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Civil Service--Examination for Unemployment Insurance Referee--Assignment of Relative Weight to Written Examination--Excluding Lawyer Applicants Who Are Not Graduates of Law Schools (Matter of Cowen, et al. v. Reavy, et al., 283 N.Y. 232 (1940))

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assets of every kind and nature of the * * * defendants, derived by means of fraudulent acts, practices or transactions in the sale of securities * * * and liquidate same or any part thereof for the benefit of all persons * * *". From the language of the order it is to be seen that the powers of the appointed receiver were limited. The receivership, which is contemplated by the Chandler Act [4] to constitute an act of bankruptcy, is one where the powers of the receiver are unlimited and general in their scope. There has to be a complete liquidation of all the property of the bankrupt, and, in substance, should amount to a general assignment of the assets.[5]

J. A. S.

CIVIL SERVICE—EXAMINATION FOR UNEMPLOYMENT INSURANCE REFEREE—ASSIGNMENT OF RELATIVE WEIGHT TO WRITTEN EXAMINATION—EXCLUDING LAWYER APPLICANTS WHO ARE NOT GRADUATES OF LAW SCHOOLS.—Petitioners are lawyers who were admitted to the Bar under rules authorized by statute [1] and rules promulgated by the Court of Appeals.[2] Each have had at least five years' experience in active practice. The State Industrial Commissioner was authorized to appoint "subject to the regulations of the civil service" as many unemployment insurance referees as might be necessary to perform the prescribed duties under the law.[3] Accord-

[4] See note 2, *supra*.

[5] Burns v. Maguire, 255 App. Div. 552, 8 N. Y. S. (2d) 313 (1st Dept. 1938), *aff'd*, 280 N. Y. 700, 21 N. E. (2d) 203 (1939). An action brought by a receiver appointed under the Martin Act (see note 1, *supra*) was dismissed because the receiver failed to allege that the cause of action arose out of fraudulent practice; since the receiver was not a "general receiver", he could not maintain the action without such an allegation. The Court of Appeals affirmed the decision of this case upon the authority of *Goldberg, et al. v. Weihman, et al.*, 247 App. Div. 734, 277 N. Y. Supp. 657 (2d Dept. 1935), *aff'd*, 269 N. Y. 537, 199 N. E. 524 (1935). Plaintiff in this case was appointed receiver pursuant to the Martin Act; he sued for an accounting and damages were alleged to have been sustained through the mismanagement of the directors of the corporation. The court held that the acts complained of did not affect the property of the corporation since such assets were derived by means of the fraudulent practices denounced by the Act. Therefore plaintiff had no legal capacity to sue. Hughes v. Ellenbogen, 256 App. Div. 1103, 11 N. Y. S. (2d) 561 (2d Dept. 1939) (the scope of the receivership, contemplated under the Martin Act, is limited to such property as derived by means of fraudulent practices and does not extend to general assets). See People v. Lother, 241 App. Div. 524, 273 N. Y. Supp. 669 (4th Dept. 1934).

[1] N. Y. JUD. LAW § 53.

[2] N. Y. CT. OF APP. RULES FOR ADMISSION OF ATTYS. III, IV.

[3] N. Y. LABOR LAW §§ 518 (6a), 530 (The statutory duties of an unemployment insurance referee are defined as follows: "It shall be the duty of a referee, under the supervision, direction and administrative control of the appeal board, to hear and decide disputed claims for benefits, to hear and decide cases arising under section five hundred twenty-three hereof and to conduct further hearings in connection with the foregoing, as may be required by the appeal board").

ingly, there was published a notice of examination [4] of candidates for vacancies existing in the position of unemployment insurance referee in the competitive class. Petitioners filed applications which were rejected by the Civil Service Commission as not fulfilling the minimum requirements. Petitioners also applied to the Commission for a revision of the minimum requirements, but the application was denied. In spite of many protests forthcoming from the various Bar associations and individual members of the legal profession the Commission conducted the examination. Petitioners thereupon brought proceedings under Article 78 of the New York Civil Practice Act for an order directing the cancellation of the examination, and for a revision of the minimum requirements on the grounds that the requirements set forth in the notice of examination were arbitrary, capricious and unreasonable, and further, that they were discriminatory as against lawyers who were not graduates of recognized law schools. *Held*, in favor of petitioners.[5] *Matter of Cowen, et al.* v. *Reavy, et al.*, 283 N. Y. 232, 28 N. E. (2d) 390 (1940).

