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RIGHTS OF THE PUBLIC EMPLOYEE UNDER
THE ILLINOIS CIVIL SERVICE SYSTEM:
A PROGRESSION OF THE LAW

by Rea T. Markin*

With a vast number of individuals on its employment rolls, government, whether federal, state or local, is fast becoming the largest employer in the United States. How government is dealing with the problems presented by the large number of individuals it employs is becoming increasingly important in light of recent decisions expanding the definitions of personal and property rights to include employment rights. This article will concern itself with the procedural and substantive law that protects the rights of public employees.

To begin an evaluation of civil service law, one must look to the reasons for its adoption. Since the birth of this nation, our leaders have recognized the value of a civil service merit system to the orderly administration of our country's day-to-day affairs. During his Presidency, George Washington set high standards for federal government service based upon the individual's qualifications for the position sought.1 This concept was eroded in subsequent administrations by preference for veterans, geographical distribution of appointments, and reliance on Congressional recommendations.2

Culminating in Andrew Jackson's administration the use of patronage and the building of political machines led to low morale, indifferent service and payment for jobs.3 The excesses of the “spoils” system eventually led to public demand for reform. In 1851, Congress passed a resolution requesting Cabinet officers to draw up a plan for the classification of their subordinates, to equalize salaries and to provide for "a fair and impartial examination of the qualifications of clerks and for promoting them from one grade to another".4 Subsequently, in 1853, Congress passed legislation which carried out those recommendations.5


2. Id. at 2.
3. Id. at 4.
4. Id. at 6.
At the state and local levels, the evils of the "spoils" system also led to pressure for reform. In 1877, New York became the first state to form a Civil Service Reform Association.\(^6\) That system served as a model for reform associations in other states, all dedicated to the regulation and improvement of civil service. Following the movement initiated by the federal and state governments, municipalities and counties began to incorporate civil service systems into their local governments.\(^7\)

**STABILITY AND CONTROL OF THE WORK FORCE IN GOVERNMENT EMPLOYMENT**

It is a well known and generally accepted rule that no one has an absolute right to employment by a governmental body.\(^8\) In *Kennedy v. Sanchez*, the three judge panel of the District Court for the Northern District of Illinois stated:

> The concept of due process is flexible. The procedural safeguards called for depend upon a balancing of the governmental and private interests involved. The government's interest is in maintaining efficiency through the prompt removal or suspension of employees who presently contribute to inefficiency because of their past conduct. The employee's interest is in avoiding unwarranted dismissal or suspension 'for cause' when it is not warranted by the facts.\(^9\)

Governmental agencies faced with a vast number of public employees find it increasingly necessary to maintain stability and control over their work force through the use of, among other devices, disciplinary measures. When such measures are necessary, these agencies must adhere to the laws, regulations and statutes which were promulgated not only to discourage misconduct on the part of the employee but additionally to control the application of sanctions in order that they be fair, reasonable and protect the rights of the employees involved. The disciplinary sanctions of suspension and dismissal from the classified service are surrounded by statutory procedural due process requirements as well as substantive laws to guard against arbitrary application of these sanctions.

Although discipline is usually considered a form of punishment for correcting a dereliction on the part of an employee, in a positive sense, discipline is a tool for maintaining stability and control within the governmental work force. When viewed in this sense, the objective of discipline is to elicit certain de-

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7. Id. at 27. Also, it is worthy of note that Cook County, Illinois, was the first county in the country to develop a merit system.
sired behavior from employees—it is a method of teaching and training. In addition to disciplinary measures, management uses rewards such as salary raises and promotions to act as incentives for further cooperative accomplishments. As stated by Eugene F. Berrodin, ideally

"Effective employee disciplinary practices contribute to the smooth functioning of an organization by marshaling the best efforts of its human resources. Thus defined, discipline is a positive force used to motivate employees and to insure desired standards of performance. In an organization with effective discipline, rules are willingly observed because employees understand and support them as a result of their over-all commitment to the organization and its purposes."

**Due Process**

**Theory**

The policy embodied in the Civil Service rules and regulations is to afford the employee protection against arbitrary and capricious suspension or discharge by his employer. These laws generally provide that no public employee may be discharged for any reason other than one detrimental to the public service and also provide for administrative review of disciplinary measures. In order to insure strict adherence to the law, judicial review of administrative decisions is provided for under the Administrative Review Act, or by writs of certiorari or mandamus.

