PUBLIC SECTOR EMPLOYMENT AT THE LOCAL LEVEL: THE NEED FOR GREATER REFORM

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I. Introduction

On September 25, 1986, Governor Thomas Kean signed the New Jersey Civil Service Reform Act (the Act) into law.[1] This Act revised the state's seventy-eight year old existing civil service law.[2] Although the Act will apply to an estimated 140,000 workers in the state's counties and municipalities, its greatest effect will be on the 70,000 state employees it governs.[3] The governor remarked that this Act "will boost morale and enhance productivity by allowing state managers to reward a good employee and punish an incompetent employee."[4] In addition, Governor Kean noted that the Act will protect the due process rights of public employees, protect them from political patronage, and protect employees from retaliation for reporting governmental waste or mismanagement.[5]

The governor's comments express laudable goals for which he should be complimented for making Civil Service Reform a priority of his administration. In many respects, his insistence on enacting a reform bill provided the momentum for this legislation to be passed by the New Jersey Senate and Assembly.[6] While prior governors sought civil service reform, the concerns of the different constituencies affected by Civil Service prevented

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1 Civil Service Act of September 25, 1986, ch. 112 (codified as amended in N.J. STAT. ANN. §§ 11A:1-1 to :12-6 (West Supp. 1987) which repealed N.J. STAT. ANN. §§ 11:1-1 to 11:28-3 (West 1976).

2 *Id.*

3 The Star-Ledger (Newark, N.J.), Sept. 26, 1986, at 1, 13, col. 1.

4 *Id.* at 1, 13, col. 5.

5 *Id.*

6 Assemblyman Anthony Villane who sponsored the Civil Service Reform Act in the Assembly (Assembly Bill No. 2194), had been pursuing civil service reform for eight years prior to the enactment of this legislation.

reform measures from being enacted.[7]

This article does not deal with the New Jersey Civil Service Reform Act nor the Federal Civil Service Reform Bill of 1978.[8] What this article addresses are the problems of public sector employment at the local level. While the Act may improve the efficiency and productivity of the 70,000 state employees it covers, it is not certain that it will do the same for the 140,000 local and county employees it governs. For example, under section 11A:6-28 of the New Jersey Reform Act "[t]he commissioner shall establish an employee performance evaluation system for State employees in the career and senior executive service."[9] However, the section also provides: "[p]olitical subdivisions may adopt employee performance evaluation systems for their employees."[10] The difference between "shall" and "may" can be great and can result in the conclusion that counties and municipalities may opt not to consider using professional employee performance evaluation systems.

There are many factors which effect employment at the local level. The following discussion will attempt to highlight some of the legislation and resulting court decisions which have mandated certain behavior on the local hiring authority. Considerations such as the employee's right to notice and hearing before termination,[11] mandated merit principles,[12] certainty against termination for purely political reasons,[13] veterans preference,[14] and municipal residency requirements[15] all play a major role in public employment decision making at the local level. Because of statutory and court mandates in all of the above areas, personnel decisions at the local level can be more difficult and frustrating to make than they are at the state level or in the private sector. Even if the local hiring authority has the best interests of the pub-

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7 The Star-Ledger (Newark, N.J.), Sept. 26, 1986, at 13, col. 1.

8 N.J. ADMIN. CODE tit. 4, §§ 1-1.1 to 8.8B (1987); Civil Service Reform Act of 1978, Pub. L. No. 95-454, Title II, § 201(a), 92 Stat. 1119 (1978) (codified as amended in 5 U.S.C. §§ 1101 to 1105 (1982)).

9 N.J. STAT. ANN. § 11A:6-28 (West Supp. 1987).

10 *Id.*

11 *Id.* §§ 11A:2-13 to :2-22.

12 *Id.* §§ 11A:2-3 to :2-7.

13 *Id.* § 11A:9-9.

14 *Id.* §§ 11A:5-1 to :5-15.

15 *Id.* § 11A:4-3.

lic in mind, as well as greater productivity of the employee, the legal and statutory environment in which the public official operates may thwart his or her ability to achieve these goals. Equal employment opportunity requirements and collective bargaining rights also affect local government hiring.[16]

This article will discuss certain statutes and court decisions dealing with the several areas affecting local government employment before recommendations for reforms are made principally in the public sector at the local level.

II. Purpose of Civil Service Laws

The first movement for a civil service system occurred on the federal level with a singular purpose.

> The fundamental purpose of civil service laws and rules is to establish a merit system whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and to safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious, or political reasons or affiliations.[17]

The impetus behind the establishment of the federal civil service system was the assassination of President Garfield by a disgruntled office seeker.[18] The event brought to a peak the ramifications of the spoils system made popular during Andrew Jackson's administration.[19] As a result, Congress passed the Pendleton Act of 1883[20] which created the Civil Service Commission and for the first time called for open competitive examinations for entrance into the federal civil service.[21] The Pendleton Act was enhanced by the Lloyd-LaFollette Act of 1912,[22] which provided that no person in the clas-

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16 *Id.* §§ 11A:7-1 to :7-13.

17 15A AM. JUR. 2D Civil Service § 1 (1976).

18 Te-Chung Tang, *On the Legal Protection of Civil Service Employees from Arbitrary Dismissal*, 37 AD. L. REV. 37 (1985).

19 *Id.* at 40.

