The Role of the Synagogue Board In The Employment of the Rabbi

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The central figure in a Jewish congregation is, of course, the Rabbi. Jewish law regards the Rabbi as the spiritual leader and *mara d'atra* of the congregation; literally, the "master of the place" in matters of Jewish law, ritual, observance and learning. The relationship between a congregation and its Rabbi, while couched in terms of "employment" and "contract" is a unique and sacred one – a partnership and covenant embodied in the lesson from *Pirkei Avot,*1:6, *"aseh l'cha Rav u-k'nei l'cha chaver* ("make for yourself a teacher and acquire for yourself a friend"). In this article, we consider the limitations imposed by New York State law on the role of the Synagogue Board in creating, defining and terminating that relationship.

Rabbis are elected by individual congregations. Typically, the conditions of their election, including, but not limited to their compensation and any limitation on the exercise of their *mara d'atra* authority, are embodied in a written agreement.

Synagogue personnel and contractual decisions are commonly regarded as coming within the province of the Board of Trustees to negotiate and approve. However,

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uniquely among the States, New York by statute and case law *prohibits* synagogue Boards from playing any but a passive role in the "the calling, settlement, dismissal or removal of" the Rabbi, "or the fixing of his salary."

The New York Religious Corporations Law ("RCL") applies to all religious congregations including those organized as unincorporated associations, not-for-profit corporations and religious corporations.[1] RCL § 5, enumerating the general powers of congregational trustees,[2] provides that:

> But ***this section does not give to the trustees of an incorporated church, any control over the calling, settlement, dismissal or removal of its minister, or the fixing of his salary*****;** or any power to fix or change the times, nature or order of the public or social worship of such church. [Emphasis added.]

RCL §200 repeats the same express limitation on Board power, albeit in slightly different language:

> ***The trustees of an incorporated church to which this article is applicable, shall have no power to settle or remove or fix the salary of the minister****....* [Emphasis added.]

These extreme statutory limits on the Board's authority vis-a-vis the Rabbi often come as a surprise to synagogue Board members unfamiliar with them and more attuned to the lines of corporate authority in the business and non-profit worlds. However, the reason for these provisions is clear and they are uniformly enforced by the New York Courts.[3]

In ***Hayes v. Board of Trustees of Holy Trinity Baptist Church of Amityville***,[4] a challenge to the dismissal

of the pastor of a Baptist church, the Court explained that:

> The office of pastor of a congregation is one of dignity, reverence and esteem. Its import to the members of the congregation is of the greatest significance. ***It is one in which the entire congregation shares interest and one in the continuation of which, the entire congregation is entitled to a voice.*** It is not an office to be lightly bestowed or withdrawn. [Emphasis added.]

Later cases have consistently applied the clear statutory rule and protection of congregational, i.e., membership, prerogatives.

In *Kupperman v. Congregation Nusach Sfard of The Bronx*,[5] in which the Court held that a Rabbi was wrongfully discharged when, in the absence of any applicable provisions in the congregation's by-laws, notice of a special meeting of the congregation to approve discharge of the Rabbi by the Board was not given in accordance with the statutory requirements,[6] the Court noted that:

> This Congregation's Constitution and By Laws are silent on the matter of calling or discharging a Rabbi. Concerning the same matter, the only reference in Article 10 of the Religious Corporations Law (Consol. Laws, Ch. 51) under which defendant was incorporated, is found in section 200 which recites '***the Trustees of an incorporated church to which this article is applicable, shall have no power to settle to remove or fix the salary of the minister,*** ** * *'*. In the statute, the term 'minister' is defined as including a duly authorized Rabbi. (Art. I, Sec. 2, Religious Corporations Law.)
>
> The General Provisions of the Religious Corporations Law are contained in Article 2 thereof and section

5 of said Article recites ***the same prohibition against the independent action of trustees with respect to the settling or dismissal of a Rabbi.*** [Emphasis added in part.]

In ***Zimbler v. Felber,***[7] in which an attempt by a Board of Trustees of the Kissena Jewish Center to ignore a membership resolution to re-hire the Rabbi, based on a by-law provision giving the Board power over all contracts involving over $500, was rejected "as a matter of law," the Court held (emphases added):

... [T]he Board of Trustees of a Synagogue is expressly prohibited by statute from exercising any power with respect to the tenure of the Rabbi. Section 5 of Article 2 of the Religious Corporations Law provides, in part, as follows:

" * * * ***But this section does not give to the trustees of an incorporated church, any control over the calling, settlement, dismissal or removal of its minister, or the fixing of his salary*** * * *."

