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COMMENTS

THE APPLICATION AND SCOPE OF THE NEW YORK STATE CONSTITUTIONAL MERIT SYSTEM PROVISION

FLORENCE WEINER SIEGEL, Ph.D.

On January 1, 1895, a new constitution, ratified by the people of New York in November of the previous year, became effective. Among its provisions was the simple declaration that:

"Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive. . . . Laws shall be made to provide for the enforcement of this section."¹

What effect did this amendment have on the existing civil service system? The then existing law only covered positions in the state and municipal services. Did this new provision automatically bring positions to the county and village services under the merit system? If not, when and how did they come under the system? Are there positions in the civil service which are not subject to this constitutional provision? Are there positions in the civil service which are not subject to the Civil Service Law? These are some of the questions the courts have been asked to answer. The answers given by the courts have been instrumental in defining the area of civil service and its direction.

Effect of the Constitutional Merit System Provision on Antecedent Civil Service Legislation

One of the first problems arising under the civil service amendment which the courts had to unriddle was how the amendment affected the application and scope of the existing civil service laws. These laws required that all appointments and promotions to subordinate positions, clerkships, and officers in the state and municipal services were to be made on the basis of merit and fitness determined by competitive examination. If competitive examination was not found practicable, non-competitive examination could be used. All elective officers, laborers, and those whose appointments were confirmed by the Senate as well as others shown to be specially exempted from examination were not subject to the civil service rules.² The courts had reduced the scope of these laws by pronouncing that departments whose heads possessed a constitutional appointing power were also exempted from the rules.³ In 1894, the Legislature passed an act which attempted further to restrict the application of the Civil Service Law. This act excepted veterans from civil

1. N. Y. CONST. Art. V, § 9 (1894), re-numbered Art. V, § 6 (1925).

2. N. Y. Laws 1883, c. 354; N. Y. Laws 1884, c. 410.

3. SIEGEL, *THE DEVELOPMENT THROUGH JUDICIAL INTERPRETATION OF THE CONSTITUTIONAL MERIT SYSTEM IN THE STATE OF NEW YORK* 9 (1949).

service rules in positions where the compensation did not exceed four dollars per day.⁴

Did the civil service amendment which became effective in 1895 change the validity of these acts? This was the query before the court when an honorably discharged Civil War veteran sought a writ of mandamus to compel the police commissioners of Albany to administer the oath of office to him for the position of patrolman. He had not passed a civil service examination, but claimed exemption under the 1894 statute. He further contended that even if he were not exempt from examination by the above statute, the constitutional amendment still would not be applicable because as yet there had been no legislation to enforce the provision. In answer to this, the court said:

" . . . while a provision of the Constitution may need legislation to enforce its principles, and give them affirmative effect, yet, without any legislation, such provision may have a negative force in prohibiting acts in violation of its terms and nullifying statutes repugnant to its principles, and thus, while from lack of legislation its principles cannot be affirmatively enforced, neither, on the other hand, can those principles be lawfully violated, or any statute violating them be enforced."⁵

The court further cited Section 16 Article I of the state constitution which specifically stated that all laws in existence at the time the constitution was adopted would be voided if repugnant to it. The act in question clearly fell under the prohibition of this amendment since it violated the principles of the new civil service provision. The court did add, however, that any law in harmony with the constitution was not abrogated. Therefore, the petitioner's application was denied.

The court also ruled that any former provision of the constitution that bestowed an exclusive appointing power upon any department head was superseded by the new amendment. Thus, the court no longer permitted the superintendent of public works to appoint his subordinates without competitive examination. Now, said the court:

" . . . the Constitution has been changed in such a manner as to include within the scope and operation of the Civil Service Law just such a case as this court then held to be beyond its application.

" . . . there can be little doubt that the obstacles then found to exist to the full operation of the Civil Service Law in every department of the state government have been entirely removed."⁶

The civil service laws passed prior to the enactment of the constitutional civil service provision were still in force. The court had to reiterate this when a civil service board removed the name of a veteran, who had been on an eligible list when he reached the age of sixty. The court cited the civil service laws of 1883 and 1884 which contained the provision that honorably discharged soldiers should not be disqualified on account of age. It went on to

4. N. Y. Laws 1894, c. 717.

5. *Matter of Sweeley*, 12 Misc. 174, 180, 33 N. Y. Supp. 369, 372 (Sup. Ct.), *aff'd*, *People ex rel. Sweeley v. Wilson*, 146 N. Y. 401, 42 N. E. 543 (1895).

6. *People ex rel. McClelland v. Roberts*, 148 N. Y. 360, 364, 42 N. E. 1082, 1083 (1896).

explain that it was the intention of Article I, Section 16 of the constitution to put all new provisions of the constitution in operation through the instrumentality of existing laws.

"It, therefore, follows that the laws enacted prior to the adoption of the Constitution, and in force at that time, became the law of the state, and must be construed as part of the civil service system which the framers of the Constitution intended to provide for."⁷

The court granted mandamus to have the veteran restored to the eligible list since the Board had erred in assuming that the civil service laws enacted prior to the constitutional civil service provision were abrogated by it.

