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## Theory to Practice

### Commentator

### Article

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## Public Administration Review

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## A Return to Spoils? Revisiting Radical Civil Service Reform in the United States

**Stephen E. Condrey and R. Paul Battaglio, Jr.**

Condrey and Battaglio's article adds to the rich body of knowledge on civil service reform in the states generated by their earlier works. Other research in this vein also contributes greatly to this body of literature (see, for example, Bowman and West 2006; Coggburn 2006; Condrey 2002; Walters 2002).

As the authors point out, the movement to radically reform civil service systems in state government has an underlying New Public Management (NPM) agenda. According to NPM proponents, that agenda seeks to impose private sector practices and models of management on government in an attempt to improve efficiency and productivity. At the heart of

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these efforts is an all-out assault on civil service protections. As the authors astutely point out: "Rather than civil service protections being the solution for improving government performance, they are routinely portrayed as problems diminishing government performance."

This commentary picks up on this theme, which more broadly pervades contemporary reinvention efforts at every level of government. Attacking civil service protections is indeed the zeitgeist of the current Bush administration. Bush's efforts to reform personnel systems in the Department of Homeland Security (DHS) and the Department of Defense (DoD) have been but an antecedent to his ultimate goal of revamping the entire

civil service system in the federal government. As the research shows, Georgia, Florida, and Texas are the forerunners for such radical civil service reform efforts at the state government level.

### **The Erosion of Civil Service Protections**

Efforts to chip away at civil service protections at the federal level date back several decades and are, in fact, promulgated by the demonstration project provisions of the Civil Service Reform Act of 1978. Demonstration projects permit federal agencies to suspend Title V of the U.S. Code—which governs the federal civilian civil service—to explore new and improved approaches to federal personnel management. At the state level, Georgia represents the first government to abolish its entire civil service system, stripping state employees of virtually all their protections (see, for example, Kellough and Nigro 2002, 2007; Nigro and Kellough 2000, 2006).

Merit protections for public employees, which have existed for over a century in this nation, have been a primary target for what Condrey and Battaglio call radical civil service reform efforts. As they observe, "radical reformers join NPM proponents in viewing civil service protection as a hindrance to good management." At the federal level, the National Performance Review (NPR) explicitly attacked civil service protections, arguing that they serve as a major impediment to management reform. In its 1993 report, *Reinventing Human Resources Management*, the NPR stated that:

The Federal government's current personnel management "system" must be candidly termed "management by regulation"... The federal human resource administrative system contains major impediments to efficient and effective management of the workforce. It's a patch-

work of rules and requirements that confound rather than serve customer needs. It's process-driven; results are a by-product, not a measure of accountability. At the day-to-day operating level, it's not user-friendly—to managers, to employees and their representatives, or to personnel specialists. (1993, online report)

More recently, the Bush administration launched MaxHR<sup>1</sup> and the National Security Personnel System (NSPS) as reform packages to overhaul the personnel systems in the DHS and DoD, respectively. Under each, civil service rules and provisions which traditionally embraced employee protection would give way to ones that support performance and managerial flexibility and discretion. Kearney and Hays characterize these movements as "a pervasive and potentially pernicious attack on bureaucracy that may ultimately undermine the professional public service.... Although wrapped in a blanket of reform and bolstered by a plethora of positive motives, reinventing government's progress may bring with it a weakening of neutral competence, merit professionalism, and related values..." (1998, 39).

As Hayes and Kearney conclude:

Merit, neutral competence, and professionalism all stand to lose ground under the wholesale rush toward such values as marketplace efficiency, managerial accountability for results, and executive leadership.... If current trends continue, the benefits of a professional public service "characterized by independence of judgment and indifference to political pressures" may gradually dissipate. (1998, 50-51)

Similarly, Ingraham points out that NPM civil service reforms "directly challenged

definitions of merit that had come to rely on standardization, predictability, and broad security" (2006, 491). Thompson goes even further to suggest that the "manifestations of reform that center around" NPM concepts "threaten rather than promote merit ideals" (2006, 496).

The question I pose, which could inform future research as well as policy debates, is could these trends toward eroding public employee protections be halted or even reversed? Is there some tool or mechanism that could counteract the effects of radical civil service reform with respect to employee rights?

### **Watchdogging Civil Service Protections**

One only needs to look at the experience of the Bush administration's efforts to overhaul personnel systems in the DHS and DoD to answer this question. Therein lies an important lesson on the power of public employee unions in conjunction with the courts to counteract these efforts. Both initiatives sought to provide agency leaders and managers with a great deal of discretion over human resources. A number of significant changes were called for, the two most contentious of which would greatly alter collective bargaining rules and compensation. Public employee unions immediately raised objections and sought to block implementation first of the DHS's proposed labor reforms. As Frank Ferris's commentary discusses in greater detail, these threatened the collective bargaining rights of DHS employees. The regulations would have provided the DHS with the authority to declare contracts void at any time after the contracts had been successfully negotiated. In effect, the DHS could unilaterally negate otherwise lawful collective bargaining contracts.

