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COURT OF APPEALS

STATE OF NEW YORK

EILEEN JORDAN, ET AL.,

Respondents,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

NO. 40

Appellant.

20 Eagle Street
Albany, New York
May 1, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 40, Matter of Jordan
3 v. New York City Housing Authority.

4 Good afternoon, counsel.

5 MS. LIPPMAN: Good afternoon. May it please the
6 court, Jane Lippman from the New York City Housing
7 Authority Law Department on behalf of appellant NYCHA. I'd
8 like to reserve two minutes of my time, please.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. LIPPMAN: If allowed to stand, the decision
11 and order of the Appellate Division First Department will
12 upend the legislatively crafted balance of tenure rights in
13 the Civil Service Law.

14 JUDGE RIVERA: Well, how do we get past just the
15 word? I mean, "employee" doesn't have any limitation to
16 it, right?

17 MS. LIPPMAN: Yes, Your Honor. The legislative
18 history of Section 71 which - - -

19 JUDGE RIVERA: I guess the question is why do we
20 look to that?

21 MS. LIPPMAN: Because the - - - the point here is
22 to effectuate - - - to ascertain and effectuate the
23 intention of the legislature. And it is very clear from
24 the legislative history - - -

25 JUDGE RIVERA: So - - - so is your argument that



1 even if the word is plain on its face and we know what - -
2 - what the term means, that nevertheless we need to - - -
3 we need to look at the legislative history?

4 MS. LIPPMAN: Well, first of all, it's not the
5 only word in the statute. There are other words. And
6 those words must be considered when analyzing the word
7 "employee". What - - - can't just look at the word
8 "employee" and say well - - -

9 JUDGE RIVERA: I thought that was the crux of the
10 argument, whether or not "employees" includes the labor
11 class employees.

12 MS. LIPPMAN: That's correct, Your Honor. And to
13 determine that question, one must look at the legislative
14 history, as this court did in Matter of Allen v. Howe - - -

15 JUDGE STEIN: But isn't it - - - aren't you
16 saying that there's other language in the statute itself
17 that creates an ambiguity, and that is that the lay - - -
18 the reference to "preferred lists" and - - - and that sort
19 of thing - - - isn't that what gets you out of the statute
20 to look at the legislative intent?

21 MS. LIPPMAN: Yes, Your Honor. And our position
22 that - - - is that it's not ambiguous because of those
23 phrases which are statutory terms of art and specifically
24 exclude the labor class. Now, when one looks at the
25 legislative history of Section 71, as this court did in



1 Matter of Allen v. Howe - - -

2 JUDGE GARCIA: I disagree with your
3 characterization of that legislative history. I know what
4 Allen says, but if you look at the actual legislative
5 history of 71 versus 73, and 73 is a very different statute
6 - - - I think we talked about that in Allen - - - 71 says
7 the purpose of protecting employees. 73 talks about
8 Section 75.

9 MS. LIPPMAN: Well, as - - - as this court
10 discussed in Matter of Allen v Howe, and I think as is
11 reflected in the legislative history, - - -

12 JUDGE GARCIA: Show me where - - -

13 MS. LIPPMAN: Okay.

14 JUDGE GARCIA: - - - in the legislative history
15 of Section 71 they talk about the impact of Section 75.

16 MS. LIPPMAN: Well, Section - - - the legislative
17 history states that this is a new right, okay. So to give
18 people rights under work - - - that - - - for people who
19 would need to leave under Workers' Compensation Law.

20 JUDGE GARCIA: Right.

21 MS. LIPPMAN: Now, I mean, I think that you have
22 to look also at the history of the Civil Service Law.

23 JUDGE GARCIA: But if we're sticking right now -
24 - - forget the Civil Service Law for a minute, as a general
25 thing - - - at 71, 73, 75; so 71 is workplace injuries; 73



1 is other injuries. They're different statutes. We said
2 that in Allen. And 75 is certain rights under - - -
3 relating to termination.

4 And Section 73, when it's promulgated, and not
5 that much later, talks extensively about the interplay
6 between 75 and - - - and termination. 71, when it's
7 promulgated, and 75 is out there, doesn't mention 75 at
8 all.

