Internal Administration and Its Organization

MARIAN G. GALLAGHER

Legislators have less faith in the judgment and business acumen of librarians than they have in that of members of a newer profession, the city managers. While the city manager is answerable to the council and generally is regarded as its business manager, his statutory powers may include the power to make appointments and to exercise general supervision over the administrative affairs of the municipality. The librarian, who stands traditionally in the position of business manager for the library board, usually is clothed with no such statutory grant of powers.

In specifying the lines of control and internal management of American libraries, most statutes give full powers to a board of library trustees. Some library laws do not mention the librarian at all; others take passing notice of him by including, among the powers of the trustees, the power to select "other necessary officers and employees" or to appoint "a suitable librarian and assistants." Even in the statutes which describe the power of appointment in terms more compatible with the dignity of the profession, there is a noticeable absence of reference to the powers and duties of the librarian himself. This has been deliberate. To have given him statutory powers and duties would have placed him, in some respects, beyond the control of the board.

Some think that those who drafted the early library laws expected the library board actually to exercise all of the generally enumerated powers and to perform the generally enumerated duties: to select and purchase books and supplies, to hire and dismiss all of the library's employees, to supervise maintenance. Such an expectation would not have been unfounded in experience: these are the things library boards often did while librarianship was developing as a profession and still must do in the tiny village with the half-day-Monday-Wednesday-and-Friday-library, or, occasionally, in the larger community.

Mrs. Gallagher is Professor of Law and Law Librarian, University of Washington.
when the time comes to dispose of an incompetent librarian. It is
doubtful, however, that even among early legislators any but the
most uninformed and cautious was thinking in terms of actual trustee
management. Then, and now, management and control by the board
meant policy regulation and control of management, the seeing that
things were done, not the doing of them.

The division of administrative and policy-making duties between
librarian and board has universal acceptance. The question of its
legality seldom arises. Disputes growing out of the practice have
been personality and administrative conflicts, not disputes over the
law. Busy-body Board vs. Hamstrung Librarian, or Enlightened Board
vs. Incompetent Librarian: if these were suits at law rather than
political or administrative contests, the librarian, good or bad, would
always lose. As against the board, he has neither legally defined
powers nor legally defined duties. (Civil Service regulations may
modify this general rule, as they may affect many of the situations
discussed in this chapter. The next article treats this more in detail.
Such regulations must be checked for application to specific circum-
stances.)

His role in management, while it has become traditional, is one
based on sufferance. In his relation to the board he is, with a few
exceptions, a legal non-entity. He has such duties as the board, his
conscience, and his fear of public opinion impose on him, and no
more. He has no statutory powers, and the powers he does exercise
he exercises by delegation from the board.

Where statutes are silent, specific definitions of legal powers and
duties sometimes are supplied by court decision. This is not true in
the field of internal management of public libraries, for the simple
reason that conflicts over such powers and duties feature as par-
ticipants the librarian and the board and are resolved, not by court
action, but by negotiation or a parting of company. The librarian
whose management policies are wiser than those of the board and
who has the confidence of the municipal government sometimes can
force the replacement of his tormenters before they exercise (within
the limits of local personnel regulations) their absolute right to dis-
miss him, but it is difficult for a legal non-entity to uphold his non-
existent powers in court.

The library profession, and most trustees, accept without question
the management maxim advising the board to exercise jurisdiction
over policies and the librarian to assume full administrative control

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within the library. Management statistics and logic support the proposition, but directly stated legal justification is more difficult to find. If legal justification is needed, it must be based on the general rules regulating analogous management functions of private, municipal, and quasi-municipal corporations. Application of the analogy is confused by the fact that in some jurisdictions the functions of the public library may be classified as proprietary functions,\(^5\) (for the private advantage of local inhabitants), in some they may be classed as governmental functions,\(^6\) (relating to the general welfare and of interest to the state as well as to the local government) and in some the question has not been decided. The classification of function is important because of the general rule that a municipality acting in its proprietary, as distinguished from its governmental capacity, is held to the same measure of liability under contract or tort law as a private individual or corporation acting under like conditions.\(^7\) Until the matter has been resolved in the particular jurisdiction it is recommended that those concerned with library management proceed with the caution required of the management of a private corporation.

