St. John's Law Review

Volume 15, April 1941, Number 2 Article 29

Subversive Activity as a Cause of Ineligibility for the Civil Service

Lawrence D. Bell

CURRENT LEGISLATION

SUBVERSIVE ACTIVITY AS A CAUSE OF INELIGIBILITY FOR THE CIVIL SERVICE.—Persons who advocate the overthrow of the government of the United States or of any state or political subdivision thereof by force, violence or any unlawful means are by statute rendered ineligible for appointment or to continue in positions in the civil service in New York.[1] The ineligibility extends to the classified service of the state, to cities and civil divisions of the state which have adopted the civil service system, and to persons employed in the public service as superintendents, principals or teachers in public schools, academies, state normal schools or colleges or any other state educational institute. Three classes of overt acts are named by which a person may advocate, teach, or embrace a doctrine of the overthrow of the government by force, violence or unlawful means and thereby be rendered ineligible for the civil service. They are: (1) by the wilful and deliberate advocation, advising or teaching of such doctrine by word of mouth or writing; (2) by printing, publishing, editing, issuing or selling any book, paper, document or written or printed matter in any form containing such doctrine and advocating, advising, teaching or embracing the duty, necessity or propriety of adopting the doctrine contained therein; (3) by organizing or helping to organize by becoming a member of any society or group of persons which teaches or advocates such a doctrine. A person who is dismissed or declared ineligible for any of these reasons may within four months obtain an order to show cause why a hearing on such charges should not be had. The hearing, if granted, will consist of a taking of testimony in open court with an opportunity for cross-examination and will stay the effect of the order of dismissal or ineligibility. The burden of proof is upon the person who made the order of dismissal or of ineligibility and it must be sustained by a fair preponderance of the credible evidence.

The civil service in New York is provided for in the state constitution.[2] This constitutional provision imposes only two express conditions on the legislature, namely, that appointments and promotions shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations which, so far as practicable, shall be competitive; and that preference in appointment shall be given to disabled veterans. The section authorizes the legislature to make laws to provide for its enforcement.

There can be little if any doubt that the legislature had the authority to impose this condition of loyal citizenship on eligibility for civil service. It seems almost too fundamental to mention that a government as a primary right can enact legislation necessary for its self-

[1] N. Y. CIVIL SERVICE LAW § 12a (added by c. 547 of Laws of 1939; amended by c. 564 of Laws of 1940).
[2] N. Y. CONST. Art. V, § 6.

preservation, and it has been held that merit and fitness may depend on requirements other than the results of an examination.[3] Generally speaking, persons in the civil service are not public officers; they are merely public employees. In the absence of constitutional limitations the legislature has a right to provide either qualifications or disqualifications for public office.[4] If this right extends to officers it must certainly extend to subordinates in the public service. The end sought to be accomplished by this Act, namely, the preservation of our democratic form of government, is altogether desirable, particularly in this era of subversive activity and of boring from within throughout the world. The means provided by the Act are not oppressive, which again places the Act within the legislative power.[5]

This statute is new and has not yet been interpreted or construed by any court. That there will be an early construction seems unlikely. It is almost beyond belief that anyone actually and openly advocating the overthrow of the government will ever attempt to maintain the right to do so and at the same time hold a position in the government or be eligible for appointment to such a position. Assuming a person of such temerity, he might contend that discrimination on account of

---

[3] People *ex rel.* Sweet v. Lyman, 30 App. Div. 135, 50 N. Y. Supp. 444 (3d Dept. 1898), *aff'd,* 157 N. Y. 368, 52 N. E. 132 (1898). "It is apparent, not only upon the face of the provision itself, but from the debates in the Constitutional Convention, that the framers of this amendment did not intend to absolutely determine how the merit and fitness of appointees were to be ascertained and determined. The Constitution provides that to an extent those questions are to be determined by an examination, but it is obvious that it was understood at that time that it would be impracticable to fully determine the merit and fitness of an employee or appointee by a mere examination, whether competitive or otherwise. It is to be observed that the provision of the Constitution is that the merit and fitness of the applicant or appointee shall be ascertained in the manner stated so far as practicable, that is, in part at least, if they can be even partially ascertained in that manner. The words 'so far as practicable' relate to the degree or extent to which the examination should control. The provision is not that the examination shall be the basis of determining merit and fitness when or where, or in such cases as it is practicable, but that in all cases they are to be ascertained by an examination, only so far as practicable. In other words, it does not declare that the examination shall control in ascertaining merit and fitness in any or all cases where it is practicable, but that the qualifications of the candidate shall be ascertained in each case by an examination to the extent and only so far as it is practicable, and consequently sufficient to insure the selection of proper and competent employees. The Constitution plainly implies that other methods and tests are to be employed when necessary and calculated to fully ascertain the merit and fitness of the applicant."

[4] 46 C. J. § 32, p. 937 (1928) ("Subject only to the restrictions of the Constitution, the legislature may do what it thinks best with a public office or a public officer, by abolishing the office, shortening or lengthening the term thereof, increasing or diminishing the salary and the like").

Koch v. New York, 5 App. Div. 276, 39 N. Y. Supp. 164 (1st Dept. 1897), *aff'd,* 152 N. Y. 72, 46 N. E. 170 (1897).

