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CIVIL SERVICE LAW

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CIVIL SERVICE LAW

by

OLIVER P. FIELD
Professor of Political Science
University of Minnesota

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PREFACE

It is the author's hope that personnel officers and draftsmen of laws and regulations for the improvement and operation of public administration will find this volume of some aid. It is primarily for them that the book has been written.

The original plan for this work included a wider use of the reports of administrative decisions, but as work progressed it became clear that to complete it within a reasonable period of time, and to keep it within the desired compass, only the federal materials from the attorney general, comptroller general, and comptroller of the treasury could be consulted.

The author is indebted to the Social Science Research Council and to the Fluid Research Fund of the Graduate School of the University of Minnesota for grants in aid of this study, and to the Committee on Training for Public Administration for financial assistance which made possible the publication of the book.

In the preparation of this volume the author has been encouraged and helped by Professor Morris B. Lambie of the Department of Government of Harvard University, and Professor Lloyd M. Short of the Department of Political Science of the University of Minnesota. Professor Short read the manuscript and made helpful suggestions for its improvement. Mr. George Peterson and Mr. Joseph Maun, both of the Minnesota bar, and Mr. Malcolm Moos, of the staff of the Municipal Reference Bureau of the University of Minnesota, have assisted at various stages in the preparation of the book. Mr. Eugene B. Altschul has verified all the citations.

No one knows as well as the author that the likelihood of errors in a book of such detail is great, and no one would more appreciate having his attention drawn to such errors as may have crept into it.

OLIVER P. FIELD

Minneapolis, Minnesota
March, 1939

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CIVIL SERVICE LAW

Chapter I

INTRODUCTION

In a work such as this, the different meanings attached to the term "civil service" must be distinguished. In the first place, it must be pointed out that the phrase has a wider and a narrower [illegible] being the more common. Even within this narrower meaning the term has different applications.

Regarded from the broader point of view, the field of public service is divided into two large branches: the military service and the civil service. The phrase "civil service" has, however, now come to have a more restricted meaning in both the lay and the legal literature of the United States. It refers to that portion of the broader field of civil service that is governed by the merit principle in the selection of officers and employees.

In this work two different aspects of the narrower use of the term will be constantly referred to. In the first place, coupled with the definite article, "the civil service" describes a branch, an organization of the public service, a group of offices, to which the merit principle applies. In the second place, "civil service" without the definite article is used to describe certain procedures of recruitment and personnel management; in this sense it refers more to a process or method or principle of personnel management than to an organization. It is in this latter use that the term "merit system" applies, as distinguished from the "political system" or the "patronage system." It is possible to distinguish between the two meanings of the phrase only by reference to the context.[1]

The term "civil service law" may likewise have a broader and a narrower application. In a broader sense the law of civil service is a branch of the law of public officers, which in turn is a part of the more general subject of administrative law. It is more commonly used in the narrow sense of the constitutional provisions and statutory regulations imposing the merit principle in the selection of officers and employees and regulating such matters as promotion, transfer, leave of absence, and discharge. The law of civil pensions as such is not dealt with in this volume. A pension law applicable to government officers and employees may or may not be limited to those who are in the particular branch of the administrative service that is covered by the civil service act or acts.[2]

[1] For a discussion of the meaning of the phrases "civil service" and "civil service reform," see Ward v. Leche, 189 La. 113, 179 So. 52 (1937).

[2] Griffith v. Rudolph, 54 D. C. App. 350, 298 Fed. 672 (1924).

It should not be thought that the factors of merit and fitness in the selection of public servants were first introduced into the law by civil service statutes. For many years legislation has required particular and specified qualifications for certain types of office or employment, and in several instances provided boards of admission and of examiners for the numerous professions and trades. Nor should it be thought that under the political system of appointment the technical work of the public service was done by laymen; even some of the statutes recognize that such a practice would be unwise. A carpenter could not be appointed to do the work of a lawyer merely because he was to work for the government. It is true that the best qualified man might not receive the position under that system, and it often happened that a poorly qualified person did receive it. But it was in the more general types of administrative work, such as management, nontechnical inspection, and law enforcement, and in clerical and other subordinate fields, that the patronage system flourished particularly. The merit principle embodied in the civil service laws and their provisions on personnel administration represents only a broader application of the practices that were applied piecemeal by statute in almost every state and city for many years prior to the adoption of a general civil service law. It may be added that provisions regulating causes and procedures in the removal of an officer or employee were not unknown in the law of public officers, but these do not form a part of the civil service law, as that phrase is commonly understood at the present time. Most civil service laws contain special provisions of their own upon these subjects.

There is little agreement among the various civil service acts when it comes to defining the civil service to which their provisions are to apply. In recent legislation, and in some of the constitutional provisions that now are to be found on this subject, a more precise and comprehensive definition of the civil service is attempted.[3] Every well-drafted civil service act and every properly drawn constitutional provision should define the civil service to which it applies. In this way alone can a sound legal basis be furnished for the merit system which the act or provision is to support. The civil service system of the national government, as will be pointed out in more detail later, rests upon a very unsatisfactory legal basis. The national statutes in effect provide that whatever the president covers into the civil service is a part of it. This places the national civil service upon the shifting legal sands of presidential orders. It is not suggested that the details of civil service should be covered in a statute, but it is suggested that the fundamental outlines of such a service should be

[3] The federal statute of 1883 is especially defective on this score. For a more careful attempt to define the civil service, see the Michigan statute of 1937.

dealt with by statute. It is a legislative function to define the scope of the civil service and an executive function to administer that service.[4]

Civil service law is, like most Anglo-American law, a composite of statute and decision, the latter making new law as well as interpreting present and past law. But as is true of all American statutory law, it is also influenced by the manner in which the statutes are read and interpreted by common law lawyers and judges; that is to say, the statutes are read in the light of the general body of law and the general principles, attitudes, and concepts of the common law. It is necessary, therefore, not only to examine the formal legislative act with minute care, but also to examine the common law of officers as a background for the statute. Common law rules fill in the statutory gaps as well as help to give statutory words their meaning.

The extent of the civil service law, the units and persons and places to which it applies in the states and cities, is largely the province of statutory law,[5] but many situations are inadequately covered by either constitutional or statutory law. Thus many states have recently been faced with the problem (litigated in New York) of "work relief" recipients being given work in a department whose employees are subject to civil service rules. The New York department in question had reduced its force for reasons of economy. The relief workers were receiving their money partly from the national government and partly from the state and local governments. Did this constitute a violation of the requirement of the New York law that appointments be made on the basis of merit and fitness, to be ascertained by examination in so far as that was practicable? The court, using common law technique rather than substantive common law rules made some new law when it decided that in the presence of good faith on the part of the administrators, the use of relief workers to perform some of the tasks that otherwise would have been performed by civil servants was not a violation of this requirement.[6] The constitutional provision was aimed at the "conventional and stable duties of the functionaries of the civil government. Its aim was to supplant by a merit system a spoils system of office holding." The court issued a warning that the reason and reasonableness of the practice in the light of the surrounding circumstances would not, however, permit an unlimited extension of the practice so as to impair seriously the merit principle.[7]

[4] See Mayers, The Federal Service (1922). On the relation of courts to a state system, see Rice, The Function of the Courts in Enforcing the Wisconsin Civil Service Law, 2 Wis. L. Rev. 257 (1923).

[5] People v. Dalton, 158 N. Y. 175, 52 N. E. 1113 (1899).

[6] Social Investigator Eligibles Association v. Taylor, 268 N. Y. 233, 197 N. E. 262 (1935).

[7] Social Investigator Eligibles Association v. Taylor, *supra*, note 6.

Civil service statutes may repeal prior laws that are inconsistent with them, and may do so either expressly or by implication,[8] although courts do not favor repeal by implication unless the legislative intention to repeal is clear.[9] It is, of course, possible for the legislature to handicap the administration of a civil service act by failure to make appropriations, but such a failure to provide money does not operate as a repeal of the civil service statute.

The detailed effects of a statutory law of civil service upon the general rules of public employment and upon the status of public employees and officials[10] will be considered in succeeding sections. The arrangement will follow as nearly as practicable the various stages in the establishment of a civil service system and in the administrative application of that system.

[8] 8 Ops. Atty. Gen. 245 (1885). Doverspike v. Magee, 51 Pa. Super. Ct. 525 (1912). Civil service act was not construed to repeal earlier protections against removal.

[9] State ex rel. Smith v. McCombs, 129 Kan. 834, 284 Pac. 618 (1930). Folk v. Kansas City, 244 Mo. 553, 149 S. W. 473 (1912). But when a department is abolished by a new charter containing a completely new section on civil service, that repeals the prior ordinance on civil service and leaves the department's employees outside the civil service.

[10] See the discussion of the relation of a civil service law to contract in State ex rel. Mattice v. Seattle, 173 Wash. 42, 21 P. (2d) 288 (1933). Query: Is the effect of a civil service law to leave the status of those to whom it applies midway between that of office and employment?

Chapter II

CONSTITUTIONALITY AND SCOPE OF CIVIL SERVICE LAWS

I. CONSTITUTIONALITY OF CIVIL SERVICE LAWS

Inasmuch as most important legislation designed to improve governmental practices is very likely to be challenged on the ground that it is unconstitutional, and inasmuch as it is necessary either that the constitutional objections to the legislation be successfully overcome in the courts or the constitution amended to remove any obstacles, it is customary to deal with the constitutional aspects of a legislative problem at the outset of the discussion.

The constitutional problems of civil service legislation can be divided into two broad classes, arising from (1) provisions in some state constitutions dealing specifically with the civil service, and (2) provisions not expressly dealing with civil service as a special subject but affecting it in some particular.[1]

A few state constitutions contain provisions on the subject of civil service. In so far as these provisions affect particular aspects of the service, they are dealt with in later chapters on those subjects. For example, a constitutional provision requiring that examinations for the civil service be competitive in so far as practicable will be discussed both in connection with the law governing classification (see Chapter IV) and in connection with the law governing examinations (see Chapter V). Such provisions contain substantive rules of civil service law and are indistinguishable from civil service law generally except in source.

The validity of a civil service amendment to a state constitution is determined by the usual rules governing the subject of amendment,[2] and the rules that apply to its interpretation are the rules that apply generally to questions of constitutional interpretation. Whether the amendment is self-executing is likewise settled in accordance with the rules of construction applicable to this question. For example, the New York constitutional provision on civil service has been held not to be self-executing; in

[1] See Arneson, Constitutionality of Merit System Legislation, 13 Am. Pol. Sci. Rev. 593 (1919).

[2] People v. Field, 66 Colo. 367, 181 Pac. 526 (1919).

other words, it requires legislative action to bring it into operation.[3] The relationship between the civil service provision of a constitution and the other parts of the constitution is similarly governed by rules that are not peculiar to civil service law.[4]

That the constitutional provision on civil service is not self-executing does not mean, however, that none of it is enforceable by the courts as law. The provision has been said to announce a general public policy of merit in filling all positions to which it applies. This being true, a person who is employed in violation of the provision has no claim to salary if he is discharged without reference to the civil service law regarding discharge. The fact that neither the legislature nor the state civil service commission has acted to place the position under the civil service does not alter this rule.[5]

In Colorado it was held that the civil service provision of the constitution did not apply to a board of land commissioners that had been provided for by the constitution and whose duties, powers, and tenure were prescribed in detail therein.[6] The court felt that in the light of these detailed provisions, it was not intended that the commission should be subject to the more general provision dealing with the civil service.

The second phase of the constitutional problem, namely, that dealing with constitutional provisions that contain no explicit statement concerning the civil service, will be considered first in its national aspect and second in relation to the states and the local subdivisions thereof.

In the national government the constitutional problems of the civil service relate first and primarily to the power of Congress to impose upon the president and the other appointing officers certain restrictions as to qualifications of appointees and as to persons from among whom appointments can be made; secondly to the power of Congress to curtail the removal power as exercised by the president and those other officers in the national administration who, by constitution, statute, or decision, may be vested with the power of removal.

The first civil service law, of 1871, at least part of which is still in effect, authorizes the president to regulate admissions to the civil service. This authority is sometimes referred to as the power to classify, that is, the power to determine which positions and offices shall be brought under the civil service laws. The act of 1883, supplementing and expanding the statutory civil service law in the national government, provided for a United States Civil Service Commission and granted to it certain duties

[3] Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857 (1897).

[4] This is brought out in the lower court opinion in People ex rel. McClelland v. Roberts, 13 Misc. 448, 34 N. Y. S. 641 (1895).

[5] Palmer v. Board of Education, 276 N. Y. 222, 11 N. E. (2d) 887 (1937).

[6] People v. Field, *supra*, note 2.

and powers. For purposes of future discussion, the more significant portions of the act are given below:[7]

"It shall be the duty of said commissioners:

"First. To aid the President, as he may request, in preparing suitable rules for carrying this section and sections . . . of this title into effect, and when said rules shall have been promulgated, it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules and any modifications thereof, into effect.

"Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

"1. For open, competitive examinations for testing the fitness of applicants for the public service classified on January 16, 1883, or thereafter, or to be classified hereunder . . .

"2. All the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations . . .

"5. . . . No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and . . . he will not be removed or otherwise prejudiced for refusing to do so. . . .

"8. Notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, . . . of transfers, resignations, and removals, and of the date thereof, . . ."

With respect to removals, a statute of 1912 contained the following provision:

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; . . . Membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike,

[7] For a general discussion of this subject see Mayers, The Federal Service (1922). For cases see: In re Miller, 5 Mackey 507 (D. C. 1887), writ of error denied, 140 U. S. 690, 11 Sup. Ct. Rep. 1024, 35 L. ed. 763 (1888); Couper v. Smyth, 84 Fed. 757 (C. C. Ga. 1897); Dudley v. James, 83 Fed. 345 (C. C. Ky. 1897); White v. Butler, 171 U. S. 379 (1898). Equity will not prevent violations of the civil service act on removal, but see the argument contra in the early case of Priddie v. Thompson, 82 Fed. 186 (C. C. W. Va. 1897), also Butler v. White, 83 Fed. 578 (C. C. W. Va. 1897).

or proposing to assist them in any strike against the United States, having for its objects, among other things, improvements in the condition of labor among its members, . . . or the presenting by any such person or group of persons of any grievance or grievances to the Congress or any member thereof, . . . shall not be denied or interfered with."

If the acts of 1871 and 1883 are read together it is clear that they are intended as aids to the exercise of the appointing power vested by law in the president, in the heads of departments, or in the courts of law, as the case may be. The constitution is phrased in such a manner that it is not clear whether the power to appoint inferior officers is a power which may be conferred by Congress upon the three groups therein mentioned, or whether it is a power that may be given by Congress to either of them or to some other group. It may be viewed as a designation of the president, the heads of departments, or the courts of law as the authorities in which the power may be lodged, or it may be viewed as an authority to Congress to lodge it in any of them. It makes a good deal of difference which of these views is taken, because the power of Congress to attach conditions to the appointing power is differently affected by the different theories of control over appointment. If the constitutional designation theory is adopted, then it can be said that the power is one that is granted by the constitution and that all that Congress does is to furnish objects upon which that power may be exercised. Under this view Congress might be limited in the conditions it could attach to the appointing power.

It is possible to take the view, as the Myers case seems to have done, that the president stands in a different constitutional position here from that occupied by the heads of departments and the courts. Although that view is not consistent with the phraseology of the section, it may be consistent with the spirit of the whole of Article II as interpreted and applied by all three branches of government.

Nevertheless, whatever theory is accepted, it seems fairly clear that the regulation adopted in pursuance of the authority of the act of 1883 — that the appointing officer shall be offered a list of three names from which to make appointment — leaves a sufficient amount of discretion with the appointing power so as not to interfere unconstitutionally with the power to appoint and the discretion implied in that power. The practice is regarded in the law as properly aiding the appointing officer in the preliminary work of selecting qualified candidates. The legislative power to create offices and fix the qualifications of the incumbents is broad enough to permit the ascertainment of qualifications by others in addition to the appointing officer.

With respect to removal, the federal statute places relatively little

restriction upon the officer who by law is vested with that power. Apparently it is permissible for Congress to place restrictions upon the causes for which the official may remove and upon the procedure to be followed in exercising the power. However, the amount of restriction that can be placed upon the removal power of the president seems to be relatively slight, apparently being restricted primarily to procedure; only in the situations that are covered by the Rathbun case [8] does there seem to be an exception to this general rule. And this exception seems to be as weakly established as the political ground upon which the constitutional ruling is based. No serious difficulty seems to attach to the removal power as it affects the national civil service. The general theory of the national civil service law is that a relatively open rear door is necessary to preserve the political soundness of the civil service, the important thing being to authorize the closing of the front door to entrants who are not qualified.

The state civil service problem is not complicated by federal constitutional provisions. The Fourteenth Amendment, with its requirements of due process of law and equal protection of law, does not restrict in any substantial manner the operations of the state or its subdivisions in the personnel field.[9] The constitutional problems in state and municipal civil service law arise from state constitutional provisions.

The objection is advanced at times that inasmuch as changes in compensation are contemplated in the new classifications set up by the civil service system, the act cannot be applied to appointive officers whose salaries are not to be diminished during their terms of office. Constitutional provisions dealing with such matters, however, usually refer to officers rather than to employees, so that the latter are not covered. It has also been held that unless the contrary is clearly indicated by the phraseology of the text, such provisions relate only to officers with fixed terms and not to officers holding for indeterminate periods.[10] Civil service provisions cannot be applied to offices the selection of whose incumbents is provided for by the constitution.[11]

[The suggestion is sometimes advanced that a civil service commission should be made up of representatives of interested groups, and not of the public at large in the more usual generalized sense. Labor organizations may urge that the interests of the employees should be guarded by

[8] Rathbun v. United States, 295 U. S. 602, 55 Sup. Ct. Rep. 869, 79 L. ed. 1611 (1933). Myers v. United States, 272 U. S. 52, 47 Sup. Ct. Rep. 21, 71 L. ed. 160 (1926). For full discussion see Hart, Tenure of Office under the Constitution (1930), and Executive Leadership in Administration, Chapter 2 in Haines and Dimock, Essays in Governmental Administration (1935).

[9] Shelby v. Pensacola, 112 Fla. 584, 151 So. 53 (1933).

[10] Middlesboro ex rel. Minton v. Gibson, 225 Ky. 120, 7 S. W. (2d) 825 (1928).

[11] Stowe v. Ryan, 135 Ore. 371, 296 Pac. 857 (1931); People ex rel. v. Capp, 61 Colo. 396, 158 Pac. 143 (1916).

a member from their ranks. Employers in the locality may wish to have their interests represented by special commissioners chosen by themselves. Affected branches of the administration may likewise wish to choose their representatives, or if not to choose them, then to have one of their own number chosen by the appointing officer. In Prichard v. De Van,[12] the West Virginia court upheld a civil service provision that established a commission composed of members chosen by the mayor, by the local trades board, or failing that, then by an association of paid firemen, and by the local chamber of commerce. It was argued that private bodies could not be authorized to appoint public officers, but the court answered this by holding that members of the fire department were not public officers, so that to have a board thus composed make appointments to the force would not be fatal. Of course, the court probably realized that the civil service act did not give the board the power to appoint, but only to assist in the exercise of the appointing power.

The constitutions of many states contain provisions relating to the administrative division of the executive department. These provisions do not mention the administrative branch expressly, but do mention some of the more historically important administrative officers of the state government, such as the secretary of state, the attorney general, and the treasurer. Some constitutions state that the officers thus enumerated are with the governor to constitute the executive department. In such a section, duties of these offices are occasionally set forth, the method of selection is usually specified, and the terms of office fixed. The contention has been made that a civil service act is invalid because it adds to the list of officers or boards mentioned in the constitution. It has also been suggested that to impose civil service provisions upon the incumbents of such offices in the exercise of their power to appoint subordinates is an unconstitutional interference with their powers as constitutionally established officers. These contentions have all been negatived and the civil service act held constitutional in a state having such a provision in its constitution.[13] It has been held, for example, that the deputy of an elective clerk of the state supreme court can be included in the civil service even though the judicial department in which he serves was created by the state constitution.[14]

An interesting illustration of a complete misunderstanding of the legal theory of a civil service act is to be found in a recent South Carolina decision, Murphy v. Cooper.[15] The question raised involved the power of a city to apply a civil service provision to a health inspector. A statute

[12] 114 W. Va. 509, 172 S. E. 711 (1934).
[13] People v. McCullough, 254 Ill. 9, 98 N. E. 156 (1912).
[14] People v. Brady, 275 Ill. 261, 114 N. E. 25 (1916).
[15] 149 S. C. 449, 147 S. E. 438 (1929).

gave the city council power to fix the salaries of health inspectors, but gave the board of health power to appoint them. The health board in turn was authorized by a provision of the state constitution, as follows: "It shall be the duty of the General Assembly to create Boards of Health wherever they may be necessary, giving to them power and authority to make such regulations as shall protect the health of the community and abate nuisances." [16] The court, with apparent unconcern, decided that the constitution had given to the board of health the power to appoint health inspectors, and that this power to appoint could not be restricted even by requiring qualifications of the appointees. Leaving out of view any conflict between statute and city ordinance, the court said: "The board of health is authorized by constitution and statute to select its health inspectors without qualification or restriction upon such right, pursuant to Article 8, section 10, of the Constitution of South Carolina, . . ." The court reiterated the same idea when it said that "Under Article 8, section 10, of the Constitution the Board of Health selects its health inspectors without qualification or restriction upon such right." The court seems not to have seen that in the first place the constitution of the state says nothing about the power of the board to select health inspectors, although of course that power might be implied, and that in the second place it is not a qualification of, or restriction upon, that right to have a civil service commission make a preliminary canvass of qualified people and submit its results to the board.

Fortunately for American government and for those who believe that the common law is a law of growth as well as of precedent and logic, most courts have acted the part of statesmen in the law and have used legal theory and governmental necessity to make civil service laws constitutionally possible, even though the appointing authority involved may have come from the constitution itself. The theory upon which civil service laws have been upheld as constitutional, in so far as they affect the appointing power itself, is that the officer to whom the appointing power is given retains that discretion which it was intended he should exercise in making appointments, but that as an aid to his exercise of the power, another body may be given the power to determine the qualifications necessary for the position under consideration.

Not many courts would go as far as did the Colorado court when it held that it was constitutional to require the appointing officer to name the person who stood highest on the list of eligibles.[17] The court limited the scope of its decision by suggesting that this would not be its view if the power to make the appointment were constitutional rather than

[16] S. C. Const., Art. VIII, sec. 10.

[17] People ex rel. v. Capp, 61 Colo. 396, 158 Pac. 143 (1916).

statutory in its source. This suggestion is in accord with People ex rel. Balcom v. Mosher, a New York case, which held that discretion required more than one name, and that a choice between four names was sufficient.[18] Other courts have likewise held that if a choice between three eligibles is permitted, the civil service law does not unconstitutionally restrict the appointing officer; indeed, that instead of restricting him, it aids him in the exercise of his power.[19]

Civil service laws have been assailed on the ground that they involve a delegation of legislative power to the civil service commission. This allegation is generally leveled at the power of the commission to make regulations for putting the statute into effect, and at its power to allocate positions to the various classes of the administrative service. The power to make regulations is sustained on the theory that the general policy is stated in the statute itself, and that it is only in matters of detail that the power is to be exercised. As one court put it, the power itself is valid, even though an exercise of it might be invalid in a particular instance.[20] The power of the commission to classify likewise is not an unconstitutional delegation of legislative power. Nor is the power to extend the list of positions which are to be placed in the exempt class, because the conditions upon which such additions are to be made are set forth in the statute. For example, the law may direct that if it is found impracticable to give a competitive examination for a position, the position shall be placed in the exempt class. Such a provision is within the principles justifying a delegation of legislative power to an administrative body without infringing upon the constitutional requirement of the separation of powers.[21]

In general it is held that civil service acts do not violate the separation of powers with respect to the delegation of judicial power to a commission.[22] The power of the civil service commission to make investigations and conduct hearings is not a violation of the rule that an administrative body may not be granted judicial power. Nor is this altered by a power to the commission to issue subpoenas or resort to court to enforce its orders. To conduct a hearing is an administrative function. To enforce a subpoena by court process is but to make the usual request that the court do something in which it uses its own discretion. The action is the court's, not the commission's.

Nor is it a violation of the common law prerogative of such admin-

[18] People ex rel. Balcom v. Mosher, 163 N. Y. 32, 57 N. E. 88 (1900).
[19] State ex rel. Buell v. Frear, 146 Wis. 291, 131 N. W. 832 (1911).
[20] Green v. Commission, 90 Oh. St. 252, 107 N. E. 531 (1914).
[21] State ex rel. Buell v. Frear, *supra*, note 19.
[22] People ex rel. Akin v. Kipley, 171 Ill. 44, 49 N. E. 229 (1898).

istrative adjuncts of the judiciary as the sheriff to require that his subordinates shall be chosen according to merit and fitness.[23]

The civil service law provisions on classification are not contrary to the state constitutional statements guaranteeing equal protection of the law to all persons.[24] That is, it is not invalid to discriminate between various groups by placing some within the classified service and some outside, others within the competitive service, and still others in an exempt class.

In Rogers v. Common Council of Buffalo,[25] the provision that the civil service commission should not be constituted of more than two members from one political party was upheld as not violating a constitutional provision that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or judgment of his peers."[26] Nor was it found contrary to the due process clause of the state constitution. The reasonable basis of such provisions of civil service law is emphasized by the courts, and it is a general principle of American constitutional law that classification and discrimination are valid if based upon a reasonable ground. The right of a person to office is not a right to the office, but the right to be eligible for the office; and this he is even though a restriction be placed upon the number of places that shall be available to the entire group to which he belongs.

The requirement of merit and fitness incorporated in all civil service laws is not contrary to the common provision of state constitutions forbidding the requirement of any "other oath, declaration or test . . . as a qualification for any office of public trust." [27] The historical basis of these constitutional provisions is to be found in the English experience with religious tests. Although the present provisions are somewhat broader than might be suggested by their historical antecedents, the courts nevertheless tend to restrict them in matters such as these. A test of fitness is said to be reasonable and therefore constitutional. The privilege of holding an office is not a natural right, said one of the courts.[28]

Constitutional protection of privileges and immunities does not extend to offices, and no property rights are violated by civil service laws.[29] The legislature has the power to create, regulate, and control offices unless expressly restricted by the constitution. "It is only every citizen hav-

[23] State ex rel. Milwaukee County v. Buech, 171 Wis. 474, 177 N. W. 781 (1920).
[24] State ex rel. Milwaukee County v. Buech, *supra*, note 23.
[25] Rogers v. Common Council of Buffalo, 123 N. Y. 173, 25 N. E. 274 (1890).
[26] N. Y. Const., Art. I, secs. 1, 6.
[27] Rogers v. Common Council of Buffalo, *supra*, note 25; People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785 (1898).
[28] State ex rel. Buell v. Frear, *supra*, note 19.
[29] People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785 (1898).

ing the proper qualifications for the office who has the right to hold such office. The mode of determining whether such qualifications exist, as established by the civil service act, applies to all citizens alike, and therefore the rights and privileges of none in that regard are abridged." [30]

Civil service acts sometimes contain provisions restricting the freedom of political activity of civil servants, and on the other hand, forbidding removal because of political activity. Such restrictions, and intermediate provisions between the two extremes, are sometimes found in separate statutes also. They are generally held to be valid, and not to infringe upon the right of freedom of speech.[31]

A jury trial is not necessary to make the procedure whereby one may be removed from office consistent with the requirements of due process of law. But when a state constitution requires that grand jury indictment is necessary for infamous crimes, it is not permissible to penalize violations of a civil service law by disqualifying an officer or employee for five years following conviction unless indictment by a grand jury is provided for, because this punishment makes the crime an infamous one.[32]

Several cases have come to the higher courts in which the question of the conformity of the civil service acts with the provisions on municipal home rule and with special legislation has been raised. In New York, where municipalities are constitutionally given the power to appoint their own employees and officers, the question has been complicated by the fact that the state civil service commission has been given power to approve rules that are made by the municipal commissions and also to appoint civil service commissioners for the municipality if the mayor does not do so. The court has held that the civil service acts of the state are valid even though they contain these provisions.[33] The power of appointment resides in the municipality, since the civil service law affects not the power to appoint but the power to determine qualifications. Similarly, in New Jersey it has been held that in the absence of express constitutional limitations it is valid for the state commission to exercise some powers over the municipal commissions. There is no inherent right to local home rule, says the New Jersey court.[34] In Illinois it has likewise been held that when the legislature has power to regulate local government, it may prescribe restrictions to be observed in the selection of municipal employees.[35]

[30] People ex rel. Akin v. Loeffler, *supra,* note 29.

[31] Stowe v. Ryan, *supra,* note 11. See 20 Nat. Munic. Rev. 296 (1931). On political activity see Catherwood, Political Activity by Civil Service Employees, 7 Ill. L. Rev. 160 (1912).

[32] People ex rel. Akin v. Kipley, *supra,* note 22.

[33] Rogers v. Common Council of Buffalo, *supra,* note 25.

[34] Attorney General v. McGuinness, 78 N. J. L. 346, 75 Atl. 455 (1909).

[35] People ex rel. Akin v. Kipley, *supra,* note 22.

If the constitution expressly extends the merit principle to local subdivisions of the state, they are not free to choose whether they wish to adopt it. In this connection a "civil division" of the state has been held to include even school districts.[36]

The local government may adopt a state law on local civil service even though the law affects the terms of local officers. The terms of local officers are subject to local control because they are of local concern.[37]

An optional civil service law that was enacted by the state legislature and that permitted the common council by resolution to accept the act for the municipality, and thereby make the act effective in that city, was held to be valid in State v. Peterson.[38] Under the legal theory applicable in these cases, such an act is a complete statement of legislative policy and is in effect in the state. An event is designated upon which the act is to become operative in particular areas; the designation of an action by the city council as that event is held to be a constitutional method of making the act conform to the requirements of the separation of powers, which forbid the legislature to delegate its legislative power to the cities. But in New Jersey it has been held that although the council may adopt the act, it is invalid to permit the voters to do so.[39] Such laws, or those permitting cities to frame their own ordinances on civil service, do not without any initiative on the part of a city put civil service into operation therein.[40]

Civil service laws are not special laws within the meaning of the phrase "special legislation" merely because they distinguish between various offices and employments and between various groups of citizens on the basis of fitness. To require the applicants for some positions to state their age, sex, health, habits, etc., and not to require those for other positions to state these facts is insufficient to constitute an unjust classification.[41]

On the whole, the courts have taken a rather friendly attitude toward civil service laws and have overruled most of the constitutional objections advanced against them. Only the more general questions involved in civil service litigation have been considered in this section. Special problems connected with particular phases of the substantive law of civil service are reserved for later discussion.[42]

[36] Palmer v. Board of Education, *supra,* note 5.
[37] Barnes v. Mayor, 213 Mass. 1 (1912).
[38] State ex rel. Benson v. Peterson, 180 Minn. 366, 230 N. W. 830 (1930).
[39] Attorney General v. McGuinness, *supra,* note 34.
[40] Fee v. Fitts, 291 Pac. 889 (Cal. App. 1930).
[41] People ex rel. Sellers v. Brady, 262 Ill. 578, 105 N. E. 1 (1914). People ex rel. Akin v. Kipley, *supra,* note 22; Kipley v. Luthardt, 178 Ill. 525, 53 N. E. 74 (1899).
[42] See, for example, the chapters on classification and appointment.

II. SCOPE OF CIVIL SERVICE LAWS

[The civil service is closely related in the minds of many persons with the classified service, and it is not uncommon to find the two terms used synonymously. Legally the two are not synonymous, for the civil service may be defined so as to include within its scope an unclassified as well as a classified division. Also, within the classified service there may be competitive and noncompetitive services. It is the competitive classified service that is commonly thought of as the civil service.]

The scope of the civil service law, that is to say, the governmental units, departments, officers, and employees to which it applies, is entirely a matter of statute or, where the constitution contains any civil service section, of constitutional provision. Quite commonly associated with the idea of civil service in the competitive class is that of protection against arbitrary removal. But, of course, it is possible to have free and summary discharge of employees and officers, for example, those in custody of public funds, and still include them in the classified service.[43] In all cases, the question is one of construction, and usually of construction of statute.

It should be explained that the term classified service is strictly used in the national government to designate what is ordinarily and loosely referred to simply as the civil service — that is, the service which is under the particular jurisdiction of the United States Civil Service Commission. This commission is not the personnel agency for all the civil service in the national government, there being other personnel laws, such as those applicable to the foreign service, that have no apparent relation to the civil service acts of 1871 and 1883. The civil service customarily referred to is that governed by the acts of 1871 and 1883 and includes those officers and employees who have been designated for, or "classified" by the president into, the civil service. In other words, the classified service in the national government is virtually that usually referred to simply as the civil service.

Of course, Congress itself may except some officers or employees from the operation of the civil service law of 1883. Whether it has done so is in each case a matter to be determined by reference to statute. Sometimes the exception is express and clear, as in the case of deputies to collectors of internal revenue.[44] When a statute recites that a department head may "employ temporarily," it has been held that the employment may be made without reference to the civil service commission.[45] "To be appointed" signifies no intention to deviate from the civil service act; "to

[43] People ex rel. Akin v. Loeffler, *supra*, note 29.
[44] United States ex rel. Palmer v. Lapp, 244 Fed. 377 (C. C. A. 1917).
[45] 21 Ops. Atty. Gen. 261 (1895).

be selected" may do so, although, as is indicated elsewhere, phrases of this type are construed by the courts in the light of the surrounding facts, and the history of the statutory phraseology in the succession of statutes on the subject is of considerable importance in determining the meaning that should attach to them.[46]

A question that gave rise to some confusion at one time was the status of the chief examiner of the civil service commission. The empowering phrase was that the commission should "employ" a chief examiner. Was he an officer, in view of the dignity of his position and the duties and powers attached to it? Or was he an employee? If an officer, he might be appointed by the president and the Senate, by the president alone, by the head of a department, or by the courts of law, but not by the commission, since the commission is not generally held to be a department, although for constitutional purposes it might have been held to be one. If an employee, the examiner might be employed by the commission. Since the statute failed to specify who should appoint him, the phrase in Article II that leaves to the president and the Senate the appointment of those officers whose positions are created by law and whose appointment is not provided for by law made it seem that only the president and Senate could appoint him. Accordingly, he was not placed within the classified service.[47]

The same attitude that prevails in the national government is found in the states. For example, a state statute recited that a particular body could "employ and remove" certain workers. Such a phrase standing alone does not necessarily mean that the positions affected are withdrawn from the operation of the civil service law. Other factors are to be considered in determining whether the phrase has this effect or whether it is to be assumed that the statutory declarations were made within the general framework of the civil service law.[48]

An authorization in an appropriation act made money available, of which a specified amount was to be "expended for personal services in the District of Columbia." In this connection two outside engineers were needed to give their opinion as to the state of deterioration of a government building. Could they be employed without reference to the civil service act? The comptroller general ruled that they must be drawn from a list to be submitted by the civil service commission.[49]

Civil service acts usually refer to officers and employees, but in addition to these two classes, most governmental units make use of special agents and of contractors. In some instances it is not easy to determine

[46] 25 Ops. Atty. Gen. 341 (1905).
[47] 18 Ops. Atty. Gen. 409 (1886). See 17 Ops. Atty. Gen. 504 (1883).
[48] Walsh v. Commissioner of Civil Service, 15 N. E. (2d) 218 (Mass. 1938).
[49] 7 Dec. Comp. Gen. 106 (1927).

whether a contract is one of employment or is for the performance of special services to be carried on in a sufficiently independent manner to constitute the performer an independent contractor. The courts, while recognizing the special category, tend to construe the phraseology in such a manner as to bring the employment rather than the contract into the foreground, and thus bring the transaction inside the civil service law.[50] The fact that a city council directs the mayor to enter into a contract which has nothing to distinguish it particularly from the employments common to the city service is not sufficient to constitute a person with whom such a contract is made an independent contractor.[51]

A statute providing that all "offices and places of employment in such city" should be within the civil service has been held to include the subordinates in the office of a city clerk.[52] Difficulty has arisen in connection with those departments, such as police or fire, in which there is a force of skilled or professional workers with a head or governing board that is lay rather than professional in membership. A statute stated that the police department should consist of the board of police commissioners, the chief of police, the police force, and such other clerks and employees as were deemed necessary, but in dealing with the fire department mentioned no corresponding boards and officers as constituting the department. It was held that such an omission should be taken to mean that the force of firefighters constituted the department, and that the secretary to the board of fire commissioners was not within the department, and not being within it, was not subject to the civil service regulations.[53] In the case of a statute providing that those in the "fire force" were to be under the civil service, it was held that the secretary-treasurer of the board governing the fire force was not within the force, and was therefore not protected by the civil service act.[54]

Careless or unskilled draftsmanship sometimes results in problems of construction for the courts which ought not to be forced upon them. In one city charter the chief of police was expressly excepted from the provisions on the civil service. In another section the police department was defined in such a manner as to include the chief of police, and a general statement was made to the effect that no member of the department should be chosen except in accordance with the provisions governing the civil service. By virtue of another section the council was empowered to effect consolidations of functions. Did the chief come within the civil service? The court held that the chief was excepted from the

[50] Peck v. Belknap, 130 N. Y. 394 (1892).
[51] Peck v. Belknap, *supra*, note 50.
[52] People ex rel. Akin v. Loeffler, *supra*, note 29.
[53] McCarthy v. Board of Fire Commissioners, 37 Cal. App. 495, 174 Pac. 402 (1918).
[54] City of New Orleans v. Commissioners, 50 La. Ann. 1000 (1898).

civil service provisions because of the rule sometimes applied in the construction of statutes that the specific overrides the general.[55]

Civil service laws often use the phrase "departments" or "executive departments" in defining the branches of the administrative organization to which they are intended to apply. The inclusion of any particular subdivision of the administrative organization under these phrases depends not only upon the civil service statute but also upon other statutes providing for the general organization of the administrative branch of government in that particular unit.[56] An institution may be a department for some purposes and not for others.[57] This is a problem that arises in all levels of government, in municipalities as well as in the states and the national government. Calling an officer the head of a department in order to evade the civil service law does not make him a head if his position, duties, and powers do not also make him one.[58]

The need for consulting branches of the law that are closely related to civil service law, though independent of it, is illustrated by Brenan v. People,[59] an Illinois case. Section 3 of the civil service act provided that "said commissioners shall classify all the offices and places of employment in such city, . . ." The question arose, Does the commission have the power to classify any employees of the board of education who are not listed in the section on exceptions? The disintegrated character of the municipal organization prevailing in many sections of the country is nowhere illustrated more strikingly than in the relationship between the board of education and the city government. It is not uncommon for the board to have independent powers, including even the power to tax, and it frequently happens that the general municipal government exercises virtually no control over the school authorities. In each case it is necessary to consult the special and general laws governing education, not only in the state but in the localities, the general and special laws governing the city governments in the state as a whole and in this city in particular, and also the civil service law. The court said in the Brennan case that "merely because a board is invested with certain corporate powers it is not necessarily separated from the municipal government."

In some cases the courts stress the ownership of the property of the organization, the source of money for defraying its expenses, and the benefits that accrue to the city from its activities, in deciding whether it is a part of the municipal service.[60] The mere fact of separate organiza-

[55] Marshall v. Williams, 85 Cal. App. 507, 259 Pac. 970 (1926).

[56] 34 Ops. Atty. Gen. 48 (1924). See 7 Dec. Comp. Gen. 818 (1928); 27 Dec. of Comp. 145 (1920); 4 Dec. Comp. Gen. 53 (1924).

[57] 27 Dec. of Comp. 145 (1920).

[58] People ex rel. Akin v. Kipley, *supra*, note 22. [59] 176 Ill. 620, 52 N. E. 353 (1898).

[60] People ex rel. Ryan v. Civil Service Supervisory and Examining Boards, 17 Abb. N. C. 64 (1885), affirmed, 41 Hun 287, 2 N. Y. St. Rep. 636 (1886).

tion, with a corporate status and special funds, is not sufficient to make a library board independent of the city for purposes of the civil service law.[61] Considerable attention is paid to the power to tax. The fact that the institution does not possess that authority militates considerably against independence for civil service purposes. Park districts and various types of park organizations present a similar problem in some cities. With all of them the statutory intention governs the answer that is given to the question of their status.[62]

The judicial departments of state, local, and national governments are outside the civil service laws either by express provision or by virtue of the clause that excepts elective officers from the operation of the act. The courts tend to construe civil service acts as not applicable to court attendants of one type or another if they are not expressly included. A civil service provision applying to "state officers" has been held not to include court employees.[63] A court interpreter has been said not to fall under a civil service act because not explicitly included.[64] A statute that extended the civil service to certain county officers did not apply to a jury clerk in the sheriff's office, the office of sheriff not being a county office within the meaning of this term as used in the civil service law.[65] Care must be taken in framing civil service provisions to make it clear just what types of employment connected with the judicial process do come under the classified service. In a California case [66] it was decided that the power to fix the number of deputies and their compensation did not include the power to fix the qualifications for office, and therefore did not include the power to impose the merit system upon them. Deputies may be either the personal employees of their principal or officers or employees of the government. This may be true of some other officers as well. The source of compensation is important in these cases.[67]

The civil service laws usually except legislative employees entirely, or place them in an unclassified service, although there are instances in which they have been placed in the classified division. This exemption applies to employees not only of state legislative bodies but usually of legislative bodies in the counties and cities as well. Legislators themselves are excepted under the usual provision exempting elective officers.

[61] Newark Library Trustees v. Commission, 86 N. J. L. 307, 90 Atl. 261 (1914).
[62] Wood v. Philadelphia, 59 Pa. Super. Ct. 90 (1915).
[63] People v. Morley, 67 Colo. 331, 184 Pac. 386 (1919).
[64] Cutugno v. New York, 9 N. Y. S. 729 (1890).
[65] Matter of Grifenhagen v. Ordway, 218 N. Y. 451, 113 N. E. 516 (1916).
[66] Crowley v. Freud, 132 Cal. 440, 64 Pac. 696 (1901).
[67] Wilson ex rel. Sullivan v. McOsher, 84 N. J. L. 380, 86 Atl. 497 (1913); Devlin v. McDermott, 84 N. J. L. 403, 86 Atl. 500 (1913); Bates v. Offerman, 147 Misc. 800, 264 N. Y. S. 547 (1933).

This practice of excepting legislative employees leaves them subject to the political discretion of the employing bodies.[68]

Labor may be either included in the classified service on a noncompetitive basis, placed in the unclassified service, or left outside the service entirely, depending upon the statutory provision. Statutes sometimes use the word "labor," at other times the phrase "unskilled labor," and in still other instances "laborers and workmen." In any case the problem is one of determining whether the words apply to all labor, to unskilled labor, to laborers who do some clerical work, to laborers on an hourly, daily, weekly, monthly, or annual wage, or to laborers in all branches of governmental administration.[69]

Some of the constitutional problems that arise from the relationships between state governments and their local subdivisions have been discussed in the section on constitutional problems of the civil service. It has been pointed out that some states have enacted statutes applying the merit system only to the state administration; others make it possible for local governments to adopt the laws that have been enacted by the state legislature; in still other states the state and local governments have civil service laws in common under a system of state legislation that either directly covers the municipalities or permits them to enact their own merit laws. The state governments retain some supervision over the local services in a few instances.

The power of the state to provide for civil service laws to be followed in the local governments is clear enough and is subject only to those restrictions found in some state constitutions upon state legislation that relates to local governments. The courts tend to look for pretty clear authorization to any state body that claims the power to enter the local personnel field; and although they will permit the exercise of the power, they are not likely to imply it lightly. This is true, for example, of the power to fix salaries.[70] In the case cited, the court said that "public considerations of a fundamental character require that if the legislature proposes to take away this power and intrust this responsibility to a state-wide appointive supervisory commission, the expression of its will should be couched in the plainest of terms."

A state law providing that "The authority by this section conferred shall not be so exercised as to take from any policeman or fireman any right or benefit conferred by law, or existing under any lawful regulation of the department in which he serves" was held not to take away

[68] Matter of Shaughnessy v. Fornes, 73 A. D. 462, 77 N. Y. S. 223 (1902).

[69] 27 Ops. Atty. Gen. 215 (1909); Ash v. Board of Civil Service Commissioners, 215 Ia. 908, 247 N. W. 264 (1933); Hoggett v. Mt. Vernon, 36 A. D. 374, 55 N. Y. S. 315 (1899); 27 Ops. Atty. Gen. 184 (1909).

[70] D'Aloia v. Civil Service Commission, 101 N. J. L. 427, 128 Atl. 877 (1925).

from the police board the power to promote a policeman without a promotional examination as required by the civil service law when under a former local law promotion could be made for meritorious services without such examination.[71] A general law does not repeal a local law in this type of situation. In Oklahoma it was held that a charter provision giving the power to fix qualifications for members of the fire department and to employ and discharge such members, restrained only by the laws of the state, was so general that it was not intended to adopt and incorporate a state law providing for removal only upon good and sufficient cause. Unfortunately, the court paid its respects to the merit principle in these terms: "Rodman was informed that it was the policy of the mayor to allow the chief to select his own men, subject to the approval of the mayor. It is a policy that appeals to us as wise. A city fire department is not a charitable institution. It has duties demanding a discipline and loyalty that are better secured by allowing the chief to select his own men than by any civil service scheme." [72]

Under the optional method, whereby a municipality may adopt a state civil service law designed for municipalities, it should be remembered that if the statute says nothing about any method for repealing the adoption, it cannot be thrown off by later municipal action.[73] Some courts seem to think of the act of adoption as even having the effect of estopping the city to question the legality of its act at a later time.[74]

Whether any particular officer or group of officers comes under the civil service law is, of course, a matter of statutory or constitutional construction, but in numerous instances the content of phrases used in both statute and constitution is to be found only in the common law of officers as developed in England and in America. One of the persisting problems in the American law of officers is that of defining whether a person is acting as a state or as a local officer; of course, it is elementary that he may be acting as a state officer in some capacities and as a city or county officer in other capacities, even though acting under the authority of only one office all the time.[75] In a civil service law case a question of this kind can be settled only by resorting to the rules of law that govern public officers; civil service law as such contains no rules for its determination. The fact that an officer performs duties in only one locality does not prove that he is a local officer. He may even receive his

[71] People ex rel. Leary v. Knox, 166 N. Y. 444, 60 N. E. 17 (1901).

[72] City of Wewoka v. Rodman, 172 Okla. 630, 46 P. (2d) 334 (1935).

[73] Warren v. New Brunswick, 79 N. J. L. 191, 80 Atl. 482 (1909).

[74] Newark v. Civil Service Commission, 112 N. J. L. 571, 172 Atl. 589 (1934). See People ex rel. Qua v. Gaffney, 142 A. D. 122, 126 N. Y. S. 1027 (1911), affirmed, 94 N. E. 1098. Cf. Sweeney v. Selectmen of Natick, 202 Mass. 539, 88 N. E. 917 (1909).

[75] Wilcox v. Meahl, 172 A. D. 263, 160 N. Y. S. 708 (1916).

compensation from local funds and not be a local officer. He may be appointed by the governor and be a local officer. He may be appointed by the governor, serve locally, and be paid locally and still be a state officer, if he is performing a state function.[76] A statutory recitation that jury commissioners "shall be officers of the several courts of record of their respective counties" makes them county and not state officers for purposes of the civil service provisions in the Colorado constitution.[77]

One court stated that whether an officer is a county or state official depends upon the source from which he receives his compensation and the authority from which he receives his directions. The use of the word "county" as a prefix to the word "officer" in a statute does not necessarily prove that the office is a county office or the holder thereof a county officer. The substance rather than the form must be considered, and if the two are inconsistent the substance is to control. The county may be used only as an administrative district of the state, so that to name the district in terms of the county does not show conclusively that the officer involved is a county officer.[78] Service in the county may be distinguished from service in the city for civil service purposes; this distinction likewise depends upon the general law of officers.[79]

Public health provides an illustration of a function often administered, organized, and financed locally, but qualifying as a state function for certain purposes under the law of officers. The source of the power to appoint the members of a municipal health board, and the source of their legal powers and duties, are of importance in deciding whether they are state officers because the function they perform is of statewide significance.[80] The unit for whose benefit the service is primarily carried on may be of considerable importance in cases of this kind.[81]

The particular organization that is involved may be significant in determining whether the employees and officers of a certain division or institution of any given unit of government are under the civil service. A clerk in the municipal court of the city of New York may be a city officer and thus come under municipal rather than state civil service provisions;[82] at the same time, it is perfectly possible and consistent that

[76] People ex rel. v. Higgins, 67 Colo. 441, 184 Pac. 365 (1919); Chambers v. People ex rel. Storer, 70 Colo. 496, 202 Pac. 1081 (1921).

[77] People ex rel. Riordan v. Hersey, 69 Colo. 492, 196 Pac. 180 (1921). People ex rel. Denholm v. Welde, 27 Misc. 697, 59 N. Y. S. 474 (1899).

[78] McDaniel v. Moore, 118 S. W. (2d) 272 (Ark. 1938).

[79] McAffrey v. Howland, 241 A. D. 624, 268 N. Y. S. 664 (1934). See Bonnell v. Philadelphia, 48 Pa. Super. Ct. 456 (1912).

[80] Civil Service Commission v. Engel, 184 Mich. 269, 150 N. W. 1081 (1915).

[81] People ex rel. Ryan v. Civil Service Supervisory and Examining Boards, 17 Abb. N. C. 64 (1885), affirmed, 41 Hun 287, 2 N. Y. St. Rep. 636 (1886).

[82] Spencer v. Leary, 137 Misc. 124, 241 N. Y. S. 388 (1930).

the clerks of the Detroit recorder's court should not be under the city's control because that court is part of the judicial system of the state government.[83] This difference between states or even within a single state is due to the laws which establish the court, fix its relationships to the local and state units, and make it clear whether the court is local or state.

A city civil service does not extend to county officers, even though the two governments have been consolidated into a single city-county unit, unless the statutory intention is very clear that the service should extend to both units.[84] Sometimes the functions that are carried on by several of the local governmental units are so closely interrelated that it is not easy to distinguish them. But those who are essentially county officers and employees come under the rules of the county on civil service and public officers, and not under the city rules.[85]

Thus far the scope of the civil service has been discussed largely in terms of the groups of officers and employees to which the statute, charter, or constitution refers. But, of course, a civil service provision operates not only as a restriction upon these groups, but upon the units of government themselves and upon those who exercise their powers for them.[86]

Several subjects treated in a rather cursory manner in this section are also touched upon in the section on classification; in each instance both sections should be consulted. The confused state of the terminology and of the law upon these two subjects makes it impossible to draw clearly defined lines of demarcation between them.

[83] Civil Service Commission v. Engel, 187 Mich. 83, 153 N. W. 358 (1915).
[84] Crowley v. Freud, *supra*, note 66.
[85] People ex rel. Webb v. Clarke, 54 A. D. 588, 66 N. Y. S. 1068 (1900).
[86] Peck v. Belknap, *supra*, note 50.

Chapter III

ESTABLISHMENT OF THE CIVIL SERVICE

I. EFFECT ON STATUS OF EXISTING PERSONNEL

One of the most troublesome of all the problems that arise in the initial stages of drafting civil service legislation is the treatment of officers and employees who are in the service when the change from the political to the merit service takes place. The proponents of the change are likely to feel that those appointed prior to the inauguration of the compulsory merit system are not the persons who should be retained indefinitely in the public service. Those who are already in the service will argue that years of experience in the service have given them competency, and also that certain humanitarian considerations should prevail in favor of those who have entered the public instead of the private service and presumably have lost some of the gains thought to inhere in the latter.

Various alternatives and compromises are found in existing civil service laws, ranging from retention of the old employees, with or without the tenure protections of the civil service law, to immediate discharge. The statute or charter provision must lay down the rule to be followed.[1]

A civil service law may provide that as vacancies occur in the service those selected to fill the vacancies shall be chosen in accordance with the civil service provisions and shall be subject to the obligations and protections provided for in such a law. New positions may likewise be subjected to the recruiting provisions of the civil service law. This method has the advantage of fitting the new principles of personnel into the system gradually and without too sudden a change. The proponents of the merit principle often feel, however, that it takes too long under such a plan to convert the system into a merit service.

Under a charter providing that vacancies and newly created positions were to be filled in accordance with the civil service rules, it has been held that employees appointed under the civil service and those appointed under the previous laws are of equal status in case of a reduction of force made for reasons of economy; that is, it would be possible for the old employees to be retained and for those chosen under the civil service procedure to be laid off, subject of course to the usual rules gov-

[1] People ex rel. Corkill v. McAdoo, 113 A. D. 770, 99 N. Y. S. 324 (1906).

erning good faith in the economy plea.[2] A statement of the kind made in this charter did not affect the status or rights of the old employees. A new appointee who has not complied with the new civil service act cannot obtain the help of the courts in ousting the prior holder of the position.[3]

A provision that on and after a certain date appointments are to be made on the basis of merit leaves untouched all officers then holding office for definite terms. The phraseology of the statute is such that the operation of the act is prospective,[4] and has no effect upon those appointed for definite terms under earlier statutes.

It is important to notice in each case whether the civil service law affects offices or officers. Some courts tend, in case of doubt, to read the statute as covering in offices rather than officers. This interpretation makes it possible to remove those who were appointed under the political system in accordance with the rules governing appointments of that kind; the court seems to feel that only those who have been examined and certified under the civil service provisions should be entitled to the special career protections usually provided therein.[5]

The courts tend, in interpreting a statute, to restrict it to its express provisions. A statute reciting that "all the clerical and other subordinate forces . . . not removable without cause in the public employ in any part of the city" shall likewise under the newly reorganized city administration not be removed without cause was held not to protect officers against political removal but to apply to employees only.[6]

Some statutes provide for the creation of vacancies in all positions in the classified service as soon as the rules for the administration of the civil service have been adopted and eligible lists prepared from which the vacancies can be filled. An example of such a statute follows. "The incumbents (all employees) of all positions at the time this charter takes effect coming within the competitive class of the classified service, may continue in service and discharge the duties assigned them until the beginning of the fiscal year 1910, and until the board secures an eligible list and promulgates rules as provided . . . whereupon said incumbents shall be deemed to have vacated their several positions."[7] Such a statute applies to the incumbents so as to cut their terms of office or employment short by operation of law.

[2] Kessler v. Seattle, 93 Wash. 192, 160 Pac. 423 (1916).

[3] Middlesboro ex rel. Minton v. Gibson, 225 Ky. 120, 7 S. W. (2d) 825 (1929).

[4] State ex rel. McNamara v. Campbell, 94 Oh. St. 403, 115 N. E. 29 (1916).

[5] Shinn v. People, 59 Colo. 509, 149 Pac. 623 (1915); Sowers v. Pitcher, 63 Colo. 139, 165 Pac. 253 (1917).

[6] People ex rel. Percival v. Cram, 164 N. Y. 166, 58 N. E. 112 (1900).

[7] Gregory v. Kansas City, 244 Mo. 523, 149 S. W. 466 (1912). See State ex rel. Nelson v. Board of Public Welfare, 149 Minn. 322, 183 N. W. 521 (1921).

A Minnesota statute provided that "No officer or employee after six months' continuous employment shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense as in this chapter hereinafter provided." The court held that this section permitted the removal without cause of city employees during the first six months of a newly adopted civil service system. Such interpretation would be necessary, said the court, in order to clean house, as it were, and leave room for appointees recruited under the merit system.[8]

Not only do the courts seem disinclined to interpret a civil service statute in such a manner as to bring under it those not clearly included by the terms of the act,[9] but they tend to a narrow interpretation of the phrase "civil service" itself. A statute that covered in persons "serving in the state civil service" has been construed to mean persons serving in the state administration under prior civil service acts,[10] rather than all that part of governmental administration distinguished from military service.

Some difference of opinion has arisen over the effect of covering in officers "now elected," but the Massachusetts rule seems preferable to the Illinois rule on this point. The former court holds that the use of the phrase "now elected" is significant, and has decided that offices created after the adoption of the act are also to be subjected to the statute.[11] The attorney general has ruled that the United States civil service act applies to positions created and classified subsequent to its enactment.[12]

An attempt to give old employees some preference under a reorganized administrative system that included a civil service is to be seen in a charter which provided that the new board should make appointments from among the force in the service at the time the new charter went into effect, and that such members should not be required to pass a civil service examination, although all future appointments should be made from lists of persons who had passed such examination. This was held to leave the board free to fill any newly created offices, that is, not in the old department, with persons outside the department membership list.[13] It does not follow, of course, that giving preference to old employees in a newly reorganized department necessarily protects them against arbitrary removal. Whether such preference does or does not carry with it

[8] Saholt v. Rochester, 185 Minn. 510, 242 N. W. 4 (1932).

[9] People v. Chicago, 242 Ill. 561, 90 N. E. 259 (1909).

[10] Kennedy v. State Personnel Board, 6 Cal. (2d) 340, 57 P. (2d) 486 (1936). See Huston v. State Personnel Board, 13 Cal. App. (2d) 707, 57 P. (2d) 976 (1936).

[11] Attorney General v. Tillinghast, 203 Mass. 539, 89 N. E. 1058 (1909). See People ex rel. Akin v. Kipley, 171 Ill. 44, 49 N. E. 229 (1898).

[12] 17 Ops. Atty. Gen. 621 (1883).

[13] Maxwell v. Fire Commissioners, 139 Cal. 229, 72 Pac. 996 (1903).

this protection depends upon the phraseology of the statute involved. This is well illustrated by a California case. One section of the charter provided for preference to "persons employed in operating services of the Geary Street . . . Railroad Co. on May 5, 1912, such preference to be solely for employment in the Municipal Railroad service," while another section provided that persons employed in the operating service of any public utility acquired by the city who had been so employed for not less than one year, and who were employed by the public utility at the time when it was acquired by the city, should be continued in their positions. These two sections were held to give protection against removal to one group but not to the other.[14] Preference in employment carries with it less than a guarantee of continuance in employment. The rule is general that an act providing protection to persons "appointed or employed as a result of such examination" gives no protection to those appointed or employed without such an examination unless the statute expressly extends it to them.[15]

Another example of the difficulties encountered in cities with municipally owned commercial enterprises is to be found in these provisions of a California charter. Holders of exempt positions under the previous civil service law "shall be continued in their positions as if appointed thereto after examinations and certification from a list of eligibles and shall be governed thereafter by the provisions of this charter." But the provision concerning the municipal airport stated that "Positions and employments in the municipal airport . . . shall be continued and the employees thereof shall, subject to the approval of the commission, be appointed by and hold office at the pleasure of the manager of utilities." Those who came under the latter provision were held not to have been covered in by the charter.[16]

Protection against removal without cause was granted by the Des Moines charter to those who were retained through long and efficient service; protection against removal without a hearing was extended to those who were appointed under examinations authorized by the new civil service provision.[17] Effect was given to the distinction, as it was thought not inadvertent. A Minnesota statute provided that "All officers and employees of the department of health shall be eligible to similar positions under the board of public welfare hereby created without being required to take a civil service examination as to their qualifications therefore, and they shall continue in their respective positions from the time this act goes into effect, until further action of the board." An employee

[14] Kydd v. City and County of San Francisco, 37 Cal. App. 598, 174 Pac. 88 (1918).
[15] State ex rel. Langhauser v. Board of Commissioners, 171 La. 690, 131 So. 850 (1931).
[16] Archer v. Civil Service Commission, 26 P. (2d) 41 (Cal. App. 1933).
[17] Larson v. Des Moines, 216 Ia. 42, 247 N. W. 38 (1933).

was discharged from service and the next day was appointed to a different position. A month later he was suspended and given a hearing by the board. Subsequent to his discharge, he claimed that he should have been given a hearing before the civil service commission, such a hearing being provided for in the removal section of the civil service law. The court held that he was not entitled to such hearing.[18] Only those who were appointed from the eligible list that was prepared after examination, not those appointed from the list of existing employees, were entitled to the protections of the civil service act. He was a probationer, having served only one month in the new position. The case was weakened somewhat by the fact that he had admitted the charges and had waived his right to a hearing by not claiming it seasonably, but the opinion of the court is clear on the point that different protections were extended to those who came in by examination and to those who came in by the covering section.

There have been cases in which department heads or those influencing them moved to discharge certain employees before the civil service came into effect. "Employees within the scope of this article at the time of the adoption of this article shall retain their positions, unless removed for cause" has been made the basis for permitting the use of quo warranto by the ousted officer to question the title of one who was appointed in his place after the passage of the civil service law but before the establishment of the machinery necessary to its operation.[19] The removal provisions of the new statute may become effective even though the appointive sections do not. One method used in paving the way for a free administrative hand after the civil service law has become effective is to take resignations and hold them until such a time as seems suitable. A resignation is valid, even though obtained with this purpose in mind, if no duress or fraud enters into the situation.[20] However, if duress is used and misrepresentations are made, a resignation is invalid.[21]

The practice of covering in officers and employees makes it necessary to fix some time as of which members of the service are to be treated as members for coverage purposes. It is customary to fix a date for beginning the new service, but there may remain some question as to whether certain individuals were appointed to the service before or after that date. The date of the appointment, not the date when the appointee

[18] State ex rel. Nelson v. Board of Public Welfare, 149 Minn. 322, 183 N. W. 521 (1921).

[19] State ex rel. Powell v. Fassett, 69 Wash. 555, 125 Pac. 963 (1912).

[20] Byrne v. St. Paul, 137 Minn. 235, 163 N. W. 162 (1917).

[21] Kidd v. State Civil Service Commission, 57 P. (2d) 569 (Cal. App. 1936). On removal through resignation from the classified service, see Williams v. State, 127 Oh. St. 398, 188 N. E. 654 (1933); People ex rel. Doran v. Gallaher, 82 Misc. 679, 144 N. Y. S. 107 (1913).

starts work, decides the issue.[22] So, also, the date of appointment rather than the date of taking the oath is determinative, unless the oath is a condition precedent to the taking of office.[23]

In one instance, an employee was told on April first, the date on which the civil service act went into effect, that he had been fired the day before. The court held that removal could not have a retroactive effect, and that on and after the date that the law went into effect, the removal procedures outlined in the new law must be followed.[24]

Civil service laws sometimes impose the requirement of residence. Interpretation depends on the phraseology used, but a statement that no person "not a citizen" and resident in the state shall be eligible to appointment or employment has been used to bar nonresidents from service even though they held positions in the prior service.[25]

A requirement that an examination must be passed by persons in the service less than five years prior to the adoption of the civil service law is valid, although members of the service for more than five years are excused from the requirement.[26] The five-year term of service is a reasonable one and looked on as assurance of competency and familiarity with the work. Statutes vary considerably in the periods used to measure these factors, however.

The requirement that those now in the service must take examinations does not always guarantee them places, even though they pass the examinations. A provision that present employees should be kept on and assigned to work is interpreted to mean that if there is work they can get it, but mandamus will not issue to compel the fixing of a salary for work that has not been entered upon, because until the person has actually been assigned to a position, it is not possible for him to show a clear right to any particular salary.[27]

For one reason or another it sometimes happens that the qualifying examination for retention in the service is not given within the time specified by law. What happens to the tenure of those who should have been given the examination? As one example, an Ohio statute provided that "The incumbents of all offices and places in the competitive classified service . . . shall, whenever the commission shall require, and within twelve months after the rules adopted by the commission go into effect, be subject to non-competitive examinations as a condition of continuing

[22] 21 Ops. Atty. Gen. 140 (1895).
[23] 19 Ops. Atty. Gen. 410 (1889).
[24] Stevens v. Crosbie, 137 Md. 655, 113 Atl. 329 (1921).
[25] Hellyer v. Pendergast, 176 A. D. 383, 162 N. Y. S. 788 (1917).
[26] Stolzy v. City of Henderson, 8 S. W. (2d) 629 (Ky. 1928). See Roark v. State ex. rel. Waters, 107 Fla. 659, 145 So. 867 (1933).
[27] People ex rel. Sullivan v. New York, 128 N. Y. S. 776 (1910).

in the service . . ." The examination was not given within this specified period. The court said that it was a reasonable construction of the statute to hold that if the commission should delay the noncompetitive examination for a reasonable time beyond that prescribed, the employees affected would hold over. It was made clear, however, that if the examination was delayed an unreasonable length of time, the court could compel the commission to offer it to the affected persons.[28]

The courts are sometimes influenced by factors of fairness and reliance upon administrative inaction in cases in which employees have been declared to be subject to examination before receiving full civil service status but have been given no such examination. The mere fact of taking an examination is not sufficient. It is necessary to pass it. It is likewise necessary to assert the rights that are supposed to accrue from the passing of the examination within a reasonable time.[29] A person who is covered in and given protection against removal does not lose his rights upon illegal removal from the service, and after such a removal cannot be forced to take an examination to recover the position from which he was wrongfully ejected.[30] A person who is wrongfully in the service, but who would otherwise seem to be within the provisions covering in existing employees, is not given the benefits of coverage. A statutory recitation that all persons holding positions within the classified service, as that service is defined in the act, shall be retained in the service does not save a person who is wrongfully in office.[31] The court properly thought that in a civilized community the phrase "holding a position or office" meant lawfully holding a position or office.

The tenure provisions of a civil service act do not protect a de facto officer. "To construe the civil service act so as to keep in office one holding such office without right, would subvert the beneficent purpose of that legislation. It is manifest that its applications must be limited to the protection of officers de jure." [32] Neither does a person holding an exempt position under an existing civil service act get any protection during the probationary period provided under a new act.[33] The statute provided that "such probationary period [was] to commence on the effective date hereof of not less than two months nor more than eight months." This was held not to mean that the commission must fix the probationary period before the two months expired. It had been argued that if this

[28] State ex rel. Mugavin v. Keefer, 3 Oh. App. 440 (1914). State ex rel. Bartholomew v. Witt, 3 Oh. App. 414 (1914).

[29] Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155 (1906). See Johnson v. Pugh, 152 Minn. 437, 189 N. W. 257 (1922).

[30] People v. Stevenson, 270 Ill. 569, 110 N. E. 814 (1915).

[31] People v. Chew, 68 Colo. 158, 187 Pac. 513 (1920).

[32] Salter v. Burk, 83 N. J. L. 152, 83 Atl. 973 (1912).

[33] Kennedy v. State Personnel Board, *supra*, note 10.

were not done, all employees would be protected after that time. This contention was rejected by the court.

A holdover is not protected by the provisions that are usually made for covering in present employees or officers. The reason for a successor's provision ("and until a successor is appointed and qualified") is not to extend the term of office, but to ensure the performance of the duties of the position. Under this view of the purpose of a holdover provision, a vacancy exists that can be filled when the new civil service act becomes effective.[34] The courts are badly confused and divided on the subject of holdovers in general.[35]

The status of temporary appointments under civil service acts will be discussed in detail elsewhere (Chapter VI). Temporary appointments are authorized under certain conditions and for relatively short periods by many of the merit statutes. But are temporary appointees who are in the service when a civil service act is adopted affected by the usual coverage provisions? The courts look with disfavor upon any interpretation that tends to include temporary appointees in the group covered in under the new act. A statute reciting that all officers "holding office or employment at the time of the introduction of this act, or who may hereafter be appointed, shall continue to hold their offices or employments as the case may be, and shall not be removed therefrom except in accordance with the provisions [of this act]" was held not to apply to temporary appointees who were in office either at the time the act was introduced or when it took effect.[36]

Apparently the courts are not always particular whether the examination required is noncompetitive or competitive, so long as it is at least as severe as that specified by the statute. In Ohio it was held that a person who took a competitive examination and passed it, though ranking nineteenth on the list, had complied with the statutory requirement that present incumbents pass a noncompetitive examination as a condition of retaining office. This rule was extended to a temporary appointee who was holding office at the time the law was adopted.[37]

A civil service rule that permitted temporary appointments not to exceed one month provided that temporary appointees should not be covered in under the new law. A person who claimed that he had originally held a position that was covered in accepted a temporary appointment to another position for one month and until an examination was

[34] For removal and its relation to this problem, see Chapter IX. See also People v. Chicago, 104 Ill. App. 250 (1902), affirmed, 210 Ill. 479, 71 N. E. 400.

[35] See Dawley, The Governors' Constitutional Power of Appointment and Removal, 22 Minn. L. Rev. 451 (1938).

[36] Shalvoy v. Johnson, 84 N. J. L. 134, 86 Atl. 81 (1913).

[37] Hornberger v. State ex rel. Fisher, 95 Oh. St. 148, 116 N. E. 28 (1917).

to be held; he then asked that his rights be adjudged on the basis of his original position. The court held that by accepting a temporary appointment he was estopped to assail the rule. He was also estopped to deny that his appointment was temporary.[38] A rule of the United States Civil Service Commission that "all persons serving under temporary appointments at the date of the approval of this section may be permanently appointed, in the discretion of the proper appointing officer" was interpreted as applying only to those positions for which there were no eligibles on the list. Temporary appointees in the sense of persons appointed to work temporarily could not be given permanent status.[39]

In general it may be said that the status of persons in the old service at the time the civil service act takes effect is controlled largely by the provisions of the act itself. They may be treated as outsiders or they may be given various degrees of protection under the new act, depending in most cases on the exact phraseology of the act itself.[40]

The salary claims that have arisen out of removals preceding the adoption of a civil service law may be cut off by the new statute, and apparently such a provision is valid.[41]

II. EFFECT ON TERMS

The manner in which tenure of office is affected by the introduction of civil service laws has not received much attention in the descriptive books on the merit system. Rules governing tenure of office are the product partly of statutory provisions, partly of constitutional provisions, and partly of common law principles. To discover the rules governing tenure in any particular case, it is necessary to consult not only the civil service laws and regulations but the statutes and decisions on tenure in general.[42]

An example of a constitutional provision affecting tenure is found in Section 20 of Article II of the constitution of Ohio: "The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers: but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." The Ohio court held that this provision applied to both elective and appointive officers, and that if an office falling within the scope of a subsequent civil service law had a definite term attached to it,

[38] Matter of Hayes, 56 A. D. 20, 67 N. Y. S. 340 (1900), affirmed, 166 N. Y. 603, 59 N. E. 1132.

