

POLITICAL PARTIES:
PUBLIC EMPLOYEES:

Patronage employment within all levels of government in the state of Missouri is constitutionally

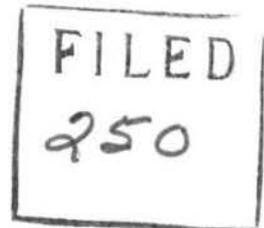
impermissible where any of the following conditions attach to such employment: (1) Any requirement that political party membership or approval be obtained before consideration is afforded applicants for patronage positions or to assure job security in patronage employment; and, (2) Any requirement that contributions of money, time or talent be made to a political party or personage before consideration is afforded applicants for patronage positions or to assure job security in patronage employment.

Likewise, any other form or manner of restriction or qualification placed on patronage employment would be constitutionally impermissible upon a determination by a court of law that it infringes or denies any of the following protected rights: (1) The First Amendment's guarantee of free speech and political association; (2) The Ninth Amendment's guarantee that allows one to engage in varying forms of political endorsements and activities to advance a particular view; (3) The Fourteenth Amendment's protection against infringement of the right to have an equal chance to attain elective office; and, (4) The Fourteenth Amendment's protection against infringement of the right to have an equally effective voice in the management of government.

OPINION NO. 250

October 16, 1972

Honorable A. Robert Pierce, Jr.
State Representative
225 North Clark
Cape Girardeau, Missouri



Dear Representative Pierce:

This opinion is in response to your request for an opinion on the following submitted question:

"Is patronage hiring which conditions employment with a governmental agency on varying forms of political allegiance to a party or personage Constitutionally permissible?"

This office interprets your question to be whether certain conditions, as below enumerated, can attach to patronage employment with governmental agencies within the state of Missouri or whether such conditions on employment are impermissible under

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the United States Constitution. Restrictions placed on public employment under patronage hiring practices, considered by this opinion, are the following:

(1) The requirement that an applicant for a patronage position be associated with a particular political party before consideration is afforded that applicant for patronage employment;

(2) The requirement that clearance be obtained from a political party or official before consideration is afforded that applicant for patronage employment; and,

(3) The requirement that contributions of money, time or talent be made to a political party or personage or that membership be retained in a political party to assure job security as a patronage employee.

The conditioning of patronage employment by governmental employers within Missouri affects the following rights protected by the United States Constitution:

(1) The right of free speech and association guaranteed under the First Amendment;

(2) The right to vote, the right to seek public office and the right to associate with a candidate for public office as a worker or contributor thereof guaranteed under the Ninth Amendment; and,

(3) The right to the equal protection of the laws and due process guaranteed under the Fourteenth Amendment.

Applicants for public employment in patronage positions and employees within a patronage office are directly affected by the conditioning of their employment, as above described. The United States Supreme Court has held that public employment cannot be denied a person or taken from him on impermissible constitutional grounds. This position was recently articulated in Perry v. Sindermann, 40 L.W. 5087 (June 29, 1972) wherein the United States Supreme Court stated:

"For at least a quarter century, this Court has made clear that even though a person has no

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'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible.

"We have applied this general principle to denials of tax exemptions, . . . unemployment benefits, . . . and welfare payments, . . . But, most often, we have applied the principle to denials of public employment. . . . We have applied the principle regardless of the public employee's contractual or other claim to a job. . . ." (40 L.W. at 5088-5089)

The respondent in Perry was a nontenured college professor who under applicable regulations could be dismissed without cause except ". . . that the nonrenewal of a nontenured public school teacher's [employment] . . . may not be predicated on his exercise of First and Fourteenth Amendment rights. . . ." (40 L.W. at 5089). See also, Wieman v. Updegraff, 344 U.S. 183 (1952) and Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969), cert. den. 396 U.S. 843 (1969). A patronage employee is in the true sense a nontenured employee who under prevailing case law may be dismissed from public employment or not hired in the initial instance without any statement of cause. However, the failure to hire or the dismissal of that employee may not be based on impermissible constitutional grounds.¹

