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Administrative Law—Failure to Bring Article 78 Proceeding Bars Action for Damages

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Term,[49] which had been affirmed by the Appellate Division.[50] The majority (5) held that the statements on the examination when viewed in the light of the circumstances and excitement surrounding the examination did not sufficiently appraise the petitioners of the necessity of copying their answers. For this reason it held that the petitioners did not have notice that they were aggrieved until they were allowed access to their papers.

The right of examinees to challenge as arbitrary answers promulgated as correct by an administrative agency has been upheld.[51] Until this case the statute of limitations pertinent to such challenges has been held to run from the official publication of the answers.[52] The minority in the Court of Appeals (2) felt that the examination paper contained sufficient notice of the need for copying answers and for that reason this case presented no grounds for departing from the established rule.

Since the official answers promulgated by the respondent were merely the letter answers to the examination questions, the petitioners could not know that they were aggrieved until they compared the official answers with their own answers. If the right to challenge arbitrary action on the part of administrative agencies is to be more than illusionary, the short statute of limitations provided by Article 78 should be tolled until an aggrieved party has real notice that he is aggrieved.[53] The holding of this case tends to promote such a result.

FAILURE TO BRING ARTICLE 78 PROCEEDING BARS ACTION FOR DAMAGES

In an action to recover back salary in *Austin v. Board of Higher Education of the City of New York*,[54] the Board of Higher Education appealed from an order of the Appellate Division, which reversed, on the law, the Supreme Court's dismissal of the complaint.

Plaintiffs, six discharged members of the staff of defendant Board, commenced an action at law to recover damages allegedly resulting from their wrongful dismissal. All of the aggrieved parties were summarily discharged, without a hearing, after they had claimed their Fifth-Amendment privilege against self-incrimination, during a United States Senate investigation. The Board defended upon the ground that plaintiffs' exclusive remedy was in an Article 78 proceeding governed by a four-month statute of limitations, and that plaintiffs were precluded from commencing action under Article 78, since this period had elapsed. Plaintiffs had never sought reinstatement through an Article 78 proceeding, but entered into a stipulation with the Board whereby

49. 12 Misc. 2d 67, 173 N.Y.S.2d 719 (Sup. Ct. 1958).
50. 6 A.D.2d 781, 175 N.Y.S.2d 556 (1st Dep't 1958).
51. Gruner v. McNamara, 298 N.Y. 395, 83 N.E.2d 850 (1949); Fink v. Finnigan, 270 N.Y. 356, 1 N.E.2d 462 (1936).
52. Lennox v. McNamara, 16 Misc. 2d 9, 99 N.Y.S.2d 867, *aff'd* 275 App. Div. 1023, 91 N.Y.S.2d 826 *motion for leave to appeal denied* 276 App. Div. 757, 92 N.Y.S.2d 918 (1st Dep't 1949); Robinson v. McNamara, 16 Misc. 2d 10, 99 N.Y.S.2d 840, *aff'd* 275 App. Div. 918, 90 N.Y.S.2d 674 (1st Dep't 1940); Goldberg v. Municipal Civil Serv. Comm'n, 16 Misc. 2d 11, 128 N.Y.S.2d 51 (Sup. Ct. 1954).
53. N.Y. CIV. PRAC. ACT art. 78.
54. 5 N.Y.2d 430, 186 N.Y.S.2d 1 (1959).

their claims to reinstatement were to be disposed of upon the same terms as similar claims of other petitioners.[55]

From an adverse decision in the Court of Appeals of New York, separate notices of appeal were filed in the United States Supreme Court one by Slochower and the other by Shlakman as petitioners. Except for Slochower, the appeals of all the petitioners were dismissed for want of a properly presented federal question. On appeal the Supreme Court held in *Slochower v. Board of Higher Education of the City of New York*,[56] that Slochower had been wrongfully discharged in violation of his Constitutional rights. None of the discharged employees had been reinstated except for Slochower. The Court of Appeals held in the instant case, that plaintiffs had lost their rights under the stipulation since they had failed to appeal from an adverse decision,[57] and that an Article 78 proceeding was a prerequisite to an action at law for damages, when the right to a public office is put into question.[58] The dissenting opinion based its argument on the ground that the Supreme Court ruling in the *Slochower* case showed clearly that plaintiffs were entitled to reinstatement since the discharge was illegal, and therefore, they had established their right to the position from which they were discharged.

