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Administrative Law—Power of Public Service Commission to Regulate Advertising in Telephone Books

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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 complainant 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

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. *Gilbert 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

The Appellate Division, third department, after accepting a transfer of the proceedings from the Supreme Court, unanimously affirmed the Commission's determination.⁹⁹ The Court of Appeals, however, reversed, holding that the Commission was without authority to prohibit business from competing with the telephone companies by allowing such a prohibition to be included in the tariffs of the telephone companies.

Any order of the Public Service Commission may be vacated as "unreasonable" if it is beyond the power granted the Commission by the Public Service Law, or if there is no evidence to support it.¹

While the Public Service Law does grant regulatory power to the Commission over any "apparatus" used in the business of telephone communication,² and directories may well be within the meaning of the term "apparatus," the Commission's jurisdiction is limited to seeing that advertising in the directory is set up in such a manner so as not to interfere with the use of ordinary listings and that the privilege of inserting advertising is available to all subscribers on a non-discriminatory basis.³ As the court pointed out in *City Ice and Fuel Company v. Public Service Commission*,⁴ "it is quite another thing to assert jurisdiction to immunize telephone companies from competition where the telephone companies are engaged in activities which do not come within the scope of an essential public service."

Thus, if the determination of the Commission is allowed to stand it must rest on the ground that the tariff is necessary to prevent interference with telephone service. However, the Court could find no basis in the evidence in the record for a conclusion that any noticeable interference with service would result from the use of the prohibited covers. The only evidence offered by the telephone companies on this subject was the statement of an officer of one of the companies that he had a "feeling" that the covers would cause interference with service.

Therefore, the Court, of necessity, to prevent interference with the constitutional requirements of due process, concluded that the Commission's determination approving the tariff should be vacated as not supported by the evidence.

cover which contains no advertising, and which is not so attached as to impede reference to essential service information or otherwise interfere with service." *Supra* note 97 at 488, 186 N.Y.S.2d 49.

99. 5 A.D.2d 366, 171 N.Y.S.2d 1009 (3d Dep't 1959).

1. *People v. McCall*, 219 N.Y. 84, 88, 113 N.E. 795, 796 (1916).
2. N.Y. PUB. SERV. LAW §§ 94, 2(18).
3. *Solomon v. Public Service Comm'r*, 286 App. Div. 639, 146 N.Y.S.2d 439 (3d Dep't 1955).
4. 260 App. Div. 542, 23 N.Y.S.2d 376 (3d Dep't 1940).