[39] 22 Ops. Atty. Gen. 556 (1899).

[40] People v. Chew, 67 Colo. 394, 179 Pac. 812 (1919).

[41] State ex rel. Otto v. Kansas City, 310 Mo. 542, 276 S. W. 389 (1925). Presumably this could not be done if the claims had been reduced to judgment.

[42] See Tenure of Office under New Jersey Civil Service, 32 N. J. L. Jour. 163 (1909).

the incumbent could not be subjected to the control of a civil service commission until the office either became vacant or was abolished.[43] When his term had expired, however, the provisions of the civil service law would be followed in filling the vacancy. This case illustrates the possibility that a civil service act, though perfectly valid in general, cannot immediately upon its enactment and application be applied to all those to whom it can eventually apply. The constitutional definition of offices may not refer to statutory or local offices, and for that reason the offices to which the civil service applies may not be affected by the constitutional rule.[44]

A constitutional provision that limits the terms of all offices in a state to four years does not apply to employees because of the distinction at common law between officers and employees.[45] If a provision relates to officers, it relates to officers alone; if all governmental workers are to be included, draftsmen must be careful to make that clear. The problem of determining whether a person is an officer or an employee is solved by reference to the common law tests of an officer. Constitutional mention of "officer" is interpreted as a use of the term in its common law meaning unless the contrary is clear.

It is clear that a civil service law cannot extend terms of office to run indefinitely when under the constitution they run at the pleasure of the appointing authority.[46] Section 2 of Article XV of the Kansas constitution provided that "The tenure of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment . . ." A civil service law may not extend the tenure here provided for and substitute indefinite tenure during good behavior. Section 3 of Article X of the New York constitution is very similar to that quoted above: "When the duration of any office is not provided for in this constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment." The existence of provisions in a civil service law protecting officers within the service against arbitrary removal was held not to fix a term for them, with the result that removal could be at the pleasure of the appointing officer.[47] Such a decision seems to confuse a statute fixing tenure with one governing removal procedure. For example, a provision that the term of office shall

[43] State ex rel. McNamara v. Campbell, *supra*, note 4.

[44] People ex rel. Akin v. Loeffler, 175 Ill. 585, 51 N. E. 785 (1898).

[45] Jagger v. Green, 90 Kan. 153, 133 Pac. 174 (1913). See People ex rel. Akin v. Loeffler, *supra*, note 44.

[46] Haney v. Cofran, 94 Kan. 332, 146 Pac. 1027 (1915), modified, 95 Kan. 335, 148 Pac. 640.

[47] People ex rel. Ray v. Henry, 47 A. D. 133, 62 N. Y. S. 102 (1900).

be two years does not mean that the appointee may, under any and all circumstances, hold that position for two years. He may be removable for enumerated causes. Nor does the fact that he may be removed within one year for cause mean that the tenure is for less than two years. To construe the removal protections of a civil service law as fixing tenure is to confuse the procedure for exercising the power to terminate tenure with the statutory declaration of the maximum term of that tenure if no occasion arises for bringing this procedure into play. A later New York case seems to proceed upon the theory set forth in this paragraph.[48]

A statute may combine provisions for tenure and provisions for terminating that tenure, with the result that the tenure is for an indefinite period. A statute providing that certain officers "shall continue in office unless suspended or dismissed" creates an indefinite term.[49] Some courts, for example, that in Massachusetts, are more loath than others to see in a civil service law a change in the law of terms of office unless the civil service law is clearly intended to affect terms. A Massachusetts statute recited that persons in the classified service "shall hold such office . . . and shall not be removed therefrom . . . except for just cause"; the court held that this did not extend the term of office of one holding under a prior statute fixing a definite term. "Any other construction would enlarge an appointment for a term of years into a life tenure, provided it was a classified office under the civil service rules."[50] The court was affected by the fact that offices rather than officers were classified under the civil service law.

As is noted elsewhere in this chapter, a civil service law may have the effect of protecting an officer against removal during the term for which he holds office, even though the term is definite. After the term expires he receives no protection from the civil service act. But while his term is running, he can be removed only in accordance with the provisions of the civil service act. "It long has been established that the statute which regulates removals from office in the classified civil service protects the holder of the office only during the term for which he has been appointed."[51]

A civil service statute or a civil service provision of a state constitution may, of course, provide explicitly for definite or indefinite terms; and when that is clearly done, the courts apply the law so declared. The Colorado constitution provides that "Appointments and employments . . . in the classified civil service of the state shall be made according to merit

[48] Matter of Jacobs v. Board of Supervisors, 236 A. D. 193, 258 N. Y. S. 73 (1932).
[49] People ex rel. Kenison v. White, 220 A. D. 347, 221 N. Y. S. 559 (1926).
[50] Smith v. Mayor of Haverhill, 187 Mass. 323, 72 N. E. 988 (1905).
[51] Bates v. Hall, 222 Mass. 296, 110 N. E. 303 (1915). See Barnes v. Mayor, 213 Mass. 1 (1912).

and fitness . . ." "The classified civil service of the state shall comprise all appointive public officers and employees and the places which they hold, except the following; . . ." "Persons in the classified service shall hold their respective positions during efficient service . . ." This provision creates a system of tenure during "efficient service," and the court so held.[52] Statutes may likewise create tenure for "good behavior" or "good behavior and efficient service," and the courts seem to favor giving civil service laws such effect when there is no special obstacle thereto.[53]

A civil service law may extend to officers holding office for fixed terms and may change tenure to tenure during good behavior.[54] The traditional view of a civil service law is that its removal provisions are among its most essential features; therefore, it may seem somewhat strange that a person holding a position for a definite number of years should be subject to the merit system. But even though his term is not affected by the civil service law, it is perfectly possible to apply to him many of the provisions of such a law. Also, the position, once vacant, and if appointive, may have to be filled in accordance with the merit rules. It may even be that the removal provisions of the statute will protect the holder if an attempt is made to remove him before his term expires. There is nothing inconsistent in holding for a fixed term and being placed within the classified service for many purposes; nor does the fact of coming under the civil service law change the term from a definite to an indefinite one. If the term is not changed by the civil service law, the mere fact that the position is placed within the classified service, either by statute or by administrative regulation under the statute, does not change the term. The courts sometimes overlook the fact that it is not necessary to eliminate a fixed term in order to place a position or person within the classified service.[55]

If the tenure is indefinite by virtue of a statutory provision, that tenure is not affected by any existing or past administrative practice of appointing for definite terms,[56] and the fact that the appointee has accepted an appointment for a definite term does not change the law governing his tenure. It remains indefinite even though he and his appointer thought that it was definite.[57] The question is one of statutory interpretation.

When the appointing officer or body is given authority to fix the term

[52] People v. Stong, 67 Colo. 599, 189 Pac. 27 (1920).

[53] State ex rel. Brittain v. Board of Agriculture, 95 Oh. St. 276, 116 N. E. 459 (1917).

[54] Matter of Phillips, 139 A. D. 365, 124 N. Y. S. 60 (1910). See Sullivan v. Mayor and Aldermen, Logan v. same, 201 Mass. 506, 88 N. E. 9 (1909).

[55] Hosp v. Civil Service Commission, 83 N. J. L. 10, 84 Atl. 614 (1912).

[56] Matter of Goold v. Vosburg, 152 Misc. 599, 273 N. Y. S. 918 (1934).

[57] Matter of Stowe v. Board of Supervisors, 236 A. D. 212, 259 N. Y. S. 503 (1932), reversed, 260 N. Y. 662, 184 N. E. 136.

for an office, then the terms recited in the various appointments previously made are important in deciding on the length of term.[58]

The term of a deputy is usually that of the officer for whom he is acting. This rule is applied to questions of the tenure of deputies under civil service provisions in the absence of statutory provision to the contrary.[59] The problem of holdovers is no different in civil service cases than in the law of public officers generally.[60]

Sometimes tenure is used as a test for determining whether a person or place comes within the meaning of a civil service act. It was held that a "merchant appraiser" was not in the national civil service partly because he was a temporary employee "selected" instead of "appointed" or "employed" to perform certain duties for the United States.[61]

III. EFFECTIVE DATE OF ACT

The date at which the civil service act becomes effective is governed by the same rules as are other statutes. The statute itself may specify the time at which it is to take effect. In the national government the statute provided that it was to take effect "after the expiration of six months from the passage of this act," the day on which the president signed the statute to be included. "Where the computation is to be made from an act done, the day on which the act is done is to be included" is a general rule of construction.[62]

The most troublesome problem in connection with the time at which the act becomes effective is due to the fact that civil service statutes provide a method for testing qualifications of applicants, and that the procedures and organization necessary for carrying out that method cannot be established immediately upon the day that the act takes effect. It is one thing to say that the act becomes effective on January first of a given year, and quite another thing for the act to become effective in the sense of having an organization ready to apply its provisions on that day. It takes days, weeks, and even months to formulate the necessary rules, to make the classifications and draw up examinations, and to give and grade the examinations preparatory to sending the names of candidates to the appointing officer upon his request for a list of eligibles. What are the appointing officers to do during the interval?

Clearly, not all vacancies that occur during this period can be left un-

[58] Board of Education v. State Board of Education, 115 N. J. L. 67, 178 Atl. 208 (1935).

[59] 30 Ops. Atty. Gen. 1 (1913).

[60] Biddle v. Atlantic City, 91 N. J. L. 679, 103 Atl. 386 (1918). See Browne v. Hagen, 91 N. J. L. 544, 104 Atl. 207 (1918); People v. Chew, *supra*, note 40.

[61] Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. Rep. 103, 34 L. ed. 674 (1890).

[62] 4 Dec. of Comp. 399 (1883). That time of effect depends on statutes, People ex rel. Wilson v. Knox, 45 A. D. 537, 61 N. Y. S. 472 (1899).

filled. There are several alternatives which the appointing officer may follow. In the first place, he may leave the position unfilled. In the second place, he may make a temporary appointment to tide over the period. The civil service acts usually provide for temporary appointments, and once an act has gone into effect, that provision is also effective. In the third place, the appointing officer may wish to make the appointment as he would have done if the act had not gone into effect. Whether he can do so will depend upon the phraseology of the statute. The courts are likely to hold against the last alternative if any method can be found by which he might make the appointment in accordance with the act. In any event, he must ask the commission whether it is ready to conduct examination and certify names.[63]

It has been held that if a temporary appointment expires but the appointee stays on, performing the duties attached to the position, he is entitled to compensation on the same basis as a de facto officer.[64] The gap in the succession here is due to the fact that permanent appointment takes effect in the future. The temporary appointment may not, however, be used to avoid the requirement of an examination when one can be given.

The removal provisions of the civil service act become operative upon the date at which the act takes effect, and they may be in force even though the administrative machinery and procedure required by the act are not yet in operation.[65] This would not be true, of course, if the removal procedure depended upon administrative rules and organization, because then the removal provisions would have to wait upon administrative action to become effective. The removal sections of many civil service acts and of many charters are phrased in such a manner that they are capable of application much earlier than are the examining, classifying, certifying, and other provisions of those laws.

In cities the civil service may be established by charter, by ordinance, or by a general state law that either imposes the system upon the cities or leaves it to their option. Under a general state law providing for optional establishment, the question may arise whether the civil service law goes into force in a particular city at the time of the enactment of the law or at the time of its adoption by the municipality. The natural answer to such a question would be that it becomes effective at the time of its adoption by the city, but the phraseology of some of the statutes has caused some argument upon this question. Suppose that the general law

[63] People ex rel. Chamberlain v. Knox, 45 A. D. 518, 61 N. Y. S. 469 (1899). Lea v. State, 34 Oh. Cir. Ct. 672 (1911), affirmed, 83 Oh. St. 518, 94 N. E. 1109.

[64] Roberts v. People, 81 Colo. 338, 255 Pac. 461 (1927).

[65] Grobbel v. Board of Water Commissioners, 181 Mich. 364, 149 N. W. 675 (1914). See State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11 (1914).

provides that no officer or employee "now" in the service of the city shall be removed except for cause, nor unless in accordance with the provisions of this act. Does the word "now" mean the time of the enactment of the statute or the time of its adoption? It has been held that such a statute should be interpreted as referring to the time of the adoption of the law by the city.[66]

IV. THE CIVIL SERVICE COMMISSION AND ITS RELATION TO OTHER DEPARTMENTS

It is usual for civil service laws to provide for civil service commissions or commissioners. However, since it takes some time for a personnel agency to organize and begin its work, it is important that arrangements be made for the payment of those who are to be employed in the preliminary work of establishing the system. If a separate staff is not to be organized immediately, then care should be taken to provide, either by the civil service law or by some other statute, for transfers from other departments or for temporary appointees to perform the duties incident to the preliminary work.[67] In the national government, for example, it was found necessary to provide by statute for the detail of employees from other departments to aid the Civil Service Commission before such detail was permissible; also the detail could not be for duties other than those prescribed by the statute.[68] The practice of assigning employees from other departments to aid the civil service agency at one time had to be subjected to statutory regulation in the national government.[69] It occasionally happens that existing offices are entrusted with the new personnel work, but this is not usual.[70]

It is important to make provisions for enforcing the cooperation of existing administrative departments. Failure to do so may prove embarrassing.[71] When an officer is under a legal duty to give information to the civil service commission in the conduct of its investigations, he is entitled to the compensation that he would receive on his regular work.[72]

The civil service act may provide in detail for the status that the civil service agency shall have in the governmental organization, or its position may be partially left to the courts, to be worked out on the basis of general laws governing organization. Some civil service laws call the organization, officers, and employees that make up the administrative

[66] Steel v. Board, 89 N. J. L. 609, 99 Atl. 318 (1916).
[67] 8 Dec. Comp. Gen. 582 (1929).
[68] 25 Ops. Atty. Gen. 379 (1905). See 20 Ops. Atty. Gen. 750 (1894).
[69] 25 Ops. Atty. Gen. 382 (1905). See 24 Dec. of Comp. 253 (1917).
[70] See Newcomb v. Indianapolis, 141 Ind. 451, 40 N. E. 919 (1895).
[71] 25 Ops. Atty. Gen. 492 (1905).
[72] 18 Dec. of Comp. 135 (1911).

machinery of the civil service the "department of civil service." When this is done, the status of the organization is a little easier to determine than when the act merely says that there shall be a commission composed of a fixed number of members with certain powers enumerated in the act.

In the national government the question has frequently arisen whether the United States Civil Service Commission is a "department" as that word is used in the federal statutes. The answer to this question depends wholly upon statute, and not only the civil service statutes but other organizational statutes as well. For example, a statute provided that no officer or employee should represent a claimant in a case against any department in which he had been working while the claim was pending. Does this apply to an employee of the United States Civil Service Commission? The attorney general has ruled that it does not. Examination of the history of and changes in the exact phraseology of the statutes using the phrases "department" and "executive department" is typical of the method that is followed in cases of this type.[73] The phrase "heads of the executive departments," when used in a statute requiring these officers to fix a working day of not less than seven hours in their departments, was held not to apply to the commission. The commission was said not to be in or under one of the executive departments, but under the president directly.[74] The theory of the commission in the national government is that it is an advisory body, acting as an aid to the exercise of the appointive function of the president and of his subordinates.[75]

In the cities it is common to find the personnel agency a regular part of the city government, whether or not it is expressly classified as such by the civil service act itself. Its employees usually come within the civil service, although the commissioners are generally chosen as political officers. But the fact that they are selected as political officers does not mean that they are not part of the city government. If the mayor, with the approval of the council, appoints the commission, if it makes reports to the city executive, if it is financed by the city, and if in general it is dealt with by law as one of the city departments, then it is a part of the city government.[76] The city is liable for payment of the services of a secretary to the civil service commission just as for those of any city officer.[77] The mayor exercises such powers over the commission as the law gives him over the departments and bureaus of the municipal government, subject of course to any limitations and restrictions that appear in the civil service or any

[73] 25 Ops. Atty. Gen. 6 (1903).
[74] 22 Ops. Atty. Gen. 62 (1898).
[75] 20 Ops. Atty. Gen. 557 (1893).
[76] People ex rel. Jacobs v. Chicago, 202 Ill. App. 105 (1916).
[77] Kip v. Buffalo, 123 N. Y. 152 (1890).

other law.[78] He may be given the power to remove the commissioners; in doing so, he is governed by the express provisions of the statute and by the general rules of the law of public officers.[79]

A civil service act does not in and of itself make any changes in the departmental organization of the administrative branch of the unit of government to which it applies.[80] The civil service law affects the selection, status, and tenure of the officers and employees in those departments so far as they come within the provisions of the act, but may make changes in organization only as part of a reorganization plan, not as part of the merit principle itself. Its powers in this regard are, of course, a question of statute.[81]

The introduction of a civil service system does not alter the powers of existing officers or boards so far as the ordinary work of administration is concerned, but it does impose qualifications upon some of those powers. It is sometimes said that the civil service act changes the power to appoint, but of course this is not true. The power of a civil service commission is to determine the qualifications of those who are to be certified for appointment, and the power of appointment is left where the law placed it before the enactment of the civil service statute.[82] Similarly with respect to the power to remove, that power being left in the hands of the officers who possessed it under the prior law, the civil service act only prescribing procedures to be followed in the exercise of the power. Unless the act expressly says so, the civil service commission is not vested with the power of removal.[83] Thus, if a hearing is guaranteed on a removal proceeding, it is presumed, in the absence of anything in the law to the contrary, that the hearing will be held by the board or officer having the power to remove. An administrative act may not give the commission power to participate in removal proceedings, it being illegal for this power to be delegated to the commission by any act of the officer possessing it.[84]

A civil service commission usually fixes the necessary qualifications for any position that is within its classifying power; the types of tests that are to be used to determine competency are also within the power of the commission to prescribe. The appointing officer has some discretion in making appointments by means of which he may indirectly bring

[78] Kenton v. Dooley, 137 Misc. 86, 241 N. Y. S. 431 (1930).
[79] Allison v. Stevens, 23 Oh. App. 259, 155 N. E. 652 (1925).
[80] Grota v. Holcombe, 97 S. W. (2d) 301 (Tex. Civ. App. 1936).
[81] People v. Coffin, 282 Ill. 599, 119 N. E. 54 (1918).
[82] Dawkins v. Bazer, 16 La. App. 284, 134 So. 119, 238 (1931).
[83] 26 Ops. Atty. Gen. 260 (1907); Santangelo v. Civil Service Commission, 12 N. J. Misc. 193, 170 Atl. 861 (1934); State ex rel. Nelson v. Board of Public Welfare, 149 Minn. 323, 183 N. W. 521 (1921).
[84] Paddock v. Brisbois, 35 Ariz. 214, 276 Pac. 325 (1929).

some pressure to bear upon a commission, but the final authority in these matters rests with the civil service commission.[85] An appointing officer may use his own judgment as to a candidate's past record even though the commission has certified his name.[86] A wise commission, of course, will consult with the affected departments in these matters, but an unwise personnel agency is within its legal powers if it adheres to its own judgment, even though mistaken in its practices. However, a civil service commission has no power to create or change positions and offices.[87]

As an administrative body, the civil service commission is subject to the judicial controls common to all administrative bodies which perform work that is partly informal and partly formal. When the commission carries on the work of formal hearing in removal cases, it may be subject to those controls which the courts exercise over all bodies carrying on that type of work. When carrying on investigative work, it is acting in a field that is not subject to ordinary judicial controls, except as it violates those rules that apply to administrative officers generally. Being an administrative and not a judicial body, the commission is not subject to the writ of prohibition as a part of the judicial system.[88]

V. POWER OF THE CIVIL SERVICE COMMISSION TO MAKE REGULATIONS

The statutes that provide for a civil service system usually authorize the commission or commissioners to make such rules and regulations as may be necessary for the enforcement of the act. Usually little attention is given by the statute to the form of the rules or the procedure to be followed in making them. Nor is it usual to find any statement in the statute concerning the legal effect that such rules and regulations are to be given. That is left to the general rules of law governing the power to make regulations.

The tendency of state legislatures to be more detailed in the administrative provisions of their statutes than is Congress is illustrated in state and local civil service laws. The more detailed the statutory provisions, the less important is the role that administrative regulations play. The broader and the shorter the statute, the greater will be the place of such regulations. In the national government the statutes that provide for the civil service are few and brief. There is no comprehensive national statute dealing with even all the important phases of national civil service law.

[85] Pratt v. Rosenthal, 181 Cal. 158, 183 Pac. 542 (1919).
[86] Santangelo v. Civil Service Commission, 12 N. J. Misc. 193, 170 Atl. 861 (1934).
[87] State ex rel. Mattice v. Seattle, 173 Wash. 42, 21 P. (2d) 288 (1933).
[88] People ex rel. Bender v. Milliken, 185 N. Y. 35, 77 N. E. 872 (1906).

The interstices in the law that are filled in by civil service rules promulgated by the president (though prepared by the commission), as well as the gaps filled in by commission rules, are very great. As an example of this, it may be observed that in the national service the scope of the civil, or as it is sometimes called, the classified service is almost wholly dealt with by rules, not by statutes.

The distinction between the state and local laws on the one hand and the national laws on the other arises partly out of the different positions that are held in the administrative systems by the president and by the governors and mayors.[89] The president, with some qualifications as to the independent establishments under the decision in Rathbun v. United States,[90] is the administrative head of the national government. He is the head of a largely integrated administrative system. Most of the state governments are not organized in such a manner that there is either any integration in their organization or any one officer at the head of the state administration. The governor is not the chief executive of the state administration in the same sense that the president is the head of the national administrative system. Constitutional centralization of administrative power in the president is to be contrasted with constitutional decentralization of that power in the states.

The result of this difference in the status and power of the chief executive in the various units of government is that the president has much greater power in the field of administrative regulations than have most other American executives. The president has a much greater power of appointment, and with it a much greater power of removal, than have governors and mayors; he has also a broader power of administrative supervision. All of these things, coupled with the dominant political position of the president, have resulted in the statutory grant of broader rule-making power to the president than has been granted to other heads of governmental administration.

The constitutional power of the president to see that the laws are faithfully executed, when combined with "the executive power" granted to him in the constitution, provides him with a substantial basis for the making of rules to regulate the work of the national administration. Considering that civil service law affects the law of appointment as intimately as it does, it was only natural that the national legislation should have conferred upon the president broad rule-making power in this field. The national law virtually leaves it to the president to determine who shall be within and who shall be outside of the civil service, with the ex-

[89] See the discussion of the relation of national civil service to the president in Mayers, The Federal Service (1922), Chapter 3.

[90] 295 U. S. 602, 55 Sup. Ct. Rep. 869, 79 L. ed. 1611 (1933).

ception of certain classes mentioned in the basic statutes.[91] The legal theory of the national civil service is fundamentally that the civil service commission is to aid the president in the exercise of those preliminaries that attend upon his appointing power, and upon that of the heads of departments and other appointing officers, not that it is to impose restrictions upon these powers. It is to relieve the president of all the details that have to be dealt with under the political system of appointment that the civil service commission exists.[92] The portions of the national civil service law that deal with removal will be discussed later.

The civil service rules in the national government have no legal effect in the sense of being enforceable by the courts, because while they may be regarded as authorized by statute, the statutes give them no legal status or sanction as law. If the president makes a regulation that employees in the civil service shall not be removed except for cause, and a department head removes an employee without cause, the national courts will not intervene to afford any redress against the action of the removing officer.[93] The discharged employee cannot obtain an injunction to prevent adverse administrative action against him, partly because the presidential rules are not "law" in the same sense that rules authorized by statute and given a legal sanction are "law" in the courts.[94] He cannot obtain a writ of mandamus to reinstate him in the position from which he has been ousted.[95] If, on the other hand, the protection against removal were incorporated in a statute, the court could give the discharged person some remedy against illegal removal — probably qualified by the limits on the power of Congress to restrict the removal authority of the president.[96] It is also possible to get court relief if the removal is governed by administrative regulations which are within the power granted by statute to the administrator making the rules, and if the statutes provide for the sanction against the breach of the regulations thus made. But where the rule is made under an authority independent of statute, the courts will not enforce it by the usual remedies in the absence of statutory direction to do so.

Needless to say, the violation of such presidential rules as are involved in the civil service field is not a crime, and administrative order is not

[91] See Mayers, The Federal Service, Chapter 3. See also Hart, The Ordinance-Making Power of the President of the United States (1925).

[92] United States ex rel. Palmer v. Lapp, 244 Fed. 377 (C. C. A. Oh. 1917).

[93] United States ex rel. Palmer v. Lapp, *supra*, note 92; Taylor v. Kercheval, 82 Fed. 497 (C. C. Ind. 1897).

[94] Fleming v. Stahl, 83 Fed. 940 (C. C. Ark. 1897). Page v. Moffett, 85 Fed. 38 (C. C. N. J. 1898). Morgan v. Nunn, 84 Fed. 551 (C. C. Tenn. 1898).

[95] United States ex rel. Taylor v. Taft, 24 D. C. App. 95 (1904).

[96] Fleming v. Stahl, *supra*, note 94.

sufficient to make that a crime which the statute does not make so.[97] However, the fact that the courts will not enforce presidential rules does not mean that these rules are without effect as a matter of government. The president himself, as chief executive, may enforce them by such administrative measures of discipline as he thinks fit. They are also used as the basis of rulings by the attorney general in answer to inquiries from government officials,[98] and are enforced by the comptroller general in his rulings on proposed expenditures.

When the president's power to make regulations affecting the civil service arises out of statute, as it does in some instances, then of course he is restricted to the power granted him by statute.[99] The president may not broaden a statute so as to make it cover that which its text or spirit does not cover, nor may he restrict a statute by rules so as to make it cover less than it is intended to cover.

It should be pointed out that one advantage of the flexible system of regulations in the national civil service is that equities may be accomplished in particular cases more easily than under a system of rules more closely approximating a legal system.[100]

In some states the regulations of municipal civil service commissions may be suspended or modified by the state commission, just as they are made initially subject to the approval of that commission. When this is true, the state commission must give its approval within the period fixed by law. For that body to approve the suspension of a subdivision of a regulation two or three years after the expiration of the statutory period is to render its approval nugatory.[101]

The rules of civil service commissions in the states occupy the same position in state law as do the rules of administrative officers generally. As indicated elsewhere,[102] it has been held constitutional to give the civil service commission power to make rules. But this does not mean that a different status may be given to a candidate by rule than is accorded him by statute.[103] Similarly, a definite leave of absence granted by statute may not by rule be changed to an indefinite leave.[104] But considerable discretion may be exercised by the commission in making its rules, as is illustrated by the fact that a rule requiring six months of service in the

[97] Johnson v. United States, 26 D. C. App. 128 (1905).

[98] 30 Ops. Atty. Gen. 512 (1919); 23 Ops. Atty. Gen. 595 (1901); 21 Ops. Atty. Gen. 502 (1897).

[99] 28 Ops. Atty. Gen. 112 (1909); 20 Ops. Atty. Gen. 649 (1893).

[100] 20 Ops. Atty. Gen. 64 (1891); 20 Ops. Atty. Gen. 274 (1891).

[101] Shanahan v. Jenkins, 166 Misc. 433, 2 N. Y. S. (2d) 461 (1938).

[102] See Chapter II, p. 14.

[103] Mitchell v. McKevitt, 128 Cal. App. 458, 17 P. (2d) 789 (1932).

[104] People ex rel. Davie v. Lynch, 164 A. D. 517, 149 N. Y. S. 895 (1914).

next lower position before the promotional examination can be taken has been sustained as reasonable.[105]

The courts will determine for themselves the reasonableness as well as the legality of rules, but usually the two questions are dealt with as though they were one and the same question.[106] In this as in other branches of rule-making law, the courts really inquire into rules under three heads: Are the rules authorized by statute? Are they constitutional if authorized by statute? Are they reasonable if made in the exercise of a discretion that is granted in broad and general statutory terms? The latter question becomes in the final analysis a composite of common law ideas of reasonableness and of contemporary practices in the particular field being investigated, in this instance personnel practices. The statutes seldom specify the procedure to be followed in making civil service law regulations, and actually they are made in a great variety of ways. It is not necessary, in the absence of statute, to have them made or promulgated formally.[107]

Rules must be properly pleaded before the court will take notice of them,[108] and the action in which they are tested must be an appropriate action.[109] No adequate method of reviewing rules that are made by civil service commissions exists in American law so far as the courts are concerned. It is not possible without express statutory authorization, and in some courts it is not possible except with the aid of constitutional amendment, to have rules passed upon by judicial bodies in the manner that the judicial section of the council of state passes upon administrative rules in the French system. The common law system of remedies evolved out of a system in which injury already inflicted became the basis of relief; and the idea that a judge cannot pass upon the validity of a statute without having it first applied to some person to see whether it injures is due to this historical background of Anglo-American procedure. The situation is contributed to by the fact that the law does not afford satisfactory methods of checking an officer when he illegally exceeds his statutory authority. The power to make a given rule is one thing and the question whether the rule has been applied in a manner permitted by the law is quite another thing, but the Anglo-American courts have been unable to distinguish between them because of the inability of the judges of our day to make procedural innovations which their predecessors would not have hesitated to make if the need for them had existed four hundred years ago as it does today.

[105] Matter of Ricketts, 111 A. D. 669, 98 N. Y. S. 502 (1906).
[106] Matter of Ricketts, *supra*, note 105.
[107] Mann v. Tracy, 185 Cal. 272, 196 Pac. 484 (1921).
[108] People ex rel. Caridi v. Creelman, 150 A. D. 746, 135 N. Y. S. 718 (1912).
[109] People ex rel. Caridi v. Creelman, *supra*, note 108.

Chapter IV

CLASSIFICATION

I. BASES OF CLASSIFICATION

Classification is a term that is used to describe three different procedures. In the first place, it may refer to the process of dividing the whole administrative service into those offices and positions that are to be subject to the merit system as defined in a civil service law and those that are not to be subject to it. In the second place, and somewhat more commonly, the term refers to the division of the civil service into the class that is to be affected by competitive examination and that which is not to be so affected. In the third place, classification refers to the listing of the positions already decided upon as belonging to the competitive group, along with their titles, characteristic duties, and salaries.

The distinction between the second and third of these usages and the significance of the distinction is well stated in Story v. Craig, a leading New York case:[1]

"The plaintiff, a taxpayer, complains that positions in the civil service have been illegally filled, and that the incumbents, being there without title, are paid without right. The judgment under review upholds the complaint and adjudges the intrusion. Payment of salaries and certification of pay rolls have accordingly been restrained as acts of threatened waste.

"The charter of the city of New York (Laws 1901, c. 466, sec. 123) empowers the municipal civil service commission, within the limit of appropriations, to appoint a secretary, examiners, 'and such other subordinates as may be necessary.' In 1904 the commission, acting under the authority of that section, created a new position which was to be known as assistant chief examiner. Under section 56 of the charter, the board of aldermen, acting upon the recommendation of the board of estimate and apportionment, approved the resolution of the commission, and fixed the salary to be paid. In 1909, with like approval, the number of the positions was increased. In 1913 there was established yet another position known as first assistant chief examiner. Resolutions of the board of aldermen upon proper recommendation prescribed in successive years

[1] 231 N. Y. 33, 131 N. E. 560 (1921). See Mosher and Kingsley, Public Personnel Administration (1936), Chapter 18.

the rate of compensation, and appropriated, in successive years the necessary moneys. No attack is made upon the regularity of the proceedings in these preliminary stages. The existence of positions, with moneys adequate for payment, is undisputed and indisputable.

"(1) With the field of controversy thus narrowed, we reach the question to be determined. The rules of the municipal commission incorporate a schedule of title, offices, and positions arranged in grades and classes. When the new positions were created, the schedule included in its enumeration the positions of chief examiner and examiners. It did not speak of assistant chief examiners or first assistant chief, for such places did not then exist. The plaintiff insists that there could be no lawful examination, and hence no lawful appointment, until by amendment of the rules the titles of the new positions were included in the schedule. The commission held promotion examinations as vacancies occurred. It gave public notice of these examinations as prescribed by law and usage. It gave opportunity for promotion to all the examiners then in the service who desired to compete. No complaint is made that the tests were unfair, or the candidates unjustly rated. Mr. Murray, one of the defendants, an examiner since March, 1904, was promoted to be assistant chief examiner in July, 1909, the examination giving him first place on the eligible list, and he was again promoted, this time to be first assistant chief, in July, 1913. Miss Upshaw, another defendant, who became examiner in 1902 was promoted to be assistant chief in April, 1913. During all the years that followed until the plaintiff launched his challenge there was no suggestion, either by public officer or taxpayer, of irregularity or flaw. In the meanwhile the schedule had been amended (December 7, 1917) so as to incorporate in its enumeration the titles of the new positions. Then in September, 1918, there came the present action. Public servants who were promoted after competitive examination, and who have rendered years of service on the faith of such promotion, must be ousted, it is said, because the commission which created their positions, and examined and appointed them, failed before the examinations to incorporate their titles in the columns of a schedule.

"We find nothing in rule or statute that constrains to such inequity. People ex rel. Fowler v. Moskowitz, 220 N. Y. 669, 116 N. E. 1067, leaves the question open. We held there that all examiners must be admitted to examinations without discrimination when there was to be an appointment of a chief. We did not attempt to determine whether past examinations had been so conducted as to affect the status or the tenure of those who claimed to be assistant chiefs. The answer to that question requires us to consider the function of classification in the administration of the civil service. Classification in that service will be found to have

two meanings, one primary and the other secondary. The primary meaning is that indicated in the Civil Service Law (Consol. Laws, c. 7), and imports a division of offices and employments into those where competitive examination is necessary or practicable, and those where it is not. There shall be 'four classes, to be designated as the exempt class, the competitive class, the noncompetitive class and, in cities, the labor class.' Civil Service Law, sec. 12. The requirement that there shall be classification in this sense is fundamental and substantial, since such division is the basis for the administration of the system. People ex rel. Sims v. Collier, 175 N. Y. 196, 200, 67 N. E. 309. The secondary meaning of classification is the mere arrangement or enumeration in a schedule of the titles of positions whose quality, as competitive or the opposite, has already been determined. This requirement is a creature, not of the statute, but of local rules, and is formal, and not substantial. No schedule so minute or definite exists under the rules of the state civil service commission. Rule 7, State Civil Service Rules. All that we find there is a statement of general groups and subdivisions, coupled with a provision that any position not designated shall be assigned to the group and subdivision most appropriate to its functions. The preparation, under the rules of this municipal commission, of a schedule more minute and definite, is a regulation of convenience.

"The plaintiff makes no complaint that there has been any failure on the part of the commission to give to these positions a place in one of the four statutory classes. The complaint, if made, would be untenable. The positions have been put by the commission in the competitive class, and so in practice they have been treated. They have been put there by the general statement of the rules (declaratory, indeed, of provisions of the statute, sections 14 and 16) that everything shall be in the competitive class unless expressly included elsewhere. Classification has thus been effected in the only sense prescribed by statute. Classification has been effected in the only sense essential to determine merit and fitness by competitive examination. Classification has been effected in the only sense that would be necessary if the positions were in the state service rather than in the service of the city. The only question then is whether the rules of the local commission have made a condition precedent of something which in its nature is a mere dictate of convenience or a mere requirement of form.

"We think the imputation of such a purpose is forbidden by the rules themselves. They provide, following the direction of the statute that the classified service shall be arranged in four general classes, which shall be known, respectively, as the exempt, the competitive, the noncompetitive, and the labor class. Rule 4, subd. 1. They then provide that 'the positions

in each of the aforesaid classes shall be those specifically designated, under the head of each, in the appended classification; except that all positions, whether now existing or hereafter created, of whatever functions, designations or compensation, the titles of which are not so designated, shall be deemed to be in the competitive class.' Rule 4, subd. 2. The closing words are significant. A classification is appended, but any position not mentioned in it is to be regarded as competitive. The implication is inevitable that the list is understood to be neither exhaustive nor exclusive. Omissions are expected. Their effect is weighed and determined. Directions how to deal with them are given so that confusion may be avoided if they shall afterwards develop. Enumeration in a schedule is not a condition precedent, which, unfulfilled, will defeat the title to office or position. It is a form to be recommended, a device to be preferred, in furtherance of method and order, and simplicity and system.

"We find nothing in other rules that is sufficient to neutralize the effect of a disclosure of purpose so direct and unequivocal. Rule 6, subdivision 6, and rule 15, subdivision 4, do not mean that examinations shall never be conducted at all unless the title of a position is designated in the schedule. They mean that, when a title is designated, that shall be the title under which the examination shall proceed, unless for special reasons to be stated in the minutes. Whether candidates would be affected even then by an omission from the minutes of which they had no notice we need not now consider. The suggestive thing for us is that the title, even when designated, may sometimes be abandoned, and that nowhere is designation indicated to be an indispensable condition.

"(2) Enumeration in the schedule, therefore, is rather a counsel than a command. The rules, taken as a whole, point unerringly to that conclusion. Doubt, however, if it might otherwise exist, is dispelled by a practical construction that is continuous and uniform. Grimmer v. Tenement House Dept., 205 N. Y. 549, 550, 98 N. E. 332; Wintersteen v. City of New York, 220 N. Y. 57, 115 N. E. 17; City of New York v. N. Y. City Ry. Co., 193 N. Y. 543, 86 N. E. 565. The commission presumably knew its own rules, and understood them. Yet succesive boards, year after year, examined and promoted applicants, and certified pay rolls, without suggestion or suspicion that omission from the schedule had nullified their action. That would be significant though the positions now in controversy were the only ones affected. The significance is heightened when we learn that there are many others. The record states without contradiction that a host of officers and employees in all or nearly all the departments of the city government have been appointed and promoted to positions not enumerated in schedules. We do not readily overturn the settled practice of the years.

"In reaching this conclusion, we are not forgetful of the public interests. They weigh heavily at all times in the solution of these problems. Public policy does, indeed, demand that there shall be compliance with whatever is of substance in statute and rule for the formation of the civil service. We shall not willingly ignore anything of such an order, anything that makes for efficiency or fairness. On the other hand, public policy forbids that members of the civil service, complying in good faith with the tests of competitive examination, shall hold their places by a tenure made unattractive and precarious by technicality and formalism."

Positions and offices may be classified and/or persons holding them may be classified; it is of some legal significance whether the one or both are involved, as appeared in the discussion of covering in at the inception of the merit system.

Ordinarily classification in the more fundamental and broader sense, as discussed in the opinion just quoted, is statutory, and the legislature may use its own discretion as to the bases upon which it is to be predicated, subject only to those constitutional provisions which relate to the structure of government and the offices or positions therein and to the constitutional mandates for filling them. This is true in the national as well as in the state governments.[2] Classification in the narrower sense may be by statute, and sometimes is, but more commonly it is left to administrative officers, usually those of a personnel agency, such as a civil service commission.[3]

Where the state constitution includes express provisions on civil service, the discretion of the legislature to classify positions may be somewhat restricted. Thus, under a provision such as that in New York, that "appointments and promotions in the civil service of the state . . . shall be made according to merit and fitness, to be ascertained, so far as is practicable by examination, which so far as practicable, shall be competitive . . ." what at first glance may seem a legislative discretion to place a position in the competitive class may turn out instead to be a duty to place it there. This, of course, does not mean that no discretion exists as to whether a position should be placed inside or outside the competitive class, but it is clear that the judicial bases for interference are much greater under a provision of this type than under a constitution not containing such a statement.[4]

The question whether a statute does classify any given group of officers or employees is one of construction and depends upon many factors.[5]

[2] United States ex rel. Palmer v. Lapp, 244 Fed. 377 (C. C. A. Oh. 1917).

[3] 8 Dec. Comp. Gen. 27 (1928); 4 Dec. Comp. Gen. 915 (1925).

[4] Murray v. Kaplan, 206 A. D. 202, 200 N. Y. S. 664 (1923).

[5] 24 Ops. Atty. Gen. 95 (1902); 4 Dec. Comp. Gen. 900 (1925); 34 Ops. Atty. Gen. 98 (1924).

Even deputies may be placed in the classified service by statute,[6] although, of course, they are often not included. There is some tendency to rule that persons or positions come within the classified service unless the statute or rule clearly excludes them.[7]

As has been pointed out elsewhere, most of the classification in the national system is by presidential order. As used in this connection, the term requires explanation.[8] It is common, in the national government, to speak of the classified service, but in many respects the phrase is only synonymous with the phrase civil service. With some exceptions, to be in the classified service is to be in the civil service, in the sense that those outside of the classified service are usually not in the civil service. The president is authorized to "classify" employees, that is, to bring them within the classified service. This usually means that he brings them into what is thought of as the merit system. The president ordinarily does not perform the task of classifying those within the classified service in the sense of listing them. The act of classification performed by the president is determining whether a group should be placed within that portion of the service which is subject to administrative classification. This the president does by virtue of authority of statute. In addition, he may, under his constitutional powers to appoint and to see that the laws are faithfully executed, impose the procedures of merit selection upon groups outside the competitive service; but he cannot give them that status or protection which congressional statute alone can give.

As suggested earlier, the arrangement within the classified service may be by positions rather than by persons.[9] Considerable significance may attach to the fact that it is the position rather than the person that is classified. This is illustrated by the question whether temporary employees for certain classified positions in the national Department of Agriculture must be selected in accordance with certain classification acts; it was held that since the positions were classified, all those who were to hold them must follow the rules applicable thereto. Classification of positions at times involves certain complications in the adjustment of salaries that apply to the positions and to part-time help.[10] It is important that statutes or rules on classification be drafted with care in order to accomplish no more than is really intended. It should be borne in mind that when the position is classified, no particular protection attaches to the person holding the position unless the statute expressly affords that protection to the holder of the position. In the section dealing with re-

[6] 26 Ops. Atty. Gen. 363 (1907).
[7] 27 Ops. Atty. Gen. 95 (1908). See 26 Ops. Atty. Gen. 502 (1908).
[8] Morgan v. Nunn, 84 Fed. 551 (C. C. Tenn. 1898).
[9] See 4 Dec. Comp. Gen. 296 (1924).
[10] See 4 Dec. Comp. Gen. 239 (1924).

moval it will become clear that "persons in the classified service" and "persons holding classified positions" are not identical phrases so far as legal consequences are concerned.[11]

In the next few pages some of the problems involved in administrative classification, or listing of positions, will be discussed. The two most common bases of classification are the duties of the position and the compensation attaching to it. Sometimes, as in the national government, classification is primarily related to salary standardization.[12] The compensation that is attached to a position presumably has some relation to its duties, but it may not. A position that pays five thousand dollars may fall in a different class from a position that pays thirty-three hundred dollars, even though the duties are identical.

The duties and responsibilities of the positions may be, and commonly are, made the bases of classification. The usual inclination to classify positions with respect to duties receives a good deal of support from the common requirement that examinations be practical in nature.[13] The differences in the responsibilities of two positions may be used as the basis for a distinction in class that may reflect a difference in compensation.[14]

It has been held that a specific command that classification into grades shall be based on compensation does not override a general statement that classes are to be based on the nature of the duties.[15]

A classification act may specify that the "existing compensation" be used as a basis for computing the initial salary under the act; this means the compensation of the position actually held by the employee on the date fixed in the law, whether held temporarily or permanently.[16] There is a tendency to interpret a salary statute so as not to raise the salary of a person to a higher classification if the salary to which he is to be advanced is that for which a promotional examination would otherwise be necessary.[17]

Salaries that have been fixed by classification cannot be increased in effect by the addition of allowances for travel when by law no allowance is provided for.[18] Nor can the restrictions of compensation be evaded by giving a higher rate of pay on the per diem basis.[19] Employment by the

[11] See 4 Dec. Comp. Gen. 757 (1925).
[12] See 8 Dec. Comp. Gen. 154 (1928).
[13] Hinton v. Bahrs, 18 Cal. App. 53, 122 Pac. 80 (1912).
[14] 34 Ops. Atty. Gen. 118 (1924).
[15] Matter of Rudd v. Cropsey, 159 A. D. 275, 144 N. Y. S. 198 (1913), appeal dismissed, 210 N. Y. 643, 105 N. E. 1098.
[16] 4 Dec. Comp. Gen. 27 (1924).
[17] Ryan v. United States, 56 Ct. Cl. 103 (1920).
[18] 7 Dec. Comp. Gen. 114 (1927).
[19] 5 Dec. Comp. Gen. 764 (1926). See 7 Dec. Comp. Gen. 816 (1928).

day is not permissible when the statute fixes compensation only by the hour or by the year. Another check on evasions of the compensation classification acts is provided by the office that approves payrolls, it being within the function of that office to ask for the necessary data on new positions or expansions of staff.[20] The comptroller general has ruled that the certificate of service of a person working by the hour should show the number of days on which service was actually rendered on the hourly basis, as well as the total number of hours, exclusive of the number of days taken for annual leave or sick leave.[21]

When it is necessary to detail someone to perform the duties of a position before it is classified, that person is entitled to the compensation of the position from which he is detailed rather than of the position to which he goes.[22] The fixing of salary does not operate retrospectively in such a case. When a dispute over the proper allocation of the position which is to be reclassified is in progress, the incumbent receives the compensation formerly attached to the position.[23] If a position is classified properly, the person who performs the duties attached to the position is entitled to the compensation as of the proper class, despite an administrative error in giving the position a lower status.[24]

While the work of classifying positions is proceeding and examinations are being prepared, the old appointing rules may be applied.[25] The date at which a classification becomes effective is governed by statute if any provision is to be found in the law; if not provided for expressly, it is effective when promulgated. Once the date is announced, the administrative officers must adhere to it.[26] Under statutes which require the approval of an administrative officer before the allocation of any position becomes effective, his consent may be express or tacit.[27] It has been held that even though the initiative was taken by the wrong party, the allocation becomes effective and valid if he who should have taken the initiative accepts the allocation and acts in reliance on it.

II. POWER TO CLASSIFY

The power to classify positions in the service does not carry with it the power to abolish positions, nor does it imply the power to remove in-

[20] 9 Dec. Comp. Gen. 261 (1929).
[21] 4 Dec. Comp. Gen. 52 (1924).
[22] 9 Dec. Comp. Gen. 128 (1929).
[23] 9 Dec. Comp. Gen. 325 (1930).
[24] 5 Dec. Comp. Gen. 406 (1926).
[25] 20 Ops. Atty. Gen. 584 (1893). See People ex rel. McClelland v. Roberts, 148 N. Y. 360 (1896); In re Agar, 21 Misc. 145, 47 N. Y. S. 477 (1897).
[26] See 11 Dec. Comp. Gen. 115 (1931); 4 Dec. Comp. Gen. 721 (1925); 10 Dec. Comp. Gen. 538 (1931).
[27] 8 Dec. Comp. Gen. 441 (1929).

dividuals from their places in the service;[28] the power is only to arrange, with respect to fixed bases, the positions that have been created by the proper laws and authorities in the government. The power to classify or reclassify must be exercised in the manner set forth in the statute, and though the discretion granted may be broad, it must rest upon some substantial basis.[29]

The power to classify in the administrative sense can be exercised only by the officer or body to whom the power has been given. Customarily this agency is the civil service commission or commissioners. If by law the power to classify has been given to a municipal civil service commission, the municipal council cannot exercise it, and an attempt by the council to declare a position in the classified service would be ineffective.[30]

A recent case illustrating the principle that the power to classify must be exercised by those to whom it is given is Birdsall v. Sanders,[31] a Colorado case. The city charter provided that the civil service commission "shall provide for the classification of employments in the department of public safety" (the department that was affected), in addition to providing for examinations, eligible lists, etc. The city manager might remove employees, "but all appointments and removals to be subject to the civil service provisions of the charter." The municipal council then enacted an ordinance directing the city manager to classify employees on the basis of efficiency ratings. One of the employees who had been given a low standing because of his efficiency ratings was dismissed and brought a petition for mandamus to obtain his reinstatement. The court decided in his favor. The civil service commission, according to the court, had authority to fix the bases for classification, and it was not for the council to specify them. The fact that no rules on this subject had been adopted by the commission did not justify the council and manager in proceeding in the absence of such rules.

Classification may be carried on by an administrative officer within the regular administration rather than by a civil service agency; at times this has been the arrangement in the national administration. A separate classification board may be established to which questions involving the classification of certain positions may be referred; such a body was established in the national government under the title of the Personnel Classification Board. But the board's powers could be brought into play

[28] People ex rel. Boyd v. Hertle, 28 Misc. 37, 60 N. Y. S. 23 (1899), modified, 46 A. D. 505, 61 N. Y. S. 965. See Winslow v. Bull, 97 Cal. App. 516, 275 Pac. 974 (1929). See also Gharaud, Discretion of Civil Service Commissions, 17 Cornell L. Q. 103 (1931).

[29] See Winslow v. Bull, 97 Cal. App. 516, 275 Pac. 974 (1929).

[30] Matter of Kilcoyne v. Lohr, 226 A. D. 218, 235 N. Y. S. 207 (1929).

[31] 96 Colo. 275, 42 P. (2d) 194 (1935).

only upon the action of an administrative officer having the power to allocate positions or upon the request of the affected employee, the board having no power to act on its own initiative.[32] A distinction has been drawn between a request by the administrative officer that the board take action and a notice by the officer of action that he has taken in allocating the office or employment.[33] Once the board is asked to enter into the question, it may use its discretion in either raising or lowering the allocation of the position.[34]

A statute which requires that newly created positions be submitted to the classification office for allocation does not mean that additional persons employed in one of the established types of positions already classified need to be referred to the classification office. Such a statute does not apply to the expansion of an established force.[35] A distinction is also made between allocating new positions and reallocating old ones.[36]

A personnel classification board of the type that was used in the national government is of limited power, and while administrators may as a matter of courtesy notify it of vacancies, appointments to fill vacancies, or promotions, it has been held by the comptroller general that they are not required by law to do these things.[37]

The power to fix salaries is not the equivalent of the power to classify in and of itself; a board of education can have the power to fix salaries and the civil service commission the power to classify, so that in order to obtain the higher salary attached to a position in a higher class an employee must take a promotional examination.[38] On the same general theory, it has been decided in the national government that when the president has placed a group of employments under the classified service, it is for the civil service commission rather than for the treasury to determine whether a specific position comes within the terms of the classification.[39]

When the approval of a civil service commission is required before a classification or allocation of positions by an administrative officer becomes effective, and an allocation is made without such approval, the courts deal with the position so as to take it out of the competitive service and put it into the noncompetitive service; the incumbent is removed as

[32] 7 Dec. Comp. Gen. 820 (1928).
[33] 8 Dec. Comp. Gen. 248 (1928).
[34] 8 Dec. Comp. Gen. 551 (1929); 8 Dec. Comp. Gen. 296 (1928).
[35] 9 Dec. Comp. Gen. 101 (1929).
[36] See 8 Dec. Comp. Gen. 275, 400 (1928); 9 Dec. Comp. Gen. 71, 80, 193 (1929).
[37] 8 Dec. Comp. Gen. 522 (1929).
[38] Ryan v. Kaplan, 240 N. Y. 690, 148 N. E. 760 (1925).
[39] 11 Dec. of Comp. 806 (1905).

a result of the new allocation as though he had been removed legally from his position in the competitive service.[40]

Incident to the power to classify, a civil service commission possesses the power to make such surveys of the work of the administration to be classified as are necessary to the execution of the classifying power.[41]

III. DUTY TO CLASSIFY

The duty to classify must be distinguished from questioning a classification once it has been made. For one reason or another, the classifying body may fail to classify positions or persons, although it is under a legal duty to do so. What can be done to obtain the classification contemplated by the statute?

If the duty to classify is clearly stated in the law, and if the officers who are empowered to make the classification fail to do so, mandamus will issue to compel them to proceed to make a classification.[42] They may be compelled to classify certain specified positions.[43] But, of course, this cannot be done if the duty is discretionary, because mandamus will not lie to control discretion.[44]

Nor will mandamus lie to compel a city council to appropriate money to defray the expenses of classification.[45] The civil service commission cannot be compelled to classify if its present staff is not adequate to the task and no money has been made available for its use in carrying on the work of classification.[46]

Mandamus is the proper remedy for obtaining a reclassification as well as an original classification.[47] But, of course, in both an original classification and a reclassification it is necessary to join all the officers or agencies that participate in the process because mandamus would be ineffective to obtain complete relief if issued to only one of two parties in such a case.[48]

IV. JUDICIAL REVIEW OF CLASSIFICATION

Whether a certain position comes within one or another schedule in the classification is a question of law and will be determined by the

[40] People ex rel. Barron v. Scannell, 30 Misc. 328, 63 N. Y. S. 474 (1899).
[41] State ex rel. Emmons v. Guckenberger, 131 Oh. St. 466, 3 N. E. (2d) 502 (1936).
[42] Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857 (1897).
[43] People ex rel. Brennan v. Ellicott, 243 Ill. App. 374 (1927).
[44] Matter of Gluck v. Rice, 265 N. Y. 132, 191 N. E. 862 (1934).
[45] Strott v. Broening, 160 Md. 560, 154 Atl. 45 (1931).
[46] Strott v. Broening, *supra*, note 45.
[47] In re Hammond, 140 A. D. 921, 124 N. Y. S. 406 (1910). See in 200 N. Y. 527, 93 N. E. 1123.
[48] In re Hammond, *supra*, note 47.

courts.[49] However, the courts are loath to interfere with an allocation that has been made by the classifying officer and will do so only if they think that the action was arbitrary or clearly illegal.[50]

The work of classification is administrative work and involves a large amount of discretion. The fact that it involves discretion, or what is sometimes called "judgment," does not give to the allocations the character of a judgment in the judicial sense; nor is the work legislative in nature. It is administrative, though involving some of the characteristics that otherwise are associated with executive, legislative, and judicial work. Because it is not judicial the courts will not review it by the writ of certiorari.[51] Taxpayers' actions may be authorized to test evasions of a civil service law; and when they lie, they, and not certiorari, are proper for raising questions of classification.[52]

Mandamus to reclassify the positions will lie if it is clear that the positions are to be classified and have not been classified, as was pointed out above, or if they are to fall in one class and have been placed in another.[53] If, for example, a question of classification is involved in a removal case, the writ must be against the classifying officer. It will be of no avail to proceed against the administrative officer unless he has the authority to correct the error in classification.

Sometimes the writ of mandamus is used to compel the commission to rescind its action in giving a certain status to a person or a certain allocation to a position. When this is done, care must be taken that all those officers who are to share in the making or approving of the classification have acted.[54] Otherwise the issuance of the writ will be only partially effective. The order may be to strike a position from a certain grade or list. But in any event, whatever the form of the order, the writ of mandamus will not issue if a discretion has been lodged in the officer whose action is questioned, and that discretion has not been abused so clearly that the usual rule in mandamus concerning discretion is waived.[55] The same rules that generally govern the joining of parties in mandamus apply to its use here.[56]

A taxpayer may not ordinarily assail a classification, because it in-

[49] Peck v. Rochester, 3 N. Y. S. 872 (1888).

[50] People ex rel. Schau v. McWilliams, 185 N. Y. 92, 77 N. E. 785 (1906); Matter of Simons v. McGuire, 145 A. D. 471, 130 N. Y. S. 306 (1912), reviewed, 204 N. Y. 253, 97 N. E. 526 (1912).

[51] People ex rel. Mack v. Burt, 65 A. D. 157, 72 N. Y. S. 567 (1901).

[52] People ex rel. Mack v. Burt, *supra*, note 51.

[53] Carroll v. Murray, 226 N. Y. S. 663, affirmed, 131 Misc. 577, 226 N. Y. S. 667 (1927).

[54] Matter of Weeks v. Kraft, 147 A. D. 403, 132 N. Y. S. 228 (1911), appeal dismissed, 205 N. Y. 585, 98 N. E. 1118.

[55] People ex rel. Sims v. Collier, 175 N. Y. 196, 67 N. E. 309 (1903).

[56] People ex rel. Huber v. Adam, 116 A. D. 613, 101 N. Y. S. 925 (1906).

volves no expenditure of money. It is conceivable that he might prevent a classification from being made if the law did not authorize it, but clear authorization is usually present in civil service law. The question whether a classification has been made correctly is not a question that involves the expenditure of tax money.[57] This fact, of course, would not prevent a taxpayer from bringing suit to test the classification if the statute authorized him to do so irrespective of monetary interest. The usual taxpayer's action is not of this type, however.

Claim for salary due an employee because he has been paid at a rate proper for a lower classification but lower than the rate attaching to the schedule in which his position lies is governed by the usual rules governing judicial review of classification. If the employee can show that he was entitled to the higher rate, he is entitled to it. But he must assert his claim within a reasonable period, and the doctrine of laches rather than that of the statute of limitations governs the appropriateness of any particular delay that is involved.[58]

V. CLASSES

In this section the problems to be dealt with concern the scope of the civil service and legislative classification in the more fundamental sense.

A. The Exempt Class

An allegation that a person took and passed a competitive examination does not show that his position is in the competitive class, nor does the lack of examination place him in the exempt class. Normally, examination is not the basis of classification, nor is it proof of it.[59]

A good deal of confusion is to be found in both statutes and descriptive writing as to use of the phrase "the exempt class." Sometimes this phrase refers to a group of persons or positions not included in the civil service at all. In other instances, the phrase refers to a group within the civil service but not subject to examination; because its members are not subject to the requirements of the civil service law with respect to selection, promotion, transfer, and other aspects of personnel management, they are not accorded the protections against removal accorded those who do come under these personnel provisions. According to this latter use of the phrase, the exempt class is within the civil service but outside that class within the service affected by most of those principles that go to make up the merit system. The payroll certification provisions of the statute and the veterans' preference provisions may apply to both, but

[57] Slavin v. McGuire, 205 N. Y. 84, 98 N. E. 405 (1912).
[58] Ryan v. United States, *supra*, note 17.
[59] This accords with general rules of pleading.

the removal and the selective provisions may not apply to them alike. The use that is made of the phrase can be determined only by a study of the statute and the context of civil service regulations and judicial decisions.[60]

An interesting case that really deals with the scope of the civil service rather than with its classes is Ottinger v. Civil Service Commission.[61] The question was raised as to the power of the legislature to authorize the attorney general of the state to appoint deputies, officers, and other persons whom he deemed necessary to the execution of certain statutory duties imposed upon him by law. The court held that under the New York constitutional provision requiring appointments in the state service to be made in accordance with merit and fitness, so far as practicable to be ascertained by examination, this authorization to the attorney general was too sweeping. The law might provide for a system different from civil service for determining merit and fitness, but some satisfactory system would have to be used. This case does not mean that any state which has a constitutional provision relating to the civil service is prohibited from having an exempt class, in the sense of having a class not subject to formal examination on a competitive basis. The Ohio court has quite properly decided that the provision in the constitution of that state on the merit system does not prevent the creation of an exempt class.[62] The court will determine whether a particular person or position should come under the exempt class, once it has been defined by statute, but it will not prevent the formation of such a class by substituting its discretion for that of the civil service commission, which is usually authorized by law to make rules and classifications within the broad groupings marked out by the legislature.[63] The power to classify is subject to judicial review of the statute or of the commission's regulation defining the limits of the exempt class, because the legislature is not free to annul the constitutional requirement of merit in its definition of that class.[64]

When a statute exempts from the classified service those for whom a bond is given by a superior, it becomes necessary to inquire into the nature and scope of that bond. If it covers the defaults and actions of an assistant, that assistant may be placed within the exempt class.[65] An assessor's clerk has been held to be in the classified service because the

[60] People ex rel. Garvey v. Prendergast, 148 A. D. 129, 132 N. Y. S. 115 (1911). See Cutting v. McKinley, 19 P. (2d) 507 (Cal. App. 1933); 4 Dec. Comp. Gen. 827 (1925); State v. Green, 40 Oh. App. 400, 178 N. E. 603 (1931).

[61] 240 N. Y. 435, 148 N. E. 627 (1925).

[62] State ex rel. Myers v. Blake, 121 Oh. St. 511, 169 N. E. 599 (1929).

[63] People ex rel. Merritt v. Kraft, 145 A. D. 662, 130 N. Y. S. 363 (1911), affirmed, 204 N. Y. 626, 97 N. E. 1114.

[64] See text to note 4, *supra*.

[65] Butler v. Milwaukee, 119 Wis. 526, 97 N. W. 185 (1903).

assessor was not required to give a bond covering defaults of his subordinates. In this case the charter extended the classified service to all except certain enumerated groups, including those officers elected by the people and their subordinates, for whose defaults the officers would be liable.[66]

A provision that three clerks, assistants, and stenographers for each elective officer, board, or commission are to be in the exempt class does not mean that each member of a board of five is entitled to three in the exempt class, but the board as a whole.[67] Neither does the provision that one clerk and one deputy clerk of court shall be in the exempt class mean that each of the twenty-eight divisions of a large municipal court should have a clerk and a deputy clerk in that class.[68] The court said, in a general observation upon exemptions of this kind, that "these exemptions which may be made by the legislature or by the civil service commission appointed under its authority must have relation to the duties of the office and not simply to the title which is used. In other words, there must be a reasonable exercise of the power given under the constitution . . . There must be something in the nature of the duties which makes the service either one of confidence or else of such importance that personal selection instead of competitive examination is for the best interests of the public and fulfillment of the particular duties."

Sometimes the confidential nature of the relationship between the superior and subordinate is the basis for placing the subordinate in the exempt class along with the superior. But when this is the case, the courts will look to see whether a particular subordinate or group of subordinates is actually engaged in the performance of duties that cause such a confidential relationship to arise.[69] A sheriff in a large office may have some employees who do not occupy a position of such confidence; if they do not, then they are not entitled to be in the exempt class, nor is the sheriff entitled to have them placed there.

At other times it is the peculiar and exceptional qualifications required for the position that serve as the basis for exemption from the classified service. A medical examiner in the department of education is not the holder of such employment as falls within this exceptional group.[70]

In general, the courts like to make certain that the position is not clearly within the classified service before they are willing to investigate whether it should go in the exempt class. Doubtless this is partly due to

[66] In re Gaffney, 3 N. Y. S. 664 (1889).
[67] State ex rel. Fesler v. Green, 40 Oh. App. 400, 178 N. E. 603 (1931).
[68] Matter of Friedman v. Finegan, 268 N. Y. 93, 196 N. E. 755 (1935).
[69] Matter of Flaherty v. Milliken, 193 N. Y. 564, 86 N. E. 558 (1908).
[70] Spencer v. Ryan, 237 A. D. 50, 260 N. Y. S. 798 (1932).

the relatively common statutory statement that all positions not in the exempt class shall be in the classified service.[71]

When a person is appointed to a position in the classified service for which examination is required without taking that examination, he is appointed illegally, and gets no protection against removal, because personally he is not to be treated as in the classified service, even though his position is.[72] This was the decision in a case involving a statute that listed a number of positions as in the unclassified service and recited that all others were to be included in the classified service. Under an earlier law the position involved had been placed in the unclassified service, but this recitation was held to change the allocation of the position.

When unusual qualifications are required for a position, the civil service commission may be permitted to waive the rule that requires competitive examination, but a person appointed to such a position in the classified service does not receive the protections that usually go with a classified position.[73]

Civil service laws or charter provisions sometimes provide for division into competitive and noncompetitive classes. In some instances this is a primary basis of classification; but at other times it is subsidiary, as in the division into classified and unclassified services, with a subdivision of the classified service into the competitive and noncompetitive, the exempt, and the labor classes. It is necessary to observe very closely the exact status of each of these divisions and classes, because the rights that accrue to the holders of positions in the different ones may vary somewhat. It might be that a noncompetitive position under one type of classification would bring with it rights that would not accrue under another type.[74]

The civil service commission is usually given some discretion as to which positions and employees are to be in the classified and which in the unclassified service. One statute recited that the unclassified service "shall include such heads of divisions . . . as the civil service commission shall from time to time, by rule determine." A position that had never been placed in the unclassified service by a rule of the commission was said by the court to remain in the classified service so far as removal protections were concerned, even though no examination was required.[75]

"All clerks and . . . others rendering clerical service" does not include a road inspector for purposes of classification.[76]

[71] State ex rel. Rundberg v. Kansas City, 206 Mo. App. 17, 226 S. W. 986 (1920).
[72] Board of Education of Newark v. Civil Service Commission, 99 N. J. L. 106, 122 Atl. 807 (1923).
[73] People ex rel. Rosenthal v. Travis, 169 A. D. 203, 154 N. Y. S. 403 (1915).
[74] Matter of Merriweather v. Roberts, 152 Misc. 57, 274 N. Y. S. 188 (1934).
[75] State ex rel. Dewald v. Matia, 125 Oh. St. 487, 181 N. E. 901 (1932).
[76] Carmody v. City of Mount Vernon, 38 N. Y. S. 314 (1896).

The courts sometimes watch a reclassification from the competitive to the noncompetitive class with a sharp eye in order to see whether it is merely a method of avoiding the removal restrictions sometimes confined to the competitive class.[77]

Sometimes the phrase "ungraded service" is used. This seems to include much the same type of position as the phrase "unclassified service." The civil service commission is often given no authority to regulate promotions and salary increases in this service; if it is not given such power, it may exercise none.[78]

The division of employees into temporary and permanent generally does not involve a problem of classification in the usual sense of that term under civil service law. It is a classification, to be sure, but one that may be made within any of the other established classes. It relates to the duration of the work or employment rather than to the nature of the work, although the nature of the work may be somewhat involved by virtue of its relation to duration. The general subject of temporary appointments, made to fill in gaps in the personnel system due to a rush of work or to a failure in the eligible lists or to other causes of that type, will be discussed elsewhere.[79] But in so far as the problem of classification is involved, it should be said that it is the courts which determine whether as a matter of law an employment is temporary or permanent. The general test used in distinguishing the two types is laid down by a California case as follows: "If the position . . . actually exists in practice with a reasonable degree of continuity and permanency, the courts are justified in treating the position as a permanent one within the meaning of the civil service provision although the services in the position may occasionally be intermitted by resolutions of the board of public works 'laying off' the incumbent of the position." [80]

B. Relation of Practicability of Examination to Classification

The usual statement that merit and fitness are to be ascertained, so far as practicable, by examination has caused some courts to introduce this concept of practicability of examination as a test for certain types of classification. When this is done, the courts will consider the nature of the duties that are to be performed by the incumbent of the position in question.[81] This is not to be taken, however, to mean that the courts will intervene in all instances to determine the question of practicability,

[77] People ex rel. O'Toole v. Hamilton, 98 A. D. 59, 90 N. Y. S. 547 (1904).

[78] Amann v. Finegan, 253 A. D. 364, 2 N. Y. S. (2d) 208 (1938).

[79] See Chapter VI, on appointment. Powers v. Board of Public Works, 216 Cal. 546, 8 P. (2d) 496 (1932), affirmed, 15 P. (2d) 156.

[80] Powers v. Board of Public Works, 216 Cal. 546, 8 P. (2d) 496 (1932), affirmed, 15 P. (2d) 156.

[81] Van Fleet v. Walsh, 122 Misc. 316, 202 N. Y. S. 745 (1924).

because they are slow to do so and will refuse to disturb the determination of the personnel agency on the practicability of examination. Only when the case is a clear one will the court interfere.[82]

However, the practicability of a competitive examination was used by the Ohio court as the test for determining whether a confidential position was to be placed in the exempt class. The court emphasized that a fiduciary relationship existed between the cashier in a department and the head of that department because of the large sums of money handled for the department by the former. His "fitness," it was said, was to be determined by intimate knowledge of his qualifications; for this reason he belonged in the class exempted from examinations. Now, although the statute did not specifically list the position among those comprising the exempt class, it did exempt persons who were deputies and who occupied fiduciary positions. The cashier, though not a deputy, did occupy such a fiduciary position. This latter fact should have been the basis for the decision, rather than the test of practicability of examination, which confuses two distinct matters.[83]

Another Ohio case makes the same confusion. An assistant prosecuting attorney was held to be in the unclassified service because a competitive examination was not suitable for testing his fitness for the office.[84] The service was divided into a classified and an unclassified division, and the classified division into competitive and noncompetitive groups. The competitive group consisted of those positions for which a competitive examination was suitable. The noncompetitive group covered "all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character, as may be determined by the rules of the commission." The court emphasized that the position was one of trust and confidence, and apparently this feature, together with its resentment against imposing further tests upon those who had already passed the bar examinations and had been admitted to the bar by the court itself, constituted the real basis of the decision. But the court seems to base its decision upon the impracticability of examination in such a position, a view that is not only illogical but based upon a plain misreading of the statute, because if the competitive type of examination could not properly be used then the position should, under the provision of the statute, be placed in the noncompetitive class, within the classified division of the service, not in the unclassified division. It is, of course, ridiculous to suppose that a general examination in the law of the type administered by bar examiners under the supervision of state su-

[82] In re Hammond, *supra,* note 47.
[83] State ex rel. Bryson v. Smith, 101 Oh. St. 203, 128 N. E. 261 (1920).
[84] State ex rel. Ryan v. Kerr, 126 Oh. St. 26, 183 N. E. 535 (1932).

preme courts serves the more exacting purposes of an examination to determine the professional competency of a lawyer to be employed in the specialized type of work involved in various types of governmental administration. It is also going pretty far to say to a governmental administration that a competitive examination is not suited to determine the relative fitness of several applicants for a legal position. An examination for admission to the bar is for the purpose of determining a required minimum of competency. In an examination for purposes of *selection for employment* the purpose of the examination is to determine the *relative competency* of the applicants for a position. The resentment of the court on this score is, therefore, entirely misdirected. Though an incidental point in the case, the feeling of the court is important because it seemed to underlie the whole discussion.

