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CIVIL SERVICE APPOINTMENTS AND PROMOTIONS

N.Y. CONST. art. V, § 6:

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as is practicable, by examination which, as far as practicable, shall be competitive

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Connery v. White⁴
(decided December 27, 1990)

Petitioner Connery, a civil service employee, challenged the Department of Transportation (DOT) Commissioner's promotion of a third party to Director of Personnel A, asserting that the DOT had violated the mandate of the New York State Constitution,⁵ which requires that promotions shall be made by competitive examination "as far as practicable."⁶

The supreme court dismissed the petition and the appellate division affirmed. The appellate division held that DOT's limitation of those eligible for the promotion, as well as their determination to use a non-competitive qualification process, did not violate the constitutional mandate.⁷

The statute enacted to carry out the constitutional mandate,

4. 164 A.D.2d 535, 564 N.Y.S.2d 530 (3d Dep't 1990).

5. N.Y. CONST. art. V, § 6.

6. *Connery*, 164 A.D.2d at 537, 564 N.Y.S.2d at 531 (citing N.Y. CONST. art. V, § 6).

7. *Id.*

Civil Service Law section 52(7),⁸ provides that a promotion “may be accomplished by a noncompetitive examination [when] there are no more than three persons eligible for examination for such promotion.”⁹ Connery claimed that the DOT narrowly defined the eligibility standard unnecessarily in its determination of which positions were in direct line for promotion to Director of Personnel A, resulting in only three people satisfying its criteria. Further, Connery claimed that it was “practicable to have extended the list of eligibles to more than three so as to have made it possible to hold a competitive examination.”¹⁰ Three reasons were given for this argument: 1) in 1968, the last time such a position was vacant, a competitive test was held; 2) the 1978 Classification Standards for Directors of Personnel A through D’s requirement for such position was one year of personnel administrative experience if at least a grade 27 level; and 3) the 1989 Listing of Administrative Titles included Connery’s position as one of personnel administration.¹¹

The court disposed of petitioner’s argument by stating that the legislature has carved out exceptions “where competitive examinations are not ‘practicable.’”¹² The court then asserted that

8. N.Y. CIV. SERV. LAW § 52(7) (McKinney 1983). Section 52(7) provides:

Promotion by non-competitive examination. Whenever there are no more than three persons eligible for examination for promotion to a vacant competitive class position, or whenever no more than three persons file application for examination for promotion to such position, the appointing officer may nominate one of such persons and such nominee, upon passing an examination appropriate to the duties and responsibilities of the position may be promoted, but no examination shall be required for such promotion where such nominee has already qualified in an examination appropriate to the duties and responsibilities of the position.

Id.

9. *Connery*, 164 A.D.2d at 536, 564 N.Y.S.2d at 531 (quoting N.Y. CIV. SERV. LAW § 52(7) (McKinney 1983)).

10. *Id.* at 537, 564 N.Y.S.2d at 531.

11. *Id.* at 537-38, 562 N.Y.S.2d at 531-32.

12. *Id.* at 538, 562 N.Y.S.2d at 532 (quoting, *inter alia*, Council 82, AFSCME, AFL-CIO v. New York State Dep’t of Civil Serv., 117 A.D.2d 110, 112, 502 N.Y.S.2d 292, 293 (3d Dep’t 1986)).

Connery's constitutional rights were not violated if there was a rational basis for DOT's application of section 52(7) of the Civil Service Law.¹³ The court found that there was a rational basis for the decision in the nature of responsibilities of a Director of Personnel, which could be classified as a "highly sensitive position."¹⁴ This classification, along with the size and complexity of the agency, makes it practicable to limit the eligibility of applicants. Another determinative factor in the practicability of DOT's limiting the eligibility list was that the Assistant Directors of Personnel A were basically doing the same job as that of the Director of Personnel A. Therefore, the court concluded that confining eligibility to just this group was rational.

The court's use of the rational basis standard comports with that of the United States Supreme Court. Of the three traditional methods of analysis applicable to equal protection cases,¹⁵ the Supreme Court has adjudicated equal protection cases dealing with legislative classification in social and economic areas by utilizing the rational basis test. This test requires only a minimal rational relationship between the interests of the state and the purpose of the legislation.¹⁶ A principle underlying this lenient standard is that "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the

13. *Id.* The court cited *Organization of New York State Mgt./Confidential Employees, Inc. v. Lawton*, 106 A.D.2d 48, 481 N.E.2d 258, 484 N.Y.S.2d 360 (1985), as precedent for the use of a rational basis test in article V, section 6 cases. *Id.*

14. *Connery*, 164 A.D.2d at 538, 564 N.Y.S.2d at 552. The court found that the responsibility of staffing services, position qualification, compensation and overseeing employee services programs could be "reasonably characterize[d] . . . as a highly sensitive position." *Id.*

15. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988). The three tests are the strict scrutiny test, which is used when a fundamental right or a "suspect class" is involved; the heightened scrutiny test, a less demanding test than the former, which is used in cases involving discriminatory classifications; and the last test is the rational relation test, applicable to cases in social or economic classifications. *Id.*

16. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); J. NOWAK & R. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3, at 574-75 (4th ed. 1991); Note, *Justice Stevens's Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1147-1148 (1987).

classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"¹⁷

Given the Supreme Court's perspective of resolving equal protection cases of this type, it is a fair statement that the Supreme Court would have yielded the same result as the appellate court in *Connery*. The wide latitude that is allowed to find a rational basis was furthered by the Supreme Court by stating that this type of case "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."¹⁸

17. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

18. *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).