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Administrative Law--Termination of Employment--Reinstatement Held Not Condition Precedent to Suit for Salary Where Plaintiff Shows Clear Legal Right to Position (Austin v. Board of Higher Educ., 5 A.D.2d 664 (1st Dep't 1958))

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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.

unconstitutional.[2] In the present action at law to recover accrued salary, the Appellate Division, reversing the New York Supreme Court's dismissal of the complaint,[3] *held* that plaintiffs had a clear legal right to reinstatement and therefore actual reinstatement was not a condition precedent to their action for salary. *Austin v. Board of Higher Educ.*, 5 A.D.2d 664, 174 N.Y.S.2d 511 (1st Dep't 1958).

The usual procedure in New York for recovering salary from a municipal corporation is a petition for an order of mandamus to compel payment,[4] in a proceeding under article 78 of the Civil Practice Act.[5] Where the employee's salary has been withheld, he petitions for its payment.[6] Where the employee has been dismissed, he petitions for both reinstatement and payment of salary accrued.[7] Some cases, however, allow recovery of accrued salary in an action at law,[8] and some early mandamus petitions were unsuccessful because an action would lie at law.[9]

In the principal case, the Court struck down defendant's contention that plaintiffs had chosen an improper remedy by suing at law. The defendant first argued that the dismissals of the plaintiffs were discretionary, and thus reviewable only by an article 78 proceeding[10] in the nature of certiorari. The Court answered that the dismissals were non-discretionary because they resulted from the self-executing provisions of section 903 of the New York City Charter. The defendant then argued that the complaint was insufficient for failure to allege reinstatement, which may be obtained only

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[2] Slochower v. Board of Educ., 350 U.S. 551 (1956).

[3] Austin v. Board of Higher Educ., 9 M.2d 253, 170 N.Y.S.2d 7 (Sup. Ct. 1957).

[4] See, *e.g.*, N.Y. CIV. SERV. LAW § 22, repealed April 15, 1958, effective April 1, 1959, LAWS OF N.Y. 1958, c. 790; Daniman v. Board of Educ., 202 Misc. 915, 118 N.Y.S.2d 487 (Sup. Ct. 1952), *aff'd mem. sub nom.* Shlakman v. Board of Higher Educ., 282 App. Div. 718, 122 N.Y.S.2d 286 (2d Dep't 1953), *aff'd sub nom.* Daniman v. Board of Educ., 306 N.Y. 532, 119 N.E.2d 373 (1954), *rev'd sub nom.* Slochower v. Board of Educ., 350 U.S. 551 (1956); 22 CARMODY-WAIT, NEW YORK PRACTICE 275-76, 293-94 (1956).

[5] See N.Y. CIV. PRAC. ACT §§ 1283 (which abolishes the form of the writ of mandamus), 1284(3) (which preserves the substantive remedy of that writ).

[6] See, *e.g.*, People *ex rel.* Churchman v. Board of Trustees, 58 N.Y. 654 (1874); Gelson v. Barry, 233 App. Div. 20, 250 N.Y. Supp. 577 (2d Dep't), *aff'd mem.*, 257 N.Y. 551, 178 N.E. 791 (1931); Conolly v. Craft, 205 App. Div. 583, 200 N.Y. Supp. 69 (2d Dep't 1923).

[7] See, *e.g.*, Barmonde v. Kaplan, 266 N.Y. 214, 216, 194 N.E. 681 (1935); Daniman v. Board of Educ., *supra* note 4; Ironside v. Tead, 13 N.Y.S.2d 17 (Sup. Ct. 1939), *modified mem.*, 258 App. Div. 940, 17 N.Y.S.2d 994 (1st Dep't), *aff'd mem.*, 283 N.Y. 667, 28 N.E.2d 399 (1940).

[8] See, *e.g.*, Rasmussen v. City of New York, 301 N.Y. 532, 93 N.E.2d 344 (1950); Toscano v. McGoldrick, 300 N.Y. 156, 89 N.E.2d 873 (1949); Steinson v. Board of Educ., 165 N.Y. 431, 59 N.E. 300 (1901).

[9] See, *e.g.*, People *ex rel.* Harnett v. Inspectors, 44 How. Pr. 322 (Sup. Ct. N.Y. 1873); People *ex rel.* Perry v. Thompson, 25 Barb. 73 (Sup. Ct. N.Y. 1857); *Ex parte* Lynch, 2 Hill 45 (Sup. Ct. N.Y. 1841).