This same erroneous view that there is a direct relationship between classification and practicability of examination has crept into some of the decisions of the courts in New York.[85] The impracticability test is allowed to take the place of the recognized test of confidential relationships, which in themselves do bear some reasonable relationship to classification.

C. Status of Special Groups

1. *Elective Officers.*—Civil service laws often deal expressly with a number of special groups in the public service—elective officers, legislative officers and employees, heads of departments, deputies and confidential employees, and the labor group.

These groups are sometimes left entirely outside the service, in the same status as other political appointees and employees. At other times they are included within the civil service as defined by the law, but are accorded a special status to which many of the provisions of the merit portions of the civil service law do not apply. The logical, as well as the most convenient and practical method to follow in drafting a civil service law is to include all the administration in its definition and then give to such special groups the special status that may seem wise or necessary. In this way the peculiar problems of each group can be distinguished most easily and effectively.

Elective officers are very commonly not included in the statutory definitions of the civil service. They may be included,[86] but unless the intention is to change the term of office, the effect of including them in the service is, of course, limited. It is not without significance, however, for

[85] People ex rel. Coit v. Wheeler, 56 Misc. 289, 106 N. Y. S. 450 (1902); Merritt v. Kraft, 71 Misc. 492, 129 N. Y. S. 636 (1911); Chittenden v. Wurster, *supra*, note 42.

[86] Robertson v. Coughlin, 196 Mass. 539, 82 N. E. 678 (1907).

example, in protecting them against removal during their term of office except for the causes set forth in the law and according to the procedures outlined therein.

Ayers v. Hatch,[87] a Massachusetts case, presents an interesting, though now somewhat doubtful, authority upon the meaning that attaches to phraseologies of exemption in so far as they refer to elective officers. The original civil service act had exempted elective officers but had been amended so as to read: "judicial officers and officers who are elected by the people or a city council, . . . shall not be affected as to their selection or appointment . . ." It was held that this amendment specified more particularly what is meant by "officers," and that the changed wording should be taken to mean "officers whom the people are and have been accustomed to elect." For that reason an officer who was formerly elective was held to be outside the civil service act even though no longer elective.

An office to which appointment is made by a board does not come within the meaning of the phrase "elective office" in a civil service act. The position is subject to the act, not exempt from it.[88] Election means elected by the people, and the fact that a plural membership is to be found in the appointing authority does not convert the appointment into an election.

2. *Legislative Groups.* — The common practice is to make an express exception of legislators. This applies also to such bodies as the city council and the board of county commissioners. In many instances the exemption goes further, extending to employees of legislative bodies, and in a few cases extends even to certain officers whose duties involve keeping records of a legislative nature, and their employees. Under this rule, a janitor in a county courthouse has been said to be in the exempt class.[89]

"'All legislative officers and appointees,' and those words are used not only in connection with the state but with each of its civil divisions, and each of its cities, manifestly contemplating that there shall be within the unclassified service of the state those who are officers or employees in bodies whose functions are limited to legislation" was the statement of one court in holding that a clerk in the office of the clerk of the board of aldermen was in the unclassified rather than the classified service.[90] The same rule and the same reasoning have been applied to the subordinates in the office of a city clerk. The court thought that it was immaterial that the duties of the subordinates were not entirely of a legis-

[87] 175 Mass. 489, 56 N. E. 612 (1900).

[88] Matter of Phillips, 139 A. D. 365, 124 N. Y. S. 60 (1910), affirmed, 200 N. Y. 521, 93 N. E. 1129.

[89] O'Brien v. Board of Supervisors, 236 A. D. 748, 259 N. Y. S. 511 (1932), affirmed, 260 N. Y. 608, 184 N. E. 113.

[90] People ex rel. Martin v. Scully, 56 A. D. 302, 67 N. Y. S. 839 (1900).

lative nature. The fact that the office was exempt under the legislative exemption clause was sufficient to extend the exemption to all those who worked in the office.[91]

3. *Heads of Departments.* — The heads of departments are usually placed outside the classified service because it is believed that officers who are vested with the power to formulate policies and authorized to use a high degree of discretion in their work should be considered political officers rather than part of the bureaucracy. Heads of departments created subsequent to the establishment of the service are subject to the same exemption regulations as heads of departments in existence at the time of the adoption of the civil service.[92]

The superintendent of a municipal garage was held not to be the "head of [one of] the principal departments" within the meaning of a civil service law.[93] He was subject to the general supervision of the director of finance, and the regulations of the ordinance that created the position were so detailed that his discretion was much more narrowly limited than that of the head of a department. A superintendent of a municipal waterworks system who was subordinate to one of the members of the city commission, under a commission form of city government, was also said not to be a head of a department within the meaning of that phrase as used in a veterans' preference case in Minnesota.[94] Similarly, it was held in New Jersey that the business manager of a school system was not the head of a department.[95] The board of education was the head of the department of education, and it was the school system that constituted the department, rather than the various specialized divisions that had been created in the administration of school affairs. The court added that even if it is assumed that the business manager is the principal executive officer of the department in which he works, there is no authority in law for the appointment of a deputy manager to act generally for him, a test that is apparently sometimes used by the courts, although taken alone it is not of much weight. After examining the duties of the position, the court concluded that it was an employment because on major contracts and decisions of policy the board and the superintendent of schools had the power of decision.

Under the commission form of municipal government the comptroller is not entitled to a private secretary in the exempt class because he is not one of the principal executives of the city, that class including the commissioners but not those administrative officers who are the technical

[91] Matter of O'Grady v. Polk, 132 A. D. 47, 116 N. Y. S. 290 (1909).
[92] People v. Lower, 142 Ill. App. 173 (1908), affirmed, 236 Ill. 608, 86 N. E. 577.
[93] Robertson v. Commissioner of Civil Service, 259 Mass. 447, 156 N. E. 536 (1927).
[94] State ex rel. Trevarthen v. City of Eveleth, 179 Minn. 99, 228 N. W. 447 (1929).
[95] Virtue v. Civil Service Commission, 97 N. J. L. 80, 116 Atl. 168 (1922).

heads of departments under them.[96] A city clerk has been held to be the head of a department.[97]

In all cases involving the status of one who claims to be the head of a department for civil service purposes, it is necessary to investigate carefully the exact organization of the government in which he claims to occupy that title, and to canvass in detail his duties and powers and his relations to other officers and governing bodies.

4. *Deputies.* — Deputies are sometimes not included in the civil service, but they may be placed in the exempt subdivision of the classified service; in this case the provisions on competitive examinations and on removal from office do not apply to them. Which class deputies are in depends entirely upon statute, if the statute has anything to say upon the subject.[98] Statutes seldom define the word "deputy," however, so that the courts are left to work out the tests to be applied and the definition to be used in each case.

It is not sufficient to make a person a deputy that he be called a deputy; he must satisfy certain tests.[99] In a New York case[100] the court said it must be shown that the person was authorized by law to act in place of his chief in order to be a deputy within the civil service act.

A statute provided that persons in the classified service should be removed only in accordance with the rules set forth in that statute, and then recited that "nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department." An assistant corporation counsel claimed to be a deputy because the charter contained the statement that "any assistant corporation counsel shall, in addition to his other powers, possess every power and perform all and every duty belonging to the office of the corporation counsel, or so much of such duties as the corporation counsel shall deem it necessary to delegate whenever so empowered by said corporation counsel by written authority, designating a period of time, not extending beyond three months nor beyond the term of office of said corporation counsel." The majority of the court held that this provision of the charter indicated that the position occupied by the plaintiff was that of a deputy. A vigorous dissent was filed, stating that the officer "can by no stretch of the imagination" be called a deputy. The dissent went on the ground that the corporation counsel had not made any delegation of authority in writing.[101]

[96] Feeney v. Burke, 89 N. J. L. 359, 98 Atl. 192 (1916).
[97] Fagen v. Morris, 84 N. J. L. 759, 86 Atl. 1102 (1913).
[98] Nerling v. Walsh, 245 A. D. 796, 281 N. Y. S. 427 (1935).
[99] State ex rel. Emmons v. Guckenberger, *supra*, note 41.
[100] Van Fleet v. Walsh, *supra*, note 81.
[101] Matter of Byrnes v. Windels, 265 N. Y. 403, 193 N. E. 248 (1934).

A statute placed in the unclassified service "two secretaries, assistants or clerks and one personal stenographer for . . . each of the principal appointive executive officers, boards or commissions." A director of industrial relations, presumably the head of a department or of an executive office, asked that the chief of boiler inspection be placed in this exempt group. In a subsequent case involving the ousted holder of the position, the court held that he had no rights, because when placed in the exempt class, he was subject to discharge without benefit of statement of reason; it also held that the position of chief of a division under the general jurisdiction of the director was that of an "assistant" because his work was subject to the administrative supervision of the director.[102]

The exempt class in a service was to include "the deputies of principal executive officers authorized by law to act generally for and in place of their principals" and in addition "one clerk, and one deputy clerk, if authorized by law, of such court, and one clerk of each elective judicial officer." The question arose whether special deputies that were necessary because several divisions of the court sat concurrently were to be placed in the exempt class. The opinion stated that their positions were to be placed in the classified service because the court was one court, though acting in divisions.[103]

A deputy is in the exempt class in which the law places him even though he may be performing incidental duties in addition to those of a delegated nature. An interesting illustration of this is to be found in Blust v. Collier,[104] a New York case, in which it was held that although the person in question was really a steam engineer he performed certain duties as a deputy around the jail. That he had been unacceptable for the exempt class in his technical capacity, because the position of engineer fell within the classified service, was held not to be fatal in view of the fact that he was a deputy, and that the number of deputies allotted to the office had not been exceeded.

5. *Confidential Positions.* — Confidential officers or employees are often placed in a separate class within the civil service, and in some instances are left outside that service as defined in the law. Whether a confidential employee is exempt or not depends upon the statute or charter; the fact that the position is one involving duties and relationships of a confidential nature does not in and of itself render the position exempt from the normal provisions applicable to the competitive classified service.[105]

[102] State ex rel. Myers v. Blake, *supra,* note 62.
[103] Meahl v. Ordway, 162 N. Y. S. 576 (1917).
[104] 62 A. D. 478, 70 N. Y. S. 774 (1901).
[105] Attorney General v. Trehy, 178 Mass. 186, 59 N. E. 659 (1901).

A general test of confidential employment was given by the Pennsylvania court [106] when it said that "any relation in which one person represents another in the performance of duties involving skill, integrity and trust is a confidential one within the general legal conception of that term." The Pennsylvania statute provided for an exempt, a competitive, a noncompetitive, and a labor class, permitting certain "confidential" positions to be in the exempt class. Under this statute the chief clerk to the head of a department was discharged. The court held that he was not entitled to the protection of the provisions limiting removal in the competitive branch. It was argued that in so far as the duties of the chief clerk were not of a secret nature, the position was not confidential. However, the court held that the general test set forth above applied, and decided that the element of secrecy was not essential to the status of confidential employee.

Another factor considered by some courts is the financial relationship between superior and subordinate. If the superior is held responsible for the acts of the subordinate, then the courts may hold the position to be confidential; and if he is not responsible, it has been held that the position is not confidential.[107] A chief clerk of a bureau who prepared all orders for payments, made collections for the bureau, and kept the accounts of the general financial operations of the bureau, and in addition served as secretary to the commissioner of public works, was said to occupy a confidential position.[108] The fact of financial responsibility when combined with other delegated duties may create a confidential position, as is shown by the New York case in which the positions of "assistant deputies" were held not subject to the civil service examination.[109] A court stenographer is not a confidential employee.[110]

Whether it is necessary that all the duties of a position be confidential in order to have the position brought within that designation has been answered by the courts in the same manner as a like question was answered with respect to deputies. It is not necessary that a clerk be a full-time confidential clerk. It is enough if some of his duties are confidential.[111]

An attorney engaged in tax collection work in the city attorney's office is not a confidential officer or employee.[112] The court realized that

[106] Davies v. Pittsburgh, 252 Pa. 251, 97 Atl. 413 (1916).

[107] People ex rel. Speight v. Coler, 31 A. D. 523, 52 N. Y. S. 197 (1898), affirmed, 157 N. Y. 676, 51 N. E. 1093.

[108] Matter of Peters v. Adam, 56 Misc. 29, 106 N. Y. S. 158 (1907).

[109] People ex rel. Scanlon v. Milliken, 193 N. Y. 675, 87 N. E. 1125 (1908), reversing 127 A. D. 468, 111 N. Y. S. 551. See Davies v. Pittsburgh, *supra*, note 106.

[110] People ex rel. Weatherly v. Milliken, 72 Misc. 430, 130 N. Y. S. 1 (1911).

[111] Matter of O'Brien v. Ordway, 218 N. Y. 509, 113 N. E. 518 (1916).

[112] Matter of Blatz v. Esser, 189 A. D. 763, 179 N. Y. S. 143 (1919).

there was room for a difference of opinion on this question, but did not think that the case was so clear that it was justified in refusing to adhere to the civil service commission's decision that the position should come within the classified competitive service. A similar attitude was taken toward the question of whether a coroner's physician could be placed in the competitive class.[113]

Sometimes the fact that something of the function of a deputy is added to the financial responsibility of the superior is considered in deciding that a position, such as that of a warrant clerk who acted for the comptroller in the latter's absence, is confidential and exempt.[114]

The fact that an employee is under bond to cover his defaults is of importance. So is the fact that his duties are fixed by law and not by his superior.[115] A special agent in the excise department has been held to be confidential because of the nature of his duties.[116]

A statute provided that "the provisions of this act shall not be construed to apply to the position of private secretary or deputy of any official or department or to any other person holding a strictly confidential position." Petitioner's duties consisted of opening the mail that came to the office, with the exception of personal letters, referring the letters to the proper bureau, supervising the keeping of records, taking and transmitting to the board any testimony given in proceedings for arson, granting temporary leaves of absence, and seeing that orders were executed. He also had custody of small cash in the office. In holding that the position was confidential, the court said that the commissioners "necessarily had to repose trust and confidence in their secretary and that he would perform the duties which fell within his province in the manner designated by him."[117]

The title of a position is of little effect in determining whether an employee is confidential or not. The custody of funds or of records has been referred to in some of the cases previously discussed, and it has also been held that a clerk who has custody of property seized by the police, and who is responsible not only for its production in court but also for the details of its subsequent sale, is a confidential clerk.[118]

Underlying all the decisions is the idea that in order to classify a position as confidential, it is necessary that there exist some relationship of confidence. The various factors that are considered by the courts in these

[113] Matter of MacLeod v. McGuire, 71 Misc. 166, 129 N. Y. S. 883 (1911).
[114] People ex rel. Crummey v. Palmer, 152 N. Y. 217, 46 N. E. 328 (1897).
[115] People ex rel. Sears v. Tobey, 153 N. Y. 381, 47 N. E. 800 (1897).
[116] People ex rel. Sweet v. Lyman, 30 A. D. 135, 50 N. Y. S. 444, 51 N. Y. S. 641 (1898), affirmed in People v. Lyman, 157 N. Y. 368, 52 N. E. 132.
[117] People v. Scannell, 64 N. Y. S. 593 (1900).
[118] People v. McAdoo, 181 N. Y. 547, 74 N. E. 1123 (1905).

confidential cases are of significance only because the courts think that they are evidence as to whether a confidential relationship does exist.[119]

Closely related to confidential employments, and often placed in the exempt class, are positions that require special or peculiar qualifications. If these qualifications are not such that they can be supplied by technical or professional education, they are sometimes recognized as putting their possessor into the classified service even though the position would otherwise fall into the exempt class. As such, the holder of the position is quite commonly afforded protection against removal. A special examiner of abstracts of title has been held to be within such a class.[120]

6. *Labor Class.* — Labor is often left entirely outside the civil service, but is also quite often included in the service as a separate class. Again the statute must be consulted.

Labor is sometimes divided into two groups, the skilled and the unskilled labor groups. "Workman" is used less commonly than "labor." The usual provisions of the classified service seldom apply to the unskilled group, but rules of tenure, rules of priority in layoff, and rights of a procedural nature in removal may apply to this group. To skilled labor it is possible to apply more of the competitive principle or some tests of minimum standards.[121]

An Illinois case[122] contains an interesting discussion of the status of the labor group in the civil service. A laborer chosen by noncompetitive examination and employed for two years was discharged without charges and a hearing. The statute provided that officers and employees in the service were to be removed only after charges had been made against them and a hearing had been held. The labor class was expressly excluded from these provisions. The discharged laborer failed to obtain mandatory relief for reinstatement; and the court held as unfounded his claim that the statutory discrimination against labor was unconstitutional. The court took the position that the laborer held a different relationship to the government than does an officer or employee. The officer is compensated upon the basis of his office, and the employee upon the basis of his contract. But the laborer is compensated because of the work that he has performed. The distinction between the status of skilled and unskilled labor was a reasonable one, according to the court.

The duties of the position rather than its title are to be considered in determining whether it falls within the unskilled labor class, and it is not conclusive against placing a position in the labor group that it was

[119] Matter of O'Keefe v. Clark, 238 A. D. 175, 264 N. Y. S. 299 (1933).
[120] Thompson v. Troup, 74 Conn. 121, 49 Atl. 907 (1901).
[121] 27 Ops. Atty. Gen. 446 (1909).
[122] People ex rel. Reilly v. Chicago, 337 Ill. 100, 168 N. E. 904 (1929). See Cooper v. Paris, 73 Misc. 244, 130 N. Y. S. 1043 (1911).

once placed in the competitive class.[123] When a phrase like "common labor" or "unskilled labor" or "merely labor" is used, the problem of interpretation is simplified. But when "labor" is used alone, the task is more difficult. In interpreting the latter term, the courts usually read into it the distinction between unskilled and skilled labor and hold that when unmodified, the term is intended to apply only to unskilled labor.[124] Emergency and seasonal workers are sometimes placed in separate categories, and in some instances are not included in the scales of compensation fixed for the regular classifications of labor.[125] The day-labor wage provisions of a statute have been held inapplicable to laborers who were subject to call on a twenty-four hour basis; their salaries may be fixed on an annual basis.[126]

A statute included the labor class in the civil service and provided for appointment to fill vacancies in that class from eligible lists of applicants registered by the commission. The law further provided that "the commission shall require an applicant for registration for the labor service to furnish such evidence or pass such examination as they may deem proper with respect to his age, residence, physical condition, ability to labor, skill, capacity and experience in the trade or employment for which he applies." The court held that this statute permitted the commission to accept the endorsement of two citizens and the superintendent of streets as sufficient evidence of the qualifications of the applicant. To do this was held not to be a delegation by the commission of its power, since the examination was not required but only authorized. It is not necessary that the commissioners personally investigate the fitness of each applicant.[127]

[123] People ex rel. Langdon v. Dalton, 49 A. D. 71, 63 N. Y. S. 258 (1900), affirmed, 163 N. Y. 556, 57 N. E. 1121.

[124] People v. Board of Trustees of University of Illinois, 283 Ill. 494, 119 N. E. 595 (1918).

[125] 5 Dec. Comp. Gen. 136 (1925).

[126] McNulty v. New York, 238 N. Y. 29, 143 N. E. 781 (1924), reargument denied, 238 N. Y. 555, 144 N. E. 889.

[127] Burke v. Holtzman, 110 A. D. 564, 97 N. Y. S. 218 (1906).

Chapter V

EXAMINATION, ELIGIBLE LISTS, AND CERTIFICATION

I. EXAMINATION

A. Preliminaries to Examination

When the service has been classified and the agencies for administration of the civil service law have been organized, examinations can be given for positions that fall vacant or that have been newly created. But before an examination can be given, several preliminary steps must be taken and a number of questions settled: the examination must be prepared; the qualifications to be imposed upon those seeking to take the examinations must be fixed; the notices of examination must be given. Upon such preliminary matters a number of disputes have arisen; some of them have come to the courts for decision, though of course the greater number of rulings on details such as these are made by the law officers and by the personnel agencies themselves.

1. *Notice of Examination.*—The civil service laws usually require that public notice be given of examinations for positions that are to be filled on the basis of merit and fitness, as ascertained by examination. Apparently, the important things about notices of examination are that they be given in the proper form, at the proper times and places, and that they contain an accurate description of the duties attached to the position and the qualifications required of the candidates for it. It is customary to state the salary ranges for the position, but it seems that unless the statement of salary in the notice is such that it might affect the type and quality of persons taking the examination, the particular figures set forth in the notice have no legal significance. The statement of the figures presumably establishes no contractual relation that binds the government, nor does it create any obligation upon the applicant to accept the position even if his name is placed upon the eligible list. It has been held that a notice reciting a salary of twenty-five hundred dollars for a position was not invalid merely because the body having authority to fix the salary for the position had fixed it at five thousand dollars. The court thought that there was no evidence that the recitation had affected the type of applicant taking the examination.[1]

2. *Application.*—Notices of examination usually bring requests for application blanks. The statutes vary a great deal as to the detail which

[1] Matter of MacDonald v. Ordway, 219 N. Y. 328, 114 N. E. 386 (1916).

they contain concerning applications, but in general the tendency is to leave the details of application to the personnel agency. This body usually works out a form blank containing certain conventional questions to be answered by the applicant. The civil service commission is usually permitted a fairly broad discretion as to the contents and form of the application blank. Occasionally the power of the commission to require certain types of information from the applicant has been challenged, and the procedures whereby such information is to be given have been questioned.

In Johnson v. United States,[2] a person was convicted of perjury under federal law because he had answered under oath that he had never been discharged from the civil service of the United States when it seemed that he had been so discharged. The Civil Service Act of 1883, providing for the United States Civil Service Commission, says that "every application for an examination shall contain, among other things, a statement under oath setting forth his or her actual bona fide residence at the time of making the application." The civil service rules, promulgated by the president, had required that an oath be sworn covering the answers to all questions in the application, not only to the question of residence. Did the president have power to require that the answers to all questions be covered by oath? The court decided that the rule was valid, and being authorized by statute, was a law of the United States. Therefore, swearing falsely to that which was required of the applicant by a law of the United States conformed to the statutory definition of perjury. The court did not settle the question of whether the rule that required information upon the subject of discharge was valid.

In 1912 a statute was enacted by Congress providing that the members of the United States Civil Service Commission could "administer oaths to witnesses in any matter depending before the Civil Service Commission" and also empowered its representatives to do the same. Did this statute cover a case in which a person falsely answered a question in an application blank? The court held that it did, and that the word "witness" did not confine the statute to formal hearings, but that it included as well declarations made under oath for some legal purpose.[3]

Criminal prosecution is not the only type of disciplinary action available in cases of false answers in applications. Sometimes the applicant is already holding a position in the government; if so, there are various penalties that may be attached to different kinds of misconduct. If the applicant is removed from his position as the result of his act, one of these penalties may be a forfeiture of any salary that is due him at the time

[2] 26 D. C. App. 128 (1905).
[3] United States v. Crandol, 233 Fed. 331 (D. C. Va. 1916).

of his discharge. Whether this or any other penalty will apply depends upon whether the offense is of such a nature that it falls within the rule of law prescribing the forfeiture.[4]

It is no fraud for an applicant to fail to furnish information not requested in the questions put to him.[5] Apparently it is within the power of the personnel agency to obtain information, but not the duty of the applicant to go out of his way to give information not required of him.

When a civil service commission has power to investigate the "enforcement of this article and of the rules and the action of the examiners herein provided for and when the statute provides that false answers to questions constitute good grounds for barring the applicant from examination, for excluding him from the eligibility list if he passed, or for discharging him from his position if he had been appointed, the commission has power to conduct an investigation into alleged fraudulent statements and this power is not any the less to be exercised merely because the statements were immaterial." The court refused to enjoin the commission from proceeding with its investigation.[6]

3. *Qualifications.* — Qualifications for taking examinations may be required of applicants. The statutes themselves often require some qualifications such as age or residence or citizenship, and civil service rules often specify others. It seems that the personnel agency, by virtue of its power to formulate rules to make the civil service law effective, may make such additional requirements if they are reasonable and have a substantial bearing upon merit or fitness to perform the duties of the positions that are to be filled. The courts will examine into the question of whether any particular qualification imposed is reasonable and within the legal power of the commission to require.[7]

A civil service commission must adhere to the rules it has prescribed for admission to examinations, and if changes are to be made in the requirements laid down in the rules, those changes must be made in the proper manner.[8]

a. Education, Experience, Physical and Moral Fitness. — An example of the type of requirement commonly found in civil service regulations is that of a high school education. This requirement is usually valid, but both the phraseology of the statute and the nature of the position to be filled will affect its validity in a particular instance. A city charter provided that "no one shall become a member of the police department un-

[4] 9 Dec. Comp. Gen. 416 (1930).

[5] Matter of Nalore v. Baker, 244 A. D. 554, 279 N. Y. S. 944 (1935).

[6] Veitch v. McCullough, 124 Wash. 405, 214 Pac. 631 (1923).

[7] Bruce v. Civil Service Board, 45 P. (2d) 419 (Cal. App. 1935). See People ex rel. Moriarty v. Creelman, 206 N. Y. 570, 100 N. E. 446 (1912).

[8] Mendelson v. Finegan, 253 A. D. 709, 1 N. Y. S. (2d) 648 (1937).

less he shall be able to read and write the English language." Provision was made for free, open, and competitive examinations, the charter stating that "such examinations shall be for the purpose of determining the qualifications of applicants for positions, and shall be practical and shall fairly test the fitness of the persons examined to discharge the duties of the positions to which they seek to be appointed." The civil service section also empowered the board to make rules to carry out its purposes and referred specifically to examinations, appointments, and promotions. The commission then adopted a rule which required that applicants for examination must have completed a twelfth-grade education. The court sustained the claim of a person to take the examination even though he had not completed the twelve grades of the school system. The ability to read and write required in the charter was not the equivalent of a high school education, and to require the latter was beyond the power of the civil service commission.[9] It has been held that a requirement of graduation from a senior high school is reasonable when applied to a group seeking admission to an examination for positions in the general clerical force of a city.[10]

Practical experience is sometimes required; when it is, considerable discretion is left to the commission. A requirement of five years of practical experience for a mechanic does not mean that the candidate must have spent all that time in the actual handling of tools.[11]

Physical fitness is often important, and the courts permit the personnel agency a broad discretion in determining this fitness also. The board may decide that it is irrelevant that a person is blind; if so, the court will not overturn this determination lightly, if at all.[12]

The question whether a person shall be barred from an examination because he has previously committed a crime is one that is common to the law of examinations generally. The chief difficulty arises because not all criminal acts are of equal antisocial significance. A New York regulation recited that "the commission may refuse to examine an applicant . . . who has been guilty of a crime . . ." The court said of this that it was not a mandatory prohibition, but rather that it endowed "the commission with discretion to be exercised in the light of all available information bearing upon the applicant's fitness for employment. Prior criminal guilt is but one cause, among others mentioned in the rule which 'may' prompt the commission as an administrative board to refuse to examine an applicant. It is fair to assume that such an applicant would

[9] Bruce v. Civil Service Board, *supra*, note 7.

[10] O'Callaghan v. Finegan, 166 Misc. 556, 2 N. Y. S. (2d) 15 (1937).

[11] People ex rel. Beck v. Board of Aldermen, 18 Misc. 533, 42 N. Y. S. 545 (1896).

[12] State ex rel. Hoskins v. Ohio Board of Administration, 92 Oh. St. 457, 111 N. E. 283 (1915).

be refused only in the event his moral qualities at the time of his application, when considered in their relation to the employment he seeks, would warrant such refusal. To interpret the rule otherwise would disqualify for civil service every applicant who has been guilty of a crime, regardless of the duties of the position to be filled or the nature of the crime previously committed; it would disregard both the possibility and the hope of moral reformation." [12a]

b. Citizenship. — Citizenship is another one of the qualifications frequently required of applicants. The case law on this subject is not extensive. The general rules of citizenship furnish the applicable rules for most of those cases which do exist, the problem of determining citizenship in this connection differing in no material respect from the same problem in connection with other subjects. Likewise the statutes requiring citizenship are construed in accordance with the rules governing statutory construction in general.[13] It is doubtful that this requirement could be imposed in the absence of statute.

c. Age. — Age limitations, both minimum and maximum, can be imposed by administrative regulation, providing they are reasonable and have a close connection with the qualities that are deemed essential to effective performance of the duties of the positions involved. For example, an age range from twenty-five to thirty-five years is valid for traffic patrol officers because of the nature of the work to be performed and the relation that age bears to the performance of the work.[14] Likewise a minimum age of twenty-five years is thought to be reasonable for employees in a fire prevention bureau.[15]

The commission must be careful not to provide for any preferences or requirements, other than the age requirement, that may reveal a belief on the part of the commission that the age fixed is not really related to the duties of the position for which the examination is being conducted. It is unreasonable, for example, to say that one group of applicants who have had a certain type of experience need be only eighteen years, and at the same time to say that another group without that experience must be twenty-five years to qualify for admission to the examination.[16]

Sometimes those for whose benefit veterans' preference legislation is enacted feel that the power to fix age ranges may be used to disqualify veterans of wars that terminated several years ago. In order to prevent this, some statutes have been enacted which make the age restrictions inapplicable to veterans. "Persons thus preferred shall not be disqualified

[12a] Matter of Nalore v. Baker, *supra*, note 5. [13] 26 Dec. of Comp. 762 (1920).

[14] Shubert v. Department of Motor Vehicles, 16 Cal. App. (2d) 353, 60 P. (2d) 538 (1936).

[15] People ex rel. Moriarty v. Creelman, 206 N. Y. 570, 100 N. E. 446 (1912).

[16] Ryan v. Finegan, 166 Misc. 548, 2 N. Y. S. (2d) 10 (1937).

from holding any position in the civil service on account of their age, nor by reason of disability, provided such age or disability does not render them incompetent to perform the duties of the position applied for." [17] A statute of this type makes it impossible to set up an age qualification that will disqualify veterans, and means that a veteran can be disqualified only upon a showing that his own particular age has unfitted him for the duties of the particular position for which he is applying. It makes personal that which otherwise affects a class.

The age restriction is not always imposed as a qualification for taking the examination, but may be phrased in such a manner as to be rather a restriction upon the placing of names on the eligible list. In that event, the fact that a candidate has taken and passed the examination while still within the age limit does not render him eligible if before the eligible list is made up, he attains the age that renders him ineligible to be a candidate for the position.[18]

If a person over the age permitted for appointment nevertheless receives the appointment, he may be removed from the position without reference to the civil service act as to causes and procedures in removal. It is not material for this purpose whether his appointment was a pure mistake or whether it was wilful on the applicant's part, although in many types of situations this factor would probably be a material one.[19]

d. Residence.—Residence is closely related to citizenship as a qualification for taking an examination, although not all statutes and charters require both. In the national government the requirement of residence has been imposed by statute in some instances; when so imposed, the commission may not make regulations that apply the rule in a manner different from that intended by the statute. So, when a statute provided for "bona fide" residence, the commission was not at liberty to make an additional requirement of actual residence.[20]

The meaning of the term residence is usually undefined by statute; its definition has been filled in largely by administrative and judicial decision. Since civil service law as such provides no rules for determining the meaning of residence, resort must be had to the general law of citizenship and residence. There is no simple and single rule for determining whether a person has been a bona fide resident of a state, let us say, for six months preceding the date of the examination. The exercise of his right to vote is one factor that is considered; the place where he actually lived in a physical sense, if he did live in any one place, is another con-

[17] People ex rel. Kittenger v. Board of Civil Service, 20 Misc. 217, 45 N. Y. S. 46 (1897). See Matter of Loud v. Ordway, 219 N. Y. 451, 114 N. E. 800 (1916).

[18] People ex rel. Smith v. Creelman, 134 N. Y. S. 395 (1912).

[19] People ex rel. Lane v. Lindblom, 215 Ill. 58, 74 N. E. 73 (1905).

[20] 20 Ops. Atty. Gen. 649 (1893).

sideration; the repeated return to a place from travels to distant parts may be given weight; the place he announced and acted upon as his home may also be taken into account; but no one of these factors will be conclusive when taken alone. In the last instance, the court tries to find out what the person intended as to his place of residence, looking at such factors as those enumerated, and many additional ones, as evidences of that intention.[21] Sometimes the statute requires actual domicile. When this is the nature of the requirement, the problem may not be exactly the same, but for most practical purposes domicile is the same as residence. It has been held that a minor is presumed to have adopted the domicile of his parent.[22] The fact that a person has been away from home while in the employ of the government does not in and of itself constitute a conclusive fact against his actual domicile in the place which he considered was his home and to which he always intended to return.[23] A temporary sojourn abroad need not carry with it an intention to abandon residence in the state from which departure was taken, and actual domicile may be maintained therein even though the trip abroad has taken a relatively long time.[24]

The persons to whom a residence requirement may apply are usually specified in rather broad terms. A congressional statute which required it of applicants for positions "in the departmental service" in the District of Columbia, but went on to state that "this provision shall not apply to persons who may be in the service and seek promotion or appointment in any other branches of the government," was interpreted as applying to the classified service; the exception applied to those outside the District of Columbia service.[25] Transfer to another department was said not to be covered.

As stated before, statutory regulations on residence must be carefully considered by the civil service commission. An example of a state statute requiring residence as a qualification for public office follows: "No person shall be capable of holding a civil office who shall not at the time he is chosen . . . be . . . a resident of the state, and, if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, . . ." Under this provision an officer in the classified service is subject to the residence requirement, whether the civil service law expressly requires it or not.[26] Under the familiar rule

[21] 21 Ops. Atty. Gen. 33 (1894).
[22] 27 Ops. Atty. Gen. 546 (1909). See Deming v. United States ex rel. Ward, 37 F. (2d) 818 (D. C. App. 1930).
[23] 27 Ops. Atty. Gen. 564 (1909).
[24] 27 Ops. Atty. Gen. 566 (1909).
[25] 19 Ops. Atty. Gen. 624 (1890).
[26] People ex rel. Distler v. McGuire, 68 Misc. 516, 125 N. Y. S. 90 (1910).

that distinguishes between officers and employees a statute requiring residence as a qualification for office might be interpreted as not applying to employees.[27]

When a statute requires residence in a state, the civil service commission may not dispense with it unless expressly authorized to do so under conditions specified by the statute itself. While professional administrative opinion tends to run against the residence rule, the courts enforce it when cases involving it are brought before them.[28] Residence and citizenship in a state are not always synonymous terms, although in some instances they may be.

A civil service commission may not subdivide a city for administrative purposes and require special eligible lists for each subdivision, with residence in the subdivision as the basis of assignment to the lists, even though the subdivisions are those used for general purposes of municipal government.[29] The civil service law might require that this be done, but unless the civil service commission has been thus empowered by law, it is illegal for it to do so.

4. *Place of Examination.* — The places at which examinations are to be given are usually designated by civil service rules rather than in detail by statute. In the national service the requirement of apportionment in appointments has influenced the practice with respect to the places of examination, which is understandable in view of the widely separated areas involved in some instances. The Census Act of 1909 contained a provision that "all examinations of applicants for positions in the government service, from any state or territory, shall be had in the state or territory in which such applicant resides, . . ." Some confusion arose in the administration over the scope of the act, and the attorney general was asked to decide whether this act applied to the apportioned service. He finally ruled that it applied to the apportioned service in the District of Columbia only.[30] It was held that an employee or officer in one branch of the apportioned service who wished to take an examination for a position in another branch of that same service was not required to return to the state of his domicile to take the examination.[31] A later opinion distinguishes between assembled and nonassembled examinations, suggesting that only the former were covered by the act.[32]

Occasionally it happens that a person has taken the examination in the District of Columbia when he should have taken it in the state of

[27] Powell v. People, 121 Ill. App. 474 (1905).
[28] State Public Utilities Commission v. Earley, 285 Ill. 469, 121 N. E. 63 (1918).
[29] People ex rel. Franklin v. Fetherston, 168 A. D. 416, 153 N. Y. S. 325 (1915).
[30] 28 Ops. Atty. Gen. 78 (1909). Cf. 27 Ops. Atty. Gen. 567 (1909).
[31] 28 Ops. Atty. Gen. 348 (1910).
[32] 30 Ops. Atty. Gen. 194 (1913).

domicile. The mistake may not be discovered until after the papers have been graded, the name placed upon the eligible list, and the person appointed in reliance upon a certification made from the list. What should be done? The attorney general ruled that in the absence of fraud and bad faith, and in view of the lapse of time, the mistake had been cured, especially since there was some doubt as to the applicant's domicile.[33]

B. Examinations

Not all the positions in the civil service are filled by examination, nor are all those for which examination is required filled by competitive examination. But this does not mean that the appointment or employment is free from conditions of a qualifying or formal nature. Registration may be required instead of examination. Where such a requirement is imposed, the personnel agency must see to it that the employee is informed of it. If he is employed, knowing nothing of the requirement, he may avail himself of such rules and benefits as the civil service law affords to those in his class, assuming, of course, that he acted in good faith.[34]

The problems that arise because of various exceptions to the general rule that examinations of some type are required for most positions in the civil service are illustrated in People v. Knox.[35] This case held that when a statute allows a person who originally entered the service by examination to be reinstated without examination after separation from service without fault, if he seeks reinstatement within one year from the date of separation, a person who originally entered the service without examination could not procure reinstatement under the statute, but would have to take the examination to regain his old position.

Statutes, ordinances, and charters usually permit the civil service commission considerable discretion in making use of the necessary aid for conducting examinations and grading papers or other types of tests. In the national service, and in many state governments, some departmental examining boards were in existence prior to the enactment of the Civil Service Act of 1883. Such boards may be limited either to departments or to divisions within departments. Their status is not always expressly dealt with by the general civil service act, and must therefore be determined in accordance with the usual rules of statutory interpretation. If the new act covers the whole field and contemplates new procedures, the old boards are superseded even though the statute makes no express mention of their status.[36]

[33] 31 Ops. Atty. Gen. 110 (1917).
[34] Munds v. Superintendent of Streets, 264 Mass. 242, 162 N. E. 311 (1928).
[35] People ex rel. Gumprecht v. Knox, 66 A. D. 517, 73 N. Y. S. 361 (1901).
[36] 21 Ops. Atty. Gen. 393 (1896).

Unless the provisions are carefully drafted, some difficulty may be experienced in recruiting and financing examiners or examining boards, whether departmental or directly under the civil service agency itself. The national statutes recognized the necessity for detailing certain members of the departmental service for duty in this work, but in some instances made no provision for proper clerical help for such boards. The treasury ruled in 1904 that a department could not out of its own appropriations employ a person whose sole duty was to act as clerk to the examining board.[37] When compensation is based even in part upon the performance of duties of a designated kind, a vexing problem may occur when it comes to compensating the employee for his service on an examining board. It may be necessary to resort to provisions on travel, or those on special duty by order of the office, to work out a theory of compensation that will satisfy the disbursing officer.[38]

The question whether an outsider may be brought in to conduct an examination is sometimes raised. The answer will be determined by statutory provisions if there are any. There seems to be a tendency for the courts to construe a doubtful statute so as to permit the commission the greatest possible amount of discretion in this matter.[39]

Once the question of who shall give the examination is settled, the question of whether or not an examination is practicable must likewise be settled. The relationship of practicability to classification has been considered elsewhere,[40] but it should be repeated here that whether or not an examination is practicable is a question of law, to be determined in the final instance by the courts.[41] If a doubt exists the courts tend to uphold the decision of the personnel agency. A person may not ask for a competitive examination and later seek appointment on the theory that an examination was not practicable.[42] But once it is decided that examination is not practicable, the door is opened for substituting other requirements, such as fixed periods of experience in specified types of positions.[43]

The practicability of examination must not be confused with the practical nature of the examination; the two problems are quite distinct. It is a usual recital in civil service laws in this country that the examinations

[37] 10 Dec. of Comp. 814 (1904).

[38] 2 Dec. of Comp. 516 (1896).

[39] Clayton v. Civil Service Commission, 55 Colo. 83, 133 Pac. 73 (1913).

[40] See Chapter IV, on classification, pp. 65–67.

[41] State ex rel. Day v. Emmons, 126 Oh. St. 19, 183 N. E. 784 (1932). See O'Reilly v. Lewis, 105 Misc. 380, 173 N. Y. S. 214 (1918); Oehler v. St. Paul, 174 Minn. 410, 219 N. W. 760 (1928); Hile v. Cleveland, 118 Oh. St. 99, 160 N. E. 621 (1928). See also 17 Nat. Munic. Rev. 346 (1931).

[42] State ex rel. Hoskins v. Ohio Board of Administration, *supra,* note 12.

[43] Hile v. Cleveland, 118 Oh. St. 99, 160 N. E. 621 (1928).

are to be practical or that they are to test the candidates on their ability to perform the duties of the position they seek to fill. "Civil service examinations shall be practical in their character, and shall relate to the duties of the position." It is not strange that under this provision the courts encourage the commission in its tendency to examine and classify on the basis of particular duties rather than on the basis of general qualifications.[44]

A good deal of discretion is ordinarily left to the commission as to the content of the examination. The mere fact that some of the questions bear only incidentally upon the particular duties of the position is not fatal; nor is the fact that the questions may seem somewhat vague and ambiguous. Some basis of reasonableness is, of course, required, but given this, the courts permit the examiners a pretty free hand.[45]

The law may require other examinations in addition to the regular ones of the usual competitive character. These may test for special skill or knowledge, such as knowledge of the highly specialized branch of the law of real property known as title abstracts.[46] In the case cited the court held that what on the face of it seemed like a special test for examiners of titles really was intended as an addition to the regular civil service examination. A physical examination is required for some types of work; when required, the examination must be conducted in accordance with the valid rules prescribed for it.[47]

The requirement so commonly found in civil service laws that appointment and promotion shall be based on "merit and fitness" raises the question whether merit and fitness are to be separated or whether they refer to the same thing for purposes of examination. It seems that they may be separated, but that in some instances they may be consolidated.[48]

With respect to the conduct and contents of examinations, two cases are of sufficient importance to require special mention. The first is Pratt v. Rosenthal.[49] In this case the city charter provided for practical examinations to "relate to those matters only which will fairly test the capacity . . . to discharge the duties of the positions to which they seek to be appointed." The board of health was given power to fix salaries and prescribe the duties of those who carried on the work of the health department. In announcing an examination for meat and market inspectors under the board of health, the civil service commission required

[44] Hinton v. Bahrs, 18 Cal. App. 53, 122 Pac. 82 (1912).
[45] Matter of Darling v. Maguire, 70 Misc. 597, 129 N. Y. S. 385 (1911).
[46] People ex rel. Weaver v. Rice, 110 Misc. 699, 181 N. Y. S. 144 (1920).
[47] People ex rel. Lee v. Gleason, 32 A. D. 357, 53 N. Y. S. 7 (1898). See *supra*, note 12.
[48] People ex rel. Drake v. Knauber, 163 N. Y. 23, 57 N. E. 161 (1900).
[49] 181 Cal. 158, 183 Pac. 542 (1919).

that the candidates be graduates of a veterinary college, and have three years of experience; for a second group, to consist of laymen, provisions were made for experience, with varying credits for the varying types and amounts of experience. The commission said that pamphlets containing a description of the duties to be performed and copies of old examinations would be distributed to those who requested them as long as the supply lasted. It should be added that the charter contained a provision which forbade giving secret information concerning examinations. The examination was assailed in a taxpayer's action on the grounds that the examination was not practical and that the allotments of credits were invalid.

The injunction was denied. After a preliminary statement that it was the province of the commission and not of the board of health to prescribe the tests that were to be used, the court said that to give applicants who were veterinary graduates credit without experience and to give laymen credit only if they had experience was a reasonable exercise of the discretion vested in the commission. In case of doubt, the court said, the presumption is in favor of the legality of the commission's action. For the commission to give out the pamphlets was likewise permissible since they contained no confidential information. The materials that were contained in them could be obtained by consulting public documents and records which the applicants could demand to see as of right. The court also held that in giving credit for experience it was permissible for the commission to grade the different types of experience and to give more credit for one type than for another. That is, to differentiate between the various types of experience was held proper.

The second case is Fink v. Finegan,[50] decided in New York in 1936. In an examination for a medical officer the subjects and weights were as follows: "Experience, 3.70 per cent required; technical 5.75 per cent required; oral 2.70 per cent required; and 70 per cent general average required." The candidate passed the written test and correctly answered oral questions of a technical character. He was told that he had failed to pass the oral examination. "The reasons given for this failure were that in the opinion of the examiners, although he was pleasant in manner and bearing and in comprehension fairly quick, he lacked force and executive ability, and was altogether too mild. The examiners were unanimous in remarking 'we do not believe he would make an acceptable police surgeon and medical officer.'" He asked for a rerating of the examination. The examination had been conducted by three eminent surgeons nominated by the Academy of Medicine, each of whom rated the petitioner independently. On mandamus to rerate the examination, the

[50] Matter of Fink v. Finegan, 270 N. Y. 356, 1 N. E. (2d) 462 (1936).

court of appeals decided that an alternative writ should have been granted and sent the case back for further consideration, but in doing so laid down the general limits of the types of tests to be used and the conditions under which they might be used. The opinion should be set forth at length.

"The State Constitution requires that appointments and promotions in the civil service '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.' N. Y. Const. art. 5, sec. 6. This mandate has been rendered effective by appropriate legislation.

"The keynote of civil service is merit and fitness, comprising not only efficiency, but character and loyalty to duty. This must be ascertained, as far as practicable, by examinations which, as far as practicable, shall be competitive.

"The constitutional provision for civil service has not left the mandating to implication, but expressly provides that: 'Laws shall be made to provide for the enforcement of this section.' Const. art. 5, sec. 6. In accordance therewith, the Legislature has enacted the Civil Service Law (Consol. Laws, c. 7) and the amendments thereto. The Civil Service Law divides the civil service into the classified and the unclassified service (section 9), and subdivides the classified service into four divisions: the exempt class; the competitive class; the noncompetitive class; and, in the cities, the labor class (section 12). The positions of police surgeon, medical officer, and medical examiner have been classified by the New York City municipal civil service commission as competitive. Rules of Commission, rule X, part XII.

"No one questions that in all the tests given the petitioner, except perhaps the oral one, there was competition. Nor is the oral test questioned in so far as it tested technical ability. The examiners, however, in giving the oral test also attempted to test the personalities of the candidates. They have eliminated the petitioner on the ground that he is lacking in force and executive ability. The test or measure of executive ability nowhere appears. All that the record shows is the conclusion that the candidate lacks these qualities.

"A test or examination, to be competitive, must employ an objective standard or measure. Where the standard or measure is wholly subjective to the examiners, it differs in effect in no respect from an uncontrolled opinion of the examiners and cannot be termed competitive. Cf. Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140, 16 A. L. R. 1404; Barlow v. Berry, 245 N. Y. 500, 157 N. E. 834.

"This does not mean that competitive examinations must be limited to tests of knowledge and physical ability. Objective tests have been de-

vised and are being developed which measure many qualities and characteristics. For example, tests of intelligence such as the army Alpha test and the Binet-Simon tests have been generally accepted. Mental alertness tests and special ability and aptitude tests of many kinds are widely recognized.

"The oral test serves its purpose in a competitive examination. Obviously it may be employed as a test of knowledge. In addition, it may be used to test other qualities. For example, in the selection of teachers it may be necessary to appraise their voices for carrying power, distinctness, and absence of speech defects. Such tests are necessary, particularly where the pupils are young and prone to learn through imitation. A teacher who answers all the technical questions correctly may not be acceptable or may be given a lower rating because he stutters or has so feeble a voice as to preclude his being heard throughout a large classroom.

"The above qualities may be tested objectively, albeit orally. A definite standard may be formulated. In the case at bar, no standard appears. An examination cannot be classed as competitive unless it conforms to measures or standards which are sufficiently objective to be capable of being challenged and reviewed, when necessary by other examiners of equal ability and experience.

"Some positions in the civil service may require that the person who fills them have certain qualities which cannot be measured by existing objective tests. This fact should not make it necessary to place the position wholly in the noncompetitive class. The Constitution requires that the examination be competitive as far as practicable. Thus, for such positions, the examination should be competitive except for the testing of the qualities not measurable by objective tests. Cf. People ex rel. Sweet v. Lyman, 157 N. Y. 368, 52 N. E. 132. However, before a noncompetitive test is made part of an examination for a competitive position it should be found that the quality to be tested is essential for the position and that no objective standard or measure is available. That industry examines for these qualities by noncompetitive examination, relying upon the subjective reactions of the examiners, should not be conclusive. The employer in industry generally has a self-interest in the selection of capable and efficient employees which is not so strong in the case of civil service examiners. Noncompetitive examinations may readily be manipulated by the unscrupulous with little likelihood of detection. Politics, passion, and friendship may play their part. Even the most scrupulous examiner may be influenced in his determination by unconscious prejudice and bias. For these reasons, the noncompetitive test should not be employed unless the need is imperative.

"The determination of the necessity for such a test is a discretionary

one to be made by the municipal civil service commission subject to review by the state commission, and, if the discretion is abused, by the courts. In the case at bar, however, there has been no finding that executive ability and force are qualities necessary for the position, nor did the announcement of the examination reveal that these qualities would be tested. There has been no finding that these qualities cannot be measured objectively. Upon the face of the record before us, these examiners, without warning or notice, and without a finding by the commission that the qualities of force and executive ability are necessary for the positions and cannot be measured objectively, have employed what amounts in effect to a noncompetitive test of these qualities, and have eliminated the petitioner on the ground that he lacks these qualities. From all appearances, this is not an exercise of discretion in accordance with the Constitution and the Civil Service Law.

"The Civil Service Law and rules would seem to require that the commission prepare lists of preliminary requirements and subjects of examination and publish them with the notice of examination. Civil Service Law, sec. 14; Rules of Municipal Civil Service Commission, rule V. sec. II (1), sec. IV (8-b).

"Unless the commission can show that the test of force and executive ability was objective or that it properly exercised its discretion and determined that a noncompetitive test was necessary and gave notice thereof, the examination of the petitioner should be rerated or the examination set aside and a new official list established.

"The orders should be reversed, and the motion for an alternative order of mandamus granted, with costs to abide the event."

The civil service commission usually has power to investigate the conduct of examinations as part of its general power to investigate the operation of the civil service law. As an aid to the power to investigate, the statutes may give the power to obtain such papers and materials as may be necessary and relevant to the inquiry. The person who is requested to furnish materials, in the investigation of an examination, for example, must plead the right of refusal to give the material on the ground that it will tend to incriminate him if he is to receive the benefit of the right; he cannot sit silently by and later raise the defense.[61]

As a disciplinary matter, the civil service commission may discharge one of its own employees for failing to handle the papers and grades properly. In one case a person who was in charge of the computing room took with him, and carried in his pocket, a memorandum of the grades of various candidates. At the time rumors were rife that various indi-

[61] Kanter v. Clerk of Court, 108 Ill. App. 287 (1903); Weber v. Clerk of Court, same.

viduals knew what they had received on the examination. The employee was under no duty to check these rumors. The court sustained the power of the commission to remove the employee,[52] stating that had he wished merely to check the reports against the ratings, he might have looked at the ratings in the computing room, but that it looked odd for him to be taking the ratings with him when he left that room.

Civil service rules or statutes sometimes provide for a review of examination papers by the commission. An example of such a provision follows: "A competitor may inspect his examination papers, and upon a definite written showing of errors in marking or of errors in computing the results thereof, received by the commission within thirty days of the notice of the examination results, the commission may review the points in question and make proper correction. In no other case will the result of an examination once completed be changed." The court held that under this rule the commission could not proceed to review an examination paper unless a request was filed with it by the complaining competitor.[53]

The courts are sometimes asked to review the work of the commission or its staff in the grading of papers or in the rating of candidates.[54] Their attitude in general is well expressed by the following quotation from the California case of Mitchell v. McKevitt.[55] "To have the courts review by their necessarily slow process the questions and answers of every person who voluntarily submitted himself for examination as to his qualifications and who thereafter had a competitive test that was devoid of prejudice, caprice and arbitrary action, practical in its character, given and determined in good faith by persons of a high degree of proficiency, but who (examinee) was dissatisfied would be a burden upon the courts and the taxpayers who maintain them."

A regrading of the papers of some does not necessarily give all those who took the examination a right to have their papers regraded.[56]

The writ of certiorari will not lie to review the grading of papers because such grading is an administrative and not a judicial act, certiorari lying only to review judicial or semi-judicial acts.[57] An attempt to inquire into the correctness of the grading of examination papers of a person who had been in the service for some time and was now being

[52] Matter of McGuire, 157 A. D. 351, 142 N. Y. S. 426 (1913).

[53] State ex rel. Strecker v. Listman, 156 Wash. 562, 287 Pac. 663 (1930).

[54] Mandamus to rerate rather than certiorari seems to be the proper remedy. See *infra*, note 57.

[55] 128 Cal. App. 458, 17 P. (2d) 789 (1932). See People v. McCooey, 100 A. D. 240, 91 N. Y. S. 436 (1905).

[56] Matter of Beck, 135 A. D. 156, 119 N. Y. S. 1028 (1909).

[57] People ex rel. Buckley v. Roosevelt, 19 A. D. 431, 46 N. Y. S. 517 (1897).

removed was unavailing. The removal did not give rise to any question of his grade or rank, the court said.[58]

The question of reopening an examination is one that has come up occasionally, but on which there have not been many formal rulings. In the national government the question of the power of the civil service commission to reopen an examination to veterans, who had been excluded but who were now eligible by virtue of a statute enacted just after the examination had been given, was submitted to the attorney general. His opinion was that if the commission found it in the interests of good administration to reopen the examination to only that group, it could be done; but that if the interests of good administration did not demand it, then if reopened at all, it must be reopened to everyone who wished to take it and who qualified for it. This decision was based on the recitals in the statute that the presidential rules were to be enforced in the interests of good administration. The statute, of course, was to be enforced in any event.[59]

If during a probationary period a person voluntarily takes an examination he is under no duty to take, that does not have the effect of postponing the date upon which the probation terminates and ripens into permanent appointment.[60] It sometimes happens that a person begins work on a voluntary basis as a method of becoming familiar with the duties of the position, in the hope that thereby he may later take an examination and pass it successfully. Suppose that he takes the examination and fails to pass it. Would he then be entitled to compensation for the period during which he worked? It has been decided in the national government that if there was an agreement that he was to be appointed and compensated if he passed the examination, he could not be paid for the period that he actually worked if he failed that examination. He was a volunteer, subject to the rules that govern services rendered upon that basis.[61]

Penalties for violation of civil service acts are provided for in general terms in most instances; this is also true of perjury or conspiracy to defraud the government and those other crimes that arise from the great variety of specific statutes affecting relationships between the government and private individuals. In the national government the question came up whether an indictment for conspiring to defraud the government "in any manner or for any purpose" was supported by an agreement to impersonate another at a civil service examination. The court held that the

[58] People ex rel. Crowell v. Connolly, 161 A. D. 745, 147 N. Y. S. 186, 211 N. Y. 609, 105 N. E. 1095 (1914), affirmed, 212 N. Y. 599, 106 N. E. 1039.
[59] 31 Ops. Atty. Gen. 489 (1919).
[60] Nisbet v. Frincke, 66 Colo. 1, 179 Pac. 867 (1919).
[61] 24 Dec. of Comp. 748 (1918).

indictment was good, and that obtaining a position to which one was not legally entitled constituted a fraud on the government and an agreement to do so a conspiracy to defraud.[62]

II. ELIGIBLE LISTS

Once the examination has been given, the papers graded, and the candidates ranked, their names are placed upon an eligible list from which names are certified to the appointing officer at his request.

Usually the eligible lists are expressly referred to in the statutes, but if they are not expressly authorized, the personnel agency has the power to formulate rules concerning the creation and administration of such lists as part of its general authority to make rules for the effective enforcement of the act. Not only is it a power of the commission to establish such lists, but it is its duty to do so. Mandamus will lie to compel the preparation of such lists if the civil service commission refuses to establish them.[63] The administrative head of a department within the civil service can be compelled to prepare a statement of the number of positions that are vacant on a particular schedule. This having been done, the civil service commission is under a duty to prepare an eligible list from which certifications can be made to the appointing officer.

Sometimes the name of a successful examinee is left off the list by clerical error. The one whose name has been omitted from the list may obtain mandamus to compel the proper authority to add it.[64] The rule has been enunciated by one court that his rights may even extend to certification if his standing was such that he would have been certified had his name been on the list. If others had priority over him, so that his name would not have been certified for the particular vacancy, then his remedy is mandamus to have his name placed upon the list.[65]

Those whose names have been placed upon the list are entitled to retain their positions upon it during the legal life of the list. The term of that legal life may be fixed by statute or by commission regulation, but whatever the term, he who is at the head of the list by legal right retains his position and cannot be displaced by a new examination given before the list expires. Those who take a new examination under such conditions cannot be placed above him. To adopt a rule to the contrary has been held not to be within a statutory authorization to the commission to make "reasonable rules and regulations" concerning the duration of

[62] United States v. Curley, 130 Fed. 1 (C. C. A. 1st 1904), certiorari denied, 195 U. S. 628, 35 Sup. Ct. Rep. 787, 49 L. ed. 35.

[63] People ex rel. Brennan v. Ellicott, 243 Ill. App. 374 (1927).

[64] People ex rel. Merritt v. Civil Service Commission, 13 A. D. 309, 43 N. Y. S. 191 (1897).

[65] People ex rel. Merritt v. Civil Service Commission, *supra*, note 64.

a list.[66] But the rule as stated in this paragraph may be changed by law, and in some instances has been changed, to permit later examinees to displace those on the list.[67] The law may also permit a transfer into the position for which certification otherwise might be made, with the result that those on the eligible list are excluded from certification.[68]

The civil service commission may be vested with power to strike names from the list after a fixed time. "There is, of course, nothing objectionable in such a power of removal vested in the commission." [69] The laws sometimes provide for striking names of persons who have been certified and who have been appointed.[70] In Mann v. Tracy [71] the civil service commission, which was authorized to make rules for the enforcement of the civil service act, had inserted in the notice of examination that the eligible list would cease in three years after the determination of the list, and that the commission could strike names from the list after two years. The court held that to terminate a list within three years was reasonable on the theory that the examination might not be a test of fitness for a longer period than that. The insertion of the announcement in the notice of examination constituted an exercise of the rule-making power. Finally, the court decided that it was not necessary actually to draw a red line through the names on the list after it had expired; it was sufficient that there was a rule terminating the list. "It is immaterial that they were not actually stricken out with red ink; they were automatically expunged."

The San Francisco charter contained a provision that empowered the civil service commission to strike names from the register of eligibles "after they have remained thereon more than two years." A plaintiff who had been an eligible for two years claimed that he had not been on the register continuously for that period, as he had been appointed to do seasonal work, and that therefore he could be removed from the list only in accordance with the provisions governing removal from office. Furthermore, a civil service rule gave preference in employment to persons who had six months of seasonal service in one or more departments. Could the plaintiff's name be stricken from the register at the end of two years even though he was employed for a portion of the time? The court upheld the power of the civil service commission thus to remove his name.[72] The removal provisions of the civil service law did not apply,

[66] People ex rel. Pettit v. Knox, 31 Misc. 440, 65 N. Y. S. 635 (1900).
[67] Rodrigue v. Rogers, 4 Cal. App. 257, 87 Pac. 563 (1906).
[68] People ex rel. Webb v. Milliken, 66 Misc. 192, 122 N. Y. S. 793 (1910).
[69] Jensen v. Civil Service Commission, 4 Cal. (2d) 334, 49 P. (2d) 383 (1935).
[70] People ex rel. Webb v. Milliken, *supra*, note 68.
[71] 185 Cal. 272, 196 Pac. 484 (1921).
[72] Gilbert v. Civil Service Commission, 61 Cal. App. 459, 215 Pac. 97 (1923).

because when he was laid off seasonal work he was an "unemployed eligible" and not a permanent employee. His appointment to do seasonal work did not remove his name from the list of eligibles so as to interrupt the two-year period. When the charter says that the commission may strike the names of "candidates," that also includes names of those temporarily employed. It was not necessary that his name remain on the list for two years. The court passed by, though [illegible] the question of the power of the commission to strike his name while he was engaged on his temporary employment.

When an inferior court order to strike names is appealed, the commission should not strike the names but should await the outcome of the appeal.[73]

In New York a person applied for examination, passed it, and complied with all the formalities for having his name placed upon the eligible list, including certificates of physical fitness from a physician and of general character from three citizens. The commission did not prescribe any special physical examination under its own supervision. Later his name was stricken from the list on the ground that he was physically incompetent. No notice was given him by the commission. The court held that the action of the civil service commission was wrongful and ordered his name restored to the list.[74] The opinion said that the service was safeguarded against physical incompetency inasmuch as provision had been made for a probationary period, during which incompetency would be discovered. Even if the candidate's name had been placed upon the list by error, or without examination, notice and an opportunity to be heard would be required.

A person on the eligible list has no property right in that place, but this does not mean that he has no rights that will be recognized by the law. Removal provisions are doubtless not intended to apply to removal from a list, but the elements of removal procedure, such as notice and explanation, seem reasonable requirements whether or not provided for by statute. A distinction should be drawn between terminating a list entirely and striking the name of some particular individual from the list. In the first case, general principles of law would seem not to require notice to each and every person whose name is on the list. But when the name of an individual is stricken from the list, it should be done only after notice of an intention to strike and after an explanation and, if the facts warrant it, after a hearing. Civil service statutes should provide for such a procedure or should require the commission to make regulations ensuring it. A position on the eligible list is valuable even though it may

[73] Cook v. Civil Service Commission, 160 Cal. 598, 117 Pac. 663 (1911).
[74] People ex rel. Van Petten v. Cobb, 13 A. D. 56, 43 N. Y. S. 120 (1897).

never result in certification or appointment. The point of significance is that the chances of its doing so are sufficiently great to justify the draftsmen and the courts in recognizing their worth. The law recognizes even more tenuous advantages than the superiority of one who is on the list over those who are not on it.

The principle that should be applied to termination of an eligible list, of course, is that those on the list be given general notice of the duration of the list, either through prior announcement or by reason of some general statutory provision or administrative regulation. This conforms to rules governing notice in other fields of the law. But when the rights of an individual are specially concerned, differently from those of the rest of the class, a different situation arises.

In People ex rel. Keisler v. Moscowitz [75] the relator had passed the examination and his name had been placed on the list of eligibles. Thereafter the civil service commission ordered his name removed from the list. The commission in examining into the relator's past, had uncovered certain facts concerning business affairs which it considered unsavory and which it believed were related to his fitness. The relator failed in his attempt at restoration to the list by mandamus. The court held that the commission had the power to investigate the fitness of the relator, including the right to investigate his past record, and that in the light of the facts found, the action of the commission was not arbitrary.

The vacation of an eligible list affects only those who are on the list at the time of the vacation. Termination of the list does not affect the status of those who have been certified from the list, even though they have not been appointed to office. No withdrawal of the certified group is effected through termination of the entire list itself.[76]

A rule fixing the term of a list at one year and until "a new list is established under the same title . . ." is valid under a statute that provided that "the term of eligibility shall be fixed for each eligible list at not less than one nor more than four years." [77]

The civil service commission may wish to extend an eligible list instead of terminating it; this gives rise to opposition from those who are anxious to take a new examination for the positions for which certification is to be made from the list. Whether the civil service commission may extend the period is, of course, a question of statute. Whether the legislature may extend it by law is a question of constitutional power in some states.

In Carow v. Board of Education [78] the statute in effect at the time

[75] 87 Misc. 448, 150 N. Y. S. 571 (1914).
[76] Board of Trustees v. State ex rel. Laird, 128 Oh. St. 560, 192 N. E. 877 (1934).
[77] Golland v. Baker, 52 Misc. 187, 102 N. Y. S. 721 (1906).
[78] 272 N. Y. 341, 6 N. E. (2d) 47 (1936).

that an examination was given provided that no eligible list should last more than three years. A person took the examination, passed it, and received a rank on the list. A subsequent statute extended the term of the list to four years, and a still later one by four more years. The court decided that since it had been found "practicable" to give competitive examinations for the positions involved, that finding having been made by the legislature when it authorized the use of competitive examination for these positions, it was unconstitutional under the provision on civil service to confer eligibility for appointment by legislative extension of the list. To render the persons on the list eligible after it had expired was the same as placing them on the list without examination.

In Ciaccia v. Board of Education[79] an injunction was denied in the lower court to prevent the appointing officer from appointing a person certified from an old eligible list that had been revived by the [illegible] after its term had expired under the old law. The court of appeals thought that the injunction should have been granted. For the legislature to extend the old list for more than a limited and reasonable time was thought to violate the New York constitutional provision requiring appointments to be made in accordance with merit and fitness. The court used the argument that with the passage of time a prior examination loses its reliability in the choice of the most fit persons. New candidates may now be available who possess a greater degree of merit and fitness.

A civil service rule provided that "all eligible lists resulting from original examinations shall be effective for two years . . . from the date of enrollment, provided that the commission may, before the expiration of the two year period, extend for not more than one year and only until a new list is obtained from examination." A list was made up on February 1, 1929, and was extended for one year from February 1, 1931. It was extended for another year from February 1, 1932. The court seemed to think that the action of the commission was valid.[80]

May a civil service commission cancel an entire list before the period specified for its duration has expired? It is one thing to remove the name of a person from a list or to terminate a list upon the expiration of the period for which it is to be effective legally. It is quite a different matter to cancel the entire list because [illegible] in the examination and in the steps preliminary to the establishment of the list. In one case the civil service commission canceled the list and ordered that a new examination should be held. The court decided that the commission could not set aside the list unless there had been some serious irregularity in the examination or in the ratings given as a result of it. The fact that waivers

[79] 271 N. Y. 336, 3 N. E. (2d) 446 (1936).
[80] State ex rel. Buchanan v. Seattle, 171 Wash. 113, 18 P. (2d) 3 (1933).

had been obtained from those who stood higher on the list in favor of some who stood lower was not fatal to the list, but affected procedures subsequent to the establishment of the list itself. "The clear legal duty of the commission, having once established the list, was to continue it in existence as a single list for the period fixed by law, or by rule having the force of law." [80a]

The remarks of the Ohio court upon the relationship of a position on the eligibility list to the right of certification are interesting. A civil service rule required that "in positions where the nature of the public service requires the joint employment of persons related by blood or marriage . . . both such persons must be eligible in order that either be certified. In such cases, standing on the eligible register will be determined by the average grade of both." The husband had taken and passed the examination. His wife was unable to pass it. He was appointed, apparently in reliance on a statute that empowered the employing officer to employ a "matron and such labor from time to time, at a rate of wages to be fixed by the county commissioners." The appointment was treated by the court as a provisional appointment, and not as one coming under the classified service. The husband was removed and claimed the right to reinstatement under the civil service act. He failed to obtain reinstatement. In the course of its opinion the court said that the receipt of a notice by the husband that he was number one on the eligible list did not amount to a certification of his name. Neither did the fact that his name was on the list mean that he was eligible for certification. That could be assumed only after the commission had certified him as eligible. His remedy was mandamus to compel certification. He had no recourse against being removed from a provisional status.[81]

Statutes and rules are sometimes phrased so as to give veterans a preferred status at the head of the eligibility list. When this is the case, the certification preference is assured.

The statutes not infrequently state that certification is to be from the "most nearly appropriate eligible list" if it happens that no list is available which has been specifically established for the particular position to which appointment is to be made. A statutory requirement of this type is not met by reducing an existing list by means of a new examination. To reduce a list in this manner is deemed to be the establishment of a new list, and the statutory requirement is that if there is an existing appropriate list, it is to be used.[82]

[80a] People ex rel. Finnegan v. McBride, 226 N. Y. 252, 123 N. E. 374 (1919).
[81] State ex rel. Hart v. Board of Commissioners, 101 Oh. St. 336, 128 N. E. 286 (1920).
[82] Henry Hudson Parkway Authority v. Kern, 167 Misc. 699, 4 N. Y. S. (2d) 713 (1938).