The first lawsuit was filed in January of 2005 by four major public employee un-

ions—the National Treasury Employees Union (NTEU), the American Federation of Government Employees (AFGE), the National Association of Agriculture Employees (NAAE), and the National Federation of Federal Employees (NFFE). The unions were successful in their challenge. In August of 2005, a federal district court judge for the District of Columbia ruled in *NTEU et al. v. Chertoff* (385 F. Supp. 2d 1) that the proposed labor relations rules of the DHS did not guarantee public employees their lawful bargaining rights and therefore rendered the rules invalid. The court opined that the unions "collective bargaining would be on quicksand, as the Department would retain the right to change the underlying bases for the bargaining relationship and absolve itself of contract obligations while the Unions would be bound" (38). The court went on to say that "while DHS may be required to *bargain* in good faith, there is no effective way to hold it to that bargain. Under such circumstances, a deal is not a deal, a contract is not a contract, and the process of collective bargaining is a nullity" (41-42).<sup>2</sup>

The DHS appealed, and in June of 2006, the U.S. Court of Appeals for the District of Columbia unanimously upheld the district court ruling (*NTEU, et al. v. Chertoff*, 452 F.3d 839 [D.C. Cir.]). The three-judge panel, which included two Republican-appointed judges, went even further than the district court decision by ruling that the DHS unlawfully limited the scope of employee bargaining. Specifically, the appeals court ruled that the regulations:

...effectively eliminate all meaningful bargaining over fundamental working conditions (including even negotiations over procedural protections), thereby committing the bulk of decisions concerning conditions of employment to the Department's exclusive discretion. In no

sense can such a limited scope of bargaining be viewed as consistent with the [Homeland Security] Act's mandate that DHS ensure collective bargaining rights for its employees. (2006, 844)

As such, the court ruled that the proposed DHS reforms were "utterly unreasonable and thus impermissible...[and] it makes no sense on its own terms" (2006, 865). Then, in a decisive victory for the unions, the administration indicated that it would not appeal the decision to the U.S. Supreme Court (Rutzick 2006a). In effect, the labor relations' system was enjoined before it even began. Despite the rulings in *Chertoff*, however, Pentagon officials attempted to push through proposed labor reforms at the DoD. Thirteen unions, including those mentioned above and representing DoD civilian employees, prevailed at the district court level (see *AFGE v. Rumsfeld*, 422 F. Supp. 2d 16 [2006]). The DoD appealed, but as of this writing, a decision has not yet been handed down. Nonetheless, Congress has blocked funding of the labor relations' aspects of NSPS for 2007 (Rutzick 2006b). Meanwhile, federal employee unions have turned their attention to other aspects (e.g., pay-for-performance) of the proposed personnel reforms for the DHS and DoD.<sup>3</sup>

As the preceding illustrates, federal employee unions have clearly been unwilling to allow NPM reforms to alter the system of civil service that has historically worked to protect workers' rights. They have effectively relied on the courts to ensure that their rights are preserved. The lesson to be learned here is that any significant reform effort must take into account such internal stakeholders as public employee unions. Re-invention efforts must also recognize the role of the courts, which are the ultimate enforcers of civil service rules and regulations.

## Future Directions

With the impact of public employee unions on radical civil service reform clear at the federal level, future research on this topic might profitably be directed at the state level. As Hays and Sowa's (2006) examination of the impact of civil service reform on state personnel management systems shows, 28 states across the country are moving toward some form of at-will employment. What has the role of unions been amid these developments?

Interestingly enough, there is no discernible pattern among the states that are expanding at-will employment policies. For example, one might surmise that only the Sunbelt or right-to-work states are expanding such policies, but the research shows otherwise. Strong union states in the Northeast such as Massachusetts and New Jersey are expanding the numbers of employees subject to at-will employment policies. On the other hand, a number of right-to-work states—such as Alabama, Louisiana, Nevada, North Dakota, South Dakota, Tennessee, and Virginia—are not expanding their at-will employment policies. Have states such as New York and Wisconsin eschewed efforts to reform their civil service systems because of union resistance? This and other union-related questions suggested in the other commentaries are worthy of pursuit in future research.

## Notes

1. MaxHR has undergone a name change; it is now referred to as the "Human Capital Operational Plan."
2. The court also struck down proposed DHS rules which would have interfered with the Merit System Protection Board's (MSPB's) role of protecting public employees from merit abuses. The rules would have prevented the MSPB from altering or vacating DHS penalties imposed on employees for actions or behaviors that the DHS deemed improper or undesirable. The court also struck down the DHS's pro-

posed rules to weaken the responsibilities of the Federal Labor Relations Authority (FLRA), which serves as fact-finder and adjudicator in labor disputes in the federal government. The rules would have subsumed the FLRA's responsibilities under a newly appointed Homeland Security Labor Relations Board.

3. The Pentagon, however, has already moved a number of non-bargaining personnel into a new pay-for-performance system.

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