The issue of whether the existing civil service laws were still applicable after the adoption of Article V, Section 9 of the state constitution, came before the court again when a Civil War veteran, who had passed a civil service examination for a position in the State Excise Department, and was later appointed for a probationary term of three months, received notice in writing from the commissioner of the department three days before the term expired that his efficiency and capacity for the work had not been satisfactory. The relator sought mandamus to compel his continued employment on the ground that he had been tested for merit and fitness according to the constitutional mandate and that the old statutes requiring probationary periods were no longer in force. "The act of 1883," answered the court, "so far as it affects the question under consideration, is, and has been, in operation and effect since the adoption of the new Constitution, as well as before."⁸ The court added that the framers of the amendment knew the rules in force and did not intend to supersede them.⁹

The court, in another case, repeated that the existing civil service laws were in effect under the new constitution. In fact, the court pointed out that the new provision only had immediate applicability in the state and municipal services since these were the only jurisdictions covered by the existing statutes. Even though the provision was mandatory, machinery was required to carry out its mandate in civil divisions not already covered by law. The court added that until legislation would be enacted to carry out the amendment in villages, counties and towns it would remain ineffectual there.¹⁰

Thus, the early decisions held that the new amendment when it became effective had, with one exception, the same scope and application as the then existing civil service laws. As a result of the amendment the civil service rules could now be applied to departments whose heads had a constitutional appointing power. For jurisdictions not covered by civil service laws, the amendment needed implementing legislation before it could be carried out.

7. *People ex rel. Kittenger v. Board of Civil Service*, 20 Misc. 217, 219, 45 N. Y. Supp. 46, 48 (Sup. Ct. 1897).

8. *People ex rel. Sweet v. Lyman*, 157 N. Y. 368, 375, 52 N. E. 132, 134 (1898). *Cf. People ex rel. Balcom v. Mosher*, 163 N. Y. 32, 57 N. E. 88 (1900).

9. *People ex rel. Sweet v. Lyman*, 157 N. Y. 368, 377, 52 N. E. 132, 135 (1898).

10. *Chittenden et al. v. Wurster et al.*, 152 N. Y. 345, 354, 46 N. E. 857, 859 (1897).

Any law which contravened the new amendment was invalid. This was the court's view of the application and scope of the constitutional merit system provision during the decade following its adoption.

Extension of the Merit System to Counties, Villages, and Towns

The decision in 1896 by the Court of Appeals in *People ex rel. McClelland v. Roberts*,¹¹ gave the new constitutional provision a broad interpretation and increased the hope of the civil service reformers that the state and all of its civil divisions would soon be under the constitutional mandate. In this case the court declared:

"The principle that all appointments in the civil service must be made according to merit and fitness, to be ascertained by competitive examinations, is expressed in such broad and imperative language that in some respects it must be regarded as beyond the control of the legislature, and secure from any mere statutory changes. If the legislature should repeal all the statutes and regulations on the subject of appointments in the civil service the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal."¹²

In spite of this decision, the Legislature, from 1884, the year in which it made the adoption of civil service rules mandatory upon municipalities, to 1941, made no attempt to extend the rules to the counties, villages and towns. The court had ruled in *Chittenden et al. v. Wurster et al.*,¹³ that the Legislature would have to act before the constitution could be effective in these areas. And again in *People ex rel. Seward v. Sing Sing*,¹⁴ the court implied the same and stated, "It is true that the Legislature has the power to regulate the civil service of villages, but as yet it has not seen fit to do so."¹⁵ The Legislature delegated the task to the State Civil Service Commission. The Commission felt it could only extend the merit system to the subdivisions when it became practicable for them to administer examinations in these jurisdictions.¹⁶ This process moved slowly. In June, 1900, the Commission extended the civil service rules to the counties of New York, Kings, Erie, Richmond and Queens.¹⁷ Again, in 1905, the Commission extended the rules to four more counties, Albany, Monroe, Onondaga and Westchester.¹⁸ Eight other counties were added as a result of a 1909 resolution by the Commission.¹⁹ The following year the Commission extended the rules to seven villages; this marked the

11. 148 N. Y. 360, 42 N. E. 1082 (1896).

12. *Id.* at 366, 42 N. E. at 1084.

13. 152 N. Y. 345, 46 N. E. 857 (1897).

14. 54 App. Div. 555, 66 N. Y. Supp. 1094 (2d Dep't 1900).

15. *Id.* at 558, 66 N. Y. Supp. at 1096.

16. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMM'N 12 (1899).

17. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMM'N 13 (1900).

18. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMM'N 7 (1905).

19. Chatauqua, Nassau, Niagara, Oneida, Orange, Rensselaer, Suffolk, and Ulster. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMM'N 21 (1909).

first inclusion of villages under the civil service rules.²⁰ During 1913 a few other extensions were made. In May of that year the rules were extended to probation officers, and superintendents and employees of tuberculosis hospitals in all counties. Positions in the police departments of all villages and towns in Westchester County were added in June, and in July Bronx County was also included under the civil service rules.²¹ A few other negligible extensions were made. The Commission claimed that it had neither staff, equipment, nor funds to carry a larger load.²² As late as 1937, three-quarters of the state still remained outside of the merit system.²³

This situation became publicized in 1937 by the decision of the Court of Appeals in *Palmer v. Board of Education*.²⁴ Palmer had been employed as a carpenter for six years by the Board of Education when he was discharged. He alleged in his complaint that he had been employed under a contract for the term of one year which began July 1, 1926. This contract was renewed each succeeding year. He was discharged in August 1932 and brought suit to recover the salary he would have earned up to July 1, 1933. The plaintiff had never taken any examination to demonstrate his fitness for the position. His complaint was based on the assumption that the constitutional provision did not apply to the position he held. The court asserted:

