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# Civil Service Appointments and Promotions

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. Koehler[21]
(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.

the appointment of Rigia was prohibited by article V, section 6 of the New York State Constitution[23] and section 56 of the Civil Service Law.[24] The court held that to appoint Rigia regardless of his physical condition "would violate the Constitutional requirement of 'merit and fitness' . . . which is intended to protect the public."[25] The court decided to reinstate the DOC's determination that Rigia was not medically qualified, and never reached the issue of whether section 56 of the Civil Service Law was violated.[26] Section 56 of the Civil Service Law prohibits appointment based on results from a Civil Service Examination that is more than four years old.

In 1982, Rigia took a Civil Service examination in order to qualify for the position of correction officer. While awaiting appointment, Rigia took a second examination for the position of correction officer in the department. In April 1984, Rigia was notified that he had been considered for appointment. In December 1985, Rigia was again notified that he had been considered, but not selected for appointment. "He [then] filed a complaint with the Department's Equal Employment Opportunity

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23. N.Y. CONST. art. V, § 6.

24. N.Y. CIV. SERV. LAW § 56 (McKinney 1983). Section 56 provides:

> The duration of an eligible list shall be fixed at not less than one nor more than four years; provided that, except for lists promulgated for police officer positions in jurisdictions other than the city of New York, in the event that a restriction against the filling of vacancies exists in any jurisdiction, the state civil service department or municipal commission having jurisdiction shall, in the discretion of the department or commission, extend the duration of any eligible list for a period equal to the length of such restriction against the filling of vacancies. Restriction against the filling of vacancies shall mean any policy, whether by executive order or otherwise, which, because of a financial emergency, prevents or limits the filling of vacancies in a title for which a list has been promulgated. An eligible list that has been in existence for one year or more shall terminate upon the establishment of an appropriate new list, unless otherwise prescribed by a state civil service department or municipal commission having jurisdiction.

*Id.*

25. *Rigia*, 165 A.D.2d at 529, 568 N.Y.S.2d at 929 (citing Montero v. Lum, 68 N.Y.2d 253, 501 N.E.2d 5, 508 N.Y.S.2d 397 (1986)).

26. *Id.* at 529-30, 568 N.Y.S.2d at 930.

Office, alleging that he had been denied appointment, as a result of discrimination, based upon his prior arrest history . . . ."[27]

Following a long administrative process, a bench trial was held which resulted in a judgment directing the DOC to appoint Rigia to the position of correction officer.[28] However, before Rigia was to enter the DOC's training academy, the DOC ordered him to undergo a medical examination. The results of the examination indicated that Rigia's hearing levels fell below the minimum level required under the DOC's medical standards. Rigia was tested two more times and each time he failed to meet the hearing standard.

On appeal, the court, in reinstating the finding by the DOC that Rigia was not medically qualified for the appointment, held that the memorandum of the lower court did not require the appointment when it was determined that Rigia had failed a hearing examination that is required of all applicants.[29] One purpose of New York Constitution article V, section 6, "is to protect the public as well as the individual employee . . . ."[30]

The statute enacted to carry out this constitutional mandate, Civil Service Law section 50(4)(b), permits a municipal Civil Service Commission to "refuse to certify an eligible [candidate] who is found to have a physical disability which renders him unfit for the performance of the duties of the position in which he seeks employment . . . ."[31] Rigia claimed that the supreme court's memorandum automatically required his appointment as a correction officer regardless of his physical condition even though more than two years had elapsed since his last DOC physical. However, the court, in disposing of the Rigia's argument, stated that to appoint him "would violate the constitutional requirement of 'merit and fitness' which is intended

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

28. *Id.* at 526, 568 N.Y.S.2d at 927-28.

29. *Id.* at 532, 568 N.Y.S.2d at 930.

30. *Id.* at 527, 568 N.Y.S.2d at 928 (citing *Montero*, 68 N.Y.2d at 258, 501 N.E.2d at 8, 508 N.Y.S.2d at 400).

31. N.Y. CIV. SERV. LAW § 50(4)(b) (McKinney 1983 & Supp. 1992). The 1991 amendment to this subdivision had no effect on this opinion.

to protect the public."[32]

The court further added that the "[d]epartmental policy and practice [of subjecting everyone to a second medical examination if the first examination took place over a year before appointment] is logical, and in the public interest, since [it] guarantees that an applicant will not be appointed [if there exists] a significant change in his or her physical condition, such as loss of . . . hearing."[33]

The DOC also raised the issue of whether the appointment of Rigia was prohibited by article V, section 6 of the New York State Constitution and by section 56 of the Civil Service Law, due to the expiration of Rigia's written examination. Civil Service Law section 56 provides that "[t]he duration of an eligible list [of potential candidates for hire, resulting from a civil service examination is] 'not less than one nor more than four years . . . .'"[34] Rigia's examination was over four years old and, therefore, expired prior to the court's order. However, since the appellate court decided to reinstate the DOC's determination that Rigia was medically not qualified, they did not reach the merits of the issue relative to the expiration of the civil service examination.[35] The court, in dictum, stated that "if we did reach [the issue relative to the expiration of the civil service examination], the holding in *Matter of Deas v. Levitt* . . . would furnish another ground barring petitioner's appointment."[36] In *Deas,* the New York Court of Appeals held that an "appointment of [an individual] from a constitutionally valid expired list violates article V, § 6 of the N[ew] Y[ork] Constitution."[37]

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32. *Rigia*, 165 A.D.2d at 529, 568 N.Y.S.2d at 929.

33. *Id.* at 528, 568 N.Y.S.2d at 929.

34. *Id.* at 529, 568 N.Y.S.2d at 929 (quoting N.Y. CIV. SERV. LAW § 56 (McKinney 1983)).

35. *Id.* at 529-30, 568 N.Y.S.2d at 930.

36. *Id.* at 530, 568 N.Y.S.2d at 930.

37. Deas v. Levitt, 73 N.Y.2d 525, 531, 539 N.E.2d 1086, 1090, 541 N.Y.S.2d 958, 962, *cert. denied*, 493 U.S. 933 (1989).