

**Municipal Corporations--Age Discrimination Prohibited Among
Civil Service Applicants (Deodati v. Kern, 280 N.Y. 366 (1939))**

St. John's Law Review

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unreasonable burden.¹⁵ The defendant could not prove that the classification in the tax schedule was discriminative without showing that in actual practice the tax fell with undue weight on it; ¹⁶ for if there is any conceivable reason to justify the classification, it will be upheld.¹⁷ It is only reasonable to assume that those engaged in hauling for hire will make more extensive use of the highways than private carriers. Where motor vehicles use the highways to carry on a business they are properly chargeable with a greater tax for such use.¹⁸

B. J. S.

MUNICIPAL CORPORATIONS—AGE DISCRIMINATION PROHIBITED AMONG CIVIL SERVICE APPLICANTS.—The Municipal Civil Service Commission announced that applications for the position of porter, labor class, would be received and that appointments would be made according to priority. The Commission prescribed an age limit as “under 46 years of age on date of application, and under 50 years of age on date of appointment.” Nine thousand applications were accepted and one hundred received physical examinations. The petitioner, fifty-one years of age, did not file an application, although he had notice of the announcement. One week after applications were closed, petitioner sought to cancel the entire list on the ground that the Commission had committed a void act by prescribing an age limit in violation of the Civil Service Law § 25A.¹ The Appellate Division affirmed an order of the Special Term cancelling the applications. On appeal, *held*, reversed. The petitioner is precluded from maintaining this proceeding, since he was guilty of laches, in that he waited until

¹⁵ See *Interstate Buses Corp. v. Blodgett*, 276 U. S. 245, 251, 48 Sup. Ct. 230 (1928).

¹⁶ *Ibid.*

¹⁷ See *Ogilvie v. Hailey*, 141 Tenn. 392, 210 S. W. 645, 647 (1919).

¹⁸ See *Clark v. Poor*, 274 U. S. 554, 557, 47 Sup. Ct. 702 (1927).

¹ N. Y. CIVIL SERVICE LAW § 25A. “Applicants for Civil Service Positions; age discrimination prohibited.

“Notwithstanding any provision of law to the contrary, except as herein provided, neither the State Civil Service Commission nor any Municipal Civil Service Commission shall hereafter prohibit, prevent, disqualify or discriminate against any person who is physically and mentally qualified from competing, participating or registering for a civil service competitive or promotional examination or from qualifying for a position in the classified civil service by reason of his or her age. Any such rule, or requirement, resolution or regulation of such state or Municipal Commission shall be void.

“Nothing herein contained, however, shall prevent such state or Municipal Commission from adopting reasonable minimum or maximum age requirements for positions such as policeman, fireman, prison guard, or other positions which require extraordinary physical effort, except where age limits for such positions are already prescribed by law.”

all the applications had been received and priority established. *Deodati v. Kern*, 280 N. Y. 366, 21 N. E. (2d) 355 (1939).

Rules made by the Commission have the effect of law,² but are ineffective when they are in contravention to a statute.³ If the spirit and purpose of Civil Service is violated, the court is empowered to review such rules and to declare them invalid.⁴ The courts, however, are hesitant in their attack of these rules unless they are palpably illegal.⁵ But the Civil Service Commission is the sole judge of the character, fitness and qualifications of an applicant.⁶ Its discretionary powers, however, are limited in order that the competitive nature of Civil Service may be maintained.⁷ A competitive examination is not practicable in order to determine the "merit and fitness" of those employed performing ordinary manual labor.⁸

"Assuredly the fixing of age limitations is a difficult matter. There is no hard and fast rule that can be applied. * * * the standard that is adopted must be sufficiently flexible so as not to do violence to the spirit of Civil Service * * *."⁹ Prior to the enactment of Section 25A of the Civil Service Law,¹⁰ the Commission more or less applied the test of "reason and logic" in determining age requirements.¹¹ Thus, the court upheld the Commission where the latter felt that the maturity of an older person could only fulfill the required responsible duties of a fire inspector.¹² In the case of *Laverty v. Finegan*,¹³ the

² *People v. Lynch*, 164 App. Div. 517, 149 N. Y. Supp. 895 (3d Dept. 1914); *Woods v. Fenegan*, 246 App. Div. 271, 285 N. Y. Supp. 277 (1st Dept. 1936).