Section 200 of Article 10 of the Religious Corporations Law, specifically applicable to synagogues, reiterates this provision as follows:

"A corporate meeting of an incorporated church, whose trustees are elective as such may give directions, not inconsistent with law, as to the manner in which any of the temporal affairs of the church shall be administered by the trustees thereof; and such directions shall be followed by the trustees. ***The trustees of an incorporated church to which this article is applicable, shall have no power to settle or remove or fix the salary of the minister*** * * * ."

The sole reported decision permitting a synagogue Board to play any role in the "settle[ment], remov[al] or fix[ing] the salary" of a Rabbi is *Saffra v. Rockwood Park Jewish Center, Inc.*,[8] in which the Appellate Division rejected a challenge to the vote of a Board to take no action in regard to the expiration of a Rabbi's contract, ruling:

> The petitioner's argument based on Religious Corporation Law § 200 is unpersuasive. ***While the actions of the Board of Trustees (hereinafter the Board) indicated its desire not to continue the employment of the petitioner, it did not affirmatively terminate his employment. The petitioner's termination occurred solely because the contract expired. Thus, the Board did not usurp the authority of the congregation members.***

Reading the statute and the cases together, one cannot help but conclude that *affirmative* action by a congregational Board which "usurps" the prerogative of the membership, acting in their corporate capacity, to engage and compensate (or decide to no longer engage) a Rabbi, is prohibited, but *passive non-action* (*e.g.,* permitting a Rabbi's contract to expire at the end of its term, as in *Saffra,* supra) is permissible.

Given the prohibition on Board action vis-a-vis the engagement and compensation of the Rabbi, the questions naturally arise: how is a synagogue to manage the "contractual relationships" with its Rabbi[9] and what role, if any, should the Board play?

It is the opinion of the author that the "contractual relationship" between the congregation and its Rabbi should be managed by the *officers* elected by the congregation, the standing or ad hoc committees of the *congregation*, and the congregation itself (all with appropriate respect

for the special relationship with the Rabbi and his/her unique role in a religious community), with the Board playing a supporting role which does not in any way "usurp the authority of the congregation members."

The Role of Elected Officers. Virtually every congregation has a President and other officers *elected by the Congregation* (not by the Board). It is the obligation of these officers (not the Board) to appoint necessary committees (see below), call committee and congregational meetings to address rabbinical contract issues, guide those committees and meetings so that the contract issues are handled with sensitivity and due regard for *derekh eretz* (decent, polite, respectful, thoughtful and civilized behavior) and *shalom bayit* (peace in the house), and faithfully implement the congregation's decisions.

The Role of Congregational Committees. Congregations typically have several "standing committees" (*e.g.,* Ritual, Educational, Finance, etc.) and the President normally has the power to appoint ad hoc committees for special projects and to consider rabbinic contract renewal. The members of these committees are qualified to serve by virtue of their membership in the congregation (not on the Board) and are typically chosen through self-selection (although, in the case of standing committees, not permitted to vote until they have attended a stated number of meetings) or appointment by the President or other officer. The most common example of an ad hoc congregational committee (and the one that best makes the point) is a Rabbinic Search Committee, with members drawn from all "arms" and constituencies of the congregation. All rabbinical contract issues should be handled by such standing or ad hoc congregational committees and not by the Board or any committee of the Board.[10]

The Role of the Congregation. All final decisions having to do with the Rabbi's contractual relationship with the congregation should be made at congregational meetings, preferably special meetings called on specific advance notice of what is to be discussed. The officers calling, organizing and running the meeting should recognize that such a meeting is an exercise in corporate democracy and take great care to treat any dissenting members with fairness. The purpose of such a meeting is not to pit "the congregation" against "the Board" (or the Rabbi), but to permit the congregation to express its collective will in regard to the employment or renewal of the Rabbi's contract, with the Board and officers then implementing the will of the congregation, e.g., in preparing budgets, hiring support staff, organizing programs and providing facilities consistent with the congregation and Rabbi's (presumably) shared religious values and vision of congregational life. Preserving the Rabbi's authority, dignity and, to the extent feasible, personal privacy should be of paramount importance in the process.

