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Loosen the Shackles on Pennsylvania Local Government’s Hiring Authority: An Argument for Banding

United States taxpayers annually devote $500 billion to government employees’ salaries, and no doubt Pennsylvania’s public servants account for a sizable percentage of that sum.\(^1\) Alas, not even a resource pool this vast can prevent the frequently bemoaned conclusion that government fails to provide services efficiently and effectively.\(^2\)

Pennsylvania government’s statutory-based hiring practices, referred to as civil service, are a major source of government’s reputation for substandard performance and, in fact, make such a reputation inevitable. This comment argues that Pennsylvania government units will be better able to meet the public’s needs if the legislature will adapt the civil service hiring laws to more modern workplace practices. The conclusion calls not for a drastic change that ignores the commonwealth’s long tradition of merit public employment, but for a moderate alteration, banding, that will enable government to provide services proficiently while protecting taxpayers from the inefficiencies and dangers associated with unqualified public employees.

This comment first discusses the rise of civil service. It then examines Pennsylvania civil service hiring practices and modern workplace competencies. Finally, it introduces banding and illustrates how this technique satisfies the public’s call for increased effectiveness and fair play.

A government official’s proper level of discretion in hiring has been the subject of debate since the earliest days of the United States.\(^3\) Echoing a practice already entrenched in state government

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3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), a matter involving judicial appointments. At issue was the distinction between a government official’s discretionary authority and mandated obligation. *Id.* at 165-67.
(and in effect at the federal level\textsuperscript{4}), Andrew Jackson introduced the "spoils" system to the federal level in 1828, and presidential successors, regardless of political affiliations, continued the practice of awarding government positions to political supporters.\textsuperscript{5} The debate that this practice generated involved rhetoric that one would not be surprised to read in a modern newspaper. The pro-spoils camp supported patronage hiring by citing increased participation in government, focus on the electorate's mandate (i.e., only those tied to the administration could achieve the president's platform), and lessened corruption. The anti-spoils camp campaigned for a government workforce free from administration control and thus better able to provide efficient and fair service.\textsuperscript{6}

The assassination of President James Garfield hastened the debate to a dramatic conclusion. Applying the spoils system, Garfield had excluded an office seeker. The disgruntled man shot the president and, in doing so, provided so strong a rallying point for the anti-spoils faction as to produce the nation's first federal merit employment law,\textsuperscript{7} the Pendelton Act.\textsuperscript{8} Civil service has dictated federal government hiring procedures ever since.

Pennsylvania enacted public sector merit employment acts after the federal legislature passed the Pendelton Act. Prior to civil service laws, Pennsylvania local government employment was a function of local executive nomination and local assembly consent.\textsuperscript{9} However, early in the twentieth century, the governor and the legislature joined a national groundswell calling for greater government effectiveness and less corruption. By passing various civil service acts, the commonwealth became one of the earlier


\textsuperscript{6} \textit{See Developments in the Law, supra} note 5, at 1626-28.

\textsuperscript{7} \textit{Id.} at 1627-28.


\textsuperscript{9} For example, Article 2, section 4 of the previous Third Class Cities Act, Act of May 23, 1889, P.L. 299, outlined the following procedure for police appointment:

Council shall fix by ordinance the number, rank and compensation of the members of the city police force, and prescribe all necessary rules and regulations for the organization and government thereof . . . . The mayor shall nominate, and by and with the advice and consent of the select council appoint, suspend or dismiss the said policemen, any or all of them, and in like manner all vacancies shall be filled.

\textit{See Commonwealth v. Black, 50 A. 1008 (Pa. 1902).}
states to legislate merit-based government appointments.10

The Pennsylvania Legislature's first major step toward civil service focused on Philadelphia. In 1906, Pennsylvania's governor called an extraordinary legislative session to address, among other matters, Philadelphia government appointment practices.11 In a subsequent Pennsylvania Supreme Court decision, President Judge Sulzberger summarized the necessity of the extraordinary session:

[A]n opinion had come to be generally held by the people of the Commonwealth, and of this city, that the power of appointment conferred upon directors of the various departments was in danger of being used to strengthen the power of the political party of which a director for the time being might be an adherent, instead of being exercised with an eye single to the interests of the whole public.12

The special legislative session produced The Shern Law, which established a civil service system in cities of the first class and, as a result, mandatory merit-based appointments to routine positions (based on fitness and qualifications).13