³ *People v. Miliken*, 140 App. Div. 762, 126 N. Y. Supp. 291 (3d Dept. 1910), *aff'd*, 201 N. Y. 545, 95 N. E. 1137 (1911).

⁴ *Matter of Ricketts*, 111 App. Div. 669, 98 N. Y. Supp. 502 (1st Dept. 1906); *People v. Kraft*, 145 App. Div. 662, 130 N. Y. Supp. 363 (3d Dept. 1911), *aff'd without opinion*, 204 N. Y. 626, 97 N. E. 1114 (1912).

⁵ *Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785 (1906) (this case is important in that it established that the classifications made by the Commission are legislative or executive in character, rather than judicial or quasi-judicial, and therefore subject to judicial control).

⁶ *People v. Kraft*, 145 App. Div. 662, 130 N. Y. Supp. 502 (3d Dept. 1911); *People v. Buffalo*, 18 Misc. 533, 42 N. Y. Supp. 545 (1896).

⁷ *Fowler v. Moskowitz*, 175 App. Div. 710, 162 N. Y. Supp. 453 (2d Dept. 1916), *aff'd*, 220 N. Y. 669, 116 N. E. 1067 (1917).

⁸ *People v. Dalton*, 49 App. Div. 71, 63 N. Y. Supp. 258 (2d Dept. 1900), *aff'd*, 163 N. Y. 556, 57 N. E. 1129 (1900).

⁹ *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).

¹⁰ See note 1, *supra*.

¹¹ *Moriarity v. Creelman*, 206 N. Y. 570, 100 N. E. 446 (1912); *Laverty v. Fenegan*, 249 App. Div. 411, 292 N. Y. Supp. 412 (1st Dept. 1937); *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); *O'Callagan v. Finegan*, 166 Misc. 556, 2 N. Y. S. (2d) 15 (1937), *aff'd*, 276 N. Y. 587, 12 N. E. (2d) 589 (1937).

¹² *Moriarity v. Creelman*, 206 N. Y. 570, 100 N. E. 446 (1912).

¹³ 249 App. Div. 411, 292 N. Y. Supp. 412 (1st Dept. 1937) (The applicant sought the position of chief lifeguard. He was five years older than the maximum allowed. The applicant was in the service and had an excellent record as lifeguard and was acting chief lifeguard. He was required to teach his subordinates the technique of life saving under very difficult conditions.

court sanctioned a rule which required that an applicant must not only be physically competent at the date of appointment, but that he should be able to render at least fifteen years of service. In the foregoing cases there was no "age discrimination", since the applicants were not mentally or physically qualified for their respective positions. The Commission did discriminate, however, when it justified its action in prescribing an age limit, by evincing a desire to encourage people to enter the career service at an early age.¹⁴ It is submitted that such encouragement fostered by the Commission would ultimately eliminate competition from the Civil Service System.

It is submitted that Section 25A attempts to provide protection against age discrimination for the benefit of two types of civil service applicants: (1) White collar positions, such as bookkeepers and clerks or other positions requiring mental effort;¹⁵ (2) Positions which require extraordinary physical effort, such as policemen and firemen or other positions requiring manual labor.¹⁶ As to the first type, the statute becomes operative only when the Commission prescribes an age limit, thereby disqualifying a candidate, when the applicant is otherwise mentally and physically qualified. Notwithstanding the statute, the Commission, armed with its flexible rule of "reason and logic", is empowered to determine the qualifications of the applicant. Therefore, a pathway is still left by which the Commission can prescribe an age limit which may be discriminatory in character, but legally within the statute. Thus, the effect of Section 25A would be felt in cases in which the Commission abused its power under the "reason and logic" provision. But arbitrary age limitations were not sanctioned prior to the passage of the enactment.¹⁷ It would seem that the Legislature, as to the second type, enlarged the Commission's power to fix age limits, for the Commission may

The Commission felt that a lifeguard should be able to render at least fifteen years of useful service before retirement. Thus, the applicant should measure up to certain physical standards unimpaired by advancing years).