“. . . the People of the State have declared in unmistakable terms that merit . . . shall govern appointments and promotions in the public service. . . . No administrative officer may violate the provisions of the Constitution, and no court may sanction a violation. . . . An employment which in its inception violates the provisions of the Constitution is illegal and against public policy, regardless of the good faith of the parties. It is the duty of the appropriate administrative officers of the State or its civil divisions to discontinue an illegal employment when they note its illegality, and if rights based upon such employment are asserted in the courts, the legality of the appointment should not go unchallenged by public officers; but regardless of whether the legality is challenged or not, a court must refuse to sanction such an employment which violates the mandate of the Constitution whenever the illegality becomes apparent to it.

“. . .
“The failure of the Legislature the Civil Service Commission and the Department of Education to provide for ascertainment of merit by examination has led local bodies to assume that appointments might be made without such examinations.

“. . . a person holding an administrative position by appointment or contract of employment without compliance with the provisions of the Constitution, has no legal right which is violated by a discharge. . . . There can be no right to make an appointment or contract which would create a legal right of tenure where the Constitution forbids the creation of such a right.”²⁵

20. Batavia, Canandaigua, Ossining, Peekskill, Port Chester, Saratoga Springs and White Plains. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMMISSION 14 (1910).

21. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMMISSION 25 (1913).

22. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMMISSION 11 (1939).

23. Yarmon, *New York State Extends Merit System*, 30 NAT. MUNIC. REV. 254 (1941).

24. 276 N. Y. 222, 11 N. E. 2d 887 (1937).

25. *Id.* at 226-9, 11 N. E. 2d at 888-90.

This was a far cry from the time when the court held that employees of a union free school district were not subject to the civil service acts.²⁶ The court now said in unmistakable language that even though the Civil Service Commission had failed to extend its jurisdiction, all employees of all the civil divisions of the state had been subject to the civil service provision of the constitution since 1894, the year in which it was created. The court, in its decision, suggested that chaos might occur if the situation were not remedied.²⁷ The Legislature of 1938 was familiar with the *Palmer* decision, but it postponed action in the expectation that the constitutional convention which was scheduled to meet later in the year would act.²⁸ However, the delegates at the convention could not agree on any amendment to the civil service provision.²⁹

At the end of 1938 this situation became acute. Several employment contracts, agreed upon in good faith, were found to be invalid. In many counties and in almost all towns, villages, special districts and school districts, any taxpayer was able to challenge the right of employees to their positions. Several taxpayers' actions of this kind were instituted or threatened.³⁰ Some individuals who had held positions for many years but who had never taken civil service examinations were dismissed and given no sympathy by the courts.³¹ For example, in one instance, the petitioner had served as patrolman in the village of Freeport without having passed a competitive examination and he was later dismissed. He had been appointed before 1936, the year in which the civil service rules were extended to cover village police. Nevertheless, the court upheld the *Palmer* ruling by stating:

"There can be no doubt that villages are included within the purview of section 6 of article 5 of the Constitution, because it specifically so provides. Nor can there be any doubt that the position of village policeman was and still is within the competitive class of the civil service. . . . Accordingly, it was the duty of the

26. *People ex rel. Burlingame v. Hayward et al.*, 19 App. Div. 46, 46 N. Y. Supp. 1083 (4th Dep't 1897); *People ex rel. McAvoy v. School Board*, 43 App. Div. 613, 60 N. Y. Supp. 1145 (2d Dep't 1899).

27. In *Matter of Miller v. New York*, 279 N. Y. 74, 17 N. E. 2d 773 (1938), the court stated: "Counties are civil divisions of the State and their employees are included within the constitutional provisions and also within the civil service statutes." *Id.* at 78, 17 N. E. at 775.

28. FIRST REPORT OF THE NEW YORK STATE COMMISSION ON EXTENSION OF THE CIVIL SERVICE, 20 N. Y. LEG. DOC. NO. 92 at 8 (1940).

29. 4 RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK (1938). See also SIEGEL, *op. cit. supra* note 3, at 17.

30. 20 N. Y. LEG. DOC. NO. 92 at 8 (1940).

31. In *Matter of Neary v. O'Connor et al.*, 173 Misc. 696, 18 N. Y. S. 2d 634 (Sup. Ct.), *aff'd*, 260 App. Div. 986, 24 N. Y. S. 2d 134 (4th Dep't 1940) the court held that since the petitioner had not been appointed in accordance with the constitutional mandate, he was subject to removal at will and the law offered him no protection. Cf. *Matter of Rotheim v. Patterson*, 172 Misc. 353, 15 N. Y. S. 2d 247 (Sup. Ct. 1939); *Matter of Gainey v. Village of Depew et al.*, 257 App. Div. 918, 12 N. Y. S. 2d 775 (4th Dep't 1939), *appeal dismissed*, 282 N. Y. 678, 26 N. E. 2d 809 (1940).

Legislature and the Civil Service Commission to provide for . . . examination. And their failure so to do does not make the petitioner's employment herein legal. . . .