20 The Pendleton Act of January 16, 1883, ch. 27, § 1, 22 Stat. 403 (1883) (codified as amended in scattered sections of 5 U.S.C.). *See also* Te-Chung Tang, *On the Legal Protection of Civil Service Employees from Arbitrary Dismissal*, 37 AD. L. REV. 37 (1985).

21 5 U.S.C. § 3304 (1982).

22 Lloyd-LaFollette Act of 1912, ch. 389, 37 Stat. 539 (1912) (codified as amended in 5 U.S.C. §§ 5595, 7101, 7102, 7501 (1982)).

sified civil service shall be removed from employment except for cause which will promote the efficiency of the service.[23] Therefore with the enactment of the Pendleton and the Lloyd-Lafollette Acts, the federal government began to establish the merit principle in government employment as the fundamental purpose of the civil service laws.

The first New Jersey Civil Service Act was passed in 1908.[24] It provided that "appointments to and promotions in the civil service. . .shall be made only according to merit and fitness, to be ascertained, as far as practicable, by examinations, which as far as practicable shall be competitive."[25] Also, this law provided for protection from arbitrary removals:

> No officer, clerk or employee in the classified civil service shall be removed, discharged, reduced in pay or position or otherwise discriminated against because of his religious or political opinions or affiliations. Further, no officer, clerk or employee holding a position in the competitive or non-competitive class of the classified civil service shall be removed . . . until he shall have been furnished with a written statement of the reasons for such action and been allowed a reasonable time in which to make written answer thereto.[26]

In 1947, civil service protection was incorporated into the New Jersey Constitution which provides in part "[a]ppointments and promotions in the civil service, . . . 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."[27]

The above legislative enactments indicate clearly a consistent and defined purpose to insure credibility in government employment. Based on these statutes, certain results should occur: all civil service decisions should be based on merit; all terminations should not be politically motivated; and the competitive examination process should produce an efficient means to appoint and promote the most qualified individuals to government positions. History has

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[23] *Id.*

[24] Civil Service Act of 1908, ch. 156 (1908).

[25] *Id.* § 1. Prior to the enactment of the Civil Service Reform Act of September 25, 1986, all civil service statutes were codified as amended in N.J. STAT. ANN. §§ 11:1-1 to 11:28-3 (West 1976). Regulations affecting the civil service are contained in N.J. ADMIN. CODE tit. 4 § 4:1 to 4.3 (1986).

[26] Civil Service Act of 1908, ch. 156, § 24 (1908).

[27] N.J. CONST. art. VII, § 1.

proven otherwise.[28]

The last five sections of the Pendleton Act provide that under penalty of law any political assessments, solicitations, subscriptions or contributions from any or by any employee of the United States Government are prohibited.[29] However, with the proliferation of employment by the federal government in the ensuing years, concern over non-civil service employee political coercions became strong enough for further legislative action.[30] In 1939, Congress enacted the Hatch Act[31] which "expanded [the] coverage of political restrictions to both classified and nonclassified employees.[32]

Congress extended the provisions of the Hatch Act to state and local employees in 1940.[33] The amendment included the following:

> A State or local officer or employee may not—
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> (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
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> (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
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> (3) be a candidate for elective office.[34]

In 1930, the New Jersey Legislature enacted legislation amending the Civil Service Act to apply similar prohibitions and protections.[35] "No person in the State classified service or seeking admission thereto shall be appointed, demoted or removed or be in any way favored or discriminated against because of his political or religious opinions or affiliations."[36] The legislation provided that:

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28 For a discussion of the corruption of the Hague Administration, see T. FLEMING, NEW JERSEY: A HISTORY 173-184 (1984).

29 The Pendleton Act, ch. 27, §§ 11 to 15, 22 Stat. 403, 406, 407 (1883).

30 The Hatch Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147 (1939) (codified as amended in scattered sections of 5 and 18 U.S.C.).

31 *Id.*

32 The Hatch Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147 (1939). *See also* Note, *Patronage Politics: Democracy's Antidote to Enforced Neutrality in Civil Service*, 6 U. DAYTON L. REV. 231 (1981).

33 Act of July 19, 1940, ch. 640, 54 Stat. 767 (1940) (codified as amended in scattered sections of 1, 5 and 18 U.S.C.).

34 5 U.S.C. § 1501-02 (1982).

35 Act of Apr. 18, 1930, ch. 176, 1930 N.J. Laws 606.

36 *Id.* § 38. This section resembles Civil Service Act of 1908 ch. 156, § 24 (1908).

> No person holding a position in the state classified service shall directly or indirectly use or seek to use his authority or official influence to control or modify the political action of any other person or during the hours of duty engage in any form of political activity nor at any other time take such part in political activities or political campaigns as to impair his usefulness in the position in which he is employed.[37]

As suggested by the preceding statutory enactments, the primary goals of civil service legislation have been protection from arbitrary dismissals,[38] political uprisings,[39] and the use of public office for political gain.[40] In order to protect the civil servant from arbitrary dismissals, the constitutional protection of the due process clause has been incorporated in the statutes.[41] This protection is demonstrated by the fact that civil servants have a right to notice and a hearing prior to dismissal.[42] These due process rights are contingent upon whether the individual's interest is within the fourteenth amendment protection of liberty and property.[43]

The Supreme Court in *Board of Regents v. Roth*[44] held that the term liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] to engage in any of the common occupations of life."[45] The Court went on to say that if the state, in declining to rehire the respondent, made a charge against him which would seriously damage his standing and associations in the community, then the employee's due process rights would be effected.[46] The High Court noted "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard

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37 N.J. STAT. ANN. § 11:17-2 (West 1976). The Civil Service Reform Act states: "A person holding a position in the career service or senior executive service shall not directly or indirectly use or seek to use the position to control or affect the political action of another person or engage in political activity during working hours." N.J. STAT. ANN. § 11A:2-23 (West Supp. 1987).