III. CERTIFICATION

Only the more general aspects of certification are dealt with in most statutes, charters, and ordinances. Details of the procedure to be followed in certifying eligibles for appointment are prescribed by rule. Since certification is an important step in the process of selection, it has been given legal significance in a number of different situations. For example, it has been suggested by one court that inasmuch as an appointment was not made through the certifying procedure, it was to be treated as not having been made under the civil service law. Not having been made under that law, it was not governed by it, and the person who had been appointed was not entitled to protection against removal.[83]

The initiative in case of a vacancy is not to be taken by the civil service commission. The appointing officer is to notify the civil service commission of the vacancy and to request the certification of eligibles for the position. Until the appointing officer acts there is nothing the commission can do about filling the vacancy. It is for this reason that a court will not issue a writ of mandamus to compel the civil service commission to certify the name of one who claims to be eligible and entitled to certification, even though he is on the list to be sent the officer if the latter so requests. No duty rests upon the certifying authority to act until the appointing officer has first acted.[84]

A person standing second on the list of eligibles, the highest of whom is to be certified, cannot obtain mandamus to compel certification unless he can show that the appointing officer offered the position to the person above him and that person refused it.[85] Some authority seems to exist for compelling action in appointing one or the other of two persons highest on the list.[86]

The fact that a candidate has passed the civil service examination and is on the eligible list does not in and of itself entitle him to appointment when a vacancy occurs. This is true even though only the one person who is asking for appointment took the examination. An appointing officer may not wish to fill a vacancy, and it is his privilege to refuse to do so. For this reason a person whose name is at the top of the eligibility list is not entitled to either certification or appointment in the absence of a request by the officer having the power to make the appointment.[87] Of course, if the appointing officer takes action showing his intention to fill the office, a different case is presented.

[83] Brown v. Craig, 209 A. D. 11, 203 N. Y. S. 788 (1924).
[84] People ex rel. Morrison v. Kantor, 75 A. D. 480, 78 N. Y. S. 385 (1902).
[85] Civil Service Commission v. People, 88 Colo. 319, 295 Pac. 920 (1931).
[86] Board of Trustees v. State ex rel. Laird, *supra*, note 76.
[87] In re Allen, 95 Atl. 215 (1915).

A refusal to certify the name of one who is entitled to certification upon the request of an appointing officer would create a cause of action on the part of the person whose name was withheld. Presumably it would be necessary for the person to show that a specific vacancy existed, that a request had been made by the appointing power for certification, and that he was in the position on the eligible list which would entitle his name to certification.[88] The suit may be for salary lost through the exclusion of his name from the list, according to some authority.[89]

The question of eligibility is to be decided by the civil service commission. It is not within the power of the appointing officer to make that decision.[90]

Officers who are vested with the power to appoint quite naturally like to have certification made to them from as full a list as possible. But because of the nature of civil service requirements, the list eventually shrinks to a point where the officer feels that he is not being given as competent nor as large a group to select from as he prefers. It has been held that when there are three names left on a list and one of the persons whose name is among the three dies, it is permissible for the appointing officer to appoint from the two whose names are certified to him.[91] A person who took the examination alone and who was certified and appointed under the rule of three, no other two being included, was entitled to the position as against a holdover.[92]

Sometimes the civil service law or the regulations made thereunder provide for the contingency that may arise when less than three names are left on the eligible list. "Whenever the eligible list certified contains less than three names, the appointing officer in his discretion may make a selection for appointment from such list or proceed as provided in section four or section ten of this rule, subject, however, to the provisions of the constitution giving preference in appointment to veterans." In one case plaintiff and another were certified to the appointing officer. The other was appointed but declined the appointment. The officer refused to appoint the plaintiff, who claimed that the refusal was based upon his color. It appeared, however, that the plaintiff had previously been discharged from a position in the noncompetitive service, and the court denied an application for mandamus. It emphasized the power of the appointing officer to "select" a person for the office, and insisted that inasmuch as selection involved choice, the appointing officer could not be compelled

[88] Gillen v. Wheeler, 5 N. Y. St. Rep. 904 (1887). See Petley v. Tacoma, 127 Wash. 459, 221 Pac. 579 (1923).

[89] Matter of Lipsky v. Rice, 152 Misc. 218, 273 N. Y. S. 914 (1934).

[90] 28 Ops. Atty. Gen. 392 (1910).

[91] Board of Trustees v. State ex rel. Laird, *supra*, note 76.

[92] People v. Chew, 67 Colo. 394, 179 Pac. 812 (1919).

to appoint the only candidate left, since that would not be an exercise of his power to make a choice.[93] When only one name is left on the list, the commission cannot be compelled to certify it if the rule is that three are to be certified.[94]

The duties of a position as well as its title are to be considered by the civil service commission when it certifies the names of eligibles.[95]

A statute provided that "in case of any vacancy in the classified service . . . the commission shall certify in writing . . . names . . . not exceeding three in number . . ." The question of the number that should be certified by the commission arose. The court decided that a certification of two names would comply with the statute. The certification of three could not be compelled, apparently, nor would a certification of one fulfill the requirements of the statute.[96]

The extent to which the commission may go in making notations for the information of the appointing officer in the certification of names has caused some difficulty. A statute provided: "The board of examiners shall place all applicants examined for positions on the police force and for positions on the fire department who have successfully passed the examination . . . on separate eligible lists, and shall certify the same to the board of commissioners." The law continued: "The board of commissioners . . . shall appoint the person having the highest general average" unless that person is morally or physically unfit. Certification of the plaintiff's name was made, with "insubordination" written alongside it under the heading of "physical condition." The court decided that this was not valid.[97]

Mistakes occur in certifying persons, and one who fails to be declared eligible through a mistake may subsequently be certified as eligible. If the person who passed an examination is not eligible for some other reason, but nevertheless is certified as an eligible and appointed upon the basis of the certification, the civil service commission may not withhold the approval of his payroll item.[98] The court said that the appointing officer could not go behind the certification and inquire into eligibility, but left open the question of the commission's power to revise its own judgment on the candidate's eligibility.

The civil service commission may revoke a certification after it has been made and before it has been acted upon by the appointing officer.

[93] Atkinson v. Fleming, 129 Misc. 663, 222 N. Y. S. 415 (1927).
[94] People v. Chicago, 271 Ill. App. 360 (1933).
[95] Petley v. Tacoma, 127 Wash. 459, 221 Pac. 579 (1923). Cf. 26 Ops. Atty. Gen. 522 (1908) on the problem of the eligible list from which certification is to be made.
[96] State ex rel. Attorney General v. Hoglan, 64 Oh. St. 532, 60 N. E. 627 (1901).
[97] Gamm v. Covington, 236 Ky. 711, 33 S. W. (2d) 697 (1931).
[98] People ex rel. Lazenby v. Homer, 188 N. Y. 588, 81 N. E. 1172 (1907).

The commission does not appoint by reason of its certification, so that the withdrawal of a name because the person is found to be ineligible is not a discharge, and is not to be governed by the procedure prescribed for removals.[99]

In the national government a list of four persons was certified for appointment when there should have been only three names on the list. The appointing officer appointed the fourth man. There appeared to be no fault on the part of the person who was appointed, and it was held that he was entitled to retain his post.[100] In another instance of a mistaken certification, no dishonesty or fault being present, the appointee was left undisturbed in his position.[101] In still another the attorney general ruled that the appointing officer was justified in relying on the certificate of the commission in so far as questions of eligibility were concerned.[102]

Some courts differentiate between a mistake on the part of the civil service commission in exercising its discretion in the certification of eligibles and illegal acts of the commission. Honest mistakes are not disturbed by the courts as a usual rule. "Much discretion in matters pertaining to the civil service is conferred upon the commission. If the statute was not followed strictly, under the facts and circumstances shown, its violation was only in a mere technical sense, not amounting to an illegality within the meaning of that term as used in certiorari proceedings in which it is made the ground for the issuance of the writ." [103] A New York case says that reliance on certification will not be disturbed so long as no misrepresentation of material facts prior to certification is involved.[104] Other states have applied the same rule. The protection against removal has been applied in favor of a person who was certified upon the basis of a grade that was too low but who was not responsible for the error.[105]

[99] People ex rel. Laist v. Lower, 251 Ill. 527, 96 N. E. 346 (1911).
[100] 21 Ops. Atty. Gen. 335 (1896).
[101] 21 Ops. Atty. Gen. 289 (1896).
[102] 30 Ops. Atty. Gen. 169 (1913).
[103] Jenney v. Civil Service Commission, 200 Ia. 1042, 205 N. W. 958 (1926).
[104] Matter of Boyman v. Enright, 122 Misc. 833, 204 N. Y. S. 57 (1924).
[105] McLaughlin v. Green, 96 Kan. 641, 152 Pac. 661 (1915).

Chapter VI

APPOINTMENT AND VETERANS' PREFERENCE

I. APPOINTMENT

A. General Principles

Appointment to office or employment in the administrative branch of government is a phase of the general subject of the law of public officers. Though the existence of a civil service law does not greatly modify this general body of law, there are points at which the civil service law impinges upon the law of appointment; these will be considered in the present chapter. Some phases of this branch of civil service law are so intimately connected with the law of certification that it is only with difficulty that the two can be separated; the discussion of certification in the preceding chapter should therefore also be consulted.

At the outset there is always the question as to what constitutes an appointment. The type of appointment may also be involved, for the type may determine whether the person who fills it is in the classified service.[1] Modified phrases such as "temporary appointment," "special appointment," and "probationary appointment," as well as the unmodified "appointment," suggest the kind of problems that may arise.

Is reinstatement the same as appointment? In one case involving this question, a police captain was granted a leave of absence to serve as second deputy police commissioner, a position that was not in the uniformed force. At the expiration of two years he was returned to his former position of captain. Did this restoration constitute an appointment? A rule of the civil service commission contained the following statement: "A person who has been permanently appointed to a position in the competitive class in any department, and who was separated from his position in that class by appointment to a position in a non-competitive or exempt class, or to a position in another group of the competitive class, and who has served continuously therein from the date of such separation, may be restored without the application of the foregoing restrictions, either to the position originally held by him, or to any position to which transfer could be made therefrom." The court held that under this rule the restoration was not an appointment, that the captain had not

[1] Thus, for example, a "special" appointment may leave one outside the classified service, while a "regular" appointment made later, but involving the same position and the same person, may bring him within the classified service.

been separated from the service or from his old position in a sense that would require the exercise of the power of original appointment.[2]

Sometimes reinstatement is possible within a fixed period, such as one year, following separation from the service without fault. Apparently this act of reinstatement is not an appointment. However, if the person is placed in his former position after the period expires, the procedure prescribed for original appointment must be complied with.[3] Reinstatement to a position several years after a separation with fault is an appointment.[4]

The situation in which four vacancies in positions of the same class are filled on the same day presents a problem when it comes to determining the priority in appointment. This must be determined in some instances because of legal rights which flow from priority, such as seniority in layoffs. Here the presumption exists that the candidate who stood highest on the list was appointed first, and so on down the list.[5]

There is some authority that where an appointment is not made in accordance with the procedure prescribed for the classified service, that fact should be taken as evidence that it was not found practicable to fill the position in such manner; and that therefore the appointment is legal under the civil service laws.[6] This leaves to the administrator a greater leeway than is consistent with the spirit of most provisions governing practicability; at least there should be required a formal rule or finding that such examination is not practicable. The rule should be that he who asserts an examination impracticable must bear the burden of showing such to be the case, a rule that is occasionally overlooked by some courts.[7]

As was pointed out in Chapter V, the person entitled to certification for a vacancy does not obtain the position by operation of law. The appointing officer may leave the position unfilled. However, if the latter takes any action that indicates his intention to fill the vacancy, then the candidate is entitled to the position, providing, of course, that the rule applies that the one highest on the list is to be certified.[8] To fill it without asking for certification does not bar the candidate's rights. Apparently it is not necessary that the candidate should first demand certification. This is in accordance with the general rule that while demand must first be made of the officer entrusted with the performance of a duty, it is nevertheless not necessary to demand that which is futile.

[2] Schieffelin v. Lahey, 243 N. Y. 102, 152 N. E. 690 (1926).
[3] Matter of Nammack v. Creelman, 145 A. D. 289, 130 N. Y. S. 211 (1911).
[4] Harcher v. Hurley, 116 N. J. L. 18, 181 Atl. 309 (1935).
[5] Matter of Fogle v. Levin, 150 Misc. 194, 268 N. Y. S. 419 (1934). See Chapter VIII, on layoffs, p. 170.
[6] Scahill v. Drzewucki, 244 A. D. 530, 279 N. Y. S. 933 (1935).
[7] State v. Board of Commissioners, 174 La. 516, 141 So. 46 (1932).
[8] Savage v. Detroit, 190 Mich. 144, 155 N. W. 1031 (1916).

Appointment may or may not carry with it a claim for salary. The basis for salary is an appropriation, and if there is no appropriation or authorization to pay the salary, the fact that the position is established by law and that a person has been appointed to fill the position does not entitle him to a salary payment.[9]

One of the functions entrusted to the civil service commission in some jurisdictions is the certifying of payrolls. It has been held that an action to recover salary will not lie if the plaintiff's name is not on the certified payroll, but that he must first compel the commission to certify his name on the payroll.[10] It is not a function of the commission to examine into the question of whether the employee is actually performing the duties of the position. Its duty is to see that the person has been appointed properly and that he is qualified for the position under which his name appears. It is for the department to see that he is properly performing the duties that he was appointed to perform.[11] The function of the commission is not that of a comptroller general or auditor.

The power to appoint carries with it a certain amount of discretion under most systems, although it becomes almost negligible under the system which requires the appointment of the person standing highest on the list. It has been held that discretion in appointment extends to a consideration of the past records of two certified candidates when both of them are veterans.[12] It has been noted in the previous chapter that the appointing officer may not pass on eligibility or qualifications; these are for the civil service commission to determine. It has been held, for example, that it is for the civil service commission to determine whether blindness constitutes a physical disability for the performance of the duties of a position.[13]

The failure of the appointing officer to notify the commission of a vacancy or the failure of the records of the civil service commission to show such notification is not fatal to an appointment that has been made upon the basis of certification. It is presumed that certification is of the proper persons unless the contrary is shown.[14] A law provided that the commission should keep records relating to the classified service.

Some laws provide that if the appointing officer makes a written statement that for reasons affecting the good of the service he is unable to appoint anyone on the certified list, a second list may be sent to him upon his request. But some laws fail to make provision for the submission of

[9] Munch v. New York, 93 N. Y. S. 509 (1905).
[10] Lynch v. New York, 90 Misc. 309, 153 N. Y. S. 186 (1915).
[11] People ex rel. Bedford v. McWilliams, 56 Misc. 296, 106 N. Y. S. 459 (1905).
[12] Santangelo v. Civil Service Commission, 12 N. J. Misc. 193, 170 Atl. 861 (1934).
[13] State ex rel. Hoskins v. Ohio Board of Administration, 92 Oh. St. 457, 111 N. E. 283 (1915).
[14] State ex rel. Leader v. Kansas City, 258 S. W. 762 (Mo. 1924).

the second list. Under this situation it has been held that if three persons are certified on the first list and two of them do not appear when he calls for them, the appointing officer must appoint the third, even though he is the lowest of the three.[15] The danger that he would prove unsatisfactory was minimized by the court on the theory that the administration is protected by a probationary period. The court added that the requirement of three was not only for the purpose of allowing discretion to the appointing officer but also for the purpose of ensuring that if one or two of the men should not appear there would still be someone left who was eligible for the position. A second list could not be sent to the appointing officer because the law did not authorize it.

An appointment that has been made in reliance on a certification cannot be disturbed, of course, except in accordance with the procedure governing removals, even though a mistake occurred in the certification. The civil service commission can neither cancel the certification after the appointment has been made nor refuse to certify a payroll on which the name of the appointee appears.[16]

A court will not permit certiorari to review an appointment made in reliance on a certification, because the act of appointment is not a judicial but an administrative act. Certiorari does not lie to review administrative acts unless they involve considerable of the judicial element.[17] The court suggested that quo warranto was the proper method of testing the legality of the appointment.

In assailing the title to office of one who is alleged to have been appointed, though not properly eligible, it is necessary to make the appointee a party. Mandamus against the appointing officer is not the proper method for settling this question.[18]

The civil service commission may be given the power to correct mistakes in certification and appointment when the two are closely dependent upon one another, and may even go to the length of removing a person who has been appointed. An example is the following: "The commissioner may before or after an appointment has been made cancel a certification, if he finds that the certification was made in error, or that any person certified was placed on the eligible list through mistake or fraud; and, if a person has been appointed from such certification, he may revoke his appointment and order his discharge." This was held to vest a discretionary, not a mandatory power.[19]

[15] Jenkins v. Gronen, 98 Wash. 128, 167 Pac. 916 (1917).

[16] Matter of Lazenby v. Municipal Civil Service Commission, 116 A. D. 135, 101 N. Y. S. 5 (1906).

[17] Matter of Carp, 179 A. D. 387, 166 N. Y. S. 243 (1917), affirmed, 221 N. Y. 643, 117 N. E. 1063.

[18] Carey v. Jackson, 165 Md. 472, 169 Atl. 922 (1934).

[19] Hayes v. Commissioner of Civil Service, 197 N. E. 471 (Mass. 1935).

The person who has been appointed in disregard of the civil service law cannot recover his salary or its equivalent upon the theory of quasi-contract. The fact that the city has received the benefit of his services is not sufficient to counterbalance the danger of encouraging disregard of the civil service law by permitting recovery for work done. The person who is appointed is himself under some duty to see that he is properly appointed.[20] But it is to be presumed that this may be affected by the presence or absence of fault, fraud, or negligence on his part, or by the general rules governing recovery of compensation by de facto holders of offices and positions.

In deciding whether to disturb an appointment made in error the courts are influenced to a considerable extent by the length of time the appointee has held the position from which it is sought to oust him. A long period of recognition on all sides tends to cure the original mistake.[21] For example, if a person is employed by the wrong officer and serves out a year, it has been held that he is entitled to protection against removal by virtue of the civil service act.[22]

B. The Family Rule

Though some qualifications are placed upon appointment by civil service laws, most of the qualifications prescribed in civil service statutes and regulations are not put upon appointment but upon the right to examination and to a position upon the eligible lists. The residence rule, for example, is most often imposed in connection with examination, though at times the law is phrased in such a manner as to impose it upon appointment — more commonly in the states than in the national government. The exact phraseology must be observed carefully to determine for what residence is a requirement.

The rule that a person may not be appointed if two members of the same family already are in the service does not debar the third member of the family from taking an examination.[23] A change of residence so as to establish a separate household does not conform to the family rule if at the time of the appointment the third member was really a member of the "same family." Also, it has been held that if the rule is violated and no serious equities have intervened, the person employed in contravention of the rule should be ousted.[24] In the absence of fraud, the civil service commission may withdraw its certification of the third member, but a person already employed should be left undisturbed.[25]

[20] Shaw v. San Francisco, 13 Cal. App. 547, 110 Pac. 149 (1910).
[21] State ex rel. Hamilton v. Kansas City, 303 Mo. 50, 259 S. W. 1045 (1924).
[22] Connell v. Board of Public Works, 234 Mass. 491, 125 N. E. 600 (1920).
[23] 26 Ops. Atty. Gen. 260 (1907).
[24] 31 Ops. Atty. Gen. 324 (1918).
[25] 30 Ops. Atty. Gen. 169 (1913).

The word "family" refers to a group living under one roof as a family. Thus the daughter of a father who is in the service and who lives in his home is eligible to appointment if a brother in the service lives in Washington in a separate house.[26]

C. Probationary Appointments

Civil service laws and regulations quite commonly provide for a probationary period that must be served before the person appointed to a position becomes a regular or permanent appointee.

The existence of a constitutional provision, such as that in New York, which requires appointments to be made on the basis of merit and fitness does not operate in and of itself to prevent the requirement by statute of a probationary period. The constitutional requirement that merit and fitness be ascertained by examination so far as practicable was said to leave room for the possibility that examination might not be practicable as the sole test of merit and fitness, and for that reason a probationary service to determine fitness might be imposed.[27] The commission is restricted in its power to prescribe a probationary period by the limitations in a statute or charter. Thus, if a charter requires a six months' period, the commission may not fix a term of one year.[28]

The probationary period begins on the date of appointment and not on the date of filing the notice of appointment with the civil service commission.[29] The fact that the civil service commission sent a notice of its approval subsequent to the appointment does not affect the date of the original appointment. Unless the appointment as such is conditioned by the requirement of approval in order to become effective, such subsequent formalities have no effect upon the date as of which appointment becomes effective. The probationary period runs from the effective date of appointment.

But this rule is not to be taken without some qualification. An appointment was made in these terms: "said appointment to take effect on and after November 14, 1901." The relator commenced work on November 18. The court held that the probationary period should run from the date on which he actually began work.[30]

It would seem that a rational basis for the rule that should govern the running of the probationary period is the distinction so often made be-

[26] 26 Ops. Atty. Gen. 301 (1907). Cf. 18 Ops. Atty. Gen. 83 (1884).

[27] People ex rel. Sweet v. Lyman, 30 A. D. 135, 50 N. Y. S. 444, 51 N. Y. S. 641 (1898), affirmed in People v. Lyman, 157 N. Y. 368, 52 N. E. 132.

[28] Rodger v. Board of Public Works, 208 Cal. 291, 281 Pac. 64 (1929), still distinguishable from Rodrigue v. Rogers, 4 Cal. App. 257, 87 Pac. 563 (1906), because expressly excluding temporary positions from discussion.

[29] Nisbet v. Frincke, 66 Colo. 1, 179 Pac. 867 (1919).

[30] People ex rel. O'Grady v. Low, 74 A. D. 246, 77 N. Y. S. 661 (1902).

tween office and employment. The general theory and law of the nature of an office dictates that its holder should be entitled to compensation irrespective of the actual duties performed. In the case of an employment, however, the basis of compensation is the performance of the duties of the employment. This rule, of course, will be subject to any specific provision in the civil service law or rules. The point may be covered explicitly therein, although ordinarily this is not the case.

It is, of course, not necessary to mention in the appointment that it is for the probationary period if the statutes or regulations provide that all appointments in the service are probationary. In this case the probationary condition is implied as a matter of law.[31]

The rights of a person on probationary appointment are not the same as the rights of a person on permanent appointment. An examination of some of the cases bearing on this problem will make the difference clear. It has been held that if plaintiff is unlawfully removed during his probationary period and is later reinstated, he may recover for the period that he was out of his position owing to the illegal removal.[32] He may have this right as a probationer if the law gives it to him. Whether this will be the rule depends, of course, upon whether the probationer has been given any rights against removal during the probationary period. Some courts have refused to reinstate under these conditions, because they felt that reinstatement by court order might be taken to mean reinstatement to a permanent status, instead of reinstatement for the remainder of the probationary term.[33] This would not be the rule if the probationer were given any rights against certain types of removal during probation. The normal situation is that probationers may be removed without the limitations resting upon the removal of permanent employees.[34]

A statute may contain a general tenure recital which at first glance seems not to include probationers, but which upon closer analysis is seen to include them. A California statute provided that "the tenure of every person holding a position under the provisions of this act" shall be protected against removal unless removal takes place in a specified manner. The court held that this applied to probationers as well as to permanent employees.[35]

A civil service regulation provided that "if his conduct or capacity on probation be unsatisfactory to the appointing officer, the probationer shall be notified in writing that at the end of such period he shall, for that

[31] McVay v. New York, 116 N. Y. S. 908 (1906).
[32] See Sutliffe v. New York, 132 A. D. 831, 117 N. Y. S. 813 (1909).
[33] McVay v. New York, *supra*, note 31; People ex rel. Hoeges v. Guilfoyle, 61 A. D. 187, 70 N. Y. S. 442 (1901).
[34] Wells v. Commissioner, 253 Mass. 416, 149 N. E. 144 (1925).
[35] Neuwald v. Brock, 79 P. (2d) 397 (Cal. D. C. App. 1938).

reason, not be retained. His retention in the service otherwise shall be equivalent to permanent appointment." Under this provision a person who was on probation was notified by letter on the last day of his probationary period that he would not be retained, but because of the fact that he was out of the office on that day he did not actually learn of the notification until three days later. The court refused to give him any aid, saying that as long as he had been given notice properly, the court could not inquire into the time that it was given other than to see that it was given at a time required by law, which was simply before the expiration of the period. The fact that the reasons for failing to retain him were known earlier was said to be immaterial.[36]

A charter provided that "every original appointment . . . shall be for six months, at the end of which time, if the conduct and record is satisfactory . . . he shall be permanently appointed." The same charter required "written specifications" in case of discharge. The probationer was discharged before the expiration of the probationary period, without written specifications. This action was upheld on the grounds that the discharge provisions did not apply to probationary but only to permanent appointments.[37]

The power to appoint belongs not to the civil service commission but to the appointing officer. It is his decision which permits probationary appointment to ripen into permanent appointment, not the decision of the commission; unless specifically restricted, the appointing officer determines whether probationary service is satisfactory. Any attempt on the part of the civil service commission to qualify that power by regulations requiring its own consent to exercise of the power is in conflict with the charter.

A statute provided that "all appointments or employments in the classified service shall be for a probationary term, not exceeding the time fixed by the rules." Under this statute the following rule was adopted: "all employments . . . shall be provisional, and such provisional service shall continue six months except in Schedule C, when it shall be for one month, during which period the person so employed may at any time be peremptorily discharged from service." It was held that this rule exceeded the authority of the commission, because it authorized peremptory discharge, and the statute gave it authority only so far as time was concerned. The court said that the regular notice and opportunity to explain must be accorded to the person to be removed.[38] A vigorous dis-

[36] Matter of Dalton v. Darlington, 123 A. D. 855, 108 N. Y. S. 626 (1908).

[37] Milliken v. Zarnow, 95 Colo. 170, 34 P. (2d) 84 (1934).

[38] People ex rel. Kastor v. Kearney, 164 N. Y. 64, 58 N. E. 14 (1900). See People ex rel. Zieger v. Whitehead, 99 Misc. 578, 164 N. Y. S. 663 (1917); People ex rel. White v. Coler, 56 A. D. 171, 67 N. Y. S. 652 (1900).

sent explained that such a decision eliminated the purpose of a probationary period, which is, according to the dissenting judge, to permit the administrative superior complete freedom in taking action to terminate the employment of one who is not satisfactory. The dissenting judge seems to have the best of the argument, although he had only reason with him.

Lack of work is a sufficient cause for laying off an appointee prior to the expiration of the probationary period.[39] This is only logical, lack of work being a good reason for terminating employment of even a supposedly permanent nature. A probationer has no greater rights in layoffs than a permanent employee.

A veterans' preference provision protecting a veteran from removal except under certain conditions does not apply to action that terminates the probationer's term. He is not "removed from office"; rather his term expires by its own limitation. Its extension can be effected only by action of the administrative superior.[40]

An interesting question that has arisen in connection with the running of the probationary period is the effect that an illegal suspension has upon it. Is the period of the suspension counted as part of the six months' service? If so, the probationary period would terminate at a different date than if the suspension were deducted, in which case the period would be extended. It has been held that the period of suspension should be deducted from the period of probation, not counted as part of it.[41]

An example of bad draftsmanship in providing for the termination of probation is to be found in a civil service rule which provided for a probationary period of six months and then stated that "within ten days of the termination of such probationary period, the appointing officer shall file a report with the commission certifying that said employee has met the requirements of the department . . ."[42] Must the appointing officer give his notice ten days before or ten days after the running of the six months? The court held that the officer did not have an additional ten days subsequent to the termination of the six months' period in which to give his notice. The court seemed to think, and doubtless properly so, that the provision that if the service of the probationer is unsatisfactory "the appointing officer shall certify the same in writing to the commission and such probationer shall be dropped from the service" had some bearing upon the meaning of the provision recited above.[43] The opinion did not pass unchallenged by a dissent, however.

[39] Brown v. United States, 39 Ct. Cl. 255 (1904).
[40] Cole v. Marshall, 6 N. J. Misc. 702, 142 Atl. 563 (1928).
[41] Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252 (1907).
[42] Sec. 9 of civil service rules of Spokane, Washington, in force in 1932.
[43] State ex rel. Moulton v. Spokane, 174 Wash. 679, 26 P. (2d) 89 (1933).

Notice of the termination of the probationary period must be given by the officer who is authorized to do so. If the notice has been given by the wrong officer, the proper authority must ratify it before the expiration of the period in order for it to be effective.[44] Certiorari is not the proper procedure for reviewing the decision of the appointing officer that a probationary appointee is not to be retained. Such a decision is administrative, not judicial, in character.[45]

Once an effective notice has been given, the period is terminated. Any subsequent effort to cancel the notice and to reinstate the employee for purposes of filing charges against him with a view to discharging him is ineffective.[46]

A statute may provide for a formal procedure in cases involving termination of the probationary period, just as in removal from the service. When a suspension is followed by a hearing and then by an order of removal, the effective date as of which the compensation ceases is the date of the suspension.[47] If a hearing on the termination of a probationary period is required, it is likely that a "cause" for removal will also be required.[48]

The civil service rules of the United States Civil Service Commission provided that "if, and when, after full and fair trial, during this period, the conduct or capacity of the probationer be not satisfactory to the appointing officer, the probationer shall be so notified in writing, with a full statement of reasons, and this notice shall terminate his service. His retention in the service beyond the probationary period confirms his absolute appointment." A probationer was given notice that his services would be terminated, but without full statement of reason. He refused to recognize the action of his superior officer. Later he resigned. He then demanded compensation for the period between his discharge and his resignation. The comptroller refused to allow the claim. He said: "The civil service act clearly intended that the appointing officer should have entire freedom to exercise a sound discretion based upon observation of the probationer during his preliminary trials in determining whether he should be absolutely or permanently appointed, and that the decision reached in good faith should be final. That the purpose of the law was carried out in substance if not in the letter in this case, there appears to be no doubt. The requirement of the rule in respect to making a full statement of the reasons for his action cannot operate as a restriction of

[44] Matter of Goldschmidt v. Board of Education, 170 A. D. 395, 156 N. Y. S. 66 (1915).
[45] People ex rel. Katz v. Woods, 171 A. D. 516, 157 N. Y. S. 786 (1916).
[46] People ex rel. Looram v. Henderson, 77 Misc. 25, 135 N. Y. S. 782 (1912).
[47] Ruggles v. United States, 45 Ct. Cl. 86 (1910).
[48] Ruggles v. United States, *supra*, note 47. See also the discussion of cause and hearing in Chapter X.

the substantial purposes of the law. It could not, therefore, deprive the appointing officer of the right, in the exercise of a sound discretion based upon the observation of the appointee during his probationary period, to make a final decision as to whether or not the probationer's appointment should become absolute. The appointing officer having thus made such final decision, as contemplated and intended by the law, his failure to accompany his notification thereof with a full statement of reason, whether or not such failure be a violation of civil service rules and render him amenable to discipline by competent executive authority, cannot operate to give the probationer a right which the civil service act never contemplated that he should have, but which is, in fact, in clear contravention of the plain intent of that act, namely, absolute appointment not only without the approval of the appointing officer after a preliminary trial but actually in spite of his disapproval after such trial." The appointment never became absolute, said the comptroller.[49]

It is proper for the appointing officer to conduct investigations into the past record and performance of the probationary appointee, and his findings may serve as a basis for a decision to terminate the appointment when the time comes to decide whether it shall ripen into a permanent appointment.[50] The civil service commission's findings on eligibility do not preclude such an investigation on the part of the officer.

There may be a difference in the salaries attached to probationary and to regular service. If the probationer receives permanent status, he is entitled to compensation as of the permanent status, and if he does not receive the difference, he may sue for it.[51]

D. Apprenticeships and Voluntary Service

It is becoming rather usual for persons who are desirous of entering public service to offer to work for nothing for a time. The hope that often lies behind such an offer is that by voluntary service the servant will become familiar with the duties of an office or position and thus prepare himself more thoroughly for an examination or for a vacancy that may be filled without examination. He may also feel that he will make personal contacts which will be helpful in other jurisdictions. Usually the problems raised by a practice of this kind are confined largely to the field of personnel policy, but at least one legal problem may arise. May the apprentice or volunteer advance a claim upon the government for work done to the benefit of the government, basing his claim upon general principles of quasi-contract and unjust enrichment? Some jurisdictions

[49] 26 Dec. of Comp. 804 (1920).
[50] People ex rel. Walter v. Woods, 168 A. D. 3, 153 N. Y. S. 872 (1915).
[51] Chicago v. McNally, 117 Ill. App. 435 (1904).

have taken action to deal with the problem of volunteers, although such action was apparently not directed against this particular phase of the problem, which arose during the inauguration of modern programs of training for the public service accompanied by apprenticeship service.[52]

E. Temporary Appointments

Temporary appointments, or as they sometimes are called, provisional appointments, are often provided for in civil service laws. The two phrases are not always synonymous; the latter (provisional) sometimes refers to filling a vacancy until it can be filled by the regular method, the other (temporary) means the filling of a position temporarily for one of two reasons. In the first place, it may refer to employment which is temporary because of the nature of the work, e. g., seasonal work. In the second place, it may refer to temporary employment on a permanent service or in a permanent position. Care must be taken to see which of the two situations is contemplated by the law and which of them is involved in a given case. The terms "provisional" and "temporary" may be, and in many instances are, used interchangeably.

The reasons for providing for temporary appointment are several. Among these motives that of evading the usual procedures accompanying civil service selection under the merit statutes is of concern to persons interested in the merit principle. If the candidate for a position is not competent to discharge its duties, one method of offering him an opportunity to make himself competent is to give him some experience in the position. This may be accomplished through the use of temporary appointment. Later, when an examination of a "practical nature" is given for the position, the candidate who has discharged the duties of the position will ordinarily be able to place at least among the first three on the list. Temporary appointments have therefore caused some difficulty, for, though they may be used to evade the merit principle, it is felt to be unwise to eliminate them entirely.

A temporary appointment may ripen into a probationary appointment under some circumstances. A renewal may be construed as appointment to a probationary status, even without any such intention upon the part of the appointing officer. Such a doctrine, while invented largely to protect the employee and give him a better status, is of doubtful soundness and should be reserved for the most unusual types of situations, if used at all.[53]

Some statutes specifically authorize temporary appointments and then proceed to surround them with restrictions designed to prevent abuse of

[52] See 27 Dec. of Comp. 131 (1920).
[53] Nilsson v. State Personnel Board, 78 P. (2d) 467 (Cal. D. C. App. 1938).

the power to make them. Some statutes say nothing about them. Some specifically forbid them. Still others exclude them by providing that examinations shall be required for both regular and special appointments.[54] There is some doubt that temporary appointments can be used in the absence of statutory authorization.

Sometimes confusion also arises in attempting to distinguish temporary from probationary appointment. A city charter provided that a civil service employee on the regular payroll become a permanent employee after serving a six months' probationary period. The civil service regulations provided similarly, and also stated that "all other positions shall be considered as temporary positions and appointments to temporary positions shall automatically expire at the end of four months." The charter limited temporary appointments to sixty days. A plaintiff, after taking the examination and being placed on the eligible list, had been appointed and had served more than six months in his position. Was he entitled to the protection of the provisions governing removals or was he a temporary appointee? The court held that he was entitled to such protection against removal on the ground that he was a permanent employee. The commission could not make permanent positions subject to the provisions on temporary appointments. The appointment here was to be considered as probationary rather than temporary.[55]

Temporary appointment may not be used as a method of evading retirement acts. A person retired by operation of law may not be kept on as a temporary appointee. An act providing that "all employees to whom this applies shall on arriving at the retirement age" be automatically separated from the service comes within this rule.[56]

A sanction for the rules on temporary appointments is provided in some jurisdictions by requiring the consent of the civil service commission to such appointments and by the treasury's practice of withholding compensation unless such consent is shown.[57]

It has been held that a person who is certified as an intermittent employee upon a request of the appointing officer for such an employee, no time being specified in the request or the certification, and who serves twenty-two months, is to be considered a permanent employee and given the protection accorded members of the classified service.[58] In this case the limit on temporary appointments was three months, and such appointments could be renewed for another three months upon consent of the commission. A service of twenty-two months must be considered

[54] Matter of Grenan v. Rice, 150 Misc. 784, 270 N. Y. S. 158 (1934).
[55] McGillicuddy v. Civil Service Commission, 133 Cal. App. 782, 24 P. (2d) 942 (1933).
[56] 3 Dec. Comp. Gen. 119 (1923).
[57] 3 Dec. of Comp. 52 (1896).
[58] O'Brien v. Inspector of Buildings, 261 Mass. 351, 158 N. E. 760 (1927).

permanent, thought the court, inasmuch as it exceeded the period fixed for temporary appointment as well as that for probationary appointment.

Contrary to the above cases on the rights of persons who are temporary appointees, but who have served for longer periods, is the case of State v. City of Seattle.[59] The court held that when a person serves longer than the temporary period, he is a holdover, and as such, is not entitled to the protection accorded regularly appointed permanent employees. This decision goes far toward discouraging abuse of temporary appointments. Whether most courts would adhere to this principle if the time involved were a long period is doubtful. It might be that a person who had remained in the position for a year or two would receive protection against an ouster, although he might not be able to resist an attack upon his title by the appropriate parties. It is, of course, necessary to examine very closely the statutes and the terms of appointment or employment in determining whether a particular employment is designed to be temporary or permanent.[60]

Temporary appointment often fails to bring with it the various privileges and rights that accrue to permanent status. For example, when the reclassification of the national service was authorized by the act of 1923, "all new appointments" were ordered to be made at the minimum rate of the appropriate grade or class. A person who was holding a temporary appointment at the time, but who was to be made a permanent appointee, was considered a "new" appointee and given the minimum rate of pay.[61]

A similar discrimination against temporary appointees is to be found in a California case wherein the court said that temporary appointees could not qualify for positions in the highway patrol under a provision that permitted the appointment of persons who had held office for one year. The court held that only those who had held positions for a year as a result of appointment from an eligible list compiled on the basis of examinations were qualified. A temporary appointment, even though it lasted for the period of a year, would not come under this act, said the court.[62]

Temporary appointees may be denied leaves of absence because of the absence of a statutory provision.[63] The fact that a person has held a position provisionally does not mean that, in later competition with others, he is to be appointed because of the proof of competency supposed to be

[59] State ex rel. Raines v. Seattle, 134 Wash. 360, 235 Pac. 968 (1925).
[60] McNeles v. Board of Supervisors, 219 N. Y. 578, 114 N. E. 1071 (1916).
[61] 4 Dec. Comp. Gen. 54 (1924).
[62] Shubert v. Department of Motor Vehicles, 16 Cal. App. (2d) 353, 60 P. (2d) 538 (1936).
[63] 6 Dec. Comp. Gen. 178, 275 (1926).

implicit in the fact of former temporary service.[64] A temporary appointee who takes an examination for a permanent appointment does not immediately obtain permanent appointment, but receives a probationary appointment. That is, a temporary appointment does not render unnecessary the requirement that an appointee serve the regular probationary period before obtaining permanent status.[65]

A change in a provision relating to the term of temporary appointments may be made to take effect so as to shorten the tenure of those already appointed for the longer period.[66] The temporary appointee has no recourse because no legal right of his has been violated.

The provision of the Colorado constitution relating to removals does not apply to temporary appointments. The court said that this provision protected only those who had been appointed on the basis of merit as shown in an examination, and that temporary appointees did not constitute such a class.[67]

An interesting example of a determination to keep temporary appointees in that status, irrespective of an apparent evasion of the rule governing such appointments, is to be found in State v. Golden.[68] A six-year term of service was treated by the court as still leaving the appointment temporary, so that the holder received no benefit of the removal provisions of the act. That no vacancy existed, that he had been paid as a temporary appointee, and that he had been employed as one, seemed to combine to influence the court to adhere to the rule of temporary appointment.

In order to cope with the abuse of temporary appointments, some charters and statutes forbid the renewal of a temporary appointment. It is more usual, perhaps, for the laws to permit renewals, but to require that they be consented to by the civil service commission before being considered valid. When this is the situation, it is not necessary that the commission take formal action to approve the renewal, nor is it necessary that the minutes of that body show such formal action. A notation on the employee's roster card may be sufficient, unless, of course, it can be shown that the notation of renewal was made without the proper authority.[69]

A term of temporary service that exceeds the legal term provided for such service, if in good faith on all sides, may be compensated for, according to one New York case.[70] A curious construction of a statute on

[64] Matter of Friedman v. Delaney, 147 Misc. 154, 263 N. Y. S. 502 (1933), affirmed, 241 A. D. 711, 269 N. Y. S. 995.
[65] Darling v. Maguire, 70 Misc. 597, 129 N. Y. S. 385 (1911).
[66] Deering v. New York, 107 N. Y. S. 934 (1907).
[67] Wilson v. People ex rel., 71 Colo. 456, 208 Pac. 479 (1922).
[68] State ex rel. Curran v. Golden, 116 Conn. 302, 164 Atl. 640 (1933).
[69] Nilsson v. State Personnel Board, *supra*, note 53.
[70] Gallagher v. New York, 115 A. D. 662, 101 N. Y. S. 229 (1906).

temporary appointments is to be found in Schroeder v. State,[71] in which a provision "but no such temporary employment shall continue after the establishment of a suitable eligible list" was said to mean that a temporary appointee was entitled to remain in his position until a new eligible list had been prepared. This means that by delaying the preparation of an eligible list, an appointment of this type could exceed the purposes for which it was designed.

At times it is difficult to distinguish a temporary appointment from a transfer or a promotion, for instance, when a person who is already in the service is given a position temporarily. Of course, if a transfer has been effected instead of a true temporary appointment, he retains his status in the service, assuming that the new position itself is within the classified service.[72]

A requirement that temporary appointees can be removed only after notice to the commission is not for the benefit of the appointee, but for that of the civil service commission, and therefore the requirement may be waived by it.[73]

II. VETERANS' PREFERENCE

Veterans' preference arises wholly from statute or express constitutional provision. There is no such preference in the absence of express command to give it and no such preference at common law. It is important in each instance to study the exact phraseology of the statute granting the preference, because there is no uniformity either as to the classes of veterans accorded the preference or as to the positions or offices to which it attaches. There is not even a general principle as to where in the process of selection the preference shall come into play. It may be a preference in examination, in position on the eligible list, in certification, in appointment, in promotion, in transfer, in layoff, in reduction of force, or in suspension and removal.

In general, a veteran is entitled to that which the statutes give him, but no more. A statute that provided for preference in appointment was held not to carry with it a preference in layoff.[74] Although contrary to the general theory of the law governing preference, there is some authority that preference in appointment and employment carries with it preference in layoff as well.[75] The Michigan court has gone so far as to permit a civil service rule giving preference to veterans not only in appointment,

[71] Schroeder v. State ex rel., 32 Oh. App. 105, 167 N. E. 484 (1929). Keefer et al. v. State ex rel., 3 Oh. App. 413 (1914).

[72] People ex rel. Naylor v. Cohen, 273 Ill. App. 362 (1935).

[73] Civil Service Commission v. Cummings, 83 Colo. 379, 265 Pac. 687 (1928).

[74] People v. Collins, 351 Ill. 551, 184 N. E. 641 (1933).

[75] State ex rel. Beebe v. Seattle, 148 Wash. 565, 269 Pac. 850 (1928).

but also in layoff, to stand in the face of a statute which extended preference to veterans in appointment.[76] The court said that the veterans' act should be read with the civil service act and rules in an attempt to make them harmonize, and that the harmony seemed to arise from extending the preference as far as possible.

The law of veterans' preference is not peculiar to civil service law. A preference statute could be phrased so as to relate to the civil service and to nothing else, but it is more likely to be phrased so as to apply to positions and offices both inside and outside the civil service. Statutes giving preference to soldiers and sailors, whether of particular wars or of wars in general, are most commonly intended to relate to offices and employments generally, subject to such exceptions as may be explicitly or implicitly contained therein. Preference statutes are really a part of the general law of public officers and employees, and relate to civil service only because it is under that law. In this discussion only cases connected with civil service laws will be considered, although some of them will inevitably bear also upon the more general law of offices and employments.

The veterans' preference laws present constitutional problems under two different types of constitutional provisions. In the first place, a few state constitutions have provisions that deal expressly with civil service, and in that connection mention veterans' preference. This is true of the New York constitution. In the second place, provisions of state constitutions which do not relate specifically to civil service or to veterans' preference may contain principles and rules sometimes alleged to affect validity of a preference statute. Such, for example, is a provision forbidding a legislature to enact laws denying to any person the equal protection of the law.

When a constitutional provision on the civil service is added in the form of an amendment or as part of a new constitution, and provision is made in it for veterans' preference, it may have the effect of repealing some earlier laws and reviving others, the exact effect depending upon the phraseology of the constitution and of the laws themselves. It is not necessary that the provision be self-executing to accomplish this.[77]

When the class to be preferred is described by the constitution in broad terms, the statutes may not validly single out one group in the broad class for special preference. For example, the veterans of a particular war may not be given greater preference than veterans of other wars if the statute provides preference for all.[78] The New York courts

[76] Swantush v. Detroit, 257 Mich. 389, 241 N. W. 265 (1932).
[77] Matter of Sweeley, 12 Misc. 174, 33 N. Y. S. 369 (1895).
[78] Matter of Keymer, 148 N. Y. 219, 42 N. E. 667 (1896).

have held that the legislature may not require that "standing highest on the eligible list" shall where a veteran is concerned mean "standing highest on the eligible list among the veterans." Nor does preference to veterans waive the requirement of a probationary period.[79] The New York constitutional provision granting preference may not be circumvented and the veterans deprived of their preference by narrowing the preference to positions that pay less than four dollars per day. A statute which extends the preference to a class of veterans broader than that specified in the constitution is invalid.[80] To declare that persons seeking positions of that class cannot be examined practicably is not conclusive, and the courts will use their own judgment as to whether there is any relationship between four dollars and the practicability of examination.[81]

The Ohio constitution provides that appointment is to be made on the basis of merit and fitness. Under this provision it has been held that even though a veteran stands first among the three certified as highest on the list, the appointing officer may not be compelled to appoint him, nor could the statute so provide.[82] The court made the following statement in the course of its opinion. "We hold that the director of public service was not bound absolutely by the fact that the soldier had the highest rating on the eligible list. In reality, the statute did not require the fact as to whether any of the three certified was or was not a soldier to be made known to the appointing officer. The latter was bound to consider the rating on the eligible list, for what it was worth, but was also bound to go further and appoint the applicant who answered the highest standards of merit and fitness with a view to the position to be filled. This course involved an exercise of discretion on the part of the director of public service; there was no abuse of discretion shown . . ."

A Massachusetts statute provided that "the names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the order of their respective standing above the names of all other applicants . . ." This statute was held to contravene neither the Fourteenth Amendment to the constitution of the United States nor the bill of rights of the Massachusetts constitution:[83] the equal protection of the laws clause was not violated by a provision which required preference in appointment to be given to soldiers and sailors; likewise the requirement was not violative

[79] Matter of Balcom, 28 Misc. 1, 58 N. Y. S. 1097 (1899). See People ex rel. Qua v. Gaffney, 142 A. D. 122, 126 N. Y. S. 1027 (1911), affirmed, 201 N. Y. 535, 94 N. E. 1098, that if a veteran is among the first three on the eligible list he is entitled to appointment over nonveterans.

[80] Barthelmess v. Cukor, 231 N. Y. 435, 132 N. E. 140 (1921).

[81] Matter of Keymer, *supra*, note 78.

[82] Seward v. State, 129 Oh. St. 296, 195 N. E. 241 (1935).

[83] Mayor v. Commissioners of Civil Service, 269 Mass. 410, 169 N. E. 502 (1929).

of the constitutional provision forbidding the imposition of tests other than those specified in the constitution as prerequisites for public office or employment.[84]

In general, the only real limitation upon veterans' preference legislation arises from the requirement that preference be based upon something that bears a real relationship to fitness for the public service. Past military service may bear such a relationship to fitness, and preference may be based upon it. The preference must be of a reasonable nature, however; it has been suggested that preference entirely without relation to fitness and qualification would be unconstitutional.[85] Thus the state cases infer that the federal practice of giving an outright grant of ten points to the veterans in computing their grades might be invalid if the added points raised a failing to a passing grade.[86]

The court will construe a preference statute so as to require a test of fitness if that is possible. For example, it has been held that some test is implied in language which recites that preference shall be given to designated classes of veterans who "possess other requisite qualifications, which shall be at least equal to those of other applicants."[87] In Ohio it was decided that to give a bonus of twenty points to a veteran who passed the competitive examination was not an arbitrary and unreasonable appraisal of the value of military experience as a qualification for civil service. The court emphasized that the bonus was given only to those who had received a passing grade. The implication of this is that such a bonus would not be valid if it were given to those who had not passed the examination, and who would receive a passing grade only by counting in the bonus.[88]

The statute may not constitutionally impose upon the certifying and appointing officers the duty to certify and to appoint a veteran merely because he is a veteran, irrespective of his fitness. The requirement that any three persons may attest to his fitness is not a substitute for a requirement of fitness itself.[89] A lower passing grade may not be required of veterans than of nonveterans.[90]

The obligation is on the person who claims the benefit of veterans'

[84] In re Wortman, 22 Abb. N. C. 137, 2 N. Y. S. 324 (1888).

[85] Opinion of Justices, 166 Mass. 589, 44 N. E. 625 (1896).

[86] State ex rel. Meehan v. Empie, 164 Minn. 14, 204 N. W. 572 (1925); note 16 A. L. R. 1409 (1922).

[87] Swantush v. Detroit, *supra*, note 76.

[88] State ex rel. King v. Emmons, 47 Oh. App. 348, 191 N. E. 880 (1934), affirmed, 128 Oh. St. 216, 190 N. E. 468.

[89] Brown v. Russell, 166 Mass. 14, 43 N. E. 1005 (1896).

[90] Cook v. Mason, 103 Cal. App. 6, 283 Pac. 891 (1929). On federal question, see Gianatasio v. Kaplan, 257 N. Y. 531, 178 N. E. 782 (1931), appeal dismissed, 284 U. S. 595, 52 Sup. Ct. Rep. 203 (1932).

preference to show that the position to which he asks to be appointed is within the class of positions to which the preference applies.[91] Thus, for example, a veteran's claim will be lost if he asserts the right of preference to a confidential position or to that of a deputy when the preference is for a position of "deputy superintendent." The veteran must also show that his name is on the eligible list if he claims preference.[92]

A New York law recited that "In every public department and upon all public works of the state of New York and of the cities . . . any honorably discharged soldier . . . of the United States disabled in the actual performance of duty in any war, to an extent recognized by the United States Veterans' Bureau, who are citizens and residents of this state and were at the time of their entrance into the military or naval service of the United States, and whose disability exists at the time of his or her application for such appointment or promotion, shall be entitled to preference in appointment and promotion without regard to their standing on any list . . ." Applying the doctrine that all doubts in the grant of a special privilege should be strictly construed against those who claim it, the court held that under this statute it was necessary to prove the existence of a disability to the satisfaction of the state authorities in order to obtain the preference that it provided for, and that the recognition of such disability by the United States Veterans' Bureau was in the nature of an additional requirement.[93]

Even under the most loosely drawn of veterans' preference statutes (and there are many of them) it is necessary for the veteran to apply for the position and otherwise to proceed through the normal channels established for the selection of persons for the service.[94] It is necessary to notify the proper officer that the claimant is entitled to the preference. If, in an application for mandamus to compel his appointment, it appears that the claimant has not given the proper notification of claim, the application will be denied.[95] Notice of this kind need not be formal. It is enough that the appointing officer be apprised of the claim of preference. This rule applies generally to claimants to preference; there are, of course, other groups, though not numerous, to whom preference may be given.[96]

In some statutes the preference is given to "honorably discharged" soldiers and sailors. The tests used to determine when a soldier has been discharged honorably are the same as are generally applied in the law relating to military affairs. Under a statute containing such a phrase it is

[91] Matter of Ostrander, 12 Misc. 476, 34 N. Y. S. 295 (1895).
[92] Malloy v. Mayor, 12 N. E. (2d) 197 (Mass. 1937).
[93] Matter of Morgan v. Ford, 143 Misc. 887, 257 N. Y. S. 684 (1932).
[94] Opinion of Justices, 145 Mass. 587, 13 N. E. 15 (1888).
[95] In re Wortman, *supra,* note 84.
[96] People ex rel. Zieger v. Whitehead, 94 Misc. 360, 157 N. Y. S. 563 (1916).

possible that a person may be entitled to preference even though he never actually *served* in the military branch at all. It may be sufficient that he entered the service, was detained in the preliminary stages, and was finally discharged without having served in the military force.[97]

Giving the preference to those who "serve" or have been "in the service" may not include one who was drafted into the service but who was discharged before he served because of disability.[98] Preference to those who "served in time of war" does not include men who joined the army after the signing of the armistice but before the peace treaty was signed.[99] Extending the preference to "soldier, sailor or marine" does not include a field clerk in the army.[100] It has been held that a provision which gave veterans the preference in employment supported a veteran's claim for preference for himself and his team on a street improvement job in which teams were required.[101]

In one New York statute preference was given in "employment upon all public works of the state of New York, and of the cities, towns, and villages thereof." The statute also provided that the veterans must have "business capacity necessary to discharge the duties of the position involved." It was held that the preference extended to positions not involving business capacity, and that laborers were also covered.[102] Some cases on veterans' preference illustrate the constant struggle that goes on between veterans, legislatures, administrators, and courts in trying to keep veterans' preference claims within tolerable bounds. In one Minnesota case the court was confronted with a statute which practically ordered the preference to be granted notwithstanding any provision in any other existing law or in any other charter relating thereto, and the preference was sustained as constitutional and was granted.[103]

If it is necessary for the veteran to get on the eligible list before he is entitled to preference, then he must comply with such requirements for a place on the list as are applicable to him before he can successfully assert his claim to preference.[104]

A veteran who is entitled to have his name placed at the head of an eligible list by virtue of a statutory preference may not stand by for a year, during which a list is posted, without asserting his claim to preference. It is too late for him to make his claim after a year or two, and the

[97] Hurley v. Crawley, 50 F. (2d) 1010 (1931).
[98] Dunn v. Commissioner of Civil Service, 281 Mass. 376, 183 N. E. 889 (1933).
[99] Scott v. Commissioners of Civil Service, 272 Mass. 237, 172 N. E. 218 (1930).
[100] Stephens v. Civil Service Commission, 101 N. J. L. 192, 127 Atl. 808 (1925).
[101] People v. Wallace, 55 Hun 149, 8 N. Y. S. 591 (1889).
[102] Matter of Sullivan v. Gilroy, 55 Hun 285, 8 N. Y. S. 401 (1890).
[103] State ex rel. Kangas v. McDonald, 188 Minn. 157, 246 N. W. 900 (1933).
[104] Matter of Allaire v. Knox, 62 A. D. 29, 70 N. Y. S. 845 (1901), affirmed, 168 N. Y. 642, 61 N. E. 1127.

court will confront him with the doctrine of laches in such a case if he asks for mandamus to have his name advanced to the head of the list.[105] A preference in appointment or to a position on an eligible list is not to be confused with a right to certification as to competency.[106]

It has been held that a preference as to a place on the certified list does not entitle the veteran to any preference in appointment, the latter not being expressly granted.[107] If the statute permits of the interpretation that the appointing officer may use his discretion, the courts favor that reading. Thus, any provision indicating that veterans are to be preferred over nonveterans, when they are equal, leaves the officer free to appoint a nonveteran if he is higher on the list than a veteran.[108]

A preference that is phrased in terms of appointment, but which does not make reference to a position on the eligible list and says nothing about certification, should not be held to affect certification.[109]

When the preference is general and is in terms of appointment, a veteran who stands among the three highest is entitled to the appointment, but a veteran whose standing on the eligible list is such that he is not among the first three certified cannot claim that the commission should certify the names of the three veterans who stand highest on the list.[110] A statute could be phrased so as to accomplish this, but it would have to make it clear that such is the rule.[111]

The problem of enforcing the right to preference sometimes proves a difficult one. Mandamus will lie only when the right is one to which the applicant is clearly entitled and when he is one to whom the officer owes a duty. The statute provided that a veteran "whose name is on the eligible list for a position shall be entitled to preference in original appointments to any such competitive position . . . over all persons eligible for such appointments and standing on the list thereof with a rating equal to that of such soldier . . ." Under such a statute, if two veterans are on a certified list and a third person who is a nonveteran is on the list with them, and one of the veterans asks for mandamus to compel the appointing officer to appoint him instead of the nonveteran, he will fail, because the officer may choose to appoint the second veteran, and inasmuch as he possesses this discretion, mandamus is inappropriate as a remedy.[112] The

[105] People ex rel. McSweeney v. Collins, 276 Ill. App. 1 (1934).

[106] In re Brown, 60 Hun 98, 14 N. Y. S. 450 (1891).

[107] Corliss v. Civil Service Commissioners, 242 Mass. 61, 136 N. E. 356 (1922).

[108] People ex rel. Chin v. Poillon, 16 Abb. N. C. 119 (1885). See People ex rel. Schultz v. Scott, 163 Minn. 190, 203 N. W. 774 (1925).

[109] See People ex rel. Schultz v. Scott, 163 Minn. 190, 203 N. W. 774 (1925).

[110] People ex rel. Drake v. Common Council, 26 Misc. 522, 57 N. Y. S. 617 (1899).

[111] People ex rel. O'Brien v. French, 51 Hun 345, 4 N. Y. S. 330 (1889).

[112] Sergeant v. McSweeney, 126 Oh. St. 623, 187 N. E. 241 (1933). See People ex rel. Conlin v. Dobbs Ferry, 63 A. D. 276, 71 N. Y. S. 578 (1901).

court pointed out that the law did not give one veteran any preference over another, but only a preference over those who were not veterans.

Sometimes the preference is granted to veterans of a designated group, with the qualification that they be of good moral character and be able to "perform the duties of said position." The ability to "perform the duties of the position" demands something more than an ability to perform the duties, and signifies that the veteran must be able to perform the duties reasonably well before he can claim the benefit of preference.[113] The public service is not compelled to accept the lowest possible standard of performance because of veterans' preference laws. The appointing officer does not lose his power to determine the business capacity of a veteran who has been certified as eligible for appointment, even though the statute recites that passing the examination and being certified as eligible shall be "regarded as evidence" that the candidate possesses that business capacity demanded by the particular position for which he has been certified.[114]

The requirement that the appointing officer shall make an investigation "as to the qualifications of the veteran for the place or position" does not mean that the appointing officer must carry through an investigation if he is personally acquainted with the applicant and his qualifications. If the appointing officer knows that the candidate is not really fit for the position, that is sufficient.[115] Given an honest use of discretion on the part of the appointing officer, it is not for the court or the jury to interfere.

Because of the attempt of many personnel agencies to evade veterans' preference laws by fixing age limits that will exclude the veterans of past wars, some statutes require that age shall not be considered in making the appointment if the veteran is otherwise qualified. A typical provision of this kind is as follows: ". . . and it is further provided that the persons thus preferred should not be disqualified from holding any position on account of their age, or by reason of any physical disability, provided such age or disability does not render them incompetent to perform the duties of the position applied for." It has been held that such a provision benefits those in the service as well as applicants for admission to it.[116]

How shall disability be determined when veterans who have been disabled in actual service are given a preference? One statute recited that veterans who were disabled in actual service and who were recognized by the United States Veterans' Bureau "and whose disability exists at the

[113] State ex rel. Meehan v. Empie, *supra*, note 86.

[114] Jones v. Orlando, 119 N. J. L. 227, 195 Atl. 717 (1937).

[115] State ex rel. Moilan v. Brandt, 178 Minn. 277, 226 N. W. 841 (1929).

[116] People ex rel. Washburn v. French, 52 Hun 464, 5 N. Y. S. 712 (1889). See State ex rel. Abati v. MacDonald, 185 Minn. 194, 240 N. W. 361 (1932).

time of his or her application for such appointment" should be preferred. The court held that it was for the national bureau to decide whether the disability had resulted from war service, but that it was for the state agencies to decide whether the disability existed at the time that the preference in appointment was to become effective.[117]

The offices or positions for which preference is to be effective have caused some difficulty, owing to the phraseology of some of the preference statutes. It has been held that a statute which gives preference as to "appointments, employments, and removals in public departments and upon public works" and relates to "state, judicial, county, township, city and town officers" does not extend the preference to the position of a department head.[118] The labor class has been held to be excluded from a preference statute which provided that in every public department and upon all public works of the state, veterans of the Civil War "shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made providing their fitness shall have been ascertained." The court said that there was no eligible list for laborers, so that the general import of the act with reference to ascertainment of fitness could not be extended to cover the labor group.[119] Other exceptions, such as that of confidential positions,[120] are to be found in statutes and cases.

Special remedies are often granted by statute to veterans who claim that they have been denied a preference to which they are entitled under a statute. An action for damages against the officer who refuses to accede to the veteran's claim to preference is sometimes provided for in the laws.[121] In some instances such a sanction has proved of great practical importance in the actual administration of the preference laws.

The rules that govern defective appointment of veterans and the methods of curing such appointment are the same as those that apply to appointments in general. There is nothing in veterans' preference laws to prevent these rules from operating in their normal manner. A defective appointment that cannot be converted into a valid one by the acts of the parties under the general rules cannot be so converted simply because the appointee is a veteran.[122]

[117] Potts v. Kaplan, 264 N. Y. 110, 190 N. E. 201 (1934).

[118] State ex rel. McOsker v. City Council, 167 Minn. 240, 208 N. W. 1005 (1926).

[119] Sweet v. Partridge, 66 A. D. 309, 72 N. Y. S. 699 (1901).

[120] People ex rel. Tate v. Dalton, 41 A. D. 458, 58 N. Y. S. 929 (1899), affirmed, 160 N. Y. 686, 55 N. E. 1099.

[121] People ex rel. Hoyt v. Trustees, 19 A. D. 567, 46 N. Y. S. 564 (1897).

[122] De Salvo v. Murray, 237 A. D. 857, 261 N. Y. S. 427 (1932), affirmed, 262 N. Y. 573, 188 N. E. 34.

Chapter VII

PROMOTION, TRANSFER, AND LEAVE OF ABSENCE

I. PROMOTION

A. General Principles

Once the civil service system has been provided for by law, its constitutionality settled, its relationships to the general law of officers and employees and to the law of administrative organization determined, the rules and principles of selection established and applied, the problem of status within the service becomes important.

The method of selection and the techniques and procedures involved in examinations, eligible lists, and certification have as their chief aim the ascertainment of merit and fitness. The career aspects of civil service are to be found partly in the laws on promotion, transfer, and leaves of absence, and partly in the rules governing layoff, reduction in rank, suspension, and dismissal. The former constitute the essentials of a career; the latter deal with its protection.

One of the troublesome questions often confronting lawyers and administrators is whether promotion involves an appointment. If John Blank is appointed to a position and holds it for two years and is then promoted to a higher position, has he received one or two appointments? The general rule is that in some instances promotion is considered as an appointment, but that in other instances and for other purposes it is not so considered. Illustrations will be given in the course of the following discussion.

The typical promotional situation is that in which a person in an existing position is promoted to an existing higher position. But a law creating a new position may require that it shall be filled from a certain class of incumbents of existing positions, such as the "members of the uniformed force." It has been held that a newly created position such as this must be filled by competitive examination, just as in the case of original appointment.[1] In the national government the question of promotion may encounter problems arising from the constitutional provisions concerning the division of powers between the president and the Senate in the nomination, appointment, and confirmation of appointment to of-

[1] Schieffelin v. O'Brien, 243 N. Y. 151, 153 N. E. 31 (1926).

fice.[2] If a promotion is a new appointment, one rule may govern. If it is not, another rule may apply.

Just as in the case of a vacancy to be filled by original appointment through open competitive examination rather than by promotion, an officer vested with authority to promote may ordinarily use his own discretion in deciding whether to fill the vacant position. If he decides to fill it, he may be compelled to fill it by promotion, depending upon the applicable words of the statute, charter, or civil service regulation. "There may also be employed as first class post officers foremen and stenographers at a salary of $1300 or more per annum" does not mean that these positions must be filled.[3] When a statute creates two grades and provides for promotion from the lower to the higher grade, the right to promotion is not a vested right in any individual. Therefore, if the promotions are made a week after they might have been made, the persons being qualified and the positions being open, that does not alter the effective date of the promotion.[4] The power to make the promotion is entirely within the discretion of the promoting officer.

Promotion is usually an act of administration, and the legislature may not designate, either by name or in effect, any particular person for promotion. To do so would be to violate either the provisions on special legislation or those on the civil service.[5]

Promotion, of course, is subject to any statutory rules that apply to it, and to any applicable administrative regulations that are validly made. Whether or not promotions must be permanent depends upon the phraseology of the statute. A temporary promotion may be made if authorized by statute.[6]

Persons entitled to promotion are entitled to it only because the law so provides. The class may include substitute workers as well as regular permanent workers,[7] again depending upon the statute.[8] Under a statute requiring that the chief of police be chosen from members of the police department, it was held not fatal that the member appointed to the office had served as lifeguard for a portion of each year, since he did so under orders as a member of the police force and therefore never lost his status as a member of the force.[9] The rules may be formulated in such a way that they apply to persons who formerly held the higher position as well as to those who are to be appointed to it for the first time.[10]

[2] 29 Ops. Atty. Gen. 254 (1911).
[3] 27 Dec. of Comp. 409 (1920). See 7 Dec. Comp. Gen. 721 (1927).
[4] 3 Dec. Comp. Gen. 517 (1924).
[5] Barlow v. Berry, 245 N. Y. 500, 157 N. E. 834 (1927).
[6] 9 Dec. of Comp. 11 (1902).
[7] 1 Dec. Comp. Gen. 349 (1922). [8] 2 Dec. Comp. Gen. 586 (1923).
[9] Wilentz v. Jernee, 13 N. J. Misc. 138, 176 Atl. 725 (1935).
[10] 4 Dec. Comp. Gen. 439 (1924).

B. Qualifications for Promotion

Promotion need not be made upon the basis of seniority alone unless the statute specifically requires it. Seniority and merit are not necessarily synonymous, and it is merit that is required under most civil service laws. ". . . we cannot substitute our own judgment for that of the officials charged with the public duty by the mere circumstance that prosecutor had been a police officer for a few years longer than those advanced. As between those in the same class of service, merit cannot be easily determined by the bare written record. Certainly, the legislature could not have intended, because they did not so say, that years of service should be the sole criterion. They provided that merit should be considered also." [11]

Statutes sometimes require that promotion shall be from those in the next lower rank. When this is required and when examination is to serve as the basis for promotional selection, the commission may not certify for promotional appointment the name of a person who has taken the examination for original entrance into the service but who has never been appointed to the service. The examination must be offered to those already in the service.[12]

"All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination" is a typical statutory statement. Under this provision it was held that those in the next lower group in the same line of work were to be preferred, even though the members of a much lower group in the same line of work made much higher grades in the examination.[13]

If the statute describes the class from which promotion is to be made, the commission may not restrict a promotional examination to the members of a subdivision of that class.[14] The courts will exercise their own judgment as to what constitutes the statutory class described in the law.

In a promotional appointment, just as in an original one, the appointing officer is entitled to rely upon the certification of candidiates by the civil service commission. If the commission has failed to compute the experience ratings of the candidates when it should have done so, that fact cannot be used by the commission as the basis for refusing to sign a payroll for the persons. That the wrong officer made up these ratings should not be permitted to disturb the appointment.[15]

[11] McBride v. Bloy, 13 N. J. Misc. 136, 176 Atl. 675 (1935).

[12] People v. Finn, 238 Ill. App. 17 (1925).

[13] People v. Frazier, 219 Ill. App. 234 (1920). See State ex rel. Hoskins v. Ohio Board of Administration, 92 Oh. St. 457, 111 N. E. 283 (1915).

[14] People ex rel. Fowler v. Moskowitz, 175 A. D. 710, 162 N. Y. S. 453 (1916), affirmed, 220 N. Y. 669, 116 N. E. 1067.

[15] People ex rel. Joyce v. Schirmer, 253 A. D. 845, 1 N. Y. S. (2d) 740 (1938).

A civil service rule provided that "promotions in the classified service shall be based on ascertained merit and seniority of service, and shall be made from rank or grade . . . in the same line or character of work to be determined by the commission, and shall be made upon voluntary competitive examination." When the position of assistant superintendent of streets fell vacant, the contention was made that the examination should be open only to the ward superintendents of streets because they were the next in rank. There were some positions that were classified between the vacant position and that of ward superintendent, so that the salary differentials were quite large, but the court held that classification here must not only take salary into account, but must consider the "same line of work" as well.[16] In this case the question was also raised whether a court will review the implied determination of a civil service commission that a promotional examination is not practicable. The court decided that the better procedure for the commission to follow is to hold such an examination; then, if the results prove unsatisfactory, it will have better grounds upon which to decide that the position should be filled otherwise than by promotional examination. The court said that such a determination would be subject to judicial review.[17]

Sometimes promotion is partly based on efficiency ratings. If so, a person may not be promoted on the day he receives his original appointment, because at that time he could not have had an efficiency rating.[18] Statutes providing for increases in compensation or for promotions upon the basis of efficiency ratings are interpreted so as not to make them automatic if there is any room for such an interpretation.[19]

The officer who makes the efficiency ratings may express his opinion frankly; even his use of such a word as "stupid" does not furnish a cause of action for damages for libel.[20] This freedom from liability in the expression of an honest opinion is essential to the use of efficiency ratings in an administrative service. It must be remembered that these ratings seldom constitute the sole basis for promotion; and while it should be possible for an aggrieved person to have his rating reviewed by some committee or tribunal in the service if he feels that it is demonstrably unfair, such a review should be furnished by an administrative tribunal rather than by a regular court. Review through an action for libel is properly discouraged.

