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Administrative Law—Authority of Civil Service Commission to Change Grading Method

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trative order after complaint, albeit *ex parte*,[86] there appears no reason to allow administering officials to effect seizure without complying with that procedure.

The instant decision should not be regarded as prohibiting summary or provisional seizure in the cases of nuisances,[87] but rather as requiring that administering officials observe the minimum procedural safeguards statutorily prescribed.

AUTHORITY OF CIVIL SERVICE COMMISSION TO CHANGE GRADING METHOD

In *Hymes v. Schechter*[88] the Civil Service Commission for the City of New York, pursuant to one of its rules, applied a conversion formula in determining the grades in a promotion examination for the position of assistant housing manager. The effect of this was to lower the passing grade from that which was announced on the day of the exam. Candidates for the examination who had passed without the benefit of the conversion formula, brought this Article 78 proceeding[89] to annul the determination of the Commission.

The Supreme Court denied the relief, and the Appellate Division affirmed.[90] The Court of Appeals reversed, holding that where the rule of the city Civil Service Commission authorizing the use of a conversion formula on the examination grades was not officially in effect until more than two weeks after the examination was held, application of the rule to such examination was improper.[91]

Rule V section 5(1) of the Civil Service Commission relied on by the Commission so far as is pertinent provides:

> The rating shall be comparative and in accordance with such standards as the needs of the service may require. Where there is an insufficient number of candidates in open competitive or promotive examination to provide an adequate eligible list to meet the needs of the service, the Director of Examinations may provide a mathematical formula of penalties for incorrect answers on the basis of test difficulty.[92]

This rule previously applied to open competitive examinations but was amended to include promotion exams as well. This amendment was approved by the Civil Service Commission on March 20, 1956 and the examination was given on April 7, 1956. The rule was not approved by the Mayor and the State Civil Service Commission until more than two weeks after the exam, and the candidates were notified of their grades almost a year later.

There is no question that the commission is authorized to amend its rules at any time upon approval of the Mayor and the State Civil Service Commission.[93] Nor can it be seriously contested that the provision could have

86. NEW YORK EDUC. LAW 6815(1)(b)(3), *supra*.
87. See North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Adams v. Milwaukee, 288 U.S. 572 (1913).
88. 6 N.Y.2d 352, 189 N.Y.S.2d 870 (1959).
89. N.Y. CIV. PRAC. ACT § 1283 *et seq.*
90. Hymes v. Schechter, 7 A.D.2d 294, 182 N.Y.S.2d 726 (1st Dep't 1959).
91. *Supra* note 88.
92. N.Y. City Civil Service Commission RULES, Rule V § 5(3).
93. N.Y. CIVIL SERVICE LAW § 11(2).

legal effect before it had been formally approved.[94] The issue is whether it was necessary for the rule to be in effect officially before the examination was given or before the candidates were notified of their respective grades. Past decisions have clearly established that a Civil Service body may after an examination has been given, adjust the passing grade, provided adequate and informative advance notice is made.[95] In the instant case the rule did not become effective until more than two weeks after the exam was given. It is clear therefore that applicants who took the examination had no notice, either actual or constructive, that the passing grade which had originally been set by the commission might subsequently be changed.

The Appellate Division sustained the finding of the Commission by relying on Rule V section 5 subd. 4 of the Civil Service Commission. This provides:

> The required passing grade in any test, subject or part of an examination shall be fixed by the Director of Examinations prior to the disclosure of the identities of the candidates therein.[96]

The Court interprets this subdivision to mean that it may not fix the required passing grade but may change it after the examination has been given. The language of this provision would certainly allow this construction. However, the interpretation is not acceptable when viewed in the light of the advance notice requirement previously mentioned. Subdivision 4 was complied with by the Commission when they fixed the passing requirements prior to the exam. Since subdivision 1 of this rule was not applicable to this exam, the Commission had no authority to change the grading after the exam had been given.

POWER OF PUBLIC SERVICE COMMISSION TO REGULATE ADVERTISING IN TELEPHONE BOOKS

A recent Court of Appeals decision concerned an Article 78 proceeding for review of a determination by the Public Service Commission which authorized several telephone companies to amend their tariffs.[97] The complained of tariffs prohibited subscribers from attaching to, or using with, telephone directories, a cover or attachment, containing advertising, and not furnished by the telephone companies.[98]

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94. Corrigan v. Joseph, 304 N.Y. 172, 106 N.E.2d 593 (1952); Fay v. Schechter, 1 N.Y.2d 604, 154 N.Y.S.2d 927 (1956).

95. Gilburt v. Kroll, 17 Misc. 2d 409, 144 N.Y.S.2d 219 (Sup. Ct. 1955), *aff'd* 1 A.D.2d 819, 150 N.Y.S.2d 153 (1st Dep't 1956), *aff'd* 2 N.Y.2d 896, 161 N.Y.S.2d 148 (1956); Dowling v. Brennan, 284 App. Div. 563, 131 N.Y.S.2d 594 (1st Dep't 1954); Robbins v. Schechter, 7 Misc. 2d 436, 162 N.Y.S.2d 790 (Sup. Ct. 1957), *aff'd* 3 A.D.2d 1010, 165 N.Y.S.2d 442 (1st Dep't 1957), *aff'd* 4 N.Y.2d 935, 175 N.Y.S.2d 814 (1958).

96. N.Y. City Civil Service Commission RULES, Rule V § 5(4).

97. 5 N.Y.2d 485, 186 N.Y.S.2d 47 (1959).

98. "Telephone directories distributed from time to time by the Telephone company remain the property of the Telephone company, shall not be mutilated, and shall be surrendered upon request, or upon delivery of the subsequent issue. No binder, holder, insert, auxiliary cover or attachment of any kind not furnished by the Telephone company shall be attached to or used with the directories owned by the telephone company, except that this prohibition shall not apply to a subscriber—provided binder, holder, insert, or auxiliary