" . . .
 "Everyone concerned seemed to be of the opinion that the rules . . . would not apply until expressly extended. . . . That they were all wrong . . . can now furnish no aid or comfort to this petitioner. . . ." ³²

It became imperative that the Legislature be the one to act. For the court stated that it had no power to compel the extension of the civil service rules because Section 10 of the Civil Service Law requires the Governor's concurrence to any change in the rules. Since this is a discretionary act on his part, the court could not compel its performance. The court did say that the petitioners, in another proceeding, if they were found to be entitled to take competitive examinations could compel the holding of such an examination. In other words, the right could not be barred by a mere refusal to extend the rules because the constitutional mandate applies to all civil divisions of the State without requiring any further action by any State official.³³

Governor Lehman, in his annual message to the 1939 Legislature, called attention to this situation and advised that a commission be appointed to study the problem and make recommendations to remedy it.³⁴ Legislation was enacted which authorized the creation of such a commission.³⁵ The Commission under the chairmanship of Emerson D. Fite began its task in August, 1939.³⁶ On February 20, 1941, it presented its recommendations together with proposed legislation to the Legislature. The job was a tremendous one, for in the Commission's own words it had "to advise and recommend an effective and practicable method of administering the Civil Service Law in forty-four counties, about nine hundred towns, about five hundred villages, about eight thousand school districts, and several thousand special districts to which Civil Service rules have never been extended."³⁷

The bill proposed by the Commission was approved by the Legislature that

32. *Matter of Rotheim v. Patterson*, 172 Misc. 353, 356, 15 N. Y. S. 2d 247, 250 (Sup. Ct. 1939).

33. *Matter of Booker et al. v. Reavy et al.*, 281 N. Y. 318, 320, 23 N. E. 2d 9, 10 (1939). In *Matter of Madden et al. v. Reavy et al.*, 284 N. Y. 418, 31 N. E. 2d 756 (1940), the court refused to grant mandamus to compel the Civil Service Commission to hold a competitive examination for, and place into the classified civil service, positions of clerical, maintenance and cafeteria employees of Union Free School District No. 1, on the ground that there was no need for judicial action since the problem was being considered by a legislative committee. Even though a delay had occurred in extending the benefits of the civil service law to the petitioners, the court held that the delay was not unreasonable because the problem involved such a mass of administrative detail.

34. PUBLIC PAPERS OF HERBERT H. LEHMAN, FORTY-NINTH GOVERNOR OF THE STATE OF NEW YORK, Fourth Term, at 34 (1942).

35. N. Y. Laws 1939, c. 862.

36. 20 N. Y. LEG. DOC. NO. 92 at 9 (1940).

37. SECOND REPORT OF THE NEW YORK STATE COMMISSION ON EXTENSION OF THE CIVIL SERVICE, 13 N. Y. LEG. DOC. NO. 47 at 7 (1941).

same year and became Section 11-a of the Civil Service Law. The act permitted the counties to choose from among three types of civil service administration already in operation in the state. They could elect to set up their own county civil service commission, or choose a county personnel officer or else be under the administration of the State Civil Service Commission. The choice had to be made by July 1, 1942 otherwise they would automatically fall into the latter category. The law was to go into effect in each county by July 1, 1943. The cities were given the privilege of changing to any of the three designated types of administration, if they so desired. All school districts were to be under the jurisdiction of the State Commission.³⁸ Astonishingly enough, it took almost fifty years to effectuate the basic constitutional requirement that all appointments and promotions in the civil service of the state, and of all its civil divisions "be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive."³⁹

The constitutional merit system provision applies to all appointments and promotions in every department of the civil service of the state and its subdivisions. This provision has been chiefly administered through the Civil Service Law.⁴⁰ This law has the same scope as the constitutional provision with such exceptions as the law itself specifies. These exemptions include:

" . . . all elective officers, all offices filled by election or appointment by the legislature on joint ballot; all persons appointed by name in any statute; all legislative officers and employees, all offices filled by appointment by the governor . . . except officers and employees in the executive office; all persons appointed by the secretary of state subject to the approval of the governor; all election officers, the head or heads of any department of the government, all persons employed in or who seek to enter the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college. . . ."⁴¹

Although these positions are exempt from the scope of the Civil Service Law they are not exempt from the scope of the constitutional provision, since the latter applies to all positions in the civil service. Therefore, if competitive examination is practicable for determining the merit and fitness of applicants

38. N. Y. Laws 1941, c. 885. The New York State Civil Service Commission reported, (at p. 9), on the form of civil service administration adopted by the counties. All but eight of the fifty-seven counties under the Fite Law voted for county civil service commissions. Chautauqua, Essex, Rockland, Sullivan and Tompkins counties chose to come under the jurisdiction of the State Commission while Erie, Hamilton and Westchester Counties selected the personnel officer type of administration.

39. N. Y. CONST. Art. V, § 6. In *Matter of Goss v. Rice et al.*, 160 Misc. 698, 290 N. Y. Supp. 449 (Sup. Ct. 1936), the court ruled that the executive officer and employees of the Westchester County Alcoholic Beverage Control Board were subject to the civil service rules because, "The administration of the Alcoholic Beverage Control Law by a local board is a service of the State, and in any event a service of a civil division of the State, within the express meaning of . . . the Civil Service Law." *Id.* at 701, 290 N. Y. Supp. at 452.

