles of justice, or allow its citizens to flaunt its laws, or to surrender any of its sovereignty merely because a foreign power desires to enforce its own domestic policies which happen to be in conflict with those of New York.

J. D. R.

#### THE PUBLIC AUTHORITY AND SOVEREIGN IMMUNITY

-The growth and expansion of government has created many administrative difficulties. The conventional form of governmental institution was not suited to the handling of many of the vast enterprises carried on by governmental units. To facilitate administrative efficiency, we have developed the public authority, an organization halfway between government and private business and endowed with the virtues of both. The dual personality of the public authority or public corporation has posed some serious problems especially in the area of sovereign immunity.

*Benz v. New York State Thruway Authority*<sup>15</sup> illustrates the types of problems encountered in the area of sovereign immunity and the public corporation. The plaintiff brought a suit in equity against the Thruway Authority for rescission or reformation of a contract for the sale of her land to the Authority. The Thruway Authority appeared specially to contest the Supreme Court's jurisdiction over person and subject matter. The gist of the Authority's argument was that, as an arm or agency of the State, it possessed sovereign immunity<sup>16</sup> and could not be sued in any court, unless it waived its immunity. The State had only waived its immunity to be sued in the Court of Claims,<sup>17</sup> which does not have equity jurisdiction; therefore, the Supreme Court was without jurisdiction. The Supreme Court dismissed the complaint and the Appellate Division<sup>18</sup> and the Court of Appeals affirmed.

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15. 9 N.Y.2d 486, 215 N.Y.S.2d 47 (1961).

16. *United States v. Lee*, 106 U.S. 207 (1882); *Railroad Company v. Tennessee*, 101 U.S. 337 (1879); *Briggs v. Light Boats*, 11 Allen (Mass.) 157 (1865).

17. N.Y. Court of Claims Act § 8.

18. 11 A.D.2d 906, 205 N.Y.S.2d 1004 (4th Dep't 1960).

The origins of sovereign immunity from suit were well explained in *Glassman v. Glassman*:

The doctrine of sovereign immunity from suit, rooted in the ancient common law, was originally based on the monarchical, semi-religious tenet that 'the King can do no wrong'. In modern times, it is more often explained as a rule of social policy, which protects the state against burdensome interference with the performance of its governmental functions and preserves its control over state funds, property and instrumentalities. (See *United States v. Lee*, 106 U.S. 196, 206.)<sup>19</sup>

The problem presented by the *Benz* case and others is not whether the State is immune, but rather, is this public corporation clothed with the immunity of the State. The test seems to be whether the particular activity in which the governmental agency is engaged at the time of the injury is of a public or a private nature.<sup>20</sup> The New York State Thruway Authority meets this test. The construction and maintenance of highways, bridges and tunnels is one of the primary governmental functions of the state.<sup>21</sup> The case of *Easley v. New York State Thruway Authority* relied on by all the courts in the instant case squarely decided this issue. The Court said:

The Thruway Authority is a 'body corporate and politic, constituting a public corporation', Public Authorities Law, Section 352, which performs part of the work of the State Government in building and maintaining a highway. It cannot be doubted that this authority is an arm or agency of the State. The closeness of its relationship to the State is illustrated by these situations among others: Its members are appointed by the Governor with the approval of the Senate; its statutory purposes are declared to be governmental; its real property is held in the name of the State; the State advanced the money for constructing the Thruway etc., and eventually the Authorities' property will revert to the State itself.<sup>22</sup>

The immunity of a state agency is in no way affected by the fact that the agency is endowed with the powers and privileges of a corporation.<sup>23</sup>

Since the Thruway Authority is an arm or agency of the State, it can be clothed with sovereign immunity. Indeed, it has generally been held that in the absence of some express waiver of immunity, such bodies *inherently* partake of their parent's sovereign immunity.<sup>24</sup> When sovereign immunity is waived, the State may attach conditions and limitations to the right to bring an action.<sup>25</sup> The only question then left for the Court to decide was the extent to which

19. 309 N.Y. 436, 440, 131 N.E.2d 721, 723 (1956).

20. *Yonker v. City of San Gabriel*, 23 Cal. App. 2d 556, 73 P.2d 623 (1937).

21. *Voorhis v. Cornell Contracting Corp.*, 170 Misc. 908, 910, 10 N.Y.S.2d 378, 380 (City Ct. 1938), citing, *Atkins v. Kansas*, 191 U.S. 207, 221, 222 (1903).

22. 1 N.Y.2d 374, 376, 153 N.Y.S.2d 28, 29 (1956).

23. *Breen v. Mortgage Commission of State of N.Y.*, 285 N.Y. 425, 430, 35 N.E.2d 25, 27 (1941); *In re Hicka*, 180 Misc. 173, 40 N.Y.S.2d 267 (Sup. Ct. 1943).

24. *In re Brown v. Trustees of Hamptonburg School Dist.*, 303 N.Y. 484, 104 N.E.2d 866 (1954).

25. *Weber v. Lacey*, 281 App. Div. 290, 120 N.Y.S.2d 88 (4th Dep't 1953).

immunity from suit was waived by the Legislature. Section 361-B of the Public Authorities Law confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims against the New York State Thruway for alleged torts and breaches of contract. The State itself is amenable to suit only in the Court of Claims.<sup>26</sup> The Court of Claims does not have power to hear and decide equitable claims.<sup>27</sup> Thus, the plaintiff's cause of action being equitable fails.

