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THE REVERSAL OF SHAKMAN: IS IT ALSO A RETURN TO THE SPOILS?

The word patronage is synonymous with American government and politics,¹ especially at the local level. Despite the presence of civil statutes,² patronage has continued to thrive in the 1970s and 1980s. The federal judiciary, however, began an assault on the patronage system in two United States Supreme Court cases³ and in

1. Patronage is defined as "the allocation of discretionary favors of government in exchange for political support." M. TOLCHIN & S. TOLCHIN, *TO THE VICTOR* 5 (1971). Political parties at any level of government utilize patronage to enforce party discipline. *Id.* at 299. Probably the most well-known form of patronage is found at the local level. At the heart of its operations is a political organization informally called a "machine." Rakove, *Observations and Reflections on the Current and Future Directions of the Chicago Democratic Machine*, in *THE MAKING OF THE MAYOR* 127-28 (M. Holli and P. Green eds. 1984). That organization is made up of three elements. First, there are the ward committeemen and precinct workers. *Id.* Second, there are city and county governments. *Id.* Finally, there are the private sector groups consisting of big business, labor unions, financial institutions, and churches. *Id.*

The machine uses a number of patronage forms in order to subsidize itself. One form of political patronage is granting public jobs in exchange for political support. See M. TOLCHIN & S. TOLCHIN, *supra*, at 5. However, there are other lucrative forms as well, such as the award of construction contracts and investment of government funds in favored financial institutions. *Id.* at 6.

2. The federal government passed its first civil service legislation in 1883 with the Pendleton Act, ch. 27, § 1, 22 Stat. 403 (1883) (codified at 5 U.S.C. § 1101 (Supp. II 1982)). The State of Illinois passed its first such act on March 20, 1895. OFFICE OF THE CIVIL SERVICE COMMISSION, CHICAGO CIVIL SERVICE COMMISSION ANNUAL REPORT 5 (1896) [hereinafter CIVIL SERVICE REPORT]. The Act established a Civil Service Commission to regulate the civil service activities of Illinois municipalities. *Id.* It was intended to eliminate the burden of numerous applicants badgering government administrators for jobs. *Id.* at 7. In addition, the Act was created to relieve city workers from the "unfair burden of political assessments." *Id.*

The civil service statute also applied to the City of Chicago. CIVIL SERVICE REPORT, *supra*, at 5. However, history portrays Chicago government and civil service ideologies as contradictions in terms. Some have called the City the "patronage capital of the world" despite the presence of the civil service act. See M. TOLCHIN & S. TOLCHIN, *supra* note 1, at 27.

From its very beginning, Chicago challenged these civil service principles. Kingsbury, *The Merit System in Chicago from 1895 to 1915: The Administration of the Civil Service Law Under Various Mayors*, 4 PUBLIC PERSONNEL STUDIES 154 (1926). In an effort to get the legislation passed, state congressmen had to grant a 90-day grace period before the Act became effective. *Id.* This allowed the Mayor (at that time, Republican George Swift) the opportunity "to remove his political enemies and install his friends." *Id.* The City Council opposed it as well. They drafted a resolution declaring that the Council had "no sympathy with the so-called civil service law and with the manner in which it ha[d] been enforced." *Id.* at 155.

3. *Branti v. Finkel*, 445 U.S. 507 (1980) (refined and reinforced the Supreme Court's decision in *Elrod*); *Elrod v. Burns*, 427 U.S. 347 (1976) (Supreme Court found the practice of discharging government workers for political reasons violated the employees' constitutional rights).

two federal district court decrees.⁴ This assault was aimed at eliminating the politically motivated firing and hiring of government employees.⁵ However, the Court of Appeals for the Seventh Circuit took a massive step backwards in the case of *Shakman v. Dunne*,⁶ which set aside a district court decision that prohibited political hiring.⁷

This antipatronage litigation has a tortured history. It began when Michael Shakman was defeated in his bid for a seat in the 1970 Illinois Constitutional Convention.⁸ Convinced that his loss was due to the massive political base built and maintained by the Cook County Democratic Organization,⁹ Shakman and one of his political supporters filed suit in 1969, alleging that his rights as a candidate, and the rights of those voters who supported him, were stymied by the Democratic Organization.¹⁰

Initially, the district court dismissed Shakman's complaint on the ground that he lacked standing to attack the patronage practices of the Democratic Organization and local political entities.¹¹ But

For a synthesis of the *Elrod* and *Branti* decisions, see MOELLER, *The Supreme Court's Quest For Fair Politics*, in 1 CONSTITUTIONAL COMMENTARY 203, 213-19 (1984); Comment, *First Amendment Limitations On Patronage Employment Practices*, 49 U. CHI. L. REV. 181 (1982).