38 N.J. STAT. ANN. § 11:15-2 (West 1976).

39 N.J. STAT. ANN. § 11A:2-24 (West Supp. 1987).

40 *Id.* § 11A:2-23.

41 *Id.* § 11A:2-13.

42 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42 (1985); *see also* N.J. STAT. ANN. § 11A:2-13 (West Supp. 1987).

43 470 U.S. at 541-42.

44 408 U.S. 564 (1972).

45 *Id.* at 572.

46 *Id.* at 573.

are essential."[47]

Regarding the property interest, the Court in *Roth* said that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."[48] The Court went on to define these interests more clearly:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.[49]

The Court in *Roth* notes that property interests "are not created by the Constitution,"[50] but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[51] Therefore, once the state has created this property interest in employment, it must safeguard this interest by proper constitutional procedures.

In 1985, the Supreme Court in *Cleveland Board of Education v. Loudermill*,[52] made this quite clear. The Court held:

> [T]he Due Process clause provides that certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . . "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred not by legislative grace, but by constitutional guarantee. *While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred without appropriate procedural safeguards.*"

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47 *Id.*
48 *Id.* at 576.
49 *Id.* at 577.
50 *Id.*
51 *Id.*
52 470 U.S. 532 (1985).

> An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. . . . *The principle requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.*[53] (emphasis added)
>
> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[54]

With this 1985 decision, the Supreme Court has taken the civil service statutes on the state and federal levels and clearly conferred a constitutional requirement of a pretermination hearing for the tenured employee.[55] By establishing that a tenured civil servant has this property right, the Supreme Court has expanded the expectation of permanency that a public employee may have.[56] The statutes themselves made it difficult to dismiss employees.[57] The *Loudermill* decision seems to suggest that it may be more difficult to terminate non-productive employees because of these pretermination requirements.[58]

Practically speaking, any employer who is bound by the Court's decision in *Loudermill* and wishes to release someone will have to spend more time accumulating evidence against the employee. Additional administrative costs will be incurred to insure that these procedural requirements are upheld. The result of this may be that less time and money will be spent on providing services to the public due to this increased burden.

In addition to the constitutional protections for tenured, nonprovisional public employees, the Supreme Court has held that nontenured, provisional employees have constitutional protections as well.[59] Frequently, political considerations play a role in appointments to government positions. Unfortunately, these appointments do not always require job related qualifications as a prerequisite.

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53 *Id.* at 541-42.

54 *Id.* at 546.

55 *Id.*

56 *Id.* at 544.

57 *See, e.g.*, OHIO REV. CODE ANN. § 124.11 (Page 1984), *cited in* 470 U.S. 532, 539 n.4 (1985).

58 *Id.* at 544.

59 Branti v. Finkel, 445 U.S. 507 (1980).

Civil service statutes were enacted to try to protect the bulk of government positions from this type of influence. There are government employees who are not protected by the civil service provisions, and therefore vulnerable to politically motivated discharge despite their competency.

The Supreme Court in *Branti v. Finkel*[60] addressed the issue of politically motivated discharge. The Court noted "[t]he question presented is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs."[61] In this case, registered Republicans serving as assistant public defenders in Rockland County, New York were terminated by a newly appointed Democratic public defender.[62]

The Court quoted extensively from *Elrod v. Burns*[63] where the unproductive effects of blanket patronage dismissals were clearly recognized.[64] In *Elrod v. Burns*, the Court was not persuaded by the argument that employees who were in another political party would work to subvert the incumbent administration efforts "to govern effectively."[65] The Court noted:

> The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work. Further, *it is not clear that dismissal in order to make room for a patronage appointment will result in replacement by a person more qualified to do the job since appointment often occurs in exchange for the delivery of votes or other party services not job capability*.[66] (emphasis added)

Because of this, the *Elrod* Court held that patronage dismissals had to be confined to "policymaking positions," and that this would be sufficient to insure that the "policies which the electorate has

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60 445 U.S. 507 (1980).

61 *Id.* at 508.

62 *Id.* at 509-10.

63 427 U.S. 347 (1976). This case dealt with the Republican employees of the Cook County, Illinois Sheriff's Department who were fired by a newly elected Democratic sheriff.

64 *Id.* at 372-73.

65 *Id.* at 364.

66 *Id.* at 364-65.

sanctioned are effectively implemented."[67]

In *Branti*, the Supreme Court redefined the inquiry pertinent to a patronage dismissal.[68] The Court held that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[69] Finding no conflict between the duties of an assistant public defender and the individual's party affiliation, the Court held that an injunction against termination was entirely appropriate.[70]

The significance of the holdings is apparent because they brought first and fourteenth amendment protections to non-civil service government employees. Any attempt by a public employer to terminate employees who fall within the parameters of *Branti* must be based upon the individual's competence.[71] In many respects, the concepts behind *Branti* and *Elrod* are just as pertinent to greater productivity in public sector employment as are the civil service statutes themselves. The intent is to protect the employee as well as provide a continuation of services to the public.[72] Unfortunately, some politicians may expand the payroll with further patronage because they cannot terminate the existing employee. This has been accomplished at the local level with the creation of new divisions or departments under the guise of overall reorganization.