**Specific Safeguards Afforded to the Certified Employee**

In Illinois, the appointing authority has the right to suspend a certified employee for cause for a period of up to 30 days without pay and without review. If the suspension exceeds 30 days,
the employer must adhere to the statutory due process requirements.\textsuperscript{15}

Statutory due process requires that a certified employee suspended beyond 30 days, or who is subject to discharge, must be given written notice of the charges against him. If requested by the employee within 15 days after receiving the required notice,\textsuperscript{16} such employee must be afforded a public hearing either before the Civil Service Commission having jurisdiction or by a Board or Officer appointed by the Commission. At this hearing the employee has the right to representation by counsel, to present witnesses in his own behalf and to cross-examine adverse witnesses.\textsuperscript{17}

Further safeguards are provided by the right of an employee to judicial review of an administrative decision in the circuit court, with further recourse to the Illinois Appellate and Supreme Courts. Under the Administrative Review Act, all civil service employees, including teachers, policemen and firemen, may resort to the courts for relief from arbitrary or unjust decisions or for the failure to follow statutory guidelines by an administrative agency.\textsuperscript{18} The civil service employees of Cook County are exempted from this Act. They may seek review only by the extraordinary writs of certiorari or mandamus.\textsuperscript{19}

\textit{Due Process in the Courts}

\textit{Procedural Due Process}

The courts are strict in requiring administrative agencies to abide by procedural as well as substantive law in arriving at their decisions. However, where the order of discharge is based on proven evidence and the Civil Service Commission adheres to the statutory due process requirements, the decision of the Commission will be sustained.

One of the earliest cases decided in Illinois concerning procedural due process was \textit{City of Chicago v. Luthardt}.\textsuperscript{20} The Chief Clerk of the Detective Bureau of the City of Chicago, who was under civil service status, was dismissed \textit{without notice or hear-}

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and to have the aid of counsel . . . the Civil Service Commission may, for disciplinary purposes, suspend an employee for a period of time not to exceed 90 days, and in no event to exceed a period of 120 days from the date of any suspension of such employee, pending investigation of such charges . . . Nothing in this Section shall limit the authority to suspend an employee for a reasonable period not exceeding 30 days.
15. \textit{Id.}
16. \textit{Id.}
17. \textit{Id.}
18. \textit{Id.} \textsection 63b11a.
19. \textit{Id.} ch. 110, \textsection 265.
20. 191 Ill. 516, 61 N.E. 410 (1901).
\end{flushleft}
ing. His dismissal was initiated by the Chief of Police with the approval of the Common Council. The appellate court, in ordering his reinstatement, determined that his removal was illegal in that there was a failure to follow the statutory due process requirements of notice and hearing.

Section 12 of the State Civil Service Act recognized three types of punishment—suspension of a subordinate not exceeding 30 days to be administered by an officer; suspension exceeding 30 days or discharge, to be inflicted only after charges have been filed and a hearing had before the Commission.\(^\text{21}\) "[T]he Civil Service law is necessarily a part of the contract of employment of every civil service employee, and such employee can only be discharged in the manner provided by Sec. 12 of said Act."\(^\text{22}\) This holding affords protection to civil service employees based on a contract theory. For example, in People ex rel. Polen v. Hoehler,\(^\text{23}\) this protection was afforded to a certified institution worker. The court held that, because she was automatically discharged without notice, written charges or hearing, her discharge was illegal because it was arbitrary, unreasonable and contrary to law,\(^\text{24}\) and her reinstatement was ordered. So it can be seen that if procedural law is not strictly adhered to the courts will not hesitate to overrule a decision of the Commission disciplining an employee.

The Civil Service Commission may not impose qualifications or conditions to employment not authorized by law. People ex rel. Baird v. Stevenson\(^\text{25}\) is illustrative. Plaintiff was an Assistant State Librarian who was employed prior to the passage of the Civil Service Act of 1911. Section 3b of that Act provided that all persons holding positions prior to passage were to become members of the classified state civil service but that all future

\(^{22}\) People ex rel. Jacobs v. Coffin, 282 Ill. 599, 610, 119 N.E. 54, 58 (1918).
\(^{23}\) 405 Ill. 322, 90 N.E.2d 729 (1950).
\(^{24}\) Id. at 324, 90 N.E.2d at 731. Plaintiff was discharged under a rule adopted by the Commission which provided that "[a]n employee absent from duty without leave for a period of three successive days or longer, without proper written notice . . . shall be considered to have resigned." Id. at 324, 90 N.E.2d at 731. The court held that the rule amounts to no more than that three day's absence conclusively operates as a discharge if the superintendent so decides and is the equivalent to conclusive evidence that a resignation has taken place regardless of the intent of the employee. The Commission had not yet been granted authority by statute to say what shall constitute a resignation, and the rule also resulted in an ouster of the jurisdiction of the courts to review the legality of the "resignation". The rule was also unreasonable and arbitrary since in many cases three day's absence without notice might occur regardless of the slightest indication of improper conduct on the part of the employee.
\(^{25}\) 270 Ill. 569, 110 N.E. 814 (1915).
applicants would be required to take competitive examinations. The Civil Service Commission ordered plaintiff and all other employees in the State Library who had not qualified by examination to take the next examination for the position of Assistant State Librarian. The plaintiff did not take the examination and the Commission ordered her discharge.