40. N. Y. Laws 1909, c. 15.

41. N. Y. CIVIL SERVICE LAW, Art. 2, § 9.

for these positions, it must be used. By the same token, if competitive examination is impracticable for a position covered by the Civil Service Law, it need not be filled competitively.⁴²

"Exemptions" to the Constitutional Provision

The courts have ruled that there are situations where the provision is not applicable. This, states the court, does not contradict the statement that the provision applies to all positions in the civil service. In effect, the courts, at times, have been called upon to determine whether a certain group of duties and responsibilities constitutes a position in the civil service. For example, in 1897, the Appellate Division ruled that persons working as janitors in armories of the National Guard were not covered by the constitution. The basis for this decision was that these positions belong to the military service of the state rather than its civil service.⁴³

In a series of cases which began in 1908, the court has pronounced that Article V, Section 6 of the state constitution applies only to those who are engaged exclusively in the public service and does not extend to public officers, who, as to all or a part of their duties are engaged in the services of a superior officer.

In *Matter of Flaherty v. Milliken et al.*,⁴⁴ the Sheriff of Kings County applied to the court for a peremptory writ of mandamus to compel the Civil Service Commission to certify the payrolls of his office. The Commission had refused to do so on the ground that the assistant deputy sheriffs, jail keepers, van drivers and other employees of the sheriff's office have been appointed in violation of the civil service rules. The court had to decide whether the sheriff's appointees were in the service of the county or in the personal service of the sheriff. If the employees were not in the service of the county but in the service of the sheriff, their positions would not be governed by the constitutional provision. The court decided that some of the employees were in the sheriff's service and others in the service of the county; the determining factor was whether the duties of the position were of a criminal or civil nature.

". . . the relation which the appointees of the sheriff bears to that officer in the discharge of the criminal duties of the office differs essentially from that borne in the discharge of the civil duties of the office . . . all appointees of the sheriff whose duty relates exclusively to the functions of the sheriff's office in criminal matters should be considered in the service of the public and not of the sheriff personally, and are subject to the civil service regulations."⁴⁵

The van drivers whose duties related solely to the transportation of criminal prisoners had to be appointed in accordance with the civil service rules. However, jail keepers and matrons, whose duties related to both civil and

42. See SIEGEL, *op. cit. supra* note 3, c. V.

43. *Matter of Goedal et al. v. Palmer*, 15 App. Div. 86, 44 N. Y. Supp. 301 (2d Dep't 1897).

44. 193 N. Y. 564, 86 N. E. 558 (1908).

45. *Id.* at 569, 86 N. E. at 560. *Cf. People ex rel. Scanlon v. Milliken*, 193 N. Y. 675, 87 N. E. 1125 (1908).

criminal prisoners were to be exempt from the civil service rules along with the assistant deputy sheriffs. The court in effect held that the constitutional merit system provision was only applicable to public officers who were exclusively in the service of the public and it did not apply to public officers, whose duties, in whole or in part, were in the service of an individual. The writ applied for by the sheriff was therefore granted in part.

The court twice reaffirmed the *Flaherty* decision in 1916. In one instance it held that the duties of a jury clerk are the duties of the sheriff and the jury clerk is an agent of the sheriff and not of the county. Therefore, the position does not come under Article V, Section 9 (now 6) of the state constitution.⁴⁶ In the other case, the court declared that an elevator operator, employed by the sheriff, who is required at times in the performance of his regular duties to have the sole custody of prisoners detained under civil process, is not subject to civil service rules. Even though his duty as custodian of prisoners is only incidental to his duties as an elevator operator, he is still the sheriff's agent and therefore outside of the constitutional provision.⁴⁷

The method used by the Board of Education of the City of New York for the maintenance of public school buildings was directly challenged in 1945. The board uses what is known as the indirect custodial system and was accused therein of violating Article V, Section 6 of the state constitution. The indirect custodial system is one in which a custodian engineer is appointed from a civil service list for each school. He is paid a lump sum and has the exclusive right to employ and dismiss cleaners and helpers who aid him in his work and who are paid from the lump sum given him. The board exercises no control over these helpers. The court in upholding the constitutionality of this system asserted that the mere fact that an individual performs service in or upon a public building does not make him a civil servant.

" . . . He becomes a civil servant or employee only when he furnishes his services or labor for compensation directly paid to him by the State, civil subdivision or Board, or for pay fixed by the State, subdivision or Board when they control his selection.

" . . .
"The foregoing constitutional provision becomes applicable to the action of the Board only when it sees fit to have work done or labor performed by individuals directly employed by it, or where it retains control of the compensation to be paid to individuals doing the work, or of their selection or the conditions of their employment. . . . Under the indirect system here attacked the individuals are hired by the custodians as their helpers. They are not approved by or directly employed by the Board, nor is control retained by it of the number, compensation, or terms of employment of these individuals and, therefore, they are not 'in the civil service of the state.' They are employees of the custodians."⁴⁸

46. *Matter of Grifenhagen v. Ordway et al.*, 218 N. Y. 451, 113 N. E. 516 (1916).

47. *Matter of O'Brien v. Ordway et al.*, 218 N. Y. 509, 113 N. E. 518 (1916).

48. *Beck v. Board of Education et al.*, 268 App. Div. 644, 648, 52 N. Y. S. 2d 712, 715 (2d Dep't 1945), *aff'd*, 295 N. Y. 717, 65 N. E. 2d 426 (1946).

The custodian's dual role of public employee and employer-contractor is not unlike that of the old sheriff. The court in 1945 was still applying the *Flaherty* rule.

