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Administrative Law--Formal Hearing and Evaluation of Conduct Underlying Applicant's Previous Conviction Held Necessary for Refusal of Broker's License (Koster v. Holz, 3 N.Y.2d 639 (1958))

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However, the dissenting opinion of Mr. Justice Clark,[21] once past the issue of jurisdiction to review, poses an interesting question of statutory interpretation. It is his contention that the act providing for judicial review based on "all available records" means all the records of an inductee's life both before and during his service in the Army; that the Court's limitation of the statute to only the soldier's military record is "lacking of justification." [22] It is submitted that Justice Clark's interpretation is more consonant with the wording of the statute and the probable intent of Congress.

ADMINISTRATIVE LAW—FORMAL HEARING AND EVALUATION OF CONDUCT UNDERLYING APPLICANT'S PREVIOUS CONVICTION HELD NECESSARY FOR REFUSAL OF BROKER'S LICENSE.—Petitioner was refused a broker's license by the Superintendent of Insurance without a formal hearing, on the ground that he was not "trustworthy" within the meaning of that requirement of the Insurance Law. The Superintendent's decision was predicated on petitioner's previous conviction for refusing to be inducted into military service after having been denied classification as a conscientious objector. Petitioner's proceeding under article 78 of the Civil Practice Act to obtain an annulment of the Superintendent's determination was dismissed by the Supreme Court, Special Term. The Appellate Division affirmed. In reversing and remitting to the Superintendent of Insurance for further action, the New York Court of Appeals *held* that petitioner was entitled to a formal hearing which might establish a judicially reviewable record. The Superintendent was instructed to go behind the previous conviction and evaluate petitioner's underlying conduct in determining whether he met the requirement of the statute. *Koster v. Holz,* 3 N.Y.2d 639, 148 N.E.2d 287, 171 N.Y.S.2d 65 (1958).

When not specified by statute, the requirement of a hearing has generally been predicated upon an individual's substantive rights being adversely affected by agency action; [1] where a mere privilege is denied or revoked no such hearing is required.[2] The requirement of a hearing has been given special emphasis in regard to the granting or refusing of a license necessary to engage in certain occupations.[3] Statutes prescribing licenses to practice as a physician,[4] to prosecute

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[21] Harmon v. Brucker, 355 U.S. 579, 583 (1958).
[22] *Id.* at 585.

[1] DAVIS, ADMINISTRATIVE LAW 246-47 (1951).
[2] *Id.* at 250.
[3] *Id.* at 251-54.
[4] Gage v. Censors of Eclectic Medical Soc'y, 63 N.H. 92 (1884).

claims before an official board,[5] and to deal in alcohol[6] have been held to require a hearing before an applicant can be rightly refused; in these cases the applicants had satisfied all technical or professional requisites and were rejected solely because not "worthy of public confidence." The United States Supreme Court held in *Bratton v. Chandler*[7] that a statute requiring real estate brokers to be licensed must be construed as requiring notice and a hearing prior to a refusal to issue a license. As an exception to the rule, in some rigidly controlled areas thought to be of doubtful morality, licenses have been refused and revoked without hearing as a matter of public policy.[8]

Often, revocation or refusal to renew a license requires notice and hearing[9] even where initial refusal to grant the license does not, the courts considering that an established business or profession is a valuable franchise which cannot be destroyed without at least quasi-judicial proceedings.[10] The practice of a profession or an occupation has been considered to involve a property right even prior to the granting of a license to practice.[11]

The general rule in New York is that a superintendent or commissioner, in the exercise of his discretion, may not arbitrarily or capriciously refuse a license.[12] Any refusal must be predicated upon pertinent and reasonable grounds.[13] In *Perpente v. Moss*,[14] it was held that a license may not be refused on the ground that the applicant is not of good character unless the applicant has a fair opportunity to refute the conclusion and unless the court of review is apprised of the specific basis for the agency's finding.

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[5] Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926).

[6] Smith v. Foster, 15 F.2d 115 (S.D.N.Y. 1926).

[7] 260 U.S. 110 (1922).

[8] Saloon licenses—Boerner v. Thompson, 278 Ill. 153, 115 N.E. 866 (1917); Martin v. State, 23 Neb. 371, 36 N.W. 554 (1888), *aff'd*, 27 Neb. 325, 43 N.W. 108 (1889).

Pool room license—Commonwealth v. Kinsley, 133 Mass. 578 (1882).

Dance hall license—People *ex rel.* Ritter v. Wallace, 160 App. Div. 787, 145 N.Y. Supp. 1041 (2d Dep't 1914) (per curiam).

Licenses to operate a motor vehicle have also been revoked without hearing. LaPlante v. Board of Pub. Roads, 47 R.I. 258, 131 Atl. 641 (1926); Law v. Commissioner, 171 Va. 449, 199 S.E. 516 (1938). See also 4 WIS. L. REV. 180, 185 (1927).

