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Civil Service Appointments and Promotions

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NEW YORK STATE CONSTITUTIONAL DECISIONS: 1991 COMPILATION

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

COURT OF APPEALS

Nissequogue v. Suffolk County Department of Civil Service¹
(decided April 2, 1991)

The Village of Nissequogue (Village) brought an article 78 proceeding to overturn a Suffolk County Department of Civil Service (Department) ruling which refused to certify the Village payroll due to an alleged illegal appointment of two police officers.² The court of appeals held that appointments limited to

1. 77 N.Y.2d 915, 572 N.E.2d 34, 569 N.Y.S.2d 593 (1991).

2. *Id.* at 916, 572 N.E.2d at 35, 569 N.Y.S.2d at 594. In *Nissequogue*, the Village did not assert a constitutional claim. Rather, the claim arose under the applicability of § 100(5) of New York's Civil Service Law. The court of appeals, however, is permitted under an article 78 proceeding to determine whether a statute has been applied in an unconstitutional manner. See *R & G Outfitters, Inc. v. Bouchard*, 101 A.D.2d 642, 475 N.Y.S.2d 549 (3d Dep't 1984).

three to six months that were extended for a period of years violated the New York State Constitution³ and the Civil Service Law.⁴

In 1982 and 1984, Dennis McHugh and Roger Leigh, respectively, were appointed by the Nissequogue Village Board to be “acting police officer[s].”⁵ These appointments, however, were not drawn from an eligibility list of applicants who successfully completed a civil service examination. In 1989, the Department refused to certify the Village payroll because of the alleged illegal hirings of McHugh and Leigh. The Village asserted that the Department should certify the payroll pursuant to section 100(5) of the New York Civil Service Law⁶ which, according to the Village, allowed the Department to certify the payroll because McHugh and Leigh were employed for over three years.⁷ Alternatively, McHugh and Leigh claimed that even if section 100(5) did not apply to the Village, the Department should certify the payroll anyway because the section applied to them.⁸

The Suffolk County Supreme Court agreed with the Village’s

3. N.Y. CONST. art. V, § 6.

4. *Nissequogue*, 77 N.Y.2d at 917, 572 N.E.2d at 35, 569 N.Y.S.2d at 594.

5. *Id.* at 916, 572 N.E.2d at 35, 569 N.Y.S.2d at 594.

6. N.Y. CIV. SERV. LAW § 100(5) (McKinney Supp. 1992). Section 100(5) provides:

Limitation upon the certification of payrolls. Solely for the purposes of this section and in the absence of fraud, an employee having completed the applicable probationary period and holding a position in the classified service of a civil service division by appointment or promotion for at least three years shall be presumed to have been duly appointed or promoted. After such time, neither the state civil service commission nor a municipal commission shall withhold certification of such employee on a payroll or voucher by reason of a violation of this chapter or rules made pursuant thereto. The provisions of this subdivision shall not apply in cities with a population of one million or more.

Id.

7. *Nissequogue*, 77 N.Y.2d at 916, 572 N.E.2d at 35, 569 N.Y.S.2d at 594.

8. *Id.* at 917, 572 N.E.2d at 35-36, 569 N.Y.S.2d at 594-95.

interpretation of section 100(5) and ordered the Department to certify the payroll.⁹ On appeal, the appellate division reversed, as a matter of law, the lower court's decision.¹⁰ The appellate court found that section 100(5) did not apply because McHugh and Leigh were not originally hired from successful completion of a civil service examination.¹¹ According to the appellate division, New York State Civil Service Law, section 64¹² and article V, section 6 of the New York State Constitution¹³ were the correct laws to apply with regard to the Village's appointments of McHugh and Leigh. The provisions provide, in substance, that appointments extending over several years without successful completion of a civil service examination are illegal.¹⁴

On further appeal, the court of appeals agreed with the appellate division's application of the law. The court of appeals stated: "Civil Service Law § 100(5) applies only to appointments made from an eligible list after successful completion of a civil service examination."¹⁵ According to the court, article V, section 6 of the New York State Constitution "requires all permanent appointments or promotions to be made from three persons certified as standing highest on an eligible list."¹⁶ In *Nissequogue*, McHugh and Leigh were appointed as "acting police officers," which is a temporary position pursuant to section 64 of the state's Civil Service Law.¹⁷ Under this section,

9. *Village of Nissequogue v. Suffolk County Dep't of Civil Serv.*, 145 Misc. 2d 382, 387, 546 N.Y.S.2d 916, 919 (Suffolk County Sup. Ct. 1989), *rev'd*, 157 A.D.2d 784, 550 N.Y.S.2d 384 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 915, 572 N.E.2d 34, 569 N.Y.S.2d 593 (1991).

10. *Village of Nissequogue v. Suffolk County Dep't of Civil Serv.*, 157 A.D.2d 784, 785, 550 N.Y.S.2d 384, 385 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 915, 572 N.E.2d 34, 569 N.Y.S.2d 593 (1991).

11. *Id.*

12. *See* N.Y. CIV. SERV. LAW § 64 (McKinney 1983).

13. N.Y. CONST. art. V, § 6.

14. *Nissequogue*, 157 A.D.2d at 785, 550 N.Y.S.2d at 385.

15. *Nissequogue*, 77 N.Y.2d at 916, 372 N.E.2d at 35, 569 N.Y.S.2d at 594.

16. *Id.* at 917, 372 N.E.2d at 35, 569 N.Y.S.2d at 594.

17. *Id.* at 916, 372 N.E.2d at 35, 569 N.Y.S.2d at 594 (citing N.Y. CIV. SERV. LAW § 64 (McKinney 1983)).

a temporary appointment could last only up to six months. Because McHugh and Leigh were employed by the Village for seven and five years respectively, their employment “was in violation of the Civil Service Law and contrary to the spirit of [the New York State] Constitution”¹⁸

Addressing McHugh’s and Leigh’s alternative claim, the court again held that section 100(5) of the Civil Service Law did not apply to them since it applies only to appointees who successfully completed a probationary period.¹⁹ To begin the probationary period, according to the court, the appointee must be drawn from an eligible list consisting of appointees who successfully completed a civil service examination. Because McHugh and Leigh never took the examination and in turn were not placed on an eligible list, their probationary period never commenced and, thus, section 100(5) did not apply to them. The court concluded “that an unlawfully extended period of temporary service cannot ripen into a permanent appointment unless the appointee met all the requirements for permanent appointment at the time of the temporary appointment.”²⁰

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Rigia v. Koehler²¹
(decided April 9, 1991)

The petitioner, Robert Rigia, brought an article 78 proceeding seeking to compel respondents, Department of Correction (DOC) and city personnel, to appoint him as a correction officer based on the assertion that he was discriminated against due to his prior arrest record.²² On appeal, the DOC raised the issue of whether

18. *Id.* at 917, 572 N.E.2d at 35, 569 N.Y.S.2d at 594.

19. *Id.* at 917, 572 N.E.2d at 36, 569 N.Y.S.2d at 595.

20. *Id.*

21. 165 A.D.2d 525, 568 N.Y.S.2d 927 (1st Dep’t 1991).

22. *Id.* at 526, 568 N.Y.S.2d at 927.