

Westhampton Free Library
Board of Trustees

Report on Selection of Trustees
April 13, 2016

Background

The Westhampton Free Library is an association library that was first chartered by the New York State Board of Regents in 1897.

“An association library is a private corporation established by the members of the association. It contracts with a unit of local government to provide library service to the residents of that jurisdiction. In legal terms, this contract may be written, oral or implied; but it always exists. Though association libraries are private not-for-profit education corporations and not subject to some of the laws and restrictions of true public libraries, they are generally supported by public funds and must always keep transparency and accountability in mind as they make decisions. In addition to Education Law such libraries are subject to some aspects of the New York State Not-for-Profit Corporation Law.”

Handbook for Library Trustees of New York State, 2015 Edition, Page 9

The Westhampton Free Library in the recent past has been served by five trustees. The Charter permits the Board to be comprised of from five to seven trustees, and the current By-Laws provide the same flexibility.

“[M]ost association libraries in New York still appoint their own board members. Therefore, an important part of every association library trustee's job is to be on the lookout for potential new board members who can help keep the library and the board strong and move it confidently into the future. A board should seek out and encourage qualified candidates who can complement board strengths or fill a gap in the current board's expertise. It is essential that board composition reflect the ethnic, racial, and cultural diversity of the community.”

Handbook for Library Trustees of New York State, 2015 Edition, Page 80

Duties of Trustees as outlined by the New York State Education Department

Duty of Care: A trustee must act in good faith and exercise the degree of diligence, care and skill that an ordinary prudent individual would use under similar circumstances in a like position.

Duty of Loyalty/Conflicts of Interest: Trustees owe allegiance to the institution and must act in good faith with the best interest of the organization in mind. The conduct of a trustee must, at all times, further the institution's goals and not the member's personal or business interests. A trustee should avoid even the appearance of

impropriety. Acts of self-dealing constitute a breach of fiduciary responsibility that could result in personal liability and removal from the board.

Duty of Obedience: A trustee has a responsibility to insure that the institution's resources are dedicated to the fulfillment of its mission. The member also has a duty to ensure that the institution complies with all applicable laws and does not engage in any unauthorized activities.

Handbook for Library Trustees of New York State, 2015 Edition, Pages 14-15

The History of Our Association Library

(Historical Information from A History of the Westhampton Free Library in Westhampton Beach NY, by Helene Gerard, published 1971.)

The Westhampton Free Library began as an idea that became formalized in a provisional charter from the New York State Board of Regents in 1897. In January of 1897 a representative from the NY State Board of Regents visited the library and assessed the value of the book collection at \$200.00 and agreed, upon application for a charter from the state, the state would provide matching funds of \$200.00 for the purchase of additional books on a list subject to state approval. This provisional charter became a permanent charter and the Westhampton Free Library has been an association library under the terms of the charter.

In *A History of the Westhampton Free Library in Westhampton Beach NY* the author chronicles the service of trustees over the years in the context of the history of the village. Harold R. Medina, an attorney, takes a prominent place in the history of our library based upon his generous donations. His first donation in 1946 provided funds for the construction of the library on property donated by the Westhampton Chapel Society where the current library is situated. This was followed by more donations by then Judge Medina that provided for two additional expansions of the library.

In 1953 the Board appointed honorary trustees in an effort to encourage additional participation and funding for the library. Throughout its history the library has been supported with substantial tax revenues. Nevertheless, volunteer service and generous donations have been essential to the library's success. In each of the last five years the library has received on average more than \$79,000 in donations. This is not only a measure of individual generosity, but stands as an ongoing assessment that a donation to the library will be well spent on a valuable asset that has served our community for well over 100 years.

In 2003 the library purchased the adjacent parcel of property, 5 Library Avenue, to allow for future expansion of the library. In 2008, in preparation for construction, temporary library

space was secured on the east side of Library Avenue, construction began and the doors to the new library were opened on June 26, 2010.

Trustee History (October 30, 2015 - Present)

October 30, 2015 brought a change in the governing body of the Westhampton Free Library. Three new trustees were appointed to serve by the Board of Trustees and this restored the Board to its full membership of five. In December a fourth member of the board of trustees resigned, leaving the board with three new members and one remaining veteran.

The Board of Trustees undertook its duty to identify those people in the community who were willing, able and qualified to serve as trustees. The threshold qualifications to serve as a trustee are to be a resident and qualified voter of the library service area. This service area is coextensive with the Westhampton Beach Union Free School District which includes principally the areas of Westhampton, Westhampton Beach, and Quogue. Beyond these two threshold requirements for service as a trustee it is incumbent that a trustee candidate be capable of the duties outlined by the New York State Education Department.