[9] Courier-Journal Co. v. Federal Radio Comm'n, 46 F.2d 614 (D.C. Cir. 1931); Blunt v. Shepardson, 286 Ill. 84, 121 N.E. 263 (1918); Lillienfeld v. Commonwealth, 92 Va. 818, 23 S.E. 882 (1896).

[10] Board of Health v. McCoy, 125 Ill. 289, 297, 17 N.E. 786, 788 (1888).

[11] See Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 711-23 (1938). See also Globe Indem. Co. v. Bruce, 81 F.2d 143, 150 (10th Cir. 1935); DAVIS, ADMINISTRATIVE LAW 250 (1951).

[12] People *ex rel.* New York & Queens Gas Co. v. McCall, 219 N.Y. 84, 113 N.E. 795 (1916); BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 327 (1942).

[13] Fink v. Cole, 1 N.Y.2d 48, 133 N.E.2d 691, 150 N.Y.S.2d 175 (1956); Goldman v. Pink, 253 App. Div. 862, 1 N.Y.S.2d 562 (3d Dep't 1938) (per curiam).

[14] 293 N.Y. 325, 56 N.E.2d 726 (1944).

The Court in the principal case deemed it unnecessary to do more than interpret the applicable sections of the Insurance Law and their legislative history in order to find that a formal hearing was required. By section 119 of the Insurance Law the Superintendent of Insurance has the discretionary power to issue a broker's license to any qualified individual who ". . . is deemed by him trustworthy and competent to act as a broker. . . ." [15] Section 119(12) grants a rejected applicant the right to judicial review, and section 34 provides that such proceedings are to take place under article 78 of the Civil Practice Act. The Court reasoned that since the predecessor of section 119(12) and section 34 provided that review be by order of certiorari,[16] proceedings under the current statutes would also be of that nature.[17] Then, of necessity, there would have to be a formal hearing at which a record was made, for certiorari requires a record.[18] Traditionally, it is more the statutory requirement of a formal hearing, expressed or implied, that gives rise to review by certiorari than vice versa,[19] and the Court of necessity must have assumed that the legislature intended formal hearings although it did not so specify in the statute. Review in cases where there is no required hearing was generally by mandamus.[20]

After deciding that a hearing was required, the Court in an extended dictum discussed the validity of the Superintendent's decision that petitioner's prior conviction was sufficient evidence of untrustworthiness. The conviction of a crime involving moral turpi-

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[15] Applicant had fulfilled all other requirements of the statute.

[16] Section 119(12), as supplemented by § 34, replaced former § 143(13) of the N.Y. Insurance Law, Laws 1936, c. 625, § 9, which then provided that the action of the Superintendent of Insurance in such matters was subject to review by order of certiorari. In 1937, New York abolished the traditional remedies of certiorari, mandamus, and prohibition by the enactment of article 78 of the Civil Practice Act with the resulting change in the Insurance Law.

[17] Relying on 1939 LEG. DOC. No. 101, REPORT, JOINT LEGISLATIVE COMMITTEE ON REVISION OF INSURANCE LAWS, the opinion of the Court was that the legislature did not intend to restrict the rights of the persons affected. Koster v. Holz, 3 N.Y.2d 639, 646, 148 N.E.2d 287, 291, 171 N.Y.S.2d 65, 71 (1958).

[18] See Newbrand v. City of Yonkers, 285 N.Y. 164, 174-75, 33 N.E.2d 75, 80-81 (1941); New York Edison Co. v. Maltbie, 271 N.Y. 103, 2 N.E.2d 277 (1936); *In re* Standard Bitulithic Co., 212 N.Y. 179, 105 N.E. 967 (1914). Although certiorari, mandamus and prohibition have been abolished, the courts have found it necessary to fall back on these traditional forms of relief because of doubts as to what can be achieved by the simplified petition procedure. Carrow, *Types of Judicial Relief From Administrative Action,* 58 COLUM. L. REV. 1-2 (1958). Thus, in the instant case, the Court relies on the procedural requirements of certiorari in establishing the necessity of a formal hearing and record. Koster v. Holz, 3 N.Y.2d 639, 645-46, 148 N.E.2d 287, 290-91, 171 N.Y.S.2d 65, 70 (1958).

[19] West Flagler Amusement Co. v. State Racing Comm'n, 122 Fla. 222, 165 So. 64 (1935); 22 CARMODY-WAIT, NEW YORK PRACTICE 134-35 (1956).