III. Veteran's Preference and Residency Requirements

Two other public policy restrictions have also played a major role in public sector hiring and promotion decisions. Veteran's preference and residence requirements are areas which have affected both employment and the delivery of services by the public sector at the local level. The Veteran's Preference Act of 1944[73] was passed by Congress in response to World War II.[74]

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67 *Id.* at 372.

68 445 U.S. at 518.

69 *Id.*

70 *Id.* at 520.

71 *Id.* at 518-19.

72 *See*, Murray, *Patronage Dismissal Under a First Amendment Analysis: The Aftermath of Branti v. Finkel*, 25 ST. LOUIS, U.L.J. 189 (1981). *See also* Note, *Patronage Politics: Democracy's Antidote to Enforced Neutrality in Civil Service*, 6 U. DAYTON L. REV. 231 (1981).

73 The Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387-91 (1944) (codi-

This Act gave preference to veterans in examinations and affords them substantial protection against arbitrary and adverse personnel actions.[75] Under the Act, points are added to any veteran's score on an examination, and credit for time in the military is given to help the veteran meet experience qualifications.[76]

In New Jersey, a veteran's preference provision was included in the New Jersey Constitution of 1947, which states "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."[77] Veterans who pass a competitive exam must be put at the top of the list after disabled veterans.[78] When more than one veteran is on a certified list, the hiring authority must appoint the veterans in order of ranking.[79] Preference is given to veterans when there is a reduction in the work force.[80]

Because of veteran's preference, a non-veteran who receives the best score on an exam may not get an appointment if a disabled veteran passed the exam or a nondisabled veteran came in second or third. Because the legislation has established this preference as a matter of public policy, the most qualified person may not get hired. This is a very sensitive political issue in New Jersey, and the Act fails to change veteran's preference.

The New Jersey Supreme Court in *Ballou v. State Department of Civil Service*[81] held that absolute veterans preference did not violate New Jersey's constitutional provision which requires that appointments be made according to merit.[82] The New Jersey Supreme Court affirmed the appellate division's decision in *Ballou*[83] "substantially for the reasons set forth in its published opinion."[84] A review of the appellate division's decision reveals why

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fied as amended in 5 U.S.C. § 2108 as to what type of veteran included and at 5 U.S.C. §§ 3309 to 3319 as to preferences in examinations).

74 5 U.S.C. §§ 2108, 3309-19 (1982).

75 5 U.S.C. §§ 3309-19.

76 *Id.* §§ 3309, 3311.

77 N.J. CONST. art. VII, § 1, para. 2.

78 N.J. STAT. ANN. §§ 11:27-1 to -13 (West 1976).

79 *Id.* § 11A:5-6.

80 *Id.* § 11A:5-9.

81 75 N.J. 365, 382 A.2d 1118 (1978).

82 *Id.* at 369, 382 A.2d at 1120.

83 Ballou v. State Department of Civil Service, 148 N.J. Super. 112, 372 A.2d 333 (App. Div. 1977).

84 75 N.J. at 368, 382 A.2d at 1119.

Ms. Ballou was probably so upset about being turned down for the position in question.[85]

Ruth Ballou worked in the New Jersey Division of Consumer Affairs from 1971 to 1974 as a provisional appointee in the position of Coordinator of Federal and Local Programs.[86] On October 1, 1974, she took a competitive exam for her position and scored 99.999 which was the highest grade.[87] The second highest grade was received by a veteran who scored 82.5.[88] By statute the veteran has to be appointed because the individual was in the top three.[89] Ms. Ballou who developed and directed the program from its inception objected to the veteran's appointment.[90] The Acting Director of her division informed her that he had no choice but to appoint the veteran.[91] She was appointed "Confidential Agent" at the same salary she had received as a provisional appointee and many of the duties of the Coordinator's position were then assigned to her rather than to the veteran.[92]

The appellate division remanded the matter to the Civil Service Commission to conduct a hearing on all aspects of veteran's preference.[93] The Civil Service Commission adopted the findings and recommendation of the hearing officer's report.[94] Although the report held that moderate discrimination should be tolerated in order to effectuate the public policy for veteran's preference, it found that New Jersey's absolute preference system "discriminates excessively."[95] The hearing officer remarked: "[t]he absolute and inexhaustible preference system had a distorting depressing and adverse effect on Civil Service appointments to classified positions under the Civil Service program."[96]

The appellate division's decision incorporated findings from the "Veteran's Preference Impact Study" of June 1975.[97] This

85 148 N.J. Super. at 115-16, 372 A.2d at 334.
86 *Id.* at 115, 372 A.2d at 334.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 115-16, 372 A.2d at 334.
93 *Id.* at 116, 372 A.2d at 335.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* at 117, 372 A.2d at 335.

study was conducted by the Division of Personnel Management and Employee Development for the New Jersey Department of Civil Service. The third of their conclusions stated that "[t]he present system of veteran's preference restricted the free selection of qualified personnel for state service.[98]