The supreme court held that "the State Civil Service Commission exercises purely statutory powers and must find in the statute its warrant for the exercise of any authority which it claims." Since the law did not confer "authority to require an examination of any officer or employee in the classified service" upon the Civil Service Commission, the order of the Commission for plaintiff to take an examination was not authorized by law. Thus, her discharge was void.

In two cases, employees have contended that the Commission only has jurisdiction to hear and decide cases of discharge within the 30 day period established under the statute for disciplinary suspension.

The issue was first raised in Foreman v. Civil Service Commission. A policeman was discharged on a finding of misconduct based upon the abandonment of his post of duty without permission.

Upon the Commission’s appeal from the trial court’s finding that the dismissal was unwarranted, the plaintiff asserted for the first time that since the Commission had not heard the case within the 30 day period of his suspension, he was automatically reinstated to his position and that thereafter the Commission had no jurisdiction to try him. The appellate court determined that the statute did not impose a 30 day time limit for the Commission to hear and determine a cause or lose jurisdiction.

This issue was again considered in the case of Brewton v. Civil Service Commission. The court held that the statute, neither directly nor by implication, requires that charges leading to dismissal must be filed and heard within the 30 day suspension period.

The two preceding cases were decided under § 10-1-18 of the Cities and Villages Act. In 1972, the General Assembly amended the Personnel Code for state employees to provide, inter alia, that "[u]pon the filing of . . . a request for a hearing, the Commission shall grant a hearing within 30 days."
nolds v. Civil Service Commission\textsuperscript{32} the Illinois Appellate Court for the First District held that the use of the word "shall" by the General Assembly mandated that the Commission hold a hearing within 30 days after requested by the employee and that upon failure to do so, the Commission lost its jurisdiction to hear the case.

**Jurisdiction of the Reviewing Courts**

A landmark case which reviews prior cases and analyzes the law relating to the rights of civil service employees as they pertain to examination, appointment and removal under civil service law, with particular reference to Section 12 of the State Civil Service Act,\textsuperscript{33} is that of Nolting v. Civil Service Commission.\textsuperscript{34}

In Nolting, a policeman was ordered discharged by the Civil Service Commission for misconduct. He was charged with abandoning his beat without permission, driving his personal automobile while on duty, striking and damaging a parked automobile, failing to leave his name and address after the accident, and failing to respond to final roll call or to calls from his superior officers. The policeman's excuse was that he had undergone a black-out caused by high blood pressure.

The trial court held that the Commission's decision was too severe, and, upon the policeman's agreement to waive all back salary as a condition precedent, the court ordered his immediate reinstatement.

On appeal, the appellate court held that what the trial court had measured was not the evidence but "the gravity of the charge against the severity of the punishment"\textsuperscript{35} and had substituted suspension for discharge in consideration for a waiver of claims for salary. A court's assumption that it had general jurisdiction over orders of the Civil Service Commission so as to give it the power to decide whether the punishment ordered was too severe and to enter orders more kind and merciful was held to be erroneous. Trial courts are not super-commissions.\textsuperscript{36} The trial court's jurisdiction is limited to appellate review, and the scope of review is based on the fundamental law which is granted to a particular commission.

The court went on to state the following:

Perhaps intentionally or perhaps by legislative oversight, no similar amendment was made to the Cities and Villages Act.

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  \item \textsuperscript{32} 18 Ill. App. 3d 1058, 310 N.E.2d 662 (1974).
  \item \textsuperscript{34} 7 Ill. App. 2d 147, 129 N.E.2d 236 (1955).
  \item \textsuperscript{35} Id. at 150, 129 N.E.2d at 238.
  \item \textsuperscript{36} Id. at 152-53, 129 N.E.2d at 239.
\end{itemize}
The Administrative Review Act has been sustained and an appeal under it may be had to review all questions of law and of fact presented by the entire record. The findings and conclusions of the administrative agency on questions of fact are to be considered prima facie true and correct. The reviewing court is required to determine from the entire record whether the findings are against the manifest weight of the evidence.\textsuperscript{37}

The court found that the offense charged was amply supported by the evidence, was service related and was not trivial.