A review of trustee resumes past and present demonstrates that trustees typically have a documented history of community service. The Board of Trustees has endeavored to make the process by which trustees are identified both transparent and well publicized.

The trustees, desiring to restore full membership to the board, proceeded to canvass the community for trustee volunteers.

- The Board posted an invitation to serve as a trustee on the library website on November 19, 2015. In November there were 3,515 visits to the library website and 3,238 visits in the month of December.
- On November 19, 2015 the Board sent 1,894 e-mails through Constant Contact to all patrons who had signed up to receive e-mails and invited applications to serve as a trustee.
- On January 14, 2015, again through Constant Contact, the Board sent 1,808 e-mails to all patrons who had signed up to receive e-mails and invited applications to serve as a trustee.
- The *Southampton Press* printed an invitation for residents to serve the library as a trustee on January 21, 2016, in its Around Westhampton column at page A14.

- The Board published a quarter page advertisement in the *Southampton Press* on January 28, 2016 at page A14.
- The search for trustees yielded three candidates who were each interviewed on February 10, 2016. The By-Laws allow for up to seven trustees and the board decided to expand its membership from five to seven and appoint all three individuals who came ready and willing to serve.
- On February 16th the Board of Trustees appointed these three candidates to the Board such that we have six new trustees of the seven who are serving.

Beginning in August 2015, a request was made that the Board of Trustees also consider changing the selection process from appointment by the sitting board to public elections held annually. There have been other association libraries which have made this change and the Board of Trustees (October 30, 2015 to present) considered the proposal worthy of careful examination.

An immediate concern identified was whether the change from an appointed board to a publicly elected board, viewed together with primary funding from tax revenues, would change either the character or legal status of our association library.

The Character of our Association Library

The Westhampton Free Library, our Library, is a 501(c)3 non-profit corporation. Section 501(c)(3) is the portion of the US Internal Revenue Code that allows for federal tax exemption of nonprofit organizations, specifically those that are considered public charities, private foundations or private operating foundations. It is regulated and administered by the US Department of Treasury through the Internal Revenue Service.

Throughout the history of the library and continuing through events to date, every trustee has fulfilled the duties of Care, Loyalty and Obedience with dedication. It is the obligation of the current board to provide for the continued representative governance of the library and preserve the institutional reputation of the Westhampton Free Library, so it continues to remain above reproach.

Trustees considered the character of our library. It is a place of reflection, access to bibliographic and digital content, increasingly a place of education and cultural opportunity. It is an institution comfortable in its role in civil society described by Senator Bill Bradley and quoted in the American Library Association website: "Civil society is the place where Americans

make their home, sustain their marriages, raise their families hang out with their friends, meet their neighbors, worship their god. It is the churches, schools, fraternities, community centers, labor unions, synagogues, sports leagues, PTAs, libraries and barber shops. It is where opinions are expressed and refined, where views are exchanged and agreements made, where a sense of common purpose and consensus is forged. It lies apart from the realms of the market and the government and possesses a different ethic.”

A unique feature of the character of our library is the charitable support it has enjoyed throughout its history. The board considered whether these donations might be compromised if our association library were altered to subject it to the roiling electioneering of a political process.

We considered the question of whether our appointed board status is out of step with other organizations of the twenty-first century. It appears that this is not the case. Private non-governmental organizations supported with government subsidies and tax exemption do successfully and responsibly provide a variety of services in our community and throughout the world. Some examples are: The American Red Cross; East End Hospice; Seaford Resources, Inc.; Peconic Community Counsel, Inc. (umbrella organization for Maureen’s Haven); Peconic Bay Medical Center; Westhampton Beach Historical Society; Southampton Hospital; and, of course, The Westhampton Free Library.

The Legal Nature of the Library

Currently, as an association library, the Westhampton Free library is not a public library even though it is open to the public.

*“Public libraries, **those considered to be** municipal, school district or special legislative district libraries, are also subject to several additional laws, regulations and policies designed to protect the public interest. Most notable of these include:*

- *Civil Service Law (Job titles, examinations, due process)*
- *General Municipal Law (Bidding and Procurement; Conflicts of Interest)*
- *Labor Law (Hour & Wage, Safety and “Wicks Law”)*
- *Public Officers Law (Indemnification, Open Meetings, Oath of Office & FOIL)*
- *NY State Comptroller’s Policies and Procedures (Accounting standards, investments, etc.)”*

Handbook for Library Trustees of New York State, 2015 Edition Page 8, Emphasis supplied

The Board of Trustees has historically recognized that many legal obligations applicable only to public libraries constitute good governance for private libraries such as ours. For transparency, we have adopted some of these legal obligations as board policies, because they are beneficial to the community, although we are not legally bound to do so. For example, The Westhampton Free Library has adopted a policy to follow the Freedom of Information Law (FOIL).