4. *Shakman v. Democratic Org. of Cook County*, 569 F. Supp. 177 (N.D. Ill. 1983) (prohibited government from using political considerations when hiring employees); *Shakman v. Democratic Org. of Cook County*, 481 F. Supp. 1315, 1356-59 (N.D. Ill. 1979), *vacated*, 829 F.2d 1387 (7th Cir. 1987) (Consent Judgment entered May 5, 1972) (prohibiting defendant governments dismissing employees for political reasons).

5. See *supra* notes 3 and 4 for an explanation of the federal court decisions.

6. 829 F. 2d 1387 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1026 (1988). The United States Supreme Court has let this decision stand without comment. *Chicago Daily L. Bull.*, Feb. 22, 1988, at 1, col. 13.

7. *Shakman v. Dunne* effectively overruled *Shakman v. Democratic Org. of Cook County*, 569 F. Supp. 177 (N.D. Ill. 1983).

8. *Shakman v. Democratic Org. of Cook County*, 310 F. Supp. 1398, 1399 (N.D. Ill. 1969). Shakman was an independent candidate, *i.e.*, a candidate not endorsed by any particular political party. *Id.* at 1398.

9. *Id.*

10. *Id.* Shakman did not limit himself to suing the Democratic Organization of Cook County. Rather, he either originally named or eventually added 42 local, county and state government agencies and the Republican County Central Committee of Cook County as the defendants to his suit.

It should be noted that Shakman and one of his political supporters, Paul Lurie, sued individually and on behalf of all other candidates, voters, and taxpayers similarly situated. The taxpayer cause of action, however, was eventually dismissed. See *Shakman v. Democratic Org. of Cook County*, 481 F. Supp. 1315, 1322 (N.D. Ill. 1979), *vacated*, 829 F.2d 1387 (7th Cir. 1987).

11. *Shakman*, 481 F. Supp. at 1403. The case was originally assigned to District Court Judge Abraham Marovitz. *Id.* at 1399. Ironically, Marovitz himself was a product of patronage, having risen through the state's attorney's office, state legislature, and finally the federal court on numerous political endorsements, including the backing of Richard J. Daley. McClory, *Shakman: the man and his battle against patronage*, Illinois Issues, Sept. 1983, at 7-12.

upon appeal to the Seventh Circuit, Shakman was found to have stated a cause of action appropriate for the district court to review.¹² At last, the judicial door was open and Shakman stepped in.

Shakman's strategy was two-fold. First, he mounted a campaign against the Democratic Machine¹³ and local and county government agencies,¹⁴ challenging their practice of firing government employees for political reasons.¹⁵ Shakman and other candidates similarly situated faced "insurmountable odds for independent candidates in view of the fact that such candidates cannot match either the funds or campaign hours derived from patronage employees."¹⁶

In 1972, the plaintiffs and numerous defendants negotiated a consent decree that prohibited the firing of government employees for political reasons.¹⁷ The judicially approved decree, now known as *Shakman I*, also banned employees from engaging in partisan activities during their regular work hours.¹⁸ Finally, the district court retained jurisdiction for the purpose of considering the legality of hiring government employees for political reasons.¹⁹

12. *Shakman v. Democratic Org. of Cook County*, 435 F.2d 267 (7th Cir. 1970). The court found that "it is clear that at least some aspect of the interests of candidates in an equal chance and of the interests of voters in having an equally effective voice are rights secured from state action by the equal protection clause of the fourteenth amendment." *Id.* at 270.

