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Absolute Preferences in Municipal Civil Service

Appointments: The Unresolved Conflict With Municipal Discretion

State legislatures have enacted civil service laws applicable to municipalities in order to ensure that local governments provide optimum services to their citizens.¹ To achieve this objective, the laws restrict eligibility for public service positions to persons of proven qualifications. Although these statutes provide general guidelines for municipal employment procedures, final decisions as to the actual hiring of employees are generally left to the municipalities. This practice recognizes the advantages of permitting local officials who are intimately acquainted with the demands of government work in their particular localities to select employees at their own discretion.² However, it has been deemed appropriate in certain situations to eliminate choice in the selection process and to entitle persons with specified qualifications to be appointed as a matter of right. These preferences are designed to effectuate objectives supplemental to, or independent of, traditional civil service policies. Although the use of such "absolute preferences" is subject to forceful criticism,³ this comment is predicated upon the realization that the use of such preferences in one form or another represents an established practice in a majority of the states. This study will attempt to delineate the historical bases and current prevalence of absolute preferences, describe the various types of preferences currently in force, discuss the means available of enforcing them, and suggest revisions necessary to effectuate their objectives.

I. INTRODUCTION

Eighty years ago the hiring and firing of subordinate public officials was subject to the plenary control of the chief executive of the municipality. The result was a "spoils system" of public employment, under which jobs were granted in return for political favors⁴—a practice which greatly impaired the efficiency and quality of public service, since in many instances those employed by the government were wholly unqualified. Job assignments were frequently in no way correlated with the particular competence of individuals. In addition, a disruption of the entire public service inevitably occurred when a newly elected official took office and replaced the partisans of

1. *Turner v. Denver*, 146 Colo. 336, 361 P.2d 631 (1961).

2. See notes 24-26 *infra* and accompanying text.

3. See, e.g., Gladioux, *Civil Service Versus Merit*, 12 PUB. ADMIN. REV. 173, 176 (1952); Weintraub & Tough, *Veterans Preferred, Unlimited*, 34 NAT'L MUNIC. REV. 437 (1945). See generally Kaplan, *Civil Service 75 Years*, 47 NAT'L CIVIC REV. 220 (1958).

4. *Keith v. Beasley*, 177 Tenn. 652, 152 S.W.2d 618 (1941), quoting from 10 AM. JUR. *Civil Service* § 2, at 921-22 (1938); see 15 AM. JUR. 2d *Civil Service* § 1 (1964).

the former official with his own supporters.⁵ Furthermore, the system severely limited the supply of qualified workers for public service positions, because most qualified persons were reluctant to allow their job security to depend upon another's political fortunes. Finally, extravagance resulted from the creation by elected officials of unnecessary jobs to offer as rewards for political fidelity.⁶ It was the need to remedy these defects inherent in the spoils system which led to the enactment of civil service laws.⁷

The basic reform provided by the civil service laws was to place the hiring of employees on the basis of merit. Under the merit system, open competitive examinations are used to establish a list of persons qualified for each job classification,⁸ and appointment to the position is limited to these qualified persons. A corollary reform was the enactment of tenure provisions, which protect an employee's job security by prohibiting dismissal without cause and by providing a hearing to examine the validity of the alleged "good cause" when an employee is dismissed.⁹ These desirable employment practices have been effectuated by the establishment of civil service commissions to eliminate the arbitrary control of public employment by individuals.

The typical procedural method of carrying into effect the merit policies of civil service laws is illustrated by the Pennsylvania statute providing a municipal civil service system for police.¹⁰ The statute provides for the establishment of a three-member local civil service commission¹¹ empowered to prescribe, amend, and enforce regulations for implementation of the act.¹² In implementing state merit

5. Mitchell, *Merit Versus Spoils in Public Employment*, 22 NAT'L MUNIC. REV. 492 (1933).

6. See King, *Political Patronage Threatens Democracy*, 22 NAT'L MUNIC. REV. 496 (1933).

7. For some interesting expressions on the value of and need for political patronage in the hiring of municipal employees, see BANFIELD & WILSON, *CITY POLITICS* 207-12 (1963); Flynn, *How the Spoils System Works*, in *URBAN GOVERNMENT* (Banfield ed. 1961). But see Sorauf, *The Silent Revolution in Patronage*, 20 PUB. ADMIN. REV. 28 (1960). Sorauf argues that the formerly practical uses of political patronage no longer exist in modern government because of economic and political changes. See also King, *supra* note 6.

8. For purposes of administration there are general classifications of jobs according to skills and aptitudes measurable by examination. Under each classification there are usually many jobs the qualified applicant can fill. Of course, in certain instances this is not true, since such positions as those of firemen and policemen cannot readily be classified with any other job. *E.g.*, MICH. COMP. LAWS § 38.412 (1948).

9. 15 AM. JUR. 2d *Civil Service* § 38 (1964). See note 71 *infra* and accompanying text. For discussion of various statutory provisions, see Agger, *The Government and Its Employees*, 47 YALE L.J. 1109, 1114-20 (1938) (federal employees); Joelson, *Legal Problems in the Dismissal of Civil Servants in the United States, Britain, and France*, 12 AM. J. COMP. L. 149 (1963); Comment, 23 LA. L. REV. 121 (1962) (Louisiana state employees). See also 35 WASH. L. REV. 220 (1960), suggesting a constitutional due-process right against arbitrary dismissal.

10. PA. STAT. ANN. tit. 53, §§ 53251-77 (1957).

11. PA. STAT. ANN. tit. 53, § 53252 (1957).

12. PA. STAT. ANN. tit. 53, § 53256 (1957).

policies for appointments, the civil service commission is initially empowered to preclude certain applicants from taking the qualifying examination if they fail to meet certain physical and moral standards.¹³ Those who meet the initial standards for qualification are then given an examination, which must be "practical in character and . . . relate to such matters and include such inquiries as will fairly test the merit and fitness of the persons examined to discharge the duties of the employment sought by them."¹⁴

On the basis of the results of the examination, it is determined that those meeting a prescribed minimum standard¹⁵ are capable of performing the duties of a police officer, and they are listed as qualified for appointment.¹⁶ Upon notification by the municipal appointing power¹⁷ of a vacancy to be filled, the commission certifies as eligible for appointment the three persons standing highest on the list of qualified applicants.¹⁸ In order to be certified,¹⁹ an applicant must have attained his position on the list through an examination held within a one-year period preceding the request for certifica-

13. PA. STAT. ANN. tit. 53, § 53263 (1957). Under this section, the civil service commission can refuse to examine someone if he is (1) physically unfit for the job, (2) addicted to the use of intoxicating liquors or drugs, (3) guilty of having committed any crime involving moral turpitude, (4) guilty of infamous, notorious, or disgraceful conduct, (5) affiliated with any subversive group, or if he has previously been dismissed from public service for delinquency or misconduct in office. See note 33 *infra* and accompanying text.

14. PA. STAT. ANN. tit. 53, § 53261 (1957).

15. The applicant is generally required to achieve a certain score, such as 70%, to pass the examination. *E.g.*, N.Y. CIV. SERV. LAW § 50; OHIO REV. CODE ANN. § 143.17 (Page Supp. 1964). However, the standard for passing an examination may be lowered after the examination has been given if it appears that without a lowering of the standard there would be an insufficient number of persons eligible for appointment. *Doe v. Lang*, 47 Misc. 2d 182, 261 N.Y.S.2d 925 (Sup. Ct. 1965). *But see* *Poss v. Kern*, 263 App. Div. 320, 32 N.Y.S.2d 979 (1942) (insufficient number of eligible applicants deemed inadequate reason for declaring eligible certain persons not attaining required score on examination).