The response of the appellate division was that although "[v]arious alternatives were suggested which, it was argued, would accomplish the same objectives without the harmful effects of the present system . . . these arguments and the suggested alternatives are more appropriately addressed to the Legislature."[99] Therefore, the court upheld the veteran's preference scheme as it appeared in the first civil service statute,[100] and as it appears in the subsequent Act.[101]

In addition to the veteran's preference, New Jersey has a residency requirement for hiring public employees. By statute, municipalities may restrict appointments to residents of the respective community.[102] The governing body of the municipality can also require that a non-resident employee move within the boundaries of the town.[103] Similar to the adverse affects of absolute veteran's preference are the impracticable ramifications of the residency requirement at the municipal level. Both of these restraints curtail the hiring and promotion of the most meritorious individuals by restricting the pool of candidates to choose from.

The rationale for the residency requirements is noted in *Abrahams v. Civil Service Commission*[104] where the New Jersey Supreme Court quoted from an earlier decision in *Kennedy v. City of Newark*.[105] In *Kennedy*, the court held in part that "[g]overnment may well conclude that residence will supply a stake or incentive for better performance in office or employment and as well advance the economy of the locality which yields the tax revenues."[106] The argument is that the public welfare is fur-

98 *Id.*
99 *Id.* at 119, 372 A.2d at 336.
100 *Id.* at 120, 372 A.2d at 337.
101 *Id.* at 121, 372 A.2d at 337.
102 N.J. STAT. ANN. §§ 40A:9-1.3 to -1.10 (West 1980).
103 *Id.* § 40A:9-1.5.
104 65 N.J. 61, 319 A.2d 483 (1974).
105 29 N.J. 178, 148 A.2d 473 (1959).
106 *Id.* at 184, 148 A.2d at 476.

thered by the residence requirement.[107] The plaintiff in *Abrahams* was a woman who worked as a secretary in the City of Newark Law Department.[108] She lived in Newark between 1967 and 1970.[109] Mrs. Abrahams moved to the Township of Union in 1970.[110] It was in 1970 that the Corporation Counsel notified all secretaries and clerical personnel in the Law Department that any employee not a resident of Newark by January 1, 1971, would be subject to dismissal.[111] When Mrs. Abrahams failed to move back to Newark, disciplinary proceedings were instituted against her and she was terminated on May 21, 1971.[112] Mrs. Abrahams' reasons for not moving back to Newark were that she could not afford apartment rents, the crime rate was high, and she would have to take her son out of school in Union.[113] Justice Pashman pointed out in his dissent that Mrs. Abrahams was also attempting to become reunited with her husband.[114]

From a managerial perspective, the most important aspects of the *Abrahams* case are not the constitutional arguments presented, but the arguments presented in behalf of the residency requirement itself. The majority in *Abrahams* was in accord with and cited specifically the reasons for a residency requirement from *Ector v. City of Torrance*.[115] The *Abrahams* court held that

> Among the governmental purposes cited. . .are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and tardiness among municipal personnel, ready availability of trained manpower in emergency situations, and the general economic benefits flowing from local expenditure

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107 *Id.*
108 65 N.J. at 63, 319 A.2d at 484.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.* at 64, 319 A.2d at 485.
114 *Id.* at 85, 319 A.2d at 496.
115 *Id.* at 71, 319 A.2d at 488 (citing Ector v. City of Torrance, 10 Cal.3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974)).

of employee salaries.[116]

Theoretically, these are all notable goals. However, when considered in a realistic sense, they may not be so compelling. For example, the concern for greater community and employee relations and the need for trained manpower in emergency situations have been disregarded in New Jersey.[117] Justice Pashman noted in his dissent, "the legislature enacted L. 1972 c.3 secs. 1 and 11,[118] prohibiting municipalities from requiring policemen and firemen to reside within their employer municipality and indicating that it did not consider their residence so compelling as to justify residence requirements."[119] Justice Pashman's opinion in *Abrahams* followed the federal district court's decision in *Krezewinski v. Kugler*[120] which recognized "rioting and looting that had taken place in Newark in 1967 and attributed most of this lawlessness to a deeply rooted disrespect for an absentee police force."[121] Justice Pashman continued in *Abrahams* "[t]he majority now tells us that even though the Legislature does not deem it necessary to require policemen and firemen to reside in a municipality, it is still necessary and compelling for a stenographer to so reside."[122] Regarding tardiness and absenteeism, it would seem that these characteristics have more to do with the type of individual hired and not whether he or she happens to live in the municipality.

Justice Pashman noted that the final result is that "[c]ity employees must choose between living outside Newark or retaining their jobs with the City. They may not do both."[123] The question which follows from this is how many qualified individuals have not considered employment in a city, like Newark, because of the residency requirement? The answer to this question is the reason why there needs to be a reconsideration of the residency requirement.

All of the areas discussed above play a part in the everyday personnel decisions made by the local government employer. The termination of a permanent civil service employee involves a process

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116 *Id.* at 72, 319 A.2d at 489.
117 *Id.* at 87, 319 A.2d at 497.
118 N.J. STAT. ANN. §§ 40A:14.9-1, 40A:14-122.1 (West Supp. 1987).
119 *Abrahams*, 65 N.J. at 88, 319 A.2d at 498 (Pashman, J., dissenting).
120 338 F. Supp. 492 (D.N.J. 1972).
121 *Abrahams*, 65 N.J. at 88, 319 A.2d at 497 (Pashman, J., dissenting).
122 *Id.* at 88, 319 A.2d at 498 (Pashman, J., dissenting).
123 *Id.* at 95, 319 A.2d at 501 (Pashman, J., dissenting).

that requires time and effort without the guarantee that the local government employer will succeed.

