

Administrative Law--Civil Service Commission--Attempt to Adjust Required Passing Grade of Examination Without Advance Notice to Candidates of Such Change Held Invalid (Hymes v. Schechter, 6 N.Y.2d 352 (1959))

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Although a court could possibly order him to appoint someone, it could not tell him whom to appoint.⁴² Therefore, it seems the chairman could continue to recommend only himself for the position.

The Appellate Division probably could have aided in the effectuation of stable county government to a greater extent by sustaining the petition, rather than by dismissing it. The Board of Supervisors should not be permitted to ignore what is undoubtedly the clear mandate of the law to appoint only persons recommended by the county political chairman. "The public interest requires that such illegal procedure be disapproved."⁴³



ADMINISTRATIVE LAW—CIVIL SERVICE COMMISSION—ATTEMPT TO ADJUST REQUIRED PASSING GRADE OF EXAMINATION WITHOUT ADVANCE NOTICE TO CANDIDATES OF SUCH CHANGE HELD INVALID.—Petitioners brought an Article 78 proceeding to annul the determination of the New York City Civil Service Commission affecting the grading of a promotion examination. Candidates were required to obtain a grade of seventy per cent in both parts of the written test to qualify for the rest of the examination. Determining that Part I had been too difficult, the Commission without advance notice applied a conversion formula in accordance with a civil service rule, which did not become effective, however, until two weeks after the examination was held. Petitioners claimed that employment of the conversion formula resulted in a greater number passing the entire examination, thereby placing petitioners lower on the list. Reversing the Appellate Division, the New York Court of Appeals *held* that the Civil Service Commission may not lawfully adjust the required passing grade of an examination unless it notifies the candidates in advance of the examination by duly promulgated rule that such an adjustment may be made. *Hymes v. Schechter*, 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959).

Regulation through the administrative process has been effectuated on both the state and federal levels since the founding of our country.¹ As a result of the steady growth of administrative law "the state has extended its controls into every aspect of our individual and collective activities."² The reasons for the increase of

⁴² *Gimprich v. Board of Educ.*, 306 N.Y. 401, 406, 118 N.E.2d 578, 580 (1954); *People ex rel. Harris v. Commissioners*, 149 N.Y. 26, 30, 43 N.E. 418, 419 (1896).

⁴³ *Ahern v. Board of Supervisors*, 6 N.Y.2d 376, 383, 160 N.E.2d 640, 643, 189 N.Y.S.2d 888, 892 (1959) (dissenting opinion).

¹ See GELLHORN & BYSE, *ADMINISTRATIVE LAW* 1-7 (1954).

² *Kramer, The Place and Function of Judicial Review in the Administrative Process*, 28 *FORDHAM L. REV.* 1, 3 (1959).

administrative agencies in government functions are several and varied.³ The amount of authority which is delegated to the individual agency is determined by the enabling act,⁴ and such power may be express or implied.⁵ In carrying out this authority the administrative agency often acts both legislatively and judicially.⁶

Because of the concentration of power in the various agencies, the problem of judicial review is perhaps the most important in the area.⁷ Although there are several decisions which indicate that the Constitution prohibits the barring of all judicial review,⁸ especially where constitutional or jurisdictional facts are in question, certain areas have heretofore been relatively free from judicial review.⁹ In other areas the doctrine is greatly restricted so as to be available only when the act complained of is illegal, arbitrary, capricious or whimsical as a matter of law.¹⁰

The power of the courts to review administrative acts lies generally in two areas, *i.e.*, in the judicial area of trial-type hearings¹¹ and in the legislative area of rule making.¹² Because of the wide

³ *Ibid.* Among the reasons set down by the author are the following: the need for continuous, consistent, integrated regulation and control; the tremendous volume of cases involved; the need for swift, inexpensive action; the necessary requirement for the wise exercise of great amounts of flexibility and discretion. *Ibid.*

⁴ GELLHORN & BYSE, *op. cit. supra* note 1, at 65.