16. PA. STAT. ANN. tit. 53, § 53261 (1957).

17. Under this Pennsylvania statute the appointing power is the borough council. PA. STAT. ANN. tit. 53, § 53252 (1957). In many states the department head is empowered to make the appointments within the department. ALA. CODE APP. § 1222 (1958) (chief of police or fire department); ILL. REV. STAT. ch. 24, § 10-1-14 (1963). N.Y. CIV. SERV. LAW § 2 defines appointing authority as "the officer, commission or body having the power of appointment to subordinate positions." See also notes 31-32 *infra* and accompanying text for a discussion of a Texas statute providing for a splitting of the responsibility for appointments. TEX. REV. CIV. STAT. ANN. art. 1269m (1963).

18. PA. STAT. ANN. tit. 53, § 53264 (1957). When there is more than one vacancy to be filled, the act provides that three persons are to be certified for each vacancy to be filled. Other states provide different means for filling more than one vacancy. In Ohio, the positions are filled one at a time from the top three eligibles; thus, the two applicants not appointed to the first position are eligible, along with the fourth highest applicant, for appointment to the second position. OHIO REV. CODE ANN. § 143.20 (Page Supp. 1964). Some states provide that one additional applicant be certified for each additional vacancy—a method which is similar in effect to the Ohio provision. See, *e.g.*, ALA. CODE APP. § 662 (1958); R.I. GEN. LAWS ANN. § 36-4-26 (1956).

19. An applicant is "certified" when the civil service commission informs the appointing authority that he may be appointed.

tion.²⁰ After three such persons have been certified by the commission, the appointing authority can fill the vacancy only by appointing one of them.²¹

Statutes similar to that of Pennsylvania have consistently been upheld as a valid exercise of state power.²² One justification is the interest of the state in benefiting its citizens by increasing the efficiency of public service throughout the state. Furthermore, since the state is the source of municipal power, civil service laws can be justified as an exercise of the state's plenary power over municipalities.²³ Nevertheless, the states have traditionally avoided placing restrictions on municipal discretion in civil service appointments, recognizing that the greater concern and responsibility regarding appointments rests with the municipality, and that examinations cannot disclose all relevant aspects of an applicant's qualifications for employment.²⁴ Indeed, many statutes specifically provide that the appointing authority be afforded a choice in making every appointment.²⁵ By allowing a choice among various applicants, states have avoided restrictions which might prove disadvantageous to a department head attempting to appoint subordinate personnel with particular qualities which, although incapable of measurement on the examination, increase the applicants' suitability for the position.²⁶

20. PA. STAT. ANN. tit. 53, § 53264 (1957). The duration of the validity of lists of eligible applicants is generally limited, although the period of validity varies from jurisdiction to jurisdiction. For example, N.Y. CIV. SERV. LAW § 56 authorizes a duration of not less than one year nor more than four years, while N.J. REV. STAT. ANN. § 11:9-10 (1960) authorizes a period of six months to three years. MASS. GEN. LAWS ANN. ch. 31, § 12 (Supp. 1964), on the other hand, specifically limits duration to two years.

21. PA. STAT. ANN. tit. 53, § 53264 (1957).

22. *State ex rel. Buell v. Frear*, 146 Wis. 291, 131 N.W. 832 (1911). Since there is no unqualified right of persons to enter the public service and since holding public office is considered a privilege, it is proper for the state to place reasonable conditions upon the enjoyment of that privilege.

23. "[Under] American constitutional law . . . the state legislature is possessed of all legislative power except as its exercise is prohibited by the federal or state constitutions. . . . [T]he power of the legislature over municipal corporations is plenary. It has the power to create and the power to destroy" Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 646-47 (1964). In view of this plenary power of the state, courts generally regard municipalities as agents of the state administering only such state affairs as to which they are expressly authorized to act. *Loeb v. City of Jacksonville*, 101 Fla. 429, 437, 134 So. 205, 207-08 (1931); *Lang v. City of Cavalier*, 59 N.D. 75, 84, 228 N.W. 819, 822 (1930).

24. See Kaplan, *Local Autonomy and the Merit System*, 6 LEGAL NOTES ON LOCAL GOV'T 289, 290 (1941). See also Gladieux, *Civil Service Versus Merit*, 12 PUB. ADMIN. REV. 173 (1952), discussing the desirability of discretion in the federal appointment process.

25. ALA. CODE APP. § 662 (1958) (three persons eligible and available for appointment); CAL. GOV'T CODE § 19057; CONN. GEN. STAT. REV. § 5-38 (Supp. 1963); LA. REV. STAT. § 33-2416 (1950) (three persons eligible and willing to accept employment); N.Y. CIV. SERV. LAW § 61 (three persons eligible and willing to accept employment).

26. The Pennsylvania police civil service statutes (see text accompanying notes 10-21 *supra*) provide that the appointing authority may appoint any one of the top three eligible applicants on the list but do not provide for the situation where these applicants are unavailable or unwilling to accept. PA. STAT. ANN. tit. 53, § 53264 (1957).

Some states have avoided any direct restrictions on the discretion of the local appointing authority by adopting a general enabling statute empowering the municipality to provide its own civil service system.²⁷ However, this device has sometimes resulted in the municipality itself limiting the choice of the appointing authority by imposing certain absolute preferences.²⁸

Despite the factors justifying a degree of municipal discretion, states have remained alert to the dangers of too much discretion. For instance, some states have prohibited discriminatory exclusions of individuals²⁹ based on race, religion, or political affiliation.³⁰ In some states, provisions have been enacted which seek, through division of responsibility for appointments, to prevent the discrimination resulting from an appointing officer's personal dislike for an applicant for a position under the immediate supervision of the appointing officer. For example, under the Texas statute providing a civil service system for local police, the appropriate department head determines that an appointment should be made, but it is the mayor who then makes the appointment.³¹ It might be argued that this procedure could result in a relapse to the spoils system, since the person most able to use political patronage to his advantage is empowered to make the appointment. In addition, such a procedure may simply shift the opportunity for discrimination in the making of appointments from the department head to the mayor. However, since the person standing highest on the list is entitled to an absolute preference under the Texas statute, it would seem probable that the mayor will automatically make the required appointment rather than risk possible repercussions with the civil service commission or the local electorate.³² Dis-

27. *E.g.*, CAL. GOV'T CODE §§ 45000-01.

28. See *Balf v. Civil Serv. Comm'n*, 43 Cal. App. 2d 211, 110 P.2d 478 (Dist. Ct. App. 1941); *State ex rel. Raines v. Seattle*, 134 Wash. 360, 235 P. 968 (1925).

29. Even though an arbitrary exclusion of individuals is generally prohibited, certain states have provisions which appear to make such an exclusion possible. These states provide by statute that a person may be removed from the list of eligible persons if he is not appointed after being certified the same number of times as there are names certified for each vacancy. That is, in a state where three names are certified to the appointing authority in response to its request, an individual's name may be removed from the list after he has been certified three times. ALA. CODE APP. § 662 (1958); KY. REV. STAT. § 90.170 (1962); LA. REV. STAT. § 33-2416 (1950); WIS. STAT. § 16.18 (1963). It is reasoned that an applicant who has been passed over three times does not meet the discretionary requirements of the appointing authority and should not remain eligible. However, the provisions may be used as a device to avoid appointing an applicant for unjustified reasons. Since the act of appointment from among the top three on the list is discretionary, there is no basis for the applicant to challenge his non-appointment.