9 MS. LIPPMAN: Well, let - - -

10 JUDGE GARCIA: In the legislative history.

11 MS. LIPPMAN: - - - me - - - let me just point
12 out that 71 was amended to add employees who were assaulted
13 on the job. So in - - - in its original iteration, it just
14 applied to - - -

15 JUDGE FAHEY: Let me ask - - - let me ask you
16 this, Ms. Lippman. The - - - I think Judge Garcia makes a
17 good point. So let's stay with the language of Section 71.
18 Forget about the legislative history. Is there, in the
19 statute itself, language that - - - that would indicate
20 that you had to rely - - - that this is restricted to the
21 competitive class in civil service, and that specifically -
22 - - like preferred eligible list, language like that, that
23 would support your argument?

24 MS. LIPPMAN: So preferred - - - preferred lists
25 and preferred eligible lists are in Section 71.



1 JUDGE FAHEY: All right.

2 MS. LIPPMAN: Okay.

3 JUDGE FAHEY: Those - - - those terms, what do
4 they mean to you?

5 MS. LIPPMAN: Oh, okay. So those are clear
6 indications that the labor class is excluded. Why?
7 Because - - -

8 JUDGE FAHEY: Well, let's forget about the labor
9 class being excluded, because I don't know how clear they
10 are. But let's just talk about the language itself. In -
11 - - in the - - - in the Section 71, they refer to the
12 preferred list and the preferred eligible list, and there
13 are only certain people that are qualified to be on those
14 lists, and they are?

15 MS. LIPPMAN: The competitive class.

16 JUDGE FAHEY: The - - - right, in the competitive
17 list. So I think that much of this case has been argued -
18 - - and I really think Judge Garcia is right - - - much of
19 this case has been argued on the legislative history of the
20 case, and what I wonder is really, you should have started
21 with the language first. And that's why I'm asking you
22 these questions.

23 So respond to my point.

24 MS. LIPPMAN: Okay. So Section 71 contemplates a
25 couple of scenarios. The employee is reinstated to a lower



1 grade position, that's one. There is no - - - and in that
2 case, the employer (sic) is placed on an eligible list.
3 Second scenario: the - - - there is no vacancy to which
4 the employee may be reinstated. In that case, the employee
5 is placed on a preferred list.

6 Now, some very noteworthy points here. Labor
7 class positions have no lines of promotion. There are no
8 grades. So there is no lower grade to which a labor class
9 employee may be reinstated. That's one.

10 Two, eligible list. Eligible lists are found in
11 Section 50 of the Civil Service Law, and connote a
12 competitive class title. Why? Because an eligible list is
13 composed on the basis of competitive examination rankings.
14 Labor class employees don't take competitive examinations.

15 Now, with respect to the preferred list, an
16 employee is placed on a preferred list when there's no
17 vacancy. Now, the definition of preferred list is found in
18 Section 81. Okay? Section 81 only applies to employees in
19 Sections 80 and 88.

20 JUDGE GARCIA: Doesn't the City use that term in
21 its own regulation to refer to laborers?

22 MS. LIPPMAN: Well, there is a DCAS regulation
23 6.5.5. This is - - -

24 JUDGE GARCIA: Do they not know the definition in
25 Section 81?

1 MS. LIPPMAN: Well, this is a - - - this is a
2 local DCAS regulation, okay, that gives the labor class
3 Section 81 rights which they don't otherwise have under the
4 Civil Service Law.

5 Now, again, this is - - - this is a local
6 regulation, a DCAS - - -

7 JUDGE GARCIA: So couldn't 71 be doing that,
8 giving them the right to be on a list which they wouldn't
9 otherwise have under the Civil Service Law, if you could do
10 that with a regulation?

11 MS. LIPPMAN: Well, I think that we must
12 distinguish the difference between a local rule which may
13 have arisen out of collective bargaining and a statewide
14 statute. I mean, presumably different municipalities have
15 different - - -

16 JUDGE GARCIA: If it works in that context, why
17 wouldn't it work here?

18 MS. LIPPMAN: Well, I think - - - I mean, that is
19 a DCAS regulation. I think DCAS would have to address
20 that; that might be another reason why they're a necessary
21 party. But as I said, these - - - these rights can be
22 collectively bargained. We need to look at the statute
23 which has statewide effect.