[10] N.Y. CIV. PRAC. ACT §§ 1283, 1284(2).

by an article 78 proceeding[11] in the nature of mandamus. The Court answered that reinstatement is not necessary where plaintiff shows a clear legal right to the position.

By way of deciding that the dismissals were non-discretionary, the Appellate Division characterizes section 903 as imposing a "self-executing forfeiture" and emphasizes that "no further action is required."[12] However, the United States Supreme Court in *Slochower v. Board of Educ.*[13] indicated that section 903 constitutionally terminates employment only upon proper action by the city agency. Thus it seems that the Appellate Division urges an unconstitutional construction of the statute by declaring plaintiffs' positions forfeit as of the time of their refusal to testify.[14] If the statute were construed so as to save its constitutionality, the Board's decision to dismiss would have marked the termination of plaintiffs' employment. Under this construction, the presence or absence of discretion in the Board's decision would be a question of fact determinative of whether or not a suit at law was available. A finding to the effect that the Board's application of the statute's varied requirements to plaintiffs' acts involved discretion seems possible. With a finding of discretion, plaintiffs' complaint would be dismissible and their proper remedy a proceeding[15] to review the Board's judgment.

The Court cites *Toscano v. McGoldrick*[16] as conclusive authority for the proposition that plaintiffs had a clear legal right to their positions and thus could recover accrued salary at law. The *Toscano* case allowed the unreinstated employee an action at law on the theory that his dismissal was clearly illegal. The illegality of the dismissal was shown by a prior New York Court of Appeals decision to the effect that the statute authorizing the dismissal was illegal. Thus the *Toscano* case, while not requiring reinstatement, is consonant with the over-all view that a definitive recognition of plaintiff's right to the position is necessary to a law action.[17] In the early case of

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[11] N.Y. CIV. PRAC. ACT §§ 1283, 1284(3).

[12] Austin v. Board of Higher Educ., 5 A.D.2d 664, 666, 174 N.Y.S.2d 511, 513 (1st Dep't 1958).

[13] 350 U.S. 551 (1956).

[14] It is submitted that the Court should not have construed the statute as unconstitutional on its face. However, the Board's decision to dismiss might have been found an unconstitutional exercise of its power to dismiss. For a constitutional application of the statute, the United States Supreme Court indicated that the agency's inquiry should consider ". . . the subject matter of the questions, remoteness of the period to which they are directed, or justification for the exercise of the privilege . . . . mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely." Slochower v. Board of Educ., 350 U.S. 551, 558 (1956).

[15] N.Y. CIV. PRAC. ACT §§ 1283, 1284(2).

[16] 300 N.Y. 156, 89 N.E.2d 873 (1949).

[17] Toscano was reinstated without any further action by him after the decision in Matter of Rushford v. LaGuardia, 280 N.Y. 217, 20 N.E.2d 547 (1939). The *Toscano* Court said that, since the dismissal had already been declared illegal, the city was only doing what it had to do in restoring him to

Thompson v. Board of Educ.[18] the Court of Appeals considered recognition by reinstatement necessary, for they denied the remedy at law in the absence of reinstatement. Dicta in more recent cases likewise indicates that a successful mandamus is a condition precedent of the action at law.[19] In a case where the law action was available, the facts show that the unreinstated teacher's right to the position had been recognized administratively by the Superintendent of Schools.[20] In these cases, the clear legal right to the position without which a plaintiff at law is unsuccessful seems to be a right already defined by reinstatement, adjudication, or administrative acknowledgment. Inasmuch as the instant case states that plaintiffs will eventually have to sustain their right either under the *Slochower* case or otherwise,[21] its finding of a clear legal right to their positions seems to depart from the *Toscano* view of a clear legal right, *i.e.,* a right which has prior official recognition. In the absence of any judicial or administrative determination of plaintiffs' right, the recognition by reinstatement seems essential.[22]

Under precedent, then, the legality of a municipal employee's dismissal was not litigated in a law action but in a mandamus proceeding. Under the present ruling, the legality of any dismissal not involving discretion can be determined at law. While a contract action is the logical procedure to determine whether a defendant has breached a binding promise of employment by dismissing the plaintiff,[23] the question of a municipality's breach should not be resolved in this way. The unfair result would follow that an employee seeking restoration to public service must move against the municipality within four months of dismissal, while an employee seeking salary without service need not act for six years.[24] The public interest would

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his previous position. Thus, it was continued, a mandamus for restoration would be superfluous.

