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February 8, 2016

BY EMAIL [REDACTED]@westhamptonlibrary.org

Re: Legal Implications of Converting to a Publicly Elected Board of Trustees

Dear President Moore:

We are writing in response to your request for advice about several specific issues regarding the possible amendment of the Library's Charter and by-laws to provide for a publicly elected Board of Trustees. Your questions and our answers are outlined below.

Question 1: "The Board of Trustees requests your opinion concerning the legal and practical implications if, upon its change to a publicly elected Board of Trustees, its employees of the library were determined to be "*public employees*" under the Civil Service Law."

Answer: Conversion of the Library to a publicly elected Board of Trustees would not make the Library's employees "public employees" covered by the New York Civil Service Law. The Civil Service Law does not apply to association libraries or their employees, since association libraries are "established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust" and are not created or controlled by the State or a political subdivision thereof. See N.Y. Educ. Law § 253.2 "Types of Public Libraries: A Comparison"¹ (noting that employees of [REDACTED] libraries are not covered by the Civil Service Law); *see also* "Civil Service 101 for Public Library

¹ Available at: <http://www.nvsl.nysed.gov/libdev/libs/pltypes.pdf>.

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Trustees”² (stating that “[association libraries do not fall under [the] Civil Service Law”).

Question 1(a): “Would employees have to pass a civil service test and be selected on a competitive basis?”

Answer: No. The Library’s employees would continue to not be subject to the Civil Service Law (see #1).

Question 1(a)(1): “Would current Westhampton Free Library employees be grandfathered in, or would they be required to take the next competitive test offered by Suffolk County and score in the top three of candidates offered the job?”

Answer: No. The Library’s employees would not be subject to the Civil Service Law or the testing/selection requirements of the Civil Service Commission (see #1).

Question 1(b): “Would library employees lose their protections under the National Labor Relations Act and, instead, be covered only by the New York State Public Employees’ Fair Employment Act (Taylor Law) as administered by the Public Employment Relations Board (PERB)?”

Answer: Probably not. After researching this issue in depth, we have concluded that it is not likely that the Library will be able to come within PERB’s jurisdiction if it remains an association library.

While the Library currently has many aspects of its operations that are similar to those of a public entity (*e.g.*, the ability to levy taxes and participate in the New York State Health Insurance Plan), we do not believe that converting to a publicly elected board will result in a finding that the Library is a political subdivision of the State. The National Labor Relations Board (“NLRB”) does not have jurisdiction over a “political subdivision” that is exempt from the National Labor Relations Act’s (“NLRA”) definition of “employer” (NLRA Section 2(2) excludes from the definition of employer, “...any state or political subdivision thereof...”). To determine whether an entity is an exempt political subdivision, the NLRB applies the *Hawkins County* test, which requires that the entity either: (1) be created directly by the State, so as to constitute a department or administrative arm of the government; or (2) be administered by individuals who are responsible to public officials or to the general electorate. *See N.L.R.B. v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971).

Even with a publicly elected Board of Trustees and a charter issued by the New York State Board of Regents, the Library will not be able to meet the first prong of the

² Available at <http://www.nvsl.nvsted.gov/libdev/trustees/handbook/csl01.htm>.

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Hawkins County test because it was created by private individuals. See *Chicago Mathematics*, 359 NLRB 41 (2012) (“...entities created by private individuals as non-profit corporations are not exempt under the first prong of *Hawkins County*”); see also *Monroe Free Library*, 200 L.R.R.M. (BNA) 1819 (N.L.R.B.), 2014 WL 4640132 (“...the mere receipt of a charter of incorporation from the [New York State Board of] Regents is insufficient to establish that the Employer was created by a government entity or legislative act”); *Research Foundation of the City University of New York*, 337 NLRB 965 (2002) (“[t]he creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leave the Employer outside the ambit of the Section 2(2) [of the NLRA] exemption”).

The Library is not likely to be successful in establishing the second prong of the *Hawkins County* test, i.e., that it is an entity administered by individuals who are responsible to public officials or the general electorate. This determination is made based upon, among other things, whether the composition, selection and removal of the employer’s board of directors are determined by law as opposed to the employer’s own governing documents (see *Charter School Admin. Servs., Inc.*, 353 NLRB 394 (2008) (citing *Research Foundation of the City University of New York*, 337 NLRB at 969)). The Library Board’s appointment, removal and composition is determined largely by the Library’s “governing documents” (i.e., its Charter and by-laws) and not by statute.