Efficiency ratings cannot be given to a person when he is on leave of absence, and ratings so given cannot serve as the basis for promotion.[21]

[16] People v. Errant, 229 Ill. 56, 82 N. E. 271 (1907).
[17] People v. Errant, *supra*, note 16.
[18] 8 Dec. Comp. Gen. 47 (1928).
[19] 7 Dec. Comp. Gen. 721 (1928).
[20] Hodgins v. Bingham, 141 A. D. 514, 126 N. Y. S. 493 (1910).
[21] 10 Dec. Comp. Gen. 102 (1930).

To be acceptable, certification of efficiency ratings must be based upon records that are kept in accordance with statutory or administrative regulations.[22] The civil service commission need not accept ratings based upon irregular records.

Sometimes the statute provides that "meritorious service" shall be one of the factors to be taken into account in promotion. A civil service commission interpreted this phrase to include such commendations and honorable mentions as had been made for individual acts of bravery. The court upheld this interpretation.[23]

Some very real injustices can occur in connection with the application of laws of the type referred to in the preceding paragraph if the routine of awards and of certification is not carried out correctly and promptly. For example, in a New York case [24] the court was confronted with a delay in the award of points for acts of bravery which, if they had been awarded with reasonable promptness, would have given the petitioner a higher standing for promotion. The court held that the points that were before the commission at the time were the only ones that could be considered by it, and that it could not later give the petitioner a rerating that would take into account the delayed report of the proper officer or board. The civil service commission in this instance had a rule that "no examination paper . . . or any record or statement rated as part of an examination, or in connection therewith, shall be subject to review, alteration or rerating after the marks of the examiners have been registered or attested as required hereunder." This rule applied, thought the court, despite the unexplained circumstances of delay. The charter contemplated that the reports should be filed before examination, and though the case was a difficult one, no exception could be made, ruled the court.

A few years ago there was another New York case in which the delay in an award of distinction made a difference to the recipient.[25] The plaintiff had performed an act of heroism for which he received a medal. However, the medal was awarded him after he had taken a promotional examination, the delay in this case exceeding the period fixed by the civil service rules for examining and reporting on acts of heroism. The court nevertheless followed and extended the rule in the Beck case, discussed in the preceding paragraph, holding that the civil service commission acted correctly upon the record before it, and that since it acted upon that record, no subsequent action would lie to reconsider the earlier determination.

[22] People ex rel. Steele v. McGuire, 139 A. D. 680, 124 N. Y. S. 552 (1910).
[23] Morris v. Baker, 49 Misc. 440, 99 N. Y. S. 957 (1906).
[24] Matter of Beck, 135 A. D. 156, 119 N. Y. S. 1028 (1909).
[25] People ex rel. Walsh v. Kaplan, 134 Misc. 131, 234 N. Y. S. 159 (1929).

A charter provided that "individual acts of bravery may be treated as an element of meritorious service in such examination [for promotion], the relative rating thereto to be fixed by the municipal civil service commission." Under this it was held that the acts of heroism could be considered only for the next higher position to which the person could be promoted, not for the second or third higher position to which he might later be promoted. The statute could authorize this successive consideration, but unless it did so, the court could not permit it.[26]

The requirement that a person shall have been in the service for a given length of time in order to be eligible for promotional examination is a common one. Sometimes a date is fixed prior to which service will entitle one to admission to the examination. When the words "shall have been in the . . . service prior to July 1, 1920" are used, they mean that if the person was in the service before that date he is entitled to take the examination, even though since that time he may not have been in the service at all.[27] This situation arises in some cases in which preference is granted to veterans who have been members of the service for a year or more.

Because the statutes tend to be general rather than detailed and specific upon the subject of promotions, the civil service commissions are left with quite wide discretion in imposing conditions and qualifications for promotional examination. A civil service regulation provided that "examination for promotion shall be ordered as often as may be necessary to meet or anticipate the needs of the higher grade, and so far as practicable shall be held periodically. Except where otherwise provided by law, such examination shall be open, in each case, to all persons who shall have served with fidelity for not less than six months, in positions of the same group or character, in the grade next lower, in the same department, office, or institution." The imposition of a six months' term of service as a qualification for admission to the examination was held to be reasonable under the statute, and constitutional.[28]

Another regulation provided that an examination for the recently created position of deputy fire chief in a village should be open not only to members of paid fire departments generally, but to both paid and volunteer firemen in the village. The court sustained this rule. An age minimum of thirty years and a maximum of forty years were thought to be questionable, but the court refused to disturb them.[29] In each case the courts will examine into the reasonableness of the conditions required for admission to the examination, and if they are arbitrary, will set them

[26] People ex rel. Burns v. Baker, 124 A. D. 565, 108 N. Y. S. 969 (1908).
[27] McCarthy v. Civil Service Commission, 95 Cal. App. 749, 273 Pac. 98 (1928).
[28] Matter of Ricketts, 111 A. D. 669, 98 N. Y. S. 502 (1906).
[29] Matter of Bridgman v. Casse, 157 Misc. 8, 283 N. Y. S. 226 (1935).

aside.[30] In general, however, the courts permit rather broad discretion to be exercised by the civil service commissions.

Examinations are not required, of course, for every promotion. They are required when practicable, in most instances, just as for original appointment. Most courts would probably not be willing to hold with the court which decided that approval of a payroll for a person appointed to a higher position was the equivalent of a finding that an examination was not necessary for promotion to the position, inasmuch as no examination had been given.[31] Practicability is a matter of law and will be passed upon by the courts, though not in a taxpayer's action.[32]

The failure of the commission to classify a position may mean that it can be filled without a promotional examination.[33] This situation may occur often in the period of adjustment during which a merit system is being introduced, because if the service is extensive, it takes many months to complete the classification of positions.

It is for the civil service commission rather than for the appointing officer to decide who shall be admitted to the examination. Of course, the better practice in actual administration is for the personnel agency to consult with the appointing officers, but the final decision is the commission's.[34]

In the absence of any restrictive statute, the commission may require that the examination be either competitive and open or noncompetitive, as it thinks best.[35] It may give weight to seniority, or to any other factors that are pertinent to the ascertainment of fitness and merit, and it has even been held that it may require the examination to be given before rules have been formulated for promotion, though this seems a somewhat dubious holding.[36] If the examinations are to include tests of physical fitness "when appropriate," it is for the civil service commission to decide whether the tests are appropriate and necessary.[37]

Notice of promotional examinations must be given, just as for original examinations, and it must be given a reasonable time before the examinations are held. Twenty-four hours is too short a period in which to require everyone to prepare for a promotional examination. The court may find that the same length of time applies to the notice for promotional examination as to that for original examination.[38]

[30] People ex rel. Kennedy v. Feldman, 179 A. D. 295, 166 N. Y. S. 375 (1917).
[31] State ex rel. v. Kansas City, 213 Mo. App. 349, 257 S. W. 197 (1923).
[32] Kelty v. Kaplan, 205 A. D. 487, 199 N. Y. S. 337 (1923).
[33] Matter of Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655 (1903).
[34] Timmins v. Civil Service Commissioners, 276 Mass. 142, 177 N. E. 1 (1931).
[35] Haub v. Tuttle, 80 Cal. App. 561, 251 Pac. 925 (1927).
[36] Cook v. Civil Service Commission, 160 Cal. 589, 117 Pac. 662 (1911).
[37] Maxwell v. Civil Service Commission, 169 Cal. 336, 146 Pac. 869 (1915).
[38] People ex rel. O'Hara v. Neville, 58 Misc. 279, 109 N. Y. S. 640 (1908).

A statute which provides that "due credit" shall be given to experience does not justify giving additional points to the ratings of those applicants who have served temporarily in an emergency bureau and not to other applicants with other types of experience. If interpreted to authorize such a practice, the New York court felt that the statute would be contrary to the civil service provision in the constitution of that state.[39]

C. What Constitutes Promotion?

The problem of what constitutes a promotion has given rise to some difficulty. Not every change of duties is a promotion; also a promotion may take place without a change of duties.[40] A change of work may be a reduction in rank as well as an elevation. A change from one position to another may be permissible on the ground that they both involve the same type of qualifications, in which case no promotional examination is necessary.[41] The problem of promotion may arise even in the labor class, because some labor may be in the classified service.[42]

A detail or assignment to a higher position for the purpose of temporarily performing the duties thereof does not bring with it the compensation of the higher position and does not involve a promotion to it.[43] A person who serves in such a capacity for a few months and who is later promoted to it permanently may not count the months served on such detail as part of his service in the higher position if later he wishes to be promoted to a still higher one.[44] Some danger of abuse inheres in the practice of assigning a person from a lower rank to perform the duties of a higher position, and some laws reflect the apprehension of this danger when they forbid the payment of salaries to persons doing the work of others in violation of the statute. For example, one law contained this section: "If the state civil service commission or any municipal civil service commission shall find that any person has been transferred, assigned to perform the duties or reinstated in violation of any provision of the civil service law or of the rules adopted thereunder, it shall so notify the comptroller . . . thereof and thereafter such officer shall not draw . . . any warrant on the treasurer or other disbursing officer for the payment of salary or compensation to any such person." This has been held not to apply to a situation in which a person in the lower ranks was assigned to the duties of a higher position that had fallen vacant.[45] The courts are

[39] Sheridan v. Finegan, 166 Misc. 920, 2 N. Y. S. (2d) 183 (1938).
[40] 26 Ops. Atty. Gen. 522 (1908).
[41] People ex rel. Rudd v. Cropsey, 215 N. Y. 451, 109 N. E. 550 (1915).
[42] See 30 Ops. Atty. Gen. 10 (1913); 27 Ops. Atty. Gen. 520 (1909).
[43] 4 Dec. Comp. Gen. 126 (1924).
[44] Moran v. Baker, 49 Misc. 327, 99 N. Y. S. 197 (1906).
[45] Matter of Kinney v. Nares, 125 Misc. 435, 211 N. Y. S. 714 (1925).

confronted with a problem of honest intention in cases arising under such a statute. A person assigned to perform the duties of a higher position, and later promoted to it permanently, is not entitled to the higher rate of compensation from the date upon which he began his work in the higher position, but only from the date of his promotion.[46]

The mere addition of duties to a position and an increase in compensation do not automatically constitute a promotion. Unless the added duties are different in kind, the position is the same as before. A change in title may not be significant if no change is made in the kind of work. Changing the amount of work, in the absence of anything else to show an intention to create a new position, does not create a new position.[47]

The detail or assignment of a person to perform the duties of a position on a temporary basis is to be distinguished from a regular transfer to the position. Transfers from one position to another are provided for under civil service laws, subject to restrictions contained in the statutes and in civil service regulations. But a transfer must be scrutinized to make certain that it is not a method of evading the rules governing promotion.[48]

A transfer from a position that paid nine hundred dollars to one that paid twenty-five hundred dollars, followed shortly by another transfer to the position of superintendent of the division at twenty-five hundred dollars, was sufficient to put a court on guard for an evasion of the promotional rules. When, in addition to this, the fact appeared that the transferred person was seventh on the list of eligibles for promotion, the court held that the case was a clear one.[49] The transfer to a higher position generally can be made only through the regular promotional channels.[50] A transfer that can be made to another position in the same salary range is not a promotion, even though the salary is higher. It is the range that is important.[51]

A statutory statement that "all original appointments shall be made to the rank of substitute railway postal clerks" has been held not to forbid transfers to the classes of clerks affected from other comparable positions; and when such transfers are made, the applicable salary rules are not those on original appointment but those on transfer.[52]

Efficiency ratings are sometimes used as the basis for increase in compensation as well as for promotion. When there is only one person in a

[46] 6 Dec. Comp. Gen. 133 (1926).
[47] McArdle v. Chicago, 172 Ill. App. 142 (1912).
[48] 4 Dec. Comp. Gen. 741 (1925). See 29 Ops. Atty. Gen. 313 (1912).
[49] Hale v. Worstell, 185 N. Y. 247, 77 N. E. 1177 (1906).
[50] People ex rel. Campbell v. Partridge, 89 A. D. 497, 85 N. Y. S. 853 (1903), affirmed, 179 N. Y. 530, 71 N. E. 1136.
[51] State ex rel. La Grave v. Seattle, 111 Wash. 340, 190 Pac. 908 (1920).
[52] 7 Dec. Comp. Gen. 295 (1927).

grade, no comparative rating can be made, but the administrative determination of the employee's efficiency may be high enough to entitle him to a compensation two or three levels higher in the grade. Under these circumstances he may be given any rate of pay within the grade, even the highest, without going through the successive salary levels.[53]

D. Promotion and Increase in Salary

Promotion and increase in salary have no necessary connection with each other; often, however, they are related, and the courts find it necessary to scrutinize them because of the possibility that an increase in salary may be used to accomplish one of the most desirable results of a promotion and accomplish it in evasion of the rules. Not every increase of salary constitutes a promotion; it is common for a person to be entitled to several levels of compensation within a single grade. Differences in the legal rules that apply to increase and promotion are to be found among the various services. In the national service, for example, it is common to find the ruling that a promotion may not be retroactive in effect, but that an increase in salary may be.[54]

The law or the regulations, of course, may provide for or permit a transfer or promotion to be made without a competitive examination; in such a case, the rules that apply to salary increases may not differ materially from those that apply to promotion.[55] But in general a raise to a salary that is above the salaries for the grade is regarded as constituting a promotion. A statute sometimes recites that an increase to a salary above those for the grade shall be deemed a promotion and expressly forbids an increase except in accordance with the applicable rules on promotion.[56]

In one case a person had been holding a position for several years when its title was changed in the appropriation act. Under the new title he received salary increases which brought him above the grade in which the first position was placed. He was later discharged, and on a petition for mandamus to reinstate, it was contended that the first position had been abolished and that the second was not in the classified service. The court held, however, that the petitioner had been promoted. The change in title had no significance so far as abolishing the old position was concerned. The petitioner had been promoted, not legislated out of a position; and the duties remaining the same and the payroll having been approved, it must be taken that a finding was implied to the effect that no examination was necessary for the promotion. This, of course, was a twisting of

[53] 4 Dec. Comp. Gen. 77 (1924).
[54] 3 Dec. Comp. Gen. 924 (1924).
[55] State ex rel. Caire v. Board of Commissioners, 174 La. 516, 141 So. 46 (1932).
[56] People ex rel. Gilhooly v. McAdoo, 108 A. D. 1, 95 N. Y. S. 400 (1905).

promotional law in order to square the law governing discharge with the requirements of justice in the individual case, as the court saw it.[57]

The requirement of a promotional examination is not dispensed with merely by showing that the person who was promoted without an examination, by means of salary increases, entered the service at a time when there were no restrictions upon the salaries that could be paid for that kind of work.[58] The section of the civil service law that was applicable to this case is illustrative and shows the detail which some sections on this subject contain. "For the purposes of this section an increase in the salary or other compensation of any person holding an office or position within the scope of the rules in force hereunder beyond the limit fixed for the grade in which such office or position is classified shall be deemed a promotion . . . nor shall any person be promoted or transferred to a position for original entrance to which there is required by this chapter or the rules an examination involving essential tests or qualifications different from or higher than those required for original entrance to the position held by such person, unless he shall have passed the examination or attained a place upon the eligible list for such higher position."

A distinction must be drawn, apparently, between the fixing of salaries for a position or grade in general, as a part of the task of classification, and the increases in salary paid to a particular incumbent. The former may be valid and the latter invalid, depending upon the particular circumstances.[59]

The power to classify may be vested in the civil service commission and the power to fix salaries in another body, such as a board of education for employees in the department of education. In such a case the power of the board of education to establish automatic salary increases is restricted by the classification established by the civil service commission. A person can no more be given an increase in salary over that of his class by the automatic scale method than he can receive it as a matter of discretion applied to his individual case.[60]

One court, in explaining the operation of the rules applicable to promotion on the question of increases in salary made by an administrative body having the power to determine salaries, said that classification by the civil service commission does not act as a veto upon the power to fix salaries, but merely establishes the conditions under which the increases

[57] State ex rel. v. Kansas City, *supra*, note 31.

[58] People ex rel. Perrine v. Connolly, 170 A. D. 917, 154 N. Y. S. 1139 (1916), affirmed, 217 N. Y. 570, 112 N. E. 579.

[59] People v. Creelman, 148 A. D. 890, 134 N. Y. S. 1142 (1911), affirmed, 205 N. Y. 589, 98 N. E. 1112.

[60] Ryan v. Kaplan, 240 N. Y. 690, 148 N. E. 760 (1925).

in salary can be obtained if those increases go beyond the salary range for the grade.[61]

When a position is ungraded, a raise in salary is not the equivalent of a promotion, and no examination is required, even though the position is in the classified service.[62] An increase in salary was held not to be a promotion when the holder of a position took the examination for grade four, received a salary below that fixed for the grade, and was later raised to the maximum salary for grade four. That is, the increase in salary while still within the grade to which he had been appointed did not violate the rules on promotion.[63]

In the national government, or in any jurisdiction in which the officer having the power to pass upon proposed expenditures passes upon payroll items for personal services, that officer may serve to ensure enforcement of the rules governing promotions and increases in salary.[64] The reports of the comptroller general of the United States contain numerous illustrations of the exercise of this power.

A person may be reduced to a lower salary without a change of position. If this is done with his consent, so that no problem of removal, suspension, or reduction in rank or pay against his will intervenes to complicate the situation, the action is regarded as a transfer rather than as a demotion.[65]

E. Promotional Procedure

The examination for promotion results in an eligible list, just as in original examination, and the rules governing certification in original appointment usually apply in promotion. The rights that exist under an eligible list from which promotions are to be made must be claimed while the list is in force, not after it has expired. The idea behind this ruling seems to be that of laches — sleeping on one's rights.[66]

An appointment to a higher position often carries with it a probationary period preceding permanent status. This involves a certain element of risk because the person who has left his original position may prove unsatisfactory in his new one. If he is removed or laid off for lack of funds, his status, unless saved by a statute, may be only that of a typical probationer.[67] In some instances specific cognizance is taken of this situation in the law or in the regulations, and some provision is made for return

[61] O'Malley v. Board of Education, 160 A. D. 261, 145 N. Y. S. 645 (1914).
[62] People ex rel. Stokes v. Tully, 47 Misc. 275, 95 N. Y. S. 916 (1905).
[63] People ex rel. Lodholz v. Knox, 58 A. D. 541, 69 N. Y. S. 602 (1901).
[64] 6 Dec. Comp. Gen. 161 (1926).
[65] 4 Dec. Comp. Gen. 104 (1924).
[66] People ex rel. Walter v. Kaplan, 117 Misc. 257, 192 N. Y. S. 105 (1921).
[67] Fish v. McGann, 107 Ill. App. 538 (1903), affirmed, 205 Ill. 179, 68 N. E. 761.

to the eligible list, for preference in appointment, or for return to the original position held by the promoted person. It is difficult to work out a compromise between the risk accompanying ambition and the security of remaining in the original position. It has been held that a preference in appointment given to persons who have served a year in a permanent position does not extend to one who has served in several permanent positions, but for only a short while in each, less than one year in the aggregate, and who has been laid off from each of them because of lack of funds.[68]

Abolition of the position to which he has been promoted is one of the risks taken by the person accepting promotion. He is not entitled to his old position unless the statute saves his rights to it. Neither does the rule that removals are to be in the inverse order of original appointment help him. He was *originally* appointed to the new position, and it is the date of that appointment which governs. He gains no preference for lower positions by such a provision and cannot claim a position in the lower class if the position is occupied.[69]

Promotions and salary raises are usually held to be prospective in nature unless there is something in the law that requires a contrary conclusion. Sometimes the statute makes them retroactive, and when it does the civil service commission and the administrators have no discretion in the matter.[70] When a salary increase or a promotion is subject to the approval of a different officer from the one who takes the initiative in granting it, that approval may operate to make the promotion effective as of the date when it was first made.[71] The time at which a promotion takes effect is ordinarily governed by the same rules that govern the date of the original appointment. The requirement of an oath, the entrance upon the duties of the position, the date of the signing of the commission may all be factors to consider, either singly or together.[72]

When a person is appointed to a position on condition that he is to receive no increase and later an increase is given, the increase is prospective in effect.[73] When a salary increase depends upon the reallocation of a position, the effective date of the increase is the effective date of the reallocation, and the statute governing reclassification will have to be consulted to settle the question of that effective date.[74]

The remedies that are available to compel the recognition by the civil

[68] Rodgers v. Board of Public Works, 274 Pac. 1034 (Cal. App. 1929).
[69] Shepherd v. Greene, 153 Misc. 289, 274 N. Y. S. 211 (1934).
[70] 6 Dec. Comp. Gen. 286 (1926).
[71] 4 Dec. Comp. Gen. 957 (1925).
[72] 7 Dec. Comp. Gen. 96 (1927).
[73] 24 Dec. of Comp. 356 (1918). Cf. 1 Dec. Comp. Gen. 349, 355 (1922); 2 Dec. Comp. Gen. 515 (1923).
[74] 6 Dec. Comp. Gen. 758 (1927).

service commission of the rights of a person claiming to have been denied them are the same in cases involving promotion as in cases involving other breaches of civil service laws that confer rights upon individuals and impose duties upon the commission. Mandamus is the usual remedy whereby to compel the certification of one's name for promotion, just as it is the remedy to compel the certification of it for an original appointment, and the writ is governed by the common law rules and statutory modifications of it in the particular state. For example, if the statutes on appeals provide that cases shall go through one hierarchy of courts rather than another, that is true of mandamus, since it is a writ that presents a "civil case." [75]

F. Veterans' Preference

Preference is sometimes given to veterans in promotion as well as in original appointment. The tendency is to restrict the preference to original appointment unless the statute expressly or by strong implication extends it to promotion.[76]

A preference statute provided that "in such promotions such person or persons shall be given an additional credit in the promotional examination of one and one half per cent for each six months or fraction thereof of such military or naval service; and provided further that such additional credit shall not be computed so as to increase or decrease the rating allotted to any person competing in such examination for ascertained merit or seniority. And provided further that no person shall be given such additional credits in the promotional examination for more than eighteen months of such military or naval service." The eligible list in question had been established before the enactment of this statute. Did the statute affect only examinations to be given in the future or did it also affect existing lists? The court held that the law should be given prospective operation only, and not be applied to lists that were established at the time of the enactment of the law.[77]

A bonus of twenty per cent in examination grade was granted by an Ohio statute creating a preference for veterans. The bonus was provided for in the portion of the act dealing with original examinations. Another provision of the law stated that "vacancies in positions in the classified service shall be filled so far as practicable by promotion. The commission shall provide in its rules for keeping a record of efficiency for each employee in the classified service, and for making promotions in the classi-

[75] O'Brien v. Frazier, 299 Ill. 325, 132 N. E. 434 (1921).

[76] In re Brown, 60 Hun 98, 14 N. Y. S. 450 (1891). See McGuire v. Byrnes, 50 Hun 203, 2 N. Y. S. 760 (1888).

[77] O'Brien v. Frazier, 228 Ill. App. 118 (1923).

fied service on the basis of merit, to be ascertained so far as practicable by promotional examinations, by conduct and capacity in office, and by seniority of service; and shall provide that vacancies shall be filled by promotions in all cases where, in the judgment of the commission, it shall be for the best interest of the service to fill such vacancies. All examinations for promotions shall be competitive. In promotional examinations efficiency and seniority in service shall form a part of the maximum mark attainable in such examination . . . The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations, except as otherwise provided herein." The court held that the bonus of twenty per cent applied to original examinations only, not to promotional examinations. The use of the word "herein" in the last sentence quoted above was held to refer only to the particular section and not to the whole statute.[78] The court restricted the use of the bonus in accordance with the general rule of statutory construction that a special preference in a statute is to be given a strict rather than a liberal interpretation against those who claim it.

II. TRANSFER

The problem of transfers and their relation to promotion has been touched upon in the preceding section. A transfer is usually thought of as moving or changing a person from one position to another within the same general level of the classified service, but in different departments or branches. Transfer is usually within the classified branch, rather than from an unclassified position to a classified one. The reason for this is clear; if it were otherwise, the problems of promotion and demotion might be involved, and the principle of competition evaded. This is not to say that a transfer is always to exactly the same kind of a position, nor that exactly the same salary will attach to the two positions. The same salary range is all that is required.[79] Transfer may either be made with the consent of the person transferred and the consent of the officers from whose division the person is being transferred and to whose division he is being sent, or it may be made without the employee's consent. In addition, the consent of the civil service commission may be required. The conditions upon which transfers may be made, of course, are governed first by statute and second by civil service regulations.[80] The civil service commission usually has some discretion in transfers. But the approval

[78] State ex rel. Schmidt v. Harter, 43 Oh. App. 503, 183 N. E. 389 (1932).

[79] State ex rel. La Grave v. Seattle, *supra*, note 51.

[80] See the interesting problem and points of view to be found in People ex rel. Kelly v. Milliken, 201 N. Y. 545, 95 N. E. 1137 (1911).

of a transfer to a higher position does not constitute a reclassification of the position and cannot be upheld upon that ground.[81]

In a reorganization or reallocation of positions within a service it may happen that the duties of a position are redefined and the position reclassified. In such a situation a person may actually be reappointed, and the appointment must be consented to by the civil service commission before it is valid as a transfer.[82]

Transfer is not the same as detail or assignment of a temporary nature. A detail, of course, is governed by statutes and regulations and may be made only when it is authorized by law. Such an authorization is usually given in broad statutory language or in an executive order, but some authority must be shown before the detail can be made.[83] The legal effect of a detail is not the same as that of a transfer. A person who is detailed from one position to another does not hold the position to which he is detailed. If that position is reclassified, the one detailed to the position receives none of the benefits of the change.[84] For example, if a member of the police force is detailed to serve in the telegraph bureau and the members of that bureau are given a higher ranking, the patrolman under detail retains his original ranking.

The adjustments to be made between departments when the services of an employee of one department are loaned to another are determined by the rules of law governing the relations between departments. Such a loan is for all practical purposes like a detail.[85] Statutes may also govern the payment of traveling and other incidental expenses pertaining to a detail.[86] It is important, of course, whether in detail or in transfer, to make certain that the arrangements are made in such a way as to retain for the transferred person his status in the civil service. If he is out of the service he may lose traveling expenses and other allowances or perquisites.[87] The definitions of the departments and services to be included in transfer statutes or regulations are important.[88]

Transfer to a lower position, at least in the national government, may not amount to a demotion if the persons who are transferred request or consent to it.[89]

[81] Winslow v. Bull, 97 Cal. App. 516, 275 Pac. 974 (1929).
[82] 5 Dec. Comp. Gen. 560 (1926).
[83] 26 Dec. of Comp. 214 (1919).
[84] People ex rel. Murphy v. Bingham, 130 A. D. 112, 114 N. Y. S. 702 (1909), affirmed, 196 N. Y. 519, 89 N. E. 1109.
[85] 23 Dec. of Comp. 242 (1916).
[86] 23 Dec. of Comp. 430 (1917).
[87] 5 Dec. Comp. Gen. 1025 (1926).
[88] 27 Ops. Atty. Gen. 421, 425 (1909); 27 Ops. Atty. Gen. 100 (1909); 34 Ops. Atty. Gen. 192 (1924).
[89] 4 Dec. Comp. Gen. 150 (1924).

Under the Classification Act of 1923 it has been held that temporary employees in the unclassified service, when transferred to positions that are subject to classification, are to be considered as new appointees for purposes of salary.[90]

It is quite usual for the civil service commission to be vested with some discretion in the matter of deciding whether a transfer shall be permitted, even though the affected administrative officers are agreeable to the transfer. It is within the authority of the commission to decide whether the two positions are "similar" in nature and in the qualifications required for the effective performance of their duties. This discretion will not be interfered with lightly by the courts upon petition to compel transfer by the civil service commission.[91]

As is the case with so many problems in civil service law, a transfer often raises a question of classification. When transfers are to be made to "similar" positions, the question may arise whether the two positions carry similar duties, similar compensation, and similar privileges. There is no requirement that the duties, compensation, or privileges be identical, but they must have sufficiently common elements to make it possible to classify them on fundamentally the same bases. For example, "social service work" may cover inspectors and nurses; and if the salary differential does not complicate the problem, it may be permissible to transfer an inspector to the position of nurse, both being in "social service work."[92]

But it has been held that the positions of fireman and engineer in a water plant were not sufficiently similar to satisfy the transfer requirements, even though a veteran's rights to transfer were involved.[93] The courts tend to look at common examinations for positions as one evidence of similarity of duties and qualifications.

A statute provided that "if the position so held . . . shall be abolished . . . the said . . . soldier . . . holding the same shall not be discharged from the public service, but shall be transferred to any branch of the said service for duty in such position as he may be fitted to fill, receiving the same compensation therefore, and it is hereby made the duty of all persons clothed with power of appointment to make such transfer effective." This, which is typical of many provisions concerning veterans' preference in transfers to other positions when the positions the veterans hold are either abolished or vacated for lack of funds, was held not to entitle a veteran to a salary in excess of that attached to the lower position to which he consented to be transferred after the position that he formerly held had been abolished, no position being vacant which carried with it

[90] 6 Dec. Comp. Gen. 455 (1926).
[91] Matter of O'Connell v. Clark, 200 A. D. 606, 193 N. Y. S. 647 (1922).
[92] Craighan v. O'Brien, 199 Cal. 652, 250 Pac. 653 (1926).
[93] In re Owens, 76 Misc. 610, 137 N. Y. S. 308 (1911).

as high a rate of pay as had his former position.[94] A statute of this type does not require the head of a department to discharge a nonveteran in order to create a vacancy for a veteran who has been deprived of his position by virtue of its abolition.[95] All that it requires is that the veteran shall be given work if there is work to be given him.

Occasionally a person who is transferred claims that he was misled or duped into thinking that he was being transferred to a position that was more desirable than it turned out to be. A transferred employee may even charge that fraud was practiced upon him in order to get him to consent to a transfer and that later the position to which he was transferred was abolished and his status lowered or ruined. The courts usually require rather clear and convincing proof that such has been the case before they give relief to the complainant. General and vague allegations that prove to be based upon strained personal relations or upon personal incompatibilities are not sufficient to support a claim for relief.[96]

A transferred person does not lose his status under the removal provisions if he remains in the protected service.[97] Once completed, a transfer cannot be denied by a new department head.

The comptroller general of the United States has finally decided that a transfer is not a new appointment for purposes of compensation. Apparently the rule is that instead of being forced to receive the minimum rate of pay attached to the position, such as a new appointee would receive under the classification act, a transferred person may receive that rate of pay which is comparable to that he left and which is within the range prescribed for the position to which he has been transferred.[98]

The eligible list from which certification must be made to the appointing officer who has the power to fill a position changed from one schedule to another is the list prepared for positions in the schedule to which the position in question has been transferred.[99] Positions as well as individuals may be transferred, although a change in positions is usually thought of as a change in classification rather than as a transfer. A person transferred from one department to another and from one exempt position to another like it does not need to obtain a rating on a competitive examination for the position when the statute provides that positions shall be filled by competitive examination, except positions that are "filled by promotion, reinstatement, transfer or reduction."[100]

[94] Matter of Pettis v. Brearton, 145 Misc. 913, 261 N. Y. S. 55 (1932).
[95] Clancy v. Halleran, 263 N. Y. 258, 188 N. E. 746 (1934).
[96] Butler v. Directors of Port, 222 Mass. 5, 109 N. E. 653 (1915).
[97] Allen v. New York, 120 A. D. 539, 104 N. Y. S. 919 (1907).
[98] 9 Dec. Comp. Gen. 71 (1929). Cf. 4 Dec. Comp. Gen. 492, 498 (1925).
[99] People ex rel. Carroll v. Civil Service Board, 5 A. D. 164, 39 N. Y. S. 75 (1896).
[100] Matter of Peters v. Adam, 56 Misc. 29, 106 N. Y. S. 158 (1908), affirmed, 190 N. Y. 567, 84 N. E. 1118.

III. LEAVE OF ABSENCE

Although the general body of law on the subject of leaves of absence is quite extensive, the case law is not. The bulk of materials in this branch of the law consists of rulings by various law officers and decisions or opinions by financial and personnel agencies. So far as they concern states and local governmental units, these materials have not been included to any large extent in this work.

Leaves may be leaves of absence, with or without pay, or leaves for illness, better known as sick leaves. Leaves of absence are often mentioned in statutes or in charters dealing with civil service, and it is quite usual for the law to vest the chief administrative officers or the personnel body, or both, with power to prescribe rules for both leave of absence and sick leave. Some statutes prescribe the rules that are to be applied, but more commonly the details of this subject are left to civil service or administrative regulations. In the absence of statute, it appears that an administrative chief, under his general administrative power to supervise and direct his department by regulation, may provide for leaves. Unless granted by law, leaves are not matters of right so far as the employee is concerned, but matters of grace. If leave is provided for by statute, the law may be phrased in such a way as to make it a matter of right. The legal theory of a leave is apparently that it promotes the efficiency of the employee to give him some time off, whether he is well or ill. Upon this theory, compensation may be given him during the period of the leave. However, if the leave is not a matter of right, but one of discretion, then it follows from this same theory that if the employee gets no leave, no claim can be made for compensation for an unused portion of the leave upon separation from the service.[101] The personnel body may be given some control over leaves through the requirement that persons obtaining leave must be employed in compliance with civil service regulations.[102]

A statutory provision that leaves "may be granted" allows discretion in the granting of them. It is a fair exercise of the discretion thus vested in the officer to impose a condition upon a leave that if it is taken during the first six months of the year for which it is to accrue, and instead of coming back to work, the employee takes a leave without pay for the second six months, he shall suffer a deduction later for the amount of the leave taken which would have accrued for the second six months if he had returned to work and served out that period.[103]

[101] 13 Dec. Comp. Gen. 179 (1933). Cf. 7 Dec. Comp. Gen. 198 (1927). Example of departmental regulation, 4 Dec. Comp. Gen. 69, 161 (1924).

[102] 4 Dec. Comp. Gen. 650 (1925).

[103] 22 Dec. of Comp. 103 (1915).

The problem of leave for temporary employees has caused some difficulty, especially as some temporary employees remain in the service for quite a long period. Leaves for temporary employees seem not to be favored, and statutes and regulations are generally interpreted against rather than in favor of them. Thus a statute which specifies leaves for those who have served twelve consecutive months or more does not entitle a temporary employee to a leave, even though he has served more than the twelve consecutive months.[104] For this purpose temporary appointments mean those which have not ripened into probationary appointment.[105] A civil service regulation specified that appointments thereunder were temporary and not to be in excess of thirty days unless previously approved by the commission. It was held that persons appointed under this regulation were temporary appointees.[106]

A person who is compensated at an hourly rate may be entitled to leave. For example, a statutory provision that persons in the service shall be paid by the hour or by the year does not mean that the hourly worker is a temporary worker. That he is paid by the hour does not necessarily mean that he is employed by the hour.[107] On the other hand, it may happen that a person who is paid on an annual basis is a temporary worker. A distinction must be drawn between the basis of compensation and the length of appointment or employment, although for many purposes they are closely related.

A service may be temporary even though employment in it may be for a period as long as the life of the project. The worker is not a temporary worker in the usual sense of that term, but is working on a temporary project. In such a situation leaves may or may not be forthcoming, depending upon the statute.[108]

Reorganization may present problems of leaves. In some instances it is necessary to transfer a bureau to another division, and in order to effect the transfer with as little friction as possible with regard to salary adjustments and other factors, it may be wise to terminate all appointments in the bureau and reappoint the incumbents to positions in the new division. The reappointments may be temporary with a view to being made permanent later, but that intent may not materialize. For purposes of leave it makes a good deal of difference whether the holders of these positions are to be deemed permanent or temporary appointees.[109]

Sometimes the scope of the service to which leaves may be extended

[104] 13 Dec. Comp. Gen. 347 (1934).
[105] 4 Dec. Comp. Gen. 17 (1924).
[106] 6 Dec. Comp. Gen. 266 (1926). Cf. 5 Dec. Comp. Gen. 903 (1926).
[107] 4 Dec. Comp. Gen. 51 (1924).
[108] 13 Dec. Comp. Gen. 47 (1933).
[109] 13 Dec. Comp. Gen. 238 (1934).

is problematical. "Employees in the postal service" is not confined to those who work with mail matter and may include janitors. This has been held to be the correct interpretation even though the building used by the postal service is not owned by the government but leased by the post office.[110]

A statute which permits leaves of absence for field exercises or for instruction has been interpreted as not permitting a post office clerk who is a member of the reserve corps to obtain a leave of absence for the purpose of serving as an officer in the Civilian Conservation Corps.[111]

The civil service rules concerning removal in the national government required written notice, and authorized suspension for a period of not to exceed ninety days, but required the filing of the reasons for the suspension at the time it became effective. A civil service employee was on leave, which had been properly granted, and while on leave was suspended. The comptroller general ruled that he was entitled to notice, and that if the order of suspension was revoked prior to the time that such notice had been received, the employee was entitled to compensation otherwise due, without regard to the order of suspension.[112] Under the statutes and rules governing the national postal service the dismissed employee may be restored to duty status in order to have leave granted him, unless he is suspended or removed for an action which violates his oath of office.[113]

It is of considerable importance that care be taken not to appoint anyone to fill the position from which leave is being taken unless it is intended to oust the original holder. A leave of absence does not vacate the position. If either a temporary or a permanent appointment is made to fill the position, the result is to cut off the term of the person who is on leave.[114] Other methods of doing the work must be found if this result is to be avoided.

It is a usual condition that before leave is granted, a certain length of continuous service must have passed. It has been held that the continuity of service is not necessarily broken by a termination of the employee's services when that same person is re-employed the next day. Sometimes such occurrences are incidental to certain administrative procedures or reorganizations, and accordingly are not treated as real breaks in the term of service for purposes of leave.[115]

"To employees . . . who have served less than one year leave of ab-

[110] 5 Dec. Comp. Gen. 477 (1926).
[111] 13 Dec. Comp. Gen. 161 (1933).
[112] 4 Dec. Comp. Gen. 668 (1925).
[113] 7 Dec. Comp. Gen. 757 (1928).
[114] 13 Dec. Comp. Gen. 170 (1933).
[115] 27 Dec. of Comp. 604 (1921).

sence with pay may be granted at the rate of not more than two and one half days a month for the time they have served" implies continuous service; a break in the continuity of service by resignation affects the period of service even though the employee is later reinstated. The date of reinstatement is the date from which the period of service is to be counted.[116]

An employee is entitled to the leave that he is permitted by law to take, and the intrinsic merit of his reason for absence beyond that time does not constitute a legal reason for extending the length of the leave. This rule has been applied to compel a person to take leave without pay when he had used up the leave to which he was entitled, even though he desired to use the time for prosecuting a suit for damages that he had suffered in the course of his official duties.[117]

No compensation can be allowed for a period beyond the expiration of the leave, even though the employee is awaiting the departure of a ship so that the delay is something over which he has no control.[118]

Sometimes a leave of absence without pay, if it is prolonged beyond a fixed period, results in separation from the service. When this is the case, the period of absence without pay cannot be counted as part of the period during which the employee earned leave with compensation.[119]

The statutes sometimes provide for cumulative leave. Under this plan leave which is not taken one year may be added to the leave earned the next year. Usually some limit is placed upon the total amount of cumulative leave. "Employees in the postal service shall be granted fifteen days leave of absence with pay, exclusive of Sundays and holidays, each fiscal year"; that "the fifteen days leave shall be credited at the rate of one and one-quarter days for each month of actual service" does not provide for a cumulative leave. The employee can neither add the unused leave of this year to the next year's leave nor be paid for it.[120]

Some difficult situations arise in connection with leaves when the employee is furnished quarters.[121]

Sick leaves, like leaves of absence, depend largely upon statutes for their authorization.[122] Sick leave may be cumulative if the statute so provides.[123]

As with leave of absence, if a person is appointed to a position while the incumbent is off duty on sick leave, such an appointment terminates

[116] 19 Dec. of Comp. 90 (1912).
[117] 1 Dec. Comp. Gen. 615 (1922).
[118] 7 Dec. Comp. Gen. 130 (1927).
[119] 5 Dec. Comp. Gen. 752 (1926).
[120] 1 Dec. Comp. Gen. 611 (1922).
[121] Cf. 5 Dec. Comp. Gen. 999 (1926).
[122] 4 Dec. Comp. Gen. 772 (1925).
[123] 3 Dec. Comp. Gen. 20 (1922).

the tenure of the latter. One comptroller suggested that a way out of the situation was to ask for the resignation of the person who had exhausted regular and sick leaves and was still compelled to be absent from work, and then to make a new appointment on condition that it be subject to revocation when the sick person returned to work.[124] Some doubt might be raised concerning the legality of such an appointment, but perhaps it is a serviceable device nevertheless.

It is often said that to be entitled to sick leave it is necessary actually to be ill. From this it follows that one who is quarantined but who is not ill himself has no claim to sick leave. This was held to be the rule under a provision that "employees in the postal service shall be granted . . . sick leave with pay at the rate of ten days a year to be cumulative . . ."[125]

A statute providing for disability payments provided also that "if at the time the disability begins the employee has annual or sick leave to his credit he may . . . use such leave until it is exhausted." If the disabled employee is receiving benefits, he may not waive them in order to take sick or annual leave and then return to his benefits, but if he has not received benefits he may exhaust his sick or annual leave.[126]

If the statute or administrative regulation does not impose any condition upon the time the sick leave is to be taken, it may be taken at any time during the period for which it is to run.[127] If the head of the department is not restricted by the statute, he may grant sick leave retroactively, so that it can be made effective even though the employee died while on an absence of a few days and had made no formal application for it.[128]

Leave of absence has been suggested as the proper method of compensating a person who was forced to work a longer day than he should have been. But if he asks for the additional overtime pay instead of asking for the leave, he gets neither.[129]

An Ohio law provided that "with the consent of the civil service commission, the appointing officer may grant leave of absence to a classified employee for a period of not to exceed one year, and upon the expiration of such leave of absence, such officer or employee shall be reinstated. All such leaves of absence granted by appointing officers shall be referred to the commission promptly for approval in order that the civil service status of such absentee may be protected." Plaintiff, a classified servant, was taken ill and granted a leave of absence for one year. The work in the office became pressing, and plaintiff was notified as the end of the

[124] 23 Dec. of Comp. 438 (1917).
[125] 1 Dec. Comp. Gen. 740 (1922).
[126] 4 Dec. Comp. Gen. 5 (1924).
[127] 8 Dec. Comp. Gen. 283 (1928).
[128] 2 Dec. Comp. Gen. 701 (1923).
[129] State ex rel. Mattice v. Seattle, 173 Wash. 42, 21 P. (2d) 288 (1933).

year approached that she must appear for work within ten days or the leave would be revoked. Upon failure to appear, the plaintiff received a notice of discharge. The court held that the civil service commission had the power to revoke the leave and that a failure to appear for work in accordance with the request constituted a resignation.[130] This decision is rendered somewhat doubtful by virtue of a recital in the statute that "absence from duty without leave for any time will be considered good cause for dismissal, absence from duty without leave for ten consecutive days shall be deemed a resignation . . . provided, however, that if at any time within thirty days the person so absenting himself shall make satisfactory explanation to the civil service commission of the cause of absence, he may be reinstated." This seems to indicate that as long as the one-year leave had not expired, the civil service commission was not entitled to revoke the leave. Once validly revoked, the ten-day period would begin to run, of course, but the query is whether the failure of plaintiff to appear came within the provision of the law that absence for that period *without leave* applied here. This, of course, was really answered by the decision on the question whether the leave could be revoked. This places the person on leave in a hazardous position, although the administrative problem due to long leaves is also to be considered. However, it is to be presumed that the administrators considered that when they granted the leave.

When a person has been separated from the service because of illness, he may be entitled to have his name placed upon a special list in accordance with a statutory provision, or he may be reinstated "with the consent of the commissioner upon good cause shown" if the appointing officer wishes him to be so. If the statute is phrased in this way, the employee cannot obtain mandamus to compel his reinstatement, the matter of reinstatement being discretionary.[131] But to be entitled to a place on such a list and to the preference provided for, he must make the proper demand before he resorts to the courts.[132]

One of the problems occasionally encountered in connection with leaves of absence is that presented by repeated requests each year for a leave of absence for that year, the employee working only two or three days each year so as to continue in his status as a member of the classified service. It has been held to be within the legal discretion of the civil service commission to determine that it is not a bona fide return to service to return for purposes of leave. That the practice has been widespread in the service does not alter the legal rule.[133]

[130] State ex rel. Lamb v. Swisher, 112 Oh. St. 707, 148 N. E. 686 (1925).
[131] Dunn v. Commissioner of Civil Service, 279 Mass. 504, 181 N. E. 794 (1932).
[132] Fernandez v. Mayor of New Bedford, 269 Mass. 445, 169 N. E. 438 (1929).
[133] People ex rel. Thornton v. Whealan, 264 Ill. App. 28 (1931).

Chapter VIII

DEMOTION, ABOLITION OF POSITIONS, AND LAYOFF

In the preceding chapter the legal problems connected with the career aspects of the civil service were considered. In this and the following chapters the legal phases of separation from the service will be discussed. The general subject of separation from service is often used to cover demotion, layoff, abolition of office or position, removal, and retirement on pension. There is a difference between retirement in accordance with a fixed schedule, as in a regular pension system, and retirement by way of removal or layoff. Demotion assumes that the person remains in the service, but in a lower rank, and usually at a lower rate of compensation. Retirement on a pension is in a certain sense voluntary; the other types of separation usually are not, although they may be. That is, it is exceptional for them to be voluntary; it is usual rather than rare for retirement on pension to be voluntary. Each of these types of separation from position, class, compensation, or service presents its own legal problems, and each will be discussed separately.

I. DEMOTION AND REDUCTION OF SALARY

The civil service laws in and of themselves do not prevent a reduction in the salary of an employee or officer. They may contain provisions upon the subject but they often do not, and frequently the rules applicable to this subject are found in other laws.[1] The reduction of an employee's salary does not necessarily affect his rank, and unless it does, it is not covered by the protections found in civil service laws against removal from position or rank. That is, demotion in position and reduction in pay are not synonymous. But, of course, reduction in salary may not accomplish a demotion without complying with the rules on demotion; this is important because of the fact that ranks and positions often depend upon salary rates in the classification system.

An appropriation reciting that a certain sum is allowed for a position does not as of right entitle the person holding that position to the amount mentioned. The head of the department may reduce that amount, and his action in so doing is legally proper so long as it does not reduce the em-

[1] Black v. Board of Education, 92 N. Y. S. 118 (1904).

ployee's salary below the figure provided for in the classification.[2] Reduction in salary is not reviewable by certiorari, if made in good faith and not contrary to the civil service law, because it is an administrative rather than a judicial act.[3]

During times of depression governmental expenses for personnel may have to be reduced, and several different methods of accomplishing that end may be used. A frequent method is granting furloughs without pay. The statutes usually provide that the head of a department may suspend, say for thirty days, without pay. Suspensions may not be inflicted successively so as to follow upon the heels of one another, but are proper if given some time apart. By giving furloughs without pay, and having the employee receipt for pay not received, some governmental units have reduced personnel expenditures. An employee in such a case later began to wonder about the legality of this procedure, and brought suit for the compensation for which he had receipted but which he had not received. He was met with the answer that he had acquiesced in the procedure, that the city had acted in reliance upon his acquiescence and had failed to take advantage of alternative methods of reducing expenditures, that the furlough procedure was valid, and if not valid that he should previously have appealed to the civil service commission, which had jurisdiction to disallow furloughs, and that "the appellant could not mislead the city to its injury by his conduct and then hold it liable to him."[4]

Some statutes give special remedies against reduction in salary when the circumstances surrounding the reduction make it seem like a removal. For example, it has been held that where three persons occupy similar positions at eighteen hundred dollars per year and one of the positions is cut to nine hundred dollars, mandamus will be granted to reinstate the holder of the reduced position under a law granting that remedy to soldiers who are reduced illegally.[5]

Statutes are sometimes phrased in such a way as to cover both removal and reduction; if this is the case, the same procedure is to be followed in both situations. A reduction in salary may be a reduction in rank; if so, it is treated like a removal. This may be the case even though the duties remain the same.[6]

Statutes may vest authority in certain officers or bodies to revise salaries and classifications, in which event salaries and positions may be reduced.[7] But if the statute does not so provide and the reduction in salary

[2] Thoma v. New York, 263 N. Y. 402, 189 N. E. 470 (1934).
[3] Whalen v. Special Justice, 3 N. E. (2d) 1005 (Mass. 1936).
[4] Taskey v. Pittsburgh, 123 Pa. Super. Ct. 573, 187 Atl. 292 (1936).
[5] People ex rel. Jones v. Saxe, 92 Misc. 409, 156 N. Y. S. 975 (1915).
[6] Waters v. New York, 101 A. D. 196, 88 N. Y. S. 238 (1905).
[7] Walters v. New York, 190 N. Y. 375, 83 N. E. 48 (1907).

is so great that it puts the position in a lower class, the revision constitutes a removal from the class.

A civil service statute which provided that police officers in the classified service "shall not be lowered in rank or compensation . . . except after a full hearing" was held not to be a limitation of the power of a city council to lower the salary scales.[8] A distinction must be drawn between cutting the salaries of a class or cutting the scales for the whole service and cutting the individual salary. It is to the latter that the removal provisions apply, not to the former. One of the cases in which this doctrine was applied points out that civil service laws are for the protection of individuals, and are not to strait-jacket municipal finances so that when periods of financial stress come, the cities may not take appropriate measures to save themselves;[9] there is, however, authority for the opposite undesirable rule.[10]

When the reduction is not of a class nor for reasons of economy, a reduction in salary that amounts to a reduction in rank must be accompanied by notice if a removal must be accompanied by notice;[11] so too, it must be for cause if removal is to be for cause.[12] One court reasoned that removal must be for cause, that an indefinite suspension amounts to a removal, and that a demotion is an indirect method of removal or suspension, because by a series of reductions and demotions an employee's salary and position could be entirely eliminated for all practical purposes.[13]

In the absence of statutory provision, a reduction in salary does not amount to a removal when the person affected is not in a classified position.[14] The question of reduction in salary and rank is, of course, a statutory matter if the statutes cover it,[15] but if the statutes do not expressly apply, the courts generally call demotion a removal in order to extend the removal protections to the individual.[16]

If the protection against demotion applies only to those in the competitive service, it is necessary for a complainant to allege and prove that the position from which he was ousted was in that service. A mere allegation that competitive tests were given is not sufficient to show classifica-

[8] Alger v. Justice of the District Court, 283 Mass. 596, 186 N. E. 838 (1933).

[9] Adams v. Plainfield, 109 N. J. L. 282, 161 Atl. 647 (1932), affirmed, 110 N. J. L. 377 166 Atl. 164. Brigham v. New York, 182 N. Y. S. 145 (1920).

[10] McCoach v. Philadelphia, 273 Pa. 317, 117 Atl. 71 (1922).

[11] People ex rel. Strahan v. Feitner, 49 A. D. 101, 63 N. Y. S. 209 (1900).

[12] State v. Board of Commissioners, 161 La. 361, 108 So. 770 (1926).

[13] State v. Board of Commissioners, *supra*, note 12.

[14] Sauerbrunn v. Board of Education, 150 A. D. 407, 135 N. Y. S. 85 (1912), affirmed 208 N. Y. 550, 101 N. E. 1120.

[15] People ex rel. Havron v. Dalton, 85 A. D. 110, 83 N. Y. S. 321 (1903).

[16] Matter of Rox v. Sweeney, 131 Misc. 780, 228 N. Y. S. 272 (1928).

tion; it should be remembered that competitive tests may be given even though not required by law. If an employee enters a position when it is not competitive, but it becomes so later, and if as the incumbent he receives its benefits, then he receives the protection against demotion to which others in the competitive classified service are entitled.[17]

The purposes of demotion cannot be accomplished by changing duties if the practical result of the change is to achieve a demotion.[18] Demotion from above may be used as a method of filling positions that are claimed to be vacant when in fact the rightful holders of them have been ousted illegally. Demotion from a higher to a lower rank does not cure the illegal removal of those in the lower rank.[19] Seniority rights run by ranks, not between ranks, in such a situation.

When a person contends that he was demoted for reasons other than those of economy and efficiency, he must bear the burden of showing that the presumption in favor of legality of official action should not be applied. In one case in which the number of officers seemed excessive the court said that "our examination of the testimony . . . does not at all convince us that this reduction in the number of superior officers would not make for greater efficiency." [20]

The existence of veterans' preference in removals does not require that in the event of salary reductions, the salaries of all nonveterans shall be lowered before those of veterans.[21]

In an administrative reorganization of the city the usual rules on notice and hearing, whether for veterans or for others, do not apply to salary reductions, even though resulting in demotions in rank. When a statute authorizes such reorganizations, it is presumed that the ordinary rules of procedure in removal, suspension, and demotion do not apply, these rules being designed for individual cases and not for the sweeping changes that accompany general budget revisions or reorganizations of the service.[22]

It is not uncommon to find reserve or special lists upon which may be placed the names of persons who have been separated from the service for certain designated reasons, such persons to be preferred in appointments and reinstatements when vacancies occur and additional positions are opened up. The exact phraseology of the statutes and civil service

[17] Matter of Sugden v. Partridge, 174 N. Y. 87, 66 N. E. 655 (1903).

[18] McArdle v. Chicago, 216 Ill. App. 343 (1920).

[19] Matter of Smith v. Greene, 156 Misc. 833, 283 N. Y. S. 264 (1935).

[20] Christie v. Mayor, 13 N. J. Misc. 331, 177 Atl. 888 (1935).

[21] People ex rel. Tyng v. Prendergast, 178 A. D. 895, 164 N. Y. S. 1108 (1918), affirmed, 221 N. Y. 659, 117 N. E. 1082.

[22] Walters v. New York, 119 A. D. 464, 105 N. Y. S. 950 (1907), affirmed, 190 N. Y. 375, 83 N. E. 48.

regulations must be noted to ascertain whether a distinction is drawn between the rights of persons separated and persons demoted.[23]

In the field of remedies for alleged wrongful reduction in salary or rank, it has been held that a statute which gives the courts power to take appeals involving removals also covers wrongful demotions, and that the provisions applicable to the one are applicable to the other.[24] The general rule that administrative remedies should be exhausted before asking for judicial review applies to petitions for reinstatement to a position from which the petitioner has been demoted.[25]

Because of the fact that the courts hesitate to convert the writ of certiorari into a declaratory judgment, they refuse to issue the writ to test the refusal of the civil service commission to certify for payment the names of demoted officers. Mandamus, not certiorari, is the method of testing the legality of the demotion action.[26]

A vacancy is not created in a position from which a person has been demoted while he is appealing his demotion. Nor is it a wrongful demotion to oust from a position the person who was placed in it during the period of the litigation.[27]

The liability of a superior officer for wrongfully demoting a subordinate is established in a Massachusetts case; the injury is a tortious one, with damages accordingly. The wrong is committed by the officer making the order of demotion, but if a successor comes into the superior's office and the demoted person makes the proper demand for a correction of the erroneous order and the succeeding officer fails to correct it, then he is liable.[28] The damages may include the salary lost if the amount of that loss can be determined; in some instances this is not easy because some discretion in changing the subordinate's compensation may be vested in the successor to the superior office.

II. ABOLITION OF POSITIONS

The abolition of positions has given rise to much friction and disputation in the administrative process because of the difficulty of determining whether an abolition is made in the cause of economy or constitutes an evasion of the civil service rules governing status, career, and tenure.

A position may be abolished by the officer or body having the power

[23] Smith v. Director of the Department of Public Safety, 290 Mass. 307, 195 N. E. 311 (1935).

[24] Village of Ridgewood v. Howard, 13 N. J. Misc. 510, 179 Atl. 461 (1935).

[25] O'Brien v. Cadogan, 220 Mass. 578 (1915).

[26] Newark v. Fordyce, 88 N. J. L. 440, 97 Atl. 67 (1916). See Sullivan v. McAneny, 145 A. D. 413, 130 N. Y. S. 24 (1911).

[27] People ex rel. Albertson v. McAdoo, 46 Misc. 517, 92 N. Y. S. 1004 (1905).

[28] Ashton v. Wolstenholme, 243 Mass. 193, 137 N. E. 376 (1922).

to abolish it, and the abolition may be for reasons of economy or efficiency or because of the nature of the work involved. That is, if the position has been created for the performance of temporary work, and it is abolished after the fulfillment of its function, no question can arise as to the legality of the abolition.[29] Of course, whether the officer who abolished the position was the one having legal power to do so is always an open question, even in such a situation.[30]

For example, if an administrative officer abolishes a position, and it turns out that he must secure the board's approval for the abolition, his action taken alone may not be effectual. A distinction should be drawn between abolition of a position and action dispensing with the services of one holding a position.[31]

The importance of the position is not the test of whether it can be abolished legally. The fact that a position may seem to be of the greatest importance to the effective functioning of a governmental unit is not determinative.[32] Whether there is legal power to abolish the position and whether the abolition is in good faith, and not for the purpose of accomplishing an otherwise prohibited removal, are the pertinent questions in abolition cases.[33]

The presumption is that abolition has been in good faith, and it must be shown by pertinent facts that the contrary is the case before the abolition will be treated as not in good faith.[34]

The removal provisions of most civil service laws do not prevent abolition of positions for purposes of economy. It is a general rule that the power which creates a position has the power to abolish it, unless the law provides to the contrary.[35] Thus an office that is created by ordinance may be abolished by ordinance, even in the case of an officer "appointed for a definite term, or by special statutory provision, or one who cannot be removed except for cause after a full hearing."[36]

Some laws provide for a procedure involving notice and hearing and a written statement of the circumstances before a position is abolished; of course, in such an instance, the requirements of the law must be followed in the abolition.[37]

[29] Matter of Barton v. Brannon, 141 A. D. 295, 126 N. Y. S. 47 (1910).

[30] People ex rel. Machen v. Hayes, 233 N. Y. 542, 135 N. E. 910 (1921), affirming 115 Misc. 373, 190 N. Y. S. 30.

[31] People ex rel. Machen v. Hayes, *supra,* note 30.

[32] O'Neill v. Fitzimmons, 114 Ill. App. 168 (1905), affirmed, 214 Ill. 494, 73 N. E. 797.

[33] O'Neill v. Fitzimmons, *supra,* note 32.

[34] People ex rel. Nuthall v. Simis, 18 A. D. 199, 45 N. Y. S. 940 (1897).

[35] Essinger v. New Castle, 275 Pa. 408, 119 Atl. 479 (1923). See Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518 (1901).

[36] O'Neill v. Williams, 53 Cal. App. 1, 199 Pac. 870 (1921).

[37] Hill v. Mayor, 193 Mass. 569, 79 N. E. 825 (1907).

Whether an abolition is in good faith and is not a removal is a question for the court to decide in each instance in which it is properly raised, on the basis of the particular circumstances involved.[38] One case suggests that the question whether the duties of a position are in reality being performed by another is a question of fact to be decided by the jury.[39]

The civil service commission may be given the power to hear appeals of employees whose positions have been abolished on the basis of its power to hear such appeals in cases of removal. This is in order to give the commission an opportunity to determine whether the abolition is a removal.[40] It has been held that when the incumbent stands ready to serve at the lower salary attached to the position, the promotion of a subordinate to perform the duties formerly performed by the plaintiff constitutes a removal and not an abolition of the position.[41]

Abolition and discharge are not synonymous terms, however, and in each case it is necessary to determine into which of the two categories the particular case falls. If the case is one of discharge, the civil service commission may have jurisdiction to take an appeal. If it is one of abolition, the commission may have no such jurisdiction. The only way to settle a dispute as to which it is, of course, is to take it to court.[42] The fact that some of the duties of the abolished position are given to a position and person in the exempt class is not necessarily fatal.[43]

A veterans' preference law that provides for preference in appointment and for special protection in removal does not mean that veterans may not be properly ousted from the service if the positions they hold are abolished in good faith.[44] Abolition may come about through a reduction in the number of positions in a department, in which event the question borders on the subject of layoffs.[45] The veteran has a preference in this situation only in case of express provision.

The rule against abolition except in the interests of economy or efficiency and within the legal power of the abolishing authority does not prevent layoffs. A layoff may be in effect an abolition of a position.[46]

The burden of proving bad faith or a lack of the economy plea or any other factor justifying court review of the administrative action in abolition cases rests with him who asserts that his position was illegally abol-

[38] State v. Board, 174 La. 516, 141 So. 46 (1932); Matter of Hay, 72 Misc. 434, 130 N. Y. S. 331 (1911).
[39] People ex rel. Wanzor v. Sturgis, 38 Misc. 433, 77 N. Y. S. 1008 (1902).
[40] Ellis v. Holcombe, 69 S. W. (2d) 449 (Tex. Civ. App. 1934).
[41] Ellis v. Holcombe, *supra*, note 40.
[42] Livingstone v. MacGillvray, 1 Cal. (2d) 546, 36 P. (2d) 622 (1934).
[43] People ex rel. Skilton v. Smith, 91 Misc. 131, 154 N. Y. S. 288 (1915).
[44] Brand v. Common Council, 271 Mich. 221 (1935). See 5 Detroit L. Rev. 167 (1935).
[45] State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N. W. 30 (1923).
[46] People ex rel. Steers v. Delaney, 190 N. Y. S. 29 (1920).

ished.[47] But there may be special situations in which this general rule is not applied. For example, a person who had been granted leave of absence to serve in the military forces in time of war, and whose name was omitted from the blank space in the appropriations for the city personnel budget, was not under the burden of showing that the city had not abolished the position; rather the city was under the necessity of showing that it had abolished the position.[48] The mere fact of omission under such circumstances did not amount to an abolition of the position.

The courts will look to the motives rather than to the form of the action in a given case. Abolishing an office and creating one or two new positions with different titles, but with the exact duties of the one abolished, is not sufficient to convince the court that economy was the reason for the abolition.[49] If the duties of the new positions are substantially the same as those of the abolished position, the courts will not let the abolition stand.[50] The fact that the efficiency rating of a person in an abolished position was higher than that of a person left in a position in the same office, but in a different class, was not taken as proof that the abolition was in bad faith and not made for economy and improvement of the service.[51]

Some statutes recite specifically that a board may have power to dispense with the services of "unnecessary employees," and when the workers are really laid off, for lack of work, for example, the law is satisfied.[52]

The effective date of the resolution of a city council providing for the abolition of an office is the date of its passage, under the rules of law governing the enactment of laws or resolutions by the abolishing body. If the office is abolished before the civil service law goes into effect, the fact that the incumbent is not informed until after the civil service law is in effect is not fatal.[53]

If, as sometimes happens, the courts are doubtful about the facts in an abolition case, they usually sustain an action of the administrator that has been sanctioned by the civil service commission.[54] The fact that another person was hired nine months later to do the same work that was involved in the abolished position looks suspicious, but is not sufficient to enlist judicial interference.[55]

[47] People ex rel. Vineing v. Hayes, 135 A. D. 19, 119 N. Y. S. 808 (1909). Cf. Colgarry v. Street Commissioners, 85 N. J. L. 583, 89 Atl. 789 (1914).

[48] People ex rel. Kehoe v. Leo, 233 N. Y. 173, 135 N. E. 234 (1922).

[49] People ex rel. Lazarus v. Coleman, 57 Misc. 57, 107 N. Y. S. 957 (1907).

[50] Barry v. Jackson, 30 Cal. App. 165, 157 Pac. 828 (1916).

[51] Santucci v. Paterson, 113 N. J. L. 192, 173 Atl. 611 (1934).

[52] State ex rel. Lutz v. Sewerage and Water Board, 179 La. 742, 155 So. 10 (1934).

[53] Ziegler v. Burk, 83 N. J. L. 207, 83 Atl. 976 (1912).

[54] Middlesex County v. Civil Service Commission, 10 N. J. Misc. 754, 160 Atl. 881 (1932).

[55] Middlesex County v. Civil Service Commission, *supra*, note 54; Walkling v. Smith, 276 Mich. 193, 267 N. W. 616 (1936).

To discharge a person on the ground that his position has been abolished and to retain one who is his junior in the service to do the same work under a different title is not legal, and the person so ousted is entitled to back salary. The salary claim cannot be made dependent upon the time when he claimed the new position, unless the law so provides; and if the law does not so provide, a civil service regulation cannot require it.[56]

One employed on a per diem basis cannot recover for work not done, according to the New York rule, and this seems logical; however, such a rule may encourage evasion of the tenure principle in practice.[57] And a position may be abolished even though the work formerly performed in the position is given to a private organization to do.[58]

The fact that the civil service commission consents to a change that is claimed to be a reclassification or an abolition of a position is not conclusive that the action is in fact not a removal.[59] But distributing the work of a position among other positions makes the action seem more like an abolition than a removal and aids in the claim that economy was the basic motive for the action.[60]

When the service being performed by the employee is one in which an instrument or vehicle is used, the question may arise whether the continued use of the vehicle in the service of the city is evidence that the position, of chauffeur, for example, has not been abolished.[61]

A civil servant cannot complain that only a portion of the duties he was performing have been assigned to another office if the abolition was in good faith and the abolition action fair on its face.[62] This "fair on its face" test is borrowed from other fields of the law, and probably serves no useful purpose other than to express the court's opinion that in view of all the facts presented the action was legal. In situations of the type involved in abolition cases the phrase is not a test but a conclusion.[63]

The fact that by a distribution of work the relator was in effect ousted from his position is not sufficient to convert an abolition into a removal. In such cases it is less the motive than the outward evidences of it that the court attends to, though the phraseology of the opinion is often in terms of motive. If the relator has no preferential rights, he has no standing in such a case.[64] But if the work formerly done continues to be done

[56] Allard v. Tacoma, 176 Wash. 441, 29 P. (2d) 698 (1934).
[57] Matter of Ovens v. Marks, 173 A. D. 138, 159 N. Y. S. 424 (1916).
[58] Storey v. Seattle, 124 Wash. 598, 215 Pac. 514 (1923).
[59] Winslow v. Bull, 97 Cal. App. 516, 275 Pac. 974 (1929).
[60] State ex rel. Dunbar v. Seattle, 121 Wash. 247, 208 Pac. 1092 (1922).
[61] Angelo v. State Civil Service Commission, 6 N. J. Misc. 648, 142 Atl. 910 (1928).
[62] State ex rel. Voris v. Seattle, 74 Wash. 199, 133 Pac. 11 (1913).
[63] Clements v. Commission of Birmingham, 215 Ala. 59, 109 So. 158 (1926).
[64] State ex rel. La Grave v. Seattle, 109 Wash. 629, 187 Pac. 339 (1920).

by another, instead of being distributed, that may be taken as evidence that the action was one of removal rather than of abolition.[65]

One factor that often makes the court suspicious of a disguised removal is any action preliminary to abolition which looks as though it might be preliminary to discharge. For example, if an employee receives a notice of intended discharge, which is later changed to notice of abolition of the position, that factor, while not always conclusive, is nevertheless a very important one in determining whether abolition or removal is intended.[66]

It is illegal to discharge a truck driver and fill his place with a laborer because the work of the position is continued and continued merely by recruiting a person from a different classification.[67] Nor can the work be given to a deputy, whether his position is newly created or not; and this is the more true when the position abolished was in the classified service and the newly created "deputy commissioner" is in the exempt class.[68] To do so would run contrary both to the removal provisions and also to the provision that if a position is abolished, the incumbent is entitled to appointment to any similar vacant position.[69] However, as noticed earlier, the fact that the new appointee is in the exempt class taken alone is not conclusive.[70] A policeman cannot be discharged under the guise of abolition of his position if a detective who is appointed in his stead performs the work of a policeman rather than of a detective.[71]

During periods of depression the problem of abolition becomes an acute one, just as do those of demotion and layoff. Statutes in the New York economy legislation of 1934 provided that certain offices and positions could be abolished, consolidated, or merged; further, that "any action taken under the provisions of this act shall be subject to and in accordance with the civil service law." Another section stated that "no person shall be employed from any emergency relief rolls to perform the duties of any employee whose office shall have been eliminated or who shall have been discharged or suspended from employment pursuant to the provisions of this act." In the case of a nurse who was notified that her position had been abolished, but who was able to show that her work was being performed by relief workers, the action of the administrator was held illegal. Whether she could be reinstated would depend upon whether the position was really abolished and whether an appropriation

[65] State ex rel. Miller v. Witter, 114 Oh. St. 122, 150 N. E. 431 (1926).
[66] State ex rel. Sonnenberg v. Board, 149 La. 1095, 90 So. 417 (1922).
[67] State ex rel. Jarrett v. Seattle, 186 Wash. 541, 58 P. (2d) 1212 (1936).
[68] Van Fleet v. Walsh, 122 Misc. 316, 202 N. Y. S. 745 (1924).
[69] Van Fleet v. Walsh, *supra*, note 68.
[70] See text to notes 42 and 43.
[71] Marcum v. Boggs, 258 Ky. 401, 80 S. W. (2d) 36 (1935).

was available, but to employ the relief workers to do her work was illegal.[72]

In one case an employee was discharged and subsequently reinstated. Thereupon his position was abolished. The court, taking a cue from this series of events, looked into the situation and found that the work was being done by another, therefore that the case was one of removal rather than of abolition of position.[73] There had been a change of title, but this of course was not sufficient.