Further, the court compared a police department to a military department and indicated that strict discipline must be enforced in order for the department to function effectively. The court determined that substitution of the judgment of a court for that of the Commissioner of Police, who initiates the charges before the Civil Service Commission, would result in damage to the Police Department and to the quality of its service to the public. Moreover, such a substitution would break down the morale of the Department.\textsuperscript{38}

Only the appointing officer has the power to suspend; therefore, since the Commission has no power to suspend, the courts upon review of a ruling by the Commission may not by indirect, such as by an agreement to waive back salary, accomplish a result equal to suspension.\textsuperscript{39}

The appellate court also alluded to the question of the separation of powers between the government branches involved. It pointed out that the courts must recognize that the relationship of the executive branch to its employees was involved and that the discipline of an entire department may be affected.\textsuperscript{40}

Although \textit{Nolting} held that the jurisdiction of the reviewing court is limited to a determination of whether the Commission's findings were against the manifest weight of the evidence, the court did not address itself to the question of the sufficiency of the record of the Commission's proceedings in setting forth the evidence upon which their finding was based.

This question was considered by the Illinois Supreme Court in \textit{Funkhouser v. Coffin}.\textsuperscript{41} The court criticized the Commission because its record did not disclose the facts constituting the cause for removal. The record stated that "the evidence was heard

\textsuperscript{37} \textit{Id.} at 158, 129 N.E.2d at 242. Notice that the requirement for reversal used here is the same as in all other appellate review in Illinois. Cf. \textit{Murphy v. Houston}, 250 I11. App. 385 (1928), wherein the court held that the record of the hearing must contain evidence from which it could reasonably and justifiably find cause for its order of dismissal of a civil service employee. 250 I11. App. at 400.

\textsuperscript{38} 7 I11. App. 2d at 160, 129 N.E.2d at 243.

\textsuperscript{39} \textit{Id.} at 163, 129 N.E.2d at 244.

\textsuperscript{40} \textit{Id.} at 162, 129 N.E.2d at 244.

\textsuperscript{41} 301 I11. 257, 133 N.E. 649 (1922).
and appellee was found guilty as charged."\textsuperscript{42} The court held that this was not sufficient to show jurisdiction\textsuperscript{43} and that such a statement was a mere conclusion of law. The court remanded the cause for further hearing by the Commission.

In addition to the requirement that the record of the Civil Service Commission should recite the facts which show jurisdiction, it is also necessary that the record disclose the facts upon which the decision was based. As stated by the appellate court in \textit{Cord v. Coffin}.\textsuperscript{44}

The only sure and effective way to insure a superior tribunal that the judgment of the inferior tribunal is not arbitrary or prejudiced would be the reproduction of all the evidence.\textsuperscript{45}

\textbf{Probationary Employees}

An employee who has passed a civil service competitive examination and has been appointed to a position must survive a probationary period of six months before he may be certified. During this probationary period the supervisors have the opportunity to observe his ability, character, adaptability and other requirements for the particular position he occupies. If he is not discharged during this period he acquires classified status and may not thereafter be discharged except in the manner provided by the Civil Service laws. However, if the employee proves to be unsatisfactory during this period he may be discharged without a hearing.\textsuperscript{46}

The lack of entitlement to procedural due process safeguards was questioned in \textit{Rose v. Civil Service Commission}\textsuperscript{47} where a probationary employee was discharged without a prior hearing. The employee was suspended because of false statements made in his application for employment. Illinois law with respect to discharge of probationers required:

(1) the assignment of a reason therefore to the Commissioners;

\textsuperscript{42} Id. at 263, 133 N.E. at 651.
\textsuperscript{43} Under the Civil Service Act there are but two ways by which the Commission may obtain jurisdiction of the question whether an employee should be discharged, one being an investigation upon its own motion and the other upon charges filed with the Commission. \textit{People ex rel. Mosby v. Stevenson}, 272 Ill. 215, 220, 111 N.E. 595, 597 (1916).
\textsuperscript{44} 226 Ill. App. 326 (1922).
\textsuperscript{45} Id. at 331.
\textsuperscript{46} See, e.g., \textit{ILL. REV. STAT. ch. 24½, §§ 38b7, 88, 124} (1973).
\textsuperscript{47} 14 Ill. App. 2d 337, 144 N.E.2d 768 (1957).
(2) the consent of the Commission to the discharge.\textsuperscript{48} In seeking the employee's discharge, the Commissioner of Police complied with the statute set out above, and the Civil Service Commission approved the discharge.

In upholding the discharge, the appellate court stated:

'The purpose of the probationary period is to enable the appointing officer to determine whether a permanent appointment is desirable. That question is left solely to his judgment, and he has the whole probationary period in which to decide it.'\textsuperscript{49}

\section*{Repeated Suspensions}

The question has arisen as to whether an appointing officer can circumvent the statutory requirements of notice and hearing. \textit{People ex rel. Lasser v. Ramsey}\textsuperscript{50} involved a survey inspector who was repeatedly suspended for 30 days or less with reinstatements of one day between suspensions for a period of six months, after which period he was suspended indefinitely, pending the disposition of criminal charges against him for carrying a concealed weapon. He was adjudged guilty of these charges and subsequently removed from his position by the Commission.