The dissent argued that, prior to the enactment of Section 361-B, the Thruway was amenable to suit in the supreme court.<sup>28</sup> The conferring of exclusive jurisdiction on the Court of Claims to hear and determine suits against the Thruway for torts and breaches of contract did not prevent other types of suits from still being brought in the supreme court. If the intention had been to confer exclusive jurisdiction on the Court of Claims in all instances, it would have been simple to have said so.

The answer to the dissenting position is best stated in the majority opinion as follows:

It would indeed be remarkable if the legislature, which could have forbidden suits to be maintained against the Authority in any court or tribunal, produced a situation where suits at law could be prosecuted (per express agreement) in the Court of Claims only but (by legislative silence) equity suits would be allowed against the Thruway Authority in the Supreme Court. There is no sign that the lawmakers had any such strange intent.<sup>29</sup>

The independent corporate aspect of an authority was emphasized in *New York Post Corp. v. Moses*,<sup>30</sup> a proceeding under Section 1283 of the Civil Practice Act for an order directing the Triborough Bridge and Tunnel Authority to permit petitioner to inspect its files and records. The Court of Appeals upheld the Supreme Court's dismissal of the order and reversed the Appellate Division's granting of the order.

The plaintiff, aware of the lack of specific legislation, argues that he has a right of inspection under the general provisions of law applicable to public records of government.<sup>31</sup> Such a contention may be sustained here only if the Authority is an agent of New York City<sup>32</sup> or constitutes a "public office."<sup>33</sup> It is not valid as applied to officers or agents of the State.<sup>34</sup> The question then is, whether the Authority is an arm or agency of the City.

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26. Supra note 17.

27. *Psaty v. Duryea*, 306 N.Y. 413, 118 N.E.2d 584 (1954).

28. *Strang v. State of New York*, 206 Misc. 734, 134 N.Y.S.2d 871 (Ct. Cl. 1954).

29. Supra note 15 at 490, 215 N.Y.S.2d at 49.

30. 10 N.Y.2d 199, 219 N.Y.S.2d 7 (1961).

31. N.Y. Public Officers Law § 66; N.Y. Gen. Mun. Law § 51.

32. N.Y. Gen. Mun. Law § 51.

33. N.Y. Public Officers Law § 66.

34. *Bull v. Stichman*, 298 N.Y. 516, 80 N.E.2d 661 (1948); *Schieffelin v. Komfort*, 212 N.Y. 520, 106 N.E. 675 (1914).

The Court of Appeals held that there is not a sufficiently close connection between the Authority and the City to deem it agent and principal. The Authority is a public benefit corporation, designed to function autonomously and free from the controls and restraints which hamper the conventional type of State board or department. On the authority of the *Benz* case, the Court declared that constitutional and legislative policy dictates that public authorities should be subjected only to those procedures which have been specifically mandated. A like result was reached in *Plumbing, etc. Contractors Association v. New York State Thruway Authority*,<sup>35</sup> in which case it was held that the Thruway was free from the requirements of the State Finance Law, a statute general in nature. The Public Authorities Law, which is the only specific statute dealing with these bodies, does not authorize the public to inspect the records of Triborough; therefore, the Legislature did not intend to grant the public such a right.

Chief Judge Desmond, who wrote for the majority in *Benz*, emphatically disagreed with the holding in the *N. Y. Post* case. He felt that, in applying the test stated in *Easley*, which found the Thruway Authority to be an arm or agency of the State, to the Triborough Authority, the Court should conclude that the Authority was an arm or agency of the City or, at least, a board acting on behalf of the City. Judge Fuld, in a separate dissenting opinion, points to the *Benz* case as authority for the "public office" character of Triborough.

The *Benz* case points up the public character of an authority; whereas, the *N. Y. Post* case emphasizes its private aspects. As a result of these decisions, the public corporation is put in the unique position of having all the advantages of government and none of the disadvantages of a private body. This presents a fertile area for sovereign irresponsibility.

F. P. M.

#### RIGHT TO RECEIVE THE REPORT OF SLA HEARING OFFICER

A tavern owner was charged with selling alcoholic beverages to a minor under eighteen years of age.<sup>36</sup> A hearing was subsequently held at which a deputy commissioner presided as the hearing officer.<sup>37</sup> At the close of the hearing, the attorney for the licensee requested a copy of the hearing officer's report, prior to action thereon by the State Liquor Authority, in order that he might have an opportunity to controvert the findings or conclusions in the report. This request was refused, and the Authority thereafter revoked the licensee's liquor permit. The licensee then instituted the present Article 78 proceeding,<sup>38</sup>

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35. 5 N.Y.2d 420, 185 N.Y.S.2d 534 (1959).

36. N.Y. Alcoholic Beverage Control Law § 65.

37. N.Y. Alcoholic Beverage Control Law § 119 (1, 2). (Providing the Liquor Authority with the authority to revoke licenses and providing a hearing before a hearing commissioner pursuant to final determination by the Authority.)

38. N.Y. Civ. Prac. Act § 1284 provides the court with the power to review any act or refusal to act of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, which involves an exercise of judgment or discretion.