Control of a private corporation usually is vested in a board of directors, whose functions parallel those of the board of library trustees. The relation of the directors to the general manager employed by them is much like the relation of the librarian to the trustees. Like the librarian, the manager is hired to get done the things the board wants done (with the purpose of monetary rather than public-service return), and the directors delegate to him such duties and powers as will allow him to carry on an efficient enterprise.

The authority to delegate management functions is implied from the necessities of efficient administration, but there are certain limits. These limits vary with the source of power or function delegated. A leading authority on the law of private corporations\(^8\) has classified the various kinds of corporate powers, thus aiding the definition of proper management activities and providing a starting point for determining, in disputes between board and librarian, who has the power to administer the library, and in relation to third parties, who has the power to enter into agreements concerning administrative details. He says that:

the corporation is bound where the officer or agent exercises any one of the following powers:

1. Powers expressly conferred by a statute, the charter or valid bylaws. These are called express powers.
2. Powers conferred on particular officers or agents by resolution or other express act of the board of directors, where the powers are subject to delegation by the board. These powers are also classed as express powers.

3. Powers incidental to the express powers.

4. Apparent powers, as hereafter defined.

5. Inherent powers which, however, are in reality one form of apparent powers, i.e., powers apparent from the very nature of the office. Nor is it important whether we call the agent’s authority apparent or implied.

He acknowledges⁹ two other classifications noted by the late F. R. Mechem in his work on Agency:¹⁰

6. Powers conferred by custom or usage.

7. Powers arising in cases of emergency.

Powers expressly conferred by library laws or charter normally belong exclusively to the library board; none of them belongs to the librarian. Those affecting internal administration, with which we are concerned here, most commonly appear in the statutes as powers of supervision over the library’s property, employment and control of staff, control of finances, control of purchases of library materials, supplies, equipment, and the power to adopt such bylaws, rules and regulations as the board may deem necessary for the orderly government of the library. Lest something develop not covered by these functions, those who draft the laws may provide expressly for one which would fall into W. M. Fletcher’s third classification, powers incidental to the express powers: the power to do all other acts necessary for the library’s efficient management. The board’s statutory express powers can be summarized as the power to run the library. This cannot be taken from the board except by amendment of the statute or charter; part of it can be delegated to committees of the board, or to the librarian, but such delegation is a temporary thing, not implying an abdication of power.

Such express functions of the first classification as the librarian can claim generally arise, not from the statutes, but from the board’s bylaws. The extent of his functions varies, of course, with the extent of the board’s faith in him (or, in some cases of overdue amendments, with the extent of its faith in his predecessor) but it is usual to make the librarian executive director of the board’s policies and supervisor of the staff. Such broad terms are in the best tradition of the well-constructed bylaw. To enumerate specific things the librarian
shall do might tend to restrict him to those things only. For example, a bylaw provision giving the librarian the function of selecting and purchasing books for the library would, by general rules of construction, negate his power to select and purchase maps or phonograph records. The defect might be remedied by board resolution, conferring upon him the second class of express power, but this procedure would be subject to the technical objection that simple resolution cannot be substituted for a specified and more exacting method of bylaw amendment. In the absence of either direct amendment or empowering resolution, it might be argued that the power to purchase maps and phonograph records is incidental to the power to purchase books, or that the purchase might be justified as one of the librarian's customary powers. There is even authority for the proposition that a bylaw can be amended by custom or repealed by non-use, or waived. As a practical matter, there is the comforting thought that deviation from strict construction of the bylaws may be unimportant so long as the one for whose protection they are designed (here, the board members, and possibly members of the public) does not complain that his rights have been violated. As an even more practical matter, the amendment of bylaws to substitute general for enumerated powers, although a nuisance (as every meeting attendant knows) is not an insurmountable problem. In the example case this would be the method employed by a board which wanted to remove all possibility of controversy.

Even aside from rules governing amendments of bylaws, there is a plain principle of efficiency requiring functions of like nature to arise from a common source, and not partly from first-thought bylaws reinforced by afterthought resolutions. The board's bylaws should define, in general terms, the powers of the librarian; resolutions should be used only to define methods by which he shall exercise those powers.