⁵ "In absence of . . . express statutory provision the authority of the . . . agency to adopt rules and regulations has been held to be implied by the enabling act. . . ." KAPLAN, *THE LAW OF CIVIL SERVICE* 103 (1958). See also *Mayor v. Sands*, 105 N.Y. 210, 11 N.E. 820 (1887); *Jordan v. City of Mobile*, 260 Ala. 393, 71 So.2d 513 (1954).

⁶ Compare *Hymes v. Schechter*, 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959) (exercise of legislative power in determining grade requirements), with *In re Larson*, 17 N.J. Super. 564, 86 A.2d 430 (1952) (exercise of judicial power in conducting a hearing). These two functions have been respectively classified as "administrative legislation" and "administrative adjudication." Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938).

⁷ See generally, Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 6 (1959).

⁸ See *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1935); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

⁹ These areas as set forth in Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 17-26 (1959) are: (a) military matters; (b) immigration and treatment of aliens; (c) foreign affairs; (d) political issues; (e) government programs; (f) negative agency orders.

¹⁰ See KAPLAN, *THE LAW OF CIVIL SERVICE* 146 (1958).

¹¹ See *Kessler v. Strecker*, 307 U.S. 22 (1939); *Han-Lee Mao v. Brownell*, 207 F.2d 142 (D.C. Cir. 1953). In some cases there is no right to a judicial hearing. See *United States v. Ju Toy*, 198 U.S. 253 (1905).

¹² See *Hymes v. Schechter*, 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959). See also *Dowling v. Brennan*, 284 App. Div. 563, 131 N.Y.S.2d 594 (1st Dep't 1954); *Gilbert v. Kroll*, 144 N.Y.S.2d 219 (Sup. Ct. 1955), *aff'd*, 1 App. Div.2d 819, 150 N.Y.S.2d 153 (1st Dep't 1956) (memorandum decision).

amount of discretion involved in rule-making, courts are reluctant to overturn agency decisions in this area.¹³ Thus, only where there is a clear abuse of discretion or where a constitutional or statutory mandate has been violated will the courts intervene.¹⁴

The civil service commissions were among the first administrative agencies empowered to make rules implementing the enabling act which had the force and effect of law.¹⁵ The rules of this type of agency generally were concerned with the administration and content of examinations,¹⁶ and the problem of review has become an increasingly more important one for the New York courts.¹⁷ The conflict normally arises because of the interplay between two established principles of administrative law, namely, the indispensable right of agencies to alter announced judgments or standards where unforeseeable circumstances require¹⁸ and the rule that an agency is bound by its own rules.¹⁹

Applying these rules to the facts of the instant case, the question is posed whether the Civil Service Commission, if it deems such change necessary, may validly alter one of its rules covering grade requirements where no notice of such change was given to candidates. The view of the courts with respect to the validity of the retroactive effect of such rule changing can best be seen by an analysis of the case law in the area.

¹³ See *Maxwell v. Civil Service Comm.*, 169 Cal. 336, 146 Pac. 869 (1915). See also *Pratt v. Rosenthal*, 181 Cal. 158, 183 Pac. 542 (1919).

In those cases where the courts have interfered they have not substituted their judgment for that of the commission, "but have merely invalidated the determinations or actions of the personnel agency as being contrary to the law's requirements." KAPLAN, *THE LAW OF CIVIL SERVICE* 132 (1958).

¹⁴ Compare *Application of Fallon*, 14 Misc.2d 918, 178 N.Y.S.2d 459 (Sup. Ct. 1958), with *Hymes v. Schechter*, 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959).

¹⁵ See *Rogers v. City of Buffalo*, 123 N.Y. 173, 25 N.E. 274 (1890); *George v. City of Seattle*, 184 Wash. 560, 52 P.2d 360 (1935). For the distinction between administrative "rules" and "regulations" see KAPLAN, *THE LAW OF CIVIL SERVICE* 107 (1958).