The current Philadelphia civil service law (the "First Class Cities Act") is a more detailed, more protective act than was its Shern Law predecessor.14 Enacted in 1919, the current act embodies the legislature's intention to attract and retain competent employees regardless of their political or religious affiliations, so long as those employees perform adequately.15 The act provides for distinguished

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10. Cynthia Grant Bowman, Public Policy: "We Don't Want Anybody Anybody Sent": The Death of Political Patronage Hiring In Chicago, 86 NW. U.L. Rev. 57, 60-63, 1991. Professor Bowman notes that patronage hiring has roots in ancient China and credits the Progressives and journalists with bringing the matter to the public's attention. In addition, "lawyers, editors, clergyman, professors, and businessmen whose interests were mercantile and financial rather than industrial" also contributed to the reform movement. Developments in the Law, supra note 5, at 1626-27.


12. Id.

13. Id. The Act of February 15, 1906 (P.L. 19) further required just cause dismissals. For legislative purposes, Pennsylvania divides its cities into four classes: first class cities have populations of at least one million; second class cities have populations of at least two hundred and fifty thousand and fewer than one million; second class-A cities have populations of at least eighty thousand and fewer than two hundred and fifty thousand; third class cities also have populations of at least eighty thousand and fewer than two hundred and fifty thousand but do not choose second-class A status. General Municipal Law, Classification of Cities, 53 PA. CONS. STAT. §§ 101 (1997).


employment classes, rule-making authority, just cause dismissal, and merit testing.

Shortly after passing the original civil service law (which applied only to first class cities), the Pennsylvania legislature extended merit employment to smaller cities. On the heels of the consolidation of the separate cities of Allegheny and Pittsburgh into what is presently the city of Pittsburgh, the legislature enacted the General Civil Service Act for cities of the second class. The act's purpose is familiar to reformers: "securing legislation to protect honest and capable employees and to improve the service by establishing a set of requirements which would ensure that new employees would be capable of fulfilling the duties of their position." The provisions are similar to those of the First Class City Act because they identify employment classes, authorize civil service commission rule making, and require just-cause dismissal and merit testing. Third class cities gained civil service in 1931 and second class-A cities followed in 1943.

Thus, in the battle between proponents of spoils and proponents of merit, the Pennsylvania legislature awarded victory to the latter by enveloping all cities within civil service systems. Although they differ by class of city, the merit laws share similar principles. Key among these similarities are classification of positions and requirements of appointment.

Aware that not all job types are alike, the legislature identified several classifications of positions. Each law designates a

16. The Act divides first class city employees into the following classifications: competitive; exempt; and labor. 53 PA. CONS. STAT. at § 12627 (1998).
17. The Act authorizes the civil service commission to adopt rules concerning, among other matters, application rejection, former employee reinstatement, position transfer, public advertisement, and eligibility list creation. Title 53, § 12633.
18. The Act specifically requires just cause for dismissal and provides discharged and disciplined employees with the right to a public hearing. Title 53, § 12638.
19. Title 53, § 12634.
23. 53 PA. CONS. STAT. at § 23443.
24. Title 53, § 23440.
25. Title 53, § 23453.
26. Title 53, §§ 23441, 23455.
28. 53 PA. CONS. STAT. §§ 30451-30475 (1998). This comment focuses on the first class and second class laws. Note that the topics discussed herein, including banding, apply equally to second class-A and third class cities.
competitive class of positions that requires appointments to follow practical examinations to distinguish candidates' merit. The laws further recognize that not all government positions are amenable to distinguishing candidates by competitive examination. Thus, civil service laws allot both first and second class cities certain "exempt" positions and jobs that include duties and responsibilities that do not lend themselves to testing and therefore require no qualifying examination. By limiting the initial number of exempt titles and requiring a hiring authority to show cause at a public hearing to add to the initial allotment, the civil service acts discourage exemptions and thereby push titles into classifications that require testing, including the competitive class.

A second similarity among civil service laws is the method of appointing candidates to competitive classification positions. Candidates for competitive positions in first and second class cities must successfully complete practical examinations and gain entry on a ranked eligibility list. Pennsylvania civil service law limits a hiring authority's access to the competitive eligibility list. Instead of selecting from among all examination passers, the hiring authority of the first class city must choose between the two highest-scoring available candidates (the "Rule of Two"), and a second class city hiring authority must choose from among the three highest-scoring

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29. The first class city law requires practical examinations modeled on the relevant job's duties and allows for oral examinations, so long as their weight does not exceed 25% of the final score. 53 PA. CONS. STAT. § 12634 (1998). Examination score order determines candidates' arrangement on resulting eligibility lists. Title 53, § 12634. The second class cities law also requires practical examinations that judge merit and fitness (53 PA. CONS. STAT. § 23441 (1998)) and examination score order dictates eligibility list arrangement. Title 53, § 23446.