[20] Small v. Moss, 277 N.Y. 501, 14 N.E.2d 808 (1938).

tude has been considered in the past sufficient evidence of untrustworthiness to warrant refusal [21] or suspension [22] of a license by an agency granted such discretion. But conviction of a crime not requiring *mens rea* is not of itself conclusive evidence of untrustworthiness.[23] Conversely, the New York Court of Appeals has affirmed a holding that acquittal in a criminal action was not res judicata in determining character and fitness of an attorney, and that the underlying conduct of the applicant in the matter might be evaluated.[24] The verdict in the criminal action was not conclusive evidence regarding the character of the applicant in the circumstances from which the criminal charge arose. The Court in the principal case maintained that the applicant might possibly have been convicted originally, although sincere in his objections to military service, and if such were the case, the conviction would not reflect upon his trustworthiness within the meaning of the Insurance Law.[25]

In 1951, the date of petitioner's conviction, the Universal Military Training Law allowed the classification of conscientious objector to any person who ". . . by reason of religious training and belief, is conscientiously opposed to participation in war in any form." [26] The statute further states that religious training and belief means ". . . belief in relation to a Supreme Being . . . but does not include essentially political, sociological, or philosophical views or a merely personal moral code." [27] Therefore, the applicant might have been refused the classification although espousing sincere sociological,

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[21] See 1927 OPS. ATT'Y GEN. 119, 123, N.Y. LEG. DOC. No. 12 (1928).

[22] In Zdrojeski v. Dineen, 268 App. Div. 877, 50 N.Y.S.2d 691 (2d Dep't 1944), an insurance broker who entered a plea of guilty for violating the National Housing Act was properly determined to be untrustworthy and his license was properly suspended. See also Tompkins v. Board of Regents, 299 N.Y. 469, 87 N.E.2d 517 (1949).

[23] *In re* Silverman, 183 Misc. 264, 49 N.Y.S.2d 179 (Sup. Ct. 1944), where it was held that a police commissioner could not withhold a hack license for conviction of a misdemeanor, although he could for a felony conviction; Baker v. Miller, 236 Ind. 20, 138 N.E.2d 145 (1956), where an attorney convicted of filing a false and "fraudulent" income tax return could not be disbarred under a statute providing for disbarment of an attorney convicted of a felony, since evasion of income taxes is not an offense involving moral turpitude. Defendant, who had pleaded guilty in the prosecution for tax evasion, was suspended from the practice of law for a period of nine months. *Cf.* 1927 OPS. ATT'Y GEN., *supra* note 21. For an extensive discussion of crimes neither involving moral turpitude nor requiring a *mens rea,* see Comment, 1956 WIS. L. REV. 625-67. See also Hall, *Ignorance and Mistake In Criminal Law,* 33 IND. L.J. 1 (1957); Mueller, *Mens Rea And The Law Without It,* 58 W. VA. L. REV. 34 (1955).

[24] Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (2d Dep't 1944), *reargument denied,* 270 App. Div. 1046, 63 N.Y.S.2d 840 (2d Dep't 1946), *aff'd mem.,* 296 N.Y. 926, 73 N.E.2d 41 (1947).

[25] Koster v. Holz, 3 N.Y.2d 639, 646-48, 148 N.E.2d 287, 291-92, 171 N.Y.S.2d 65, 71-73 (1958).

[26] 62 STAT. 612 (1948), as amended, 50 U.S.C. § 456(j) (Supp. V 1952).

[27] *Ibid.*

philosophical, or political objections, and have subsequently been convicted for persisting in his principles. Furthermore, recent developments in the substantive and procedural law in the area might possibly have effected a result other than conviction. The interpretation of the requirement of "religious training" as used in the statute has been liberalized in one district court,[28] and the United States Supreme Court has enlarged the ability of an individual to gain judicial appeal of Selective Service Board classifications.[29]

Although the rationale of the Court in arriving at the necessity of a hearing appears tenuous, the result achieved is equitable. Conviction per se can hardly be considered conclusive evidence of untrustworthiness in this era of crime without culpability, and evaluation of conduct would seem the better test in determining an applicant's character.

ADMINISTRATIVE LAW — TERMINATION OF EMPLOYMENT — REINSTATEMENT HELD NOT CONDITION PRECEDENT TO SUIT FOR SALARY WHERE PLAINTIFF SHOWS CLEAR LEGAL RIGHT TO POSITION.—Pursuant to section 903 of the New York City Charter,[1] plaintiffs were dismissed from city colleges in 1953 for pleading their privilege against self-incrimination before a legislative subcommittee. The United States Supreme Court subsequently held a similar application of the charter provision to another city college employee

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[28] *In re* Hansen, 148 F. Supp. 187 (D. Minn. 1957), 32 ST. JOHN'S L. REV. 105 (1957).

[29] Dickinson v. United States, 346 U.S. 389 (1953); Comment, 50 NW. U.L. REV. 660, 668-69 (1955). In Falbo v. United States, 320 U.S. 549 (1944), the Supreme Court held that defendant was not entitled to review in a criminal proceeding for violation of the Universal Military Training Law. However, in Estep v. United States, 327 U.S. 114 (1946), the Court reversed its stand and assumed a jurisdiction which was subsequently enlarged by the *Dickinson* case.

[1] "If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." N.Y.C. CHARTER § 903.