Additionally, the Board of Trustees strives to be responsive to the community. For example, in October there was a request that Board meetings be held in the evening rather than during normal business hours, a policy which we gladly adopted.

The request to change from an appointed board to a publicly elected board could, nevertheless, have unintended consequences for both the employees and the cost of operations. Following, is a review of the possible legal ramifications of the requested change.

Union Representation under the NLRA

In September of 2015 the library employees organized to form a union.

The union as an organization now provides a structure through which employees can discuss terms and conditions of employment presented to the Library Director and the Board of Trustees through a negotiated contract. The Director and the Board of Trustees will be able to keep its focus on the proper overall allocation of community resources for the betterment of the library. The union is currently working on a proposal that will be its first contract ever. It will be a new chapter in management-employee relations.

Currently, the library employees are covered by the National Labor Relations Act (NLRA). See *Monroe Free Library v. Communications Workers of America*. This Depression Era Legislation was adopted in 1935 to guarantee the right of private sector employees to organize into trade unions, engage in collective bargaining, and engage in collective action.

Should our employees be deemed public employees, they would not be covered by the NLRA. As quoted from the NLRB website: "Most employees in the private sector are covered under the NLRA. The law does *not* cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions)". The library employees voted by a majority to create the union, and that was all that was required under the NLRA. However, public employees do not have any rights under the NLRA and the National Labor Relations Board (NLRB), the administrative agency that enforces the NLRA, has no jurisdiction to protect their interests.

This brings to the fore the question of whether a change in the Charter from the New York State Board of Regents so that future trustees must be publicly elected would change the nature of the library such that the library would thereafter be considered a public employer.

In determining whether an entity like the Westhampton Free Library is a public employer, the United States Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) set forth a test. This is now known as the “*Hawkins County test*” which provides that an employer may be considered a political subdivision and exempt from the NLRA if it is **either:**

"(1) created directly by the state, so as to constitute departments or administrative arms of the government; or

(2) administered by individuals who are responsible to public officials or to the general electorate."

The legal question presented is whether the Westhampton Free Library, by changing to a publicly elected Board of Trustees with the entire board responsible to the general electorate, would then be changing the status of the library from a private sector employer, subject to the NLRA, to an exempt public sector employer for which employees have no rights under the NLRA.

New York Civil Service Law

New York State Civil Service Law (the Taylor Law) does provide some protections for public employees who are not protected under the National Labor Relations Act (NLRA). At the same time this raises the following questions concerning the current employees of the library who have been employed by a library which has thus far been considered, under New York Civil Service Law, to be a private employer.

- If the Board of Trustees obtained a change in its Charter from the New York State Board of Regents, so that all of the trustees must be elected by the public, would this change the library into a public employer subject to the New York Civil Service Law?
- If the library became subject to the New York Civil Service Law would current library employees be grandfathered in and not have to take a civil service test, or would they have to take the next administration of the relevant test, if any, and retain their job by scoring high enough?

In *New York Public Library, Astor, Leno and Tilden Foundations, et.al. v. New York State Public Employment Relations Board*, the highest court in our state considered such a question with respect to the New York Public Library which is an association library.

The Court of Appeals in its majority opinion stated that the Taylor Law applies only to employment which is unequivocally or substantially public. It held that, on the facts presented:

“[T]he nonpublic aspect of library employment is sufficiently substantial to exclude it from regulation under the Taylor Law, as it now reads.”

The history of the New York Public Library and the facts relied upon by the high court were recounted in the lower court opinion. Notable among the facts considered was that: *“The operations of the Library are directed by a self-perpetuating board of directors comprised of 25 members, only 3 of which are included by virtue of their city office, i.e., Mayor, Comptroller, and the President of the City Council.”*

In the New York Public Library case 22 of 25 members of the board of directors were **not** responsible to the electorate. The question that remains unanswered is: “If every member of the board of trustees is elected directly by the public, is the library then a public employer under the Taylor Law?”