Another suit tried to prevent the extension of the indirect custodial system to positions formerly filled from civil service lists. The Board of Education had decided to place elevator operators, who were civil service employees, under the indirect system. The Supreme Court of Kings County held that "the transference of positions from civil service to non-civil service is . . . contrary to the Constitution."⁴⁹ The court further said that since practice has found it practicable to hold examinations for the position it should remain subject to the civil service rules. However, the Appellate Division, on the strength of the *Beck v. Board of Education*⁵⁰ decision, reversed the Supreme Court. The former held that the board has the power to employ the system which it considers to be the most desirable.⁵¹

The contention of some that the civil service amendment does not apply to fixed term positions was denied by the court as early as 1910.⁵² However, a person holding a fixed term position has no assurance that he will automatically be given another term.

The courts have in some instances permitted government agencies to engage in employment contracts. However, certain conditions must exist before the courts will condone the practice. They have been careful in seeing that the employment contract is not used as a means of circumventing the Civil Service Law and the constitutional provision.

In one instance the Board of Education of the City of New York created a position of "medical consultant" and proceeded to fill it without resorting to the civil service regulations. The board had made a contractual agreement with a physician in order to circumvent the eligible list in existence for the same position under the title of "medical examiner." When the board's action was challenged the court condemned it saying, "To justify the resolution . . . it must appear that the services to be rendered are 'of an occasional and exceptional character' and that the 'limit of time or compensation' are not subject to 'definite estimate.' The record here did not indicate that these conditions existed."⁵³

The constitutional provision does not cover positions whose duties are concerned with transient matters. For instance, several persons who were on a

49. *Guastoferrri v. Board of Education*, 183 Misc. 158, 161, 47 N. Y. S. 2d 561, 564 (Sup. Ct. 1944).

50. 268 App. Div. 644, 52 N. Y. S. 2d 712 (2d Dep't 1945), *aff'd*, 295 N. Y. 717, 65 N. E. 2d 426 (1946).

51. *Guastoferrri v. Board of Education*, 270 App. Div. 946, 62 N. Y. S. 2d 257 (2d Dep't 1946).

52. *Matter of Phillips v. Milliken*, 139 App. Div. 365, 124 N. Y. Supp. 60 (3d Dep't 1910), *aff'd*, 200 N. Y. 521, 93 N. E. 1129 (1910). *Cf. Matter of O'Keefe et al. v. Clark et al.*, 238 App. Div. 175, 264 N. Y. Supp. 299 (3d Dep't 1933).

53. *Spencer v. Ryan et al.*, 237 App. Div. 50, 52, 260 N. Y. Supp. 798, 800 (1st Dep't 1932), *aff'd*, 262 N. Y. 600, 188 N. E. 82 (1933).

preferred eligible list in the City of New York for the position of "Engineer Inspector Grade 3," applied for an order to compel the Triborough Bridge Authority to employ only persons who were on that list for construction work on the Bronx-Whitestone Bridge. The TBA had given the work out on contract; the petitioners claimed that this violated Article V, Section 6 of the state constitution. The court asserted that the constitution does not apply to such situations, but is applicable in connection with the conventional and stable duties of the functionaries of civil government. "The construction of a bridge is to be distinguished from maintaining it after its completion. The latter would concededly be a stable and continuing function which would call for employment of civil service employees whereas the former is merely temporary or transient, and best accomplished by direct contracts."⁵⁴ The court further bolstered this position by adding that the bridge was being financed by private capital and that the TBA was given power to make such contracts.

In another case the petitioners maintained that the selection of paid assistants for the purpose of helping the Civil Service Commission prepare and rate examinations for the position of master plumber was illegal where such assistants were selected without competitive examination. The court refused to sustain this contention. These assistants were selected to perform one job: to advise the Commission on qualifications for master plumbers, advice which it could ignore. Furthermore,

" . . . since the positions are of a temporary nature and not of the permanent character contemplated by the provisions of the Constitution relating to appointments in the civil service, there appears to be no merit in the contention that the statute is illegal insofar as it authorizes selection to be made without competitive examination."⁵⁵

In *Matter of Turel et al. v. Delaney et al.*,⁵⁶ the legality of a contract, by which the Board of Transportation of the City of New York retained a physician to supply the medical and surgical care which the Workmen's Compensation Law required the board to provide for its workmen on the city-owned railroads, was contested. The physician employed several assistant physicians and nurses. Neither he nor his employees had taken any examination for the positions involved. The petitioners in the case were on the "Police Surgeon" eligible list and were of the opinion that this list should be used to fill these positions. The court upheld them by pointing to the command in the State Constitution.

" . . . that merit and fitness shall be the basis of the choice of public servants and that the test of such merit and fitness shall be competitive examinations where . . . practicable.

54. *Meadows v. Moses*, 44 N. Y. S. 2d 697, 698 (Sup. Ct. 1938).

55. *Matter of Benedetto et al. v. Kern et al.*, 167 Misc. 831, 838, 4 N. Y. S. 2d 844, 851 (Sup. Ct.), *aff'd without opinion*, 255 App. Div. 753, 7 N. Y. S. 2d 227 (1st Dep't 1938), *aff'd without opinion*, 279 N. Y. 798, 19 N. E. 2d 92 (1939). The statute in question is contained in N. Y. Laws 1936, c. 610.