30. *E.g.*, ALA. CODE APP. § 669 (1958); PA. STAT. ANN. tit. 53, § 53273 (1957); WIS. STAT. § 16.14 (1963).

31. TEX. REV. CIV. STAT. ANN. art. 1269m, § 10 (1963).

32. See Sorauf, *supra* note 7, at 30, noting the disinclination of voters to support a candidate suspected of exercising the powers of his office in return for favors from constituents.

crimination at the examining level has also been attacked by providing in the statute an exclusive list of reasons justifying a refusal by the civil service commission to examine or certify a particular applicant.³³

Rather than being considered an undue restriction on municipal discretion, civil service laws are generally said merely to prescribe the limits within which such discretion may be exercised.³⁴ Absolute preferences may be regarded as merely a further limitation of this discretion, since they eliminate the choice of whom to appoint, but do not impair the municipality's decisions concerning whether and when to make appointments.

II. TYPES OF ABSOLUTE PREFERENCES

A. Preference for Applicant With Highest Score

The most basic type of absolute preference requires the appointment of the person with the highest score on the examination. However, such a preference is uncommon; only one state, Illinois,³⁵ requires that all local civil service appointments be of the highest scorer on the list of eligible applicants,³⁶ while seven states require the appointment of the top eligible applicant for the position of fireman or policeman.³⁷ The latter states generally recognize the value

33. E.g., ALA. CODE APP. § 660 (1958); PA. STAT. ANN. tit. 53, § 53263 (1957); WIS. STAT. § 16.13 (1963). See note 13 *supra* and accompanying text.

34. *Bragdon v. Ries*, 346 Pa. 10, 29 A.2d 40 (1943).

35. ILL. REV. STAT. ch. 24, § 10-1-14 (1963). Compare *People ex rel. Beardsley v. Harl*, 109 Colo. 223, 124 P.2d 233 (1942); COLO. CONST. art. XII, § 13, as interpreted in *Schmidt v. Hurst*, 109 Colo. 207, 124 P.2d 235 (1942). The Colorado Constitution requires that all appointments in the civil service of the state shall be of the applicant with the highest test score. However, Colorado has no state law covering local civil service.

36. The "rule of one" has met with some disfavor, as evidenced by the fact that various states have repealed provisions requiring appointment of the first on the list, in favor of allowing the appointing power a choice. See Ark. Acts 1937, No. 322, § 3, at 1226, as amended by Ark. Acts 1959, No. 464, § 1, at 1838 (now ARK. STAT. ANN. § 19-1303 (Supp. 1965)); Ark. Acts 1933, No. 28, § 3, at 65, as amended by Ark. Acts 1959, No. 205, § 1, at 1121 (now ARK. STAT. ANN. § 19-1603 (Supp. 1965)); R.I. Laws 1939, ch. 661, § 12, as amended by R.I. Laws 1941, ch. 1050, § 8 to provide a "rule of three," as amended by R.I. Laws 1955, ch. 3527, § 1 to provide the present "rule of six" (now R.I. GEN. LAWS ANN. § 36-4-26 (1956)).

The "rule of one" has met disfavor in Colorado (see note 35 *supra*) where two attempts at a constitutional amendment have failed. See 49 NAT'L CIVIC REV. 252 (1960). Similarly, attack has been made on the Illinois provision. Formerly, a "rule of one" was applied to state civil service jobs by Ill. Laws 1943, at 449, § 1, but this was amended to a "rule of three" by Ill. Laws 1945, at 529, § 1. At present there are no civil service statutes covering Illinois state employees generally. *But cf.* ILL. REV. STAT. ch. 24½, §§ 38b1-m (1963), providing a University Civil Service System covering employment with state universities. Under this act a "rule of three" has been adopted. ILL. REV. STAT. ch. 24½, § 38b7 (1963). However, the "rule of one" has been retained in local civil service appointments by the recently enacted Illinois Municipal Code. Ill. Laws 1961, at 870, § 10-1-14 (now ILL. REV. STAT. ch. 24, § 10-1-14 (1963)).

37. ALA. CODE APP. § 1222 (1958); IND. ANN. STAT. §§ 48-6204, -6244, -6253 (1963);

of municipal discretion in local employment decisions,³⁸ but impose this absolute preference in order to avoid any undesirable local influence on these appointments because of the overriding state interest in preserving public safety and welfare.³⁹ Despite the existence of an absolute preference, some discretion is retained subsequent to the appointment; most statutes furnish a probationary period of employment during which the appointee must demonstrate his actual merit and capabilities.⁴⁰

Although this type of absolute preference is generally imposed only upon municipalities, a few state civil service systems contain an implied preference for the person standing highest on the list of qualified applicants.⁴¹ This preference is effectuated by providing an opportunity for review by the civil service commission of the validity of the appointment. The appointing authority is required to provide the commission with "good reason" for passing over any applicant with a higher examination score than the appointee. Since these reasons are not only subject to review by the commission but also open to public inspection, there is a definite pressure to appoint the person standing highest on the list.⁴²

B. Preference for the Last Remaining Applicant on the List

Because small municipal working forces generally result in a slow turnover of civil service jobs, lists of eligible applicants are infrequently used in small communities. As a result, many eligible applicants find work elsewhere before being certified for appoint-

MICH. COMP. LAWS § 38.511 (Supp. 1961); NEB. REV. STAT. § 19-1810 (1962); OHIO REV. CODE ANN. § 143.344 (Page Supp. 1964); TEX. REV. CIV. STAT. ANN. art. 1269m (1963); WASH. REV. CODE §§ 41.08.100, 41.12.100 (1958).

38. See notes 24-26 *supra* and accompanying text.

39. See State *ex rel.* Jameson v. Denny, 118 Ind. 382, 409-10, 21 N.E. 252, 261-62 (1889); Ice, *Municipal Home Rule in Indiana*, 17 IND. L.J. 375, 392 (1942).

40. The Nebraska statute seems to go so far as to equate the probation period with appointive discretion by specifically providing a three to six month probation period "to enable the appointing power to exercise a choice in the filling of positions." NEB. REV. STAT. § 19-1810 (1963). Other states generally provide a probation period for all appointments. See, e.g., ALA. CODE APP. § 662 (1958) (12 months); ILL. REV. STAT. ch. 24, § 10-1-14 (1963) (not to exceed 6 months); OHIO REV. CODE ANN. § 143.20 (Page Supp. 1964) (not less than 2 nor more than 12 months); PA. STAT. ANN. tit. 53, § 53266 (1957) (6 months). See Kaplan, *Let's Look at Civil Service!*, 33 NAT'L MUNIC. REV. 441, 444 (1944), arguing that probationary employment is the best means of exercising discretion and should be utilized to full advantage.

41. N.J. REV. STAT. § 11-10-6.1 (Supp. 1947). See also IOWA STAT. § 70.3 (1962); MASS. GEN. LAWS ANN. ch. 31, § 15 (Supp. 1964); MINN. STAT. § 43.30 (1961) (state employees); TENN. CODE ANN. § 8-3210 (1956) (implied preference for veterans).