As demonstrated by both the federal case, **Hawkins**, in applying the National Labor Relations Act (NLRA) and the **New York Public Library** case considering the applicability of the Civil Service Law, these courts have been guided by the true nature of the employer. In other words, if it walks like a duck and quacks like a duck, it’s a duck. However, because the status of “public employer” is being interpreted in the context of different statutes by different courts, it is conceivable that a federal court could determine the employees are not protected by the NLRA and at the same time a New York court could determine the employees are not protected by the Taylor law possibly leaving our current employees with no protections.

Prevailing Wage Law and Public Works

Our State Constitution provides that laborers, workers and mechanics engaged in "any public work" cannot "be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used" (NY Const, art. I, § 17)

The implementation of the term “prevailing wage” has been problematic at best, and completely Orwellian at worst. It is generally accepted that it substantially increases the cost of any public work by up to one third. See *Things New Yorkers Should Know About Prevailing Wage and Prevailing Wage would raise affordable-housing costs.*, *Crain’s New York Business Jan. 2016*. The question of whether the library is subject to this law for works it may undertake is an important financial consideration for the library as it considers future construction.

In 2013 the New York Court of Appeals addressed this question in a case involving a volunteer fire department, a private not-for-profit corporation, which was building a firehouse. The New York State Department of Labor determined the fire department was subject to the prevailing

wage law, the majority of the Court of Appeals said it was not, and Chief Judge Lippman authored a dissenting opinion.

In this case the majority on the Court held that only those specific government entities listed in the Labor Law would be governed by the prevailing wage requirements. In the context of the “prevailing wage” law, the Court had rejected the legal analysis that if it walked and talked like a duck, it must be a duck.

J. Lippman, the Chief Judge of the New York Court of Appeals, wrote that this interpretation of the statute by the majority of the court contradicted the NY Constitution and the construction of the fire department was a public work and should have been subject to prevailing wage requirements. The majority opinion of the Court did make a noteworthy observation that an amendment to the Labor Law adopted in 2007, after this case began, might have required a different result had it been in effect at the time.

These developments leave the Westhampton Free Library Board of Trustees with some degree of uncertainty concerning whether work done at the library would, in the future, be subject to prevailing wage.

NY State Retirement System

There have been some who have suggested that the push for a publicly elected board of trustees has been orchestrated by those wishing to make library employees participants in the New York State Retirement System. This is not true. There has been legislation that was proposed to make association library employees eligible to participate in the State retirement system if such association library has a publicly elected boards of trustees. However, this legislation did **not** pass, and the bill did **not** mandate that association library employers participate in the State retirement system.

Participation by library employees in the New York State Retirement System, at last estimation by the bill sponsors in 2010, would require annual retirement contributions by the library amounting to 12.6% of the library payroll for Tier 5 employees enrolled in the retirement system, and annual retirement contributions by the library amounting to 15.6% the library payroll for Tier 4 employees enrolled in the retirement system. There would also be a deficiency cost based upon the age, service credit, and Tier of the affected employees that would be payable by the library over 25 years. Again, this legislation has **not** been enacted.

Westhampton Free Library employees, like other private employees, may participate in such pension programs as may be negotiated between the Westhampton Free Library and the union in compliance with the Employee Retirement Income Security Act of 1974 (ERISA). The issue of whether to have a publicly elected board of trustees is separate.

Referral of Concerns to Legal Counsel.

In view of some of the aforementioned identified concerns the Board of Trustees on January 6, 2016 requested that Library counsel provide a legal opinion on these various questions so that the Board could receive and consider his advice. Counsel wrote an opinion on February 8, 2016.

“Changing the Library’s Charter to provide for a publicly elected Board of Trustees (as opposed to doing nothing) will make it more likely to be viewed as a public entity, especially in the context of the NLRB.”

Richard K. Zuckerman, Esq., February 8, 2016 opinion letter to Board

Terra Incognita

Counsel did endeavor to anticipate what might happen upon a change to a publicly elected board of trustees. In offering this opinion as to the applicability of the NY Civil Service Law counsel was relegated to assessing these matters based upon cases that did **not** involve a governing body elected directly by the public; and to citing administrative publications founded upon *New York Public Library, Astor, Leno and Tilden Foundations, et.al. v. PERB* in which a privately appointed board controlled that library. Counsel proposed the Civil Service Law would remain inapplicable, and did not analyze the consequences to library employees if the result were otherwise.¹

With respect to the continued applicability of the National Labor Relations Act (NLRA) as administered by the National Labor Relations Board (NLRB), counsel advised that legal analysis indicated the library would no longer be subject to the NLRA, but stated that the political composition of the NLRB was a significant factor in this assessment and would have to be revisited after the 2016 Presidential election.²

¹ These questions are of sufficient consequence they should be addressed before moving to an elected Board of Trustees.