[5] "If the end sought is a legitimate one, all means which are not oppressive, but appropriate and reasonable and adapted to that end are within the legislative power." Ullman Realty Co. v. Tamur, 113 Misc. 538, 552, 185 N. Y. Supp. 612, 621 (1920).

creed is prohibited by statute.[6] But creed within the meaning of this section undoubtedly refers to a religious belief. Webster defines creed as "any formula or confession of religious faith; a system of religious belief, especially as expressed or expressible in a definite statement; *sometimes* [italics mine] a summary of principles or set of opinions professed or adhered to in science or politics or the like". He might take the position that his organization is a political party and that inquiry into his political affiliations may not be made. It has been so held.[7] He might argue in this connection that candidates for civil service positions are on an equal footing despite their political classification and that this is true despite the fact that they may be so-called radicals.[8] But in the *Bridgman* case the court said this is true "so long as they believe in and support our constitutional government and are willing to uphold our constitution." He might raise the more fundamental question of the constitutional guaranty of freedom of speech.[9] The Constitution grants to every citizen the right freely to speak, write and publish his sentiments on all subjects. But he is held responsible for the abuse of that right. This right does not amount to license. It permits a fearless discussion of the shortcomings of our government, but it does not sanction attempts to subvert the government; nor does it authorize the publication of matter prompting the overthrow of the government by force, or the advocacy of the destruction of the government by means which are abhorrent to the entire spirit of our institutions.[10] This statute clearly is not an invasion of the privilege of free speech.

The greatest difficulty in the enforcement of the statute will be in the detection of persons who fall within its provisions. People who advocate the overthrow of the government by force and violence do not generally do so in the market-place, or shout it from the housetops. But the statute is a weapon in the hands of the people for the defense of constitutional government and it is submitted that it goes in the

---

[6] N. Y. CIVIL SERVICE LAW § 14c.

[7] N. Y. CIVIL SERVICE LAW § 25.

"We do not understand the mandate regarding 'political opinions', as used in this statute, to forbid merely inquiry concerning whether a Civil Service candidate is a member of an existing political party, or usually makes a choice between such parties in voting. It should be given a broader meaning, especially when today political thought is dividing along other than ordinary party lines. The Constitutional requirement that appointments in the Civil Service be based on merit and fitness (Art. V, Sec. 6) and the prohibition of Section 25, read in the light of that Constitutional requirement, prohibits searching the political opinions of all candidates in any manner . . . We accordingly hold that questions directed to searching the political ideologies of a candidate, for the purpose of rating him or her higher or lower because of holding one political view rather than another, are violative of our Constitution and our Civil Service Law." Bridgman v. Kern, 257 App. Div. 420, 434, 13 N. Y. S. (2d) 249, 262 (1st Dept. 1939).

[8] Bridgman v. Kern, 257 App. Div. 420, 13 N. Y. S. (2d) 249 (1st Dept. 1939).

[9] N. Y. CONST. Art. I, § 8.

[10] People v. Gitlow, 234 N. Y. 132, 136 N. E. 317 (1922).

right direction. Judicial interpretation will eventually make specific its general terms and establish a guide for its enforcement.

LAWRENCE D. BELL.

ALIMONY IN ANNULMENT ACTIONS.—Although the legislature has recently changed the statutory rules which provide some of the legal remedies for discontented spouses, few students of the law of Domestic Relations would venture to predict that these changes will be received by the public with great acclamation. For many years the science and philosophy of the legal regulation and control of marriage has presented to the legislature some of its most perplexing problems. Many of those who believe that the families are the fundamental groups upon which our society is based and the primary units of our economic system deeply lament our quite un-uniform state laws of marriage. Different culture groups and religious organizations have urged the legislature to adopt a great variety of drastically divergent points of view in respect to marital problems. The legislature, consequently, has been extremely cautious, and as a result changes in the law have been made only after extensive hesitation. Many persons believe, therefore, that the rules of this particular category of our law have become somewhat antiquated. Hence, a change of these rules is often regarded as a dilatory enactment which should have been made years ago.

Recently the Civil Practice Act has been changed by adding a new section numbered 1140-a [1] and by amending Section 1169.[2] These amendments set forth the first statutory authorization for the allowance of alimony in annulment actions in New York. Previously alimony in these cases had been awarded as an impliedly necessary exercise of the statutory power to entertain annulment actions.[3] The interpretation to be given to these statutes may be inferred in part,

[1] N. Y. CIV. PRAC. ACT § 1140-a as added by N. Y. Laws 1940, c. 226, § 2. "When an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires. . . . This section shall apply to any action brought by either the husband or the wife or by any other person in the lifetime of both parties to the marriage."

[2] N. Y. CIV. PRAC. ACT § 1169 (this section governing alimony and expenses in actions for divorce and separation now includes actions to annul a marriage and actions to declare the nullity of a void marriage).

[3] Higgins v. Sharp, 164 N. Y. 4, 8, 58 N. E. 9, 10, *aff'd*, 51 App. Div. 631, 64 N. Y. Supp. 1137 (2d Dept. 1900) ("The power to allow alimony and counsel fee to the wife in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman, in many cases, could not be adequately protected"). See North v. North, 1 Barb. Ch. 241 (N. Y. 1845); Griffin v. Griffin, 47 N. Y. 134 (1872); Brinkley v. Brinkley, 50 N. Y. 184 (1872).