Contending that the suspensions subsequent to the first 30 day suspension were illegal, the plaintiff claimed reimbursement for back salary during the periods of illegal suspension.\textsuperscript{51} The defense was based on the statutory power of the appointing officer to suspend a subordinate for a reasonable period not exceeding 30 days.\textsuperscript{52}

The appellate court found that the construction urged by the
defense was untenable since it would vest a power of removal in the head of a department, which power rests exclusively in a Civil Service Commission where the hearing is surrounded by procedural due process safeguards.

**Rights of Laid-Off Employees**

The rights of about-to-be laid-off employees were considered by the Illinois Supreme Court in *Powell v. Jones*, a class action for declaratory judgment and injunctive relief by plaintiffs on behalf of themselves and approximately one thousand other state employees who had received lay-off notices.

Plaintiffs claimed that they were constitutionally entitled to remain in their employment until their employment was terminated by a full prior hearing with the right to full procedural due process safeguards, thus affording the certified employee the same due process protections prior to lay-off as he is entitled to prior to discharge.

The supreme court noted the expansion of the concept of due process in relation to public employees in recent years and distinguished two recent decisions of the United States Supreme Court: *Board of Regents v. Roth* and *Perry v. Sindermann.* In *Roth* the U.S. Supreme Court had held that due process did not require a hearing prior to a refusal to renew a nontenured state teacher's contract unless the plaintiff could show a deprivation of a "property" interest in continued employment or that such nonrenewal deprived him of some other constitutionally protected right. *Sindermann* involved a college professor who had been employed for ten years in a Texas state junior college. He was not offered a renewal contract nor was he granted the hearing to which he alleged he was entitled. He further alleged that failure to grant him a hearing violated his free speech guarantee under the fourteenth amendment to the Constitution, alleging that the basis for the nonrenewal was his criticism of the college administration. Contrary to *Roth*, the Court held that the plaintiff had established a property interest in his continued employment. Even though plaintiff's interest in such employment was not secured by a formal contract, he possessed a de facto property right of which he could not be deprived without a hearing.

The Illinois Supreme Court distinguished the instant case in that it involved a lay-off, whereas *Roth* and *Sindermann* dealt with a failure to renew employment. Therefore, the court con-

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53. 56 Ill. 2d 70, 305 N.E.2d 166 (1973).
54. 408 U.S. 564 (1972).
55. 408 U.S. 593 (1972).
cluded that there are qualitative differences between lay-off and discharge of certified employees. A certified employee prior to discharge is entitled to a full hearing with all the protections of procedural due process. However, the court stated that neither the Federal nor the State Constitutions require a plenary hearing before lay-off of a certified employee and that such a requirement would create confusion, delay and uncertainty in the functioning of state government.  

**DISCIPLINED CERTIFIED EMPLOYEE'S RIGHT TO PAY**

Generally, the remedies of a certified employee who is wrongfully removed are reinstatement and payment of lost salary. These remedies may be granted either by the Administrative Commission after a full hearing or by the courts upon appeal. If upon review the court determines that the employee was denied due process or that the ruling of the Commission was against the manifest weight of the evidence, the court will order reinstatement.

The case law concerning the entitlement of a disciplined certified employee to payment of salary during the period in which he is prevented from performing his duties is in a state of conflict. However, the following principles may be gleaned from a careful reading of the cases discussed below. First, a certified employee who has been illegally removed or suspended is entitled to pay from the date of his illegal removal or suspension. A suspension or removal is deemed illegal if the statutory due process procedures are not followed. When an action taken by the Commission is held by the court to be against the manifest weight of the evidence or arbitrary and capricious, the removal or suspension is considered to be illegal from the date of the judgment rather than from the date of the actual suspension or removal. Second, payment of salary to a de facto employee during the period in which the de jure employee is prevented from performing his duty is a *pro tanto* defense by the employer to an action by the de jure employee to recover such salary. However, this defense is not available to the employer where the de jure employee has been illegally removed or suspended.