¹⁶ See, e.g., *Bridgeman v. Kern*, 282 N.Y. 375, 26 N.E.2d 299 (1940); *Sloat v. Board of Examiners*, 274 N.Y. 367, 9 N.E.2d 12 (1937); *Fink v. Finegan*, 270 N.Y. 356, 1 N.E.2d 462 (1936); *Dowling v. Brennan*, 284 App. Div. 563, 131 N.Y.S.2d 594 (1st Dep't 1954).

¹⁷ New York courts in early cases declined to examine into the merits of civil service examinations. See *Levanthal, Administrative Law in New York Civil Service Litigation*, 15 *FORDHAM L. REV.* 62, 72 (1946). For recent cases where courts have intervened in civil service cases, see *Hymes v. Schechter*, 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959); *Dowling v. Brennan*, 284 App. Div. 563, 131 N.Y.S.2d 594 (1st Dep't 1954); *Gilburt v. Kroll*, 144 N.Y.S.2d 219, *aff'd*, 1 App. Div.2d 819, 150 N.Y.S.2d 153 (1st Dep't 1956) (memorandum decision).

¹⁸ See *Levanthal, Administrative Law in New York Civil Service Litigation*, 15 *FORDHAM L. REV.* 62, 74-75 (1946). See also *Abramson v. Commissioner of Educ.*, 1 App. Div.2d 366, 150 N.Y.S.2d 270 (3d Dep't 1956).

¹⁹ See *Wittekind v. Kern*, 170 Misc. 939, 11 N.Y.S.2d 569 (Sup. Ct. 1938), *aff'd mem.*, 256 App. Div. 918, 10 N.Y.S.2d 862, *aff'd mem.*, 281 N.Y. 701, 23 N.E.2d 537 (1939).

In *Brady v. Finegan*,²⁰ a candidate for the New York City police force was notified of his failure in the written test because of a rating of forty per cent in the subject of memory. At the date of the written test, the Commission rules required only a twenty per cent minimum grade in each announced subject. Before the release of the results, the rule was amended to require fifty per cent in each subject. The Court of Appeals upheld the new rule as not improperly retroactive, especially since the identity of candidates remained undisclosed when the rule was revised. However, in a later case, *Wittekind v. Kern*,²¹ where the Commission after promulgating a list containing only candidates who had received the required passing mark in each of a series of tests as well as an overall passing mark for the entire test, attempted to re-rate the papers of candidates who had received an overall passing mark but who had failed to receive the required mark in one or another of the tests, the court directed the Commission to strike from the eligible list those placed thereon as a result of the Commission's re-rating.²²

In *Dowling v. Brennan*,²³ the Civil Service Commission had failed to advise the candidates in advance of their taking the written examination that failure to obtain a passing mark in the first part of the examination would disqualify the candidate. In holding the examination invalid the court stated:

The candidates for the examination had no advance notice that the passing of Part I of the written examination was prerequisite to having the balance of the written examination rated and considered in the aggregate mark. . . . [T]here is a sound public policy served in requiring the civil service commission to provide as much information in advance concerning the procedure affecting an examination as is consistent with sound and practical adminis-

²⁰ 269 N.Y. 571, 199 N.E. 676 (1935) (memorandum decision). See also *Allen v. Finegan*, 254 App. Div. 858, 6 N.Y.S.2d 363 (1st Dep't 1938) (memorandum decision). The Appellate Division in the instant case relied, *inter alia*, on the *Brady* case in upholding the act of the Commission. *Hymes v. Schechter*, 7 App. Div.2d 294, 182 N.Y.S.2d 726 (1st Dep't 1959).

²¹ 170 Misc. 939, 11 N.Y.S.2d 569 (Sup. Ct. 1938), *aff'd mem.*, 256 App. Div. 918, 10 N.Y.S.2d 862, *aff'd mem.*, 281 N.Y. 701, 23 N.E.2d 537 (1939).

²² The court there stated:

"There was nothing improper in the original rule fixing the requirement of an eighty per cent general average in order to have an applicant placed on the promotion list. That was notice not only to those who took the examination, but to the world at large that this examination was to be determined on the basis of an eighty per cent average. That is the law of this case, and is binding on the commission as well as every one else." *Id.* at 941, 11 N.Y.S.2d at 571.