13. The Democratic Party has had a colorful history in Cook County. That party has controlled the Mayor's Office in the City of Chicago since 1931. ZIKMUND, *Mayoral Voting and Ethnic Politics in the Daley-Bilandic-Byrne Era*, in *AFTER DALEY: CHICAGO POLITICS IN TRANSITION* 31 (1982). The then Mayor, Alton Cermak, has been credited for establishing the Chicago machine whose reputation was fully developed during the "reign" of Richard J. Daley. *Id.* This Democratic machine has historically been a very powerful entity, not only controlling the Mayor's Office, but controlling or influencing numerous other county, state and national positions. *Id.*

For an observation on the history and prospects for the Cook County Democratic Machine, see Rakove, *Observations and Reflections on the Current and Future Directions of the Chicago Democratic Machine*, in *THE MAKING OF THE MAYOR* 127-28 (M. Holli & P. Green eds. 1984).

14. See *supra* note 10 for an explanation of who the defendants were in the *Shakman* litigation.

15. *Shakman*, 356 F. Supp. at 1243. Shakman asserted that the Democratic Machine built its own voting base through the work forces of the local government entities. *Id.* In return for political support and votes, the Machine would reward these supporters with government jobs. *Id.* Then, they would effectively retain the employees' support using the threat of loss of employment. *Id.*

16. *Id.*

17. The plaintiffs negotiated an agreement banning politically motivated discharges of government employees which was subsequently approved in the form of a judicial order. Its text can be found in *Shakman*, 481 F. Supp. at 1356-59 (Consent Judgment entered May 5, 1972). The defendants later challenged portions of that order in *Shakman v. Democratic Org. of Cook County*, 356 F. Supp. 1241 (N.D. Ill. 1972). Specifically, the decree prohibited the defendants from "conditioning, basing, or knowingly prejudicing or affecting any term or aspect of governmental employment, with respect to one who is at the time already a governmental employee, upon any political reason." *Shakman*, 481 F. Supp. at 1358 (emphasis added).

18. *Id.*

19. *Id.*

The attack on patronage hiring was the second phase of Shakman's strategy.²⁰ In a decision commonly called *Shakman II*,²¹ the district court agreed with the plaintiffs and found that the practice of hiring governmental employees harmed the plaintiffs' interests as candidates and voters.²² At stake were the candidates' interest in political expression, the interests of both candidates and voters in the freedom of association, and the voters' interest in equal participation in the electoral process.²³ The Machine's practice of hiring a massive number of employees for political reasons effectively prohibited the plaintiffs from exercising their own first amendment rights of expression and association.²⁴ This decision led to additional negotiations and the 1983 consent decree.²⁵

Some of the defendants chose to challenge each step of the *Shakman* litigation.²⁶ Others, such as the City of Chicago, voluntarily signed the *Shakman II* decree.²⁷ In so assenting, those entities agreed to develop a plan of compliance that would explain how the government entity would hire its work force without using political

20. The court found that there were approximately 250 government workers per ward in Chicago who needed Democratic sponsorship as the basis of obtaining public employment. *Shakman*, 481 F. Supp. 1325. There are 50 such wards in the City of Chicago. To get this sponsorship, potential public employees generally had to perform some type of political work, such as working in a precinct, working in support of the Democratic Party, or switching their political affiliation to Democratic. *Id.*

21. The actual decree, known as *Shakman II*, is found in *Shakman v. Democratic Org. of Cook County*, 569 F. Supp. 177 (N.D. Ill. 1983). The judicial decision that discusses the defendants' defenses against the enforcement of this decree is found in *Shakman v. Democratic Org. of Cook County*, 481 F. Supp. 1315 (N.D. Ill. 1979).

22. *Shakman*, 481 F. Supp. at 1332.

23. *Id.* These interests, the court found, are embodied and protected in the first and fourteenth amendments. *Id.* at 1332-35. The defendants were found to have intentionally used the powers of their offices and the work forces to effectively impede the candidacies of citizens like Shakman. *Id.* at 1333. "[A] plaintiff's interest in running for . . . [public office] . . . and thereby expressing his political views without interference from state officials who wished to discourage the expressions of those views lies at the core of the values protected by the First Amendment." *Id.* (citing *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.), cert. denied, 434 U.S. 968 (1977)). *Newcomb* dealt with a public employee who was dismissed allegedly because he chose to run for a government office. Unfortunately for plaintiff *Newcomb*, he occupied a policy-making position and the court found his dismissal justified.

24. *Shakman*, 481 F. Supp. at 1332-35.