30. Title 53, section 12628, identifies first class cities' exempt titles and procedures and requirements for adding additional exempt titles. Title 53, section 23444 provides the same function for second class cities.

31. A first class city's statutorily exempt titles are department chief assistants, one mayor-appointed secretary or clerk, and one secretary or clerk for each department. No other titles are exempt unless the civil service commission so designates it after a public hearing. 53 PA. CONS. STAT. § 12628 (1998). First class cities employment designations also contain an unclassified service—including, among others, elected officials, department directors, city solicitor and assistant city solicitors, and certain contracted personnel, none of whom enjoy civil service privileges. Title 53, § 12623. Second class city law mandates exempt classification for heads of police and fire departments, one secretary and one clerk reporting to the mayor, and one clerk reporting to each department director. 53 PA. CONS. STAT. § 23444 (1998). The second class city law also designates an unclassified service consisting of elected officials, department heads, civil service commissioners, and those appointed by name in any statute. Title 53, § 23439.

32. See supra note 26.

available candidates (the "Rule of Three"). A separate civil service act for cities of the second class addresses the firefighting service. This act requires the second class city hiring authority to appoint the highest scoring available candidate to the firefighter vacancy (the "Rule of One").

In this way, municipal employee selection is a function of limited employer discretion. Instead of perusing the full slate of available candidates and hiring anyone who meets the qualifications, the hiring authority may appoint only from among the highest examination scorers or not appoint at all. Whether this procedure is appropriate turns on its ability to staff municipalities with employees who are able to meet modern local governments' missions. Because they are outdated and contrary to modern workplace practices, such discretion limitations are too severe to allow local government to function effectively and should be supplanted with a more responsive approach.

Faced with a public employment system based in large part on patronage, state legislators devised civil service systems that reflected best-practice employment models. These models were creatures of an industrial period that valued such employee traits as physical strength and the ability to perform repetitive actions. Employees would fit into a triangular structure in which those at the higher end managed the work processes and those at the lower, more populous end performed tasks without straying from

34. 53 PA. CONS. STAT. § 23446 (1998).
36. Title 53, § 23493.1. The hiring authority may refuse to appoint the firefighter eligibility list member with the highest examination score for written just cause. Title 53, §23493.1.
37. See Trosky v. Civil Service Commission, 652 A.2d 813 (Pa. 1995) (to promote an employee under the Rule of Four, the municipality must choose from among the four highest-scoring candidates). See also Civil Service Commission v. Paieski, 559 A.2d 121 (Pa. Commw. 1989) (the municipality is without authority to alter the civil service-prescribed method of promotion). A municipal hiring authority does have a degree of discretion in original appointments. For example, a second class city hiring authority may remove a candidate from an eligibility list after the hiring authority has, through the Rule of Three, selected three lower-scoring candidates (53 PA. CONS. STAT. § 23442 (1998)). In addition, the hiring authority may refuse to examine an applicant who does not meet the job's prerequisites or who "has been guilty of any crime or of infamous or notoriously disgraceful conduct" and for other reasons. Id.
38. See supra notes 3-36 and accompanying text.
their narrowly-defined duty lists. This system compensated for employees' low education levels and the demand for goods by matching employees with pre-scripted, unalterable tasks, thereby focusing on the product instead of the process.

Nearly a full century after the passage of early civil service laws, including Pennsylvania's civil service laws, business operations and perceptions of employees' worth have changed. In the modern workplace, greater productivity and the profits associated therewith result from turning the triangle on its head. Workplaces today empower employees to manage work, thereby emphasizing knowledge, learning, judgment, and innovation as opposed to ability to follow rules and perform repetitious tasks. This change in orientation reflects the recognition that increasing the work output is a direct function of increasing the quality of personnel, that employees are as strategic a resource as is capital, and that a business's ability to prosper relies on its ability to hire effective employees.