Thus, even with a publicly elected Board, the Library will not likely be able to satisfy this criterion. The NLRB has previously refused to find an entity to be an exempt “political subdivision” where “the employer was administered by its own board of directors, whose appointment and removal were governed by the employer’s by-laws, not by any law or statutory provisions.” *Id.* The Board of Regents’ limited authority to remove Trustees in instances of willful violations of Board of Regents rules is insufficient to establish the level of responsibility to public officials or to the general electorate required by *Hawkins County*. See *Monroe Free Library* at page 9.

Regarding the second half of the second prong of the *Hawkins County* test [“administered by individuals who are responsible to... the general electorate”], individuals are responsible to the general electorate only if the “the composition of the group of electors eligible to vote for the entity’s governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type and degree of popular political control.” *Enrichment Services Program, Inc.*, 325 NLRB 818 (1998). Individuals are not responsible to the “general electorate” if the electorate is comprised of “only a limited group of voters.” *Id.*

Here, it would appear that the Library should meet this part of the test because the group of people who would be eligible to vote to elect the Board’s Trustees would

PRIVILEGED AND CONFIDENTIAL

likely be the same people who are eligible to vote in the Village's political elections (similar to when the public votes on the members of the Village or school board).

~~Satisfying this part of the second prong of the test should theoretically be sufficient to exempt the Library from the NLRB's jurisdiction as a political subdivision.~~ The existing case law, however, relies more heavily on the other parts of the test than on whether an entity is responsible to the general electorate. *See: Enrichment Services Program* (analyzing whether an employer is responsible to the general electorate and, in addition to this analysis, giving strong consideration to whether the state considers the employer to be a political subdivision: "[the non-profit] was incorporated by private individuals under the State's nonprofit corporation laws, and there was no requirement for the filing of a petition with any governmental body or for the holding of an election to approve its creation"). ~~Given the current political composition of the NLRB, it is unlikely that it will consider the Library to be exempt from the NLRB's jurisdiction because of the inapplicability of the other parts of the *Hawkins County* test. That might change, however, if the political composition of the NLRB changes after the upcoming Presidential election. If that occurs, we will need to revisit our advice.~~

Question 2: "The Board of Trustees would like to know possible financial consequences should the Prevailing Wage law or the Wick's law be made applicable to Association Libraries that have publicly elected Boards of Trustees."

Answer: The Library, as an association library, will not be subject to these laws regardless of whether it has a publicly elected Board of Trustees. The Wick's Law only applies to a "political subdivision," which does not include the Library. (The term political subdivision is defined in General Municipal Law § 100 as "...a municipal corporation, school district, district corporation and board of cooperative educational service.")

Likewise, the NYS Prevailing Wage Law (Labor Law § 220) does not apply to the Library, as that Law only applies to "a state department, agency, board or commission; a county, city, town or village; a school district, board of education or board of cooperative educational services; a sewer, water, fire, improvement and other district corporation; a public benefit corporation; and a public authority awarding a public work contract."³

Even if these laws did apply to the Library, the payment obligations run to the contractors and subcontractors of public works projects, so the impact on the Library would be limited to the increased costs for future projects as a result of the contractors and subcontractors having to pay more to their workers. The obligations that are imposed

³ See <https://labor.nv.gov/workerprotection/publicwork/PDFs/pw39.pdf>; see also N.Y. Labor Law §§ 220 *et. seq.* and 230 *et. seq.*

PRIVILEGED AND CONFIDENTIAL

on the "Department of Jurisdiction" (in this hypothetical, it would be the Library) are procedural in nature (such as, for example, having to obtain a prevailing rate schedule from the Department of Labor's Bureau of Public Work and advising the Bureau of certain details regarding the contractor who was awarded the contract and specific information about the contract itself).

Question 2(a): "Would the Prevailing Wage Laws apply to library employees who are not employed as laborers, workmen or mechanics?"

Answer: No (see #2).

Question 2(b): "Would the Prevailing Wage Law apply to those who are employed as laborers, workmen or mechanics AND were engaged in either construction-like labor or janitorial services?"