25. Specifically, the 1983 judgment prohibited the defendants from "conditioning, basing, or affecting the hiring of Governmental Employees upon any political reason or factor." *Shakman*, 569 F. Supp. at 179 (emphasis added).

26. The following agencies filed immediate appeals after the 1983 judgment and continued to challenge the litigation up until the latest decision in 1987: Board of Commissioners of Cook County; Forest Preserve of Cook County; Cook County Clerk; Assessor of Cook County; and the Democratic Party Cook County Organization. *Shakman v. Dunne*, 829 F. 2d 1387, 1390 (7th Cir. 1987), cert. denied, 108 S. Ct. 1026 (1988).

27. The City of Chicago decided to sign its own consent decree separate from the other defendants. It is found in *Shakman v. Democratic Org. of Cook County*, 569 F. Supp. at 186-90 [hereinafter Chicago Judgment].

considerations.²⁸ These guidelines would then receive judicial scrutiny before going into effect.²⁹

Using the City of Chicago as an example, the process of developing an apolitical hiring system was a massive project.³⁰ Prior to *Shakman II*, the City's hiring policies were very general and quite nebulous, thereby allowing the current administration to bypass the system easily and often.³¹ After intensive study, a step-by-step hiring manual was drafted.³² It stressed the use of objective hiring criteria and prohibited any reliance on a job candidate's political allegiance.³³

Not all government agencies were as willing as the City of Chicago to embrace the sound philosophy of *Shakman II*.³⁴ Those agencies chose to continue their fight, taking the issue once again to the Court of Appeals for the Seventh Circuit.³⁵ In 1987, with one drastic decision, the appellate court struck down the district court decision that had banned patronage hiring.³⁶ The court effectively placed Chicago-area politics back to the 1960s, signaling to all local governments that political hiring was an acceptable way to build a public work force.

In rethinking the principles of *Shakman II*, the court of appeals reconsidered the issue of the plaintiffs' standing.³⁷ In 1970, this

28. *Shakman*, 569 F. Supp. at 180. The *Shakman II* decree, however, did not completely ban patronage firing or hiring. Rather, the judgment recognized that there are certain confidential or policy-making positions where political affiliation is appropriate when making employment decisions. *See id.* at 182. The court initially determined which positions were exempt. *Id.* at 183. However, the court allowed the defendant agency to petition the court to ask for additional "Shakman-exempt" positions. *Id.* at 182.

29. *Id.* The district court retained jurisdiction to not only oversee the development of the hiring plans but also to hear complaints related to the violation of those plans. *Id.*

30. Not only was it a massive project to completely revise the City's hiring guidelines, but the district court only granted the City 120 days to develop the Plan of Compliance. Chicago Judgment, *supra* note 27, at 187.

31. The individual City departments exercised their own discretion in the hiring of their employees with little central oversight from the City's personnel department. CITY OF CHICAGO PERSONNEL RULES, Rule VII, § 5 (1980). The Department of Personnel's functions in the area of hiring were basically limited to the administration of employment tests, *id.* Rule VI, § 1, and maintaining lists of employees who passed those tests. *Id.* Rule VII, § 1.

32. The City's Department of Personnel coordinated this study with the help of a consulting staff from Arthur Anderson. *Shakman v. Democratic Org. of Cook County*, No. 69 C 2145, at 3 (N.D. Ill. 1984) (1984 Annual Report).

33. CITY OF CHICAGO, DETAILED HIRING PROVISIONS FOR COMPLIANCE WITH THE SHAKMAN JUDGMENT (August 20, 1986). These provisions effectively placed the Department of Personnel as the entity responsible for ensuring that the City complies with the judgment. *Id.* at I-2.

34. *See supra* note 26 for a list of these agencies.

35. *Shakman v. Dunne*, 829 F.2d 1387.