24 JUDGE FAHEY: Well, there's two things here.
25 There is a - - - there are situations, aren't there, where



1 the labor class employees have rights that are similar to
2 the statutory rights you have, but they're the result of
3 bargaining. If we - - - the - - - what would the effect be
4 if we were to say that this applied to them, not just where
5 DCAS rules, but in every city throughout the state?

6 MS. LIPPMAN: Well, I mean, to expand the Civil
7 Service Law like that is - - - is totally unwarranted. It
8 would - - - well, it would create tremendous administrative
9 and financial burdens. And that has to be done by the
10 legislature. It cannot be done by the court to - - - to
11 allow - - - I mean, and actually - - -

12 JUDGE FAHEY: Well, it can be done in one of two
13 ways, I would think: statutorily, by the legislature, or
14 by contract between the municipality and - - - and the
15 contracting union - - - whatever the union is for the - - -

16 MS. LIPPMAN: Correct. And as is reflected in
17 the record in this case, this topic was the subject of
18 collective bargaining between Local 237 and NYCHA. That's
19 in the affirmation of Nicole Van Gatenow (ph.).

20 JUDGE GARCIA: But isn't one of the arguments - -
21 - going back to Section 75 - - - that 71 and 73 were put in
22 place because otherwise to terminate these employees would
23 require some types of hearing and findings of misconduct or
24 whatever, right?

25 MS. LIPPMAN: Yes.



1 JUDGE GARCIA: And isn't that argument completely
2 undermined by the addition of labor class employees to
3 Section 75? So now if you've been a labor class employee
4 for five years, you get the protections of Section 75
5 anyway.

6 MS. LIPPMAN: Yeah, no, I - - - actually, I don't
7 think it's undermined at all, and I think it shows that
8 when the legislature gives tenure rights to the labor
9 class, they do so explicitly and unambiguously.

10 JUDGE GARCIA: But don't you have the exact
11 problem, at least for five-year labor employees - - - let's
12 say, laborers who have five years on the job, you now have
13 the exact problem you have that led to the enactment of 71,
14 because you can't get rid of them without a disciplinary
15 hearing now?

16 MS. LIPPMAN: Uh - - -

17 JUDGE GARCIA: Because you can't use 71, and you
18 can't use 73.

19 MS. LIPPMAN: I'm not - - - I'm not sure I
20 understand your question.

21 JUDGE GARCIA: So as I understand it - - - and I
22 might be wrong - - - I thought Section 75, last year, was
23 amended, so now laborers with five years of experience get
24 the protections of Section 75.

25 MS. LIPPMAN: That's correct.



1 JUDGE GARCIA: Which they didn't have before.

2 MS. LIPPMAN: That's correct.

3 JUDGE GARCIA: So doesn't that create, for that
4 class of laborers who have been working five years on the
5 job, the same problem that you had that led to the
6 enactment of Section 71 and 73 in the first place,
7 according to you, which is we can't get rid of these people
8 without bringing disciplinary proceedings?

9 MS. LIPPMAN: No, I don't think it does. I think
10 - - - I think that's conflating different concepts. I - -
11 - I think the idea here is that - - -

12 JUDGE GARCIA: Doesn't Section 75 say that about
13 laborers now, who've been working for five years or more,
14 that they can't be fired without certain - - - they have
15 certain protections before they can be terminated?

16 MS. LIPPMAN: That's right. They have - - - they
17 have due process rights after five years. But I think that
18 - - - that one mustn't conflate that with Section 71. So
19 Section 71 addresses a situation where a covered employee,
20 a competitive class employee, is injured on the job. Okay?
21 They're allowed a year to convalesce, and then they are
22 terminated - - - okay - - -

23 JUDGE GARCIA: Right, but what about a laborer
24 who's been working for more than five years who is in that
25 situation now? What happens?