¹The Second Circuit Court of Appeals, in Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1970), cert. den. _____ U.S. _____, held that a patronage employee, dismissed from employment on the grounds of her failure to change party allegiance, was not afforded federal constitutional protection despite the employee's allegation that

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The right to engage in activities to further one's political views was held in United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) to be reserved to the people by the Ninth and Tenth Amendments of the Federal Constitution. Also, the Supreme Court in Williams v. Rhodes, 393 U.S. 23 (1968) affirmed previous holdings that the First Amendment guaranteed the right of individuals to associate freely for the advancement of political beliefs.

Does patronage employment which conditions its hiring, as before described, infringe employees' or prospective employees' rights of free speech and political association and thereby deny such persons the equal protection of the laws? Whether such persons are denied the equal protection of the laws is to be determined by balancing the interests of the governmental body in the maintenance of a conditional patronage system against the interests of the employees to be free from official influence in their right to associate or advocate for the advancement of political ideas and beliefs. That is, whether the state or other public body can justify on a substantial and rational basis the necessity for maintaining a patronage system which conditions its employment on political affiliation or clearance and continuing contributions of money, time or talents.

Two functions are historically attributed to the necessity for maintaining patronage employment which conditions its hiring. They are:

¹cont'd
such action denied her the right of free political association.

In its decision the court held that ". . . the sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations. . . ." (447 F.2d at 483). The court, however, in holding that it should ". . . not . . . be understood as saying, . . . that in all circumstances may a provisional employee be summarily discharged. . . ." (447 F.2d at 483) failed to elevate the right of political association to what the court considered as protected areas, i.e., ". . . reputation and . . . eligibility for other employment." ". . ." (447 F.2d at 483).

In light of the recent decisions of Perry v. Sindermann, supra, and the declaration in Williams, infra, that "the rights of individuals to associate for the advancement of political beliefs . . . [is] among our most precious freedoms," any credence to be afforded to the holding in Alomar is without support in law or logic.

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(1) Conditioned patronage employment is necessary to reward and thereby maintain countless party activities including the financing of the party and its candidates, for promoting intra-party cohesion and to attract voters and support for the party; and,

(2) Conditioned patronage employment is necessary to aid party responsibility and thereby control and effect public policy.

The fundamental and paramount importance afforded the rights of free speech and political association assume that these rights, recognized and protected by the Constitution of the United States, must prevail over extra-constitutional political traditions, that is, patronage employment which conditions its hiring.

Based upon the above authority, it is the opinion of this office that the prerequisite of party affiliation or clearance attaching to patronage employment places an impermissible constitutional restriction on a job applicant's right to seek a patronage position and an employee's right to job security. Likewise, any requirement making contributions of money, time, or talent a condition for continuing job tenure within patronage employment is constitutionally impermissible.²

Conditional patronage employment, furthermore, affects candidates who seek public office and voters, workers and contributors of such candidates. A recent decision by the Seventh Circuit Court of Appeals, Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (7th Cir. 1970) cert. den. 402 U.S. 909 (1971), supports a contention that conditional patronage employment denies to candidates, who are in opposition to other candidates endorsed by the administration controlling patronage employment, and voters, workers and contributors of the former candidates, the equal protection of the laws.

²This office does not interpret the opinion request as pertaining to bipartisan or nonpartisan boards or commissions within the state and such question is specifically reserved. However, it is the opinion of this office that a persuasive argument and rational basis can be advanced for upholding the validity of such boards or commissions against the charge of their invalidity under the equal protection clause of the United States Constitution.