Employers seek employees who understand the philosophy of, and have the skills to succeed in, the modern workplace model. The employee finds himself or herself in a decentralized, "fields of work" environment in which individual, narrow position descriptions defer to the workplace's broader mission. The employee is a key participant in the business or production process and often is part of a team that requires active participation and is vested with authority. Employee success, and, thus, employer success depends on the employee's adaptability, interpersonal skills, and willingness to learn, and not merely on a specific professional- or discipline-oriented skill.


42. See Milkovich, supra note 41, at 67.


44. See Carnevale, supra note 41.


46. See Carnevale, supra note 41. See also Borman, supra note 45.

47. Id.
An example of an employer that succeeds with modern employee systems is International Business Machines ("IBM"). Faced with a decision of whether to manufacture needed circuit boards or purchase the items and enjoy an estimated $60 million savings with the purchasing option, IBM decided to invest in its workforce.48 The organization restructured its processes by empowering its employees through increased training, team formation, and employee responsibility for quality. Successful IBM employees were those able to adapt, interact, and use independent judgment rather than those who excelled at a singular production duty.49 As a result, IBM enjoyed a 200% rise in productivity, a 500% rise in quality, and a 40% cut in inventory.50

Another example of a successful workplace utilizing modern personnel techniques is Texas Instruments ("TI"). Realizing that employee success is not “based on skills,” TI instituted a self-directed workforce team philosophy.51 To ensure that job candidates will thrive in the team environment, TI screens for, among others traits, ability to be a team player and strong interpersonal skills.52

The workplace refocus from employee restriction to employee worth, dramatic at first blush, is logical in light of the last century’s advancements. Today’s employers face issues unimagined by their turn-of-the-century predecessors, including steep healthcare costs, cultural diversity, and more extensive legal liability.53 Manufacturing jobs have steadily given way to positions requiring employees with enhanced education, reasoning ability, and adaptability.54 The result is natural: as routine-based jobs make up less of the available positions, the remaining jobs require multifaceted employees. Furthermore, identifying a potential employee who will succeed in a workplace demanding many skills is more difficult than is identifying one who will succeed at a single task.55

49. Id.
50. Id.
52. Id.
53. See Klinger, supra note 48.
54. See Mosca, supra note 40, at 47. Professor Mosca notes that the United States workforce lost 188,000 manufacturing jobs in 1996 and that machines now perform work historically performed by employees. Id.
55. Selecting successful employees is made more difficult by the following statistics: The United States labor force will grow one percent annually until the year 2005 (compared
Although business practices have evolved over the last one hundred years, the Pennsylvania legislature has remained true to the policy of limited public employee selection discretion. This is not to assert that local government units have remained completely fixed in time while their private sector counterparts have raced ahead. Nonetheless, the public today expects government to be more responsive and to produce greater results with lessening resources, in effect doing more with less. In attempting to achieve this edict, local government faces the same reality that private business faces, that of more complex jobs. Government, however, has been forced to navigate this reality with antiquated hiring processes that act as impediments to improvement.

Pennsylvania's mandated local government hiring practices are made more restrictive by the significant weight afforded civil service laws. It is well settled that government hiring must strictly conform to legislated civil service protocols. Such rigidity is ill suited to a Pennsylvania municipality's attempt to appoint the most able candidate for two reasons. First, a municipality may not hire a civil service candidate, even if the candidate is clearly the best job seeker, unless the candidate is among the top one, two, or three scorers. Second, a municipality's mandated reliance on practical tests does not ensure that the best candidates will rise
to 33% from 1975 to 1990 and 20% from 1990 to 1995) and 2.5 million functionally illiterate Americans join the workforce each year. See Arthur W. Sherman, George Bohlander & Scott Snell, MANAGING HUMAN RESOURCES, 1996 at 157.


57. See notes 40-44 and accompanying text. See City of Pittsburgh First to Equip Police Force with Wireless Computers, BUSINESS WIRE, December 3, 1997 (police officer abilities now include computer literacy) and Keith Herbert, Community Policing Institute Introduces Its New Director, THE MORNING CALL (ALLENTOWN), February 25, 1999, at B2 (modern police officer abilities include service orientation, problem solving, and community participation).

58. See America's Choice, supra note 41, at 54. See also David Osborne & Ted Gaebler, REINVENTING GOVERNMENT 124-30 (1993).