1 MS. LIPPMAN: They don't have Section 71 rights.

2 JUDGE GARCIA: Right. So you have to bring some
3 kind of misconduct proceeding to get rid of them. My point
4 is you were saying, I believe, that Section 71 and Section
5 73 were escape hatches from Section 75, because there were
6 certain rights given regarding termination, under Section
7 75, for certain classes of employees. And in order to
8 terminate those employees, even if they had an on-the-job
9 injury and had been out for a year, you had to file these -
10 - - let's call them - - - disciplinary proceedings under
11 75. But laborers weren't subject to 75. So why should
12 they have been included in 71?

13 But now, laborers are included in Section 75, if
14 they've been on the job for five years or more. So don't
15 you have the same problem for laborers who've been on the
16 job five years or more who are injured on the job and are
17 out more than one year?

18 MS. LIPPMAN: No. I mean, if they're out more
19 than one year, they would be terminated pursuant to a
20 Section 75 disciplinary proceeding or - - - or their leave
21 could be extended, potentially - - -

22 JUDGE GARCIA: But that was exactly what Section
23 7 - - - you - - - I thought the position of the briefs was
24 exactly what Section 71 was meant to avoid.

25 MS. LIPPMAN: Yes, but I think that you have to



1 keep in mind that the competitive class is a protected
2 class under the Civil Service Law.

3 JUDGE GARCIA: But so are laborers, now, who have
4 worked for five years or more.

5 JUDGE RIVERA: But I thought your other argument
6 was if - - - if the legislature wants to go farther it does
7 that and may do it piecemeal - - - it may not want to do it
8 all at once, and it hasn't done it comprehensively here. I
9 thought that was part of your argument.

10 MS. LIPPMAN: I mean, I think that that's right.
11 I mean - - - and actually, it - - - what they did in
12 Section 75 shows that when they want to give tenure rights
13 to the labor class, they do it explicitly. They can do
14 that with Section 71. They haven't.

15 JUDGE GARCIA: But assuming, on your theory, that
16 71 and 73 were essentially cross-referencing 75, and the
17 protected classes within 75, isn't there an argument the
18 legislature thought like a cross-reference, we amend 75, we
19 amend the other two.

20 MS. LIPPMAN: I think we have to look at the
21 legislative intent in 1958 when Section 71 was enacted. I
22 don't think we could say well, the legislature enacted - -
23 - amended Section 75 last year, therefore we go back and we
24 change how we were thinking about Section 71.

25 When the legislature enacted Section 71 in 1958,



1 the labor class was at will. That is when we have to
2 interpret the statute. And at that time, the legislative
3 history shows that the - - - it was not thought to be
4 appropriate to bring a stigmatizing disciplinary proceeding
5 to terminate and replace an absent, disabled employee.

6 We must look at 1958, not what happened
7 afterwards - - -

8 JUDGE GARCIA: I - - - well, that goes to, I
9 think the first argument we were - - - discussion we were
10 having, which is in 1958 no one mentioned 75; all they
11 mention is protection of workers. And then it's only in
12 Section 73, which is years later, that they mention 75.

13 MS. LIPPMAN: But - - - okay, but if we look at,
14 for example, Matter of Merriweather v. Roberts, which is a
15 case that was discussed at length in the City's amicus
16 brief, and we - - - we touched on it, this court held that
17 the tenure protections of the Civil Service Law were
18 intended to shield competitive - - - competitively tested
19 employees and were not intended to protect any person in
20 the civil service. That is the - - - the background of
21 this law.

22 We have to look at 1958 when it was enacted.

23 CHIEF JUDGE DIFIORE: Counsel, move to the
24 mandamus issue for a moment. What - - - what is the
25 process by which DCAS can accomplish delegating its



1 authority to conduct the medical examinations?

2 MS. LIPPMAN: Well, there - - - first of all that
3 was - - - that did not happen in this case. But there is a
4 City Charter provision section 814b that allows the
5 Commissioner of DCAS to delegate certain personnel
6 responsibilities to the head of an agency.

7 Now, the record in this case reflects that that
8 did not happen here. There's an email chain between an
9 Assistant DCAS Commissioner and the head of HR, the NYCHA
10 head of HR - - - who is not the head of NYCHA.

11 And in that email chain, DCAS confirmed for
12 NYCHA, as it had done previously in a phone call, that
13 Sections 71, 72, and 73, have no application to the labor
14 class.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 Counsel?