When a local government agency wants to fill a position, it may discover that it must hire an individual who is not the most qualified. Perhaps if a veteran scored in the top three on a competitive exam or an individual with the requisite qualifications remained unwilling to relocate into the municipality, the local hiring authority and the citizens of the town would have to settle for less than the most qualified candidate. Therefore, the stringent due process requirements protecting the employee as well as the restrictions imposed by veteran's preference and the residence requirements demand immediate attention.

IV. Equal Employment and Collective Bargaining

The proliferation of problems resulting from the requirements of the Equal Employment Opportunity Act[124] and collective bargaining are beyond the scope of this article. However, some mention should be made of their effect to further highlight the difficulties a local hiring authority may have.

In 1972, Congress decided that legislation was necessary to assure protection of suspect classifications against racial or gender based discrimination.[125] As a result, the Equal Employment Opportunity Act of 1972[126] amended Title VII of the Civil Rights Act of 1964,[127] by expanding Title VII to include state and local employees.[128] In support of the Acts, Congress cited a report released by the United States Commission on Civil Rights which examined seven urban areas located throughout the country.[129] Congress noted specifically:

> The report's findings indicate that widespread discrimination against minorities exists in State and Local government employment, and that the existence of this discrimination is per-

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124 The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103 (codified as amended in 42 U.S.C. § 2000e).

125 1972 U.S. CODE CONG. & ADMIN. NEWS 2139, Pub. L. 92-261, 92d Cong., 2d Sess.

126 42 U.S.C. § 2000e (1982).

127 The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 253 (Title VII) (codified under 42 U.S.C. § 2000e).

128 1972 U.S. CODE CONG. & ADMIN. NEWS 2137.

129 1972 U.S. CODE CONG. & ADMIN NEWS 2152, Pub. L. 92-261, 92d Cong. 2d Sess.

> petuated by the presence of both institutional and overt discriminatory practices. The study also indicates that employment discrimination in State and Local governments is more pervasive than in the private sector.[130]

The 1972 legislation was enacted to remedy this situation.[131] Local governments must follow the provisions of Title VII as it regards hiring and promotion.[132]

By amending Title VII of the Civil Rights Act of 1964 to include state and local government employees, Congress imposed a great burden on the hiring authorities at this level to meet the testing requirements of the Civil Rights Act. In *Connecticut v. Teal*, [133] the Supreme Court addressed the question of what constituted a discriminatory result of an employment examination.[134] The specific issue before the Court was whether an employer who is sued for a violation of Title VII of the Civil Rights Act of 1964 may assert a "bottom line" theory of defense.[135] Under this theory, "an employer's acts of racial discrimination in promotions—effected by an examination having disparate impact—would not render the em-

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130 *Id.*

131 1972 U.S. CODE CONG. & ADMIN. NEWS 2153-54, Pub. L. 92-261, 92d Cong., 2d Sess.

132 *See* 78 Stat. 253 at 255 under § 703(a) where it states that: It shall be an unlawful employment practice for an employer—

> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual. . ., because of such individual's race, color, religion, sex, or national origin; or
>
> 2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities. . ., because of such individual's race, color, religion, sex or national origin.

§ 703(h) further states that:

> . . .it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

5 U.S.C. § 2000e-2

133 457 U.S. 440 (1982).

134 457 U.S. 440 (1982). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971). In *Connecticut v. Teal*, the action was brought by black employees of a Connecticut State agency who alleged that the State and its agencies "violated Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related." Connecticut v. Teal, 457 U.S. at 444.

135 *Id.* at 442.

ployer liable for the racial discrimination suffered by the employees barred from promotion if the "bottom line" result of the promotional process was an appropriate racial balance."[136] The Court held that "the bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case."[137]

In addition, the Court held that, "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."[138] The Court noted "[e]very individual employee is protected against both discriminatory treatment and practices that are fair in form, but discriminatory in operation."[139] This additional burden on the employer to insure that an exam is completely job related can cause concern. It would seem that any exam may be subject to litigation if disparate impact can be shown. Whether the individual challenging the exam wins on the merits is not the question. What is important is that the hiring authority, either a state or local government, must allocate additional resources to comply with *Connecticut v. Teal*.[140]

Public employees at the local level have the right to collective bargaining.[141] This right provides municipal employees with the ability to negotiate with their employer over certain rights and bene-

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136 *Id.*

137 *Id.* Black employees were promoted provisionally to supervisors. Plaintiffs in this case failed the required written examination. Overall 48 blacks and 259 whites took the test. Fifty-four percent of the black candidates passed which was approximately sixty-eight percent of the passing rate for white candidates. Prior to trial, promotions were made resulting with 22.9 percent of the black candidates being promoted and only 13.5 percent of the whites. This bottom line result was the basis of Connecticut's defense. *Id.* at 443.

138 *Id.* at 455.

139 *Id.* at 455-56.