59. Snizaski v. Zaleski, 189 A.2d 284, 286 (Pa. 1963) (appointees did not attain civil service status and concomitant protections when municipality failed to follow civil service testing provisions in strict manner). See also Mafoski v. Pittsburgh, 350 A.2d 423, 425 (Pa. Commw. 1976) ("[I]n general, civil service laws cannot be obviated by agreement," quoting Geis' Appeal, 19 A.2d 368 (Pa. 1941) and Blawnox Council v. Olszewski, 477 A.2d 1322, 1326 (Pa. 1984) ("The provisions by which the civil service operates constitute a strict framework of operations by which no employee may be appointed, or transferred, reinstated, or discharged in any manner or by any means other than those specified by statutes regulating civil service.").
to the top of an eligibility list.

Because civil service laws prescribe municipal hiring procedures, any deviation from appointing the highest test scorers to a vacant competitive position results in an invalid hiring. For example, if the fourth-highest-scoring competitive test-taker in Pittsburgh possesses superior abilities in adaptability, interaction, and willingness to learn, the Pittsburgh hiring authority may not appoint him or her without first appointing one of the top three scorers. This result does not change when the fourth-ranked candidate's test score is one percent less than the highest test score.

When strictly applied, the Rules of One, Two, and Three as methods for determining the best candidate are inherently flawed. To determine appointment merit effectively with Pennsylvania selection protocols, a competitive test must produce scores that distinguish two test takers’ ability to succeed on the job. This task appears to be impossible. Tests often produce eligibility lists that separate numerous candidates by only one percent. However, a test can be only so precise, and tests generally are incapable of truly distinguishing between two candidates who are very close in score. The United States Supreme Court advanced this conclusion in Johnson v. Transportation Agency by quoting an amicus curae brief submitted by the American Society for Personnel

60. These are the skills sought by modern employers. See supra notes 45-52 and accompanying text.

61. See City of Pittsburgh Eligibility List for Firefighter Recruit, posted September 24, 1998 (revised February 25, 1998) (The highest ranked candidate's score is 100%, the next five candidates' scores are 99.5%, and the next ten candidates' scores are 99%; the eligibility list consists of 215 candidates.).

62. Id. The top sixteen city of Pittsburgh firefighter candidates scored within one percent of each other. See also Too Many Agencies, Too Many Rules: Reforming California's Civil Service, Report to the Governor and Legislature, LITTLE HOOVER COMMISSION, April, 1995, at 56 (It is common for ten to twenty candidates to share the highest examination score; random tie breaking does not guarantee that the best candidate will achieve an appointable rank).

63. Stephen Wollack, Confronting Adverse Impact in Cognitive Examinations, 23 PUBLIC PERSONNEL MANAGEMENT 217, at 221, Summer, 1994. ("[I]t is statistically inappropriate to make employment decisions based upon small differences in test scores.") See City of Cincinnati, Steps to High Performance City Government, REPORT OF THE CITY MANAGER'S INTERNAL REVIEW TASK FORCE, October, 1994, at 9 (promotional test scores can result in statistically insignificant graduations). For comparative analysis, See Michael S. Moore, Three Hours on a Saturday Morning, SF WEEKLY, December, 10, 1997 (small differences in Scholastic Aptitude Test ("SAT") scores are not predictive, although large differences are meaningful predictors; consequently, the SAT test has become essentially meaningless for admission to the University of California system (except UCLA and Berkeley) when the applicant has attained a 3.3 high school grade point average).

64. 480 U.S. 616 (1987).
Administration:

It is a standard tenet of personnel administration that there is rarely a single, "best qualified" person for a job. An effective personnel system will bring before the selecting official several full-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is "best qualified" are at best subjective.\textsuperscript{65}

Thus, reliance on test scores does not result in selection of the most able candidate. Strict compliance with civil service selection protocols is an "overrationalized personnel procedure" that falls short of identifying the best candidate.\textsuperscript{66}

Strict civil law interpretation also impedes a Pennsylvania municipality's efforts to hire an employee with modern workplace abilities through misplaced reliance on practical tests. Civil services laws require that competitive tests be practical in nature,\textsuperscript{67} so civil service tests must measure one's ability to act.\textsuperscript{68} However, modern employee abilities consist of more than those "manifested in practice or action," i.e., the more technical aspects of a job. Mounting evidence suggests that a candidate's personality and attitude may be stronger predictors of on-the-job success than may performance on practical skill tests.\textsuperscript{69} Employers' increasing use of

\textsuperscript{65} Johnson v. Transportation Agency, 480 U.S. at n.17 (quoting amicus curae brief). See also Norma M. Riccucci, Merit, Equity, and Test Validation, 23 ADMINISTRATION AND SOCIETY 74, 76, May, 1991. Professor Riccucci states that neither the idea of merit nor the technique for determining merit is fixed. Id. at 88. She also states that identifying through testing the mental traits necessary for successful job performance is a difficult task. Id. at 81, citing W.R. Nelson, Employment Testing and the Demise of the PACE Exam, 33 LABOR LAW JOURNAL 729, at 740-41, 1982.