17 MR. ELLISON: Good afternoon. Josh Ellison for
18 respondents. I appreciate the court's interest in looking
19 at the text of the statute, and I think that it's important
20 to note that the statute - - - Section 71 says that an
21 employee will be placed on "a preferred list" - - - it
22 doesn't say "the preferred list", it doesn't say "the
23 preferred list referenced in Section 71". It says - - -

24 JUDGE STEIN: But how - - - how is "preferred
25 list" defined in - - - in the statute?



1 MR. ELLISON: Well, "preferred list" isn't
2 defined in the statute.

3 JUDGE STEIN: Not in this particular section, it
4 isn't. But isn't it in the overall statutory scheme - - -

5 MR. ELLISON: A preferred eligible list.

6 JUDGE STEIN: Okay.

7 MR. ELLISON: Is that's what applies to
8 competitive class employees.

9 CHIEF JUDGE DIFIORE: Counsel, do you have any
10 examples of labor class employees for whom a preferred
11 eligible list was established?

12 MR. ELLISON: No, I - - - I don't believe there
13 are any preferred eligible lists. But I believe Section 71
14 establishes a preferred list.

15 CHIEF JUDGE DIFIORE: Okay.

16 MR. ELLISON: An eligib - - - I'm sorry.

17 CHIEF JUDGE DIFIORE: Any with respect to a
18 preferred list?

19 MR. ELLISON: Well, I believe Section 71
20 establishes such a list.

21 JUDGE WILSON: I think the Chief was asking you,
22 can you give an example of a laborer job where there is a
23 preferred list for that job?

24 MR. ELLISON: No, not that I'm aware of.

25 JUDGE WILSON: Okay. And the language in the



1 statute says "a preferred list for his or her former
2 position".

3 MR. ELLISON: Correct.

4 JUDGE WILSON: Doesn't that create a problem?

5 MR. ELLISON: Well, I believe this - - - the - -
6 - the effect of the statute here is to create - - - this
7 would create a preferred list. If you have multiple
8 employees who are put out in this situation - - - because
9 these are laborers, they do heavy physical work, they are
10 more likely than any other class to - - -

11 JUDGE STEIN: How would they establish such a
12 list if there's no competitive exams?

13 MR. ELLISON: Well, I believe the first - - -
14 first out, first - - - first back would be the - - -

15 JUDGE STEIN: Well, where - - -where does it say
16 that?

17 MR. ELLISON: Well, it doesn't. I believe it's -
18 - - it's left - - - there's - - -

19 JUDGE FAHEY: Would you establish it by contract?

20 MR. ELLISON: It could be established by
21 contract.

22 JUDGE FAHEY: I thought that was the normal
23 practice. It's established by contract. It's an item of
24 negotiation, isn't it?

25 MR. ELLISON: Well, it could be - - - I don't



1 believe that the - - - the negotiation could provide how
2 that - - - I also believe in this case, DCAS, the local
3 civil service, could promulgate - - -

4 JUDGE FAHEY: You could correct me, because you
5 probably know this better than I do. But I thought the
6 process was after the person's hired, if something happens
7 like this, they go off; first out, last back, then applies.
8 But in the initial hiring, they're not done off a - - - off
9 a list and that the seniority on hiring - - - or rehiring
10 after an injury is governed by contract.

11 MR. ELLISON: That - - - it can be. It - - - it
12 doesn't necessarily need to be - - -

13 JUDGE FAHEY: I see.

14 MR. ELLISON: - - - governed by contract.

15 JUDGE FAHEY: I see.

16 MR. ELLISON: The - - - there certainly - - - the
17 part - - - the union and the employer could negotiate a
18 procedure for separation and rehire, but that's - - - I
19 don't believe that that's necessary.

20 JUDGE RIVERA: That - - - that isn't based on
21 seniority?

22 MR. ELLISON: It could be. It could be first - -
23 - it could be based on - - -

24 JUDGE RIVERA: Okay, so then you're saying the
25 statute gives no guidance?



1 MR. ELLISON: I'm saying I believe the statute is
2 silent as to how to establish the preferred list.

3 JUDGE RIVERA: Okay, so who - - - who or to what
4 is the legislature delegating the authority to define the
5 parameters of the list?

