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Administrative Law—Status of Veteran under Civil Service Law I

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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).

denial of protection to private secretaries was construed to apply to all Section 13 secretaries, but added the qualification that it is not the title fastened to the position that will determine its status, instead, the nature of the duties will control. In *Mercer*, as here, the plaintiff performed clerical, supervisory, and managerial duties, hence Section 22 must be applied here as it was there. The Court restricted the scope of the *Mercer* holding in this case by explaining that its decision there properly involved Section 22 only, since Section 13 was not germane to the issue. But it is apparent that Section 13 was not in issue only because of the hoped for application of the *Glassman* holding which was not rejected but merely subjected to interpretive qualifications.

The decision, in effect, recognizes the distinction in terminology between the "private secretary" of Section 22 and the "Secretary" of Section 13. The holding would have possessed greater clarity had the Court expressly rejected the sweeping generality of the *Glassman* case and more precisely indicated that while a Section 13 secretary may utilize the protection of Section 22 if he performs clerical, supervisory, and managerial duties, if he has not these duties, then he is a "private secretary" within the meaning of Section 22.

STATUS OF VETERAN UNDER CIVIL SERVICE LAW II

New York's Civil Service Law, Section 22, subdivision 1,⁷⁷ provides, among other things, that no honorably discharged veteran of the armed forces shall be summarily removed from a Civil Service position. However, the same section excludes from this protection deputies of any official or department.

In *Behringer v. Parisi*,⁷⁸ petitioner, a veteran of World War II, was summarily removed from his position as District Administrator of the Albany District of the Workmen's Compensation Board, and brought an action under Section 22 for reinstatement. The Chairman, however, determined that petitioner was a deputy within the meaning of the section. When review of that determination was had under Article 78 of the Civil Practice Act the Court of Appeals held that a hearing was necessary to determine if petitioner was in fact a deputy within the meaning of Section 22, Subdivision 1.

Petitioner contended that in order to be termed a deputy a statute must have created his position and prescribed the attendant duties and that no statute had done so. The Court, however, could not agree with petitioner on this matter, stating that the requirement was not applicable to the term "deputy" but rather was meant to apply to the category "independent office" which had been made an exception to the law by the judiciary.⁷⁹

As recently as 1950, in *Heath v. Creagh*,⁸⁰ the Court stated that in order for one to be included in the concept of "deputy" there need be only a statute

77. The Civil Service Law has been revised, effective April 1, 1959. Section 22, however, has been substantially retained and appears in Section 75 of the revision.

78. 5 N.Y.2d 147, 182 N.Y.S.2d 147 (1959).

79. O'Day v. Yeager, 308 N.Y. 580, 127 N.E.2d 585 (1955).

80. 197 Misc. 537, 547, 96 N.Y.S.2d 247, 255, *aff'd* 276 App. Div. 948, 94 N.Y.S.2d 901 (4th Dep't 1950).