² Members of the NLRB are appointed by the President with the advice and consent of the Senate, there are five seats; each seat on the board is for five years. Currently there are four members on the NLRB and another seat to become vacant in August of 2016.

The President on January 4, 2011 without the advice and consent of the Senate In 2014 made three recess appointments to the NLRB. The D.C. Circuit Court of Appeals held these appointments unconstitutional. The Supreme Court unanimously affirmed and called into question a fourth recess appointment not directly involved in the case but which was impacted by the decision. There have been numerous recess appointments over the years, some unconstitutional. The precedential value of NLRB decisions that rely upon a vote(s) of unconstitutional appointee is dubious, as well as the value of those decisions that rely upon such precedent.

Counsel definitively advised that the Prevailing Wage Law would not apply to the library even if it should move to a publicly elected board of trustees.

The Takeaway

The single overarching conclusion that can be reached is that:

“Changing the Library’s Charter to provide for a publicly elected Board of Trustees (as opposed to doing nothing) will make it more likely to be viewed as a public entity...”

A minority of association libraries in the state have now begun to blaze this trail by changing to publicly elected boards. These libraries will undoubtedly confront these questions as well as others. In time there will be clearer answers.

Since the legal research has not yielded a precedent we can cite in our quest for the true nature of the association library with an elected Board, all we can say is that the change from an appointed Board to an elected Board is so new that we must be wary of a future challenge which could place us squarely in the definition of a public library.

Candidates and Voters

An election requires candidates and voters. The Board of Trustees encouraged every registered voter in the Westhampton School District to serve as a trustee on the board. The Library is fortunate that three residents answered that call to service. No one was rejected, no one was excluded.

Equally important to an election are voters. In the Westhampton Beach School District there are 3934 registered voters. In the past three years voter turnout was insubstantial. In 2013 there were 686 votes cast for the budget; in 2014 there were 583 votes cast for the budget; and in 2015 there were 647 votes cast for the budget. This reflects a voter turnout of 17%, 14% and 16%, respectively. One element of board governance is that a quorum of the board is required to hold a meeting and transact business. This rule addresses a concern that board action taken by a majority of those present, but less than a quorum is not representative of the will of the board. The same might be said for public elections. When voter turnout is low an organized faction with no loyalty to the best interests of the library can be a small but destructive force advancing its own interests. The all-volunteer Board of Trustees has worked very well for over

one-hundred years. The focus, of late has been on the board. What is truly important is whether the library is thriving, and responsive to the community. By these measures the library has always been, and will remain successful.

Future Solutions

The Board of Trustees has determined that it is in the best interests of the library to insure that the community is fully represented on its board of trustees. After a thorough search to identify those who are willing and qualified to serve, all residents who answered the call to service have been appointed to the board of trustees.

The Board of Trustees has resolved to:

- Continue to canvass the community at regular intervals for candidates to serve as vacancies on the board arise and as terms of office expire, and to maintain a record of these efforts.
- Adopt term limits to insure that fresh ideas and energy are brought to the service of our library.
- Maintain a record of applications made for service as a trustee and the disposition of such applications.

To date, for the library year beginning on July 1, 2015 and ending June 30, 2016, there have been six trustees who offered to serve; six trustees were appointed to the board; no application has been rejected; and no application to serve remains pending.

Afterword

The adoption of term limits together with a clear statement to the public that service on the Board of Trustees is open to all should serve the library's needs for the foreseeable future.

The Board of Trustees encourages members of the community to become active in the governance of the library, familiar with its operations, and dedicated to its secure future.

Trustees oversee the library. They don't develop the budget, make decisions about the day-to-day operations of the library, decide which employees should be assigned specific tasks or sent for professional development. After the imminent adoption of a negotiated Union Contract, nearly all the issues involving working conditions and wages of library employees will be prescribed without board input.

According to the Handbook for Library Trustees of New York State, trustees do oversee the library's finances. They do approve the budget before it is put before the public and approve monthly treasurer's reports at public meetings.

They do approve all personnel actions at a legal, public meeting.

They are responsible for reducing risk involving safety, the law, negligence of any kind.

Trustees must always act in a manner that is in the best interest of the library and in the cooperative nature of the board.

Trusteeship is public service. While public libraries require elections, association libraries do not. The selection process of the trustees is not as important as their ethics, their diligence and their accountability to both the library professionals and the public.

Report adopted by the Board of Trustees, April 13, 2016