In *People ex rel. Sellers v. Brady* a certified employee was summarily removed from her position as stenographer in the office of the Auditor of Public Accounts. The auditor contended that her removal was not illegal because the Civil Service Act of 1911 was unconstitutional. The supreme court upheld the con-

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56. 56 Ill. 2d at 82, 305 N.E.2d at 172.
57. See text accompanying notes 34-40, supra.
58. 262 Ill. 378, 105 N.E. 1 (1914).
stitutionality of the Act and affirmed the award of her salary from the date of her illegal removal.59

When a certified employee is suspended beyond a period of 30 days, he is entitled to notice by written charges and a hearing.60 If the period of suspension exceeds 30 days and written charges have not been served upon the employee or a public hearing has not been held such suspension is illegal, and the certified employee is entitled to back salary for the period of his suspension.61

The question of whether payment of salary in good faith to a de facto officer or employee constitutes an effective defense by the employer to an action for salary by the de jure officer or employee was first considered in People ex rel. Blachly v. Coffin.62 The plaintiff had survived a six month probationary period and was summarily discharged the day after the expiration of the probationary period. In holding that the plaintiff was entitled to salary from the date of his actual removal to the date of his reinstatement the court stated that “[t]he legal right to an office carries with it the right to the salary which is incident to the title to the office and not to its occupation and exercise.”63 The defense that the salary had been paid to a de facto officer was rejected without reference to the illegality of the removal. However, the defense was properly rejected as plaintiff had not been given notice and a hearing, which constituted an illegal removal.

People ex rel. Sartison v. Schmidt64 again considered this same question. A certified employee was discharged after notice and a hearing before the Commission. He was voluntarily reinstated by his employer.65 The general rule stated by the court that

59. In People ex rel. McDonnell v. Thompson, 316 Ill. 11, 146 N.E. 473 (1925), plaintiff was discharged after a hearing before the Civil Service Commission, which record was “quashed and for naught esteemed” by the circuit court. The Illinois Supreme Court stated:

The rule in this State is, that the payment in good faith of the salary of an officer to a de facto officer constitutes a bar to an action by the de jure officer or the salary paid to the de facto officer . . . . The well defined exception to the above rule is that where the relator is illegally removed from his office and the salary has been paid to another person illegally appointed in his stead a writ of mandamus will be awarded requiring the reinstatement of the relator in office and the payment of his salary during his illegal removal.

Id. at 16-17, 146 N.E. at 475. The plaintiff was entitled to salary from the date the circuit court quashed the record.

60. ILL. REV. STAT. ch. 127, § 63b111 (1973).


62. 279 Ill. 401, 117 N.E. 85 (1917) [hereinafter cited as Coffin].

63. Id. at 410, 117 N.E. at 89.

64. 281 Ill. 211, 117 N.E. 1037 (1917).

65. The plaintiff had been discharged for refusal to take an examina-
If the payment of the salary or other compensation to be made by the government is made in good faith to the officer de facto while he is still in possession of the office, the government cannot be compelled to pay a second time to the officer de jure when he has recovered the office—at least where the officer de facto held the position by color or title.

was correctly applied because his removal was not illegal but merely unwarranted. The Illinois Supreme Court distinguished Coffin on the basis that Coffin considered the question of whether the plaintiff was entitled to the office and incidentally to the salary. However, Coffin can more properly be distinguished on the basis of having dealt with an illegally removed certified employee.

Coffin was expressly overruled in People ex rel. Durante v. Burdett. A certified employee was suspended pending the hearing on his dismissal, and charges were filed the following day with the Commission. After the hearing, which took place approximately three and one-half years after the filing of charges, he was ordered reinstated by the Commission but was refused back pay. The reason given by the Commission for such refusal was that the long delay in the hearing was caused by the employee's having made numerous technical objections and by his unwarranted action in securing a writ of prohibition directed to the Commission which was overruled upon appeal. The Illinois Supreme Court expressly followed the rule expounded in Schmidt in affirming the Commission's denial of back salary to the employee. There was no need for Coffin to be expressly overruled since, as in Schmidt, the certified employee's dismissal was merely unwarranted, not illegal.

Whether payment made to a de facto officer or employee must be made by the employer in good faith was considered by the Illinois Supreme Court in O'Connor v. City of Chicago.

Proof of good faith in the payment of the salary or compensation of a public office or employment to the de facto incumbent during the time that he performed its duties, prior to the reinstatement of the de jure officer or employee, is not a requisite element of the defense of such payment to an action by the latter against the municipality for the same salary or compensation.

Corbett v. City of Chicago analogized an illegal removal of
a certified employee to an employee wrongfully refused certification in refusing to allow the defense of payment to a de facto employee. Plaintiffs had been wrongfully refused certification as telephone operators. The Illinois Supreme Court held that they were entitled to be paid from the date the circuit court ordered their certification. In holding that the plaintiffs were entitled to back salary from the date of their ordered certification by the circuit court the supreme court stated that in cases where the defense of payment to a de facto officer has been held good “there has been the element of uncertainty as to the legal correctness of the claimant's position. . . . [But it has never] been justified in the face of a judicial determination of the righteousness of the claimant's position.”