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In Shakman, resident taxpayers challenged the patronage practices of the city of Chicago and Cook County. The federal district court in Shakman dismissed the complaint. The Seventh Circuit Court of Appeals reversed. The complaint, brought by two plaintiffs, one an independent candidate for election as a delegate to the Illinois Constitutional Convention, and the other his supporter, alleged that there were in Cook County between 8,000 and 30,000 Democratic patronage employees. It was alleged that these latter employees were hired by officials of the defendant organization upon the condition that their employment was to be reviewed periodically and that the employees, for job tenure, were expected to contribute money and then work for candidates endorsed by the Democratic County Organization. The plaintiff as a candidate and both plaintiffs as voters sought a declaration that this conduct violated the equal protection clause of the Fourteenth Amendment.

The court of appeals held that the interest of voters in an "equally effective voice" in the management of their government and the interest of a candidate to an "equal chance" in an electoral contest are entitled to constitutional protection from infringement resulting from the misuse of official power over patronage employees (435 F.2d at 270). Thus, the court impliedly held unconstitutional those aspects of the political patronage system which required city and county employees, as a condition of holding their jobs, to furnish votes, campaign for and contribute money to a party or candidate of the public official's choice (435 F.2d at 270-271).

In another case, White v. Snear, 313 F.Supp. 1100 (E.D.Pa. 1970), county commissioners in Pennsylvania required county employees on primary election day to electioneer for party-endorsed candidates. The employees were marked present at work, and were, therefore, paid by the state for their political activity. In its opinion, the court held:

"The effect of [the commissioners'] . . . conduct is to favor a certain segment of a political party and to perpetrate its power through an abuse of authority conferred upon [them] . . . by the state. By doing so, they discriminate against all other segments and candidates within that party. A clearer violation of the Equal Protection Clause would be difficult to imagine. . . ." (313 F.Supp. at 1104)

The court in Shakman was confronted with the question of whether the patronage system, as alleged, violated the plaintiff's rights to equal protection under the law. The court was confronted with

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balancing the interests between the maintenance of the patronage system there employed and the rights of the candidate, voter, worker and contributor to be free from such abuse of official authority. After acknowledging the equal protection clause as the basis for relief, if any, the court held:

" . . . The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection . . ." (435 F.2d at 270)

The court in Shakman found it unnecessary to engage in a discussion between the justification for patronage hiring which conditions its employment and the elimination of such a system. The fundamental and paramount importance given to the right to vote (Wesberry v. Sanders, 376 U.S. 1 (1964)), its corollary the right to seek public office (Williams, supra), and their collaterally associated activities (United Public Workers of America, supra), assumes that these rights, recognized and protected by the Constitution, must prevail over extra-constitutional political traditions, that is, patronage employment which conditions its hiring.

It is the opinion of this office, based upon the above authority, that the rights of candidates to an "equal chance" to elective office and the rights of voters, workers and contributors of candidates to an "equally effective voice" in the management of their government are infringed by the operation of conditional patronage employment within the state of Missouri.

CONCLUSION

It is the opinion of this office that patronage employment within all levels of government in the state of Missouri is constitutionally impermissible where any of the following conditions attach to such employment:

(1) Any requirement that political party membership or approval be obtained before consideration is afforded applicants for patronage positions or to assure job security in patronage employment; and,

(2) Any requirement that contributions of money, time or talent be made to a political party or personage before consideration is afforded applicants for patronage positions or to assure job security in patronage employment.

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Likewise, any other form or manner of restriction or qualification placed on patronage employment would be constitutionally impermissible upon a determination by a court of law that it infringes or denies any of the following protected rights:

(1) The First Amendment's guarantee of free speech and political association;

(2) The Ninth Amendment's guarantee that allows one to engage in varying forms of political endorsements and activities to advance a particular view;

(3) The Fourteenth Amendment's protection against infringement of the right to have an equal chance to attain elective office; and,

(4) The Fourteenth Amendment's protection against infringement of the right to have an equally effective voice in the management of government.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kermit W. Almstedt.

Yours very truly,



JOHN C. DANFORTH
Attorney General