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## Administrative Law—Civil Service: Veterans

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previous rulings which had held that when men already in the municipal service went to war and a promotional examination was held for which they would have been eligible, they might on their return take a comparable examination, be promoted, and upon a subsequent promotional examination based on the previous one, also be entitled to another special examination.<sup>4</sup> In the instant case, as opposed to *Farrell v. Watson*<sup>5</sup> and another<sup>6</sup> which the court had decided, the men involved had not been in municipal employment previous to their military service but had only been on an eligible list. Upon their return they were given appointments. On a promotional examination they claimed and the court agreed that their seniority dated, not from the time they were actually appointed, but from the time a lower man on the original list had been appointed. The disabled veterans in this case retroactively shot to the head of the original list because of their subsequent military service and disability. As they thus headed the original list, their seniority would date from the first appointment from that list.

The dissent was based on the Appellate Division opinion<sup>7</sup> which held that the Military Law<sup>8</sup> was intended to confer benefit only on those already in the municipal service, and that in any event seniority dated only from the appointment of one actually lower on the original list. It would not appear, however, that the legislature intended to construe narrowly the rights conferred on disabled veterans, in view of the language of its enactments<sup>9</sup> and in view of the State Constitution.<sup>10</sup>

#### *Civil Service: Veterans*

Claiming a violation of the statutory protection to veterans,<sup>11</sup> the discharged clerk of the Surrogate's Court of Erie County petitioned for reinstatement under Article 78 of the Civil Practice Act.<sup>12</sup> The Court held, that he was an independent officer rather than a subordinate employee and so was subject to dismissal at pleasure.<sup>13</sup>

Surrogate's Court Act §21 provides in part: "By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate

4. *Farrell v. Watson*, 304 N. Y. 630, 107 N. E. 2d 98 (1952), *affirming* 279 App. Div. 376, 110 N. Y. S. 2d 241 (1st Dep't 1952)

5. *Ibid.*

6. *Cotter v. Watson*, 306 N. Y. 681, 117 N. E. 2d 356 (1954).

7. 285 App. Div. 165, 135 N. Y. S. 2d 853 (1954).

8. N. Y. MILITARY LAW §243(7).

9. *Ibid.*

10. Note 1, *supra*.

11. N. Y. CIVIL SERVICE LAW §22 provides that no veteran or volunteer fireman shall be removed from office except for incompetency or misconduct shown after a hearing.

12. N. Y. CIVIL PRAC. ACT §§1283-1306.

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

may appoint a clerk of the surrogate's court." This section is subject to Civil Service Law section 22,<sup>14</sup> which protects veterans in subordinate positions but does not apply to officials filling independent positions.<sup>15</sup>

In finding that the clerk was an independent officer, the majority ignored an earlier case which specifically found that the clerk of Surrogate's Court of Ontario County was not an independent official.<sup>16</sup> They reviewed the duties imposed on the clerk by Surrogate's Court Act §32 and found that his powers, "to be exercised concurrently with the surrogate," were to some extent the exercise of "some portion of the sovereign power," and so not those of a subordinate employee.

In dissenting, Judge Dye pointed out that §32 begins with the words: "The clerk and the deputy clerk of the surrogate's court may severally exercise, concurrently with the surrogate, the following *powers of the surrogate*." In his analysis of §32 he finds that the duties of the clerk are ministerial and are the powers of the surrogate, not the clerk. The important administrative powers are not statutory powers, which are essential to the status of an independent officer.

#### *Mandamus*

Because of budgetary limitations, the Fire Commissioner of New York City made a practice of assigning fire captains to perform duties of battalion chiefs, rather than fill the vacancies with permanent appointments. In a unanimous opinion, the Court held, that the Commissioner was not authorized to compel fire captains to perform duties of battalion chiefs for long periods of time without an increase in pay and permanent appointment.<sup>17</sup>

The Fire Commissioner has the power to make temporary appointments,<sup>18</sup> but the Civil Service Law spells out in great detail the situations permitting such appointments,<sup>19</sup> and by implication situations not specifically authorized are forbidden. Also, the statute expressly states that successive temporary appointments shall not be made to the same position.<sup>20</sup> The Court found that the instant appointments were frequent and recurrent and constituted a pattern for filling the position of battalion chief. Even if such action is not specifically barred by statute, it violates the spirit of the Civil Service Law and shall not be permitted.

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14. *People ex rel. Hoefle v. Cahill*, 188 N. Y. 489, 81 N. E. 453 (1907); *Mercer v. Dowd*, 288 N. Y. 381, 384, 43 N. E. 2d 452, 453 (1942).

15. *Mylod v. Graves*, 274 N. Y. 381, 9 N. E. 2d 18 (1937).

16. *Cappon v. Cleere*, 177 Misc. 1027, 32 N. Y. S. 2d 845 (1942).

17. *O'Reilly v. Grumet*, 308 N. Y. 351, 126 N. E. 2d 275 (1955).

18. N. Y. CIVIL SERVICE LAW §15; Regulations for the Uniformed Force of the Fire Department of the City of New York §§2(1)(5), 3(1)(14), 35(3)(1); Civil Service Commission Rule VIII (6) (1954).

19. N. Y. CIVIL SERVICE LAW §15.

20. *Id.* §15(3).