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Municipal Corporations—Civil Service

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cation, and interpretation of the collective agreement itself, but also any dispute which might arise in respect of matters not provided for in the agreement.[13] In other words, the parties intended to include "any dispute . . . with reference to any matter not provided for in this contract."[14] Thus, arbitration was ordered.

Judge Desmond, dissenting, seems to argue from the theory that a labor union only has those rights which are specifically granted by the collective contract and that those not granted are retained by management.[15] Since the agreement in question places no restriction on the employer's common-law right to discharge its employees with or without cause,[16] "there is nothing here to arbitrate."[17]

The parties to a collective agreement are familiar with the many problems and complexities inherent in the relations which they are attempting to control through the labor contract. They therefore realize that it would be impossible to provide in a written instrument for every contingency which might arise and that arbitration of disputes is the logical solution to this inability to put everything down on paper. The majority in the instant case, therefore, has followed the intent of the parties to settle their disputes through the arbitration process.

X. Municipal Corporations

Civil Service

The New York Civil Service Law spells out the mandate of the New York Constitution requiring that the civil service of the state and all its civil divisions shall be on the basis of merit and fitness determined as far as practicable by competitive examina-

13. Where the courts are asked to intervene prior to arbitration, they have held that their function is limited to a determination of two questions: 1.) was an agreement to arbitrate made, and 2.) has there been a refusal to arbitrate. *Mencher v. B. S. Abeles and Kahn*, 274 App. Div. 585, 590, 84 N. Y. S. 2d 718, 723 (1st Dep't 1948). C. P. A. § 1450 provides that the court's function is merely to determine whether "a written contract providing for arbitration was made . . . and there was a failure to comply therewith."

For an excellent and complete survey of the court's role in regard to labor arbitration, see Summers, *Judicial Review of Labor Arbitration*, 2 Buff. L. Rev. 1 (1952).

14. *Lipman v. Hauser Shellac Co.*, 289 N. Y. 76, 80, 43 N. E. 2d 817, 819 (1942). However, the *Lipman* case concerns a contract for the sale of merchandise and is not a collective bargaining agreement. The failure of the New York courts to distinguish between ordinary and collective contracts has been severely criticized. See Summers, *supra* note 13 at 14.

15. *General Electric Co. v. U. E. R. & M. W. A.—C. I. O.*, 196 Misc. 143, 91 N. Y. S. 2d 724 (Sup. Ct. 1949).

16. *Watson v. Gugino*, 204 N. Y. 535, 541, 98 N. E. 18, 20 (1912); *Martin v. New York Life Insurance Company*, 148 N. Y. 117, 121, 42 N. E. 416, 417 (1895).

17. This is also the position taken by the Appellate Division. *Bohlinger v. National Cash Register Co.*, 280 App. Div. 751, 113 N. Y. S. 2d 46 (1st Dep't 1952).

tions.[1] The civil service is under the Department of Civil Service,[2] headed by the State Civil Service Commission.[3] The Commission is composed of three members, not more than two of whom can be adherents to the same political party,[4] appointed by the Governor, by and with the advice and consent of the Senate.[5] The duty of the Commission, in general, is to effectuate the merit system.[6] It is thus empowered to prescribe, amend and enforce suitable rules and regulations[7] and to make investigations[8] concerning the enforcement and effect of the Civil Service Law. Commensurate with the spirit, if not the necessity, of the home rule provisions of the Constitution,[9] the local governmental units enjoy considerable autonomy in the civil service by virtue of their own local municipal civil service commissions[10] which are empowered to make rules for classification, examinations, appointments and promotions in conformance to the Constitution and the Civil Service Law.[11]

The autonomy of the municipal civil service commissions was vindicated by the Court of Appeals in two cases. In *Wirzberger v. Watson*[12] the New York City Municipal Civil Service Commission revised certain requisite qualifications to sit for promotional examinations in the Clerical Service, thereby excluding interservice participation in the examinations as to some services but not as to other services. The Commission maintained that the new qualifications would promote administrative efficiency, and such interservice participation as was permitted was from services where otherwise there would be no chance for promotion. The Appellate Division had held the Commission's qualifications as arbitrary and an abuse of discretion. The Court of Appeals in reversing held that the Civil Service Law confers the duty of establishing preliminary requirements for promotional examinations upon the Commission alone[13] and the court will not interfere with a decision of the commission, an administrative agency, where any fair argument can be made to sustain its action.[14]