In some instances removal procedure is followed when the proper procedure is abolition of office. For example, the reorganization of an administrative system may involve transfer of funds and work from one department to another and the elimination of some positions. When the appropriations are taken away, the office may in effect be abolished. If that has happened, the person to be let go should be dealt with as if his position had been abolished and should not be notified, charged, and dismissed as in removal.[74]

If, as sometimes happens, a position is abolished illegally and later a legal abolishment of the position takes place, the petitioner may be entitled to his back salary for the period of his wrongful removal, but he may not be reinstated, because there is then no position in which he may be reinstated.[75]

In the national government a court will not ordinarily give mandamus to reinstate a person in a position. For that reason there is no really effective manner in which to test the question whether an abolition in effect constituted a removal contrary to the laws or regulations. Suit for damages can be brought in the court of claims, apparently, if the petitioner is not defeated by the doctrine of laches.[76] This defect, which is one of the serious flaws in the national civil service law, results partially from the lack of a proper statutory basis for the law and partly from a defective remedial system in the national judiciary.

Of course, the fact that an employee is under suspension from a position which is abolished is not conclusive evidence that it is abolished as a method of obtaining his discharge. It may be that the abolition is not only authorized but strictly within the legal requirements for valid abolition.[77]

Not only may a person from a lower position not be promoted to perform the work of the supposedly abolished position, but neither may a

[72] Matter of Danker v. Department of Health, 266 N. Y. 365, 194 N. E. 857 (1935).

[73] State ex rel. Gilmur v. Seattle, 83 Wash. 91, 145 Pac. 61 (1914). See State ex rel. Wettrick v. Seattle, 115 Wash. 548, 197 Pac. 782 (1921).

[74] Matter of Colihan v. Miller, 72 Misc. 140, 131 N. Y. S. 99 (1911).

[75] Smith v. Greene, 247 A. D. 425, 287 N. Y. S. 953 (1936). See State ex rel. Exnicios v. Board of Commissioners, 153 La. 705, 96 So. 539 (1923).

[76] Norris v. United States, 257 U. S. 77, 42 Sup. Ct. Rep. 9, 66 L. ed. 166 (1921).

[77] State ex rel. Ware v. Sewerage and Water Board, 160 La. 251, 106 So. 845 (1926).

person from a higher position be reduced to the supposedly abolished position to carry on its duties under some other title.[78]

One case suggests that persons thrown out of their positions by purported abolition may not recover their salaries for a period longer than until the end of the budget year, but the real reason is not made clear.[79]

In the abolition of positions there may be a rule that persons shall be laid off in the inverse order of their appointment or employment, but the statute governs, and any exceptions it makes to this rule will apply.[80]

The provision is not uncommon that when positions are abolished those thereby thrown out of employment shall be placed upon a special list from which they are to be appointed to vacancies for which they are qualified. They may also be entitled to transfers to vacant positions of a similar nature in the same or in other departments of the service. The preference in such transfers, or in the ranking on any such special list, may be given to ex-soldiers and sailors by veterans' preference laws. Sometimes this situation gives rise to a race between the veteran (or any other person) whose position has been abolished and an administrative superior who is apparently glad to be rid of him, the veteran finding that the position to which he would be eligible to transfer has been abolished. If, however, the veteran is entitled to the transfer, and the position is in existence at the time that the first position is abolished, he is entitled to mandamus to compel his appointment to the other position. That the second position was abolished before he could actually enter upon it, and validly abolished, does not prevent his being appointed in order to receive the salary for the time that he was kept out of the position. But he cannot have the position re-created by judicial decree for any other purpose than obtaining compensation until the date of its valid abolition.[81] No vacancy need be created in order to make a position to which the petitioner can be transferred, and this is true even of veterans as against nonveterans.[82] The person who claims that he should be transferred to a position in some other department must allege in mandamus proceedings that there is a position in the other department, that it is vacant, and that he is qualified to fill it and entitled to have it.[83] Mandamus is the proper remedy for failure to appoint from the special list to fill a vacancy for which the list is suitable.[84]

The preference given to a person on the special list cannot be defeated

[78] Smith v. Greene, *supra*, note 75.

[79] Brady v. Greene, 248 A. D. 641, 287 N. Y. S. 990 (1936).

[80] Matter of Meehan v. Sayer, 200 A. D. 674, 193 N. Y. S. 609 (1922).

[81] Matter of White v. Harrell, 239 A. D. 604, 269 N. Y. S. 702 (1934).

[82] People ex rel. Ray v. McEneny, 153 A. D. 884, 137 N. Y. S. 1055 (1912), affirmed, 209 N. Y. 533, 102 N. E. 1111.

[83] People ex rel. Rodenbough v. Voorhis, 63 A. D. 249, 71 N. Y. S. 266 (1901).

[84] Tierney v. Wynne, 209 A. D. 401, 204 N. Y. S. 836 (1924).

by reclassifying the position after its abolition, because if it is in effect the same position, the removed person is entitled to it.[85] In some instances layoff rather than abolition of position is really involved; if so, a veteran may have greater rights than in the abolition of an office.[86] If a veteran has transfer rights, he must claim them in time; he may not let the matter go for a year and then suddenly assert his right to transfer.[87] Similarly, a two and one-half year delay in the assertion of a claim, when unexplained, constitutes laches.[88]

It may happen, of course, that a person whose position has been abolished, and whose name has been placed on a special list from which names are to be drawn when filling vacancies in similar positions, may not be appointed to such a vacant position. The appointing officer may decide to leave the position unfilled. As in the case of an original appointment, this is a decision which he may make for himself and of which the applicant on the special list may not complain successfully.[89]

Mandamus is the remedy for reinstatement in most cases where the validity of an abolition of office or position is questioned.[90] Ordinarily it is preferable to seek an alternative rather than a peremptory writ of mandamus in cases involving reinstatement to positions which it is claimed have been abolished.[91] It likewise is important that the application specify the exact form of relief asked, for if this is not done the court may find it impossible to take jurisdiction.[92]

The particular remedies available in any of the various forms of removal or separation from service vary from state to state and must be studied from both the common law and the statutory points of view. For example, one case holds that certiorari is not the correct method for testing the validity of an order abolishing a position. It was suggested in the opinion that the proper remedy would be quo warranto to oust the person who supposedly is performing the duties of petitioner's position.[93] This seems doubtful doctrine, because while quo warranto lies to oust a person from office, technically it does not reinstate another one in that office. Nor does it lie except on the theory that the position is there; therefore, the existence of the position is the question to be determined. As far as certiorari is concerned, normally it should be regarded as inapplicable, since

[85] People ex rel. Birmingham v. Grout, 45 Misc. 47, 90 N. Y. S. 861 (1904).
[86] Matter of Pratt v. Phelan, 67 A. D. 349, 73 N. Y. S. 823 (1901).
[87] People ex rel. Rehm v. Willcox, 60 Misc. 329, 112 N. Y. S. 341 (1908).
[88] Neilley v. City of Passaic, 13 N. J. Misc. 283, 177 Atl. 855 (1935).
[89] Brizzolara v. McKenzie, 166 Misc. 282, 2 N. Y. S. (2d) 455 (1938).
[90] Newark v. Civil Service Commission, 114 N. J. L. 185, 176 Atl. 164 (1935). See People ex rel. Cahill v. Sisson, 182 A. D. 903, 168 N. Y. S. 895 (1918).
[91] Matter of Jones v. Willcox, 80 A. D. 167, 80 N. Y. S. 420 (1903).
[92] Ziegler v. City Manager, 115 N. J. L. 328, 180 Atl. 225 (1935).
[93] Oster v. Mayor, 13 N. J. Misc. 770, 180 Atl. 561 (1935).

an order abolishing an office is a legislative or administrative order and not a judicial order.[94]

III. LAYOFF

The lines that distinguish layoff from removal, abolition of position, and suspension are not very clear. Nevertheless, there is a difference between removing an employee from a position which continues in existence after the layoff and laying him off because of lack of work or lack of funds. In layoff the work of the position may have been completed so that the position is abolished; or it may be that the position cannot be continued because of lack of funds, even though the work is not yet accomplished. There is no necessary implication of incompetency in a layoff, while in a removal there normally is. Both a reduction in the number of positions and the abolition of positions may bring about a separation from service. However, in the one case there may be an opportunity later to return to the position; in the other there is no such opportunity because of the elimination of the position itself. The civil service laws occasionally distinguish between some of these different types of separation from service, but they seldom differentiate clearly between all of them. It is quite common, however, to find layoffs made from a class of holders of the same type of position, while abolition more often relates to a particular position than to a class of positions.

The removal provisions of a civil service law do not apply to a person who has been laid off because of the completion of the work that he was appointed to do.[95] For example, the notice and hearing provisions that apply in case of discharge do not govern in a layoff situation,[96] unless the statute expressly says that they shall apply to both.

The removal provisions of a civil service law do not apply to abolition of positions made in good faith and for purposes of economy or for some other legally sufficient reason. That the abolition may be unwise does not convert it into a removal.[97] The fact that the work was carried on is not in and of itself fatal to the validity of the abolition of a position or of the reduction in force.[98] Provisions as to causes and procedure in discharge are usually inapplicable to a "good faith" reduction made for economy.[99]

The power to reorganize a department carries with it the power to lay off some members and retain others. "The authority of city officials

[94] Classey v. Civil Service Commission, 9 N. J. Misc. 1297, 157 Atl. 253 (1931).

[95] Kenny v. Kane, 52 A. D. 385, 65 N. Y. S. 204 (1899), affirming 27 Misc. 680, 59 N. Y. S. 555.

[96] People ex rel. Stone v. Dalton, 57 A. D. 626, 68 N. Y. S. 1146 (1901).

[97] Chicago v. People ex rel. Byrne, 114 Ill. App. 145 (1904).

[98] Fiveash v. Holderness, 190 Ark. 264, 78 S. W. (2d) 820 (1935).

[99] Kern v. Des Moines, 239 N. W. 104 (Ia. 1931); People ex rel. Osterhout v. Williams, 91 Misc. 95, 154 N. Y. S. 331 (1916).

to reduce the number of employees even though it affects those appointed under civil service, when such action becomes necessary because of the condition of the finances of the city, cannot be questioned."[100] But, of course, a reorganization that is general and undertaken by action of the legislative body is less likely to invite judicial scrutiny than one that is partial and results from administrative action.

A layoff may take the form of a suspension; if it does, the question arises whether the statutory rules governing suspensions apply. A Massachusetts statute provided that notice and hearing must be given in cases of suspension if the worker requested them. An employee was suspended three days each week. It was held that inasmuch as there was work to do which others apparently performed and which petitioner claimed that he should have been permitted to carry on, due notice should have been given in accordance with the statute, and that oral notice on the afternoon of the day preceding suspension was insufficient. The court suggested that it might be possible to use a form of notice in which the regularly recurring layoffs could be covered, if they were legal.[101]

Civil service commissions are sometimes given the power to review orders of removal made by department heads, and in some jurisdictions this practice is also followed in layoffs. However, a contrary practice is often followed, and the law may recite as did a California city charter: "provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and not be subject to review by said board of civil service commissioners." Under this provision the court held that while the civil service commission could not review such an order, the court could do so in order to see whether the lack of funds constituted the reason for the suspension or whether other reasons lay back of it.[102] It is not permissible under a provision of this kind to notify a permanent employee that "you will thereafter be terminated on October 9th, according to the rule . . . which covers reduction of force for lack of work and lack of funds." The employee may be notified of suspension, but not of termination.

A city cannot defend against a suit for full salary brought by an employee upon whom pressure had been exerted to take a "voluntary cut" but who would not do so. The employee may be discharged or his position may be abolished in good faith, but he cannot be "laid off his salary," as it were, by this method.[103] But, of course, a voluntary waiver of salary in order to avoid layoff is valid.[104]

[100] Vansuch v. State ex rel., 112 Oh. St. 688, 148 N. E. 232 (1925).
[101] Bois v. Mayor of Fall River, 257 Mass. 471, 154 N. E. 270 (1926).
[102] Kabisius v. Board of Playgrounds and Recreation, 39 P. (2d) 264 (Cal. App. 1934).
[103] Barnard v. Lynn, 3 N. E. (2d) 264 (Mass. 1936).
[104] Kirk v. New York, 136 N. Y. S. 1061 (1910).

Under the Colorado constitutional provision requiring written charges in cases of removal or discipline, it is permissible for the legislature to authorize the governor to lay off employees for fixed periods for reasons of economy.[105]

The power to "create" offices and positions and to "employ" persons carries with it the power to reduce the force for purposes of economy.[106]

Under a statute which provides that a layoff shall be the equivalent of a suspension, it is nevertheless permissible to lay off men when there is an honest delay in work, despite the fact that the work is to be done later and the money is available for it. Some laws provide, as in a New York charter, that "the person . . . legally holding the office . . . shall be deemed suspended without pay . . ." whenever a position is made unnecessary.[107] Suspension may in fact be for lack of work and not for disciplinary purposes; when this is the case, no action for salary lies for the period during which the employee was out of work.[108]

The statutes or charters must be scrutinized with care in cases of layoff, because both the power to lay off and the procedure of layoff may be prescribed in the statute. An Ohio law provided that "in all cases of reduction, lay-off or suspension of an employee or subordinate, whether appointed for a definite term or not, the appointing authority shall furnish such employee or subordinate with a copy of the order of lay off . . . and his reasons for the same, and give such employee or subordinate a reasonable time in which to make and file an explanation." The court held that this statute did not expressly give the power to lay off for lack of work or lack of funds, and that therefore the power did not exist; the procedure specified not having been followed in the layoff in question, that layoff was to be regarded as an illegal action.[109]

The presence of bad faith in layoffs has been said to be a question of fact, not of law, so that under a statute which provided that the decisions of the municipal court were to be final, the appellate court said that they were final upon questions of bad faith, these being questions of fact.[110] This gives the lower courts a rather important role in such cases. Lack of funds and lack of work constitute good grounds for layoffs.[111] The courts

[105] Getty v. Gaffy, 96 Colo. 454, 44 P. (2d) 506 (1935).
[106] Slavin v. Detroit, 262 Mich. 173, 247 N. W. 145 (1933).
[107] Shane v. New York, 135 A. D. 218, 120 N. Y. S. 428 (1909).
[108] Hoyt v. New Rochelle, 70 Misc. 402, 127 N. Y. S. 223 (1911).
[109] Steubenville v. Bougher, 10 Oh. App. 178 (1916), 29 Oh. C. C. 342.
[110] Commissioner of Public Works v. Justice of Dorchester District, 228 Mass. 12, 116 N. E. 909 (1917).
[111] Jenkins v. Board of Civil Service Commissioners, 137 Cal. App. 410, 30 P. (2d) 606 (1934); Griffin v. Williams, 168 A. D. 63, 153 N. Y. S. 926 (1915), appeal dismissed, 216 N. Y. 651, 110 N. E. 1042.

will not review the propriety, but rather the legality, of the action in reducing numbers.[112]

Honesty of the administrative action in reducing numbers is the more difficult to demonstrate when others are immediately chosen to fill the places of those laid off.[113] However, when an appointing officer is ordered to reduce his force by one hundred men and there are one hundred and seventy-nine vacancies in the force to be filled, it has been held proper for him to appoint the whole number and later lay off one hundred.[114] It is for the court to inquire whether there is arbitrary, unwarranted, and illegal action;[115] but when the action is within the strict terms of the appointing and removal power, it will not interfere. A mere allegation that dismissal was made from improper motives, under the pretext of lack of funds, is not sufficient. The allegation must be supported by facts that show this.[116]

There is no evidence of bad faith inherent in the laying off of men in larger numbers than the reduced appropriations require, and the presence of a budget balance at the close of the fiscal period is not fatal.[117] The color of good faith is lent to layoffs which are made under a provision forbidding the employing officer to contract for services in excess of the sum appropriated.[118]

When a city council has the power to reduce numbers and a mayor has the power to appoint special police, the increased cost of special policemen appointed to do the work that was formerly carried on by men laid off the force does not show bad faith in reducing the force.[119] In general layoff cannot be justified if the work is carried on in such a way as to indicate that the aim was rather to be rid of the person than to reduce the force.[120]

Adding men as others are laid off is likely to cause the court to inquire into the real reasons for the layoffs.[121] That the places are filled by demotion does not save the situation. When regulated by law, layoffs must be in accordance with the provisions contained in the statute.[122] For

[112] Chicago v. People, 136 Ill. App. 296 (1907); Chicago v. People ex rel. Byrne, *supra*, note 97.

[113] Shira v. State ex rel., 187 Ind. 441, 119 N. E. 833 (1918).

[114] Leary v. Philadelphia et al., 314 Pa. 458, 172 Atl. 459 (1934).

[115] State ex rel. Jackson v. Seattle, 177 Wash. 646, 32 P. (2d) 1065 (1934).

[116] State ex rel. Jackson v. Seattle, *supra*, note 115; Colligan v. Williams, 91 Misc. 128, 154 N. Y. S. 329 (1915).

[117] People ex rel. Steers v. Department of Health, 86 A. D. 521, 83 N. Y. S. 800 (1903), affirmed, 176 N. Y. 602, 68 N. E. 1123.

[118] People ex rel. Forest v. Williams, 140 A. D. 723, 125 N. Y. S. 583 (1911).

[119] Middlesboro v. Byrd, 247 Ky. 348, 57 S. W. (2d) 20 (1933).

[120] McArdle v. Chicago, *supra*, note 18.

[121] People ex rel. Davison v. Williams, 213 N. Y. 130, 107 N. E. 49 (1914), affirming 164 A. D. 900, 148 N. Y. S. 1136.

[122] State ex rel. v. Kansas City, 213 Mo. App. 349, 257 S. W. 197 (1923).

example, if written statements of layoff are required, it is necessary that they be given.

A provision for hearing in removal does not carry with it the right to a hearing in layoff.[123] But a civil service commission which passes upon removals and layoffs may be fairly certain that in cases of doubt the court will support its order of reinstatement in a layoff which the commission thought not bona fide.[124]

Veterans' preference laws sometimes apply to layoffs. When they do, it is not uncommon to find that the veteran is given some type of priority in his right to be retained in the service. But a provision in a veterans' preference law forbidding removal through reduction does not mean that reduction of the force for purposes of efficiency and economy is prohibited.[125] Here, as in other cases, veterans' preference is narrowly construed, on the general principle of law that special privileges are to be strictly interpreted. This results in the refusal of the courts to give veterans preference in layoff unless the statute expressly applies it to them;[126] to this rule, however, there are some dissents.

Veterans may be laid off for lack of funds even though the statute specifically provides that "it shall not be lawful . . . to abolish any position or office held by any sailor, soldier, or marine, . . . or to change the title of any such office or position, or to reduce the emoluments thereof for the purpose of terminating the service of any such employee."[127] A New York statute provided that "no person holding a position by appointment or employment . . . who is an honorably discharged soldier, . . . shall be removed from such position or employment, except for incompetency or misconduct shown after a hearing upon due notice." This was said to mean that when it became necessary to lay off some employees, a veteran could not be removed merely by showing that he was the least efficient; he must be shown incompetent.[128] When the statute recites, as a federal statute did, that veterans shall be retained if equally competent, the court will allow the administrative officer wide discretion in determining the quality of fitness.[129] And if the protection is by executive order, the veteran may find that the action laying him off is likewise executive, so that he receives no benefit of the apparent protection.[130] Nor will the comptroller general be able to aid him in his claim for salary, for

[123] Curtis v. State ex rel., 108 Oh. St. 292, 140 N. E. 522 (1923).
[124] Middlesex County v. Civil Service Commission, *supra*, note 54.
[125] Babcock v. Des Moines, 180 Ia. 1120, 162 N. W. 763 (1917).
[126] People ex rel. Wagner v. Williams, 93 Misc. 296, 156 N. Y. S. 977 (1916).
[127] Pondelick v. Passaic County, 111 N. J. L. 187, 168 Atl. 146 (1933).
[128] Matter of Stutzback v. Coler, 168 N. Y. 416, 61 N. E. 697 (1901).
[129] Medkirk v. United States, 44 Ct. Cl. 469 (1909).
[130] Medkirk v. United States, *supra*, note 129.

that office will treat his claim as in the nature of a claim for damages,[131] and on such a claim that officer will not pass.

One of the most troublesome questions in the law governing reduction in force is the order in which the men are to be laid off. Various bases may be used. If efficiency alone were the criterion, those should be laid off first who have proved to be least competent in the performance of the duties that they have been rightfully called upon to perform. But efficiency is not the only consideration in a large personnel system; and this being admitted, the door is open for competing claims of various types. The older employees will insist that their claims to retention do not exclude the recognition of competency, but indeed are based upon it, because seniority is one of the best tests of familiarity with the duties to be performed, and repetition and experience are among the most important factors in the acquisition of skill. The veterans will insist that they should be retained because their claims are based upon factors that affect loyalty to the service, and that while loyalty alone is not sufficient, it is likely to be combined with competency in the case of persons who are already in the service and have had the benefit of experience. The administrator may feel not only that efficiency is important, but that factors of personality and cooperativeness are of the highest importance; and may well feel that the "trouble-maker" should be laid off before anyone else. The layoff situation is full of the frictions that always inhere in selecting people for separation from gainful employment, and particularly from gainful employment to which they feel they have both a political and a moral right. Statutes, of course, govern the selection of those who are to be laid off whenever they expressly cover the subject, but some statutes authorize layoffs without specifying any rule to be followed in the order of layoff. When no provision is made as to the basis for layoff, efficiency may be used as the basis.[132]

One of the more common provisions on layoffs is that the order of appointment shall be followed, the persons last appointed being the first to be laid off. One law provided that "the good of the public service shall at all times be considered and the board shall have power to waive this provision. Where individual rights conflict with public rights it is understood that the former must give way." It was held that when layoffs were made under this provision "for the good of the service," it was to be supposed that sound discretion had been exercised for the public good, and the court would not interfere.[133]

The administrator may recognize seniority in retention of civil serv-

[131] 3 Dec. Comp. Gen. 333 (1923).
[132] Jones v. Meek, 43 P. (2d) 812 (Cal. App. 1935).
[133] Hayes v. Long Beach, 105 Cal. App. 94, 287 Pac. 136 (1930).

ants even under the rule that layoffs are to be made in accordance with efficiency. "While the civil service rules provide that the officer in laying off employees must lay off those whom he deems least efficient, it is not a matter of injustice, requiring correction by the courts, if, in making the selection among those equally efficient, he retain those longest in the particular service."[134] A statutory rule providing layoff in the inverse order of appointment is not contrary to a constitutional provision giving veterans preference in appointment.[135] Some courts take the position that, unless expressly negatived by statute, seniority may be considered in addition to a good record in making layoffs.[136] On the other hand, if the statute does not require that the seniority rule be followed, the court will not impose it upon the administrator.[137] Sometimes the history of legislation is such that a legislative intent to abolish a prior requirement of the seniority rule is fairly clear. "The commissioner, notwithstanding the provisions of any other general or special law, saving . . . provisions of section 22 of the civil service law, may transfer officers or employees from their positions to other positions in the department, or abolish or consolidate such positions and may remove any officer or employee in the department" was taken to imply that a former statute prescribing the inverse order rule had been repealed.[138]

The rule that layoffs shall be in the inverse order of appointment has sometimes caused difficulty when several people have been appointed at the same time to positions in the same department, for example, a fire department. An appointing officer signs ten appointments or certifies ten employments at the same time, without respect to any particular order. Three years go by and he is compelled to lay off three men, including some of the ten so appointed. The question is: Which one did he appoint last? The law presumes in such cases that the person with the highest standing on the eligible list from which certification was made was appointed first, and so on down through the list.[139]

The inverse order rule usually applies to classes or grades, so that it becomes important to determine what constitutes a grade for this purpose. A statute provided for a reduction in the force of various bureaus when work or funds ran out, and provided that the order of layoff should be in the inverse order of certification. The bureau in question had one superintendent and twenty subordinates, and the superintendent was laid

[134] State ex rel. Burris v. Seattle, 82 Wash. 464, 144 Pac. 695 (1914).
[135] Wolf v. Delaney, 266 N. Y. 262, 194 N. E. 748 (1935).
[136] State ex rel. Evens v. Duluth, 195 Minn. 563, 262 N. W. 681 (1935).
[137] State v. Searcy, 31 Oh. Cir. Ct. 83 (1909).
[138] Matter of Fox v. Sayer, 116 Misc. 699, 191 N. Y. S. 725 (1921).
[139] Matter of Weiher v. Greene, 239 A. D. 652, 269 N. Y. S. 297 (1934). See Sanger v. Greene, 153 Misc. 507, 274 N. Y. S. 590 (1934); Matter of Skrocki v. Greene, 242 A. D. 226, 274 N. Y. S. 1 (1934).

off on the ground that he was the only one in his class. The court held that the entire bureau consisted of one service, and that the layoffs must be made accordingly.[140] When abolition of position is really a reduction in force within a class, and the inverse order rule applies, the whole class, as defined by the rules of classification, is to be considered, rather than the one holder of that particular position; and he may have seniority rights within the class.[141] Some employees are really unclassified by departments, being citywide employees; their class includes all those doing the kind of work that is involved.[142]

When seniority is "in the service" and the inverse order rule is to be used in the labor divisions, that rule does not apply to all branches of labor as a class, but applies within each division. Thus it might happen that mechanics and stone masons would not be treated as within one class.[143] Some courts say that duties rather than salary are to be considered in [illegible] the class to which seniority rights shall apply in cases of layoff.[144] The similarity of duties may not be determinative when taken alone, however, and in any case the classification and rating by the commission, if honestly made in the absence of fraud, will be likely to control.[145] If chauffeurs and teamsters are placed in the same class, the courts will look to see whether in a particular case the apparent classes are only convenient administrative categories; if they are, the courts will permit seniority rights to range throughout the general class of which there may be several subdivisions.[146] Some courts, however, follow the stricter interpretation of class and grade, and permit seniority to operate only within the formal salary divisions, even though the duties may be relatively similar.[147]

In applying the inverse order rule of layoff, the date of the original appointment means just that, and not a period of temporary appointment served by the employee before being appointed to the permanent position.[148] This is true of provisional appointment as well.[149] A distinction is to be drawn here between temporary appointment and probationary appointment: if probationary appointment ripens into permanent appointment, the date of original appointment is that of the initial appointment to the position at the beginning of the probationary period.[150]

[140] State ex rel. McCauley v. Warren, 195 Minn. 180, 261 N. W. 857 (1935).
[141] Johnson v. People, 96 Colo. 175, 40 P. (2d) 615 (1935).
[142] Hill v. Tacoma, 26 P. (2d) 1030 (Wash. 1933).
[143] Trembly v. Mayor of Fall River, 263 Mass. 118, 160 N. E. 322 (1928).
[144] Matter of Sanger v. Greene, 269 N. Y. 33, 198 N. E. 622 (1935).
[145] Ault v. Hurley, 196 N. E. 855 (Mass. 1935).
[146] McDonald v. City Manager of Fall River, 273 Mass. 368, 173 N. E. 593 (1931).
[147] Matter of Moss v. Greene, 153 Misc. 461, 274 N. Y. S. 447 (1934).
[148] Matter of Shepherd v. Greene, 153 Misc. 289, 274 N. Y. S. 211 (1934).
[149] Abrams v. Ryan, 244 A. D. 284, 279 N. Y. S. 321 (1935).
[150] Koso v. Greene, 260 N. Y. 491, 184 N. E. 65 (1933).

If there has been a separation from service without fault, followed by a reinstatement to the former position within the time permitted by the rules, the time of original appointment, so often mentioned in the laws on the order of layoffs, is the date of the first appointment rather than the date of the reinstatement.[151] But if the period of separation exceeds the rule, then the new appointment is the original one.[152] Of course, the appointment of one who has been removed for cause is an appointment not a reinstatement.[153]

Seniority is sometimes in a particularly described service. When that is the case in the "city service," for example, the transit commission service is included, although for some purposes the transit commission may be a state agency. The usual tests that are applied in the law of officers and the law of state-municipal relations are applicable in cases of this type.[154]

It has been held that a transferee is entitled to seniority from the date that he entered the service when the transfer is from a higher to a lower position, the appointment and transfer having occurred on the same day and his name having been on the list from which appointments were made to the position to which he was transferred.[155] But seniority rights cannot extend to two positions.[156] Eligibility rights and seniority rights are not synonymous.

Continuous service, for purposes of seniority, means service in the same kind of work, not necessarily in the last particular position the employee has held.[157] If the seniority is in a classified position, continuity may be broken by service in an exempt position.[158] When a person who has been out of the classified service for several years re-enters it, the date of his original appointment, for purposes of seniority, is the date of re-entry.[159] It has been held that resignation from a classified position in the civil service of the city to accept a political position in that city takes an employee out of the city service, because that phrase means the city civil service.[160]

A few laws provide that in reduction of the force those having the

[151] Knights v. Staley, 118 Misc. 837, 192 N. Y. S. 542 (1921).
[152] Marcus v. Ingersoll, 266 N. Y. 359, 194 N. E. 855 (1935).
[153] Harcher v. Hurley, 116 N. J. L. 18, 181 Atl. 309 (1935).
[154] Matter of Horn v. Gillespie, 267 N. Y. 333, 196 N. E. 205 (1935).
[155] Matter of Skrocki v. Greene, 242 A. D. 226, 274 N. Y. S. 1 (1934).
[156] Allen v. Seattle, 180 Wash. 63, 38 P. (2d) 1008 (1934).
[157] Matter of Schaefer v. Rathman, 237 A. D. 491, 261 N. Y. S. 466 (1933), affirmed, 262 N. Y. 492, 188 N. E. 34.
[158] Matter of Mullane v. McKenzie, 271 N. Y. 172, 2 N. E. (2d) 530 (1936). But see *supra*, note 153.
[159] Matter of Mullane v. McKenzie, 153 Misc. 255, 275 N. Y. S. 262 (1935). See Harcher v. Hurley, *supra*, note 153, that removed person restored to service is appointed rather than reinstated.
[160] Whitaker v. Department of Water and Power, 4 Cal. App. (2d) 530, 41 P. (2d) 367 (1935).

longest service may "displace" other employees whenever the necessity for suspension arises. In one case a person whose position had been abolished was assigned to a position in a group in which two other incumbents had shorter periods of service than he. Instead of one of the incumbents being displaced, the number of employees was increased by one. After a day or two of service in the new position, the recent appointee was suspended. The court held that he was entitled to seniority, the whole transaction having obviously been for the purpose of evading the law.[161]

Statutes granting wide discretion to the superior in layoffs (e.g., the Economy Act of 1933 as interpreted by the courts) sometimes negative in effect the rule of efficiency. In applying the married woman rule under that law, the superior could lay off a wife even though she had a higher efficiency rating than single persons retained.[162]

The use of efficiency or performance ratings in determining the relative status of an employee in cases of promotion and layoff may give rise to some difficult situations. One method sometimes used in laying a basis for the discharge of an employee is gradually to reduce his efficiency rating until it appears that he is incompetent to retain his position. This may be done either by degrees or suddenly. If no protest is made and if there is no procedure for making complaints upon ratings and no appellate board of any kind to hear such complaints, the employee may be very badly treated. It has been held in questions of layoff that if there is nothing to show that the ratings were clearly arbitrary, the court will not interefere to aid the employee.[163]

If an employee is properly laid off for lack of funds, he should be put back to work when funds later become available, even after the lapse of a few months.[164] It is quite common to provide that persons who have been laid off because of lack of work or lack of funds should be placed upon a special list, or in a preferred position upon the eligible lists, with a view to giving them preference in certification for appointment to vacancies in similar kinds of positions in the service.[165] Some laws require a request to be placed upon a re-employment list.[166] Where a definite term is involved, the holder of the position cannot obtain benefit of the special preference attendant upon layoff if the term expires at the time of the

[161] Ford v. Department of Water and Power, 4 Cal. App. (2d) 526, 41 P. (2d) 188 (1935).

[162] United States ex rel. Rhodes v. Helvering, 84 F. (2d) 270 (U. S. D. C. 1936). See 5 Geo. Wash. L. Rev. 145 (1938).

[163] State ex rel. Tate v. Seattle, 180 Wash. 635, 41 P. (2d) 784 (1935).

[164] State ex rel. McCauley v. Warren, *supra*, note 140.

[165] Harcher v. Hurley, *supra*, note 153. See, for example, the provision discussed in Ott v. Braddock, 119 N. J. L. 507, 197 Atl. 271 (1938).

[166] See Goldberg v. Commissioners of Civil Service, 174 N. E. 481 (Mass. 1931).

layoff.[167] A letter to an employee saying that he had been removed is not necessarily controlling if his name is placed upon the list and he is subsequently treated as if he had been laid off.[168] A provision that persons laid off should have preferred rights to positions open in the same class does not extend to persons in confidential positions.[169]

The employee cannot obtain mandamus to reinstate unless he first establishes his right to the place.[170] The burden of showing that a position exists rests on the claimant.[171] If he claims that he was laid off a position in the classified service to which he had been certified, he must show that he was certified.[172] If the employee was wrongfully laid off, he is entitled to reinstatement,[173] and to back salary if no one else has been appointed to his place in the meantime. No presumption exists that juniors illegally retained fill the positions of seniors wrongfully laid off.[174] Sometimes the courts are influenced by the presence of mistaken good faith in layoff cases,[175] but good faith will not save a clearly illegal layoff.

[167] People ex rel. Whitman v. Goldenkranz, 38 Misc. 682, 78 N. Y. S. 267 (1902).
[168] People ex rel. Frank v. Monroe, 99 A. D. 290, 90 N. Y. S. 907 (1904).
[169] People ex rel. Wiegand v. Cantor, 39 Misc. 454, 80 N. Y. S. 173 (1902).
[170] Wagner v. Louisville, 117 S. W. 283 (Ky. 1909).
[171] Clancy v. Halleran, 263 N. Y. 258 (1934).
[172] Fair v. Chicago, 202 Ill. App. 53 (1916).
[173] Paducah v. Gibson, 249 Ky. 434, 61 S. W. (2d) 11 (1933). See Brown v. Greene, 243 A. D. 835, 278 N. Y. S. 161 (1935).
[174] See Paducah v. Singery, 255 Ky. 644, 75 S. W. (2d) 210 (1934).
[175] Thomas v. Chicago, 194 Ill. App. 526 (1916), affirmed, 273 Ill. 479, 113 N. E. 140.

Chapter IX

SUSPENSION AND REMOVAL

The law governing suspension and removal of civil servants who are under a merit system is a branch of the general law of public officers, but inasmuch as civil service laws often contain rules regulating both the power to suspend and remove and the procedure that is to be followed in the exercise of these powers, it is necessary to distinguish between the rules that apply under civil service laws and those that apply under other laws. These rules may be alike for both the political and the civil service at some points, but at others they differ considerably. Statutes may apply some of the rules to the political service that normally apply particularly in civil services, but these applications are only fragmentary and do not represent an effort to systematize by statute, charter, ordinance, or administrative regulation the principles and rules that should govern the suspension or removal of an officer or employee from the public service. The common law background of the law governing suspension and removal is important in civil service law, but not quite as important as in the general law of officers.[1]

I. SUSPENSION

The power to suspend an officer or employee may be given by statute in express terms, but if it is not mentioned the question arises whether the officer having authority to remove has, as incidental to it, the power to suspend. The courts differ upon this question, both in the general law of officers and in civil service law. Of course, it makes a difference whether the suspension is with or without pay. If it is without pay, the courts often treat it as a removal; in this case, if the removing officer has power to remove, he may have the power to suspend, providing that all the elements required to make the removal valid are present in the suspension. In a New York case[2] the plaintiff, an officer, was suspended without pay from time to time, and finally entered into an agreement that he might

[1] For an excellent and detailed study of the manner in which civil service law and the general law of public officers are intertwined in any one jurisdiction, see Jennings, Removal from Public Office in Minnesota, 20 Minn. L. Rev. 721 (1936). See also Kettleborough, Removal of Public Officers, 8 Lawyer and Banker 12 (1915); note, 25 Ill. L. Rev. 553 (1931); note, 2 Geo. Wash. L. Rev. 463 (1934); note, 18 Minn. L. Rev. 837 (1934); note, 7 So. Cal. L. Rev. 477 (1934); note, 32 Col. L. Rev. 1252 (1932); Parker, Discharge of Firemen, Fire Engineering, June, 1932, p. 234.

[2] Emmitt v. Mayor of New York, 128 N. Y. 117, 28 N. E. 19 (1891).

be suspended without pay for short periods. He later brought an action to recover salary for the periods of suspension, claiming that he might be removed, but not suspended without pay, since the statute provided only for removal. The court permitted recovery for the periods of suspension prior to his agreement, pointing out that he could not be suspended without pay under a removal law. The tests used by the courts to determine whether one is an officer or employee for purposes of suspension or removal are those common to the law governing public officers generally.

In the national government it has been held that the power to remove, "in the absence of statutory provision to the contrary," includes the power to suspend.[3]

The power to suspend is sometimes used as synonymous with the power to lay off employees for lack of work or of funds. When this is the nature of the power, it is governed, not by the usual rules governing removal or suspension, but by the rules that apply particularly to layoffs. This branch of the subject has been dealt with elsewhere in this book.[4]

A suspension is a removal, so far as the courts are concerned, if it is without pay, and the same tests are applied to it that are applied to removal.[5] The courts apply the rules governing removal, if nothing is said about suspension, whenever the suspension is without pay.[6] In a federal case it was said that the power to suspend without pay for a definite period, for example, thirty days, is in effect a partial dismissal; the procedure that is prescribed for removals must be followed in the suspension.

A statute gave to a civil service commission the authority to make rules to "regulate the selection of persons to fill appointive positions." Under this law the commission made a rule that "with the consent of the commission, upon good cause shown, an appointing officer may reinstate in the same position or in a position in the same class and grade any person who has been separated from the service." Several employees were suspended from the police department, and when their period of suspension had expired, were reinstated without any consultation with the civil service commission. The court held that the reinstatement must have the consent of the civil service commission to be valid since the suspension had in effect been a "separation" from the service, that is, a removal. Therefore the reinstatement constituted a "selection," and selection could be made only with commission consent.[7]

A director of public safety suspended a policeman for eighteen days and subsequently for an indefinite period. No charges were preferred

[3] Burnap v. United States, 252 U. S. 512, 40 Sup. Ct. Rep. 374, 64 L. ed. 690 (1918).
[4] See the preceding chapter. Curtis v. State, 108 Oh. St. 292, 140 N. E. 522 (1923).
[5] Boyd v. Pendergast, 57 Cal. App. 504, 207 Pac. 713 (1922).
[6] Beuhring v. United States, 45 Ct. Cl. 404 (1910).
[7] Police Commissioner v. Commissioner, 278 Mass. 507, 180 N. E. 300 (1932).

against him. A written statement of reasons was required in cases of discharge. The policeman asked for salary for the period of suspension, claiming that the suspension was illegal. "Nothing herein contained shall limit the power of any superior officer to suspend a subordinate for a reasonable period, not exceeding thirty days, pending hearing and decision." The court held that the thirty-day limit applied to all suspensions, and that to suspend for an indefinite period constituted a removal.[8]

When the power of suspension for disciplinary purposes is granted to an administrator, and likewise the power to remove, but subject to a review by the civil service commission, the commission may not pass upon the propriety of the reasons for a suspension.[9]

When the removing officer has only the power to suspend, and the civil service commission has the power to dismiss in the last analysis, having jurisdiction to review the dismissal, the commission may amend the notice given by the suspending officer. The letter or notice of suspension is not invalid merely because it is couched in terms of dismissal, nor is the commission acting outside its jurisdiction if it adds other reasons for the dismissal.[10] A statement of the reasons, not of the acts committed by the employee, was sufficient to satisfy the court, when reasons were specified by the statute as the bases for removal.

In case a suspension is made by the superior and approved by the commission in accordance with its statutory power, the superior may not later increase the penalty imposed as part of the suspension.[11] Once it has been fixed and approved, the penalty is out of the control of the superior.

When the power to suspend is for thirty days, pending a hearing, thirty days is the limit of the period for which suspension can be made.[12] The statute in this case recited that "nothing herein contained shall limit the power of any superior officer to suspend a subordinate for a reasonable period, not exceeding thirty days, pending hearing and decision." It is not uncommon to find that suspension is permitted as an incident to removal, for example, pending a hearing on removal charges.[13] A charter provided that "the police commissioner shall be the chief executive officer of the police force . . . He shall have power to suspend without pay, pending the trial of charges, any member of the police force. If any member of the police force so suspended shall not be convicted by the police commissioner of the charges so preferred, he shall be entitled to full pay from the

[8] Egan v. Philadelphia, 172 Atl. 183, 113 Pa. Super. Ct. 93 (1934). Osterheldt v. Philadelphia, 113 Pa. Super. Ct. 8, 171 Atl. 100 (1934).

[9] State ex rel. Higgins v. Elsberg, 157 Minn. 177, 195 N. W. 902 (1923).

[10] Nichols v. Sunderland, 77 Cal. App. 627, 247 Pac. 614 (1926). See Karb v. State ex rel. Carter, 87 Oh. St. 197, 100 N. E. 346 (1912).

[11] Moreland v. City of Philadelphia, 101 Pa. Super. Ct. 299 (1931).

[12] Haslam v. Philadelphia, 314 Pa. 225, 171 Atl. 563 (1934).

[13] Bratton v. Dice, 93 Colo. 593, 27 P. (2d) 1028 (1933).

date of suspension, notwithstanding such charges and suspension." Further, "the police commissioner shall have power, in his discretion, on conviction by him or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days pay or salary shall be forfeited or deducted for any offense." Commenting upon these provisions, the court said: "The punishment imposed subsequent to conviction has no relation whatever to the power to suspend without pay pending the hearing of charges as provided . . . above. It is only when a member of the police force is not convicted that he is entitled to the salary withheld during suspension." In answer to the plaintiff's contention that under this interpretation he would be fined more than thirty days without pay, the court said: "Such is not the case, however; the punishment inflicted subsequent to conviction should not be confounded with the right to suspend from duty without pay prior to conviction. The one is exclusive of the other. If the officer is innocent of the charges, he loses no rights; if improperly convicted, his right to review the determination of the police commissioner is safeguarded." [14]

Of course, if no legal cause for suspension is present, the employee cannot be deprived of any part of his compensation. Thus, for example, when the statute provides for the imposition of penalties, and for suspensions "for misconduct, incompetency or failure to perform their duties under or to observe the rules and regulations of the department or office," that means that suspension cannot be made except for the reasons recited. A civil service commission hearing a case of suspension ordered that the employee be reinstated and receive the salary of which he had been deprived up to the time when he accepted other employment, but that he should receive no salary after that time; this order was defective in so far as it deprived him of salary for the full period during which he had been kept out of his position.[15]

The doctrine of laches applies in cases of suit for salary or for reinstatement following suspension, just as it does in cases of removal, though in removal the date of the period involved is that of the discharge and not of the preceding suspension.[16] Per diem employees may find themselves

[14] Lehmann v. New York, 153 Misc. 834, 276 N. Y. S. 459 (1934).

[15] Petersen v. Civil Service Board, 67 Cal. App. 70, 230 Pac. 196 (1924).

[16] People ex rel. O'Connor v. Brady, 49 A. D. 238, 63 N. Y. S. 145 (1900). See Vaughn v. Chicago, 198 Ill. App. 100 (1916).

barred from recovery because of the rule that recovery is limited to work done.[17] A suspension pending criminal charges in the courts may not be governed by the same rules as one pending the outcome of proceedings to remove.[18]

The reversal by a court of the commission's action in affirming the discharge of an employee operates, for purposes of reinstatement following a suspension pending a hearing, from the time of the order of the commission at the close of the hearing, so that the suspension ends at the time the order is given by the commission.[19]

II. REMOVAL

A. Removal in the National Government

The principles that govern the power to remove under civil service law and the general law of public officers are sufficiently different in the national government and in the states to justify a brief separate discussion of removal in the national administration.

The national civil service law, as has been pointed out earlier,[20] rests only partly on statute, being based partly upon executive and administrative regulations. The portions of the law that are to be found in orders and regulations are not treated by the courts as "law" in the same enforceable sense as is a statute.[21] The provisions on removal are to be found partially in statutes and partially in presidential regulations. The statutory provisions deal with removal for political reasons; but inasmuch as it is extremely difficult to prove that a man has been or is about to be discharged for political reasons, this provision is of small, though it is of some, significance so far as the courts are concerned.[22]

A federal court will not enjoin the removal of an officer or employee, but this rule is based as much upon the general limits of equitable jurisdiction as it is upon constitutional or statutory considerations.[23] An office is not a position that involves a property right, so the courts refuse to take jurisdiction in equity.

When the removal provision is the result of an executive regulation, no law is violated by removal in disregard of the order, and therefore no liability attaches to the United States because of the removal.[24] There is a

[17] Mandeville v. College of City of New York, 197 A. D. 107, 188 N. Y. S. 656 (1921).
[18] Mandeville v. College of City of New York, *supra*, note 17.
[19] Sjoberg v. Minneapolis, 197 Minn. 406, 267 N. W. 374 (1936).
[20] See Chapter I. [21] See pp. 4, 8–10.
[22] On this general subject see the valuable analysis in Mayers, The Federal Service (1922), pp. 89–95.
[23] Ruggles v. United States, 45 Ct. Cl. 86 (1910). See Dudley v. James, 83 Fed. 345 (C. C. Ky. 1897); Page v. Moffett, 85 Fed. 38 (C. C. N. J. 1898); White v. Berry, 171 U. S. 366, 18 Sup. Ct. Rep. 949, 43 L. ed. 199 (1898).
[24] O'Neil v. United States, 56 Ct. Cl. 89 (1921).

duty upon the removing officer not to remove in violation of the regulation, but if he does so, the matter is one for internal disciplinary action within the national administration, and cannot be dealt with by the courts in an action for salary or damages against the government. "A duty is imposed upon the officer, but if he ignores it and removes a person from office, his action is not thereby illegal, nor is the removal rendered void and of no effect, nor can the person so removed claim that he has not been removed, and that he is entitled to continue in office, to perform the services of the office, and to receive the compensation attached to it." [25]

The presidential power to remove may be derived from several different sources. In the first place, it may be a corollary of his power to appoint. This corollary is derived from the common law, not from the constitution. The power to appoint that is granted in the constitution, or vested by congressional act in pursuance of the constitution, may carry with it the common law power to remove; but if so, it is because the constitution is to be interpreted in the light of the common law and not because of any constitutional doctrine relating to interpretation in this particular branch of the law or because of any constitutional doctrine relating to the executive. It is obvious that if the power to remove is derived from the power to appoint, the power to remove is narrowed very considerably, because under that doctrine the president could not remove an officer who had been appointed by the head of a department. Nevertheless, it has been held that he can do this. Therefore, although the courts often speak of the president's power to remove as derived from his appointing power, such a statement is not to be taken too seriously.[26]

The president's power to remove may be derived from the provision giving him power to see that the laws are faithfully executed. If that is the source of its derivation, the power is as broad as the presidential power of administrative supervision implied in that constitutional provision. Under this theory the president could, in seeing that the laws are faithfully executed, remove at least those officers who are part of the "administration" subject to his control, irrespective of the power under which they were appointed.

The broadest basis for the removal power of the president is, of course, "the executive power" granted to him by the first sentence of Article II of the constitution, if that grant is regarded as vesting in him *all* executive power in the national government rather than as an announcement or description of the list of expressed executive powers that follows. The probable result of such a broad interpretation would be to give the president power to remove all officers and employees except those in the judiciary and in Congress, and the employees of these two. This limita-

[25] O'Neil v. United States, *supra*, note 24.
[26] Wilmeth v. United States, 64 Ct. Cl. 368 (1928).

tion would arise out of the doctrine of separation of powers and out of that doctrine alone.

The significance of the source from which the presidential power of removal is derived becomes apparent when considered in the light of the power of Congress to impose restrictions upon both the power and the procedure of removal. The Supreme Court seems to have favored the theory of administrative supervision, for under that theory the Humphreys case (Rathbun v. United States) is explicable, inasmuch as it permits some parts of the administration to be protected against executive removal except under such conditions as Congress prescribes.[27] It is on this theory, apparently, that the court proceeded when it ordered the postmaster general to adhere to the procedures provided for by statute in connection with a reinstatement.[28] The court has also intimated that the procedural requirements of a statute will be applied to the president.[29]

The civil service law has not affected the removal power in the national government. This principle has sometimes been stated in this form: The civil service law has not changed tenure in the national administration. The power to remove is left as it was prior to the enactment of the statute. The law governing procedure and causes is the same as it was prior to the civil service law. Whether the old rule of the Shurtleff case — that if a statute imposed on the president special procedures in removal for any of several enumerated causes, the president was unfettered when he removed for other causes — still obtains is open to doubt. However, the doubt arises not out of the civil service law, but out of the confusion inherent in the Rathbun case.[30]

B. General Principles

Removal may take place by operation of law,[31] but it is with the removal based on administrative discretion that we are concerned here. A civil service law in a state or a civil service provision in a charter or city ordinance does not necessarily make any change in the law governing removal of public officers and employees; indeed, it is common for no changes to be made in the location of the power to remove.[32] If not modified by the civil service laws, the general statutes governing the procedure in removals apply.[33] It is in regard to causes and procedures,

[27] Rathbun v. United States, 295 U. S. 602, 55 Sup. Ct. Rep. 869, 79 L. ed. 1611 (1933).
[28] United States v. Postmaster, 221 Fed. 687 (D. C. N. Y. 1915).
[29] Shurtleff v. United States, 189 U. S. 311, 23 Sup. Ct. Rep. 535, 47 L. ed. 828 (1903).
[30] Cf. Rathbun v. United States, *supra*, note 27, and Shurtleff v. United States, *supra*, note 29.
[31] Mason v. Los Angeles, 130 Cal. App. 224, 20 P. (2d) 84 (1933).
[32] People ex rel. Corrigan v. Mayor, 149 N. Y. 215, 43 N. E. 554 (1896).
[33] People ex rel. Vaughn v. Chicago, 227 Ill. 445, 81 N. E. 370 (1907); State ex rel. Nelson v. Board of Public Welfare, 149 Minn. 322, 183 N. W. 521 (1921).

particularly procedures, that the civil service laws usually make the greatest changes. The changes made are, of course, statutory,[34] but the statutes, as is true of statutes generally, are interpreted against their common law background.

State constitutions sometimes contain provisions relating to tenure of office and removals therefrom, and when those provisions specify a tenure that is to be terminated in one manner unless otherwise declared by "law," it is necessary that the legislature declare the other methods of termination, the civil service commission having no power to do so under such a constitutional provision.[35] Civil service regulations must comply with the statutes or charters in the field of removal, just as in other fields.[36] Thus a regulation providing for removal without a hearing is invalid when the charter implies that removal shall be with a hearing. Nor can the civil service commission restrict the power to remove so as to lessen the power vested by statute in an officer.[37] But when the power to remove and the civil service system both come from a city charter, an ordinance is valid which limits the power to remove in accordance with the civil service provision of the charter.[38]

Civil service laws sometimes change the location of the power to remove by vesting it in the civil service commission. For example, a statute provided that a police civil service commission should have "absolute control and supervision over the employment, promotion, discharge and suspension of all officers and employees of the police department." Other provisions prescribed certification of the action of the commission to the appropriate officer for enforcement.[39] This was held to leave the power of removal with the civil service commission, and not with the chief executive officer of the police force nor with the city council. Sometimes the power to remove is vested in more than one officer. In one case both the court and the mayor and council were vested with the power; this was held to be valid under a constitutional provision providing that "the general assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers on conviction of willful and corrupt or fraudulent violation or neglect of duty." [40]

It is not uncommon for the administrative superior to be given the power to remove, but for his exercise of removal power to be subject to a review by the civil service commission if the employee demands such review within a specified time. When this procedure is provided for, it

[34] People v. Judges of Superior Court, 56 Hun 643, 9 N. Y. S. 691 (1890).
[35] People ex rel. Percival v. Cram, 164 N. Y. 166, 58 N. E. 112 (1900).
[36] Bratton v. Dice, *supra*, note 13.
[37] People ex rel. Brennan v. Scannell, 62 A. D. 249, 70 N. Y. S. 983 (1901).
[38] Potter v. City of Compton, 15 Cal. App. (2d) 232, 59 P. (2d) 537 (1936).
[39] Naeseth v. Village of Hibbing, 185 Minn. 526, 242 N. W. 6 (1932).
[40] State ex rel. v. Walbridge, 119 Mo. 383, 24 S. W. 457 (1893).

must be followed; an appeal to the wrong officer or body will not affect the binding effect of action taken by the correct officer or body. If, by appealing to the wrong body, the time limit expires within which an appeal to the commission could be taken, that would not affect the decision. If the appeal is taken to the wrong officer and he orders the employee reinstated, the commission can nevertheless order the discharge to be carried out.[41]

A civil service commission derives no power of removal from the fairly common requirement that the removing officer must file a statement with the civil service commission.[42] This type of requirement is for the information of the commission rather than for the purpose of allowing it to participate in the removal procedure. It also serves to make public the reasons and details of the removal. The statutes may provide for administrative appeals in the power of removal, giving the power to remove some employees to one officer, with an appeal to another. This leaves no share in the procedure with the civil service commission.[43] But, of course, the officer having the power to remove must be the one to do so.[44] No one else may exercise the power for him.

The conflicts that arise between statutes relating to the power to remove are settled by the rules that generally apply in a question of which of two statutes is to govern. For example, of two statutes that were enacted during the same session of the legislature, both applying to removals, but one general and the other special, the court held that the special one would govern.[45] These rules of interpretation will sometimes favor the civil service laws, at other times acts contrary to the civil service laws.[46] Sometimes the question whether the civil service act governs removal will depend upon whether the removed officer is subordinate or confidential.[47]

In general it may be said that civil service laws curtail the removal power under existing statutes only in so far as they expressly or by clear implication substitute different procedures or causes or new rules concerning participation in the exercise of the power to remove.[48]

Under some state constitutions situations are created in which it becomes difficult to tell just how far a civil service law can go in limiting the power of removal mentioned by the constitution in connection with

[41] State ex rel. Lennon v. Kellogg, 119 Wash. 584, 205 Pac. 843 (1922).
[42] Easson v. Seattle, 32 Wash. 405, 73 Pac. 496 (1903).
[43] State ex rel. Moyer v. Baldwin, 77 Oh. St. 532, 83 N. E. 907 (1908).
[44] Beuhring v. United States, *supra*, note 6.
[45] State ex rel. v. Noel, 114 Fla. 188, 154 So. 219 (1934).
[46] People ex rel. Vaughn v. Chicago, *supra*, note 33.
[47] Naughton v. Bayle, 129 Misc. 867, 223 N. Y. S. 432 (1927); People ex rel. Johnson v. La Roche, 111 Misc. 465, 181 N. Y. S. 611 (1920).
[48] People ex rel. McKeon v. Ludwig, 215 N. Y. 389, 109 N. E. 484 (1915).

certain offices or officers. In New York it was held that where possible a section of the constitution which recited that certain officers "shall be subject to suspension and removal" by a designated officer should be interpreted so as to be subject to the civil service provision in the same constitution, in order that a statute imposing certain forms and procedures upon the removing officer might be held valid.[49]

The tenure that is provided for by those civil service acts which affect tenure was discussed in an earlier chapter.[50] The exact effect that such laws have upon tenure depends, of course, partly upon the phraseology of the constitutions under which they are enacted and partly upon the exact phraseology of the laws themselves. Some of the general principles governing the terms of officers apply to this branch of the law. If the civil service law does not expressly apply to those holding for definite terms, there is a tendency to decide that the removal provisions apply only to those holding for indefinite terms.[51] Those on definite terms do not hold on good behavior if good behavior is the tenure that is generally provided for in the civil service law.

When the statute provides for the method that is to be followed in separation from service, it is not permissible for the civil service commission to provide by rule for other methods. Thus a rule of the civil service commission that leave of absence of more than a year for sickness shall constitute a separation from service is invalid when the statute does not recognize this method of severing the employee's connection with the service.[52] Whether the term is definite or indefinite is, of course, tested by the rules of law that apply to that question in the general law of public officers; one of the most troublesome of all the phases of this subject is that of failure to reappoint when short terms have been used and continued on the assumption that the term was really indefinite.[53] Some constitutions limit the terms of officers, but not of employees, and also give the power to remove at pleasure.[54] Under some of these provisions it is not possible to grant officers tenure during good behavior.[55] This type of provision may result in only employees being covered by the classified service or in extending the removal provisions of the civil service act to employees only. The Colorado constitution is rather unusual in that it provides for tenure itself instead of leaving it to be determined by statute.[56] The definition of term or tenure is bound up inti-

[49] Matter of Seeley v. Stevens, 190 N. Y. 158, 82 N. E. 1095 (1907).
[50] See Chapter III.
[51] McKenzie v. Elliott, 77 N. J. L. 43, 72 Atl. 47 (1909).
[52] People ex rel. Davie v. Lynch, 164 A. D. 517, 149 N. Y. S. 895 (1914).
[53] People ex rel. McBride v. Atchinson, 68 Misc. 115, 123 N. Y. S. 577 (1910).
[54] McLaughlin v. Green, 96 Kan. 641, 152 Pac. 661 (1915). See Arthur v. Philadelphia, 273 Pa. 419, 117 Atl. 269 (1922).
[55] Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518 (1901).
[56] Bratton v. Dice, *supra*, note 13.

mately with removal provisions. The inverse order rule in layoffs cannot be imposed upon an officer having a constitutional power of removal.[57]

There is a tendency to require cause for removal if, by ordinary canons of interpretation, it can be required in connection with civil service laws.[58]

The time at which a civil service law takes effect has been referred to earlier, and it has been pointed out that some provisions of the law may not be applicable during the period of establishment but must wait until the selective machinery has been established and the procedures worked out. Other provisions, such as the removal provisions, need not wait upon this preliminary work but may become effective upon enactment.[59]

Not every change of duties constitutes a removal or layoff or demotion, of course, because there can be no vested right in duties. A transfer may involve change of duties and be valid. The courts are ordinarily ready to protect the employee against the use of transfer as a method of removal, and statutes also recognize the necessity of this protection. However, if a transfer is made legally and with no coercion, it is valid even though the transferred employee is laid off the new position shortly after being transferred to it, and even though the superior had knowledge that this was likely to be done.[60]

Protection against removal does not prevent reduction of force for economy, nor does it require that a position be continued indefinitely without regard to considerations of efficiency.[61] But, of course, the courts will refuse to sanction changes in titles, classifications, or duties which in reality seem to have been made for the purpose of depriving employees of classified status; and neither transfer, reassignment, nor reorganization will be sustained if the surrounding facts give to the transaction the color of evasion.[62] The general reorganization of the city administration that sometimes occurs as a part of the reconstruction of city government is not to be confused with the minor type of change that is more likely to be motivated by a desire to rid the service of an employee or officer.[63]

A failure to certify the payroll is not equivalent to a removal. Certification is evidence of title, and failure to certify may be evidence of lack of title to a position, but neither is determinative of title itself. It has been said that certification is for the purpose of administrative convenience, not for the purpose of determining legal rights.[64]

[57] Clark v. Greene, 209 A. D. 668, 205 N. Y. S. 313 (1924).
[58] Ham v. Boston Board of Police, 142 Mass. 90, 7 N. E. 540 (1886).
[59] People ex rel. Barron v. Scannell, 56 A. D. 624, 67 N. Y. S. 1142 (1900).
[60] Matter of Griffin, 77 Misc. 553, 138 N. Y. S. 128 (1912).
[61] State ex rel. Culver v. Board of Public Welfare, 174 Minn. 571, 219 N. W. 919 (1928).
[62] People ex rel. Gillespie v. Bundesen, 277 Ill. App. 169 (1934); People v. Keller, 157 N. Y. 90, 51 N. E. 431 (1898).
[63] State ex rel. v. Cleveland, 45 Oh. App. 460, 187 N. E. 317 (1933).
[64] State ex rel. Leader v. Kansas City, 258 S. W. 762 (Mo. App. 1924).

Which classes of persons are subject to removal in one manner and which in another manner are determined by statute. Usually one of the chief purposes of civil service laws is to grant certain classes of public officers and employees special protections against arbitrary or political removal and provide safeguards as to the procedure to be followed in removal. These classes may be described in general terms, or they may be identified and defined precisely. A search of the statute and a study of the decisional law relating thereto are necessary to obtain the answer to the question: Which employees are entitled to the removal provisions of the civil service law? Some of these problems have been discussed in an earlier chapter on the scope of the civil service and the establishment of the civil service law.[65]

A provision that "no member of the police or fire department shall be removed" except in a certain manner has been held to include a harness-maker in the fire department; these words were said not to be restricted to the uniformed group.[66] Persons in the unclassified service may be given regular civil service law protection against removal,[67] but it is usual for those in the exempt class to be unaffected by the civil service provisions with respect to discharge.[68] Probationary status has been discussed elsewhere,[69] but it may be repeated that in general the rule applies that probationers do not come within those provisions.[70] Confidential positions may be subject to the regular rules of removal that are contained in the general officers' law, or they may be in the exempt class. The problem of their status arises in connection with removal as well as with appointment.[71]

The day laborer and part-time worker may occupy a somewhat different status than others in the service because of the time factor in their employment.[72] The day laborer may be distinguished from the part-time worker because the laborer may or may not be in the classification scheme of the statute to which the removal provision may refer, while the part-time worker may be working in a permanent position on a part-time basis and thus be in the classified service.[73] A reduced hour schedule may result in putting a person on part time. This may not affect his status in the service. A seasonal worker may be removed without reference to the civil service law, because each seasonal employment is a new hiring;

[65] See Chapter II.

[66] Matter of Deth v. Castimore, 245 A. D. 156, 281 N. Y. S. 114 (1935).

[67] Lattime v. Hunt, 196 Mass. 261, 81 N. E. 1001 (1907).

[68] Kydd v. City and County of San Francisco, 37 Cal. App. 598, 174 Pac. 88 (1918).

[69] See Chapter VI. McGillicuddy v. Civil Service Commission, 133 Cal. App. 782, 24 P. (2d) 942 (1933).

[70] Kenyon v. Chicago, 135 Ill. App. 227 (1907).

[71] People v. Wells, 85 A. D. 378, 83 N. Y. S. 376 (1903).

[72] Cottam v. New York, 74 Misc. 67, 131 N. Y. S. 617 (1911).

[73] Stines v. Board of Commissioners of Belmar, 11 N. J. Misc. 757, 168 Atl. 177 (1933).

therefore, he never gains sufficient status to enable him to claim protection against removal. A failure to reappoint is to be treated as a problem of hiring rather than of firing.[74]

The position of those who were in the service at the time of the adoption of the civil service law has been discussed. Many of the questions in that discussion relate also to removal.[75] Sometimes those with "long and efficient service" are given the same status as those who pass either a competitive or a qualifying examination.[76] If so, they often receive the same removal protections, although of course it may be that only those who come under the selective provisions of the act are entitled to protection against removal. The question of which laws govern a particular group, of course, presents the usual problems of interpretation and of the relationship of one statute to another.[77] Temporary appointments and the status enjoyed by short-time holders of positions have been dealt with earlier.[78]

An illegal removal does not in law sever a person from the service so as to subject him again to examination for appointment when he is reinstated.[79]

C. Causes of Removal

The causes of removal that prevail in civil service law are not peculiar to that law, but may characterize those other branches of the law of public officers that are covered by statute to any considerable extent. But it is only natural that when civil service laws are enacted and the free rein of administrative power to remove is thus checked, more attention should be paid to the causes of removal than might otherwise be the case. The situations that are described below and the rules governing them are to be taken then as illustrative rather than as a complete catalogue of the particularities of the law governing cause of removal.

A common requirement in civil service laws is that no person shall be removed except "for just cause and for reasons specifically given in writing." The effect of such a recital upon the question of whether a hearing is required will be discussed later, but it should be noted that the effect of a statement of this kind is to limit the power of removal very considerably. There must be a cause for removal.[80]

Of course, the existence of an adequate legal cause does not excuse the

[74] People v. Treman, 137 N. Y. S. 64 (1912).
[75] See pp. 27–35 above.
[76] Engstrand v. Gilman, 215 N. W. 657 (1927).
[77] People ex rel. Miller v. Feitner, 27 Misc. 153, 57 N. Y. S. 807 (1898); People v. Keller, 158 N. Y. 187, 52 N. E. 1107 (1899).
[78] See Chapter VI. Budd v. Hill, 243 A. D. 735, 277 N. Y. S. 534 (1935).
[79] People v. Stevenson, 270 Ill. 569, 110 N. E. 814 (1915).
[80] Thomas v. Municipal Council of Lowell, 227 Mass. 116, 116 N. E. 497 (1917).

violation of statutory procedural requirements.[81] In commenting upon the effect of a requirement of this type, the Michigan court said: "Appellant was in office under civil service provisions. He could not be captiously removed on trivial or technical grounds. If he was to be removed at all, it must be removal for cause, and that which is charged as a reason or justification for removing one for cause must relate to and affect the administration of the office. It must be something which in a material way affects the rights and interests of the public." [82] It is, of course, the adequacy of the cause rather than the truth of any particular cause that is legally significant here.[83]

When the commission has power to remove for cause, it is not necessary that the causes for which removal may be made should be listed in a regulation of the commission.[84]

A statutory declaration that removal may be "for the good of the service" means that reasonable cause must exist for the removal.[85] It is insufficient to allege that the removal was for the good of the service when a statute requires the statement of the reasons for removal because though allegation implies a cause, it is not a reason.[86] Neglect of duty may constitute just cause for removal, if substantial. Concerning a statute which limited removal to "just cause," but defined just cause to mean any cause which is detrimental to the public service other than political, racial, or religious, one court made the following statement: "That the act and the rule require that the appointing officer, in the discharge notice, shall make out a prima facie case of 'just cause' for the discharge seems reasonably clear. The discharge notice need not be verified, and it is a serious commentary upon the so-called State Civil Service Act that the employee has no right to question the truth of the charge no matter how serious it may be. The appointing officer is not required to hold hearings or to make findings. If he makes out a prima facie case of 'just cause' on paper, he can arbitrarily and unjustly discharge civil service employees, and they have no right to a hearing save to prove, to the commission, if they can, that they were discharged solely for racial, religious or political reasons. We are forced to the conclusion that the contention of the attorney general that, under the act, whether or not there was 'just cause' as a matter of fact, for the discharge of the plaintiff, is to be determined solely by the appointing officer and that his action in that regard cannot be reviewed by commission nor court, is sound. We recognize fully that the

[81] People ex rel. Williams v. Ward, 72 Misc. 446, 130 N. Y. S. 290 (1911).
[82] Carroll v. City Commission, 265 Mich. 51, 251 N. W. 381 (1933).
[83] Matter of Griffin v. Thompson, 202 N. Y. 104, 95 N. E. 7 (1911).
[84] Joyce v. City of Chicago, 216 Ill. 466, 75 N. E. 184 (1905).
[85] Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612 (1900).
[86] McKenna v. White, 287 Mass. 495, 192 N. E. 84 (1934).

act affords little, if any, protection to the employees; but the legislature, alone, has the power to remedy the patent defects in the law." [87]

The regulation of the removal procedure does not convert the removal into a trial.[88] But when charges in writing are required, it has been held that removal can be made only for the charges that are made in writing and not for other charges brought out later in a hearing.[89]

Illegality or irregularity in appointment has been discussed in the chapters on certification and appointment,[90] but several cases have raised the question of the relation between the removal power and the illegality of appointment. This question is not unaffected by the presence or absence of a definite term.[91] It has been suggested that if there is no position to fill, that is, if no position has been legally created to which to appoint the person, then the removal protection will not apply to one who claims to hold the position.[92] But if a position legally exists and an irregularity in filling it is discovered, then on the de facto principle the holder may be protected.[93] The de facto principle, it should be observed, protects the holder against attack on the part of the public, but not against attack by the authorized representative of the state, usually the attorney general. In a removal case it is apparently to be assumed that the superior officer is not the representative of the state but rather of the public.[94] Similarly, since it is not proper for a defect in the title of the appointing authority to be visited upon the appointee, providing that the appointing officer has de facto status,[95] a person holding appointment by a de facto officer is protected by the removal provisions. There is disagreement as to what protection against removal should be given those who have been appointed irregularly, for example, when over age.[96] Long-continued recognition of the appointee by the appointing officer may affect removal of improperly certified persons.[97] It has been held that a removal statute which specifies incompetency, gross neglect of duty, or "any other reasonable and just cause" does not permit removal for unlawfully obtaining the position.[98]

[87] People ex rel. Carroll v. Durkin, 280 Ill. App. 510 (1935).

[88] In re McGuire, 157 A. D. 351, 142 N. Y. S. 426 (1913), affirmed, 209 N. Y. 597, 103 N. E. 1126.

[89] Jones v. New Orleans, 160 La. 645, 107 So. 476 (1926).

[90] See Chapters V and VI.

[91] McLaughlin v. Green, *supra,* note 54.

[92] People ex rel. Keenan v. Schultze, 81 Misc. 287, 143 N. Y. S. 303 (1913).

[93] People ex rel. Keenan v. Schultze, *supra,* note 92.

[94] See Field, The Effect of an Unconstitutional Statute (1935), Chapter 4.

[95] Moloney v. Selectmen, 253 Mass. 400, 149 N. E. 317 (1925).

[96] State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11 (1914). See McCarthy v. Board, 37 Cal. App. 495, 174 Pac. 402 (1918); Scahill v. Drzewucki, 244 A. D. 530, 279 N. Y. S. 933 (1935).