The courts will not disturb the actions of the Civil Service Commission or of other administrative bodies, even though they may differ as to the wisdom or propriety of their acts, unless such acts are pal-

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[4] The minimum qualifications set forth by the public notice may be summarized as follows:

(a) Applicants who are high school graduates and who have six years' full-time, paid employment (at least two years in a supervisory or administrative capacity) in one of the following:

1. Positions in the placement or personnel office of a business or labor organization or an employment agency.
2. Positions involving management or direction of a large staff of personnel
3. Positions in the Workmen's Compensation Bureau.
4. Positions in a public or private agency dealing with compliance with labor laws or labor agreements.
5. Positions involving settling insurance claims.

(b) Applicants who are college graduates and have four years of the experience listed in (a) (at least one year in a supervisory or administrative capacity).

(c) Applicants who are graduates from a recognized school of law, who are admitted to the Bar and have had at least five years' experience in active practice of the law, including or supplemented by the following specialized experience:

1. One year full-time paid employment in one of the positions described in (a), which must have been in an administrative or supervisory capacity, or
2. Two years' satisfactory full-time experience in a public agency or civic organization in drafting legislation, or in formulating rules of procedure affecting contested claims, or
3. Two years' satisfactory full-time, paid employment in the active conduct of labor or workmen's compensation cases, or
4. Two years' experience with a government agency as arbitrator or referee.

[5] In considering the minimum requirements prescribed in group "(c)", subds. 1, 2, 3, 4 of the notice of examination in their relation to the prescribed statutory duties, the majority of the court said: "Mindful of these requirements which partake of the judicial function, it is difficult to state a reason why admis-

pably illegal.[6] It is the function of the Civil Service Commission to fix a fair and reasonable standard by which may be tested the qualifications of applicants for appointment to the civil service. The exercise of that function may be the subject of judicial review only in the event of a clear showing that in fixing the test of fitness the action by the Commission was arbitrary, capricious or unreasonable.[7] The constitution provides for appointments and promotions in the civil service according to merit and fitness to be ascertained by examinations which, so far as practicable, shall be *competitive*.[8] An examination is not competitive merely because it is so denominated. The substance, not merely the form of a competitive examination, is required.[9] A test or examination to be competitive must employ *objective* standards, and thus, where the standards are wholly subjective to the examiners, it differs in no material respect from the uncontrolled opinion of the examiners and cannot be regarded as competitive.[10] Although

sion to the Bar, followed by five years of active practice of the law, would not be sufficient as a qualification for the performance of those duties. We cannot say, as a matter of law, however, upon the present record, that the additional minimum qualifications set forth as alternatives in group '(c)', subds 1, 2, 3, and 4, of the commission's notice of examination, are unreasonable The question of the reasonableness of such additional qualifications is, in the circumstances present here, one of fact and should be made the subject of proof at Special Term."

[6] Allaire v. Knox, 62 App. Div. 29, 70 N. Y. Supp. 845 (1st Dept. 1901), *aff'd*, 168 N. Y. 642, 61 N. E. 1127 (1901); People *ex rel.* Schau v. McWilliams, 185 N. Y. 92, 77 N. E. 785 (1906); Simmons v. McGuire, 204 N. Y. 253, 97 N. E. 526 (1912); People *ex rel.* Moriarty v. Creelman, 206 N. Y. 570, 100 N. E. 446 (1912); People *ex rel.* N. Y. & Queens Gas Co. v. McCall, 219 N. Y. 84, 113 N. E. 795 (1916) (involving a determination made by the Public Service Commission); People *ex rel.* Braisted v. McCooey, 100 App. Div. 240, 91 N. Y. Supp. 436 (1st Dept. 1905); People *ex rel.* Caridi v. Creelman, 150 App. Div. 746, 135 N. Y. Supp. 718 (1st Dept. 1912); Bridgman v. Cosse, 157 Misc. 8, 283 N. Y. Supp. 226 (1935), *aff'd*, 246 App. Div. 632, 283 N. Y. Supp. 765 (2d Dept. 1935), *aff'd*, 271 N. Y. 535, 2 N. E. (2d) 682 (1936).