¹⁴ See note 9, *supra*; O'Callaghan v. Finegan, 166 Misc. 556, 2 N. Y. S. (2d) 15 (1937), *aff'd*, 276 N. Y. 587, 12 N. E. (2d) 589 (1937).

¹⁵ N. Y. CIVIL SERVICE LAW § 25A. "Notwithstanding any provision of law to the contrary, except as herein provided, neither the State Civil Service Commission nor any Municipal Civil Service Commission shall hereafter prohibit, prevent, disqualify or discriminate against any person *who is physically and mentally qualified from competing, participating or registering for a civil service competitive or promotional examination or from qualifying for a position in the classified civil service, by reason of his or her age.* Any such rule, or requirement, resolution or regulation of such state or Municipal Commission shall be void."

¹⁶ Deodati v. Kern, 280 N. Y. 360, 21 N. E. (2d) 355 (1939) (The court construed the second type found in § 25A of the Civil Service Law, which provided "*nothing herein contained, however, shall prevent such state or Municipal Commission from adopting reasonable minimum or maximum age requirements for positions such as policeman, fireman, prison guard, or other positions which require extraordinary physical effort, except where age limits for such positions are already prescribed by law.*").

¹⁷ See note 11, *supra*.

not only avail itself of the rule of "reason and logic", but it can also justify its action when the position requires "extraordinary physical effort".¹⁸ When the latter ground is the basis of the Commission's action, however, the selection of an age requirement must not be arbitrarily adjusted.¹⁹ There is no absolute standard in determining the meaning of the phrase "extraordinary physical effort".²⁰ In the instant case the court indicated that the position of porter when compared with white collar occupations entails "extraordinary physical effort". It would seem that this comparison is a sound formula for interpreting the nature of positions requiring such effort.²¹ The Commission acts justifiably where the position involves both light and laborious tasks.²² "Extraordinary physical effort" need not be continuous, but must be available when needed.²³ Apparently, each case will have to be decided upon its own individual facts.

J. F. W.

MUNICIPAL CORPORATIONS—MUNICIPAL CIVIL SERVICE COMMISSION—CREDIT FOR EDUCATIONAL AND ATHLETIC TRAINING IN RELEVANT FIELDS—CIVIL SERVICE LAW.—This was a proceeding by the petitioners to cancel the notice of examination published by the Municipal Civil Service Commission, which notice provided for: (1) a credit¹ for educational training in relevant fields; (2) a similar credit for organized athletic training; and (3) fixed a maximum age limit of twenty-nine years for the list of special patrolmen in accor-

¹⁸ *Deodati v. Kern*, 280 N. Y. 360, 21 N. E. (2d) 355 (1939).

¹⁹ *Id.* at 374, N. E. at 358.

²⁰ *Id.* at 373, N. E. at 358.

²¹ A committee, composed of Assemblyman Wadsworth, co-author of Section 25A, and Senator Livingston, a co-sponsor of the bill, was appointed to assist the Commission in establishing a standard for positions requiring "extraordinary physical effort." The following was deemed to be a sound formula: "If the amount of the physical effort expended, or subject to be expended in the performance of the duties of a given position is considerably above that expended by bookkeepers, librarians, medical inspectors and statistical clerks, in the performance of their respective duties, or is comparable to the amount of physical effort expended, or subject or to be expended by street cleaners, policemen, firemen and prison guards in the performance of their respective duties, then the given position requires extraordinary physical effort." Instant case at 369.

²² See note 20, *supra*.

²³ Instant case at 372.

¹ Mental test to have a weight of .7. Credit on a competitive basis will be added not exceeding .04 of the weight of the mental test, or .028 of the total weight.

The physical test will have a weight of .3. Credit not to exceed .04 of the weight of the physical test, or .012 of the total weight.