[97] State v. Buech, 171 Wis. 474, 177 N. W. 781 (1920).

[98] Karb v. State ex rel., 87 Oh. St. 197, 100 N. E. 346 (1912).

Under a statute requiring that "all employees and officials under and by virtue of this act shall be citizens of the United States and residents of the city and county of New York," it was held that to have falsely represented oneself as a naturalized alien constituted a good cause for removal.[99] Fraud in the examination is a just cause for removal, and applies to one who had another person write the examination for him.[100] In the national government conduct violating the oath of office or the terms of employment may be cause for removal.[101]

The procedure to be followed in a removal may be applied to a case of illegality in appointment. For example, it has been held that a veteran is entitled to notice and hearing in a procedure to remove him for having failed to pass the examination, the statute giving such procedural protection to those removed for "incompetency."[102]

It is sometimes difficult to tell whether the removing authority is acting under one or another provision of a statute and difficult to tell whether the court sustains the action under one or another of the provisions. For example, a statute provided for removal for "habitual drunkenness" and "for any other just and reasonable cause." An employee who had been drunk once was removed. How many times does the superior have to stand by and watch the employee become intoxicated before he can remove him because of habitual drunkenness? The court sustained the removal, not saying whether it was for habitual drunkenness or for some other just and reasonable cause.[103] An officer does not violate a rule against intoxication merely by having the odor of liquor on his breath. Nor is it "misconduct" for him to have a sufficiently strong breath to cause his colleagues or superiors to suspect that he has taken a drink.[104]

A policeman may be discharged for drunkenness, though off duty, under a provision permitting removal for "conduct unbecoming to a police officer."[105] A married policeman found to be the father of an illegitimate child was discharged under an ordinance reciting that dismissal might be for "any immoral habits, lascivious or improper conduct not herein enumerated which would render him an unfit and improper person for employment by the city." This was held to be proper.[106] So, too, a removal of an officer for having been found in a compromising

[99] People ex rel. Picceola v. Woodbury, 114 A. D. 188, 99 N. Y. S. 573 (1906).
[100] People ex rel. Krushinsky v. Martin, 91 Hun 425, 36 N. Y. S. 851 (1895).
[101] 8 Dec. Comp. Gen. 443 (1902).
[102] People v. Board of Health, 15 A. D. 272, 44 N. Y. S. 597 (1897).
[103] State ex rel. Hardesty v. Wells, 121 Oh. St. 139, 167 N. E. 362 (1929).
[104] Barney v. Ashland, 220 Ky. 657, 295 S. W. 998 (1927).
[105] Bloomquist v. Rehnberg, 280 Ill. App. 1 (1935). See People ex rel. Wood v. Department of Health, 202 N. Y. 610, 96 N. E. 1127 (1911).
[106] Brewer v. City of Ashland, 260 Ky. 678, 86 S. W. (2d) 669 (1935).

position with a married woman is valid under a provision authorizing removal for conduct unbecoming an officer.[107]

Disobedience of rules of the department or of the office in which the employee works may constitute just cause for discharge. A policeman did not violate a regulation which forbade the giving out of information, when to do so would defeat the ends of justice, by telling an insistent reporter that he might look up to see who had been responsible for the change in the assignment of the policeman. The latter was under investigation at the time.[108] It has been held that an allegation of "neglect of duty" is sufficient when the requirement is that removal shall be for cause.[109] A mere mistake in judgment is not sufficient to constitute a cause for removal, and it is insufficient to establish incompetency and neglect of duty that a certifying officer certified the wrong number of names under a statute which recited that "not exceeding three" names should be certified.[110]

An employee may not successfully defend against a discharge by showing that he honestly believed it would be better for the service if he disobeyed the order and executed his duty in a manner contrary to the order.[111]

It is not insubordination for a suspended person to refuse to talk with his chief in the absence of his attorney, when acting on the advice of the latter, and he cannot be discharged because of that refusal.[112] That an employee made a charge or complaint of mistreatment in the service under a rule permitting such complaints does not support an allegation that the employee intentionally made false reports and circulated false rumors; this was held to be true even though he was unable to prove the charges that he had made.[113]

The fact that the head of a department has the power to make rules for the "government" of an office does not mean that he may prescribe a penalty of summary discharge for breach of the rules when the law requires that notice and hearing or an opportunity to explain be afforded the person who is to be removed.[114]

"For the good of the service" is not the equivalent of just cause.[115] Old age and temporary illness do not in and of themselves constitute a sufficient cause for removal when the statute does not expressly recognize

[107] State ex rel. Savin v. Seattle, 65 Wash. 645, 118 Pac. 821 (1911).
[108] Heidt v. Valentine, 252 A. D. 626, 300 N. Y. S. 609 (1937).
[109] McCarthy v. Emerson, 202 Mass. 352, 88 N. E. 668 (1909).
[110] State ex rel. Attorney General v. Hoglan, 64 Oh. St. 532, 60 N. E. 627 (1901).
[111] Matter of MacMillan v. Morgenthau, 146 Misc. 588, 263 N. Y. S. 568 (1933).
[112] Garvin v. Chambers, 195 Cal. 212, 232 Pac. 696 (1924).
[113] Jones v. New Orleans, *supra*, note 89.
[114] People ex rel. McCabe v. Constable, 27 A. D. 74, 50 N. Y. S. 121 (1898).
[115] Stiles v. Municipal Council, 229 Mass. 208, 118 N. E. 347 (1918).

them as causes, but does express incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, and the like.[116] Presumably if old age was shown to result in incompetency, the situation might be quite different. The problem of old age in the civil service is particularly difficult in the absence of an adequate retirement system, and various methods of dealing with it are in vogue in the several jurisdictions. Transfer, voluntary acceptance of part-time work, layoff, etc., are some of these practices.

Absence from work may be a cause for removal. Where, as is not uncommon, the rules provide that if unexplained absences continue for more than ten days, for example, the absence shall constitute a separation from service on the theory of abandonment of office or position, the case is clear. But what of an absence of three days under such a rule? Apparently that is also to be treated as a cause for discharge; however, if so treated, the notice and procedural provisions must be observed, whereas in an absence of ten days this is not necessary.[117] Sometimes the rule is phrased in terms of resignation: for example, "absence, without leave, of any member of the police force for five consecutive days, shall be deemed to be a resignation, and the member so absent shall, at the end of the period, cease to be a member of the police force and be dismissed therefrom without notice."[118]

The obligation that rests upon the employee to notify his superior of intended absence is enforced by the courts, and failure to give such notice may contribute materially toward justifying the superior's action in dismissing the employee for absence without leave. This is strikingly illustrated by the case of the police officer who was alleged to have suspected his wife of too intimate relations with another man and who, without notifying the proper superior, took an hour and a half's time from duty to gather evidence. After obtaining the evidence, which apparently gave rise to a fight between him and the other man, he was discharged. The court upheld the discharge, saying that there was no excuse, under modern conditions of communication, for not giving notice of his intended absence.[119]

Absence due to illness is handled in a variety of ways. For example, one rule provided that employees who were absent from duty must arrange to have their work carried on by others in the office and must pay the persons carrying it on. An absence for illness in which no notice was given was held to be a basis for removal, but of course the courts distinguish between the giving of notice by one who is able to do so and by

[116] State ex rel. Desprez v. Board of County Commissioners, 47 Oh. App. 1, 189 N. E. 665 (1933).

[117] Kammann v. City of Chicago, 222 Ill. 63, 78 N. E. 16 (1906).

[118] People ex rel. Padian v. McAdoo, 114 A. D. 100, 99 N. Y. S. 600 (1906).

[119] Robbins v. Town Council, 13 N. J. Misc. 353, 178 Atl. 212 (1935).

one who is so ill that he cannot arrange to give it.[120] Summary dismissal may not be visited upon one who failed to give notice to the proper person, but did give notice to a clerk, who for some reason failed to deliver it to the proper officer. The regular removal procedure must be utilized, because it might turn out that the notice was sufficient under the circumstances.[121]

A provision of the civil service rules recited that "absence without leave for a period of five days, unless it is substantially shown that such absence was unavoidable, shall be construed as a resignation." It was further provided that "in case of sickness, notice must be sent at once to the department in writing and a doctor's certificate must be furnished to the effect that the employee is physically unable to perform his duties." An employee was absent without leave for two days, attending to private business. He had intended to go back to work on the third day but was taken ill. He notified the office by mail, but the notice was not received on that day. The doctor's certificate came a few days later. Four days after he gave the first notice he returned to work. The court held that it was not necessary for the doctor's certificate to accompany the written notice. The court . . . ' that the absence for the first two days might have constituted a cause for removal, but that had not been the basis of the charge.[122] The courts generally apply the test that if the employee does all that he can to give the required notice as soon as he can give it, that is sufficient.[123] It is not necessary for a person who seeks to justify his absence from work on the ground of illness to show that he called a doctor; nevertheless, if he has not called one, it is clearly more difficult for him to make out a convincing case that he was really too ill to comply with notice requirements.[124]

A distinction must be drawn between an office and an employment in connection with illness as a reason for absence. The theory of compensation is that an employee is entitled to it either through contract or through work done, while the officer is entitled to it as a perquisite of office. For this reason an officer may not be removed for illness, while an employee may be under some conditions. If the employee has been ill for a long period and has received compensation for a portion of that period, that compensation is a matter of grace and gives rise to no claim to compensation for the remainder of the period during which he was ill. Long-continued illness is a valid cause for removal.[125] Absence with-

[120] O'Malley v. Robbins, 142 Misc. 305, 255 N. Y. S. 161 (1931).
[121] Matter of Crowley v. Fowler, 217 A. D. 16, 215 N. Y. S. 690 (1926).
[122] People ex rel. Holahan v. Butter, 63 Misc. 360, 118 N. Y. S. 459 (1909).
[123] Matter of Kelly v. Morgan, 241 A. D. 476, 273 N. Y. S. 142 (1934).
[124] People ex rel. Lenahan v. Grigenhagen, 164 A. D. 180, 149 N. Y. S. 636 (1915), appeal dismissed, 214 N. Y. 652, 108 N. E. 1105.
[125] Neal v. New Haven, 83 Conn. 151, 76 Atl. 543 (1910).

out leave for a fixed number of days may be a cause for removal; but absence for illness for that length of time is not automatically brought within the provision.[126] When a person who is on leave of absence is taken ill, and is thought by virtue of his age and illness to be unlikely to recover, his superior may not remove him in anticipation of his inability to perform the duties of his position when the leave expires.[127]

Closely allied with illness is mental disorder of such a nature as to incapacitate a person for work. In the case of mental disability the procedure should not be discharge of the disabled employee, but rather suspension or retirement, if he has any rights of that kind.[128] Of course, the employee may waive the right not to be discharged without notice and hearing when thought to be mentally deranged, and a claim for the refund of his contributions to the retirement fund may operate as a waiver.[129]

In a few instances insanity or unsoundness of mind rendering a police officer "unable or unfit to perform full police service" is specified as a cause for removal. The fact that the policeman has been adjudged insane by the usual authorities is only prima facie evidence that he is so for purposes of removal; it must be shown for this purpose that the unsoundness of mind rendered him "unable or unfit" to carry on his work.[130]

Gross mistakes in the performance of one's duties may justify removal. A charge setting forth that an officer had incompetently and negligently handled the paving of a certain street was held to state a valid cause of removal.[131] Usually a single mistake will not be sufficient to justify removal, but this is subject to exception; the mistake may be so serious that its bearing upon incompetency or irresponsibility is conclusive enough to constitute it a valid cause.[132]

A refusal on the part of an employee or officer to divulge the true nature of the work that he is carrying on when he is requested by a superior officer to give such information may be a cause for discharge. So, if a subordinate fails to show by his report that some of his duties involve the exercise of a great deal of discretion on his part, and his report should show this, he is not saved by the fact that his superior might by an independent investigation have so learned; he himself is under an obligation to reveal the nature of his duties.[133]

[126] Matter of Elder v. Bingham, 118 A. D. 25, 103 N. Y. S. 617 (1907), affirmed, 189 N. Y. 509, 81 N. E. 1163.
[127] State ex rel. Desprez v. Board of County Commissioners, *supra*, note 116.
[128] People ex rel. Murray v. Connolly, 184 A. D. 587, 172 N. Y. S. 48 (1918).
[129] Matter of Piani v. Davidson, 240 A. D. 383, 270 N. Y. S. 44 (1934).
[130] Matter of Reiblich v. Cropsey, 71 Misc. 502, 130 N. Y. S. 597 (1911).
[131] Heaney v. Chicago, 117 Ill. App. 405 (1904).
[132] People ex rel. Long v. Whitney, 143 A. D. 17, 127 N. Y. S. 554 (1911).
[133] People ex rel. Veiller v. Brady, 43 A. D. 60, 59 N. Y. S. 322 (1899).

Failure to make an arrest when liability for making a false arrest might attach to the employee personally is not misconduct or incompetency for purposes of removal.[134] Abuse of subordinates by a superior may be misconduct on the part of the superior.[135]

A large unexplained bank account to the credit of a police captain may constitute a "cause" for removal. The statute read, "No police officer or fireman . . . shall be removed or discharged, except for cause . . ." The court said of this statute and of this situation: "It was essential to the proper discharge of his duties that he should comport himself as an officer in such manner that no act of wrongdoing should attach itself to him, to the end that those who served under him should feel for him that respect which insures confidence and obedience. As such an officer he should have been keen to see that no taint of evil wrongdoing attached itself to him, and when charges were made, reflecting upon his honesty and integrity, that they were met with denials and answering proof of no delinquencies." [136]

It is not a proper cause for removal that the employee uses government gasoline in his own car so long as he uses his own car in the performance of his governmental work.[137]

Solicitation and bribery constitute conduct unbecoming to an officer and may be cause for removal.[138] The relation of crime to discharge is subject in part to statutes and in part to decisional rules of the common law. The statutes may provide that if an officer is convicted of crime, he shall be discharged.[139] The phraseology may be such that no discretion is left to the removing authority, or it may be such that discharge occurs by operation of law without the intervention of administrative action at all. Whether or not notice and hearing are required under the civil service laws in such a case will depend entirely upon the type of statute that is involved.[140]

Removal proceedings are not criminal proceedings, and removal from a position is not normally a criminal penalty. For this reason it is perfectly possible that conviction in a criminal court may not conclude the question of whether the convicted employee should be removed from his position. The offense of which he was convicted may or may not have any relation to his fitness for his position. The law generally recognizes this difference; thus when a court finds a man not guilty, it recognizes

[134] Matter of Eisle v. Woodin, 205 A. D. 452, 199 N. Y. S. 559 (1924), affirmed, 238 N. Y. 551, 144 N. E. 887.
[135] Williams v. City of Newport, 229 Ky. 810, 18 S. W. (2d) 283 (1929).
[136] Souder v. Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931).
[137] Morrow v. City of Somers Point, 112 N. J. L. 291, 170 Atl. 624 (1934).
[138] People v. Powell, 127 Ill. App. 614 (1906).
[139] Asbury Park v. Knight, 14 N. J. Misc. 706, 186 Atl. 721 (1936).
[140] State ex rel. v. Knoxville, 166 Tenn. 530, 64 S. W. (2d) 7 (1933).

that he may properly be discharged by administrative action, even though a hearing is required.[141] With reference to a charge of drunkenness of which the employee had been acquitted in court, the court said: "The Superior Court in trying a man on a charge of violation of the criminal law and the town council of Bristol in deciding whether the same man is qualified to be the chief of police of the town are separate and independent tribunals moving in distinct spheres and are governed by different considerations and very different rules as to the necessary degree of proof required for a finding by the one tribunal of guilty or not guilty and a finding by the other tribunal of unfitness or fitness. The purpose of the former proceeding is the punishment of crime and of the latter the maintenance of the morale and efficiency of the police force and its good repute in the community. Therefore the fact that a jury has acquitted a man of criminal charges does not prevent the council from finding such misconduct on his part as in its judgment disqualifies him for the office which he holds, even though the same conduct by him is involved in both cases." [142] This same reasoning has been applied to other types of conduct, for example, that involved in bastardy cases.[143]

A problem that is common in the general law of officers and employees is raised by the requirement that the misconduct be in the line of duty. How far does official capacity carry over to one's private life and how far is private conduct restricted by employment? In other words, can an employee be discharged for an act committed off duty which, if he committed it while on duty, would constitute a cause for discharge? The courts are not in entire agreement, but the tendency seems to be to hold the employee officially responsible for such acts committed privately as affect his official status or fitness.[144] Some examples of this are to be found among the preceding paragraphs. This problem, of course, is not peculiar to civil service but is common throughout the entire field of public employment.

Political activity and political contributions have given rise to several difficult questions which the courts have had to settle. The civil service naturally carries with it a certain amount of political neutrality, and often one of the very reasons for the establishment of the merit principle is the elimination of certain phases of political pressure upon civil servants, and in turn the restriction of the political activity of the civil servants themselves.

When a charter provides that the charges must be specified, a charge

[141] State v. Bodden, 165 Wis. 243, 161 N. W. 767 (1917); People ex rel. Mitchell v. Chicago, 243 Ill. App. 100 (1926).

[142] Kavanaugh v. Paull, 55 R. I. 41, 177 Atl. 352 (1935).

[143] Freudenreich v. Mayor, 114 N. J. L. 290, 176 Atl. 162 (1935).

[144] Joyce v. City of Chicago, *supra*, note 84.

reciting "partisan political activity" is not sufficient, even though the charter itself forbids such activity.[145]

The receipt of political contributions is sometimes forbidden, and when this is the case it is pretty difficult for a superior officer to convince a court that the contributions made to him in his office by subordinates were purely voluntary.[146] The phraseology of the laws differs considerably, and in all cases it must be noted carefully. A provision that donations or receipts are not to be made in the office building might be different from a statute that covered political activity and contributions generally. The former would cover less than the latter.

With respect to the removal of an employee for political reasons, it should be said that such removals are generally forbidden. But, of course, if the statutes do not forbid them, the courts will not protect tenure against termination for this reason.[147] If, however, removal for political reasons is forbidden, and the jury finds that removal was for this reason, the court will give its sanction to the prohibition.[148]

"Political" reasons are not to be understood as all reasons arising out of differences of opinion between superior and subordinate. The charge of political removal cannot be substantiated by showing that disciplinary measures were taken against the employee. If the employee has received his notice and hearing and if he was removed because of some action of his which might seriously embarrass his superior in his official duties, that constitutes a justifiable reason for removal. Thus it is valid to remove an employee for releasing to the newspapers material involving the appraisal of one department by an investigating department, and doing so on his own initiative.[149]

When the reasons given for removal by a city manager were (1) that the employee appealed sympathetically to the public through the press by making misleading statements about the manager, (2) that he spent public money trying to locate the city manager, and (3) that he used vulgar language about the manager before divers persons, and the evidence showed that the employee had responded to interviewers from the newspapers, that he had tried to reach the manager when the latter was in another city but did so on behalf of a newspaper, and that he had become profanely emphatic at times, the court refused to uphold the re-

[145] State ex rel. Weber v. Eirek, State ex rel. Barrett v. Eirek, 47 Oh. App. 481, 192 N. E. 172 (1934).

[146] People ex rel. Johnson v. Connolly, 152 N. Y. S. 495 (1915), appeal dismissed, 216 N. Y. 706, 111 N. E. 1096; United States v. Thayer, 209 U. S. 39, 28 Sup. Ct. Rep. 426, 52 L. ed. 673 (1908).

[147] United States ex rel. Taylor v. Taft, 24 D. C. App. 95 (1904).

[148] People ex rel. Boyd v. Hertle, 28 Misc. 37, 60 N. Y. S. 23 (1899), modified, 46 A. D. 505, 61 N. Y. S. 965.

[149] People ex rel. Goldschmidt v. Travis, 219 N. Y. 589, 114 N. E. 1078 (1915).

moval. Not every difference of opinion between inferior and superior is to be regarded as cause.[150] But, of course, sleeping at one's post is as valid a reason for disciplinary action in the civil as it is in the military service.[151]

When there is a discrepancy between the recitals received by the employee and the recital in the official records of the commission as to the cause of a removal, the official records prevail.[152]

The position of the courts with respect to a review of the question of the existence of cause or just cause will be discussed with the whole problem of judicial review of removals (Chapter XI), but at this point it should be said that this problem is a question of law which the courts will review if the proper remedy is used.[153] The doctrine of laches operates in this phase of judicial review as well as in the field generally.[154]

[150] Carroll v. City Commission, 265 Mich. 51, 251 N. W. 381 (1933).

[151] Kenyon v. Chicago, *supra,* note 70.

[152] State ex rel. v. Kansas City, 213 Mo. App. 349, 257 S. W. 197 (1924).

[153] People ex rel. Clinton v. Bingham, 123 A. D. 286, 107 N. Y. S. 1055 (1908). See People v. Baker, 129 N. Y. S. 349 (1911); State ex rel. Tracy v. Henry, 219 Wis. 53, 262 N. W. 222 (1935).

[154] Crais v. New Orleans, 172 La. 931, 136 So. 7 (1931); Chicago v. Gillen, 124 Ill. App. 210 (1906), affirmed, 222 Ill. 112, 78 N. E. 13. See Chapter XI, on judicial review.

Chapter X

SUSPENSION AND REMOVAL *(Continued)*

D. Notice

Notice in removal proceedings may refer to (1) notice that the employee is being or has been removed, (2) notice that he will be removed and that the procedure for removing him is being initiated, (3) notice of the charges against him, or (4) notice of the hearing or of the time allowed him for explanation if he wishes to avail himself of it. One notice, of course, may cover more than one of these points, but it need not do so in all instances.

Notice and hearing are not required unless the statutes provide for them; and if the power to remove is a power to remove at pleasure, it may even happen that the notice of removal will come in the form of a successor appointed to fill the removed person's place, for in some instances the law recognizes that the appointment of another to fill the position is the equivalent of a removal. Notice then is a requirement of statute and not of common law. This is the only explanation that can be offered for the decision that when a statute requires written notice for removals based on "failure . . . to comply with such instructions, or incompetency, dishonesty, discourtesy, or neglect of duty on his part" written notice is not required for removal based on any other reason.[1]

Unless expressly required, notice and hearing provisions do not apply to the termination of seasonal employment, for example, that as "recreation pier attendant." [2]

A constitutional provision stated that when the duration of any office is not provided for in the constitution it may be declared by law, but that the legislature may not create any office the term of which shall be more than four years. This was held by the Indiana court to permit the establishment of good behavior terms for policemen, the office of policeman having existed at the time of the adoption of the constitution, so that "create" did not refer to it. Therefore, if the service of a policeman could by statute be terminated only by notice and hearing, that requirement could not be dispensed with merely because it was thought to be for the good of the service to dispense with them.[3]

[1] Decker v. Board of Health Commissioners, 6 Cal. App. (2d) 334, 44 P. (2d) 636 (1935).
[2] Matter of Vincent v. Cram, 27 Misc. 158, 57 N. Y. S. 771 (1899).
[3] Roth v. State, 158 Ind. 242, 63 N. E. 460 (1902).

Notice to an employee that he has been "dropped" is not sufficient when the law provides that he must be given an opportunity to answer, because he cannot answer unless there is a charge.[4] Notice in such a case must inform him of something else than his discharge. On this same point a Massachusetts statute is of interest: "The person sought to be removed . . . shall, if he requests in writing, be given a public hearing." Under this provision an employee was notified that he was discharged, but that he could have a hearing if he wished it. The court pointed out that the hearing was a condition precedent to the discharge, and that a notice that he had already been removed was invalid.[5]

A New York statute recited that removal could be only for cause and after a hearing; a later statute dropped the words referring to cause and hearing. The removing officer could then determine for himself the adequacy of the cause, and no notice was required.[6]

Notice and charges incident to removal are not comparable to indictments in criminal prosecution, and it is necessary only that they be framed in such a manner as to acquaint the employee with what he is thought to have done to justify removal, and to notify him of the steps that are being or are to be taken against him.[7] The statutes of limitations applicable to crimes do not apply to charges on which removal is to be based.[8] If the employee has objections to the charges or notice, he must make them at the hearing; that is, he cannot let them pass and later advance them in a court.

An irregularity in the notice may be waived by an appearance at the hearing.[9] A mistake in the notice, for example, that an employee is being discharged when he is being suspended, is not fatal if he otherwise loses no rights thereby. If he does, he may be reinstated to a status of suspension.[10]

Notice and charges need not be made on a formal set of blanks, but may be transmitted in the form of a letter, which fulfills the requirement that notice and charges be in writing.[11] That the letter is filed with the proper authorities is sufficient to give jurisdiction. The forms of criminal actions are not required in civil service removals.

The requirements of notice and charges are not dependent upon the

[4] State ex rel. Brittain v. Board of Agriculture, 95 Oh. St. 276, 116 N. E. 459 (1917).
[5] Tucker v. Boston, 223 Mass. 478, 112 N. E. 90 (1916).
[6] People ex rel. Fonda v. Morton, 148 N. Y. 156, 42 N. E. 538 (1896).
[7] McGinn v. Board of Health, 113 Cal. App. 228, 298 Pac. 118 (1931).
[8] People ex rel. McKenna v. Chicago, 127 Ill. App. 118 (1906).
[9] Parks v. Common Council, 110 N. J. L. 366, 165 Atl. 635 (1933). Cf. People ex rel. Ross v. Dooling, 132 A. D. 50, 116 N. Y. S. 371 (1909).
[10] People ex rel. Levenson v. Wells, 78 A. D. 373, 79 N. Y. S. 728 (1903). See Donnelly v. Trustees, Boston City Hospital, 290 Mass. 347, 195 N. E. 327 (1935).
[11] Mohr v. Civil Service Commission, 186 Ia. 240, 172 N. W. 278 (1919).

requirement of a hearing. If a statute or rule lays down a procedure that is to be followed in notice and charges, that procedure must be followed, and one who is ousted by a contrary procedure may claim reinstatement.[12]

When the charter provides that the notice shall be left at the employee's last known residence, and when his wife says that she does not know where he is but will be seeing him in a few days, it is proper to leave the notice at the residence; nor is its validity affected by the fact that a few days later, when the employee appears at the office, he is told orally that he has been removed, and this proves to be the first notice he has received. The requirement of written notice has been complied with, even though he did not actually see that notice. The later oral statement does not make the notice an oral one.[13] But it has been suggested that a notice sent to the wrong address would not be binding, even though the employee knew of it.[14]

The failure of the notice to specify the charges may render it ineffective, so that an appeal to the civil service commission is not proper, with the result that the hearing before it may be invalid.[15] The statute may not require specific charges, but only that the notice should "set forth in general the cause for . . . discharge." When this is true, the letter sent to the employee need not specify in detail, but may state generally, the cause for which he is being discharged.[16]

A notice was held to be sufficient in which the charges were specified as failure to cooperate with the merchants in the markets and in the vicinity, arrogant and discourteous treatment of people calling with complaints and suggestions, and favoritism and partiality. Neglect of duty, political activity, and "other and further reasons," were held to be defective as items in the charges.[17]

An employee was notified that he was to be removed because "physically incapacitated for the reason that it would be unsafe for you to climb ladders on account of your weight, as per report of department physician, and further that you are unable to stand the efficiency test of the department, as per report of the department drillmaster." The charter required that "no person . . . [shall] be removed without first having received a written statement setting forth in detail the reasons therefor, and at the option of the person who shall have been removed, a copy of such

[12] State ex rel. Bauder v. Markle, 107 Fla. 742, 142 So. 822 (1932).
[13] Irwin v. Los Angeles, 3 Cal. App. (2d) 495, 39 P. (2d) 851 (1935).
[14] Shannon v. Los Angeles, 205 Cal. 366, 270 Pac. 682 (1928).
[15] City of Toledo v. Osborn, 23 Oh. App. 62, 155 N. E. 250 (1926).
[16] Enright v. Williams, 116 Cal. App. 360, 2 P. (2d) 828 (1931).
[17] State ex rel. Votaw v. Matia, 125 Oh. St. 598, 183 N. E. 533 (1932). See also Bregel v. Newport, 208 Ky. 581, 271 S. W. 665 (1925); Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184 (1905).

statement shall be filed in the office of the civil service commission." The court held that the notice and charges were sufficient and that inasmuch as he had not asked that they be filed, the employee could not complain of the failure of the officer to file them with the civil service commission.[18]

Recital in a notice that the position which the employee has been holding has been abolished for reasons of economy may be a sufficient specification for removal.[19]

If the solicitation of business for attorneys is forbidden by statute, it is sufficient for an employee to be notified that such solicitation is the cause of his discharge; nor is it necessary to itemize the exact times and places and persons and circumstances involved in particular solicitations.[20] But a general allegation that the employee engaged in political activity of such a nature as to show that he was unable to cooperate "and other and further reasons" referred to in a letter of specified date are not sufficiently specific.[21]

"For failure to carry out instructions of the department and for inefficiency" was held to be a sufficiently definite charge.[22]

The charges specified must be against the person in his official capacity, however, unless charges against him as a person are of such a nature that they are a reflection upon his official fitness. An allegation against a person as a member of a board is not an allegation against him as a superintendent of streets within the classified service.[23]

"It is my opinion that your department will function more effectively with one at its head wholly in sympathy with the mayor and his program and a change for the good of the service is therefore necessary." This charge was held not to be sufficient under a provision requiring reasons to be "specifically stated in writing."[24]

A charter may require that reasons be stated in the notice of removal, but may not specify just what charges constitute legal reasons. When this is the case, the court will assume that the reasons in the notice are the ones found to be substantiated in the hearing.[25]

The time when notice is to be given is determined by regulation in some instances and by statute in others. Whatever the time requirement, it must be complied with strictly. Forty-five hours before the trial will

[18] State ex rel. Stomp v. Kansas City, 313 Mo. 352, 281 S. W. 426 (1926).
[19] Gardner v. Lowell, 221 Mass. 150, 108 N. E. 937 (1915).
[20] Vadnais v. Department of Motor Vehicles, 3 Cal. App. (2d) 562, 40 P. (2d) 559 (1935).
[21] State ex rel. Dewald v. Matia, 125 Oh. St. 487, 181 N. E. 901 (1932).
[22] Matter of Davis v. Sayer, 205 A. D. 562, 200 N. Y. S. 134 (1923).
[23] Lindblom v. Doherty, 102 Ill. App. 14 (1902).
[24] State ex rel. Dewald v. Matia, *supra*, note 21.
[25] Bridges v. Patterson, 135 Wash. 436, 237 Pac. 998 (1925).

not do if forty-eight hours is required.[26] There is no objection to giving notice earlier than is required by statute.[27]

If a statute provides that an employee may be suspended without pay and have charges filed against him, the charges and trial must be held within the period required by statute; this in turn affects the time of notice.[28] If a hearing is to be held, the notice must specify the time and place of the hearing; failure to do so is a defect going to the jurisdiction of the body conducting the hearing.[29] But this rule is not strictly followed by all courts, one case holding that when the mayor had notified the employee of the intention to remove him at a certain time, even fixing the hour, but not mentioning formally that a hearing would be held at that time, the employee was under a duty to appear, for in view of the seriousness of the charges enumerated in the notice, he should have inferred that a hearing was to be held.[30]

A statute that provides for an opportunity to explain is satisfied by the stipulation in a notice of discharge that the employee must make his explanation within forty-eight hours.[31] Apparently a requirement that the employee is to be given three days within which to ask for a hearing is interpreted to mean three days after receipt of the notice rather than three days after the discharge takes effect. Notices of removal may, of course, be given in advance, and often are given some time before the actual discharge.[32]

Some statutes provide for filing the reasons for removal with the civil service commission. "But no regular clerk or head of a bureau, or person holding a position in the classified municipal service subject to competitive examination shall be removed until he has been allowed an opportunity of making an explanation; and in every case of removal, the true grounds thereof shall be forthwith entered upon the records of the department or board or borough president, and a copy filed with the municipal civil service commission. In case of removal a statement showing the reason therefor shall be filed in the department." This requirement of filing was said by the court to be something that might be complied with after the removal, not a condition precedent to removal.[33]

The necessary contents of notices have been referred to earlier in this chapter, and the fact that the specificity required is not that demanded

[26] People ex rel. Clancy v. Bingham, 123 A. D. 226, 107 N. Y. S. 1063 (1908).
[27] Carey v. Casey, 245 Mass. 12, 139 N. E. 384 (1923).
[28] Matter of Kelly v. Board of Education, 234 A. D. 239, 254 N. Y. S. 692 (1932), affirmed, 259 N. Y. 518, 182 N. E. 162.
[29] Powell v. Bullis, 221 Ill. 379, 77 N. E. 575 (1906).
[30] Whitney v. Judge of District Court, 271 Mass. 448, 171 N. E. 648 (1930).
[31] People ex rel. Shuter v. Butler, 54 Misc. 18, 103 N. Y. S. 583 (1907).
[32] Carey v. Casey, *supra*, note 27.
[33] People ex rel. Brown v. O'Brien, 137 A. D. 311, 122 N. Y. S. 25 (1910).

in criminal proceedings has been mentioned. The courts do not agree upon whether a mere allegation of "neglect of duty" is adequate statement of cause in a notice, but probably the absence or presence of a hearing on the matter affects the court's attitude.[34] This problem really concerns charges rather than notices, but inasmuch as the charges are usually stated in the notices, the problem also becomes one of the adequacy of the contents of the notice.

Mistakes in filing the grounds of dismissal may occur, but if they are corrected and if the ones later filed are good grounds for discharge, the fact that insufficient grounds were first filed is not fatal. This assumes, of course, that the grounds on which the employee was actually discharged and of which he had notice were the good grounds.[35]

Removal must be for the reasons set forth in the notice, and further charges made at the hearing may not be used as the basis for removal.[36] This rule, of course, makes it the more imperative that the charges set forth in the notice be the ones on which action is to be based.

By whom should the notice be sent? It is enough that the notice be signed by the authority having power to make the removal, but it is not fatal if another who has no power to remove also signs it.[37] The power to remove does not always limit the power to file charges, for the law may permit anyone to file charges but allow only one officer the power to remove. Under this principle it is possible for a wife to file a charge against her husband that may result in a hearing and discharge, even though if the proceeding involved a criminal offense and trial, she would not be permitted to testify against him in the trial. She may file charges even though she is not permitted to appear as a witness at the hearing.[38]

Another principle which illustrates the distinction between a removal and a criminal trial is that a charge once found to be unsubstantiated may later be used again, though of course the court may regard it as stale and will naturally tend to be adversely disposed toward its repeated use. But it is not subject to the rule of double jeopardy or the rule of res adjudicata.[39]

E. Hearing

Whether a hearing must be given to the employee who is threatened with discharge, and under what conditions he may have it, if provided, are matters to be settled by reference to statute. If provision for a hearing

[34] Boyd v. Pendergast, 57 Cal. App. 504, 207 Pac. 713 (1922).
[35] People ex rel. April v. Butler, 122 A. D. 790, 107 N. Y. S. 833 (1907).
[36] People ex rel. Shuster v. Humphrey, 156 N. Y. 231, 50 N. E. 860 (1898).
[37] State ex rel. Bartraw v. Longfellow, 95 Mo. App. 660, 69 S. W. 596 (1902).
[38] Bloomquist v. Rehnberg, 280 Ill. App. 1 (1935).
[39] People ex rel. Crowell v. Connolly, 161 A. D. 745, 147 N. Y. S. 186, 211 N. Y. 609, 105 N. E. 1095 (1914), affirmed, 212 N. Y. 599, 106 N. E. 1039.

is neither implied nor expressed in the statutes, the employee is not entitled to claim it. The common law apparently contains no such requirement, and due process requirements do not apply to ejections from the governmental service. A constitution could provide for a hearing, but only those provisions dealing with civil service itself are seriously to be considered in this connection, and these appear in the constitutions of only a few states.

Some statutes guarantee a hearing to certain groups in the service and not to others.[40] Veterans may be given special consideration in this respect. A distinction may be made between those who are in the service by virtue of examination and those who came in by other methods.[41] Officers may be in a different position from employees;[42] when this is true, the usual tests of officers apply. Hearings are usually not guaranteed to probationers.[43]

The statutes do not always expressly cover the subject of hearing; in this case, it may be necessary to resort to interpretation to determine whether a hearing is required. For example, a statute provided that a board "may remove such subordinates for such cause as they may deem sufficient and shall assign in their order of removal." It has been held that this imposed some qualification upon the power to remove at pleasure, but that it did not impose the obligation to grant a formal hearing.[44] Notice and written charges do not necessarily import a hearing.[45] "For cause" has been held to require charges and hearing.[46] A hearing has also been required by the courts when the charter specifies written charges and states that an opportunity to answer must be given.[47] A good cause does not permit dispensing with a hearing if one is required by law.[48]

Certain grounds, such as religious or political, may be prohibited by law. Or the law may require that written charges be given and an opportunity to answer be afforded in cases involving these causes. Such a law has been held to require no hearing.[49]

Hearings are often granted only upon request of the employee or officer. In other cases they may be given only if the removal is alleged to be for the prohibited reasons of political, racial, or religious prejudice or

[40] Commonwealth ex rel. Remmlein v. Philadelphia, 273 Pa. 332, 117 Atl. 180 (1922).
[41] Walling v. Civil Service Commission, 214 Ia. 1157, 243 N. W. 178 (1932). See Chapter III.
[42] Matter of Huber v. Stephan, 156 Misc. 131, 282 N. Y. S. 154 (1935).
[43] State ex rel. Nelson v. Board of Public Welfare, 149 Minn. 322, 183 N. W. 521 (1921).
[44] O'Dowd v. Boston, 149 Mass. 443, 21 N. E. 949 (1889).
[45] Singer v. Graves, 254 A. D. 37, 4 N. Y. S. (2d) 318 (1938).
[46] Gracey v. St. Louis, 213 Mo. 384, 111 S. W. 1159 (1908).
[47] Bratton v. Dice, 93 Colo. 593, 27 P. (2d) 1028 (1933).
[48] People ex rel. Williams v. Ward, 72 Misc. 446, 130 N. Y. S. 290 (1911).
[49] Shellenberger v. Warburton, 279 Pa. 577, 124 Atl. 189 (1924).

feeling.[50] Under such specifications, a hearing will not be granted for removal upon other grounds. This is likewise true of investigations by the civil service commission, so that if investigation is to follow filing of reasons, and no reasons for removal are assigned, the commission may not investigate.[51]

A hearing may be waived and laches run against the claim to it if the employee waits too long before requesting it. If no time limit is imposed, the request must be made seasonably; if one is specified, the request must be made within the limit provided.[52] But the waiver must be expressed or implied; and the implication of waiver will not be made lightly.[53]

It is the more common for hearing to be required before removal, but it may also be granted afterward. When a statute does not require it to be held before removal, the employee or officer may not complain if it is given later, and this even though administrative regulation provides that it should precede removal.[54]

Not all courts take a strict view against the employee. The statute may make it clear that the hearing is required, whether asked for or not; but if there is doubt, some courts favor requiring it.[55]

The phraseology of the statute is controlling, and if ten days is specified as the time within which the employee must request an investigation, he must make the request within the ten days. When he is suspended for a time and then discharged, the ten days apparently runs from the date of discharge.[56] The request must be a request and not merely a general protest against the action taken against him. The request need not be in writing unless the charter requires it.[57] It is sufficient that it be a request, but it must be that.

Instead of specifying or implying a hearing or guaranteeing an investigation upon request, the law may require that the person be informed of the charges against him and be given an opportunity to explain. The opportunity to explain may be phrased in general terms or it may be specifically regulated. While this guarantee of explanation does not guarantee a hearing, it may involve some opportunity for informal oral explanation, depending upon the statutory phraseology; in any event, it imposes some restriction upon the power to remove which narrows

[50] See People ex rel. Naylor v. Cohen, 273 Ill. App. 362 (1934).

[51] Philbrick v. Dust, 178 Mich. 605, 146 N. W. 175 (1914).

[52] Jones v. Doonan, 265 Mich. 384, 251 N. W. 571 (1933); People ex rel. Cattermole v. Bensel, 190 N. Y. 526, 83 N. E. 1129 (1907); People ex rel. Rising v. Ames, 360 Ill. 31, 195 N. E. 435 (1935).

[53] People ex rel. Millington v. Kaiser, 157 A. D. 78, 141 N. Y. S. 654 (1913); McCarthy v. Commonwealth, 204 Mass. 482, 90 N. E. 879 (1910).

[54] Gordon v. Chief of Police of Cambridge, 244 Mass. 491, 138 N. E. 905 (1923).

[55] State ex rel. Leader v. Kansas City, 258 S. W. 762 (Mo. App. 1924).

[56] State ex rel. Hubbard v. Seattle, 135 Wash. 505, 238 Pac. 1 (1925).

[57] Fosnaugh v. Seattle, 167 Wash. 519, 9 P. (2d) 1110 (1932).

that power somewhat as compared with the power to remove at pleasure. The cause must be substantial, and if the explanation is really a conclusive answer going to the merits, it may be that the employee cannot be discharged; [58] however, doubt exists on this point under some statutes,[59] and a difficulty in the judicial remedy exists under some decisions, because the procedure of explanation is said not to be reviewable by certiorari.[60]

Before whom shall the hearing be held or by whom shall an investigation be made? Nothing in the usual constitutional and common law principles forbids the hearing to be held by the accuser, and this often occurs.[61] Even under a civil service system, the statutes may provide that the hearing shall be before or by the removing officer.[62] Although there may be some tendency to interpret the law so as to require that the hearing be before some other body, such as the civil service commission,[63] it has been said that if the statute does not expressly provide otherwise, it is to be presumed that the hearing should be held before the officer making the removal.[64]

This question often arises: When a board or commission such as a civil service board or commission is to conduct the hearing, must it conduct the hearing as a body or may it delegate the routine work of hearing to a committee or commissioner and let that person or body report upon the hearing and present a record of it, with recommendations which can then be adopted or rejected by the body as a whole? An investigation is regarded as somewhat less formal than a hearing, and where the procedure calls for an investigation, it has been thought legal for one of the commissioners to conduct it and make the report and for the commission to adopt the report, providing the proper entries are made on the board records.[65] A civil service commission is sometimes authorized to make its investigations "either sitting as a body or through a single commissioner"; of course when this is true, the report of the commissioner may be adopted as the commission action.[66]

[58] Thomas v. Connell, 264 Pa. 242, 107 Atl. 691 (1919); People ex rel. Mitchel v. La Grange, 151 N. Y. 664, 46 N. E. 1150 (1897); People ex rel. Lawson v. Coler, 40 A. D. 65, 57 N. Y. S. 636 (1899); People ex rel. Van Tine v. Purdy, 221 N. Y. 396, 117 N. E. 609 (1917).

[59] People ex rel. Woltman v. Myers, 57 Hun 587, 10 N. Y. S. 815 (1890); State ex rel. Holland v. Sudheimer, 164 Minn. 437, 205 N. W. 369 (1925).

[60] People ex rel. Picceola v. Woodbury, 114 A. D. 188, 99 N. Y. S. 573 (1906).

[61] Matter of Davis v. Sayer, *supra*, note 22.

[62] McLaughlin v. Mayor of Cambridge, 253 Mass. 193, 148 N. E. 458 (1925).

[63] Brokaw v. Burk, 89 N. J. L. 132, 98 Atl. 11 (1916).

[64] State ex rel. Nelson v. Board of Public Welfare, *supra*, note 43. See Matter of Davis v. Sayer, *supra*, note 22.

[65] Krohn v. Board of Water Commissioners, 95 Cal. App. 289, 272 Pac. 757 (1928).

[66] Hudson County v. Civil Service Commission, 8 N. J. Misc. 643, 151 Atl. 379 (1930), affirmed, 108 N. J. L. 195, 156 Atl. 419.

In hearings before the commission, it is not necessary that all members be present. A quorum is sufficient for this purpose, as for most other purposes.[67] In one case some members of the civil service commission sat as the trial board, and when the commission adopted the finding of the board, the objection was made that the board had been ratified as a trial board after the investigation and that the civil service commission had adopted its report when either the board or the commission should have made the investigation. The court brushed aside technicalities and said that the adoption by the commission of the board's findings made the procedure regular.[68]

A Wisconsin case on the subject of committees is worthy of special mention. A charter provided that "a majority of the members elect of the council shall have power to dismiss from office, for malfeasance in office in said city, any person elected or appointed to office in said city, except justices of the peace. And the common council shall provide by ordinance the manner of hearing and disposing of complaints against such officers." The council appointed a committee of its own members to investigate charges and conduct a hearing. Upon the basis of the committee's report to the council, the latter body adopted the committee action as its own. The court said that the charter provision was to be interpreted as requiring a hearing, and that the hearing was to be before the council, that being the body with the power to remove. The committee might be used for purposes of investigation, but an investigation is to be distinguished from a hearing. In view of the controversial and circumstantial nature of the evidence, the employee should have been permitted to make an oral presentation and explanation, that being the purpose of a hearing; furthermore, that purpose could be satisfied only by a presentation to the body having the power to make the final decision.[69]

Apparently a hearing is to provide for oral presentation, with the employee being given an opportunity to be present, and unless the statute recognizes the hearing as on briefs, it is deemed to be oral.[70]

The hearing is to be fair, substantially fair, and without prejudice. But this does not mean that every indication of prejudice invalidates the hearing. For example, the fact that a member of a body who voted with that body to remove an employee had previously prosecuted that employee in a criminal proceeding for the same act is not fatal. There was present, the court thought, no relationship, no manifestation of ill will, and no pecuniary interest such as generally characterize disqualifications

[67] Schlau v. Chicago, 170 Ill. App. 19 (1912).
[68] Ellfeldt v. Chicago, 189 Ill. App. 610 (1914).
[69] State ex rel. Arnold v. Milwaukee, 157 Wis. 505, 147 N. W. 50 (1914).
[70] But see Rudolph v. United States, 37 D. C. App. 455 (1911).

for work of this kind.[71] The fact that some members of the board have expressed themselves as believing in the guilt of the person charged does not render the decision to remove him reviewable by mandamus.[72] On the other hand, bias may be so great as to make it clear that the removing officer was not acting in good faith.[73] There is in removal no provision for a procedure comparable to change of venue in judicial trials, so that the only corrective is to set aside the removal or transfer the person to another position. Therefore the courts are unwilling to hold that the apparent prejudging of a case disqualifies the removing officer from conducting the hearing, unless the case is clearly one of arbitrary action, and such action is sought to be prevented by the law; then the corrective is reinstatement.[74]

The fact that a removal proceeding is not a criminal trial has been noted several times, and the relationship of criminal prosecution to the removal has also been mentioned. The removing officer may not accept the findings of a criminal jury as a substitute for his own discretion.[75] That a grand jury investigation will not serve for a hearing that is provided by statute has likewise been settled.[76] No double jeopardy is involved in removing a man, after a hearing, on the basis of an act for which he has already been tried criminally and acquitted.[77] The fact that a statute uses the word "punish" does not make it criminal; the word is here used in a broad sense to include removal or suspension in the accepted meanings of those words.[78] Distinctions between a criminal trial and a hearing will appear in the following [illegible] in the course of the comments on the conduct of a hearing.

The civil service commission may be given power to hear and determine charges. It has been held that this carries with it the power to pass upon the admission of evidence and to rule on or to regulate procedural phases of the hearing.[79] This also includes the power to give notice and to provide for hearings, the giving of oaths, and other details involved. Practice varies as to whether hearings are governed by regulations made in advance or by rules prescribed for each case as it arises, but perhaps the general practice is to control some phases in advance by general regulation and other phases as the need arises.

Some of the courts are quite strict in imposing the common law rules

[71] Freudenreich v. Mayor, 114 N. J. L. 290, 176 Atl. 162 (1935).
[72] State ex rel. Szweda v. Davies, 198 Ind. 30, 152 N. E. 174 (1926).
[73] People ex rel. Packwood v. Riley, 232 N. Y. 283, 133 N. E. 891 (1922).
[74] Sharkey v. Thurston, 268 N. Y. 123, 196 N. E. 766 (1935).
[75] Cope v. Steckel, 3 Cal. App. (2d) 492, 39 P. (2d) 482 (1935).
[76] Matter of Burke v. Connolly, 76 Misc. 337, 135 N. Y. S. 179 (1912).
[77] People ex rel. Cunningham v. Bingham, 134 A. D. 602, 119 N. Y. S. 417 (1909).
[78] See People ex rel. Lee v. Waring, 1 A. D. 594, 3 N. Y. S. 178 (1896), affirmed, 149 N. Y. 621, 44 N. E. 1127.
[79] Ryan v. Everett, 121 Wash. 342, 209 Pac. 532 (1922).

of evidence upon civil service commissions in their conduct of hearings. It has been held to be error for the commission to admit the evidence of a witness who stated a conclusion in answer to a question.[80] This attitude is defensible, of course, when the common law rules of evidence really contribute to sifting the chaff from a mass of irrelevant data, but more generally the courts have taken the attitude that if the testimony contributes to the elicitation of the truth, it should be admitted, whether or not it would be rejected at common law or in court. For example, hearsay evidence has been held to be proper in a hearing.[81] A person against whom the proceedings are instituted may not sit silently throughout the hearing and later complain that the order of discharge was based entirely upon hearsay evidence.[82]

The importance of rules of evidence is illustrated by the holding that if the only evidence produced is that of a disreputable stool pigeon, the removal will be set aside.[83]

The courts sometimes phrase the rule broadly that the hearing must permit the employee to give his own testimony, bring in his witnesses, and cross-examine any witnesses produced against him.[84] But it has been suggested that unless witnesses whom he wished to bring in but had no opportunity of bringing could have proved a good defense for him, a court will not review a hearing on certiorari merely because of refusal to postpone the hearing in order to permit the witnesses to appear.[85] The witnesses should be sworn in because of the safeguard that arises from the use of the oath.[86] There is apparently no obligation upon the plaintiff to cross-examine if he does not wish to do so.[87]

In one case in which the employee was not present, no witnesses were sworn and no evidence taken except an oral statement by the sergeant that he had served the charges on the employee. This was held not to constitute a hearing, even though the employee was at fault in not being there.[88] Merely asking the employee to make a statement does not constitute a hearing.[89]

[80] People ex rel. Haverty v. Barker, 1 A. D. 532, 37 N. Y. S. 555 (1896), affirmed, 149 N. Y. 607, 45 N. E. 1133.

[81] Crofut v. Philadelphia, 276 Pa. 366, 120 Atl. 277 (1923).

[82] Fronsdahl v. Civil Service Commission, 189 Ia. 1344, 179 N. W. 874 (1920).

[83] Matter of Mitchell v. Mulrooney, 242 A. D. 48, 273 N. Y. S. 129 (1934); Matter of Reger v. Mulrooney, 241 A. D. 38, 271 N. Y. S. 20 (1934), appeal dismissed, 266 N. Y. 412, 195 N. E. 131.

[84] McCarthy v. Emerson, 202 Mass. 352, 88 N. E. 668 (1909).

[85] Smith v. Collingswood, 11 N. J. Misc. 560, 167 Atl. 4 (1933).

[86] People ex rel. Kasschau v. Board of Police Commissioners, 155 N. Y. 40, 49 N. E. 257 (1898).

[87] State ex rel. Myers v. Halencamp, 46 Oh. App. 494, 189 N. E. 258 (1933).

[88] People ex rel. Connolly v. Bingham, 124 A. D. 170, 108 N. Y. S. 684 (1908).

[89] People ex rel. Menzie v. Davis, 189 A. D. 391, 178 N. Y. S. 436 (1919). See People ex rel. Downes v. Greene, 96 A. D. 1, 88 N. Y. S. 1060 (1904).

Apparently it is not fatal that lawyers are not permitted to take an active part in the defense of the employee at the hearing.[90] Practice varies a good deal as to the role accorded to attorneys in removal proceedings, but some civil service commissions restrict their activities very severely.[91]

The trial board, officer, or civil service commission must consider the charges that are made against the employee and may not go into the general subject of his record while in the position.[92] As was said earlier, it is the charges presented rather than others which may develop in the course of the hearing that are to be the basis of action.[93]

The problem of postponement of hearings has caused some difficulty. The employee or an attorney acting on his behalf may ask for a delay in order more effectively to prepare the defense. The officer or body before whom the hearing is to take place may wish to delay for proper or for improper reasons. The general legal habit of taking postponements as a matter of course in trial practice naturally carries over to the practice of attorneys handling hearings.

A court was asked to review the action of an administrator in discharging a police officer who had repeatedly asked for postponement of the hearings arranged. It appeared that the witness for whom the postponements were being made was ill and that his illness was of a permanent nature likely to grow worse rather than better. The evidence was sufficient to justify the dismissal, so far as the court felt able to review it, and the court refused to set aside the order of discharge.[94]

Similarly a court has refused to set aside an action based upon a hearing that had been postponed to a date on which it happened that the employee's attorney could not appear. An employee has no right to an indefinite number of postponements.[95]

A New York case holds — erroneously, it is believed — that a removal hearing should be postponed until the conclusion of a criminal trial. The only rational legal ground on which this postponement could be justified would be that the employee was not free to attend the hearing. But so far as the relationship of the criminal case to the hearing is concerned, the irrelevance of criminal trials for the very same charges involved in removal proceedings has been indicated earlier.[96]

Of course, if the employee has been told that the hearing would be

[90] People ex rel. McKenna v. Chicago, *supra,* note 8.

[91] People ex rel. McKenna v. Chicago, *supra,* note 8.

[92] Matter of McGuire v. Wynne, 224 A. D. 763, 229 N. Y. S. 753 (1928).

[93] In this respect the rules conform more closely to court procedure. See Conroy v. Philadelphia, 319 Pa. 265, 179 Atl. 224 (1935).

[94] People ex rel. Downes v. Greene, 96 A. D. 1, 88 N. Y. S. 1060 (1904).

[95] People ex rel. O'Neill v. Bingham, 132 A. D. 667, 117 N. Y. 429 (1909).

[96] People ex rel. Young v. Skidmore, 243 A. D. 611, 276 N. Y. S. 369 (1935).

postponed and in reliance thereupon fails to appear, he cannot be discharged on the basis of a hearing held at the time originally set.[97]

If, on the other hand, the employee asks for a postponement beyond the time within which the hearing is required by charter and civil service regulations, he waives any claim to salary for the period by which the postponement exceeds the time limit fixed by law.[98]

Occasionally it happens that one officer initiates proceedings, filing charges and holding a hearing, but takes no final action while he is in office. What then is the status of the removal proceeding under his successor? May he remove without further action on his own part? It seems that he may not discharge the employee, but must conduct a hearing himself.[99]

F. Appeal to the Civil Service Commission

Hearings as discussed in the preceding paragraphs may be held either before the administrators themselves or before civil service commissions. But not infrequently the civil service commission is given no power to act until action has first been taken by the administrator, either accompanied or unaccompanied by hearing. The reference to the commission may in a sense be called an appeal to the commission. The civil service commission, of course, has no jurisdiction to take such appeals unless the power to do so is conferred upon it by statute, and then it must act in accordance with the statute. Statute usually prescribes the circumstances and conditions under which such appeals may be taken. No presumption exists in favor of this jurisdiction, the usual rule that favors the jurisdiction of a general trial court not being applied.[100] This strict construction, of course, is in accord with the rule generally applied by the courts to administrative bodies.

This rule of strict interpretation of the powers of the civil service commission to take appeals of discharged employees is illustrated by the case in which such appeals were granted only to members of the fire and police forces, the court holding that the other branches of the service were excluded from the right to appeal.[101]

Sometimes the civil service commission may act as the hearing body, but as an alternative may appoint a trial board, in which case it would hear appeals. When the commission is given power to approve or set aside such trial board decisions, it is not fatal that the members of the commission have not read the record in full. There is no requirement

[97] People ex rel. Lenahan v. Grifenhagen, 146 A. D. 874, 130 N. Y. S. 570 (1911).
[98] Conroy v. Philadelphia, 319 Pa. 265, 179 Atl. 224 (1935).
[99] See dictum in Matter of Elder v. Bingham, 118 A. D. 25, 103 N. Y. S. 617 (1907), affirmed, 189 N. Y. 509, 81 N. E. 1163.
[100] Lindblom v. Doherty, *supra*, note 23.
[101] Davis v. State ex rel. Kennedy, 127 Oh. St. 261, 187 N. E. 867 (1933).

that they do so if in general they have done sufficient to justify their decision to approve or set aside.[102] After certain crucial points have been cleared up, the remainder of the case may be perfectly clear.

When given the power to review an order of discharge, the civil service commission has the power to review, not the power to remove, so that its action is confined to a consideration of the grounds set forth in the order of removal.[103]

A statute provided that "if, on such hearing, the civil service commission shall disapprove of such order of removal, discharge, fine or reduction the same shall be and remain of no effect." In one appeal to it, the commission ordered the policeman reinstated on the condition that he waive a claim to two years' back salary. The court held that the imposition of this condition was beyond the power of the civil service commission.[104] The court said: "Where the findings of guilty of misconduct are reasonably supported by competent evidence, the fitness of the accused servant for further public service, or the punishment to be imposed in the event that dismissal is not regarded as essential, are matters resting within the sound discretion of the departmental head; and there is no review unless, perchance, there be a clear abuse of discretion." The court continued: "At all events, there is no expression of a legislative intent to substitute the judgment of the civil service commission, in respect of the disciplinary action to be taken when a servant has been adjudged guilty of misconduct, for that of the departmental head." The court felt that an inconsistency existed between the two parts of the commission's order.

The statute may make it clear that the civil service commission is to hear the case de novo. If this is true, the fact that the employee pleaded guilty to the charges during his hearing does not prevent the commission from finding that he ought to be reinstated in his position.[105]

The civil service commission is sometimes given power to review dismissals alleged to be based on political grounds; under such a provision the commission may not pass on the merits of the case in general if the removal is found to have had no political basis.[106] So, too, if the employee is discharged by a person having no authority to discharge him, he is under no obligation to appeal to the commission but may proceed directly to court. The commission would have had no authority to hear an appeal based on usurpation of discharging authority, being restricted to cases of discharge by the proper officer.[107] Of course, an officer having the

[102] People ex rel. Miller v. Chicago, 234 Ill. 416, 84 N. E. 1044 (1908).
[103] State ex rel. Brittain v. Board of Agriculture, *supra*, note 4.
[104] Newark v. Civil Service Commission, 115 N. J. L. 26, 177 Atl. 868 (1935).
[105] See Newark v. Civil Service Commission, 114 N. J. L. 406, 177 Atl. 121 (1935).
[106] Delaney v. Detroit Board of Fire Commissioners, 244 Mich. 64, 221 N. W. 283 (1928).
[107] Foster v. Hindley, 72 Wash. 657, 131 Pac. 197 (1913).

power to remove may approve a removal that has been made by a person without power.[108]

The civil service commissions may, however, be given broader powers by statute. A statute which says that the commission is "to fully hear and determine the matter" means that the commission may alter the punishment so as to require reinstatement but impose a forfeiture of salary claim.[109]

In line with more restrictive rules, however, is the decision that when the statute requires removal to be referred to the commission before it becomes effective, a suspension may go into effect previous to being brought before the commission.[110] This rule draws a rather fine distinction restrictive of commission power.

The commission may not order reinstatement when it is shown that the commission really thought that the charges were true, but told the employee that they would reinstate him if he would take a layoff of six months.[111]

Notice of appeal, of course, must be filed in accordance with the requirements of the charter or law, but if the appeal is to a trial board appointed by the city council, and this is not a standing board, then it is sufficient to file the notice of appeal with the council.[112]

Some courts hold that employees need not proceed to exhaust their right to appeal to the commission if they have been suspended or removed in violation of the procedures outlined by law. A suspension made without complying with notice, filing, and other requirements need not be taken to the commission first, because the commission has no jurisdiction; such being the case, the court is the only body to which appeal may be made.[113] This is in line with the rule that removal by the wrong officer should not be reviewed by the commission but by the court.[114]

The power of the civil service commission to determine cases of removals appealed to it is fixed by statute, and it is rather usual for the statute to say that the commission shall have the power to "determine" the matter and that its decision shall be "final." Such phraseology has sometimes raised the question of whether, after the case has been de-

[108] Burnap v. United States, 252 U. S. 512, 40 Sup. Ct. Rep. 374, 64 L. ed. 692 (1920).
[109] Hackett v. Morse, 45 Cal. App. 788, 188 Pac. 308 (1920).
[110] Osterheldt v. Philadelphia, 113 Pa. Super. Ct. 8, 171 Atl. 100 (1934).
[111] State ex rel. Mowre v. Civil Service Commission, 178 Wash. 325, 34 P. (2d) 873 (1934).
[112] McDonald v. City of Dallas, 69 S. W. (2d) 175 (Tex. Civ. App. 1934) was affirmed in City of Dallas v. McDonald, 98 S. W. (2d) 167; then withdrawn on rehearing, 103 S. W. (2d) 725; reversed, 103 S. W. (2d) 725; rehearing denied, 107 S. W. (2d) 987.
[113] State ex rel. Bay v. Witter, 110 Oh. St. 216, 143 N. E. 556 (1924); Shannon v. Los Angeles, *supra*, note 14. See Witkin v. Philadelphia, 110 Pa. Super. Ct. 489, 168 Atl. 491 (1933); State ex rel. Brittain v. Board of Agriculture, *supra*, note 4.
[114] Foster v. Hindley, *supra*, note 107.

cided, the commission can be forced to reopen it upon the discovery of new evidence. The rule seems to be that the court will not compel the commission to reopen a case once it has been decided.[115]

Under a statutory provision that "the decision of the commission shall be final" the commission ordered an employee suspended, subject to the condition that at the end of his suspension he should be reinstated if his superior recommended it. This the court held was not a final disposition of the case, and the order was invalidated.[116]

Two divergent views have been taken by the courts of the power of the civil service commission to reopen a case, either on its own initiative or upon request, once it has been decided. One line of cases holds that the commission may not reconsider a case that has been decided. The reasons for this view seem to be that the statutory phrases "final" or "final and conclusive" should be interpreted to mean just what they say, also that there is no presumption of the jurisdiction of statutory bodies like the civil service commissions, because of the rule that the powers of these bodies should be strictly construed.[117] One case seems to suggest that the power of the commission to act is dependent upon whether the vacated position has been filled; if it has been filled, then to reinstate the discharged employee would be to make a new appointment.[118] Another case draws a distinction between action to reopen based on the discovery of mistake, which would be permissible, and action founded upon a conclusion that the action had been too harsh, which would not be permitted.[119] The superior officer who removed the employee cannot himself reinstate after a final discharge, because that too would be a new appointment.[120]

A minority view supports the commission in its power to reopen a case, even though finally decided, apparently upon the theory that the power to discharge carries with it the power to correct mistakes in discharge.[121] Somewhat distinguishable from this rule is that which permits the commission to approve reinstatement of a discharged person upon the request of the department head because of error in the original discharge, in spite of a commission rule that a year must elapse before dismissed persons can be reinstated.[122]

[115] Ford v. Seattle, 117 Wash. 55, 200 Pac. 568 (1921).
[116] State ex rel. Sullivan v. Benson, 211 Wis. 47, 247 N. W. 450 (1933).
[117] State ex rel. Worsham v. Brown, 126 Wash. 175, 218 Pac. 9 (1923); Heap v. Los Angeles, 46 P. (2d) 205 (1935), affirmed, 6 Cal. (2d) 405, 57 P. (2d) 1323.
[118] State ex rel. Chapman v. Lesser, 94 Oh. St. 387, 115 N. E. 33 (1916).
[119] Callahan v. Philadelphia, 312 Pa. 40, 167 Atl. 293 (1933).
[120] State ex rel. Flynn v. Davis, 46 Oh. App. 46, 187 N. E. 729 (1933).
[121] Goldberg v. Philadelphia, 279 Pa. 356, 123 Atl. 851 (1924); Gallagher v. Blankenburg, 248 Pa. 394, 94 Atl. 132 (1915).
[122] Wood v. Griffith, 66 Pa. Super. Ct. 290 (1917).

A somewhat similar problem is presented by the situation in which a removing officer who has discharged an employee for a bad reason or by illegal procedure later discharges the same person for good cause and in accordance with the proper statutory procedure. It is generally held that an improper removal may be cured by later appropriate action, but that the employee can recover for the period he was thrown out of service.[123] He may not recover for the period after the defect in the discharge was cured.[124] Sometimes the procedure is to reinstate wrongfully ousted persons for such period as will enable them to be compensated for the period of wrongful ouster, but only for that period. However, in most states this is not a necessary technicality.

G. Veterans' Preference

The problem of veterans' preference has been discussed in several other places in this volume. In connection with removals, as with other questions, veterans' preference is common to a much broader body of law than that relating to civil service. The problem appears generally throughout the administrative service.

The preference in removal often takes the form of special safeguards to protect the veteran from being removed either without notice and hearing or in case there is anyone else who could be removed in his stead. Special requirements as to causes of removal may be stipulated for veterans. In all instances the preference is the creation of statute.

With respect to abolition of positions — a subject dealt with earlier, with some reference to the problem of preference[125] — the general rule is that unless the statute expressly forbids it, the administrator is as free to abolish the position of a veteran as the position of anyone else, except that special procedures may be required in the case of veterans. Veterans' preference does not give the courts any greater power over the administrative superior in abolition of offices or positions than they otherwise have. The courts cannot always prevent that which they know to be evasive.[126] Statutes prohibiting removal of veterans except for incompetency or misconduct and after notice and hearing do not prevent the abolition of positions for lack of funds, and the fact that others are retained is not fatal so long as they are not doing the veteran's work.[127]

[123] State ex rel. Tracy v. Henry, 219 Wis. 53, 262 N. W. 222 (1935); Kidd v. State Civil Service Commission, 13 Cal. App. (2d) 653, 57 P. (2d) 569 (1936).

[124] State ex rel. Roe v. Seattle, 88 Wash. 589, 153 Pac. 336 (1915). [125] See Chapter VIII.

[126] People ex rel. Hay v. Bowe, 134 N. Y. S. 524 (1912); Dykstra v. State ex rel. Albert, 42 Oh. App. 141, 181 N. E. 488 (1932).

[127] Douglas v. Des Moines, 206 Ia. 144, 220 N. W. 72 (1928). See Matter of Devins v. Sayer, 233 N. Y. 690, 135 N. E. 972 (1922); Matter of Reilly v. Smith, 92 Misc. 309, 156 N. Y. S. 686 (1915); Matter of Edkins v. Wotherspoon, 173 A. D. 330, 158 N. Y. S. 710, 159 N. Y. S. 1110 (1916).

Neither does veterans' preference convert employment into office for purposes of recovering compensation because this type of question is governed by the general law of officers rather than by veterans' law.[128] The courts will attempt in these, as in all abolition cases, to see whether the removal or abolition has been made in good faith.[129]

The difficulty of enforcing the rules governing abolition of positions has led some veterans' organizations to adopt the view that their only safeguard is expressly to prohibit the abolition of a position held by a veteran.[130] It is questionable whether even this type of legislation would preclude a general reorganization whereby under existing rules veterans' positions may be abolished as part of the general shake-up.[131]

Transfers are often provided for, so to make certain that if there is any vacant position in the service, the veteran whose own position has been abolished will have an opportunity to obtain it.[132] A statute giving to a veteran whose position has been abolished the right to transfer to "such positions as he shall be fitted to fill" has been held to entitle the veteran to nothing more than a right to fill a vacancy if one exists.[133] When the work connected with the veteran's position has been completed, the superior is under no obligation to discharge another employee in order to retain the veteran.[134]

Preferred status on a list is given to veterans whose positions have been abolished, but it is customary to qualify their preference for appointment to other positions by the word "similar"; if it is doubtful whether the veteran has the qualifications for another position to which he claims appointment on the basis of his preference, the civil service commission must determine the question.[135] If no similar position exists, the veteran is remediless.[136] It has been said that it is the burden of the superior officer to prove incompetency on the part of a veteran under veterans' acts, but that it is the burden of the veteran whose position has been abolished to prove competency for the position to which he seeks transfer.[137]

[128] Dunne v. New York, 116 A. D. 331, 101 N. Y. S. 678 (1906).
[129] Garvey v. Lowell, 199 Mass. 47, 85 N. E. 182 (1908).
[130] Nickerson v. Wildwood, 111 N. J. L. 169, 168 Atl. 142 (1933).
[131] Reynolds v. McDermott, 264 Mass. 158, 162 N. E. 1 (1928).
[132] People ex rel. Breckenridge v. Scannell, 40 A. D. 633, 58 N. Y. S. 1146 (1899), affirmed in Matter of Breckenridge, 160 N. Y. 103, 54 N. E. 670.
[133] Matter of Breckenridge, 160 N. Y. 103, 54 N. E. 670 (1899). See Powers v. Dahl, 219 N. Y. 578, 114 N. E. 1079 (1916).
[134] People ex rel. Forest v. Williams, 140 A. D. 723, 125 N. Y. S. 583 (1911), affirmed, 203 N. Y. 550, 96 N. E. 1126.
[135] Matter of Donovan v. Cantor, 89 A. D. 50, 85 N. Y. S. 406 (1903), appeal dismissed, 179 N. Y. 527, 71 N. E. 1130.
[136] Matter of Gilfillan, 127 A. D. 846, 111 N. Y. S. 808 (1908), affirmed, 193 N. Y. 655, 87 N. E. 1119.
[137] Matter of Jones v. Willcox, 80 A. D. 167, 80 N. Y. S. 420 (1903).