Answer: No (see #2).

Question 3: "As a general legal principle, is it more likely for the Westhampton Free Library to be treated under the law as a public entity if it: (a) continues as it has for over one hundred years as a private not-for-profit corporation; or (b) obtains a change in its charter to provide for the public election of its board of trustees?"

Answer: ~~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.~~ Any actions that the Library takes to align itself with the rules and procedures of other public entities would strengthen our potential argument that the NLRB should no longer assert its jurisdiction over the Library because it is an exempt "political subdivision" of the State.

Please feel free to contact me if you have any questions about this opinion.

Very truly yours,



Richard K. Zuckerman

RKZ/alz

cc: Board of Trustees



Thomas Moore [REDACTED]@westhamptonlibrary.org>

Westhampton Free Library Request for Legal Opinion on Effect of Association Library Changing to have a Publicly Elected Board of Trustees

3 messages

Thomas Moore [REDACTED]@westhamptonlibrary.org>
To: "Richard K. Zuckerman, Esq." [REDACTED]@lambbarnosky.com>

Wed, Jan 6, 2016 at 11:55 AM

Dear Mr. Zuckerman:

As you are aware, the Westhampton Free Library has functioned since 1897 as an association library under a charter from the NY State Board of Regents, with the provisional charter becoming a permanent charter in 1902. Under the terms of that charter the Westhampton Free Library is a private corporation and library trustees are selected by sitting trustees.

There has been interest expressed by a few members of the public as to whether it is prudent for the Board of Trustees to change the mode of selection for trustees from a self-selected board, and instead seek permission to change the charter issued by the NY State Board of Regents to the Westhampton Free Library so as to provide for the public election of members of the board of trustees.

According to the Handbook for Library Trustees of New York State, 2015 Edition, some association libraries do now have publicly elected trustees, however, most remain private corporations that appoint their own board of trustees. See *Handbook for Library Trustees of New York State, 2015 Edition, published by the Suffolk County Cooperative Library System at page 80.*

In evaluating the advantages and disadvantages of seeking an amendment to the charter from the New York State Board of Regents to provide for public election of trustees it is important for the Board of Trustees to understand the possible immediate and future ramifications of such a change.

Request for Opinion:

1. The Board of Trustees requests your opinion concerning the legal and practical implications if, upon its change to a publicly elected Board of Trustees, its employees of the library were to determined to be "public employees" under the Civil Service Law.

a. Would employees have to pass a civil service test and be selected on a competitive basis?

i. Would current Westhampton Free Library employees be grandfathered in, or would they be required to take the next competitive test offered by Suffolk County and score in the top three of candidates offered the job?

b. Would library employees lose their protections under the National Labor Relations Act and, instead, be covered only by the New York State Public Employees' Fair Employment Act (Taylor Law) as administered by the Public Employment Relations Relations Board (PERB)?

2. The Board of Trustees would like to know possible financial consequences should the Prevailing Wage law or the Wick's law be made applicable to Association Libraries that have publicly elected Boards of Trustees.

a. Would the Prevailing Wage Laws apply to library employees who are not employed as laborers, workmen or mechanics?

b. Would the Prevailing Wage Law apply to those who are employed as laborers, workmen or mechanics AND were engaged in either construction-like labor or janitorial services?

3. As a general legal principle, is it more likely for the Westhampton Free Library to be treated under the law as a public entity if it

a. continues as it has for over one hundred years as a private not-for-profit corporation

OR

b. obtains a change in its charter to provide for the public election of its board of trustees

Thank you,

Thomas F. Moore
President for the Board of Trustee
Westhampton Free Library

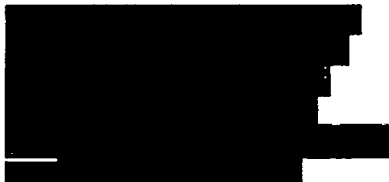
Richard K. Zuckerman [REDACTED]@lambbarnosky.com>
To: Thomas Moore [REDACTED]@westhamptonlibrary.org>

Wed, Jan 6, 2016 at 9:11 PM

We will follow up per our discussion this morning, President Moore.

Rich

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Richard K. Zuckerman



Labor Law - Management - N-pwVq.'k City

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