36. *Id.*

37. *Id.* at 1392-99.

same court found that the plaintiffs had stated a genuine cause of action.³⁸ But, in 1987, the court changed positions and concluded that this determination had been improper due to more recent Supreme Court decisions relating to the case-and-controversy provision found in Article III of the Constitution.³⁹ Those decisions, the appellate court continued, mandated that it reverse the district court's findings in *Shakman II*.⁴⁰

The court began its analysis by referring to *Allen v. Wright*,⁴¹ a recent Supreme Court case that enunciated a comprehensive test for determining whether a plaintiff has met the constitutional requirement of proper standing.⁴² That test stated that "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."⁴³ The Seventh Circuit, in applying this test, found the "fairly traceable" connection between the plaintiffs' injury and the defendants' conduct missing.⁴⁴ In essence, the court refused to acknowledge that the patronage hiring of thousands of government employees affected the constitutional rights of candidates and voters in any tenable way.

Although the court stated that the indirectness of an injury does not automatically bar one's standing in federal court,⁴⁵ it found that in *Shakman's* case, the indirectness was fatal.⁴⁶ The court stated that there are "countless individual decisions [that] depend upon . . . countless individual political assessments that those who are in power will stay in power."⁴⁷ For example, the court found that it was not the hiring policy itself that created an advantage to the incumbent administration, but rather the decision of the incumbent

38. See *supra* note 12 and accompanying text for a discussion of the basis of the cause of action.

39. *Shakman*, 829 F.2d at 1393. The circuit court found that since 1970, when this court originally held that the plaintiffs did have standing and stated a cause of action, the United States Supreme Court had reexamined the issue of justiciability. *Id.* This reexamination, the circuit court explained, had the effect of limiting the federal courts' ability to find a case-and-controversy requirement mandated in the Constitution. *Id.*

40. *Id.*

41. 468 U.S. 737 (1984).

42. *Id.* at 751.

43. *Id.*

44. *Shakman*, 829 F.2d at 1397-99.

45. *Id.* at 1396. The court noted that where government places some type of prohibition on one party that causes harm to a third party, the third party is not automatically barred from bringing suit solely on the basis of this indirectness. *Id.* The court, however, did point out that this indirectness often makes it difficult to substantiate the constitutionally required causal connection between the defendant's acts and the indirect injury. *Id.*

46. *Shakman*, 829 F.2d at 1397.

47. *Id.*

to use a patronage policy.⁴⁸

The court of appeals ignored the true basis of the plaintiffs' complaint. While the court directed its attention to the political environment in general, the court failed to address the true defendant in this case—the Democratic Machine. In Cook County, the Machine has enjoyed a history of documented success not only in retaining its personnel in high-level positions throughout the county, but also in effecting the election of many new Democrats throughout the state.⁴⁹ Shakman challenged these practices in Cook County, rather than challenging the political environment of the entire state.

Shakman, as a candidate, did suffer an injury fairly traceable to the actions of both the defendant Democratic Organization and government agencies that used patronage hiring to build its ranks of loyal supporters. Shakman lost his quest for a seat on the constitutional committee because he did not have the resources to challenge the patronage-built monolith known as the Democratic Machine. He had no real opportunity to freely associate with government workers who owed their jobs to the Democratic party. Voters, too, who tried to support the independents such as Shakman, found their votes meaningless when cast against the bulwark of Machine voters. The

48. *Id.* The court also enumerated other variables that could determine the nature and extent of a citizen's political activity. *Id.* The court stated that these factors are contingent upon the nature of the political environment. *Id.* In some political arenas, the practice of patronage hiring by the incumbent administration may enjoy a great deal of credibility with potential workers. *Id.* The incumbent may be able to point to a successful track record that shows their ability to successfully implement policies. *Id.* In other words, where an incumbent administration has been successful, patronage jobs are desirable and through the practice of granting government jobs for political support, an administration can build its voting base.

On the other hand, if the political environment was hostile to the incumbent, these patronage jobs would no longer appeal to the citizen. *Id.* Stated differently, the incumbent's patronage policy would be of no consequence because citizens would not be motivated to vote for the unsuccessful administration regardless of the opportunity to receive a government job. Hence, the court found the political environment so full of changing factors that the plaintiffs could not successfully trace their injury to the defendants' conduct. *Id.* Thus, the plaintiffs did not meet the case-and-controversy requirement. *Id.*

This argument is fatally flawed. The court fails to recognize that pre-Shakman hiring policies throughout Cook County governmental agencies were subjective and unstructured at best. They were apparently designed with the purpose of promoting patronage-based hiring practices. For example, in the City of Chicago, there was no central oversight of the hiring activities, which left the individual City departments the discretion to hire however they saw fit. *See supra* note 31. The Chicago Park District as well had a very unstable hiring policy that allowed the district to hire "temporary" employees by the hundreds and thus avoid what hiring policies were actually in place. *Chicago Tribune*, Jan. 24, 1988, at 1, col. 6. Finally, the clearest example of patronage hiring policies left completely unchecked is found at the Chicago Transit Authority. The CTA, which for some unknown reason was not a named defendant in the *Shakman* suit, has absolutely no written hiring policies at all.