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1. N. Y. CONST. Art. V, § 6.
2. *Id.* § 2.
3. CIVIL SERVICE LAW § 3.
4. *Ibid.*
5. *Ibid.*; N. Y. CONST. Art. V, § 4.
6. CIVIL SERVICE LAW § 6.
7. *Id.* § 6 subd. 1.
8. *Id.* § 6 subds. 3, 4.
9. N. Y. CONST. Art. IX, §§ 1, 11.
10. CIVIL SERVICE LAW §§ 11, 11-a, authorize municipal civil service commissions for cities and counties respectively.
11. CIVIL SERVICE LAW §§ 11 subds. 1, 2, 11-a subd. 1 for cities and counties respectively.
12. 305 N. Y. 507, 114 N. E. 2d 15 (1953).
13. CIVIL SERVICE LAW § 14 subd. 2.
14. *People* ex rel *Moriarity v. Creelman*, 206 N. Y. 570, 575-576, 100 N. E. 446. 448 (1912).

Local municipal civil service commissions notwithstanding, the maintenance and protection of the merit system in the civil service is a matter of state concern, and the State Civil Service Commission has, by general law, cognizance over the municipal civil service commissions.[15] Coupled with its powers of investigation the Civil Service Law § 11 subd. 7 prescribes that the "state commission may at any time, by unanimous vote of the three commissioners, amend or rescind any rule, regulation or classification [of a municipal civil service commission] *or rescind any examination or eligible list or cancel an appointment already made from a list so rescinded* . . . where the provisions or purposes . . . [of the Civil Service Law] are not properly or sufficiently carried out . . ." Italics are ours and indicate a new phrase added in 1944.[16] Prior to 1944, once a civil service employee in the competitive class under the merit system was placed on the eligible list (from which appointments are made), such employees' eligibility was final unless set aside on the ground of illegality, fraud, or irregularity in vital matters;[17] otherwise an appointee's removal could only be for incompetency or misconduct.[18]

Pursuant to the revised powers, the State Civil Service Commission made an investigation of the Lackawanna Municipal Civil Service Commission and its examinations, eligibility lists and appointments. The State Commission found that the qualifying examinations of fifteen employees were not practical or sufficient tests of capacity and fitness, and ordered the removal of those employees. In *Ebling v. New York State Civil Service Commission*[19] the employees sought an order in the nature of mandamus to compel the State Commission to reinstate them. The employees produced affidavits of five experts concurring in the view that their examinations had been fair tests of fitness. The gist of the case devolved upon the court's interpretation of the legislative intent behind the wording of § 11 subd. 7 that the "state commission may at any time . . . rescind any examination or eligible list or cancel an appointment already made from a list so rescinded . . . where the provisions or purposes [of the Civil Service Law] are not properly or sufficiently carried out . . ." The court in a 3-1-3 decision, by Judge Desmond, held that "provisions or purposes" meant the prime fundamental purposes of the Civil Service Law and that at least as to these appointees, there could be no cancellation "unless the examination had been so obviously inade-

15. *Matter of Kaney v. State Civil Service Commission*, 190 Misc. 944, 950, 77 N. Y. S. 2d 8, 15 (Sup. Ct. 1948), *aff'd*, 273 App. Div. 1054, 81 N. Y. S. 2d 168 (4th Dep't 1948), *aff'd*, 298 N. Y. 707, 83 N. E. 2d 11 (1948).

16. L. 1944, c. 435, effective 31 March 1944.

17. See *People v. McBride*, 226 N. Y. 252, 258, 123 N. E. 374, 376 (1919).

18. CIVIL SERVICE LAW § 22.

19. 305 N. Y. 221, 112 N. E. 2d 203 (1953).

quate, or so completely unrelated to the duties of the position, as to be on its face a nullity." Here, on the record, there was no more than a difference of opinion as to the quality and comprehensiveness of the tests. Here the employees who had continued in their appointments under the disputed examinations as long as several years would be removed from their jobs with no showing of fault on their part or fraud by anyone. While the legislature could authorize such removals the court would not construe such a "truly extraordinary result" where a more reasonable construction would place this provision within "the traditional legislative policy in this State of furnishing effective protection to civil service appointees." Judge Conway, in concurring, felt that the State Commission's rescission must be executed within a reasonable time, but the majority opinion stated that a new appointee in reliance upon the appointment may well have jeopardized outside opportunities.