The basic premise of the resulting majority opinion, was that the right to a position determines the right to the salary incident thereto.[59] In order for plaintiffs to recover, their right to the title of their office must necessarily be decided. Such question of title to a public office cannot be tried in an action at law to recover salary.[60] In such a case, the person claiming to have been injured by the removal must seek reinstatement in a direct proceeding brought for that purpose under Article 78.[61]

The dissent attacked the majority opinion as being upon the most narrow of procedural grounds, and that the rule requiring that reinstatement be first declared, had no basis in statutory law, but was a rule promulgated by the courts themselves. The right to reinstatement declared in the *Slochower* case, established the petitioners' legal right to the position, and an Article 78 proceeding is not necessary to determine this legal right.[62] The action of the Board in entering into the stipulation with petitioners and then defending upon the

55. Shlakman v. Bd. of Higher Educ. of the City of N.Y., 306 N.Y. 532, 122 N.Y.S.2d 826 (1954).

56. 350 U.S. 551 (1956).

57. Shlakman v. Bd. of Higher Educ. of the City of N.Y., 5 Misc. 2d 901, 161 N.Y.S.2d 529 (Sup. Ct. 1957).

58. N.Y. CIV. PRAC. ACT §§ 1283-1286.

59. Stetson v. Bd. of Educ. of the City of N.Y., 218 N.Y. 301, 112 N.E. 1045 (1916).

60. Hagen v. City of Brooklyn, 126 N.Y. 643, 27 N.E. 265 (1891).

61. Thomson v. Bd. of Educ. of the City of N.Y., 201 N.Y. 457, 94 N.E. 1082 (1911).

62. Desmond, J., dissenting, cites several cases where the court has held that reinstatement is not a prerequisite to an action at law, "where a clear legal right to reinstatement has been otherwise established (see Steinson v. Board of Education, 165 N.Y. 431; Toscano v. McGoldrick, 300 N.Y. 156 or where there are other special circumstances (Bean v. Clausen, 113 App. Div. 129. There is at least one case in this court (Burke v. Holtzmann, 196 N.Y. 576) where a plaintiff illegally refused an appointment was allowed to sue for damages without first petitioning for mandamus." *Supra* note 54 at 446, 186 N.Y.S.2d 14 (1959).

ground that it was ineffectual, was a defense lacking in equity and should be rejected.

However, the cases cited by the dissent found the necessity of an Article 78 proceeding had been obviated, either by the previous reinstatement of the discharged person,[63] or mandamus being refused,[64] or certiorari allowed.[65] In *Burke v. Holtzman*,[66] the original suit for damages for illegal refusal to appoint plaintiff to a public office, resulted in a granting of a new trial, reversing the dismissal of the complaint upon grounds other than the mode of remedy sought by the plaintiff.[67] The new trial in 1907 was brought by the plaintiff's administratrix upon the retrial granted in the 1906 case, plaintiff having died. An action for mandamus would have been an insufficient remedy since the person wronged had died before the 1907 case had commenced. Thus, it was not decided on the point relied upon by the dissent. These cases tend to show that the court will not insist upon an Article 78 proceeding when an action in the form of mandamus would not accomplish the result intended by that proceeding. The exception is made because the same facts which render mandamus impossible, also act to put an end to the accrual of wages, thus placing a limitation upon the damages recoverable.[68]

That an Article 78 proceeding is a condition precedent to an action at law, is not merely a "judge made rule" as argued by the plaintiffs and the dissent. The rule is a result of the interpretation of Article 78 by the court as to what the legislature intended. Since the special proceedings merged into Article 78 were not abolished, and the special short-length statute of limitations period is provided for, the Court has read the Article as retaining these proceedings in their special nature, and requiring such actions as prerequisites to an action at law.