49. *See supra* note 13 for some readings on the history and success of the Democratic Party in Cook County.

court would not, and did not, recognize that these two groups stated any cognizable injury traceable to the defendants' political activities.

Additionally, the defendants only challenged the district court's ban on political hiring, thus leaving the earlier *Shakman I* decision intact. It is inconceivable how one form of patronage-based personnel practices can remain constitutionally prohibited while another similar form is clearly acceptable. In essence, the court held that an administration that is victorious at the polls can hire its own supporters but cannot remove supporters of the previous administration. This inconsistency only serves to encourage the proliferation of the bureaucracy because the court completely avoided ruling on the validity of politically motivated hiring.

Finally, the Seventh Circuit's decision has prompted the area's largest government employer to challenge the validity of the consent decree it entered into voluntarily in 1983.⁵⁰ The City of Chicago hopes to rid itself of the detailed hiring guidelines that were developed as the means to implement *Shakman II*.⁵¹ Further, the Mayor of Chicago has stated that the city wishes to annul the *Shakman* decree to avoid paying the legal fees that were awarded to the plaintiffs.⁵² This same tactic of fee avoidance, however, provides the opportunity for the return of the same patronage practices that plagued the city through the bulk of its history.

The total return to pre-*Shakman* political days must stop here. The court of appeals must not allow the City to escape a decree that it voluntarily signed. If the decree is lifted, the City will revert to the patronage hiring of yesteryear. One need only look to other local government agencies where *Shakman* was either lightly applied or not applied at all. Those agencies, such as the park district, transit authority, and housing authority, use patronage hiring on a full-scale basis.⁵³

For example, the Chicago Park District has recently been heralded as the pinnacle of modern-day patronage.⁵⁴ The General Su-

50. Chicago Tribune, Feb. 3, 1988, at 1, col. 6.

51. *Id.*

52. *Id.* The Mayor of Chicago also stated that the City is still committed to the concepts of *Shakman II*. *Id.* However, it is dubious that the City would initiate a similar plan, or even keep the present Plan of Compliance guidelines. Throughout the history of Cook County politics, patronage has remained on the forefront. And through this history, no one attempted or desired to end the benefits that came with patronage. For the current City administration to act on its own to strip itself of this benefit stretches the imagination to the point of unbelievability.

53. See *supra* note 48 for examples of unchecked patronage hiring practices of local government agencies.

54. Chicago Tribune, Jan. 24, 1988, at 1, col. 6. According to the article, a recent study was conducted by the Civic Federation, a local good-government group, who found "patronage [at an] all-time high under the [current park district] administration, who had taken [charge] with a pledge to reform the traditional job-rich haven."

perintendent uses politically based hiring practices to build a work force loyal to him and his supporters.⁵⁵ The General Superintendent rewards individuals who join his campaign with high-level positions, paying little or no concern to the individual's qualifications.⁵⁶ Citizens interested in reforming the park district face insurmountable odds when confronted with the machine-style politics that the Seventh Circuit now permits.

The same picture may soon be painted for the City of Chicago if the appellate court continues its assault against the sound principles of the *Shakman* decrees. Candidates and voters will once again face machine-style politics at the polls. As in the past, many candidates will be unsuccessful and their constitutional rights to associate with whom they choose will be trammled. The electorate's right to equal representation at the polls will again disappear. Machine politics have never taken into account those types of rights. By prohibiting patronage hiring and firing, partisan politics in Cook County is not banned. Rather, it merely provides the opportunity for candidates and voters, who represent all political factions, to participate equally in the electoral process.

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Id. The study's results showed that in actuality, 64% of the park district staff were categorized as temporary employees who had received their jobs through direct appointments and had never taken civil service examinations, which were required by statute. *Id.*

55. *Id.*

56. *Id.*