All recommendations regarding the Rabbi's contractual relationship with the congregation should be reported via the elected officers or congregational committee chairs. While it is not *per se* impermissible for the Board to make a recommendation to the congregation regarding Rabbinic contractual issues (as Boards typically do in the case of an annual budget), and Board input on Rabbinic contract issues is often traditional and sought by the members – and as much as is seems that the Board should weigh in on this truly "most important of all" decisions – it is precisely for this reason that this is a case of "the less said, the better." A Board which does not take a position (as a Board) on Rabbinic contract issues can never be accused of "usurp[ing] the authority of the congregation members," but will,

instead, promote *shalom bayit* and through its self-restraint earn the respect of the members, enabling it to more effectively carry out their will.

Notes

[1] *See,* RCL § 2-a.

[2] As used herein, "trustees" includes "directors" of congregations organized under the NFPCL.

[3] Professor Emeritus Werner Cohn, of the University of British Columbia, has suggested that "the RLC [sic] sections regarding the appointment of clergy are unconstitutional," citing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 73 S.Ct. 143 (1952). *See,* Cohn, *When Constitution Fails on Church and State: Two Case Studies,* 6 Rutgers J. of L. & Religion 1.2 (2005). But *Kedroff* involved the right to use and occupy a church, not employment or discharge of a minister, and resulted in a declaration that Article 5-C of the RCL, a post-World War II enactment dealing exclusively with the Russian Orthodox Church, was unconstitutional, not the statute generally, nor §§ 5 or 200. And, as explained in the text of this article, all of the post-*Kedroff* New York cases have continued to enforce RCL §§ 5 and 200 as written.

[4] 225 N.Y.S.2d 316, 320 (Sup. Ct. Suff. Co. 1962).

[5] 39 Misc.2d 107, 240 N.Y.S.2d 315 (Sup. Ct. Bronx Co. 1963). *Kupperman* arises out of an interesting fact pattern involving an Orthodox congregation, several congregation meetings, and a Din Torah. Aside from the excerpt quoted in the text, it is notable because the author of the opinion, Justice Wilfred A. Waltemade, concluded that the employment contract between a congregation and a Rabbi is a "mundane," "temporal" agreement, a conclusion with which Justice Martin Rodell subsequently disagreed at great length in an opinion filled with citations to Jewish law, rendered in *Zimbler v Felber*, the next case discussed in the text.

[6] *See* RCL § 194. When the congregation's by-laws provide for a different methodology, the by-laws control.

[7] 111 Misc.2d 867, 445 N.Y.S.2d 366 (Sup. Ct. Queens Co. 1981). While not the subject of this article, Justice Rodell's classic explanation of the role and status of the Rabbi within the synagogue community is a model of Judaic scholarship and well worth reading.

[8] 239 A.D.2d 507, 658 N.Y.S.2d 43 (2nd Dept.), *lv. den.,* 90 N.Y.2d 805, 662 N.Y.S.2d 431 (1997).

[9] ***The statutory restriction on Board power does not extend to a Cantor.*** In *Peo. v. Tuchinsky*, 100 Misc.2d 521, 419 N.Y.S.2d 843 (Dist. Ct. Suff. Co. 1979), the Beth Shalom Center Board of Trustees voted to terminate the Cantor and the President notified the Cantor to vacate his office immediately. Instead, the Cantor returned to the synagogue and attempted to conduct services, leaving only when the police were called. The next month, he again returned to the synagogue to give Bat Mitzvah instruction to a student. The police were again called; the Cantor refused to leave and was arrested. The Court upheld his conviction for criminal trespass, *inter alia,* in the face of an argument that RCL § 200 required the termination decision to be made by the congregation, not the Board. Not so, said the Court. RCL § 200 (and RCL § 5) applies only to a minister "having authority ... to preside over and direct the spiritual affairs of the church or synagogue." Cantors who are not the *mara d'atrot* of their congregations do not "preside over and direct the spiritual affairs" of a synagogue. Hence, they may be "hired and fired" by the Board, but subject to the congregation's ultimate control pursuant to the first sentence of RCL § 200.

[10] While Board members can and often do serve on congregational committees -- and, indeed, may often comprise a majority of the membership on a given committee, reflecting the disproportionately high degree of involvement by Board members in all facets of congregational affairs – great care should be taken to assure that Board members do not dominate any congregational committee dealing with rabbinical contract issues, in order to avoid the appearance of "usurpation" of the Congregation's prerogatives.