See also *Poss v. Kern*, 263 App. Div. 320, 32 N.Y.S.2d 979 (1st Dep't 1942), where the court declined to permit adding to an eligible list additional candidates who barely failed to receive a passing mark, although the Commission sought to increase the number of eligible candidates in order to meet the needs of the service and to avoid the expense of a further examination.

²³ 284 App. Div. 563, 131 N.Y.S.2d 594 (1st Dep't 1954).

tration. . . . Accordingly, the failure to give advance notice in this instance was a material defect in procedure which . . . requires . . . relief.²⁴

Similarly, in *Gilbert v. Kroll*,²⁵ where candidates for licenses as principals of elementary day schools were not given advance notice that the passing mark for the practical examination might be changed from sixty to sixty-five per cent after the examination was completed, it was held that such subsequent change of the passing mark, thereby depriving candidates who had attained a mark of sixty per cent from advancing further, was illegal.²⁶

However, two other cases seem somewhat contrary to the decision in the *Gilbert* case. In *Abramson v. Commissioner of Educ.*,²⁷ an examination was given in separate parts. Between the dates of the holding of the two sections of the written examination, the Board of Examiners promulgated a passing mark of sixty-five per cent. After the papers were graded, but before the candidates were identified, the Board concluded that the examination was too difficult and accordingly voted to give a five per cent credit to each of the candidates. Reversing the Commissioner of Education who had directed the Board of Examiners to rescind the credit as a violation of the constitutional mandate of competitiveness,²⁸ the court stated:

No constitutional principle was violated by the Board in this case by its action in lowering the "hurdle," after the written examination had been given, and in accordingly allowing candidates whom it believed to be fit and qualified, to go on to the other phases of the examination.²⁹

In *Robbins v. Schechter*,³⁰ an examination announcement in January 1946 was made for the position of captain in the police department. At that time it was stated that a minimum passing mark might be required and would be so stated in the official question booklet. In April 1956 rule V of the Rules of the Civil Service

²⁴ *Id.* at 565-66, 131 N.Y.S.2d at 596.

²⁵ 2 N.Y.2d 896, 141 N.E.2d 631, 161 N.Y.S.2d 148 (1957) (memorandum decision).

²⁶ Whereas in the instant case the action of the Commission resulted in a greater number passing the entire examination, in the *Gilbert* case the Commission's action resulted in a smaller number passing the entire examination.

²⁷ 1 App. Div.2d 366, 150 N.Y.S.2d 270 (3d Dep't 1956).

²⁸ Art. 5, § 6 of the New York State Constitution provides:

"Appointments and promotions in the civil service of the state and of all 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. . . ."

²⁹ *Abramson v. Commissioner of Educ.*, 1 App. Div.2d 366, 374, 150 N.Y.S.2d 270, 279 (3d Dep't 1956). Interestingly, the court in *Abramson* says that the Commissioner could have annulled the five per cent credit in his discretion as a matter of educational policy but not on the grounds that it violated the constitutional principle of competitiveness. *Ibid.*

³⁰ 7 Misc.2d 436, 162 N.Y.S.2d 790 (Sup. Ct.), *aff'd mem.*, 3 App. Div.2d 1010, 165 N.Y.S.2d 442 (1st Dep't 1957), *aff'd mem.*, 4 N.Y.2d 935, 151 N.E.2d 613, 175 N.Y.S.2d 814 (1958).

Commission was amended so as to provide for the use of a mathematical formula which would take into account test difficulty and other relevant test factors on the rating of the examination. The examination was administered in June 1956, and the test booklet stated that candidates were required to obtain a seventy per cent grade in each of the two parts to pass the entire examination. Subsequent to the taking of the examination but before the candidates were identified it was determined that not a sufficient number would pass to complete the list, and the mathematical formula was employed with a resulting greater number of candidates passing the examination. In upholding the use of the formula the court maintained that the fact that the instruction booklet contained a notice that the passing mark was seventy per cent was not binding in the face of the civil service rule stating that a change in grading might be made.