The majority of the Court of Appeals, although recognizing the illegality of the dismissal of the plaintiffs, justify their position in the view that the court exists, "not for the benefit of each individual litigant, but for the indefinite body of litigants whose causes are potentially involved in the specific cause at issue."[69] Therefore, it is the court's duty to authoritatively declare and settle the law uniformly, notwithstanding the fact that in exceptional cases, an individual litigant may be deprived of rights he might otherwise have had.

When adequate procedures are established in order that persons may have their grievances heard and adjudicated, the fact that a complaintant does not take advantage of such procedures, or if he does, that he does not apply them properly, does not justify the conclusion that an adverse decision against such complaintant is inequitable. It was only through plaintiffs' own errors

63. Toscano v. McGoldrick, *supra* note 62.
64. Steinson v. Bd. of Educ. of the City of N.Y., *supra* note 62.
65. Jones v. City of Buffalo, 178 N.Y. 45, 70 N.E. 99 (1904).
66. Burke v. Holtzmann, 110 App. Div. 564, 97 N.Y.S. 218 (3d Dep't 1906).
67. Bean v. Clausen, *supra* note 62.
68. Austin v. Bd. of Higher Educ. of the City of N.Y., *supra* note 54 at 444, 186 N.Y.S.2d 12 (1959).
69. Shlakman v. Bd. of Higher Educ. of the City of N.Y., *supra* note 55.

in judgment that such an inequitable result occurred. Plaintiffs were aware of Article 78 and its short statute of limitations period. This, alone, should have been sufficient notice that the proper course of action was through an Article 78 proceeding. It was reasonable to believe that the *Shlakman* proceedings would encompass more than four months' time. Plaintiffs should have been aware that their failure to appeal upon the stipulation would invoke the rule of *res judicata* in a new action. The result is not a product of inadequate procedures, but the product of plaintiffs' own errors. The court is the forum where the law should be uniformly settled, and not the forum to correct the errors in judgment of an indefinite amount of litigants.

STATUS OF VETERAN UNDER CIVIL SERVICE LAW I

Section 22 of the Civil Service Law provides that an honorably discharged veteran shall not be removed from his position unless incompetency or misconduct is shown after a hearing upon specified charges and due notice given.[70] This section does not afford protection to one who holds the position of private secretary. The plaintiff, in *Driscoll v. Troy Housing Authority*,[71] sought reinstatement to his position as secretary of the respondent, contending that Section 22 applied. The Court of Appeals agreed, and reversed the decision of the Appellate Division.[72]

Since the plaintiff had never taken a competitive examination, it was necessary that the Court determine that the plaintiff's position was "exempt" under the provisions of the Civil Service Law before determining that the position was outside the exception of private secretaries under Section 22.[73]

Although the exemption provisions in the civil service laws exempt only a secretary of a "board" or "commission," the Court construed Section 32 of the Public Housing Laws, which authorizes the Housing Authority to employ a secretary ". . . subject to the provisions of the civil service law applicable to the municipality in which it is established . . . ," as making them applicable to "authorities" as well. Any other construction would necessitate the enactment of separate bodies of civil service provisions for each differently denominated administrative agency. Although the position of secretary is exempt under Section 13 of the Civil Service Law,[74] the Court still had to overcome the barrier of precedent before it could apply Section 22.

In *Mercer v. Dowd*,[75] on facts similar to the instant case, the Court had followed the decision in *Glassman v. Fries*,[76] wherein Section 22's express

70. Now N.Y. CIVIL SERVICE LAW § 75.
71. 6 N.Y.2d 513, 190 N.Y.S.2d 663 (1959).
72. 6 A.D.2d 981, 177 N.Y.S.2d 159 (1958).
73. If the plaintiff had not held an exempt position he would have been considered as holding, or having held, his position unlawfully and not entitled to the protection of Section 22. The Court construed evidence consisting of a roster card and minutes of the meeting at which he was appointed as sufficient indication that he was appointed a Secretary rather than a Director.
74. Now § 41(1)(c).
75. 288 N.Y. 381, 43 N.E.2d 452 (1942).
76. 271 N.Y. 116, 2 N.E.2d 281 (1936).