Touro Law Review

Volume 10 | Number 3 Article 15

1994

Civil Service Appointments and Promotions: Wood v. Irving

Additionally, the court stated that the statutory evaluation procedure will be upheld as long as it complies with the State Constitution's "merit and fitness requirement."[180]

FOURTH DEPARTMENT

Wood v. Irving[181]
(decided December 29, 1993)

The petitioner, a state employee, claimed that Civil Service Law section 58(4)(c),[182] did not violate the state constitutional requirement that civil service appointments be by competitive examination.[183] Consequently, the petitioner brought an article 78[184] proceeding against the Police Department of the City of Rochester seeking an appointment as detective and commensurate compensation.[185] The Appellate Division, Fourth Department,

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180. *Id.* at A.D.2d at ___, 607 N.Y.S.2d at 354.

181. ___ A.D.2d ___, 605 N.Y.S.2d 799 (4th Dep't 1993).

182. N.Y. CIV. SERV. LAW § 58(4)(c) (McKinney 1992). The statute provides in pertinent part that:

> [a]ny person who has received permanent appointment as a police officer and is temporarily assigned to perform the duties of a detective shall, whenever such assignment exceeds eighteen months in duration, be appointed as a detective and receive the compensation ordinarily paid to a detective performing such duties.

Id.

183. N.Y. CONST. art. V, § 6. Section 6 provides in part:

> 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 practicable, by examination which, as far as practicable, shall be competitive . . . .

Id.

184. N.Y. CIV. PRAC. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1992). Article 78 of the C.P.L.R. is the "major vehicle for judicial review of the actions (or inactions) of, and decisions by, government officials and bodies . . . ." 8 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE 7801.02 (1992).

185. *Wood*, ___ A.D.2d at ___, 605 N.Y.S.2d at 799-800.

relied on *Birkeland v. State of New York*,[186] ruling that Civil Service Law section 58(4)(c) was constitutional even though it provides for promotion without a competitive examination.[187] Moreover, the court held that a court will strike a statute for unconstitutionality only as a last resort, and "only when unconstitutionality is shown beyond a reasonable doubt."[188]

Respondents contended that Civil Service Law section 58(4)(c) was unconstitutional because it provides for promotion without a competitive examination.[189] The court conceded that the New York State Constitution, article V, section 6,[190] recognized that appointments and promotions shall be made by competitive examination.[191] However, according to the court, the "capacity and fitness of a police officer (who has served in that capacity for a period in excess of 18 months) to serve as detective, can better be assessed by a review of the officer's extended period of on-the-job performance as opposed to competitive examination."[192]

The dissenting opinion found that Civil Service Law section 58(4)(c) violates New York Constitution, article V, section 6.[193] According to the dissent, the Civil Service Law is facially unconstitutional because, "absent a finding of

186. 98 A.D.2d 395, 398, 470 N.Y.S.2d 661, 664 (2d Dep't), *aff'd*, 64 N.Y.2d 663, 474 N.E.2d 608, 485 N.Y.S.2d 248 (1984).

187. *Wood*, ___ A.D.2d at ___, 605 N.Y.S.2d at 800 ("[E]very legislative enactment carries a strong presumption of constitutionality including a rebuttable presumption of the existence of necessary factual support for its provisions" (quoting Borden's Farm Prods. Co v. Baldwin, 293 U.S. 194, 209 (1934))).

188. *Wood*, ___ A.D.2d at ___, 605 N.Y.S.2d at 800.

189. *Id.* at ___, 605 N.Y.S.2d at 799-800.

190. N.Y. CONST. art. V, § 6.

191. *Wood*, ___ A.D.2d at ___, 605 N.Y.S.2d at 800.

192. *Id.* at ___, 605 N.Y.S.2d at 800. The court relied on Condell v. Jorling, 151 A.D.2d 88, 93, 546 N.Y.S.2d 727, 731 (3d Dep't 1989), in stating that "[p]racticability denotes the ability to *objectively* and 'fairly test the relative capacity and fitness of the applicants to discharge the duties of the service to which they seek appointment.'" *Id.*

193. *Wood*, ___ A.D.2d at ___, 605 N.Y.S.2d at 800 (Lawton, J., dissenting). According to the dissent, "[t]here [wa]s nothing in the record to support the majority's conclusion that the Legislature found that promotion by competitive examination was impracticable." *Id.* (Lawton, J., dissenting).

impracticability, it violates the mandate of the New York Constitution that, unless impracticable, promotion must be by competitive examination."[194] The dissent stressed the notion that whether an examination is practicable is often determined by the examining authority subject to judicial scrutiny.[195] This procedure was not taken in this case.[196] Consequently, the dissent urged that no person seeking a position as detective should be appointed unless he or she passes the "required tests." Further, the dissent explained that there was nothing in the record to support the majority's conclusion that the legislature found that promotion by competitive examination was impracticable.[197] Lastly, the dissent expressed concern that a police officer's capacity and fitness to be a detective can better be assessed by on-the-job performance as opposed to competitive examination, would "negate the necessity of taking examinations, and thereby destroying the civil service system."[198]

194. *Id.* at ___, 605 N.Y.S.2d at 800 (Lawton, J., dissenting).
195. *Id.* at ___, 605 N.Y.S.2d at 800 (Lawton, J., dissenting).
196. *Id.* at ___, 605 N.Y.S.2d at 800 (Lawton, J., dissenting).
197. *Id.* at ___, 605 N.Y.S.2d at 800-01 (Lawton, J., dissenting).
198. *Id.* at ___, 605 N.Y.S.2d at 801 (Lawton, J., dissenting).