6 MR. ELLISON: I believe it would be the - - - the
7 Civil Service Commission with jurisdiction over that title.

8 JUDGE RIVERA: Don't - - - don't you need
9 statutory guidance to do that? Otherwise it's an
10 inappropriate delegation of authority.

11 MR. ELLISON: Well, I don't - - - I don't believe
12 so. I think that the - - - the - - - under the Civil
13 Service Law, the local civil - - - local or municipal civil
14 service commission has jurisdiction over all administration
15 of the Civil Service Law, to the extent it isn't directly -
16 - - conflicting with the statute.

17 JUDGE STEIN: If a labor class employee goes out
18 on - - - on disability and then wants to come back and is -
19 - - let's just assume for a moment, is entitled to the
20 protections of Section 71, and then they - - - they get on
21 this list, and then they get rehired, and - - - and they're
22 not subject to the new - - - tenure provision, so then
23 could they be fired the next day?

24 MR. ELLISON: Well, I think they would be - - -
25 would be subject to the next tenure provision - - - to the



1 - - - to the new tenure - - -

2 JUDGE STEIN: Well, let's say they - - - let's
3 say they weren't - - -

4 MR. ELLISON: - - - provisions.

5 JUDGE STEIN: - - - there for five years?

6 MR. ELLISON: Let's say - - - sure. Certainly.

7 JUDGE STEIN: Okay. So they - - - no entitlement
8 to tenure. So - - - so then you set up this whole process,
9 they get the right to come back, and then what protection
10 do they have from not being fired the next day for no
11 reason.

12 MR. ELLISON: I believe they - - - they would be
13 - - - they would be subject to termination the next day.
14 But I don't think - - -

15 JUDGE STEIN: So what - - -

16 MR. ELLISON: - - - that the le - - -

17 JUDGE STEIN: - - - would the legislature
18 establish that kind of - - - of process?

19 MR. ELLISON: Well, I don't think the legislature
20 would anticipate that a - - - a municipal employer would -
21 - - would simply discharge someone for no reason, that if
22 they were hired back that then the - - - that they would
23 presumably continue to - - -

24 JUDGE STEIN: Well, if they were hired back
25 because they were forced to hired back - - - hire them



1 back, because of this statute, particularly if you're
2 basing it on first - - - on seniority rather than on any
3 kind of merit.

4 MR. ELLISON: Well, if there's a vacancy, I would
5 think that the - - - the municipality would need them. So
6 if - - - I don't - - -

7 JUDGE RIVERA: Yes. But they might not need the
8 next person on this supposed list. Right? They might
9 think I don't want that person; that person has not been a
10 good worker. I want the fifth person down.

11 MR. ELLISON: Well, I think - - -

12 JUDGE RIVERA: What prevents them from hiring
13 them, under your scenario - - - hiring them, firing them,
14 going through that until they get to the employee that they
15 want?

16 MR. ELLISON: Nothing in the statute would
17 prevent them from doing that, but I think that that would
18 be an - - -

19 JUDGE RIVERA: Well, doesn't that - - -

20 MR. ELLISON: - - - an irrational thing to do.

21 JUDGE RIVERA: - - - then - - - but doesn't that
22 sound like an absurd result that the legislature could not
23 possibly have intended with this - - - with your
24 interpretation of the statute?

25 MR. ELLISON: Well, I think it would be an absurd



1 thing for the - - - for the employer - - - to do, if they
2 wanted to hire them back and say - - - and then fire them
3 for incompetence.

4 JUDGE WILSON: Well, if they wanted to hire them
5 back, you wouldn't need Section 71 at all.

6 MR. ELLISON: Right, if they were forced to hire
7 them back and then fire them for - - - for incompetence,
8 then there - - - you know, there would be no - - -

9 JUDGE RIVERA: Or for no cause.

10 MR. ELLISON: Or for no cause. But - - -

11 JUDGE GARCIA: Counsel, today, same facts, but
12 the termination was going to happen today, could they do
13 this to your client? She's more than five years, right?

