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## Administrative Law—Mandamus

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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).

Since the appointment of eligible applicants to a position protected by Civil Service involves the discretion of the appointing agency, the Court could not order the Commissioner to appoint the captains to the position of battalion chief.<sup>21</sup> However, this action was brought only to restrain him from exceeding his authority; injunctive relief where the Civil Service Law is being violated is properly sought in Article 78 proceedings.<sup>22</sup>

*Review of Administration Determination*

The Administrative Code of the City of New York provides that upon the death of a member of that city's employees retirement system before his retirement, and upon evidence submitted to the Board of Estimate of the city proving that the death was the natural and proximate result of an accident sustained in the course of employment, and not as a result of willful negligence on the part of an employee, employee's dependents are entitled to certain death benefits.<sup>23</sup>

The courts have decided that it is the duty of the Board of Estimate itself, in the first instance, to pass on the sufficiency and quality of the evidence presented in support of such a claim.<sup>24</sup> The criterion on review of the Board's action is only whether a rational basis for its conclusion can be found.<sup>25</sup> Since the basis for review by the courts is so narrow, all administrative agencies should conscientiously and painstakingly assess evidence presented to them.<sup>26</sup>

In *Kilgus v. Board of Estimate of City of New York*,<sup>27</sup> the court held, that the Board of Estimate had not discharged its duty by accepting a report of a trial committee, consisting solely of a non-elected employee of the Board, as the basis of its decision. This report, together with conflicting testimony surrounding the death for which claim was here made, was in the possession of the Board for some months prior to its decision. Some members of the Board had stated that in the absence of overwhelming evidence to the contrary they felt bound by the trial committee's report; other members stated that the courts would later give the claimant a full hearing if he chose to appeal. In the light of these statements, the court felt that the Board misconceived its duty in not considering and making its own independent findings and determinations of the facts before it.

The dissent strongly contended that since the report of the trial committee

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21. *Jaffe v. Board of Education*, 265 N. Y. 160, 192, N. E. 185 (1934).  
 22. N. Y. CIV. PRAC. ACT §§1283-1306.  
 23. Administrative Code of the City of New York §B3-33, O.  
 24. *Daley v. Board of Estimate of the City of New York*, 267 App. Div. 592, 49 N. Y. S. 2d 139 (2d Dep't 1944).  
 25. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146 (1939).  
 26. *Weekes v. O'Connell*, 304 N. Y. 259, 107 N. E. 2d 290 (1952).  
 27. 308 N. Y. 620, 127 N. E. 2d 705 (1955).