IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1914

JANE MONELL, *et al.*,

Petitioners,

v.

DEPARTMENT OF SOCIAL SERVICES,
OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATEMENT

In substantial part defendants' argument rests on mischaracterizations of plaintiff's position. Thus, the correctness of this Courts' prior holdings in Moore v. County of Alameda* and Monroe v. Pape** are not here at issue. Compare Brief for Respondents at 7-11, 24, with Brief for Petitioners at 14, 25-27, 37-41, 68. Nor do plaintiffs seek to "render meaningless" the results reached in Monroe and Moore, compare Brief for Respondents at 32 with Brief for Petitioners at 33-34.

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* 411 U.S. 693 (1973).

** 365 U.S. 167 (1961).

I. THE EXISTENCE OF AN IMMUNITY BASED ON GOOD FAITH IS NOT BEFORE THE COURT

The other major argument asserted in defendants' brief is that local governmental entities and officials are immune from liability under §1983 because of their presumed good faith, Brief for Respondents at 32-35. As to this wholly new argument plaintiffs need only state that the question of whether such an immunity does or does not exist was not within the scope of the question as to which certiorari was granted. The only issue presented in that question is whether the various defendants are "persons" when a back pay award is sought against them.***

** Petition at 8.

Whether that question is jurisdictional (as the Court of Appeals conceived of it, Petition, A60, A68) or one going to the remedial authority of the federal courts (as asserted by plaintiffs, Brief at 35) it is clear that the good faith of the defendants and any ensuing immunity is irrelevant to it.

Moreover, an immunity defense sounding in good faith was not included in the Answer, was not previously raised below, and is, therefore, an issue as to which plaintiffs have neither had occasion to conduct discovery nor to brief below. To allow it to be raised at this stage of the litigation would be most unfair, c.f. Federal Rules of Civil Procedure, Rule 8(c).

II. RELIEF IS AUTHORIZED AGAINST DEFENDANT BOARD OF EDUCATION

At the same time that defendant Board of Education has been arguing in this Court that it is "nothing but another department" of the City of New York,* it has been vigorously litigating a serious monetary claim against the City and has, indeed, won a victory against it.**

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* Brief for Respondent at 18.

** Board of Education v. City of New York, 41 N.Y. 2d 535, ____ N.E. 2d _____, 394 N.Y.S. 2d 148, (1977) (Stavisky-Goodman law requires City to increase the proportional share of its budget allotted to the Board of Education; Court of Appeals also reaffirms its view that educational matters are) exempt from the "home rule" provisions of the New York Constitution which define the sphere within which municipal law governs exclusively, Id. at 41 N.Y. 2d 542, 394 N.Y.S. 2d at 154, _____ N.E. 2d_____).

In its Verified Petition in its action against the City, the Board described itself as follows:

> 1. Petitioner Board of Education of the City School District of the City of New York (hereinafter "Board of Education") is a body corporate created by and existing under the laws of the State of New York and <u>charged by the State</u> with the administration of the educational system in the City of New York (hereinafter "City").* (emphasis added)

The truth of the quoted allegations was admitted by the City in the Verified Answer by which it responded to the Board's petition.**

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* Verified Petition, <u>Board of Education of the City School District of the City of New York v. City of New York</u>, Docket No. 12011/76, Supreme Court, New York County, at 2 (July 1, 1976).

** Verified Answer, <u>Board of Education v. City of New York</u>, <u>supra</u> at Para. 1 (July 26, 1976).

In the legislative arena, Mayor Beame, a defendant in this action, has in recent months sought the abolition of the Board of Education and its replacement with a commissioner appointed directly by him.* In explaining his proposal, the Mayor stressed the independence of the Board. In a prepared statement, he said:

> "In theory the board is a representative body, insulated from political pressures, able to dedicate itself exclusively to the welfare of the City's school children and teachers. In reality the board -- <u>insulated only from the City's central government</u> -- is subjected to internal pressures so overwhelming as to be nearly irresistible.**

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* N.Y. Times, May 3, 1977, p.1, col.1.