140 *See* 457 U.S. 440. Zweig, *Challenges to Employment Testing Under Title VII: "Creating Built in Headwinds" For the Civil Service Employer*, 12 FORDHAM URB. L.J. 749 (1984).

141 The New Jersey Constitution under Article 1 para. 19 holds that "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." Also in 1968 the New Jersey Employer-Employee Relations Act was passed. L. 1968, c. 303. This act amended P.L. 1941, c. 100 codified as §§ 34:13A-1 to -21 (West 1988). This act established the Public Employment Relations Commission which essentially oversees and protects the collective bargaining process in the public sector of the State of New Jersey. *See* N.J. STAT. ANN. §§ 34:13A-5.2 to -5.3 (West Supp. 1987).

fits that have not been preempted or precluded by state statute.[142] This has created an ongoing dispute concerning what employment rights and benefits are within the scope of negotiations.[143]

Besides the problem of what is negotiable, the municipal employer has the problem of potential conflicting jurisdiction. In 1981, New Jersey supplemented Title XI with its own equal employment opportunity act.[144] The 1986 Civil Service Reform Act incorporated the essential provisions of the federal act.[145] The New Jersey Department of Personnel oversees the Civil Service Statute and the Public Employment Relations Commissions (PERC) oversees the collective bargaining process.[146] Therefore, the local employer must deal with two state agencies, and with the local unions, in personal matters concerning municipal employees.

This situation has created additional costs for the municipality. Legal costs have increased together with the amount of time, effort,

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142 *Id.*

143 State v. State Supervisory Employees Association, 78 N.J. 54, 393 A.2d 233 (1978). In this case the New Jersey Supreme Court held that "a public employer may not agree to a contractual provision which purports to bind the administrative discretion of the Civil Service Commission." They went on to say that "specific statutes or regulations which expressly set particular terms and conditions of employment, . . . for public employees may not be contravened by negotiated agreement." However, they noted that "a general statute will not preclude mandatory negotiation over particular terms and conditions of employment as to which the Civil Service Commission could have but has not enacted preemptive regulation." *Id.* at 79, 80, 81. Statutory or regulatory mandated minimum levels of rights and benefits do not preclude negotiating for greater benefits in these areas. However, statutory or regulatory mandated maximum levels of rights or benefits preclude negotiation of these items. *See id.* at 82. *See also* Ridgefield Park Education Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 393 A.2d 278 (1978); In re IFPTE Local 195 v. State, 88 N.J. 393, 443 A.2d 187 (1982).

144 N.J. STAT. ANN. §§ 11A:7-1 to -13 (West Supp. 1987).

145 *See* Equal Employment Opportunity Act. (codified at 42 U.S.C. § 2000e (1982)).

146 City of Hackensack v. Winner, 82 N.J. 1, 410 A.2d 1146 (1980). The dispute in this case arose when several firefighters claimed that they were improperly denied promotions. They filed a merit and fitness complaint with the Civil Service Commission and five days later filed an unfair labor practice with the Public Employment Relations Commission (PERC). Civil Service held for the City, and PERC held for the firefighters. The New Jersey Supreme Court concluded that both agencies had a statutory basis for jurisdiction, but in this PERC should have deferred to the Civil Service Commission because the unfair practice allegations were not severable from the issues before the Civil Service Commission, *See id.* at 27, 32, 410 A.2d at 1159, 1161. The case discussed the applicability of the judicial doctrines of res judicata, collateral estoppel and the single-controversy doctrine to this type of administrative agency conflict.

and manpower that must deal with the implementation of contract provisions. The issues involved with collective bargaining in the public sector warrant a more extensive treatment. For the purposes of this article, it is only important to point out that the benefit to the employee has created an additional burden for the municipal employer.

V. Reform

The preceding discussion clearly illustrates the regulatory burden placed upon the municipality in managing its employees. Statutory requirements and judicial demands have made it difficult to enhance the abilities of local government to provide services to the public. Therefore, reform is essential to realizing greater efficiencies in providing the services in a more creative and professional manner. An attempt at reform has been made in New Jersey.

One problem with the Civil Service Reform Act[147] which becomes apparent is the affect this bill will have on public employment at the local level. The problem seems to center on the fact that there is a lack of mandatory language when the statute deals with local governments. The Act is replete with examples. One provision states: "[t]he Commissioner *may* at the request of any political subdivision initiate programs . . . and provide technical assistance to political subdivisions to improve the efficiency and effectiveness of their personnel management programs."[148] Although the statute states that the commissioner "shall establish an employee performance evaluation system for State employees" it goes on to say that "political subdivisions may adopt employee performance evaluation systems for their employees."[149] Between these two sections of the Act, there is no mandate that local governments improve themselves accordingly. The assumption can be made that as long as the political leadership deems it in their best interest to keep the status quo, nothing will change.

The mandatory language in the Act which affect local governments is essentially a continuation of the requirements im-

147 N.J. STAT. ANN. §§ 11A:1-1 to :12-6 (West Supp. 1987).
148 *Id.* § 11A:6-27.
149 *Id.* § 11A:6-28.

posed by the former statute. Municipalities must comply with the equal employment sections of the Act,[150] the veteran's preference section,[151] and they must adhere to the stringent due process requirements.[152] Except for limiting political activity and protecting "whistle blowers,"[153] the Act fails to reform public employment effectively at the local level. Essentially, the Act's failure is due to the fact that several important areas are not mentioned in the provisions. Several important changes could be made by addressing these omissions.