14 MR. ELLISON: Yes.

15 JUDGE GARCIA: So could they terminate her?

16 MR. ELLISON: No.

17 JUDGE GARCIA: Right.

18 MR. ELLISON: Not without the protections of - -
19 -

20 JUDGE GARCIA: And so that - - - so essentially,
21 if Section 71 doesn't apply to her, the only way they could
22 terminate her would be through some type of Section 75
23 proceeding, today?

24 MR. ELLISON: Correct.

25 JUDGE GARCIA: Right?



1 MR. ELLISON: Correct.

2 JUDGE GARCIA: And if this did apply to her, same
3 thing today, and she gets on a list and she gets back on,
4 they couldn't fire your client, because she has more than
5 five years, right?

6 MR. ELLISON: Correct.

7 JUDGE GARCIA: So they couldn't fire your client
8 the next day?

9 MR. ELLISON: Correct.

10 JUDGE GARCIA: Because she has more than five
11 years, she has Section 75, right?

12 MR. ELLISON: Right.

13 JUDGE RIVERA: Well, they got - - - have to go
14 through a process?

15 MR. ELLISON: They would have to go through - - -
16 yeah, they could fire her if they could prove that she
17 engaged in - - -

18 JUDGE RIVERA: She might not have to be - - -

19 MR. ELLISON: - - - misconduct.

20 JUDGE RIVERA: - - - rehired?

21 MR. ELLISON: She might - - - if there's no
22 vacancy.

23 JUDGE RIVERA: At the end of that process.

24 MR. ELLISON: If there's no vacancy, after the
25 medical determination - - -



1 JUDGE RIVERA: Right.

2 MR. ELLISON: And I would just like to point out
3 that the court's decision in Merriweather from 1935 was in
4 a - - - interpreting a version of the Civil Service Law
5 before it was recodified and expanded in 1958 to grant
6 greater protections to all sorts of classes. So I don't
7 think that that decision is very informative as to how
8 Section 71 should be interpreted.

9 And if that's all, I would rest.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. ELLISON: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel, rebuttal?

13 MS. LIPPMAN: Okay. I - - - I want to go back to
14 Judge Garcia's point about legislative history, and I want
15 to point out that we did cite some legislative history in
16 both of our briefs.

17 There's a memo from Christopher Boylan - - - and
18 this is in the record - - - Section 71 allows a person who
19 would otherwise be terminated without a right to
20 reinstatement to have an ability to be reappointed without
21 having to seek a new job through civil service testing and
22 appointment from an open competitive list.

23 So one important point - - - really important
24 point to remember here is that reinstatement rights are, as
25 a practical matter, are really only necessary for the



1 competitive class. Why? Because they have to take an
2 exam; they have to undergo an appointment process.

3 Okay. The labor class, until very recently, was
4 at will. They didn't have to take any exam. So I - - - I
5 think you have to look at Section 71 both through the - - -
6 sort of the prism of terminating the person and hiring them
7 - - -

8 JUDGE GARCIA: But the noncompetitive class isn't
9 hired either, under your view - - - the noncompetitive
10 class is not covered under Section 71? Only the
11 competitive class is covered.

12 MS. LIPPMAN: I think that definitely the
13 competitive class.

14 JUDGE GARCIA: And what about noncompetitive?

15 MS. LIPPMAN: Definitely not - - - not labor.
16 Noncompetitive, I think is - - - at least State
17 noncompetitive, I would say, is arguable, because they may
18 be placed on a preferred list. And I think that that
19 language is - - - is absolutely critical.

20 These are statutory terms of art. You know,
21 Section 71 doesn't say "list". It gives no basis for
22 departing from - - - from the very specific statutory
23 meanings of "preferred list" and "eligible list". And
24 those phrases exclude the labor class.

25 I just want to quickly respond to another point



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my opposing counsel made. He said laborers are more likely to be injured on the job. The competitive class includes police officers, firefighters, nurses, all of the skilled trades - - - NYCHA employs thousands of them.

So anyone who gets injured on the job can get Workers' Compensation. This is a special right for a protected class. I think that's very obvious in the legislative history, the - - - the Civil Service Law, the background of it. It was not intended for laborers.

And by the way the legislative history says "laborers", it does not say "employee".

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. LIPPMAN: Thank you very much.



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Eileen Jordan, et al. v. The New York City Housing Authority, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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