There is an important restriction which applies to both classes of express powers, those conferred by the board bylaw and those conferred by resolution or other express act of the board: they can arise only “where the powers are subject to delegation by the board.” Delegation of powers consumes much of the attention of judges who define, and treatise-writers who explain, the law of private and municipal corporations. The statement is sometimes made that powers which involve the exercise of discretion cannot be delegated; this statement is too broad, and is meant to apply to legislative and judicial
powers, not to administrative powers. Even if the statute or charter by failing to provide for committees or executive librarians gives the library board no express power to delegate its functions to others, authority so to delegate is implied from necessity and usage; for, like the directors of private corporations, the library trustees cannot attend to all of the details of library management, and no one expects it of them.\textsuperscript{13}

The extent of delegation permitted is limited, however. First, the board cannot rid itself of the duty to supervise and control the library by delegating all of its functions to the librarian.\textsuperscript{14} The librarian who "runs" the board, who does all of its thinking and makes all of its decisions is not clothed thereby with supervisory power. His actions are at the board’s sufferance, and it can, and probably should, resume direct control at any moment. The board’s promise to its librarian that it will go along with any suggestions he makes about library affairs is a promise the board has no right to make, and one by which it will not be bound if, in an unguarded moment, it does make it.

Second, the board cannot delegate discretionary powers which are vested by statute exclusively in itself.\textsuperscript{15} For instance, control over finances and the power to deal with real property, powers commonly given by statute exclusively to the board, cannot be delegated to the librarian. This does not mean that the board must itself perform all of the ministerial duties connected with these powers, that it must keep the library accounts and sign the vouchers and attend to all of the details preliminary to conveyances and leases. It means merely that it must assume responsibility in the final analysis for what is done.

Delegation of authority to the librarian need not be made by formal resolution of the board. The “other act” mentioned in Fletcher’s second classification of express powers may be informal agreement between the board and the librarian that he shall perform certain duties outside the scope of his every-day functions.

The board, by ratification, also may affirm the legality of action which would be otherwise outside the scope of the librarian’s, or an individual board member’s, or a board committee’s authority. This has nothing to do with delegation of powers, and may apply to some act which is within the non-delegable powers of the board. Thus, while the board may have reserved to itself the power to decide upon extraordinary purchases (say, single items costing more than a specified sum) and the librarian buys a piece of equipment which falls
within the extraordinary class, the board may legalize his contract by ratification, either by formal resolution or simply by failure to disaffirm liability for the purchase price. While the board cannot delegate to the librarian or to a committee or to an individual board member the power to lease property for a library building, yet if the power is exercised illegally by one of them, the board may legalize that act by afterwards adopting it and re-executing the lease in legal form.

The third classification of powers, those incidental to the express powers, is based on the assumption that the power to do a particular act should carry with it the power to do all things naturally and ordinarily necessary to accomplish the main purpose. If the librarian has the express power of staff supervision by board resolution or bylaw, he must have the incidental power to departmentalize staff functions, to assign duties, to transfer department heads. The librarian's incidental powers, like his express and apparent powers, may be limited by board action. Those which would be normally incidental to power conferred by resolution or informal agreement can be limited by the same method; for example the board’s resolution delegating to the librarian the authority to decorate the library with Christmas trees during the Christmas season, would normally carry the incidental authority to purchase tree ornaments, but that power might be eliminated by an economy-fathered provision, or separate resolution, directing use of popcorn strings, or last-year's or borrowed ornaments. Technical interpretation would require an amendment of the board’s bylaws to eliminate powers incidental to bylaw-conferred express powers, but practical considerations make it expedient for the librarian to accept, as limitation of his incidental powers, the informal expression of the board.

The next classifications, apparent powers, inherent powers, and powers conferred by custom or usage, for most purposes may be treated as one. Evidence which tends to show one usually is evidence tending to show the others. Apparent powers are those which the corporate body, by its action or its failure to act, leads others to think it has conferred upon its agent. Inherent powers are those which are incidental to the office. Powers conferred by custom or usage need no further definition. In determining legal responsibility for the library’s internal administration, inherent powers are of little significance, because the librarian has none and the board, while it may have some, does not need to rely upon them for its authority.
Apparent powers and powers conferred by custom or usage have no significance in disputes between the board and the librarian, because the board’s power over the librarian is not apparent or customary but express, and the board can cut off the librarian’s apparent or customary powers whenever it sees fit. These types of power do have some significance in determining the extent to which third persons may rely on agreements made with the librarian.