56. 285 N. Y. 16, 32 N. E. 2d 774 (1941).

"Salaries of persons employed by the Board of Transportation are paid out of the revenues derived from operation of the city-owned railroads. Appointments and promotions to any class or classes of employment in the operating division of the Board are fundamentally subject to the provisions of the Civil Service Law."⁵⁷

A practice of the Corporation Counsel of the City of New York for fifty years was questioned by the municipality's Civil Service Commission in 1941. The Corporation Counsel at times uses photographic exhibits as evidence during trials. These photographs are purchased from independent commercial photographers who specialize in legal and court photography. The commission said that there was a civil service eligibility list for the position of photographer which should be used for this purpose. The commission insisted that the photography companies were in effect employees of the city. The court, however, found the list to be entirely inappropriate here since it was based upon full-time employment at a fixed annual salary and it did not contemplate that the photographer would use his own materials and equipment. Furthermore, the constitutional mandate was not being violated because there was no personal service involved. "The relationship was at all times that of vendor and purchaser. There was no hiring, no appointment, no employment, no relation of master and servant. . . ."⁵⁸

The court was careful to point out that this was not a case where a city agency sought to evade the civil service law by engaging in employment contracts.⁵⁹ The law department was free to continue this practice or, if it preferred, it could in its discretion establish a position of photographer in its department. But under the prevailing conditions, the civil service mandate of the constitution was not violated.

In 1943 the court upheld a resolution adopted by the Board of Education for the purpose of awarding contracts to private architects in order to draw plans for certain projects which constituted a portion of the City of New York's Post War Works Program. This resolution had been challenged by individuals who wished the board to utilize the services of employees in the Bureau of Construction. Subdivision 4 of Section 451 of the Education Law, which created the bureau, provides that only in special cases, approved by the Board of Estimate, may drafting be performed by other than civil service employees. The court held that the Post War Works Program was a special case, one well justified, since its objective was to provide an easy transition from war to peace. Furthermore, the resolution would not be detrimental to

57. *Id.* at 20, 32 N. E. 2d at 776.

58. *Matter of Drummond et al v. Kern et al.*, 176 Misc. 669, 672, 27 N. Y. S. 2d 332, 335 (Sup. Ct. 1941).

59. Back in 1892, the Court of Appeals, in *Peck v. Belknap*, 130 N. Y. 394, 29 N. E. 977 (1892), restrained the mayor of Rochester from carrying out a contract of employment with an individual who was to perform services relating to the city's street lights. This individual had not passed the examination required by the Civil Service Law for the position, the duties of which were already enumerated. The court held that the duties of an ordinary clerk could not be transformed into those of an independent contractor and therefore the contract herein was invalid.

the merit system since its long range effect would be to maintain continued employment for civil service employees in the Bureau of Construction.⁶⁰

In another proceeding an engineer on a preferred eligible list and an association of competitive civil service employees in the architectural and engineering service tried to compel the cancellation of several contracts awarded to private engineering and architectural firms by the Board of Estimate. These contracts were for the public improvements contemplated in the Post War Works Program. The court in upholding these contracts said that it has always been the city's practice to call in private firms with specialized professional skill.

" . . . This long-standing practice constitutes a practical construction of the Constitutional provision dealing with civil service. Whenever the power to award such contracts has been challenged, courts have approved the practice.

"Moreover, the award of contracts for architectural and engineering work does not constitute a method for making 'appointments' in the 'civil service' of the City. The provisions of the contracts awarded do not create any employer-employee relationship but a contractual one between an independent contractor and the City. The contracts call for specific studies, plans and specifications. The City does not control the office organizations of such firms, has nothing to do with the persons they employ, does not prescribe hours of employment, and is not their sole client."⁶¹

Furthermore, said the court, the services contracted for were for a temporary or transient program and not for the conventional and stable duties of government. This case differs from the *Turel* case because in the latter the Board of Transportation could have recruited persons from civil service lists whereas in the present case the work was highly specialized and only for a temporary period.

The courts have permitted agencies of the state or its civil divisions to contract for services with private individuals or firms. In these situations, the contractor, not the agency, must supervise and compensate the persons performing work under the contract. Such contracts cannot be used for the purpose of circumventing the constitutional civil service provision and statutes created in pursuance of it.

The Emergency Relief Law of 1931⁶² also precipitated several actions in which the court had to interpret the scope of the civil service amendment. Section 19 of the law authorized the appointment of persons from relief rolls to positions in emergency relief agencies without regard to the Civil Service Law and existing eligible lists. In 1935 the court upheld this section

60. *Matter of Hardecker et al. v. Board of Education*, 180 Misc. 1008, 44 N. Y. S. 2d 855 (Sup. Ct.), *aff'd without opinion*, 266 App. Div. 980, 44 N. Y. S. 2d 959 (2d Dep't 1943), *aff'd without opinion*, 292 N. Y. 584, 55 N. E. 2d 49 (1944).

61. *Matter of Civil Service Technical Guild et al. v. LaGuardia et al.*, 181 Misc. 492, 494, 44 N. Y. S. 2d 860, 862 (Sup. Ct. 1943), *aff'd without opinion*, 267 App. Div. 860, 47 N. Y. S. 2d 114 (1st Dep't), *aff'd without opinion*, 292 N. Y. 586, 55 N. E. 2d 49 (1944).