* Id. at p.72, col. 3 (emphasis added)

The response of the Board of Education to the Mayor's proposal was negative. Said Robert J. Christen, President of the Board:

> "[W]e would most certainly resist the destruction of an <u>independent school system.</u> We have respectfully disagreed with the Mayor before and will continue to do so."***

*** <u>Id</u>. (emphasis added).

It appears that the Board and City have in other forums characterized their relationship in terms quite different from those they have expressed to this Court. Be that as it may, plaintiffs must accept defendant's argument here at face value. Despite the long-held view that the Board of Education is:

> ...not a department of the City government, it is an independent corporate body and may sue and be sued in its corporate name.*

the defendant argues that suit against

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* Divisich v. Marshall, 281 N.Y.170, 173, 22 N.E. 2d 327, 328 (1939). See also, People ex rel. Wells & Newton Co. v. Craig, 232 N.Y. 125, 135, 133 N.E. 419, 422 (1921); N.Y. Education Law §2551.(Footnote con't on page 8a)

the Board under section 1983 is the same as a suit against the City. Only three

- Continuation of Page 8 Footnote

The word "person" in section 1983 of course includes corporations as well as natural persons. Certainly that was the legal meaning of the word in 1871 just as it is today, see, e.g. Pembina Mining Co. v. Penna., 125 U.S. 181, 189 (1888); Beaston v. Farmers' Bank of Del., 37 U.S. (12 Pet.) 102, 134-135 (1838). There is no indication that Congress intended the term to be understood in any but its usual sense in section 1983.

cases are cited for this proposition, one of which holds that the Board is subject to the jurisdiction of the New York City Commission on Human Rights,* the second holding that teachers could be considered City employees within the meaning of a state law requiring them to testify before a Legislative Committee, ** and a third holding that the Board of Education was subject to

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* Matter of Maloff v. City Comm'n on Human Rights, 38 N.Y. 2d 329, 342 N.E. 2d 563 (1975).

* Daniman v. Bd. of Educ., 306 N.Y. 532, 119 N.E. 2d 373 (1954) rev'd on other grounds sub nom. Slochower v. Bd. of Educ., 350 U.S. 551 (1956).

audit by the Commissioner of Accounts of the City of New York.*

These cases establish a proposition which is not in dispute; the Board of Education is subject to some types of control by the City (just as are private entities located within the City borders). In so holding, two of these cases rely on a finding that the Board is "a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the City Treasury."**

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* Matter of Hirshfield v. Cook, 227 N.Y. 297, 125 N.E. 504 (1919).

** 7 Admin. Code of the City of New York § 1150-1.0. Subd. 1. See Daniman v. Bd. of Educ., supra; Maloff v. Comm. of Human Rights, supra.

Plaintiffs have never denied that the Board receives some of its funds from the City. This is not the same as saying that for fiscal purposes the City is the Board, if only because the Board also receives substantial funds from other sources,* a key fact which the court of appeals overlooked.**

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* The total Board of Education budget for FY 1976 was $2,758,169,809. Of this, $810,150,635. was contributed by New York State and $293,617,644. by the federal government. The remainder was provided principally by the City from its tax revenues, Expense Budget [of the City of New York] for the Fiscal Year 1977, published as a supplement to the City Record, Official Journal of New York City (June 16, 1976) at 198.

** The court of appeals said:

> All funds for use of the Board of Education must be appropriated by the city.
>
> - Petition, A49-

This error figured so prominently in the reasoning by which the court reached its decision that it alone requires reversal.

When defendant asserts* (without citing any authority) "such judgments [against the Board] will ultimately be paid by the City's taxpayers out of the City Treasury", it appears to be engaging in sophistry, as the money would come out of the City Treasury only in the sense that the City holds the board's money for the latter and must pay it over upon the latter's order.** No additional appropriation to the Board would be required. Thus, in a case resting upon the distinction for financial purposes between the two bodies, it

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* Brief for Respondent, at 21.

** N.Y. Education Law § 2580; People ex rel. Wells & Newton Co. v. Craig, supra, 232 N.Y. at 137-139.

was held that a suit against the Board could not be dismissed on the ground that the plaintiff failed to comply with statutory notice of claim provisions applicable to claims against the City; nor could the Comptroller of the City refuse to pay an account approved by the Board.***

*** People ex rel. Wells & Newton Co. v. Craig, supra. See also Petition of the Board in Board of Education v. City of New York, supra at ¶ 5 in which the Board alleged:

> 5. Respondent Harrison J. Goldin, as Comptroller of the City, administers the expenditure of City funds and, among other things, has the obligation to make payments to or on behalf of the Board of Education from the funds appropriated to the Board of Education in the annual expense budget adopted by the City.

The truth of this allegation was admitted by the City in its Verified Answer, Id at ¶ 1.

Thus it is not the case that this suit against the Board is, in effect, a suit against the City.

CONCLUSION

For the above reasons the decision of the Court of Appeals should be reversed and the case remanded.

Respectfully submitted,

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