\textsuperscript{66} See Klinger, supra note 48.


\textsuperscript{68} "Practical" refers to abilities "of, relating to, or manifested in practice or action: not theoretical or ideal." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 914 (10th ed. 1994).

\textsuperscript{69} John A. Parnell, Improving the Fit Between Organizations and Employees, 63 SAM ADVANCED MANAGEMENT JOURNAL 25, January, 1998. Even conservative testing experts who argue that practical skills are the most predictive benchmark of candidate success concede that an employer should be able to include personality and attitude in the hiring decision. Id.
personality tests indicates increasing acceptance of such tests that evaluate traits other than technical skills.\(^\text{70}\) However, even if one defines "practical" broadly, it is unlikely that personality and attitude evaluations pass "practical" muster. Therefore, Pennsylvania law prevents local governments from using this significant predictive tool.

Regardless of the "practical" requirements, tests may further restrict government employee selection. The idea of testing as a reliable predictor of employee success has a significant following.\(^\text{71}\) However, numerous reports conclude that testing is fraught with problems, including tests' inability to measure job candidates' potential,\(^\text{72}\) tests' predictive fallibility,\(^\text{73}\) and tests' haste in removing a potentially strong employee.\(^\text{74}\)

Charles Darwin instructed that life forms adapt over time to survive. Arguably a life form itself, government has also adapted to deliver services in modern times. This adaptation may, however, run afoul of civil service's broad purpose. Instead of consistently following the prescribed system of testing and appointing only the very highest scorers, governments are increasingly likely to bypass

\(^\text{70}\) The Americans Management Association survey reports that 28% of employers currently use pre-employment personality tests; in comparison, only 19% used such tests in 1997. Sandra Livingston, Hiring the Right Personality, THE PLAIN DEALER, August 2, 1998 at IH. Honesty is another non-technical trait that employers seek in candidates and may be a more important success predictor than are skill tests. Peter Schragg, When Preferences Disappear, THE AMERICAN PROSPECT, January, 1997 to February, 1997. The importance of honesty in the screening process is illustrated by an American Society of Chartered Life Underwriters & Chartered Financial Consultants and the Ethics Officers Association finding that 48% of employees admit to unethical or illegal on-the-job activity. Samuel Greengard, 50% of Your Employees Are Lying, Cheating, and Stealing, WORKFORCE, October, 1997, at 46.

\(^\text{71}\) See Steven J. Cesare, A Predictive Validation Study of the Methods Used to Select Eligibility Technicians, 22 PUBLIC PERSONNEL MANAGEMENT 107, March, 1993 (written tests that follow a clear methodology are predictive), and Daniel Masden, Observations and Comments on “Reinventing Government,” 24 PUBLIC PERSONNEL MANAGEMENT 113, at 123-24 (tests at least clearly compare one candidate to another and thereby eliminate bias).

\(^\text{72}\) Mike Sager, Testing Anxiety, THE WASHINGTON POST, January 16, 1983, at 6 (a National Education Association program development specialist reports that humans are too complex to be susceptible to accurate testing). Because needed workplace skills evolve so rapidly, employers must identify candidates who will be able to adapt to changing needs and add or enhance skill sets. See Jennifer J. Laabs, Eyeing Future HR Concerns, PERSONNEL JOURNAL, January, 1996, at 36 (Eckerd College Human Resource Institute director predicts employee skills will experience a one- to three-year half-life by 2005).

\(^\text{73}\) Fred E. Inbau, Integrity Tests and the Law, SECURITY MANAGEMENT, January, 1994 (citing an American Psychological Association conclusion that all tests include a degree of fallibility).