42. One obvious interpretative difficulty with this procedure involves the problem of whether the "good reason" requirement contemplates a reasonable belief, or merely a good faith belief, that the higher-scoring applicant is not in fact the better qualified. The allocation of the burden of proof, as between the rejected applicant and the appointing authority, is another source of uncertainty. See notes 80-84 *infra* and accompanying text.

ment. Thus, when a vacancy occurs, there may be only one qualified applicant still available. This situation often results in the application of a second type of absolute preference. Five states have statutes which require the appointment of this last remaining qualified applicant,⁴³ while other states have required it by judicial construction of their civil service laws.⁴⁴

Such a preference does not compromise the quality of civil service personnel, since the applicant has proved himself qualified by achieving his position on the list.⁴⁵ Furthermore, since the use of this preference has been restricted to municipal civil service appointments,⁴⁶ its infringement of the appointing authority's discretion can be justified by the desirability of avoiding the delay and expense of conducting another examination. This is especially desirable in the case of municipalities because the burdens of a vacancy on a small staff and the expense of holding an examination are proportionately greater for a local government than for the state.⁴⁷

This preference is not restricted to the situation in which all but one eligible applicant have become unavailable, but also applies where all but one eligible applicant have been appointed to fill earlier vacancies. The statutes provide generally for the maximum utilization of the eligible lists.⁴⁸ Thus, the same list may be used for certification each time a vacancy occurs, with no new examination being held until the list is exhausted.⁴⁹ The preference is therefore rationalized primarily as a matter of convenience whereby vacancies are filled promptly with an infrequent and slight sacrifice of municipal discretion and a substantial saving of expense.

43. IDAHO CODE ANN. § 50-209 (1947); KAN. GEN. STAT. ANN. § 13-2297 (1949); LA. REV. STAT. § 33-2416 (1950); UTAH CODE ANN. § 17-28-9 (1953); see KY. REV. STAT. § 90.170 (1962) (discussed note 70 *infra*). See also Wyo. Laws 1965, ch. 112, § 289, deleting a similar provision from Wyo. Laws 1937, ch. 69, § 9 (now WYO. STAT. § 15.1-289 (1965)).

44. *E.g.*, Jenkins v. Gronen, 98 Wash. 128, 167 Pac. 916 (1917); *cf.* Gottlieb v. Kryzan, 80 Ohio L. Abs. 183, 157 N.E.2d 886 (1958). See note 70 *infra*.

45. It has been held that all applicants certified are equally qualified for appointment. *State ex rel. Raines v. Seattle*, 134 Wash. 360, 235 Pac. 968 (1925). Nevertheless, numerous states have specifically precluded the appointing authority from being compelled to appoint without having a choice of applicants. See notes 25-28 *supra* and accompanying text.

46. See authorities cited notes 43-44 *supra*.

47. See Kaplan, *supra* note 3, at 225; Kaplan, *supra* note 40, at 445.

48. *E.g.*, KAN. GEN. STAT. ANN. § 13-2297 (1949): "[W]henver the eligible list of the civil service commission contains less than double the number of applicants to fill the vacancy or vacancies existing, the board of commissioners shall appoint the person or persons then available on said eligible list."

49. The list will not necessarily be exhausted in every case. Because of the limit on the duration of the validity of such lists (see note 20 *supra*) the list will frequently become invalid before it is exhausted. Also, the civil service commission is sometimes authorized to hold new examinations to supplement an existing valid list, thereby preventing depletion of the list. IDAHO CODE ANN. § 50-209 (1947).

C. The Veterans' Preference

The absolute preference is most commonly utilized as a means of preferring veterans for public employment.⁵⁰ Since this preference grants special treatment to a particular class of persons, it presents a constitutional problem under the privileges and immunities clause.⁵¹ However, since the veteran is required to pass the civil service examination⁵² as a prerequisite to being preferred for appointment,⁵³ the preference is upheld, being rationalized as a valid recognition of traits developed by military service, which, although not measurable by examination, tend to make capable veterans good public servants.⁵⁴

Many states have enabled veterans to acquire public employment more easily, and have nonetheless avoided any infringement upon the discretion of the appointing authority, by employing so-called point preferences.⁵⁵ In these states the veteran is granted a certain

50. FLA. STAT. §§ 295.07, .10 (1963); IDAHO CODE ANN. § 65-502 (Supp. 1963); IND. ANN. STAT. § 60-1319 (1961) (state only); IOWA CODE §§ 70.1, 365.10 (1962); KAN. GEN. STAT. ANN. § 73.201 (Supp. 1961); LA. REV. STAT. § 33:2416 (1950); MD. ANN. CODE art. 64A, §§ 17-18 (1957); MASS. GEN. LAWS ANN. ch. 31, §§ 23, 23B, 25 (1961); MICH. COMP. LAWS § 35.401 (Supp. 1961); MINN. STAT. § 197.45 (1961); MONT. REV. CODES ANN. § 77-501 (1955); NEV. REV. STAT. § 281.060 (1963) (state only); N.H. REV. STAT. ANN. § 283.4 (1955); N.J. REV. STAT. §§ 11:27-3, -5 (Supp. 1947), § 11:27-4 (Supp. 1952); N.D. CENT. CODE § 37-19-01 (1960); OHIO REV. CODE ANN. § 143.20 (Page Supp. 1964); ORE. REV. STAT. § 408.220 (1963); PA. STAT. ANN. tit. 51, § 492.4 (1954); WASH. REV. CODE § 73.16.010 (1958); WYO. STAT. ANN. § 19-119 (1957).

51. U.S. CONST. art. IV, § 2.

52. It has frequently been held that it is unconstitutional to permit a lower passing grade for veterans. *Cook v. Mason*, 103 Cal. App. 6, 283 Pac. 891 (1929); *Matter of Keymer*, 148 N.Y. 219, 42 N.E. 667 (1896); *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A.2d 701 (1938) (dictum). Under such a holding, all persons must meet the same prescribed minimum standard (see note 15 *supra*) before any preference can be applied. *But see* note 56 *infra* and accompanying text.

53. An exception to the requirement that a veteran must pass the civil service examination is provided in MASS. GEN. LAWS ANN. ch. 31, § 22 (1961), which authorizes the appointing authority to appoint a medal of honor winner without examination. This is somewhat ironic since the landmark case requiring that veterans pass the examination was a Massachusetts decision. *Brown v. Russell*, 166 Mass. 14, 43 N.E. 1005 (1896).

54. It has been said that characteristics of discipline, experience, loyalty, and public spirit developed by military service tend to make veterans valuable public servants. *Commonwealth ex rel. Maurer v. O'Neill*, 368 Pa. 369, 83 A.2d 382 (1951); *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A.2d 701 (1938). *But see* Weintraub & Tough, *Veterans Preferred, Unlimited*, 34 NAT'L MUNIC. REV. 437 (1945). These writers attack such preferences as based entirely on the sentimental desire of civilians to reward those who risked their lives for the war effort. They further suggest that a pervasive veterans' preference will undermine the basic competitive merit system of employment.

55. Connecticut is perhaps the clearest example of a state consciously avoiding any infringement on local choice by the use of point preferences. The statute initially provides that the appointing authority shall always have a choice of three eligibles. CONN. GEN. STAT. REV. § 5-38 (Supp. 1963). See note 25 *supra* and accompanying text. It then provides that a veteran's preference shall be effectuated only by the addition of extra points to the earned passing score. CONN. GEN. STAT. REV. § 7-415 (Supp. 1963).

number of points to be added to his earned score⁵⁶ to determine his position on the list of eligible applicants, and the appointing authority is left free to choose from among a limited number of the top eligible applicants. Thus, the point preference results in an earlier consideration of the veteran for employment.