[18] 201 N.Y. 457, 94 N.E. 1082 (1911).

[19] Barmonde v. Kaplan, 266 N.Y. 214, 216, 194 N.E. 681 (1935); Thoma v. City of New York, 263 N.Y. 402, 407, 189 N.E. 470, 472 (1934).

[20] Steinson v. Board of Educ., 49 App. Div. 143, 146, 63 N.Y. Supp. 128, 130 (1st Dep't 1900), *aff'd,* 165 N.Y. 431, 59 N.E. 300 (1901). It should be noted that it was not the Superintendent of Schools who recognized the plaintiff's right to the teaching position, but rather the defendant Board of Education that dismissed the plaintiff.

[21] Austin v. Board of Higher Educ., 5 A.D.2d 664, 668, 174 N.Y.S.2d 511, 515 (1st Dep't 1958).

[22] The Court in the principal case considers Toscano's reinstatement inoperative as to his right to salary. The reinstatement is indeed inoperative as creating the right to the position, for that right had already been created by the *Rushford* decision. Where the clear legal right has already been created, as in the *Toscano* case, its recognition by reinstatement is not essential. Thus, as the *Austin* Court reasons, Toscano's reinstatement was inoperative to determine his right to the salary. But, under the facts of the present case where the very existence of the right is in question, its recognition by reinstatement seems essential in finding a clear legal right.

[23] 5 WILLISTON, CONTRACTS § 1288 (rev. ed. 1937).

[24] *Compare* N.Y. CIV. PRAC. ACT § 1286 (which allows a four-month period

seem to be harmed by a six-year statute of limitations in determining municipal liability.

ADVERTISING—FALSE IMPRESSION HELD ACTIONABLE.—Defendant corporation had advertised toys for sale at large discounts. Nevertheless it sold two games at a "discounted" price greater than the standard retail rate established in the community. In affirming a conviction for deceptive advertising,[1] the Court of Appeals *held* that though the defendant might set its list prices and discounts freely, it might not create the false impression that it was underselling its competitors. *People v. Minjac Corp.*, 4 N.Y.2d 320, 151 N.E.2d 180, 175 N.Y.S.2d 16 (1958).

At common law the merchant's practice of making exalted claims for his wares was not actionable if the parties dealt at arm's length.[2] But when the expansion of business gave rise to mass advertising, exaggeration to the point of falsehood became so common that some regulation was badly needed. The only existing remedy made successful prosecution all but impossible because it entailed proving all three requirements of a deceit action, *i.e.*, intentional falsification, reliance, and resulting harm.[3] In 1911 the trade magazine *Printer's Ink* proposed a Model Statute [4] designed to curb advertising abuses. This statute did not require knowledge of falsity, intent to deceive, or damage to a purchaser, but rather imposed absolute liability on anyone guilty of the prohibited act.[5] At present only five states have not adopted this Model Statute in a general way; [6] eleven have added the requirement of knowledge of falsity.[7]

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for filing a petition in an article 78 proceeding in certiorari or mandamus), *with* N.Y. CIV. PRAC. ACT § 48(1) (which allows a six-year period for the commencement of a contract action).

[1] "Any . . . corporation . . . [which], with [the] intent to sell or in any wise dispose of merchandise, . . . directly or indirectly, to the public . . . , makes, publishes, . . . or places before the public . . . in the form of a . . . poster, bill, sign, placard, card . . . an advertisement [which] . . . contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor." N.Y. PEN. LAW § 421 (Supp. 1958).

[2] See, *e.g.*, Burwash v. Ballou, 230 Ill. 34, 82 N.E. 355 (1907).

[3] See RESTATEMENT, TORTS § 525, at 59 (1938).

[4] See Comment, 36 YALE L.J. 1155, 1156 n.6 (1927).

[5] *Id.* at 1157.

[6] Arkansas, Delaware, Georgia, Mississippi, and New Mexico. See Note, 56 COLUM. L. REV. 1018, 1058 (1956).

[7] CAL. BUS. & PROF. CODE ANN. § 17500 (West 1956); FLA. STAT. ANN. § 817.06 (1941); MD. ANN. CODE art. 27, § 195 (1957); MASS. ANN. LAWS c. 266, § 91 (1956); N.H. REV. STAT. ANN. 580:9 (1955); PA. STAT. ANN.