A librarian who has no express authority from the board to contract for radio publicity under certain conditions may acquire apparent authority to make such arrangements, and, in some cases the board may be held to the agreement. The most important of these conditions is that the transaction occur in a jurisdiction holding that a public library is a proprietary as distinguished from a governmental agency, or at least that the transaction in question was made to further a proprietary function. It already has been noted that this may be difficult to determine. The law is chary of the people’s money, and the weight of authority is that he who deals with an agency charged with a governmental, as against a proprietary function, is bound to ascertain the exact extent of the agent’s power. This would negate the existence of apparent authority, and municipalities have been held not liable on unauthorized contracts even when the subject matter of the contract had been delivered and completely consumed.

If, on the other hand, the contract has been made in a proprietary capacity, the board’s measure of liability is the same as that of a private corporation, and it may be bound by acts of the librarian it has clothed with apparent authority. To be so bound, the board must know, or at least not be guilty of negligence in not knowing, that the librarian is or has been representing himself as having authority to make the agreement. Ordinarily this means that he must have made such representations before he made those bringing about the transaction in controversy, because a course of conduct often must be proved in order to charge the board with knowledge that he was exceeding his express or implied authority; but actual knowledge of the representations leading up to the agreement in question would have the same effect.

The librarian’s air of authority, and the board’s knowledge of it, are not the only facts which must be proved if the radio station is to hold the board to the agreement. The protection of the apparent authority rule is extended only to the innocent third person dealing
in good faith and relying to his injury on the unauthorized representa-
tions. This coupled with the requirement of actual or constructive
knowledge of a librarian’s actions embraces all of the elements of
estoppel, a doctrine which is really a part of the apparent authority
rule. The salesman who was treated to all the staged evidences of
the librarian’s authority to purchase radio time, but who knew that
the librarian actually lacked it, meets neither the good faith nor the
reliance tests, nor would his principal.

The fact of injury, the last element the vendor must prove in order
to bind the board, has not been interpreted uniformly in all juris-
dictions. There seems to be little doubt that the radio station would
have been lured into what the law calls an injurious change of position
if the board sought to disavow the contract at the conclusion of the
series of broadcasts. If the attempted disavowal were to occur before
the broadcasts had begun, before the library had received any benefit
under the contract, proof of injury sufficient to support estoppel be-
comes less certain. Injury should be apparent, certainly, at the point
at which substitute scheduling of an equally attractive program had
become impossible. The weight of authority considers the showing
of a loss of expected profit sufficient (the other elements having been
proved), and it even has been held that the mere deprivation of the
benefit of a contract is injurious, without proof that any profit would
have resulted from it.18

The extent to which corporate boards have been bound by acts
within the apparent authority of their agents is enough to justify some
jitteriness on the part of library trustees. Things are not as bad as
the cases make them seem, however. The board which finds itself
unwillingly bound because it has slept through some of the librarian’s
maneuvers, is not bound forever thereafter by its own negligence.
While it cannot restrict the librarian’s apparently-established authority
by secret resolution or agreement, and there is a question whether it
can do so by specific provision in the bylaws,19 it certainly can do so
by well publicized resolution. The more drastic solution, in all juris-
dictions, is to fire the librarian.

The last classification of powers, powers arising in cases of emerg-
ency, is based on common sense. Cases involving their exercise in
libraries have not reached the appellate courts, but it seems reasonable
to assume that the librarian who calls the nearest plumber when a
broken pipe is flooding the Treasure Room should have the support
of the board, even without express or implied power to arrange for plumbing service, and even in the face of the board’s contract with another.

A discussion of who is the legal boss of the library emphasizes, more than actual practice shows, that the librarian’s power is extremely limited. There are restrictions, too, on the board. Their power to control the library is made quite definite by statute, and legal controversy is more apt to arise over how they exercise their powers than over what powers they exercise. Rules of parliamentary procedure, sometimes erroneously called parliamentary law, establish guides for orderly conduct of their meetings, but some distinction should be made between the rules that are aimed only at orderly conduct and those which actually delineate the difference between legal and illegal action.