In those states invoking an absolute preference in favor of veterans, the mechanics of the process vary. Statutes embodying an absolute preference for veterans commonly entitle honorably discharged veterans⁵⁷ to preference in appointment and employment.⁵⁸ Such statutes present an interpretative question as to the proper method of effectuating the preference. The preference may mean that all qualified veterans shall be appointed before any nonveterans are appointed,⁵⁹ or it may simply mean that the veteran is preferred if he is among those in the top group on the list who are actually certified.⁶⁰ Various factors are considered in resolving this interpretative question. If there is an applicable point-preference statute in addition to the absolute preference statute, it is generally reasoned that the point preferences are meant to improve the veteran's position in order to increase his opportunity of being certified; thus, the absolute

New York similarly limits veterans' preferences to the addition of points. N.Y. CIV. SERV. LAW § 85.

56. Most states allow the preference points to be added only to an actual passing score. *E.g.*, COLO. CONST. art. XII, § 14; CONN. GEN. STAT. REV. § 7-415 (1963); FLA. STAT. § 295.08 (1963); HAWAII REV. LAWS § 3-81 (1955); KAN. GEN. STAT. ANN. § 75-2955 (Supp. 1961); LA. REV. STAT. § 33:2416 (1950); N.Y. CIV. SERV. LAW § 85; R.I. GEN. LAWS ANN. § 36-4-19 (1956). However, Minnesota and Maryland specifically provide that point preferences may be added to enable a veteran to achieve a passing score. MINN. STAT. § 43.30 (1957); MD. ANN. CODE art. 64, § 18 (1957). Certain other states do not specifically require that the veteran meet the minimum standard before the preference points are added, but seem to allow the preference points to be added to enable the veteran to pass. *E.g.*, MICH. COMP. LAWS § 38.413 (Supp. 1961); MONT. REV. CODES ANN. § 77-501 (1955); NEB. REV. STAT. § 19-1804(3) (1962).

57. The specific veterans preferred vary from state to state. IOWA CODE § 365.10 (1962) (honorably discharged veterans); KAN. GEN. STAT. ANN. § 73-201 (Supp. 1961) (veterans of military operations); N.D. CENT. CODE § 37-19-01 (1960) (veterans of wartime meeting certain pre-induction state residence requirements); WASH. REV. CODE § 73.16.010 (1958) (veterans who have been awarded a campaign ribbon).

58. KAN. GEN. STAT. ANN. § 73-201 (Supp. 1961); MD. ANN. CODE art. 64A, §§ 17, 18 (1957); MICH. COMP. LAWS § 35.401 (Supp. 1961); MINN. STAT. § 197.45 (1961); MONT. REV. CODES ANN. § 77-501 (1955); ORE. REV. STAT. § 408.220 (1963); WASH. REV. CODE § 73.16.010 (1958); WYO. STAT. ANN. § 19-119 (1957). See also FLA. STAT. § 295.07 (1963); LA. REV. STAT. § 33:2416 (1950); N.H. REV. STAT. ANN. § 283:4 (1955); N.D. CENT. CODE § 37-19-01 (1960); PA. STAT. ANN. tit. 51, § 492.4 (1954).

59. N.J. REV. STAT. §§ 11:27-3, -5 (Supp. 1947) provides that veterans shall be placed ahead of all nonveterans on the eligibility list. N.J. REV. STAT. § 11:27-4 (Supp. 1952) provides all veterans shall be appointed before any nonveterans. Similarly, all veterans are appointed before any nonveterans under KAN. GEN. STAT. ANN. § 73-201 (Supp. 1961). See also MD. ANN. CODE art. 64A, § 18 (1957) (veterans shall be certified before nonveterans).

60. IOWA CODE § 365.10 (1962), as interpreted in *Zanfes v. Olson*, 232 Iowa 1169, 7 N.W.2d 901 (1943); OHIO REV. CODE ANN. § 143.20 (Page Supp. 1964); PA. STAT. ANN. tit. 51, § 492.4 (1954). See also *Herman v. Sturgeon*, 228 Iowa 829, 293 N.W. 488 (1940) (preference allowed under IOWA CODE § 70.1 (1962) to veteran certified at top of list).

preference is deemed to apply only to those certified.⁶¹ Similarly, a mandatory procedural requirement that the names of the persons with the three highest test scores be certified may imply that the absolute preference applies only to those certified.⁶² On the other hand, where the statute in some way requires a separate listing of all veterans, it may be inferred that all veterans are to be appointed before any non-veteran is appointed.⁶³

Another type of absolute preference granted to veterans requires the appointment of a disabled veteran who passes the examination and is physically capable of performing the job.⁶⁴ Under a final type of absolute preference for veterans, if a veteran and a nonveteran have identical examination scores the veteran must be appointed in preference to the nonveteran.⁶⁵ Thus, a veteran is absolutely entitled to appointment if his score (his actual earned score plus any preference points allowable under state law)⁶⁶ is equal to the highest score and he is the only veteran certified.

III. ENFORCEMENT OF ABSOLUTE PREFERENCES

A. Judicial Enforcement

Because of the policy of promoting municipal discretion in the appointment process, most state legislatures have refrained from imposing any framework for examining the propriety of appointments or for enforcing statutory preferences. As a result, it is sometimes possible for appointing authorities to ignore absolute preferences because of the lack of a readily available method of compelling compliance with the statutory requirement. Furthermore, the courts have failed to assume responsibility for enforcing preferences. Some

61. Thus PA. STAT. ANN. tit. 51, § 492.4 (1954), when read in conjunction with PA. STAT. ANN. tit. 51, § 492.3 (1954), results in a preference of a veteran if he has one of the three highest examination scores after the addition of his preference points. If he were the only veteran certified in the top three, it would be an absolute preference.

62. IOWA CODE § 365.10 (1962) (ten highest); PA. STAT. ANN. tit. 51, § 492.4 (1954). See note 60 *supra*.

63. N.J. REV. STAT. §§ 11:27-3, -5 (Supp. 1947) and N.J. REV. STAT. § 11:27-4 (Supp. 1952) entitle all veterans to be appointed before nonveterans by setting up eligibility lists according to such classifications. See notes 49 and 59 *supra*. Similarly, in *Valentine v. Redford Twp. Supervisor*, 371 Mich. 138, 123 N.W.2d 227 (1963), the requirement that veterans be listed separately was deemed evidence of a legislative intent to accord them preference rights above all nonveterans.

64. *E.g.*, IDAHO CODE ANN. § 65-502 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 31, § 23 (1961); N.J. REV. STAT. § 11:27-3 (Supp. 1947), § 11:27-4 (Supp. 1952). See *Smith v. Director of Civil Service*, 324 Mass. 455, 87 N.E.2d 196 (1949), upholding the validity of the superior preference for disabled veterans. For a decision limiting its application by allowing a disqualification of the disabled veteran due to his disability, see *Hayes v. Hurley*, 292 Mass. 109, 197 N.E. 471 (1935).