62. N. Y. Laws 1931, c. 798; amended Laws of 1933, c. 259.

as an emergency measure saying that lack of funds prevented additional appointments from civil service lists. The court found "No clear and substantial conflict between the practice here followed under the Emergency Relief Act and the constitutional provision. . . ." ⁶³ Because the latter applied to the "conventional and stable duties of the functionaries of civil government." ⁶⁴ Whereas the former was a temporary, emergency measure.

However, once the emergency was over the court quickly ruled that persons wishing to continue in these positions would have to submit to competitive examination. ⁶⁵ In other words, the court said that these individuals were never actually admitted to the "civil service." And again in 1937, the court protested:

" . . . Whatever liberality was allowable in the filling of these positions in 1931 to enable the local bureaus to function does not justify the continuance from year to year, under the guise of emergency, of the employment of thousands in violation of this civil service principle and constitutional mandate." ⁶⁶

On July 1, 1937, the Emergency Relief Bureau became the Department of Welfare. Supervisory positions in the department were filled by holdovers who had not passed competitive examinations. In 1939, a suit was brought by thirty-five persons employed as social investigators in the department to compel their promotion to supervisory positions. The petitioners had passed competitive examinations for their present positions and also for higher grade supervisory positions. The court upheld them by saying that since there had been a competitive list for supervisors, the petitioners should have been appointed instead of continuing the employment of temporary employees.

" . . . The persons upon these lists cannot be excluded from the positions to which they are entitled merely because they are filled by social investigators who have never taken the competitive examinations. . . . The requirement for competitive examination cannot be evaded by an examination to one who has held a position for years in violation of the law, giving him a rating for experience thus gained over and above one who *had* taken the competitive examination and should have been appointed in the first place. This is permitting an experience acquired in violation of law to supersede existing competitive lists. We do not mean to say that in the examinations which have been held for all these many persons who have been temporarily appointed under these welfare laws that experience is not to count and

63. *Matter of Social Investigator Eligibles Ass'n v. Taylor et al.*, 268 N. Y. 233, 238, 197 N. E. 262, 264 (1935).

64. *Id.* at 237, 197 N. E. at 264.

65. *Aversa v. Finegan et al.*, 164 Misc. 162, 298 N. Y. Supp. 618 (Sup. Ct. 1936), *aff'd*, 250 App. Div. 752, 295 N. Y. Supp. 768 (1st Dep't), *aff'd without opinion*, 275 N. Y. 512, 11 N. E. 2d 320 (1937).

66. *Matter of Kraus et al., v. Singstad et al.*, 275 N. Y. 302, 308, 9 N. E. 2d 938, 940 (1937). Lehman, J., in a dissenting opinion insisted that Article V, Section 6 of the State Constitution applies "to regular and stable positions in the State service. The constitutional provision becomes unreasonable and destructive of good government if it precludes the Legislature from providing speedy and efficient remedy in emergency and immediate relief for urgent needs, through persons employed by the State temporarily without appointment to any position in the 'civil service.'" *Id.* at 314, 9 N. E. 2d at 943.

be given a proper rating, but what we do say is that such experience cannot work against those who were upon competitive lists and should have been appointed originally."⁶⁷

The application and scope of the constitutional merit system provision was most accurately depicted by the court when it stated:

"The constitutional mandate is clear, and includes within its scope appointment to every position in the civil service of the State which is not excluded by some other provisions of the Constitution. . . . Even after the division of the civil service 'into the unclassified service and the classified service,' both divisions were still part of the 'civil service' in which the Constitution commanded that appointments and promotions shall be made according to 'merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable shall be competitive,' and the Legislature remained under a duty to provide other legislation for competitive examination in the unclassified service where such examination is practicable."⁶⁸

Although the Legislature has found that competitive examinations are impracticable for most of the unclassified positions, we should not commit the error that these positions are excepted from the constitutional mandate. As the State Commission has stated:

". . . the basic constitutional requirement of merit and fitness in appointments and promotions applies to all parts of the Civil Service in New York State; it applies to state, county, city, town and village services; it applies to all positions in such services; this basic constitutional requirement of merit and fitness applies to exempt, to unclassified, to labor, to non-competitive positions, to temporary employment as well as to competitive positions."⁶⁹

Employees of contractors performing work for a governmental unit do not hold appointments or promotions in the civil service; therefore, they are subject to neither the civil service rules nor the constitutional civil service amendment. These are not exemptions to Article V, Section 6 of the State Constitution and the Civil Service Law because they are not the appointments contemplated by these enactments. These provisions contemplate services performed for the government in relation to its stable and conventional duties. In addition, the salary, selection, and working conditions of persons performing these services must be controlled by the state or one of its civil divisions before their appointments can be subject to the constitutional provision and the Civil Service Law.

67. *Matter of Ackerman et al. v. Kern et al.*, 281 N. Y. 87, 97, 22 N. E. 2d 247, 251 (1939).

68. *Matter of Carow v. Board of Education* 272 N. Y. 341, 346, 6 N. E. 2d 47, 49 (1936). *Cf. Matter of Bemis v. Board of Education et al.*, 171 Misc. 957, 958, 14 N. Y. S. 2d 182, 184 (Sup. Ct. 1939). See SIEGEL, *op. cit. supra* note 3, c. V.

69. ANNUAL REPORT OF THE NEW YORK CIVIL SERVICE COMM'N 9 (1935).