Such was the development of case law in the area prior to the decision in the instant case, a development that followed no formal pattern. Thus, while the courts in general were reluctant to exercise the power of judicial review,³¹ their infrequent efforts produced no uniformity. The Court of Appeals in the instant case has clarified the situation somewhat.³² In holding that a civil service body may not lawfully adjust the required passing grade for part of an examination, unless it notifies the candidates in advance that such an adjustment may be made, the Court here conforms with and strengthens the *Wittekind*,³³ *Dowling*,³⁴ and *Gilbert*³⁵ decisions. By distinguishing *Robbins v. Schechter*,³⁶ the Court demonstrates that where a rule is in existence at the time of the taking of the examination which notifies candidates that the grading method is subject to change even after completion of the examination, then notwithstanding a stated passing grade in the test booklet, such grade requirements may validly be changed. However, where, as in the instant case, the rule giving notice of such possible change has not yet been fully approved,³⁷ it does not operate as constructive notice

³¹ "Generally the courts have been circumspect in reviewing ratings of examination papers, and have confined their review solely to cases where there has been a clear showing that the competitive principle has been violated, or that the ratings are so arbitrary and unreasonable as to be indefensible." KAPLAN, *THE LAW OF CIVIL SERVICE* 158-59 (1958).

³² See *Hymes v. Schechter*, 6 N.Y.2d 352, 160 N.E.2d 627, 189 N.Y.S.2d 870 (1959).

³³ See text accompanying note 21 *supra*.

³⁴ See text accompanying note 23 *supra*.

³⁵ See text accompanying note 25 *supra*.

³⁶ See text accompanying note 30 *supra*.

³⁷ Often the rules of the state personnel agency are not effective until approved by the governor, see *McCann v. Personnel Bd. of Wis.*, 255 Wis. 321, 38 N.W.2d 480 (1949), the state commission, see *Burri v. Kern*, 180 Misc. 74, 39 N.Y.S.2d 640 (Sup. Ct. 1943), or the mayor, see *Hymes v. Schechter*, *supra* note 32.

of possible change and the Commission is bound by the original requirements it has promulgated.

The *Abramson* decision³⁸ has not, however, been clarified by *Hymes* and remains inconsistent with the decision in that case. Although the Appellate Division cited *Abramson* as its authority in upholding the act of the Commission,³⁹ the Court of Appeals in reversing the Appellate Division failed even to mention the case. In light of the *Hymes* decision the *Abramson* case might well be restricted to its facts in the future.

The decision of the Court in the *Hymes* case does not violate the accepted rule of administrative law that courts will not generally review discretionary acts of the agency. The reasoning of the Court of Appeals indicates, and rightly so, that this is not a case of discretion but rather of agency noncompliance with one of its own rules. While much can be said for the refusal of the judiciary to question the wisdom of discretionary acts of the agency, courts should not be reluctant to review those decisions where what is involved is not an exercise of discretion but rather the application of its own rules and regulations. Judicial review is imperative in such cases to guarantee the continuance of individual rights.



ARBITRATION — EQUITY — BOARD'S ORDER OF EMPLOYEE'S REINSTATEMENT AGAINST EMPLOYER'S WISHES HELD VALID. — Appellant, a foreign corporation, entered into an eleven-year contract employing respondent in a highly responsible position. The contract provided that if respondent should be permanently disabled, he would receive reduced compensation for three years. It was further provided that any controversy arising out of the contract should be settled by arbitration in accordance with the American Arbitration Association Rules, which authorize specific performance of a contract. The board of directors determined that respondent was permanently disabled and that his services should be terminated. He disputed this finding and the controversy was submitted for arbitration. The Court of Appeals held that the arbitrators' award ordering petitioner's reinstatement was final and would be confirmed. *Matter of Staklinski (Pyramid Elec. Co.)*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

"Arbitration is intended to effect a summary and extrajudicial

³⁸ See text accompanying note 27 *supra*.

³⁹ See *Hymes v. Schechter*, 7 App. Div.2d 294, 296, 182 N.Y.S.2d 726, 728, (1st Dep't 1959).