

ATTORNEY GENERAL

February 9, 1976

VERNON N. POTTER, *Director*
Division on Civil Rights
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 5 – 1976

Dear Director Potter:

You have asked for an opinion as to whether the Division on Civil Rights has jurisdiction over allegations charging the Department of Civil Service with violations of the Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, in its promulgation and implementation of its statutorily authorized rules and regulations. You are hereby advised that the Division on Civil Rights lacks jurisdiction to review the exercise of the regulatory responsibilities of the Department of Civil Service under the provisions of N.J.S.A. 11:1-1, *et seq.*, Title 11.

The objectives of the Civil Service system are to obtain an efficient public service by merit appointments and to provide a modern personnel system for all levels of government in this State. *Mastrobattista v. Essex County Park Commission*, 46 N.J. 138, 145 (1965). These vital and significant functions carried out by the Department of Civil Service since 1908 were recognized by the framers at the 1947 New Jersey Constitutional Convention. The principles underlying our Civil Service system were then given permanent constitutional stature in Art. 7, § 1, par. 2, which provides:

“Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; except that preference in appointments by reason of active service in any branch of the military or naval forces of the United States in time of war may be provided by law.”

The broad regulatory authority imposed on the Department of Civil Service by the Legislature is essential to the proper administration of a constitutionally mandated merit and fitness system in the public service. It is through the implementation of the rules and regulations of the Department of Civil Service that the provisions of Title 11 are enforced in the various government subdivisions under its jurisdiction. In addition to the broad authority to promulgate rules and regulations to generally enforce the provisions of Title 11, the comprehensive legislative scheme envisions the exercise of regulatory authority over many specific and different aspects of a merit system government. Examples of the many areas subject to pervasive control by the Department of Civil Service are the following:

“. . . a classification plan approved and supervised by Civil Service Commission representatives, N.J.S.A. 11:5-1, 11:7-1; Civil Service approval for the creation of new positions, promotions, transfers, demotions, etc., N.J. S.A. 11:7-5; determination by the Commission as to designation of positions in classified and unclassified service, N.J.S.A. 11:7-11, 13; estab-

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lishment of a compensation plan by the Commission and payment in accordance with such plan, N.J.S.A. 11:8-2, 3; use of competitive tests for employment eligibility tests, N.J.S.A. 11:9-1, 2; filling of vacancies from eligibility lists, N.J.S.A. 11:10-1 to 6; regulations as to promotion following competitive tests, N.J.S.A. 11:10-7; provisions for emergency appointments, N.J.S.A. 11:11-2; regulations as to probationary period of employment, N.J.S.A. 11:12-1, 2; establishment of service standards and ratings by the Commission, N.J.S.A. 11:13-1; regulation by the Commission of hours of work, vacations and sick leave, N.J.S.A. 11:14-1 to 4; establishment of machinery for appeal to the Commission in connection with suspension, demotion and removal, N.J.S.A. 11:15-1 to 6; reinstatement of employees separated for economy reasons, N.J.S.A. 11:15-10.”

It is therefore apparent from this enumeration that the Legislature has established extensive regulatory authority in the Department of Civil Service to maintain a modern personnel system in government founded on merit and fitness.

This administrative authority is so compelling that courts have consistently declined to intervene in its application. As noted in *Flanagan v. Civil Service Department*, 29 N.J. 1, 12 (1959):

“ . . . It is important to the efficient functioning of the public service employment program that '[c]ourts should let [civil service] administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong — but it is their question. [They are] vested with a high discretion, and its abuse must appear very clearly before the courts will interfere . . . ’ ”

Indeed, in *Mercer Council #4, N.J. Civil Service Association v. Alloway*, 119 N.J. Super. 94 (App. Div. 1972), *aff'd o.b.* 61 N.J. 516 (1972), the court invalidated a civil service regulation which authorized the Chief Examiner to assign to other state agencies certain duties and functions delegated to him. The court concluded that the comprehensive legislative scheme gave absolute responsibility over those duties to the Chief Examiner, since he was vested with “primary, original, administrative authority and responsibility” over those matters.

The comprehensive jurisdiction and specific responsibility of the Department of Civil Service over the maintenance of a merit and fitness system in personnel practices of government sharply contrast with the general jurisdiction of the Division on Civil Rights over those matters delegated to it by the Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* That law confers broad jurisdiction on the Division on Civil Rights to eliminate discrimination in matters involving real property, employment and the use of public accommodations.

Although the Law Against Discrimination has been construed to confer jurisdiction on the Division on Civil Rights over the state acting as an employer, it does not extend to the conduct of government in the exercise of its basic regulatory responsibility. In *Formal Opinion No. 2 — 1975* dated January 31, 1975, the Attorney General concluded that the Division on Civil Rights lacks subject matter jurisdiction under the Law Against Discrimination to review insurance rates approved by the Commissioner of Insurance. It was opined that rate-making involves a purely governmental function in the traditional sense and is reviewable for discrimination exclu-

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sively by appeal to the courts. Similarly, in *Formal Opinion No. 28 – 1975* dated October 15, 1975, exclusive jurisdiction over complaints of discrimination in public school curricula was found to inhere in the Commissioner of Education rather than in the Division on Civil Rights. The pervasive constitutional and legislative responsibilities of the Commissioner of Education to supervise the administration of the education laws were held in that instance to take precedence over the general provisions of the Law Against Discrimination.

The power of an administrative agency to review another state agency's exercise of its unique statutory functions is an unusual power which cannot be readily inferred without a clear expression of legislative intent. *Burlington County Evergreen Park Mental Hospital v. Cooper*, 56 N.J. 579, 598 (1970). In this situation, N.J.S.A. 10:5-1 *et seq.*, contains no express or implicit authority for the Division on Civil Rights to review the governmental prerogative of the Department of Civil Service exemplified by its promulgation of rules and regulations governing the terms of employment in the public sector. Moreover, in light of the pervasive constitutional and statutory responsibility of the agency to administer a system of merit and fitness in government employment, it would be unreasonable to presume that the Legislature intended to grant such extraordinary power to review in the Division on Civil Rights. It is, therefore, our opinion that the Division on Civil Rights lacks jurisdiction to enforce the provisions of the Law Against Discrimination against the Department of Civil Service acting within the scope of its regulatory responsibilities under Title 11.*

Very truly yours,

WILLIAM F. HYLAND

Attorney General

By: THEODORE A. WINARD

Assistant Attorney General

* Although the Department of Civil Service is not subject to the provisions of the Law Against Discrimination in carrying out its basic regulatory responsibilities, it must conform its governmental conduct to the constitutional requirements of equal protection of the laws found in the Fourteenth Amendment to the United States Constitution and inherent in Art. 1, par 1, of our State Constitution. The judicial review of administrative agency determinations is comprehensive in New Jersey and has the support of a special constitutional provision. Art 6, § 5, par. 4. The courts are fully empowered to remedy discriminatory acts or practices violative of these constitutional guarantees.