[7] Story v. Craig, 231 N. Y. 33, 131 N. E. 560 (1921); Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921); Scahill v. Drzewucki, 269 N. Y. 343, 199 N. E. 506 (1936); Fink v. Finegan, 270 N. Y. 356, 1 N. E. (2d) 462 (1936) (the giving of a non-competitive test for the position of medical examiner in order to determine the fitness and executive ability of the applicants was an abuse of discretion on the part of the Commission); Andresen v. Rice, 277 N. Y. 271, 14 N. E. (2d) 65 (1938); People *ex rel.* Sweeney v. Rice, 279 N. Y. 70, 17 N. E. (2d) 772 (1938); Schwab v. McElligott, 282 N. Y. 182, 26 N. E. (2d) 10 (1940); Kelty v. Kaplan, 205 App. Div. 487, 199 N. Y. Supp. 337 (2d Dept. 1923) (the correctness of classification of a position by the Commission is subject to review, and mandamus will lie to correct an improper classification); Ryan v. Finegan, 166 Misc. 548, 2 N. Y. S. (2d) 10 (1937), *aff'd*, 253 App. Div. 713, 1 N. Y. S. (2d) 643 (1st Dept. 1937) (in which the Municipal Civil Service Commission set an arbitrary age limit of twenty-five years for the position of Clerk, Grade 2.

[8] N. Y. CONST. art. V, § 6; Marcellus v. Kern, 170 Misc. 280, 10 N. Y. S. (2d) 73 (1939).

[9] Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921) ("The test is not merely examination. The test is *competitive* examination"); Barlow v. Berry, 245 N. Y. 500, 157 N. E. 834 (1927); Sloat v. Board of Examiners of the Board of Education, 274 N. Y. 367, 9 N. E. (2d) 12 (1937).

[10] Sheridan v. Kern, 255 App. Div. 57, 5 N. Y. S. (2d) 336 (1st Dept.

objective examination is not always possible, tests should be reasonably calculated to show merit and fitness and not merely unfettered preferences or judgment of the examiners. These principles, stated in relation to the examination itself, apply with equal force to the standards which are prescribed to be fulfilled as a condition to taking it. It is, therefore, apparent that, if such standards are unreasonable, or if arbitrary or discriminatory limitations are placed upon those permitted to take the examination, the test fails to assume the competitive form and is violative of the competitive principle. The courts, upon proof of such abuse of discretion, can require postponement or direct the cancellation of the examination and order the revision of the requirements to conform to the standards of reasonableness and propriety.[11] In the instant case, the court found the quality of reasonableness lacking in the action of the Commission in assigning a relative weight of only 40% to the written examination and giving a weight of 60% to "training, experience and *general qualifications*".[12] In addition, the court held that the requirement of graduation from a recognized law school is an unreasonable and arbitrary discrimination against the lawyer who is not a graduate from a recognized law school, but who may have qualified in New York as attorney and counsellor at law under the rules authorized by statute [13] and rules promulgated by the Court of Appeals.[14]

P. C.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND OF RELIGION —FOURTEENTH AMENDMENT.—Newton Cantwell and his two sons, Jesse and Russell, members of a religious group known as Jehovah's Witnesses, were convicted of violating Section 6294 of the General Statutes of Connecticut.[1] They, in the course of distributing per-

1938) (Wherein the Civil Service Commission granted preference to applicants for the position of Social Investigator who had had experience with the Emergency Relief Bureau by giving more credit to such applicants for experience and college training than to employees of private agencies in grading the examination. The court held such act improper and directed regrading).

[11] Matter of Keymer, 148 N. Y. 219, 42 N. E. 667 (1896); Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921); Barlow v. Berry, 245 N. Y. 500, 157 N. E. 834 (1927); Mendelson v. Kern, 278 N. Y. 568, 16 N. E. (2d) 106 (1938); People ex rel. Sweeney v. Rice, 279 N. Y. 70, 17 N. E. (2d) 772 (1938); Sheridan v. Kern, 255 App. Div. 57, 5 N. Y. S. (2d) 336 (1st Dept. 1938).

[12] The court said: "The mandate for competition becomes futile when as here, we find that a candidate's 'general qualifications'—wholly subjective to the examiners and unappraised by objective standards of any kind—are made a test of fitness and, with training and experience, are given a rating weight of 60%."

[13] See note 1, *supra.*

[14] See note 2, *supra.*

[1] "No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such