65. IOWA CODE § 70.1 (1962); NEV. REV. STAT. § 281.060 (1963); OHIO REV. CODE ANN. § 143.20 (Page Supp. 1964); see *Herman v. Sturgeon*, 228 Iowa 829, 293 N.W. 488 (1940).

66. *State ex rel. King v. Emmons*, 128 Ohio St. 216, 190 N.E. 468 (1934). *But see* *Op. Nev. Att'y Gen. No. 132* (1944).

courts presented with complaints alleging wrongful failure to appoint have obviated a consideration of the absolute preference right by finding that the appointing authority refused to appoint the preferred applicant because he was not qualified,⁶⁷ and that the refusal was a lawful exercise of municipal discretion.⁶⁸ By treating the action as a valid exercise of discretion, courts have rendered the appointing authority immune from judicial scrutiny absent a showing of fraud, bad faith, arbitrariness, or capriciousness.⁶⁹ Other courts have enabled municipalities to evade enforcement of absolute preferences by flatly requiring that the appointing authority be provided a choice of applicants in all instances.⁷⁰

Although such holdings deny enforcement of rights which state legislatures have attempted to accord, the disinclination of the courts to order appointments can be explained in part by the courts' reluctance to become involved in a potentially continuing controversy generated by the appointing authority's initial dislike for the preferred applicant. For example, if the appointment were ordered, the appointee might subsequently complain of being given an undesir-

67. The most obvious example of a person who is unqualified to fill the vacancy despite being entitled to an absolute preference is a disabled veteran who is physically unable to meet the demands made by the available job. Such a case is recognized in some state statutes, and discretion is allowed for determining whether the appointment should be made. *E.g.*, MASS. GEN. LAWS ANN. ch. 31, § 23 (1962). See note 64 *supra* and accompanying text. However, other states have specifically prohibited such discretion where absolute preferences are involved, by providing that the appointing authority shall only be entitled to exercise choice by means of a probation period of employment for all applicants. *E.g.*, NEB. REV. STAT. § 19-1810 (1963). See note 40 *supra* and accompanying text.

68. The range of lawful discretion is potentially very extensive. In *Patterson v. Boron*, 153 Mich. 313, 116 N.W. 1083 (1908), the court refused to infringe upon the discretion of the appointing authority and order the appointment of a veteran because in the appointing authority's best judgment relator was not competent. Thus, the court required only a good faith exercise of discretion. See also *Boyer v. City of Creston*, 113 N.W. 474 (Iowa 1907); *Ross v. City Council of Sioux City*, 136 Iowa 125, 113 N.W. 474 (1907). California, Illinois, and New Jersey are apparently the only states which "will grant a review 'in the nature of a trial' on both the facts and the law." CARPENTER, *THE UNFINISHED BUSINESS OF CIVIL SERVICE REFORM* 122 (1952).

69. *Quintin v. Edwards*, 40 Mont. 287, 106 Pac. 695 (1910); see *Townsend v. McCall*, 262 Ala. 554, 80 So. 2d 262 (1955); *Burns v. American Cas. Co.*, 127 Cal. App. 2d 198, 273 P.d 605 (1954); *City of Philadelphia v. T.B. Rice & Sons Co.*, 274 Pa. 256, 118 Atl. 14 (1922).

70. *Seward v. Kratt*, 129 Ohio St. 296, 195 N.E. 241 (1935). See also *Neal v. Williams*, 285 Ky. 753, 149 S.W.2d 516 (1941). The *Seward* case is consistent with the earlier cited case of *Gottlieb v. Kryzan*, 80 Ohio L. Abs. 183, 157 N.E.2d 886 (1958) (see note 44 *supra*), in that both looked to the mandatory requirement that three names be certified to enable the appointing authority to exercise some discretion. Although withdrawals by two applicants in *Gottlieb* may have in fact deprived the appointing authority of his choice, the statutory provisions requiring that discretion be allowed had been met, and that was considered sufficient to require the appointment. The *Neal* case, on the other hand, was overruled on its facts by Ky. REV. STAT. § 90.170 (1962). This statute, which was enacted the year after the *Neal* decision (Ky. Laws 1942, ch. 16, § 4), provides that appointments shall be made from eligible lists until they are exhausted or replaced.

able assignment as a result of discrimination by the authority who was reluctant to appoint him in the first instance. Similarly, the court might find itself facing the same controversy if the appointee were subsequently dismissed for cause and complained of unfair treatment. Nevertheless, such considerations should not automatically preclude judicial involvement in the appointment process, since civil service commissions are generally empowered to hear employee grievances regarding reductions in rank or wrongful dismissals.⁷¹ Furthermore, courts have not hesitated to prevent arbitrary dismissals, but have compelled the retention of employees in such cases.⁷²

A novel example of judicial reluctance to effectuate absolute preferences fully is the recent Pennsylvania case of *Bobick v. Fitzgerald*.⁷³ An applicant entitled to an absolute preference as a veteran⁷⁴ was passed over in favor of another applicant for a vacant position on the police force. The rejected applicant sought by way of mandamus to have the court compel his appointment. The Pennsylvania Supreme Court, in a three-to-three affirmance of the lower court, stated that it was powerless to compel the appointment. The refusal to issue the writ of mandamus was somewhat striking, because an earlier Pennsylvania decision⁷⁵ had held that an absolute preference for veterans⁷⁶ was mandatory and had ordered an appointment.⁷⁷ However, in *Bobick* the court felt that mandamus should not issue because a judicial order requiring the appointment would in effect make the court the appointing body, thus usurping the borough council's statutory power of appointment,⁷⁸ and infringing its discretionary authority to execute that power.⁷⁹

71. E.g., ILL. REV. STAT. ch. 24, § 10-1-18 (1963); MICH. COMP. LAWS § 38.416 (1948); N.Y. CIV. SERV. LAW § 75; PA. STAT. ANN. tit. 53, § 53270 (1957).

72. E.g., *Mafera v. Pasta*, 265 N.Y. 552, 193 N.E. 316 (1934); *Smith v. Rowland*, 353 Pa. 142, 44 A.2d 575 (1946). See also *Nuttall v. Simis*, 31 App. Div. 503, 52 N.Y.S. 308 (1898).

73. 416 Pa. 588, 207 A.2d 878 (1965).

74. PA. STAT. ANN. tit. 51, § 492.4 (1957). The Pennsylvania civil service system under which this case was decided is described in text accompanying notes 10-21 *supra*.

75. *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A.2d 701 (1938). See also *Commonwealth v. O'Leary*, 46 Pa. D. & C. 397, 90 P.L.J. 653 (1942).

76. The preference statute involved was Pa. Laws 1931, § 4407, at 1113, which provided "preference in appointment shall be given" veterans. The present act, PA. STAT. ANN. tit. 51, § 492.4 (1957), provides that the "appointing . . . power in making an appointment . . . shall give preference" to veterans.

77. In a unique interpretation, the Pennsylvania court has determined that preferences for appointments are constitutional, but those for promotions are not. *Commonwealth ex rel. Maurer v. O'Neill*, 368 Pa. 369, 83 A.2d 382 (1951). This doctrine has been expressly rejected in Connecticut and Massachusetts. See *State ex rel. Higgins v. Civil Service Comm'n*, 139 Conn. 102, 90 A.2d 862 (1952); *McNamara v. Director of Civil Service*, 330 Mass. 22, 110 N.E.2d 840 (1953).