The dissent, in reciting some of the disputed examination questions[20] stated that State Commission's finding that there was no practical or sufficient test of the employees' capacity and fitness was to the same effect as if the employees had been appointed and promoted without taking the requisite examination and therefore the appointments were invalid regardless of good faith.[21] The court need only compare the specifications for duties in the various positions with the actual examination questions to establish "their utter deficiency", and upon these utterly deficient examinations employees were appointed who are responsible for the protection of the lives, liberty and the property of the People of the State. Furthermore the intent of the legislature to empower the State Commission to make such removals was plainly expressed.

The *Wirzberger* case conformed with the traditional attitude of the court that it will not interfere with an administrative agency regarding discretionary, policy-making powers in matters of disputed fact and differing opinion. The *Ebling* case was ultimately decided upon essentially the same rationale but involved a conflict of the most fundamental precepts of the state civil service system, coupled with patently constitutional legislation which on its face would seem to authorize a course of action contradictory to traditional legislative policy in the civil service field. The tenor of the majority opinion indicates probably more concern over what *might* be done in future instances if removal had here been permitted than as to the immediate situation. It would seem to this writer that the "majority" view in the *Ebling* case will in the long run

20. The dissenting opinion in the instant case recites some of the questions asked on the examinations.

21. The dissent citing *Palmer v. Board of Education*, 276 N. Y. 222, 11 N. E. 2d 887 (1937).

best serve the interests of the people of the State as well as its civil service employees. Furthermore there still remain alternative measures to remedy any abuse in the immediate case. Granted a total inadequacy of the qualifying examinations, this does not mean per se that those appointees are unfit. While in a practical sense not fully adequate, removal may be effected under the Civil Service Law for incompetency or unfitness. The proper precautions should better lie in a close and punctual scrutiny of the municipal commissions rather than jeopardizing the desirable stability and security of the civil service system to remedy a past neglect.

Municipal Tort Liability

To bring a tort action against a municipal corporation, a notice of claim must be served in person or by registered mail on the proper municipal party within 90 days after the claim arises as required by General Municipal Law § 50-e.[22] Service of such claim must strictly comply with the statutory requirements.[23] The court in dealing with the exact statutory wording, delivered two somewhat contradictory decisions.

In *Teresta v. City of New York*,[24] the city having been served a notice of claim by ordinary mail, rather than registered mail, notified claimant to appear for examination, examined claimant and did not raise the issue of improper service until the trial commenced. The Appellate Division had held[25] service was improper for lack of strict statutory compliance,[26] but the Court of Appeals reversed (5-2) on the ground that "present here, in addition to an unequivocal waiver, are elements of estoppel."[27] The basis of the dissent by Judge Lewis was that of strict statutory compliance. Subsequent to the litigated service, but prior to the court's opinion, as noted in the majority opinion,[28] the Legislature had amended § 50-e so as to validate service by ordinary mail

22. The purpose of such claim notice is to afford municipalities protection against needless litigation, stale claims and possible connivance of corrupt officials. *Brown v. Board of Trustees of Town of Hamptonburg*, 303 N. Y. 484, 490, 104 N. E. 2d 866, 869 (1952).

23. *Thomann v. City of Rochester*, 256 N. Y. 165, 172, 176 N. E. 129, 131 (1931); *Matter of Merkle v. County of Nassau*, 197 Misc. 560, 95 N. Y. S. 2d 673 (Sup. Ct. 1950).

24. 304 N. Y. 440, 108 N. E. 2d 397 (1952).

25. *Teresta v. City of New York*, 277 App. Div. 787, 97 N. Y. S. 2d 335 (1st Dep't 1950).

26. One year later the 2d Dep't went directly contrary to the 1st Dep't in the *Teresta* case. *Drake v. Comptrolier of City of New York*, 278 App. Div. 317, 318-319, 104 N. Y. S. 2d 774 (2d Dep't 1951), per Justice Van Voorhis.

27. *Teresta v. City of New York*, *supra* note 24 at 433, 108 N. E. 2d at 398.

28. *Id.* at 442, 108 N. E. 2d at 397.