The subject of layoffs has also been discussed earlier,[138] and reference to the veteran problem made therein. Veterans' preference does not extend to layoffs or reduction in force when the phraseology is restricted to removal.[139]

When the statute provides that no veteran whose record is "good" shall be laid off, the department head may decide whether his rating is good, and the fact that there is no formal efficiency rating system in force in the department does not invalidate his judgment.[140] The veteran gets the preference that he is entitled to by law and no more.[141] A statutory preference to veterans who are equally qualified with other persons does not give the preference to a veteran whose rating is "inefficient."[142]

The inverse order rule in layoffs may be used despite a statutory recital that veterans are to be removed only for incompetency.[143] Persons who have been laid off and whose names are placed on a special list for reemployment are often given preference in the order in which their names were entered.[144] When transfer privileges are given to veterans, so that if similar positions are open they may have the preference in appointment, that does not mean that those in such similar positions need to be discharged in order to render them vacant.[145]

An interesting case raising a related question is that in which eight men were appointed without including four veterans who were entitled to appointment. In complying with a court order to fill four places with four veterans, the appointing officer was not allowed to discharge the men who stood highest on the appointment list, but had to choose those who entered the service with the lowest grades on their entrance examinations.[146]

Preference granted to veterans in removal is entirely statutory;[147] indeed preference may be, and sometimes is, extended to other groups.[148] The preferred groups get exactly what the statutes grant and no more.[149] Even though the civil service section of a constitution gives preference

[138] See Chapter VIII.

[139] Lyon v. Civil Service Commission, 203 Ia. 1203, 212 N. W. 579 (1927); Rounds v. City of Des Moines, 213 Ia. 52, 238 N. W. 428 (1931).

[140] Longfellow v. Gudger, 57 D. C. App. 50, 16 F. (2d) 653 (1926).

[141] Petty v. Kracke, 154 N. Y. S. 294 (1915).

[142] Keim v. United States, 177 U. S. 290, 20 Sup. Ct. Rep. 574, 44 L. ed. 774 (1900).

[143] Franklin v. Rathmann, 143 Misc. 786, 258 N. Y. S. 351 (1932).

[144] State ex rel. Dwyer v. Duncan, 49 Mont. 54, 140 Pac. 95 (1914).

[145] People ex rel. Chappel v. Lindenthal, 173 N. Y. 524, 66 N. E. 407 (1903).

[146] State ex rel. Thornton v. Ritchel, 192 Minn. 63, 255 N. W. 627 (1934). See People ex rel. Ryan v. Wells, 176 N. Y. 462, 68 N. E. 883 (1903).

[147] People ex rel. Garrity v. Walsh, 181 A. D. 118, 168 N. Y. S. 440 (1917).

[148] People ex rel. Schulum v. Harburger, 132 A. D. 260, 116 N. Y. S. 994 (1909).

[149] Matter of Mahan v. Bacon, 154 Misc. 291, 277 N. Y. S. 390 (1934).

to veterans, they may be removed at pleasure when necessary to comply with some other more specific provision of the same constitution, such as a requirement of equal representation of political parties on certain boards.[150] Veterans' preference statutes may be repealed and removal at pleasure restored by express or implied exceptions arising out of later statutes.[151]

Sometimes protection is limited to the veterans of certain wars.[152] The types of preference given to various groups may also vary: one statute may give the preference to the veterans of one war; another statute may provide for different types of removal protection for veterans of different wars.[153]

It has been held that a veteran cannot be suspended without pay pending the settlement of charges against him in removal proceedings when no express power to suspend is given,[154] but this decision probably arises not so much out of veterans' law as out of the general law governing suspension.[155]

Preference laws make no change in the status of probationary appointees unless express reference is made to veterans on probationary appointment.[156]

Nor do temporary appointees obtain the protection of veterans' preference laws. Thus veterans temporarily appointed, pending the establishment of an eligible list from which candidates could be certified, cannot complain when removed that the removal was contrary to veterans' preference laws.[157] Preference does not prevent quo warranto from testing title to a position or office being held by the veteran.[158]

If preference is provided for those in the classified service, members of the unclassified service do not receive the benefit of it,[159] though of course the statute may extend the preference to both groups.[160] Preference laws often do not apply to deputies,[161] nor to holders of confidential

[150] Matter of Blondheim v. Cohen, 248 A. D. 75, 288 N. Y. S. 984 (1936), affirmed, 272 N. Y. 520, 4 N. E. (2d) 427.

[151] People ex rel. McNeile v. Glynn, 128 A. D. 257, 112 N. Y. S. 695 (1908); State ex rel. Allen v. Rush, 131 Minn. 190, 154 N. W. 947 (1915).

[152] People ex rel. O'Keefe v. Hynes, 101 A. D. 453, 91 N. Y. S. 1032 (1905).

[153] Cottam v. New York, 74 Misc. 67, 131 N. Y. S. 617 (1911).

[154] Matter of Bramer v. Board of Parole, 247 A. D. 414, 288 N. Y. S. 108 (1936).

[155] See the section on suspension in the preceding chapter, pages 175–79.

[156] Cole v. Marshall, 6 N. J. Misc. 702, 142 Atl. 563 (1928).

[157] Matter of Faulkner v. Board of Supervisors, 74 Misc. 502, 131 N. Y. S. 998 (1911).

[158] Toomey v. McCaffrey, 116 N. J. L. 364, 184 Atl. 835 (1936).

[159] McEneny v. McKee, 262 N. Y. 494, 188 N. E. 35 (1933).

[160] Fornara v. Schroeder, 261 N. Y. 363, 185 N. E. 498 (1933); People ex rel. Weeks v. Ward, 162 N. Y. S. 744 (1916), affirmed, 179 A. D. 905, 165 N. Y. S. 1106.

[161] Matter of Williams v. Darling, 67 Misc. 205, 122 N. Y. S. 534 (1910).

positions.[162] The distinction between a deputy and a confidential employee depends upon the general rules noted earlier in the discussion of classification (Chapter IV). But the relationship between the employee and the removing officer must be confidential if the employee is not to receive the protection of the preference law.[163]

Veterans' preference laws do not repeal by implication former statutes fixing terms of office. Since the term of office is governed by rules common in the law of public officers, where that term is definite neither the enactment of a civil service law nor a veterans' preference law governing removals can alter the term.[164] When it expires the incumbent is out of office, and no violation of the preference act has taken place.[165] But according to some cases, preference may operate because of continuity in the position.[166]

When the statute provides preference for "positions" and "employees," the law applies only to minor positions rather than to officers and those in positions of management.[167] Words of this type also indicate that the preference is not to extend to a veteran who is essentially a private contractor.[168]

The status of laborers under preference acts is determined by the phraseology of the acts themselves. If the statute uses broad phrases such as "those in the public service," it may cover laborers.[169] The use of the phrase "salaried employees or officers," or of similar phrases, raises the question of the time unit in compensation.[170] The rule seems to be that the laborer is protected against arbitrary removal if there is work for him to do of the kind he has been doing and is qualified to do.[171] The nature of the laborer's work may affect the remedies open to him; it has been

[162] In re Weaver, 72 Misc. 438, 131 N. Y. S. 144 (1911), affirmed, 147 A. D. 420, 131 N. Y. S. 931, 204 N. Y. 676, 98 N. E. 1113 (1911); People ex rel. Webb v. Clarke, 54 A. D. 588, 66 N. Y. S. 1068 (1900); People ex rel. Flood. v. Gardiner, 157 N. Y. 520, 52 N. E. 564 (1899).

[163] People ex rel. Tate v. Dalton, 158 N. Y. 204, 52 N. E. 1119 (1899); Mylod v. Graves, 274 N. Y. 381, 9 N. E. (2d) 18 (1937).

[164] Bell v. Atlantic City, 89 N. J. L. 443, 99 Atl. 127 (1916).

[165] Matter of Tiffany, 179 N. Y. 455, 72 N. E. 512 (1904); State ex rel. Castel v. Village of Chisholm, 173 Minn. 485, 217 N. W. 681 (1928); Buehler v. Board of Supervisors, 260 N. Y. 268, 183 N. E. 384 (1932).

[166] Kitterman v. Wapello County, 145 Ia. 22, 123 N. W. 740 (1909). See also note 165.

[167] People ex rel. Earl v. England, 16 A. D. 97, 45 N. Y. S. 12 (1897); Matter of Mylod v. Graves, 158 Misc. 920, 288 N. Y. S. 261 (1936). See Matter of Christey v. Cochrane, 211 N. Y. 333, 105 N. E. 419 (1914); State ex rel. Michie v. Walleen, 185 Minn. 329, 241 N. W. 318 (1932).

[168] People ex rel. Seib v. Redfield, 86 A. D. 367, 83 N. Y. S. 873 (1903).

[169] Ransom v. Boston, 192 Mass. 299, 78 N. E. 481 (1906).

[170] Matter of Murray, 17 Misc. 185, 40 N. Y. S. 1041 (1896).

[171] Canty v. City Council of Lawrence, 275 Mass. 261, 175 N. E. 481 (1931); Matter of Ziolkowski v. Holstein, 143 Misc. 819, 257 N. Y. S. 559 (1932).

held that he need not seek mandamus to reinstate him before suing for breach of contract for wages.[172]

The problem of determining who is a veteran arises at all stages of preference, whether in appointment or removal. Sometimes, by taking too great care in defining a veteran, the statute excludes some who might have been covered had a broader statement been used.[173]

The opinions commonly enunciate the rule that a veteran must claim his preference seasonably in removal cases, and that he must inform the officer or body which has the power to remove and which is threatening to exercise or is exercising it, before he is entitled to any special considerations arising from his status as a veteran.[174] It is not sufficient that he file a certificate,[175] although if there is a registration requirement, he must comply with it at the proper time.[176]

If the statute requires a definite period of service, the veteran must show that he has served the requisite number of years.[177] And if asked whether he is a veteran, he must answer directly and definitely and not be evasive in his answers, so as to raise doubt as to his real status.[178]

The courts usually do not insist upon formal notice,[179] any notice that gives the requisite information being sufficient. It is also sufficient that the removing officer know of the employee's status as a veteran, whether by virtue of the notice or otherwise.[180] Furthermore, the veteran is not required to give notice when no opportunity exists for doing so.[181]

Statutes often provide that veterans may not be removed for the same causes as may others.[182] Such a requirement is not to be confused with such procedural requirements as those requiring the statement of a cause for removal. The former affects causes; the latter leaves the law on causes as it was and merely regulates procedure.[183]

[172] Ransom v. Boston, *supra*, note 169; Fosnaugh v. Seattle, 167 Wash. 519, 9 P. (2d) 1110 (1932).

[173] Phillips v. Metropolitan Park Commission, 215 Mass. 502, 102 N. E. 717 (1913).

[174] Matter of Knapp v. Duffey, 169 A. D. 794, 155 N. Y. S. 818 (1915). See People ex rel. Robesch v. President, 190 N. Y. 497, 83 N. E. 597 (1908); Bowlby v. Board, 83 N. J. L. 346, 85 Atl. 229 (1912); People v. Porter, 90 Hun 401, 35 N. Y. S. 811 (1895); Matter of Morgan v. Smith, 224 A. D. 203, 230 N. Y. S. 97 (1928); Matter of Sullivan v. Tunney, 248 A. D. 779, 289 N. Y. S. 225 (1936).

[175] Matter of Knapp v. Duffey, *supra*, note 174.

[176] Sims v. Police Commissioner, 193 Mass. 547, 79 N. E. 824 (1907).

[177] Matter of Cooper v. Paris, 73 Misc. 244, 130 N. Y. S. 1043 (1911); People ex rel. Fogarty v. Cassidy, 118 A. D. 693, 103 N. Y. S. 671 (1907), affirmed, 196 N. Y. 568 (1909).

[178] People ex rel. Storey v. Butler, 124 A. D. 148, 108 N. Y. S. 848 (1908).

[179] State ex rel. Castel v. Village of Chisholm, 173 Minn. 485, 217 N. W. 681 (1928); People ex rel. McBride v. Atchinson, 68 Misc. 115, 123 N. Y. S. 577 (1910).

[180] Matter of Warner v. Hall, 141 Misc. 294, 252 N. Y. S. 451 (1931).

[181] Matter of Brown v. Stephan, 245 A. D. 588, 283 N. Y. S. 31 (1935).

[182] People ex rel. Rigby v. Anderson, 198 A. D. 283, 190 N. Y. S. 300 (1921).

[183] Dickey v. Civil Service Commission, 201 Ia. 1135, 205 N. W. 961 (1926).

Veterans have sometimes obtained the enactment of legislation that gives a special sanction to their claims. Criminal penalties and the infliction of personal damages upon the offending officer who makes the removal are provided for in some states as a special warning to removing officers that they act at their peril in making removals under veterans' preference laws.[184]

[184] Hilton v. Cram, 112 A. D. 35, 97 N. Y. S. 1123 (1907), affirmed, 190 N. Y. 535, 83 N. E. 1126.

Chapter XI

JUDICIAL REVIEW OF SUSPENSION AND REMOVAL

Removals are usually made by administrative superiors, but under some civil service laws they may be made by the civil service commission itself. The courts normally come into the removal process at the stage of appeal, either immediately following administrative removal or after administrative removal has been acted on by the civil service commission. The courts seem to extend to the field of civil service law the general rule of administrative law that compels a complainant to exhaust his administrative remedies before he comes into court. This rule is subject to some exceptions, but is of general application.[1]

The subject of judicial review of removal is governed partly by statute and partly by constitution, but in any case is inextricably bound up with the common law system of remedies as it has been adapted to American use and as these remedies have been modified by statute. It is not possible here to deal in detail with the intricacies of remedial law in each American jurisdiction, although the applicable law in any case is the law of some specific jurisdiction, such as a state or the national government. Only the more general principles that seem fairly common to all American jurisdictions can be noted. But it must be remembered that the remedies which are most commonly used in this field, as in the whole field of the law of officers, fall in the extraordinary class, and that owing to their technicalities, this branch of the law is both technical and local.[2] It contains less of the unifying elements than is true of the common law generally.

When an officer or employee is threatened with discharge he may have a choice of one or more of several possible remedies. He may act to prevent the removal, may act to have it set aside if the order of removal is given, may ask to be reinstated in his position, and/or may demand damages for loss of wages if he has been ousted.

I. INJUNCTION

The remedy of injunction is of little significance as a method of judicial control of removals. While there are some unusual situations in the

[1] People ex rel. Tracy v. Levitan, 279 N. W. 620 (Wis. 1938).

[2] See Jennings, Removal from Public Office in Minnesota, 20 Minn. L. Rev. 721 (1936).

general law of public officers in which a court will grant an injunction against a removal, the general rule is that the writ is unavailable to try title, and title may be involved in the ordinary removal case. "Unless the title to office, and his consequent right to remain in the discharge of his duties are *absolute* and *apparent* on the mere statement of the case, it seems well settled that a preliminary injunction ought not to issue in such a case." [3] The right to an office is not a property right, and therefore the usual rule that injunction does not protect other than property rights, unless some extraordinary element requires it, comes into play to prevent the use of that remedy. The facts that other remedies are adequate and reasonably speedy, being extraordinary remedies for the most part, and that multiplicity of suits is seldom involved, mean that injunction is not used in the ordinary case of removal from a civil service position or office. The same general rule is followed in the federal courts so far as the national service is concerned.[4]

II. PROHIBITION

The writ of prohibition is likewise of little significance in removals from the civil service. The writ is used by the appellate courts to control the inferior courts, and the body to be controlled must be judicial in a pretty strict sense. The usual administrative body or officer given the power to remove or to participate in removals is not regarded as sufficiently judicial to be subject to the writ of prohibition.[5]

III. CERTIORARI

Certiorari is a common law writ of very considerable importance as an instrument for controlling administrative exercise of the removal power, because removal is often accompanied by a hearing. The significance of the hearing, so far as review is concerned, may be said to be that it gives to the proceeding a sufficiently judicial cast to subject it to review by a court through the use of the writ of certiorari. Normally certiorari will not lie to review the action of an officer who has the power to remove at pleasure because this means the power to remove without a hearing.[6]

Certiorari is a common law writ and may be used by the courts having common law powers, whether or not the statutes expressly mention it. It is usable not only for controlling administrative action that is accom-

[3] Peters v. Bell, 51 La. Ann. 1621, 26 So. 442 (1899). See Miles v. Logan, 265 S. W. 421 (Tex. Civ. App. 1924).

[4] Couper v. Smyth, 84 Fed. 757 (C. C. Ga. 1897). Morgan v. Nunn, 84 Fed. 551 (C. C. Tenn. 1898).

[5] People ex rel. Kennedy v. Foley, 104 Misc. 684, 172 N. Y. S. 279 (1918).

[6] People ex rel. Menzie v. Davis, 189 A. D. 391, 178 N. Y. S. 436 (1919).

panied by a hearing, but also for reviewing the decision of a lower court that has passed upon an administrative removal.[7]

Statutes sometimes mention certiorari specifically as a remedy that shall be available in removal cases, and sometimes the common law rules governing its use and scope are modified by statutory provisions, although this is not often true.[8] The writ at common law is a discretionary writ, and one is not entitled to it as a matter of right.[9]

The writ of certiorari lies to review the removal of a civil servant by a civil service commission.[10] If the commission has the power to review by hearing the action of a removing officer, then the writ should be directed against the civil service commission rather than against the removing officer.[11]

The practice of certiorari demands that a record of the proceedings be certified to the reviewing court, and from this it follows that a record must be kept and be available. The petitioner himself must obtain the record if no other statutory provision is made for getting it.[12] It may even be necessary for him to have his own stenographer present to take down the evidence. The commission record must show sufficient facts to enable the court to review the action. It is not enough that the record merely state "whereupon the commission heard the evidence offered, and having considered all the evidence adduced herein, we find therefrom that said F is guilty as charged in the within and foregoing charges."[13] In the event that the record supplied by the commission is inadequate, the court will quash the proceedings instead of penalizing the petitioner who seeks to review the action of the commission.[14]

When the power to remove may be exercised at pleasure or when charges are merely required to be written, certiorari is not the proper method of review.[15] Some courts grant certiorari where no formal hearing is required, but where instead a filing of formal charges is necessary and where the employee is given the right to file a formal explanation.[16] The tendency is to refuse certiorari to review the ordinary action of re-

[7] Commissioner of Public Works v. Judge of District Court, 258 Mass. 444, 155 N. E. 431 (1927).

[8] See, for example, sec. 22 of the New York civil service law.

[9] Chicago v. Condell, 224 Ill. 595, 79 N. E. 954 (1907).

[10] Powell v. Bullis, 221 Ill. 379, 77 N. E. 575 (1906).

[11] Cutley v. New Jersey State Highway Commission, 10 N. J. Misc. 991, 161 Atl. 836 (1932).

[12] Naples v. Civil Service Commission, 113 N. J. L. 426, 174 Atl. 547 (1934); State ex rel. Boltin v. Cotterill, 125 Wash. 533, 216 Pac. 851 (1923).

[13] Funkhouser v. Coffin, 301 Ill. 257, 133 N. E. 649 (1921).

[14] Funkhouser v. Coffin, *supra*, note 13.

[15] State ex rel. Holland v. Sudheimer, 164 Minn. 437, 205 N. W. 369 (1925); Matter of Elder v. Bingham, 118 A. D. 25, 103 N. Y. S. 617 (1907), affirmed, 189 N. Y. 509, 81 N. E. 1163.

[16] See State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11 (1914).

moval when it includes only the giving of notice and an opportunity on the part of the employee to give an explanation.[17]

The requirement that the removing officer report the removal and the cause therefor does not subject the action to review by certiorari, since it is not sufficient to make the action judicial. It is regarded by the courts as the exercise of an administrative power.[18] A statute provided that "no officer or employee in the classified civil service of any city . . . shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. . . ." "In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation . . ." This section was held to require a sufficiently formal procedure to justify the issuance of the writ of certiorari.[19]

But some courts take the position that they must look into the substance, not merely the form, of the requirement of a hearing. If the hearing that was both required and given was not for purposes of trial, but merely for purposes of giving an opportunity for explanation, then the writ should not be granted.[20] And, of course, the statute may extend the use of the writ to actions which do not involve hearings.[21] Statutes sometimes provide for the use of the writ in cases involving jurisdiction of the commission, and if such a statute is later amended to cover "all cases" of veterans' preference, the court takes the amendment to mean that a veteran is entitled to the writ even though the question to be reviewed is not that of jurisdiction.[22]

Certiorari, of course, does not reinstate an employee in the position from which he has been removed.[23] In the usual course of events the removing officer reinstates when his action has been reversed on certiorari, but technically only mandamus can compel reinstatement.

Jurisdiction to review by certiorari cannot be conferred on a court by agreement of the parties. "Respondents waive appeal or writ of error" will not save the case for certiorari if certiorari is not the proper remedy to review the particular action.[24]

[17] See People ex rel. Kennedy v. Brady, 166 N. Y. 44, 59 N. E. 701 (1901).
[18] State ex rel. Martin v. Minneapolis, 138 Minn. 182, 164 N. W. 806 (1917).
[19] Chicago v. Bullis, 124 Ill. App. 7 (1905), affirmed, 221 Ill. 379 (1906).
[20] Fonseca v. Goodwin, 4 Cal. App. (2d) 58, 40 P. (2d) 570 (1935). See State ex rel. Szweda v. Davies, 198 Ind. 30, 152 N. E. 174 (1926).
[21] See the discussion in Albano v. Hammond, 268 N. Y. 104, 196 N. E. 759 (1935).
[22] Butin v. Civil Service Commission, 179 Ia. 1048, 162 N. W. 565 (1917).
[23] Civil Service Commission v. Cummings, 83 Colo. 379, 265 Pac. 687 (1928).
[24] People ex rel. Hanrahan v. Ames, 277 Ill. App. 312 (1934).

The courts differ as to the extent to which certiorari can be used to review the evidence as well as the formal record. The reasons for the varying answers to this question are not only to be found in the statutory modifications of the writ and in the different views as to the common law scope of the writ, but are also to be found in the existence or nonexistence of other remedies, such as appeal and writ of error. In viewing the whole remedial system, it will be found that the purpose to be served by this writ in some jurisdictions is narrow; in others it must be more broadly interpreted if justice is to be done.

The cases taken alone establish very little on principle, and the refusal of one court to go into the evidence does not necessarily mean that it is taking a position less friendly to the petitioner than another court which is willing to review the evidence in another case.

In the first place certiorari calls for a record, so that the question of jurisdiction is often raised on the basis of the record itself. Since no general presumption exists, as has been noted repeatedly, in favor of the jurisdiction of civil service commissions, jurisdiction must appear from the record. On certiorari it is permissible to inquire sufficiently into the evidence to see whether jurisdiction exists. Presumably this is always a question of law, though a determination of some facts may be necessary to settle the legal question.[25] Sometimes this view is expressed in slightly different form, in the statement that the court will look into the evidence to see whether any substantial grounds could reasonably be said to exist for the commission to act upon.[26] An early intimation that certiorari could be used only when property rights were involved has apparently been long disregarded, so that the rules on review of removals have not been colored by the existence or nonexistence of property rights.[27] Under this view that certiorari should be restricted largely to the question of commission jurisdiction, it follows that the court will not probe into the details of the evidence. This naturally results in a tendency, so far as policy is concerned, for the courts to leave undisturbed the commission action on removal unless something arbitrary or clearly illegal appears in, or is to be inferred from, the record.[28] Notice, whether of time or place of hearing, is a jurisdictional fact.[29]

In a state like New York, however, the scope of certiorari is broadened considerably, for example, in the case of veterans, to permit a review of

[25] Carroll v. Houston, 341 Ill. 531, 173 N. E. 657 (1930); Johaaski v. Chicago, 274 Ill. App. 423 (1934); Garvin v. Chambers, 195 Cal. 212, 232 Pac. 696 (1925), good summary.

[26] Murphy v. Houston, 250 Ill. App. 385 (1928).

[27] Kusel v. Chicago, 121 Ill. App. 469 (1905). See Hopkins v. Ames, 344 Ill. 527, 176 N. E. 729 (1931).

[28] Joyce v. Chicago, 216 Ill. 466, 75 N. E. 184 (1905).

[29] Chicago v. Gillen, 222 Ill. 112, 78 N. E. 13 (1906).

the merits of the removal.[30] While many courts state their position somewhat more broadly than others and say that they will look at the evidence, the decisions themselves generally display a tendency to uphold the civil service commissions unless very arbitrary action is obvious from an examination of the evidence. The mere fact that the commission admitted some improper evidence is not sufficient to justify a reversal if other proper and substantial evidence upon which the decision could be based had also been admitted.[31] This is the attitude whether the commission upholds or reverses an action of removal by the administrative superior.[32] A statutory recital that the commission action is to be final does not cut off certiorari, but it does tend to restrict the court to seeing whether the action was arbitrary.[33]

On the whole, the tendency seems clearly to favor the court's examining not only the formal record but the evidence as well, but to restrict the court in its reversals, so that civil service commission actions will not be reversed upon anything less than either excess of jurisdiction or arbitrary action within jurisdiction.[34]

The insufficiency of the allegations, if not raised at the hearing, cannot be raised on certiorari to review the action which was taken as a result of the hearing.[35]

Certiorari, of course, does not bring with it an award for back pay any more than it restores to office.[36]

IV. APPEAL

The appeal would seem to be the simplest method of judicial review of administrative action removing an employee from a position, but even this simple statutory device is not without its technical difficulties. In the first place, the fact that the appeal is from the commission to a specified court, such as a trial court, does not mean that one of the appellate courts may not review the trial court decision on certiorari.[37] The separation of powers does not prevent granting the court power to "review" the removal action, according to one opinion.[38] However, not all courts agree

[30] Kelly v. Morgan, 241 A. D. 476, 273 N. Y. S. 142 (1934).

[31] State ex rel. Esser v. McBride, 215 Wis. 574, 254 N. W. 657 (1934).

[32] Newark v. Civil Service Commission, 13 N. J. Misc. 444, 178 Atl. 201 (1935).

[33] State ex rel. Wolcott v. Boyington, 110 Wash. 622, 188 Pac. 777 (1920).

[34] Riley v. Crawford, 181 Ia. 1219, 165 N. W. 345 (1917); Smith v. Warren, 225 A. D. 601, 233 N. Y. S. 627 (1929); State ex rel. Esser v. McBride, *supra*, note 31; Hunziker v. Civil Service Commission, 10 N. J. Misc. 828, 160 Atl. 828 (1932).

[35] Sullivan v. Lower, 234 Ill. 21, 84 N. E. 622 (1908).

[36] Walklet v. Civil Service Commission, 12 N. J. Misc. 443, 172 Atl. 363 (1934).

[37] Mayor of Medford v. Judge of District Court, 249 Mass. 465, 144 N. E. 397 (1924). Cf. Dow v. Casey, 194 Mass. 48, 79 N. E. 810 (1907); Inhabitants of City of Plainfield v. O'Driscoll, 14 N. J. Misc. 343, 184 Atl. 799 (1936).

[38] Driscoll v. Mayor of Sommerville, 213 Mass. 493, 100 N. E. 640 (1913).

with this position; some take the view that the court may not accept the appeal because to do so would give it executive rather than judicial power.[39]

The statutory review has not been interpreted as giving the court any general supervisory or reviewing power over the removal actions of civil service commissions.[40] The statement is made in some of the opinions that questions of law may be reviewed on appeal.[41] The Massachusetts court has said that "review" does not grant a retrial, but means that the court should uphold the commission unless the action was taken "without proper cause." Whatever be the mode of its statement, in substance this rule seems to be about the same as that which is applied in most certiorari cases.[42] "It was entirely consistent for the judge of the municipal court to feel that he would decide the case differently on its merits, if it had been within his jurisdiction to do so, and yet to find that the decision of the superintendent and board of trustees of the hospital did not appear to have been made without proper cause," or in bad faith.[43]

The attitude of the courts is illustrated nicely by the Ohio cases. One case enunciates the rule of review as giving to the courts very broad power to go over the whole evidence, and apparently even to receive additional evidence, while other opinions interpret the power of review much more narrowly. The difference in statement is probably much greater than the difference in actual rule or decision.[44]

In some states review of removals is not confined to those cases in which request for review is made by the ousted party, the law providing that citizens, apparently acting in a representative capacity on behalf of the public, are permitted to request the review.[45]

It is usual to provide in appeal sections that petitions must be filed within a fixed period; and, of course, if the appeal is not filed in the time specified, the order of removal becomes valid and final.[46] Lawyers should note the decision which holds that the appeal must be perfected within the period specified by statute and that it is not permissible for the counsel to postpone or delay his work because other proceedings, such as a

[39] City of Aurora v. Schoeberlein, 230 Ill. 496, 82 N. E. 860 (1907). See Inhabitants of City of Plainfield v. O'Driscoll, 14 N. J. Misc. 343, 184 Atl. 799 (1936).

[40] Selectmen of Wakefield v. Judge of District Court, 262 Mass. 477, 160 N. E. 427 (1928).

[41] Mayor of Medford v. Judge of District Court, *supra*, note 37.

[42] Murray v. Justices of Municipal Court, 233 Mass. 186, 123 N. E. 682 (1919).

[43] Murray v. Justices of Municipal Court, *supra*, note 42. See Brown v. Board of Police Commissioners, 2 Cal. App. (2d) 245 (1934).

[44] Landrey v. Harmon, 5 Oh. App. 217 (1916); Industrial Commission of Ohio v. Evans, 99 Oh. St. 56, 122 N. E. 40 (1918); State ex rel. Shelton v. Board of Education, 129 Oh. St. 157, 194 N. E. 5 (1934).

[45] See the New Jersey statute in O'Neill v. Johnson, 99 N. J. L. 317, 123 Atl. 538 (1924).

[46] State ex rel. Allen v. City of Spokane, 150 Wash. 542, 273 Pac. 748, affirmed, 150 Wash. 550, 277 Pac. 999 (1929).

criminal trial on some of the same counts, are pending. The rule is, that to be safe, counsel must go ahead with the appeal and not await the outcome of other proceedings.[47]

Some courts, such as that of Massachusetts, draw a distinction between appeal and review to determine the scope of judicial re-examination of the evidence in the case. If the case comes by appeal, the court may consider all the evidence as though it were acting on the case originally; whereas if it comes on review, the court merely looks to see whether there is any substantial evidence to justify the findings.[48] This but illustrates the observation made earlier, that the remedies in this branch of the law are as technically complicated as in others.

The Michigan court has held that a statute providing for an "appeal" from an administrative decision to remove should be interpreted to read "appeal in the nature of certiorari." If it were not read in this manner, the statute would be unconstitutional as compelling a court to accept jurisdiction in the case of a nonjudicial function. However, if the hearing is reviewed as in certiorari, the court is given a discretionary power which it may exercise in accordance with the general rules governing certiorari.[49]

V. MANDAMUS

Mandamus to reinstate the ousted employee to the position from which he claims to have been illegally separated is probably the most commonly used remedy in civil service removal cases which reach the courts. It has been said that mandamus is a remedy for a wrong done, and that it does not lie to place a petitioner's name on a list which is to be sent in later on.[50] But this is not to be taken to mean that a person's position on the eligible list is in all cases without protection, even that of mandamus.[51] Mandamus is a proper remedy to correct violations of the rules governing layoffs.[52] It rather than quo warranto is the appropriate remedy, although in rare cases the latter can be used in its modified statutory forms.[53]

In the national government mandamus is not granted as an original writ in the federal courts, being confined to ancillary proceedings.[54] But

[47] Mayor of Revere v. Special Judge of District Court, 262 Mass. 393, 160 N. E. 431 (1928).

[48] Swan v. Justices of the Superior Court, 222 Mass. 542, 111 N. E. 386 (1916).

[49] Appeal of Fredericks, 285 Mich. 262, 280 N. W. 464 (1938).

[50] In re Brown, 60 Hun 98, 14 N. Y. S. 450 (1891).

[51] See Chapter V, pp. 93–98.

[52] State ex rel. Hughes v. Board of Commissioners, 150 La. 1, 90 So. 419 (1922).

[53] See People ex rel. Hoefle v. Cahill, 188 N. Y. 489, 81 N. E. 453 (1907); State ex rel. Powell v. Fassett, 69 Wash. 555, 125 Pac. 963 (1912); State v. Coates, 74 Wash. 36, 132 Pac. 727 (1913).

[54] Bath County v. Amy, 13 Wall. 244, 20 L. ed. 539 (1871). Freund, Administrative Powers over Persons and Property (1928), sec. 127.

in the District of Columbia the writ is issued. It does not lie to control the president nor the exercise of discretion on the part of officers generally, and to the extent that removals are left to the discretion of an officer, mandamus cannot control their exercise of it.[55]

The writ should be directed to the officer or body having the power to reinstate. The law in question must be examined with care to determine whether that power rests with the civil service commission or with some administrative officer.[56] The use of the peremptory and alternative writs is governed by the same rules here as in mandamus generally. Usually, other things being equal, it is safer from a procedural point of view to make use of the alternative writ.[57]

Mandamus is preferred by the courts in many removal cases because of its speedy and effective character,[58] and of course it is a discretionary writ.[59] If on all the facts the case seems dubious, the court may refuse the writ.[60] Thus a court refused mandamus to a removed person who had used another defense in earlier proceedings.[61]

Mandamus is often said to be the proper writ to determine whether the petitioner was ousted from his position or office illegally.[62] Statutes sometimes affect the use of mandamus. If a statute says that an employee may be reinstated within one year after separation without fault, that means that mandamus to reinstate will not be issued to reinstate an employee who has been removed with fault.[63]

Mandamus does not lie to reinstate a person who has been discharged while on probation, because, not being in the permanent service, he might again be removed, and no purpose would be served by compelling reinstatement.[64] Nor will mandamus lie to reinstate one who has a chance to be employed only whenever there is work available.[65]

The scope of the writ of quo warranto may affect mandamus because

[55] Eberlein v. United States, 257 U. S. 82, 42 Sup. Ct. Rep. 12, 66 L. ed. 140 (1921).

[56] Souder v. Philadelphia, 314 Pa. 21, 170 Atl. 260 (1934); People ex rel. Tate v. Dalton, 158 N. Y. 204, 52 N. E. 1119 (1899); McCraw v. Finegan, 243 A. D. 778, 277 N. Y. S. 543 (1935).

[57] Shepard v. Oakley, 181 N. Y. 339, 74 N. E. 227 (1905); People ex rel. Cahill v. Green, 103 Misc. 717, 168 N. Y. S. 895 (1918); People ex rel. Croft v. Keating, 63 N. Y. S. 71 (1900); People ex rel. Corrigan v. Mayor and Common Council, 149 N. Y. 215, 43 N. E. 554 (1896); People ex rel. Gleason v. Scannell, 172 N. Y. 316, 65 N. E. 165 (1902); People ex rel. Burgeson v. West Chicago Park Commissioners, 275 Ill. App. 387 (1934).

[58] State ex rel. Hayden v. Arnold, 151 Wis. 19, 138 N. W. 78 (1912); State ex rel. Bannen v. Arnold, 151 Wis. 38, 138 N. W. 85 (1912).

[59] Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155 (1906).

[60] Burke v. Connolly, 76 Misc. 337, 135 N. Y. S. 179 (1912).

[61] People ex rel. Hamilton v. Cohen, 355 Ill. 499, 189 N. E. 489 (1934).

[62] Matter of Delahunt, 96 Misc. 548, 160 N. Y. S. 900 (1916).

[63] People ex rel. O'Connor v. Creelman, 77 Misc. 23, 135 N. Y. S. 781 (1912). See People ex rel. Lane v. Lindblom, 215 Ill. 58, 74 N. E. 73 (1905).

[64] People ex rel. Looram v. Henderson, 77 Misc. 25, 135 N. Y. S. 782 (1912).

[65] Penoyer v. Commissioner of Public Works, 134 Misc. 612, 235 N. Y. S. 640 (1929).

the former is the writ whereby to try title to office. But inasmuch as most mandamus cases in civil service law refer to employments rather than offices, and therefore do not encounter this rule, and inasmuch as the courts sometimes permit title to be tried by mandamus under various circumstances, the problem is not so great as it might seem at first thought. Quo warranto must be studied in each particular jurisdiction, however, and care must be taken to determine whether the position is an office or employment.[66] Mandamus is sometimes refused when another person is holding the office by color of authority, on the ground that in that case quo warranto is the proper remedy.[67]

Mandamus, of course, is a common law writ and does not depend upon specific mention in a statute for its existence and use in a common law jurisdiction.[68] Some authority exists for interpreting statutes so as not to deny the use of mandamus, even though by ordinary rules of interpretation that might follow.[69] The courts are relatively lenient in permitting correction of the pleadings so as to make the record one in which mandamus may properly be requested.[70]

The existence of good cause is not a sufficient defense against a petition for mandamus if the removal was not in accordance with the required procedures.[71]

The duty that is to be enforced by mandamus must be a clear and present duty, and for that reason it must appear that the conditions upon which reinstatement can be predicated do exist.[72] This necessitates showing that the position was in the protected class.[73]

Demand upon the officer having the obligation to act is often said to be requisite to any petition for mandamus, but there is a correlative principle that one need not make a demand which obviously would be futile and a waste of time. Therefore, there may be cases in which no prior demand is necessary.[74]

We have noted the rule that the order must be against the one having the power to act.[75] A further rule, with respect to parties, is that it is not

[66] People ex rel. Hoefle v. Cahill, *supra*, note 53; People ex rel. Drake v. Sutton, 88 Hun 173, 34 N. Y. S. 487 (1895). City of Tulsa v. District Court, 174 Okla. 470, 51 P. (2d) 511 (1935).

[67] People ex rel. Wren v. Goetting, 133 N. Y. 569, 30 N. E. 968 (1892).

[68] People ex rel. Coveney v. Kearny, 44 A. D. 449, 61 N. Y. S. 41 (1899); State ex rel. Kansas City v. Trimble, 317 Mo. 1208, 298 S. W. 833 (1927).

[69] Merriweather v. Roberts, 268 N. Y. 12, 196 N. E. 621 (1935). Cf. People ex rel. Sommerville v. Williams, 217 N. Y. 40, 111 N. E. 252 (1916).

[70] Hefter v. Bradway, 115 N. J. L. 81, 178 Atl. 199 (1935).

[71] Peckham v. Mayor, 253 Mass. 590, 149 N. E. 622 (1925).

[72] Feehan v. Chief Engineer of Fire Department, 264 Mass. 178, 162 N. E. 342 (1928).

[73] State ex rel. Dyment v. Booth, 183 Wash. 365, 48 P. (2d) 640 (1935).

[74] Van Fleet v. Walsh, 122 Misc. 316, 202 N. Y. S. 745 (1924); People ex rel. Birmingham v. Gront, 45 Misc. 47, 90 N. Y. S. 861 (1904).

[75] People ex rel. Michales v. Ahearn, 111 A. D. 741, 98 N. Y. S. 492 (1906).

necessary to join the person as a defendant who holds the office from which petitioner claims to have been ousted illegally,[76] but it is necessary to make successors to the office of the removing officer parties defendant. The order is binding against successors if they are made proper parties.[77]

One of the allegations that must be made in the usual civil service case in which mandamus is sought to reinstate following an illegal removal is that the employee is in the classified service;[78] a mere allegation that petitioner took and passed a competitive examination is insufficient to comply with this requirement.[79] If an office is involved, it seems necessary to show that the office was legally created,[80] but for employments it is apparently sufficient for petitioner to allege that he was employed at the described work in a named position.[81] But it has been held to be a defense against mandamus that the charter did not authorize the position though plaintiff had held it for a long time and was now demoted.[82]

Mandamus is not excluded by the existence of other remedies.[83] All that is generally required is that mandamus be appropriate, not that it be the only remedy. In this respect it shows its legal rather than any equitable character. It is a writ at law rather than in equity.

Not only is mandamus the proper remedy for obtaining reinstatement to the position, but an action for back salary may be coupled with it.[84] It is not necessary to bring an action of debt or assumpsit to fix the salary claim first.[85] Mandamus to reinstate and a claim for salary may be coupled, even though another person has been appointed in the ousted person's place, because the wrong is the removal, not the subsequent appointment.[86] In a sense, an action for back salary is treated as a reinstatement to the position during the period for which the salary claim is allowed, in order to permit the salary award.[87] Actual entry upon the duties is not required.[88]

[76] People ex rel. Michales v. Ahearn, *supra*, note 75.

[77] People ex rel. La Chicotte v. Best, 187 N. Y. 1, 79 N. E. 890 (1907); Commissioner of Institutions v. Justice of Municipal Court, 290 Mass. 460, 195 N. E. 783 (1935).

[78] People ex rel. Warschauer v. Dalton, 159 N. Y. 235, 53 N. E. 1113 (1899).

[79] Dorsey v. Sweeney, 131 Misc. 784, 228 N. Y. S. 277 (1928).

[80] People ex rel. Jacobs v. Coffin, 282 Ill. 599, 119 N. E. 54 (1918).

[81] People ex rel. Jacobs v. Coffin, *supra*, note 80. Cf. Chiaverinie v. Murray, 237 A. D. 856, 261 N. Y. S. 426 (1932).

[82] Gersch v. Chicago, 250 Ill. 551, 95 N. E. 630 (1911); Phillips v. Murray, 264 N. Y. S. 716 (1933); Harris v. City of Huntington, 116 W. Va. 118, 178 S. E. 693 (1935).

[83] State ex rel. Rundberg v. Kansas City, 206 Mo. App. 17, 226 S. W. 986 (1920). Cf. State ex rel. Desprez v. Board of Commissioners, 47 Oh. App. 1, 189 N. E. 665 (1933).

[84] State ex rel. Wettrick v. Seattle, 115 Wash. 548, 197 Pac. 782 (1921); People ex rel. Blachly v. Coffin, 202 Ill. App. 100 (1917), affirmed, 279 Ill. 401, 117 N. E. 85. But cf. dictum in Twombley v. New York, 70 Misc. 515, 127 N. Y. S. 388 (1911).

[85] People ex rel. Hamilton v. Chicago, 274 Ill. App. 206 (1934).

[86] State ex rel. Rundberg v. Kansas City, *supra*, note 83.

[87] State ex rel. Wingfield v. Kansas City, 217 Mo. App. 288, 263 S. W. 516 (1924).

[88] Fort Smith v. Quinn, 174 Ark. 863, 296 S. W. 722 (1927).

If salary claim is coupled with the petition for reinstatement, it is necessary to allege in the petition for mandamus that money has been appropriated and is available to pay the claim.[89] Whether the claim for salary is proper when coupled with mandamus if the salary has been paid to another depends not upon its connection with mandamus, but upon the rules governing liabilities for salary.[90]

The wrongfully removed person may be reinstated even though he has entered upon a new position in the meantime, because the incompatibilities between the two positions, if there are any, will not develop until he actually enters upon the performance of the duties attached to both of them.[91]

Not all orders of reinstatement preceding salary payments are by order of a judicial body. An administrative order reinstating a person may be sufficient to predicate salary payment.[92] Administrative reinstatement must be accompanied by payment of back salary if the removal was wrongful.[93]

If an employee is suspended for a definite term, he cannot be reinstated before the term expires.[94]

Some exceptions must be noted to the rule stated above that salary claims may be joined with a petition for mandamus. In Massachusetts, for example, this may not be done.[95] This is also true in Ohio.[96] The theory in these jurisdictions is that the right to the position or office must be established first, that a claim for back salary cannot be settled until the right to reinstatement has been established. This, of course, goes back to the more fundamental question whether the courts should favor a practice which gets all relevant claims before them for settlement in one action or whether they should insist upon one thing at a time. But the fact that a removed laborer sued in contract for past salary or for damages does not bar an action of mandamus for reinstatement for the future.[97] Mandamus is proper when, in addition to an award of salary, a record of suspension is to be erased from the books. An action for salary alone would leave the record untouched.[98]

The writ must be against the city or against the officer having the duty

[89] People v. Board of Trustees, University of Illinois, 283 Ill. 494, 119 N. E. 595 (1918).
[90] State ex rel. Hamilton v. Kansas City, 303 Mo. 50, 259 S. W. 1045 (1924).
[91] State ex rel. Dwyer v. Duncan, 49 Mont. 54, 140 Pac. 95 (1914).
[92] Warner v. Hall, 141 Misc. 294, 252 N. Y. S. 451 (1931).
[93] Walklet v. Civil Service Commission, 114 N. J. L. 582, 177 Atl. 894 (1935).
[94] Freudenreich v. Mayor and Council, 14 N. J. Misc. 804, 187 Atl. 555 (1936); Skold v. Chief of Fire Department, 266 Mass. 513, 165 N. E. 681 (1929).
[95] Hill v. Mayor of Boston, 193 Mass. 569, 79 N. E. 825 (1907).
[96] Williams v. State ex rel. Gribben, 127 Oh. St. 398, 188 N. E. 654 (1933). Cf. 10 Dec. Comp. Gen. 478 (1931).
[97] Ransom v. Mayor of Boston, 193 Mass. 537, 79 N. E. 823 (1907).
[98] Bratton v. Dice, 93 Colo. 593, 27 P. (2d) 1028 (1933).

and power to pay, rather than against the officer having the power to fix salaries if that power does not also carry with it the power to pay.[99]

It has been held that a subsequent charter may cut off rights to claims that have accrued but have not been reduced to judgment as a result of an illegal removal under the prior charter.[100]

In case the employee is reinstated, he must report for work after he learns of the reinstatement and may not wait until he is called.[101] Voluntary retirement may prevent the use of mandamus for reinstatement.[102]

At times it is required to reinstate an employee to a comparable position. When this is the requirement, the courts watch rather closely the exact rates of compensation and the nature of the duties attached to the positions from which the employee was removed and to which he is being reinstated. This situation may arise, for example, when a reorganization has taken place during the period that the employee was out of his position.[103]

An illegal removal may be cured by a legal exercise of the power to remove, and if the cure is effected before the petition for mandamus is filed, the writ will not issue.[104]

The rules governing res adjudicata are no different in cases involving removals than in other situations.[105]

The rule to be followed by the courts in determining the extent to which they will review the evidence in mandamus cases is stated in various ways. On the whole, the courts tend to say in mandamus cases that they will not review the evidence in detail. They will look to see whether there is any substantial evidence, but they will not canvass the weight of the evidence. In general, what these statements mean is that the court will look through the record, and if it feels that on the whole the removal can be said to be justified, it will uphold the removal, even though some irregularities may be present which might cause a reversal had the review been of a judicial trial in a lower court.[106]

[99] Matter of Agar, 21 Misc. 145, 47 N. Y. S. 477 (1897).

[100] State ex rel. Kansas City v. Trimble, 317 Mo. 1208, 298 S. W. 833 (1927). See State v. Kansas City, 310 Mo. 542, 276 S. W. 400 (1925).

[101] Conroy v. Philadelphia, 319 Pa. 265, 179 Atl. 224 (1935).

[102] Thompson v. Budd, 133 Misc. 779, 233 N. Y. S. 504 (1929).

[103] Newark v. Civil Service Commission, 13 N. J. Misc. 716, 180 Atl. 617 (1935).

[104] People ex rel. Hodkinson v. Johnson, 153 A. D. 890, 138 N. Y. S. 385 (1912).

[105] Kramer v. State ex rel. Moore, 45 Oh. App. 389, 187 N. E. 256 (1933).

[106] State ex rel. Beebe v. Seattle, 159 Wash. 392, 293 Pac. 459 (1930). Fronsdahl v. Civil Service Commission of Des Moines, 189 Ia. 1344, 179 N. W. 874 (1920); Sailer v. Philadelphia, 273 Pa. 424, 117 Atl. 271 (1922); Garvin v. Chambers, 195 Cal. 212, 232 Pac. 696 (1925); Schlau v. Chicago, 170 Ill. App. 19 (1912); People ex rel. Ambrose v. Tompkins, 208 N. Y. 353, 101 N. E. 865 (1913); Gallup v. Williams, 139 A. D. 355, 123 N. Y. S. 1098 (1910). State ex rel. Szweda v. Davies, 198 Ind. 30, 152 N. E. 174 (1926); State ex rel. Felthoff v. Richards, 203 Ind. 637, 180 N. E. 596 (1932).

VI. ACTION FOR DAMAGES OR SALARY

An officer or employee may bring an action for damages or salary without asking to be reinstated to the office or position. The fact that he waits until after he procures reinstatement by court order is not fatal in those states in which he could join both claims in the same action.[107] He may, for example, be first illegally, then legally, discharged, and the suit may be for salary for the period during which he was wrongfully ousted.[108] The Supreme Court of the United States has even held that in the national government a suspension in violation of an executive order of the president would constitute a ground for suit before the court of claims.[109] However, the court of claims seems to take the position in some opinions that recovery is restricted to those instances in which the removing officer exceeded his authority; when he has the power to remove, though the cause or method of removal may be doubtful, the court will not review the administrative action.[110] Under this view a distinction is drawn between the power to remove and the procedure to be followed in a removal. The government may be held liable for removals made in excess of the power to remove, but not for violations of the procedure, even though it be statutory, governing removals.[111]

The action for removal in the case of an officer is presumably in tort rather than on contract, because under the federal constitution an office has been held to be a status, not a contract,[112] and violations of rights arising out of status normally fall in the class of torts. Employments are usually based upon contract, and therefore the removal from a position would be a breach of contract. With respect both to damages and to the statutes of limitations this distinction might become important, subject of course to the qualifications that must be introduced because of the doctrine of laches. Upon this subject something more will be said in the next section.

One of the problems about which there is difference of opinion is that presented by an action for salary brought by a person who has been ousted from his position when another person has been appointed to his position and paid the salary. Shall the injured former and rightful holder be paid the salary by the city even though the city or other governmental unit has paid it to the one who performed the duties of the position?

[107] McGraw v. Gresser, 226 N. Y. 57, 123 N. E. 84 (1919); Lattime v. Hunt, 196 Mass. 261, 81 N. E. 1001 (1907); Smith v. New Bedford, 269 Mass. 345, 168 N. E. 806 (1929).

[108] Lellman v. United States, 37 Ct. Cl. 128 (1902).

[109] United States v. Wickersham, 201 U. S. 390, 26 Sup. Ct. Rep. 469, 50 L. ed. 798 (1906).

[110] Miller v. United States, 45 Ct. Cl. 509 (1910).

[111] Nicholas v. United States, 55 Ct. Cl. 188 (1920), affirmed, 257 U. S. 71, 42 Sup. Ct. Rep. 7, 66 L. ed. 133.

[112] Butler v. Pennsylvania, 10 How. 402 (1850).

Some courts say no, some courts yes.[113] In New York it has been held unconstitutional as a gift for the legislature to authorize a city to pay back salary to an illegally ousted officer when the salary has been paid to another.[114] In general, the courts who refuse to permit recovery under these circumstances take the view that the city is obligated to pay only for the services received by it, and that having paid the one who rendered them, the obligation of the city is discharged. It is unfair, say these courts, to compel the city to pay twice. The burden of establishing title should not be upon the city. The other courts take the view that the person to whom the position rightfully belongs is entitled to the salary, and that it is part of the obligation of the city to see that the salary is paid to the rightful holder. In case of doubt or contest, it should withhold payment until the question has been determined by the proper authorities, and ordinarily the proper authorities are the courts. These two views may be put in terms of de facto officers' law at times, but the basic differences are as just indicated. The liability of the innocent, though illegal, holder of the office or position to the person who was ousted from legal title to the position is of little importance, because of the unreliability in a field such as this of any remedy that rests upon a purely personal basis.

In the case of an office it would be logical to say that a government should always be on notice that it must pay the salary to the holder of the legal title, because the salary is attached to the office and is not based upon the performance of any particular service. But with respect to employments generally, the rule might be somewhat more lenient, although here the question is which is the lesser of two evils.[115] Perhaps the rule that compels the speediest settlement of any dispute as to positions is the one to be preferred, because such a rule will tend in the long run and in the generality of cases to work out most equitably.

Of course, if the city pays the salary to the person appointed to the vacancy caused by the wrongful ouster after receiving notice that the former employee has been awarded the salary, the city cannot defend against payment to the party entitled by decision to the money.[116]

A situation in New York illustrates the difficulties and the remedies sometimes used in this branch of law. Petitioner was illegally discharged

[113] No: State ex rel. Weyant v. Seattle, 127 Wash. 681, 221 Pac. 997 (1924); City of Ashland v. Barney's Administrator, 231 Ky. 835, 22 S. W. (2d) 255 (1929); Sutliffe v. New York, 132 A. D. 831, 117 N. Y. S. 813 (1909); Martin v. New York, 176 N. Y. 371, 68 N. E. 640 (1903); Arant v. United States, 55 Ct. Cl. 327 (1920); State ex rel. Gallagher v. Kansas City, 319 Mo. 705, 7 S. W. (2d) 357 (1928). Yes: City of Cleveland v. Luttner, 92 Oh. St. 493, 111 N. E. 280 (1914); Chicago v. Luthardt, 91 Ill. App. 324 (1900), affirmed, 191 Ill. 516, 61 N. E. 410 (1901).

[114] Mullane v. McKenzie, 269 N. Y. 369, 199 N. E. 624 (1936). See Bund v. Stephan, 288 N. Y. S. 899 (1936).

[115] See discussion in Bassler v. Gordon, 122 Kan. 692, 253 Pac. 228 (1927).

[116] Jones v. Buffalo, 178 N. Y. 45, 70 N. E. 99 (1904).

from the classified service and was ordered reinstated. During the period that he was out of his position, the salary had been paid to another. The court denied payment of the salary to the ousted person, saying: "Where the position has not been filled, is left vacant, and the city has paid no one for the work, it may very well be that the incumbent, illegally removed, should get his compensation. . . . Where, however, the city has put another person to do the petitioner's work and paid him for it, the petitioner — the removed employee — is not entitled to his back pay; the nature of the procedure, whether by mandamus or action, is entirely immaterial; the right does not exist whatever the procedure may be."[117] Subsequent to this decision a statute was enacted which provided that "any officer or employee who shall have been, or hereafter might be, removed from any position held by him by appointment or employment in the state or in any city thereof, and who shall have been restored to such position or employment by order of the court, shall be entitled to receive from the state or city the same compensation therefor from the date of such removal, less the amount of compensation received from any other employment or occupation during the period he was out of office, which he would have been entitled by law to receive in such position or employment." The court held that this law operated retroactively so as to enable a person whose removal had taken place prior to the enactment of the statute, but whose litigation was pending in the courts on appeal at the time of the enactment, to receive the benefit of its provisions.[118]

The fact that other policemen are appointed to the force does not necessarily mean that another person has been appointed to fill an ousted policeman's place.[119] The problem that is presented by an office such as a police office is somewhat different from that presented by a single office with a single holder. But when, as with police and fire departments, there is a class of offices, the law may authorize a maximum number of offices for that class. In one case in which an officer was discharged and the force was later brought up to the maximum by new appointments, the court held that the removed officer could recover salary for the period of wrongful removal up to the date when the maximum was reached. But for the period following that date, no recovery could be had until an action had determined his right to one of the offices.[120]

A city cannot defend against an action for salary on the ground that officers of the city improperly put the position from which the plaintiff was removed in the classified service.[121] Nor will a general demurrer do

[117] Matter of Barmonde v. Kaplan, 266 N. Y. 214, 194 N. E. 681 (1935).
[118] Deth v. Castimore, 245 A. D. 156, 281 N. Y. S. 114 (1935).
[119] Seifen v. Racine, 129 Wis. 343, 109 N. W. 72 (1906).
[120] Kammerer v. Louisville, 142 Ky. 848, 135 S. W. 411 (1911).
[121] Craigie v. New York, 114 A. D. 880, 100 N. Y. S. 197 (1906).

as an answer to a complaint alleging illegal removal. Facts must be pleaded which show the cause of the discharge.[122]

Salary may be recovered, without deduction for money earned at other work, when the action is based not on contract but on the official status of the removed person.[123]

The government is not bound by promises made by the superior officer that the ousted person will be taken back, particularly if the superior is an employee himself and not an officer. Logically, the fact that the superior is an officer should make no difference, the real question being whether he had the power to make such promises.[124]

The nature of the compensation is sometimes a factor to which the courts attach weight. If the compensation is by the day, it looks like wages. If the work is that of a laborer, it tends to make the hiring seem contractual, with the result that recovery cannot be had for salary so long as services were not performed.[125] But wages do not necessarily import employment upon the basis of work done.[126] Suit for recovery of salary in the case of day laborers must probably be grounded in tort rather than in contract.[127] This does not mean that a laborer may not obtain mandamus to be reinstated in his position as a laborer, but means that his right to recovery of salary depends upon his performance of the service.[128]

It seems that in the absence of statute an illegally removed employee is not under obligation to accept temporary employment,[129] nor is the acceptance of temporary employment fatal to recovery.[130]

The ousted employee may either expressly or impliedly waive his claim to back salary. For example, the fact that he worked in his reduced status for two years without complaint has been held to imply a waiver of any claim that he might have had as a result of the illegal change in status.[131]

Legislative recognition of claims is not unknown, and these statutes may be retroactive, as has been noted earlier. However, such laws do not apply to claims which had been decided adversely to plaintiff prior to the enactment of the statute recognizing the claims.[132] Apparently it is con-

[122] French v. Lawrence, 190 Mass. 230, 76 N. E. 730 (1906).
[123] Fort Smith v. Quinn, *supra*, note 88.
[124] State ex rel. Hubbard v. City of Seattle, 135 Wash. 505, 238 Pac. 1 (1925).
[125] Miller v. United States, *supra*, note 110, dictum.
[126] Walsh v. City of New York, 143 A. D. 150, 127 N. Y. S. 972 (1911). O'Hara v. New York, 46 A. D. 518, 62 N. Y. S. 146 (1900).
[127] Ransom v. Boston, 196 Mass. 248, 81 N. E. 998 (1907).
[128] Smith v. New Bedford, 269 Mass. 345, 168 N. E. 806 (1929).
[129] Foster v. Hindley, 72 Wash. 657, 131 Pac. 197 (1913).
[130] Gracey v. St. Louis, 213 Mo. 384, 111 S. W. 1159 (1908).
[131] Twombley v. New York, 70 Misc. 515, 127 N. Y. S. 388 (1911).
[132] Matter of Peterkin v. Taylor, 246 A. D. 555, 283 N. Y. S. 196 (1935).

stitutional for the legislature to recognize the wrong done by paying the expenses to which a person is put in asserting his legal right to a position from which he has been illegally ousted.[133]

A waiver of back salary may be made with the understanding that it will not be used against the employee. For example, the civil service commission may have failed to hold its hearing within the specified period, and the waiver may be for the purpose of sanctioning the postponed hearing. If this is the understanding with the employee, the waiver cannot be used against him later when he asks for back salary on the ground that the suspension or removal was illegal.[134]

VII. PERSONAL LIABILITY OF REMOVING OFFICER

The person who has been removed from office may feel so strongly that he has been treated unjustly, as well as illegally, that he will wish to sue the officer making the removal. Is the superior officer liable for damages if he has made a removal that is judged illegal by the courts?

The superior is privileged absolutely in making communications connected with the removal of an inferior officer or employee.[135] It is important that letters, communications, ratings, and appraisals be privileged in order that the superior may carry on his work unrestricted by fear of lawsuits for things honestly done in the course of his duties. This work may include the exercise of the power to remove subordinates or the participation at one stage or another in giving information upon which an officer superior both to himself and to the subordinate may act. It is difficult to see why the privilege needs to be absolute, although apparently the courts phrase it as an absolute privilege, having in mind the analogy of legislative and judicial privilege in the field of libel and slander.[136] The privilege should be qualified, not absolute, and if the question was to be raised in a case in which the distinction made a difference, the courts might so hold. A qualified privilege throws a very real burden on the plaintiff, and at the same time is all that is necessary to protect the superior. Room should be left for the rare case of malice or dishonest and careless action on the part of the superior; he should at least be held liable for injuries resulting from malice.

One case involved a statute which extended the privilege to publications "in any legislative or judicial proceeding, or in any other official proceeding, authorized by law." The removal procedure came under the

[133] Farrington v. State of New York, 248 N. Y. 112, 161 N. E. 438 (1928).
[134] Bolay v. Philadelphia, 102 Pa. Super. Ct. 510, 157 Atl. 374 (1931).
[135] Donner v. Francis, 255 Ill. App. 409 (1930).
[136] Layne v. Kirby, 278 Pac. 1046 (Cal. 1929).

last clause in the sentence, thought the court, and therefore a letter written by a subordinate about his immediate superior to their common superior came within the privilege.[137]

There is an analogy that can be made use of in working out a principle of liability for removing officers — the principle that judicial officers of lower courts may be liable for excess of jurisdiction. This principle has been extended to administrative boards in certain cases. In one case the removing members of a common body were held liable for excess of jurisdiction because they did not act within the statute.[138] The problem of jurisdiction seems not to be involved in a case in which an officer acts in a manner not authorized by law, the principles of official liability for acts in excess of authority being sufficient to establish the liability. But the courts tend to think of removal as having some judicial characteristics, partly because of the procedural elements arising from the requirement of cause and hearing, and partly because it involves the exercise of discretion somewhat resembling that reposed in a judge. The liability for an illegal removal seems fixed upon the removing officer, however, by the above decision, whatever the correct rationale of the principle may be.

There seems to be some authority that if the removing officer is liable, it is not necessary for the employee to establish his title or right to the position by mandamus before bringing his action for damages.[139]

VIII. LACHES

The doctrine that a person must assert his rights seasonably or be barred from asserting them later is firmly fixed in the law of removal applying both to the field of public officers generally and to civil service law in particular. It applies whether the action be for damages, for salary, for mandamus, for certiorari, or for any other form of remedy. Apparently it is a doctrine that cuts across all remedies. In some of the special remedies, such as certiorari and mandamus, laches may be especially important because it is discretionary on the part of the court.[140] In one case in the national government the statement was made that "when a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government serv-

[137] Layne v. Kirby, *supra*, note 136.
[138] Stiles v. Municipal Council of Lowell, 233 Mass. 174, 123 N. E. 615 (1919).
[139] Cf. Bean v. Clausen, 113 A. D. 129, 99 N. Y. S. 44 (1906).
[140] Chicago v. Condell, 224 Ill. 595, 79 N. E. 954 (1907).

ice may be disturbed as little as possible and that two salaries shall not be paid for a single service."[141]

It seems clear that the statutes of limitations and laches do not coincide, but that laches operates so as to bar the action long before the statutes of limitations applicable to tort and contract would do so.[142] Laches operates even though there is no statute of limitations on mandamus.[143]

It may be the court will find that for six months a good excuse existed for failure to bring an action, but that for the second six months no adequate excuse existed, and that to wait the year constituted too long a delay.[144] Each case depends upon its own peculiar facts; six months may be too long to wait in one situation, while two years may not be too long in another.[145] The fact that plaintiff took some steps may not be effective. He must take sufficient steps to really constitute assertion of his claim.[146] An employee is not entitled to trust a casual assurance on the part of his superior that if the taxes come in, he will put the employee back to work.[147]

But it has been held that if petitioner relied upon a request to wait for the decision on a pending case, he was not guilty of laches through waiting until the decision was handed down.[148] It is permissible to litigate on one theory, lose, and then try on another theory.[149]

The shorter the period of delay, the easier it is to justify the delay.[150] Of course, laches does not operate if the person is unaware that another

[141] United States ex rel. Arant v. Lane, 249 U. S. 367, 39 Sup. Ct. Rep. 293, 63 L. ed. 650 (1919).

[142] State ex rel. Wingfield v. Kansas City, *supra,* note 87.

[143] Williams v. Pyrke, 233 A. D. 345, 252 N. Y. S. 801 (1931).

[144] State ex rel. Wiltz v. Sewerage and Water Board, 145 So. 34 (La. 1932).

[145] Carroll v. Houston, *supra,* note 25, 6 months; O'Leary v. Common Council, 8 N. J. Misc. 559, 151 Atl. 53 (1930), 1 year; People ex rel. Connolly v. Board of Education, 99 N. Y. S. 737 (1906), 16 months; Murphy v. Keller, 61 A. D. 145, 70 N. Y. S. 405 (1901), 18 months; State ex rel. Lafitte v. Sewerage and Water Board, 179 La. 1048, 155 So. 770 (1934), 18 months; McGregor v. Carney, 271 Mich. 278, 260 N. W. 163 (1935), 18 months; Kenyon v. Chicago, 135 Ill. App. 227 (1907), 2 years; McManaway v. Sisson, 170 N. Y. S. 670 (1918), 2 years; State ex rel. Skelly v. Board, 159 La. 465, 105 So. 510 (1925), 2½ years; People ex rel. Throckmorton v. McCartney, 28 A. D. 138, 50 N. Y. S. 919 (1898), 3 years; Nicholas v. United States, 257 U. S. 71, 42 Sup. Ct. Rep. 7, 66 L. ed. 133 (1921), 3 years; McMaster v. Harvey, 239 A. D. 553, 268 N. Y. S. 115 (1933), 3 years; Streeter v. Worcester, 177 Mass. 29, 58 N. E. 277 (1900), 3½ years; Phillips v. Boston, 150 Mass. 491, 23 N. E. 202 (1889), 10 years.

[146] Morse v. United States, 59 Ct. Cl. 139 (1924), certiorari denied, 270 U. S. 151, 46 Sup. Ct. Rep. 241, 70 L. ed. 518.

[147] State ex rel. Koehl v. Sewerage and Water Board, 179 La. 117, 153 So. 533 (1934).

[148] State ex rel. Exnicios v. Board of Commissioners, 153 La. 705, 96 So. 539 (1923); State ex rel. Prior v. Kansas City, 261 S. W. 112 (Mo. 1924); People ex rel. Hoeges v. Guilfoyle, 61 A. D. 187, 70 N. Y. S. 442 (1901).

[149] People ex rel. Warschauer v. Dalton, 52 A. D. 371, 65 N. Y. S. 342 (1900).

[150] Cooper v. Paris, 73 Misc. 244, 130 N. Y. S. 1043 (1911).

has been put to work when he was entitled to be put to work instead. He is not required to protest until by reasonable diligence he could have learned that there was something about which he should protest.[151]

Laches should not be confused with acquiescence. A person may by his action or inaction impliedly consent to what has been done, and as a result may be barred from subsequently asserting his former rights.[152] That a person who has been removed from a position moves out of the city has been held to constitute an important factor in determining whether he has acquiesced in his removal.[153]

Turning in a uniform in compliance with rules requiring this upon separation from the force is not conclusive that an ousted policeman acquiesced in his removal.[154]

The fact that the civil servant is a minor may affect the situation to be considered by the court. If the father kept up inquiries, if the minor was ill part of the time, if he was not notified that he was discharged, but was told instead that he was being laid off because of the need for reducing the force, it has been held proper for the minor to sue twelve days after coming of age.[155]

The rule that if one waits too long to sue on his claim for illegal removal he will be barred by laches operates against the administrator of the removed officer's estate as well as against the removed person.[156]

It is not necessary that the ousted employee report for work every day. It may be that the situation is such that it would be an idle gesture for him to do so, and the law requires him to do only those things that are necessary to show honest intention to resume his work whenever his superiors are ready to permit him to do so.[157]

IX. THE PROBLEM OF FINALITY OF COMMISSION ACTION

The most troublesome question in civil service administration is whether the commission or the courts should pass upon the legality of administrative removals. If the commission is to perform this task, it will be brought into the conflicts that arise between employee and administrator within the operating departments of the government. To perform some of its tasks most efficiently, the commission should not be involved in the internal disputes of a department. If the commission is

[151] Chicago v. Bullis, *supra*, note 19. People ex rel. Schott v. Prendergast, 148 A. D. 135, 132 N. Y. S. 113 (1911).
[152] Lake v. Fall River, 264 Mass. 98, 161 N. E. 893 (1928).
[153] Higbee v. City of Bartlesville, 147 Okla. 49, 294 Pac. 168 (1930).
[154] Seifen v. City of Racine, 129 Wis. 343, 109 N. W. 72 (1906).
[155] State ex rel. Leader v. Kansas City, 258 S. W. 762 (Mo. App. 1924).
[156] Richardson v. United States, 64 Ct. Cl. 233 (1927).
[157] Bolay v. Philadelphia, *supra*, note 134.

to be kept free of such complications, it cannot act as the judge in a case between the head of a department and an employee within the department.

The practice is general, nevertheless, of having the civil service commission pass upon removals. A few jurisdictions permit direct access to the courts. In favor of proceeding directly to a judicial body is the finality of the action taken by the court. There is less delay if the employee proceeds immediately to court action than if he goes first to a commission and then appeals to a court. Against immediate judicial review of the administrative action is the cost of such a review. It may be that the dispute will not be appealed from the decision of the commission, and if it is not appealed, the cost to the employee will be less than if it had been taken to court originally.

Some choice must be made, and it is the belief of this writer that it is preferable to relieve the civil service commission of such work. If judicial review of removal is to be provided for, the case may as well enter the court in the first instance. The decision of the trial court should be final except with respect to questions of law. The procedure whereby the dispute is brought into court should be by statutory certiorari. The statute should provide that the determination of the removing officer be reviewable upon the evidence as well as upon the jurisdiction and procedure of that officer. This imports a hearing, and while there is some dispute as to the desirability of a hearing in all cases of removal, it seems fairly clear that a hearing should be required in the dismissal of all employees and officers who should be within the branch of the civil service regarded as the career division.

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