78. PA. STAT. ANN. tit. 53, § 13201 (1957).

79. Since the decision is discretionary, the appointing authority's determination is deemed valid absent fraud, bad faith, or an arbitrary or capricious action. See note 69 *supra* and accompanying text. Courts will refuse to issue a mandamus order if there is room for the exercise of discretion by the appointing authority, *Shaw v. Marshalltown*,

In answer to the foregoing reasoning, the dissenting judges argued that the borough council had exercised its full discretion in appointing the wrong man, and, having decided to make an appointment, should be compelled to make the lawful appointment.⁸⁰ The dissenting view thus would not limit the discretion of the council in determining when to make appointments, but would eliminate its choice of whom to appoint. The majority felt, however, that the council should be entitled to consider whom they would be obligated to appoint in the process of deciding whether any appointment would be made.

The court attempted, through the use of an equitable enforcement remedy, to balance the applicant's right to a preference and the desire to preserve discretion in the appointing authority. While holding that it was powerless to compel the appointment, the court stated that Bobick's absolute preference right made him the only person who could lawfully be appointed.⁸¹ Thus the court in *Bobick* held, in effect, that the court could not compel the appointment of the petitioner, but would interfere in the appointment process to prevent unlawful appointments. The weakness of this solution, of course, is that it does not necessarily lead to the effectuation of the policy of the preference, since the appointing authority can avoid appointment of the preferred applicant by leaving the vacancy unfilled. Furthermore, this equitable device had no effect whatever in *Bobick*, since it prevented the appointment of other applicants only so long as Bobick remained among the top three on the current eligibility list, and his claim to the position had already expired with the passing of the one-year period of validity of the eligibility list.⁸²

131 Iowa 128, 104 N.W. 1121 (1906), or if another applicant has already acceded to the office under a claim of right, *State ex rel. Gallagher v. Kansas City*, 319 Mo. 705, 7 S.W.2d 357 (1928). Thus, issuance of mandamus to compel appointment has been limited to situations where the petitioner has an uncontested right to appointment. However, one acquires no legal rights by an improper appointment. *Palmer v. Board of Educ.*, 276 N.Y. 222, 11 N.E.2d 887 (1937); *Manning v. Milbourne Borough Civil Serv. Comm'n*, 387 Pa. 176, 127 A.2d 599 (1957). Therefore, since the borough council's first appointment in *Bobick* was unlawful and only the petitioner could lawfully be appointed, his claim was uncontested, and his claim for mandamus could not be summarily dismissed.

80. The dissenters explained their position by analogy to an election, arguing that since the council had voted to fill the police vacancy and the person with the most votes was unable to accept the position, the person receiving the second most votes (petitioner) was elected.

81. It should be noted that if the court were faced with a situation in which it could issue an effective injunction prohibiting the appointment of anyone but the petitioner, it might hesitate to do so if the appointing authority raised the petitioner's qualifications as a defense, alleging that in its judgment he was not qualified. See note 68 *supra* and accompanying text.

82. Since the applicable statute provides eligibility lists shall be valid for one year (PA. STAT. ANN. tit. 53, § 53264 (1957)), the appointing authority is entitled to a new list from which to appoint if it delays for one year. In the *Bobick* case, the delay caused by the legal proceedings had been four years. Of course, Bobick can again take

With a valid injunction outstanding preventing the appointment of anyone but the petitioner, an action might be brought by a third-party taxpayer to compel an appointment of a policeman in the interest of the public health, safety, and welfare. However, since the decision not to appoint a policeman was an exercise of the borough council's discretion, the complainant would have the nearly impossible task of proving bad faith in the borough council's decision.⁸³

Thus, the courts have been hesitant to enforce the rights of preferred applicants in the face of the policy of retaining municipal discretion, and unsuccessful in their effort to balance the competing equities. As a result, it would seem that the state legislatures must attempt to devise an effective means of enforcing absolute preferences without undue infringement upon the legitimate exercise of discretion by the appointing authority.⁸⁴

B. Statutory Enforcement Procedures

A basic statutory method of compelling compliance with preference provisions may be found in the statutes of several states requiring general compliance with civil service provisions. Under most such statutes, a willful violation of the civil service laws is a misdemeanor punishable by a fine and imprisonment.⁸⁵ A common additional sanction is to bar the violator from any position in the civil service for a certain period, generally five years.⁸⁶ Another means of inducing compliance with appointment procedures is to subject the willful violator to liability for the damages caused by his violation.⁸⁷ The measure of damages is the wages which were improperly paid to the person unlawfully appointed or which should have been paid the neglected applicant.

Despite their deterrent potential, such sanctions have seldom effectuated appointments required by absolute preference laws, be-

the examination, but unless he is again the only veteran to place among the top three he will not be entitled to an absolute preference. The result of the court's holding is truly incongruous when it is noted that the appointing authority, despite requesting an examination to enable it to make an appointment, never appointed anyone who qualified on that examination. See text accompanying notes 19-21 *supra* for a discussion of the statute in question.

83. See note 69 *supra* and accompanying text.

84. See notes 22-24 *supra* and accompanying text.

85. *E.g.*, ARIZ. REV. STAT. ANN. § 38-494 (1956); FLA. STAT. § 110.14 (1963); MASS. GEN. LAWS ANN. ch. 31, § 51 (1961); MICH. COMP. LAWS § 38.423 (1948); MINN. STAT. § 43.35 (1961); NEB. REV. STAT. § 19-1822 (1962); OHIO REV. CODE ANN. § 143.99 (Page 1953); OKLA. STAT. tit. 74, § 819 (1961); ORE. REV. STAT. § 240.990 (1963).

86. *E.g.*, FLA. STAT. § 110.14 (1963); MINN. STAT. § 43.35 (1961); OKLA. STAT. tit. 74, § 819 (1961). See also N.Y. CIV. SERV. LAW § 108, which provides for loss of job upon violation of provisions of the act and reemployment only on terms of a five-year probation period "during which period he shall serve without tenure and at the pleasure of the appointing officer or body."

87. *E.g.*, COLO. REV. STAT. ANN. § 26-5-27 (1963); N.J. REV. STAT. § 11:21-2 (Supp. 1954); N.Y. CIV. SERV. LAW § 95; R.I. GEN. LAWS ANN. § 36-4-49 (1956).

cause few states have imposed on the appointing authority an affirmative duty to appoint the person entitled to an absolute preference. Furthermore, states have failed to provide the preferred applicant with the means to compel his appointment; indeed, it was this problem that occasioned the anomalous result in the *Bobick* case. These fundamental weaknesses in the preference system could be at least partially eliminated by laws imposing a duty on appointing authorities to fill existing vacancies.⁸⁸ It is arguable that an applicant who could demonstrate the existence of a vacancy for which he was qualified, the duty of the authority to make an appointment to fill the vacancy, and the existence of an absolute preference in his favor, would be entitled to a writ of mandamus compelling his appointment, since no element of discretion would remain in the appointing authority.⁸⁹ However, the appointing authority could set up a defense to the mandamus action by alleging that it should be allowed to produce evidence that the preferred applicant is unqualified for the job.⁹⁰

On the other hand, this procedure could be nullified if the term "vacancy" is not carefully defined by statute, since the appointing authority could simply refuse to make an appointment on the basis of his individual determination that a vacancy does not exist. Some statutes attempt to define "vacancy" in terms of specific causes. For example, the North Dakota statute provides that a vacancy exists when the term of an incumbent expires due to death, resignation, dismissal for cause, or expiration of the tenure of the appointment,⁹¹ but may be inadequate because of its failure to provide for the existence of a vacancy due to the authorization of a new position. Furthermore, it would appear unwise to require an appointment every time a position becomes unoccupied, since the departure of an employee creates an ideal situation to satisfy a need to decrease the size of the work force. Thus, a more reasonable approach would be to define a vacancy as existing whenever the appointing authority requests a certification of persons eligible for appointment, and to establish an affirmative requirement that an appointment be made to fill each vacancy thus defined. Under this approach, the appointing authority, whose decision to make an appointment would become

88. Cf. IOWA CODE § 70.3 (1962); MINN. STAT. § 197.45 (1961); N.D. CENT. CODE §§ 37-19-01, -02 (1960). Compare IDAHO CODE ANN. § 65.504 (Supp. 1965) and WYO. STAT. § 19-120 (1957), providing an affirmative duty to appoint preferred applicants.