Although no one wants to return to the days of Andrew Jackson and President Garfield, due process requirements have made it difficult for municipal managers to terminate the unproductive employee. Because it is so difficult to fire someone, greater attention must be paid to insure that the employee when hired is the most qualified. Whether a position is classified or unclassified should not be the determinative factor in the decision to hire a new employee. Because the holding in *Branti* has established certain protections for the non-civil service employee, it becomes even more compelling that each individual hired meet the minimum qualifications for the position.[154]

The assurance that an applicant has the minimum qualifications necessary for the position he or she is being considered, requires an earlier certification of their credentials. This can be accomplished by having the local personnel officer certify that the applicant's references, academic background, work history, and overall credentials were verified. The certification completed by the personnel officer along with the individual's application could then be sent to the New Jersey Department of Personnel. Then it would be the department's responsibility to return the certification to the municipality as accepted or not accepted within two months of the date of hire. This certification requirement should not affect the examination process since examinations are not advertised or offered in a timely manner, as evidenced by the number of provisional employees that work in the State of New Jersey. Civil service examinations would be ad-

150 *Id.* §§ 11A:7-1 to -13.
151 *Id.* §§ 11A:5-1 to -15.
152 *Id.* §§ 11A:2-13 to -22.
153 *Id.* §§ 11A:-23 to -24.
154 445 U.S. at 519.

vertised so that the public could take them, but the position would be filled in the interim by someone with the minimum qualifications. The enforcement mechanism behind the certification requirement could be that if the employer fails to certify the applicant's credentials and it is learned after appointment that the employee's qualifying information was fraudulent or misrepresented, the employee would be terminated and the employer fined.

Once the goal becomes hiring qualified individuals, the need arises to have a wide variety of persons to choose from. To assist in achieving this goal, the municipal residency requirement should be abolished as soon as possible. A municipality will not meet all their personnel needs by hiring from within the respective town or by requiring that the individual relocate into that particular community. Politically, this may cause an uproar since an incumbent elected official may feel that a resident municipal employee will vote for him or her. However, when everything is considered, including the position of Justice Pashman in *Abrahams*,[155] the arguments in favor of eliminating the requirement clearly outweigh the arguments for continuing it.

Similar to the negative effects of the residency requirement are the adverse ramifications of absolute veteran's preference. Although upheld by the New Jersey Supreme Court, changes in this area would be beneficial to the public. Basing any changes to veteran's preference on the original intent of these provisions which was to compensate veterans for their time spent in active service during war time, reasonable adjustments can be made without eliminating this preference entirely.

One option would be to give the veteran an absolute preference only when he or she enters the civil service system through the examination process. Once admitted into the civil service system no other type of veteran's preference would be allowed. The individual's merit and fitness would be the only criteria for promotions or other positions.

The second option would be to allow for additional points on the veteran's examination score. Under this plan, whenever a veteran takes an exam for a civil service position he or she would be awarded a certain amount of additional points and then

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155 65 N.J. at 77-100, 319 A.2d at 491-504.

placed on the hiring list accordingly. At a minimum, this option would offset the absolute nature of the current preference.

Either one of these options would assist local governments in attaining the goal of hiring qualified candidates for civil service positions. The options retain the public policy directive that recognizes that society help those individuals who unselfishly served their country during war.

The elimination of the residency requirement together with curtailment of veteran's preference will broaden the pool of eligible applicants available to a local government. The broadening of the recruitment pool will help municipalities to meet the requirements of equal employment opportunity. Qualified applicants of all creeds and colors will become more available once the residency requirement is abolished and the veteran's preference requirement becomes less restrictive.

However, once employees are hired, the responsibility of the employer continues with the need to upgrade personnel continuously. Personnel performance evaluations should be mandatory at the local level for each employee every six months to achieve this goal. Communication between the employees and their supervisor is important to staff morale. Identifying an individual's problems and rewarding his or her achievements of the employee are fundamental to increased productivity.

Continuing job training is also vital to increase productivity. The legislature should change the word "may" to "shall" in an amendment to the Civil Service Reform Act so that it reads "The Commissioner *shall* provide technical assistance to political subdivisions to improve the efficiency and effectiveness of their personnel management programs." Also, municipalities should provide educational incentives or reimbursements for employees to increase their capabilities. Only by having a productive, ongoing relationship with an employee, will there be the possibility of benefiting from a new found personnel initiative.

VI. Conclusion

In summary, public sector employment is affected by many influences. Better services for the public requires qualified and responsible public employees. Because every New Jersey resi-

dent lives in a municipality, the quality of services at the local level becomes even more important.

Public policy considerations, such as affirmative action, veteran's preference, and collective bargaining should not force local government employers to deviate from their responsibility to the public. If the ultimate goals to be achieved by local government are better services to the public, and merit and fitness in local government employment, then policy decisions affecting these areas should not be tarnished by parochial and political considerations. The recommendations suggested above are an attempt to balance the needs of all parties concerned. There is no doubt that more can be done but by making progress in some of these areas will begin to address the fundamental problems affecting public sector employment at the local level. Since the Civil Service Reform Act in New Jersey is state oriented, and does not address all the areas needing reform at the local level, it is incumbent upon local elected officials and local government managers and administrators to continue the fight for greater reform.