The court recognized that had plaintiffs been illegally removed certified employees, they would have been entitled to back pay regardless of any payment to de facto employees and that there was no good reason to distinguish an illegally removed certified employee from one who was wrongfully refused certification.

Where the illegally removed certified employee has worked during the period in which he was illegally prevented from performing his duties, his salary must be reduced by outside earnings. In *Kelly v. Chicago Park District* the Illinois Supreme Court recognized that when an officer is illegally prevented from performing his duties any compensation earned is not to be deducted from the salary owing; however, an employee who is illegally removed from his duties may only recover his salary less any compensation earned during the period of his illegal removal.

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71. Id. at 100, 62 N.E. at 695.
72. The plaintiffs had taken a civil service examination and had demanded certification in a lower classification for which an examination had never been given. Plaintiffs had sought salary from the time the circuit court ordered their certification in the lower classification. Had the plaintiffs sought salary from the date of the Commission's refusal to certify them it would have been denied up to the date of the court order since there was an “element of uncertainty as to the correctness of the claimant's position.” Id.
73. 409 Ill. 91, 98 N.E.2d 738 (1951).
74. Plaintiffs were employees of a non-civil service park district who were discharged after consolidation with the Chicago Park District. They had been discharged without notice and hearing. The court determined that they had become certified employees upon consolidation and therefore had been entitled to notice and hearing prior to any discharge.

In exercising his amendatory veto upon a proposed amendment to ILL. REV. STAT. ch. 127, § 63b111 (1973) which would have permitted full compensation without deductions for outside earnings, Governor Ogilvie stated:

> The purpose of an award for back pay is to protect the employee, not punish the State. The employee is protected if he is compensated at the same rate he would earn, if not suspended, no matter what the source of compensation is.

The cases are in an as yet unresolved conflict as to whether a certified employee who is discharged is entitled to be paid for the period during which he was suspended pending discharge. The first case to address this question was *Brewton v. Civil Service Commission*\(^7^6\) in which the Illinois Appellate Court for the First District, Third Division, held that a suspended certified employee was entitled to salary until the time of his discharge less the salary for the first 30 days of suspension. Since the appointing authority may suspend a certified employee for a period not exceeding 30 days, the court reasoned that the employee who has been suspended longer than 30 days is entitled to reinstatement with pay after 30 days even though charges of dismissal are pending. It is no different than a situation in which a certified employee has not been suspended prior to discharge upon hearing.

However, the Illinois Appellate Court for the First District, Fourth Division, reached a contrary result in *People ex rel. Cotter v. Conlisk*\(^7^6\) and expressly refused to follow *Brewton*.

‘[I]t would be incongruous to conclude that the Legislature would provide a form of discipline which would propel this Court into conferring that which many individuals might deem a happy boon and a favor, i.e., pay without work. The status of being without pay is an incident of suspension.’ Similarly, it would be incongruous . . . for a police officer under charges for taking advantage of his office to be paid while waiting to be officially discharged.

[O]ne who has been suspended pending dismissal has no right to a salary unless his discharge is found to be unwarranted [by the administrative authority].\(^7^7\)

**CAUSE—As IT RELATES TO DISCHARGE**

*Kammann v. City of Chicago*\(^7^8\) raises the interesting and often belabored question of “cause.” In this case the Supreme Court of Illinois held that since the statute is silent as to what constitutes “cause”, the right to determine that question is left with the Civil Service Commission.

The “just cause” grounds for dismissal of civil service employees are generally based on:

- incompetence, inefficiency, insubordination, infidelity, neglect of duty, absence from duty, conduct unbecoming an officer or employee, malfeasance, misfeasance, exercise of unusually bad judgment, commission of a crime, discrediting the service, disloyalty,

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77. Id. at 347-48, 308 N.E.2d at 2.
78. 222 Ill. 63, 78 N.E. 16 (1906).
refusal to testify when lawfully required, derogatory remarks against a superior or other employee, absence without leave, soliciting bribes, drunkenness, false statement made in course of employment, failure to report when ordered, uncooperativeness, unprofessional conduct, accepting gratuities, fraud in examination or appointment, and virtually any other dereliction which among reasonable-minded men might not be viewed as specious or trivial.  

An examination of the above grounds reveals that they are all job related, and under Illinois law the offense must be "related to the requirements of ... service."  

In *Nolting v. Civil Service Commission*, in the course of its analysis, the court stated that since the statute does not define "cause", the legislature left the definition of cause and its application to the discretion of the Commission, unless the findings of the Commission "are so unrelated to requirements of the service or so trivial as to be unreasonable and arbitrary."  