89. See note 69 *supra* and accompanying text.

90. Other provisions of some interest which aim at attaining compliance with civil service laws but fail to provide any power to compel appointments are FLA. STAT. § 295.11 (1963) (authorizing the State Veterans Commission to do all in its power to aid a veteran who has been denied his preference rights); N.Y. CIV. SERV. LAW § 25 (granting the state civil service commission power to review and amend local civil service rules to effectuate state employment policies). One writer has interpreted the Florida provision as authorizing only an investigation. 34 FLA. JUR. *Veterans* § 10 (1961).

91. N.D. CENT. CODE § 37-19-02 (1960).

irrevocable when he requested the certification, could not, upon discovering the identity of an absolutely preferred applicant, frustrate the operation of that preference by leaving the position unfilled.

Several states have avoided the problem of judicial reluctance to interfere with municipal discretion in making appointments by establishing a statutory framework requiring courts to enforce preferences. Statutes in three states specifically authorize the use of mandamus to compel municipal appointments.⁹² A similar statutory enforcement procedure provides a prompt hearing in the state district court to any person who believes he has wrongfully been denied appointment.⁹³ The district court, on the basis of the petitioner's allegation of facts justifying an absolute preference, may order the appointing authority to appear within five to ten days and show cause why the petitioner should not be appointed. Upon a failure to show adequate cause, the court may order the appointment of the petitioner.

Other states have honored the judicial desire to remain aloof from appointment controversies, but have provided administrative means of protecting an applicant's statutory preference rights. These statutes commonly authorize the municipal civil service commission merely to investigate the enforcement of or compliance with civil service regulations.⁹⁴ Although these provisions grant the civil service commission substantial powers, including the power of subpoena⁹⁵ and the authority to advise a dismissal of the appointing officer on the basis of its findings,⁹⁶ the commission is still left powerless to compel an appointment. Thus, upon a finding by the commission of non-compliance with an absolute preference requirement, actual enforcement depends upon the availability of a court remedy or the inducement of voluntary compliance by persuasion.⁹⁷

Although the means provided by states to enforce absolute preferences at the municipal level have been generally ineffective, more meaningful measures have been provided for appointments at the state level. For instance, in Indiana the state civil service commission is required to pass upon the sufficiency of the reasons put forth by

92. IDAHO CODE ANN. § 65.505 (Supp. 1965); IOWA CODE § 70.4 (1962); MINN. STAT. § 197.46 (1957).

93. MONT. REV. CODES ANN. § 77-501 (1955); N.D. CENT. CODE § 37-19-04 (1960). These statutes enforce an absolute preference for veterans.

94. MICH. COMP. LAWS §§ 38.412, .420 (Supp. 1961); OHIO REV. CODE ANN. § 143.40 (Page Supp. 1964); ORE. REV. STAT. §§ 242.420, .726 (1959); PA. STAT. ANN. tit. 53, §§ 12625, 53258 (1957).

95. MICH. COMP. LAWS § 38.422 (1948); ORE. REV. STAT. §§ 242.420, .728 (1959); PA. STAT. ANN. tit. 53, §§ 53259, 12625 (1957).

96. OHIO REV. CODE ANN. § 143.40 (Page Supp. 1964).

97. Some states authorize the civil service commission to prosecute all actions aimed at enforcing civil service laws. *E.g.*, NEB. REV. STAT. § 19-1814 (1962); PA. STAT. ANN. tit. 53, § 12646 (1957). In the absence of such a provision, however, the burden of seeking enforcement of the absolute preference may fall entirely upon the aggrieved applicant.

the appointing authority for passing over a veteran eligible for a preference, and to notify the appointing officer of its finding.⁹⁸ In addition, criminal sanctions may be imposed in Indiana for non-compliance with the absolute preference law.⁹⁹ This combination of commission review and the threat of criminal sanctions would appear to be sufficient in most cases to assure that proper appointments are made. However, here again, no means have been provided for actually compelling the appointment. Maryland, however, has progressed a step further than Indiana by authorizing the State Personnel Commissioner to nullify an appointment which he finds contrary to the preference statute and to order the required appointment.¹⁰⁰

The fact that these statutes apply exclusively to the state civil service system suggests that the administrative enforcement mechanism might be unduly burdensome on a municipality. However, since municipal civil service commissions review wrongful dismissals of employees,¹⁰¹ it would appear that they also have the capacity to review improper appointments. Furthermore, where the state legislature has adopted the absolute preference as a means of implementing certain state policies, it would seem that individuals entitled to those rights should be afforded the opportunity to enforce them. In view of the judicial reluctance to assume immediate responsibility for protecting these rights, state legislatures must guarantee the effectiveness of the objectives of the absolute preference provisions.

IV. CONCLUSION

Despite the fact that there has been, in some states, effective judicial enforcement of absolute preferences, an administrative enforcement mechanism would seem more desirable, in view of the widespread judicial reluctance to interfere with municipal discretion. It would seem that the appropriate mechanism to secure compliance with such preferences is the very body created to oversee them—the municipal civil service commission. The municipal appointing authority should be required to submit to the commission his reasons for passing over a preferred applicant.¹⁰² The applicant should then be entitled to a hearing before the commission, which would be empowered to order the proper appointment if its findings were favorable to the complainant. This system would provide an efficient means of protecting statutory rights while preserving properly exercised municipal discretion. In addition to the local hearing, there should be a system of appellate review by the state civil service com-

98. IND. ANN. STAT. § 60-1319 (1961).

99. IND. ANN. STAT. § 60-1343 (1961).

100. MD. ANN. CODE art. 64A, § 17 (1957).

101. See notes 9 and 71 *supra* and accompanying text.

102. See notes 41-42, 98-100 *supra* and accompanying text for a discussion of similar procedures used at the state level.

mission or the courts, which could overturn any local commission's determination not supported by substantial evidence.¹⁰³

The effectuation of the policy of affording preferences to certain individuals will be greatly improved by increasing the control and influence of the municipal civil service commission over the appointment process. At the same time, such an increase in the role of the commission is a step in transforming that body from a mere testing service into a nonpolitical personnel department with general supervisory powers over all municipal employment.¹⁰⁴

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103. See DAVIS, ADMINISTRATIVE LAW §§ 29.01-.02 (1959).

104. See CARPENTER, THE UNFINISHED BUSINESS OF CIVIL SERVICE REFORM 124-26 (1952); Kaplan, *Let's Look at Civil Service!*, 33 NAT'L MUNIC. REV. 441 (1944).