Basic to the board’s power is the proposition that it must act as a board at a legal meeting, or its action has no legal effect. The statutes placing power of management in a specified number of trustees contemplate management directed by the judgment, counsel, and influence of all, and the substitution of the management of individual board members acting individually is illegal even when all approve the action taken. One of the best explanations for this rule appears in *Ames v. Goldfield Merger Mines Co.*

“It is fundamental that officers of boards can only act as such constituted boards when assembled as such, and by deliberate and concerted action dispose of the issue under consideration, and that they cannot act in an individual capacity outside of a formal meeting, and a majority of the individual expressions be the action of the board. The law believes that the greatest wisdom results from conference and exchange of individual views, and it is for that reason that the law requires the united wisdom of a majority of the several members of the board in determining the business of a corporation.”

This united wisdom cannot be achieved by proxy. Thus, if less than a quorum of the trustees assemble, they can take no action even though absent members telephone their assent during the meeting, and afterwards sign the minutes. The only safe solution is ratification of the intended action at a legal meeting, with a quorum present.

What constitutes a quorum may be specified in the statute or in the board’s bylaws. Unless there is specific provision to the contrary, a majority of the board’s members constitutes a quorum; and a majority of the quorum may decide any question coming before the
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meeting. Statutory language calling for unanimous consent of the board or a two-thirds vote of the board to accomplish certain purposes has been interpreted generally to mean unanimous vote, or two-thirds vote, of the quorum present at a legal meeting.\(^{22}\)

The requirement that all members be given notice of the meeting is, like the quorum requirement, no mere rule of order, but a basic legal requirement, and it is based on the same reasoning. Boards which by statute or bylaw meet regularly, the time and place being fixed, must concern themselves with this requirement only with regard to special meetings. There is some authority for the proposition that a quorum of trustees meeting specially and acting by a majority of the whole board (not by the usual majority of the quorum) can act validly notwithstanding the fact that notice of the meeting was not given to absent members. The proponents of this theory argue that notice is immaterial since the absent members, even had they been present and voted against the action, could not have changed the result. However, the better view, and the majority view, is that notice must be given to all board members unless the absence or inaccessibility of one or more makes it impossible. Just as "the law believes that the greatest wisdom results from conference and exchange of individual views," so it believes that the lone dissenter, had he been given the opportunity to present his views, might have been able to persuade the others and thereby change the result.

What constitutes sufficient notice is ruled by reason and custom rather than technicality. If a trustee actually is present at the meeting by virtue of accident, the fact that he was not given notice is immaterial. If the notice is sent to him in a way which should assure a reasonable expectancy of his receiving it, and if it contains information about the time and place of the meeting, and gives him sufficient time to arrange to be present (this will depend on the customary habits of the board members) the fact that he fails to read it may be immaterial. Personal notice, by telephone or direct contact, is always sufficient provided it is given a reasonable time before the meeting and the information is complete\(^{23}\) and provided the bylaws do not require some other method.\(^{24}\)

Just as the board may ratify acts of the librarian performed without the scope of his authority, so it may ratify actions by part of its members at an illegal meeting. Ratification is merely the doing over, in a proper way, that which has been attempted in an improper way. The ratification must be made by the board, acting as a board at a
meeting satisfying the quorum and notice requirements, and the ratifying vote must be at least equal to the vote required for the original act. Thus, if two-thirds of the board members at a meeting which was illegal because a lone dissenter was not given notice, approved an action requiring approval of two-thirds, a majority of the board cannot thereafter ratify that action at a meeting otherwise legal. The ratification vote also must be a two-thirds vote.

Other formalities may, by statute or bylaw, be made basic to the board’s power to act, but in the absence of such statutory provision, the board may make decisions and even enter into binding contracts by common consent, without formal resolutions or entry on the minutes. Minutes are evidence of board action and whether particular action is recorded properly, or at all, does not, in the absence of specific provision, affect the validity of that action. The board that fails to keep an accurate record of its proceedings is inefficient, and subject to public censure. It may become a board whose actions are unpredictable and unreliable because its history of precedent and guide for future policy is incomplete. But it cannot deny responsibility for decisions duly made, merely because they are not recorded in the minutes.

References

9. Ibid., sec. 443, pp. 332-333.
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17. Ibid., sec. 29.26, pp. 258-262, n. 17-29.