**Cause Involving Political Considerations**  

As previously stated, the intent of all civil service acts is to eliminate the evils of the "spoils" system. With this in mind, it is difficult to envision how removal based solely upon the political affiliation of an employee could be justified as job related, and thus not unreasonable or arbitrary.  

In the recent Seventh Circuit case of *Illinois State Employees Union, Council 34 v. Lewis*, the court was faced with the issue of whether a non-policy making employee, such as a janitor or a driver's license examiner, could be discharged for refusing to transfer his political allegiance. The Court of Appeals, in reversing the District Court's holding for the defendant, stated:  

Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review.
A nontenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights.

Considerations of personal loyalty, or other factors besides determination of policy, may justify the employment of political associates in certain positions. It is difficult to believe, however, that any such justification would be valid for positions such as janitors, elevator operators or school teachers.

It is now axiomatic 'that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer'. . . . The price which a government must pay to protect the constitutional liberties of its employees is some loss of the efficiency enjoyed by private employers; the Supreme Court has repeatedly decided that the value of those individual liberties is well worth the cost.85

Judge Campbell, in his concurring opinion, stated:

'For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such interference with constitutional rights is impermissible.86

Judge Campbell also noted that the decision in this Circuit stands in sharp and irreconcilable conflict with the decision in the Second Circuit in the case of Alomar v. Dwyer,87 and with a Pennsylvania state court decision.88 In both of these cases the courts rejected, as a matter of law, the plaintiffs' claim that discharge from government jobs because of allegiance to one political party and refusal to join or support another violated first amendment rights of freedom of association.89

CONCLUSION

Historically, the Civil Service Merit System was developed to avoid the excesses and injustices inherent in the "spoils" system. Although government, as much as any private employer, has a great interest in the efficient conduct of its business unim-

85. Id. at 567-75.
86. Id. at 577 (citations omitted).
87. 447 F.2d 462 (2d Cir. 1971).
89. He also noted that two district judges in the seventh circuit have followed the Alomar and Shapp decisions and rejected the claims that public employees cannot be discharged because of their political party affiliations with violating the first amendment. See Burns v. Elrod, No. 71C607 (N.D. Ill. May 31, 1972), appeal pending, Nos. 71-1285, 72-1541, argued, October 23, 1973; Shakman v. Democratic Organization of Cook County, 310 F. Supp. 1398 (N.D. Ill. 1969), rev'd, 435 F.2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971).
oped by inefficient and disruptive employees, the civil service system affords an umbrella of protection against arbitrary and capricious suspension or discharge by its provisions for due process safeguards.

In Illinois the merit system is dedicated to a fair and impartial selection of public employees based initially upon performance on a competitive examination. Once a government employee has been certified after his six month probationary period, he is brought under the protective umbrella of the Civil Service laws. These laws have evolved to protect both the rights of a civil service employee once certified and the rights of the government employer.

Whenever the rights of the certified employee conflict with the duties owed his government employer, the conflict is adjudicated by the appropriate administrative commission, subject to review by the courts. Under a review, whether on appeal under the Administrative Review Act or by writ of certiorari or mandamus, the procedural due process rights of the employee are strictly adhered to and protected, and, where necessary, the constitutional rights of the employee are zealously guarded.

With the ever increasing challenge to governmental action based upon the denial of first amendment rights, the courts, both state and federal, are faced with the problem of balancing the need of affording adequate protection for these rights existing in the employee against the employer's interest in maintaining stability and control over his work force.

When this challenge is made in the federal courts, will the inevitable effect be to convert these courts into super civil service commissions which, as was pointed out in Nolting, will have a detrimental effect on the functioning of government? Will the Illinois administrative agencies be compelled to discourage discharge of employees, where legal justification exists, in order to avoid adjudication of unfounded charges by such employees that their discharges constituted a violation of their first amendment rights, such as political affiliations, thus leading to innumerable trials and appeals? Should government be burdened with the tremendous expenses, both monetary and temporal, resulting from such litigation?

On the other hand, how can state courts, with these same considerations in mind, refuse to follow the dictates of federal law when fundamental constitutional rights are violated—rights which should be guarded and protected, such as those involving race and religion or other constitutionally protected conduct.

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90. 7 Ill. App. 2d 147, 153, 129 N.E.2d 236, 239 (1955).
When confronted with these problems the state and federal courts are attempting to balance the interests of the employee, the employer and the public.

Although the future may bring some changes in the Civil Service laws, the merit system should remain and should be guarded from erosion because of its proven fundamental fairness and the reasonable protection it affords to the rights of the employee, the rights of his governmental employer as well as the interests of their sovereign employer—the public.