\(^\text{74}\) Nora Lockwood Tooher, Aptitude Tests Work Like Signposts on a Career Path, THE COLUMBUS DISPATCH, July 6, 1998, at 8 (aptitude tests "don't tell the whole story" and may disqualify one who requires more time to become proficient).
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civil service requirements and instead employ part-time, seasonal, temporary, and exempt employees. By turning to a contingent workforce, government merely emulates a powerful private sector trend. However, by bypassing civil service appointment requirements in this way, government forsakes the civil service's broad purpose to serve as "a complete and exclusive system for the appointment, promotion, reduction, transfer, removal, or reinstatement of all officers, clerks, laborers, and other employees." 7

Local government is consistently chastised for its bureaucratic procedures and slothlike response to citizens' needs. Such criticism is inevitable, in part because the Pennsylvania legislature forces once defendable, but now outmoded, hiring systems on municipalities that are expected to satisfy modern expectations. The governmental hiring process is akin to a private company's appointing a computer programmer solely because she has the best spreadsheet skills; while recognizing her practical ability to produce a computer document (which she will do only 30% of the time), this selection ignores the required workplace abilities of leadership, adaptability, judgment, teamwork, and inter-personal communication. The private sector would not accept this myopic mode of selection, and Pennsylvania citizens should reject the same process in government employee appointment. Reforming outmoded civil service selection procedures is a

75. Donald Klinger & Dahlia Bradshaw Linn, Beyond Civil Service: The Changing Face of Public Personnel Management, 26 PUBLIC PERSONNEL MANAGEMENT 157 (1997). See also The Law of Patronage at a Crossroads, 12 JOURNAL OF LAW & POLICS 341 (Spring, 1996) (the Illinois Department of Transportation bypassed civil service requirements by hiring highway maintenance workers for six-month contracts, claiming the workers to be non-career employees and thus not covered by civil service appointment law); Jay Evenson Don't Allow Merit System to Obstruct Good Government, THE DESERT NEWS, October 12, 1997 (to avoid the civil service system, the Georgia Department of Transportation fudged job titles and job requirements). Pennsylvania courts have distinguished between full-time, career-oriented employees and part-time employees (Milisits v. City of Pittsburgh, 695 A.2d 895, 898 (Pa Commw. 1997)).

76. Towers Perrin research indicates that 20% of the workforce consists of temporary employees, a figure expected to grow to 33% by 2004; temporary employees allow an employer "to respond to an ever-changing marketplace." Shari Caudron, Contingent Work Force Spurs HR Planning, PERSONNEL JOURNAL, July, 1994 at 53. For an argument in favor of government emulation of private sector practices, see Kristi Cameron, Joan Jorgenson & Charles Kawecki, Civil Service 2000 Revisited: Old Assumptions—New Facts and Forecasts, 22 PUBLIC PERSONNEL MANAGEMENT 4, December, 1993; for an argument against government emulation of the private sector, see Madsen, supra note 71.


78. See Hard Truths/Tough Choices, supra note 2, at 1, 4.
daunting task, but several government units have achieved success. The states of California, Minnesota, and Virginia, as well as the municipal governments of Baltimore, Dallas, Indianapolis, and San Diego have rejected the “Rule of Three” and substituted increased hiring authority discretion and responsibility.80 New Jersey Governor Whitman suggested replacing the “Rule of Three” with a “Rule of Ten” and further recommended allowing local government to opt out of civil service.81 Perhaps the largest-scale civil service reform occurred in Georgia, where the state legislature disbanded civil service in its entirety for all newly-hired employees.82

This comment suggests that the Pennsylvania legislature amend the various civil service laws to allow banding, a technique that combines candidates with close test scores into one unit from which the hiring authority may appoint any member.83 This recommendation is less drastic than is the deathblow Georgia legislation, an approach that is inconsistent with Pennsylvania’s ingrained civil service tradition.84 It does, however, remove the statistically inappropriate barriers to appointing candidates who are best able to succeed and enable government hiring officials to include modern workplace competencies in selection analysis.

Banding offers a methodology geared to employer and candidate fairness and selection reliability. Recognizing that small test scores differentials are insignificant predictors of job candidates’ success, banding allows the hiring authority to focus on candidates’ superior qualifications (including modern workplace competencies) as opposed to minuscule test result differentials.85 Chief Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals expounded on banding’s effectiveness:

Banding is premised on the belief that minor differences in test scores do not reliably predict differences in job

79. Jonathan Walters, Untangling Albany, GOVERNING MAGAZINE, December, 1998, at 18 (civil service is “a monster off whose chest comprehensive reports on reform bounced like whiffle balls — 27 of them since the 1970s.”)
83. See Wollack, supra note 63, at 222.
84. See supra notes 7-35 and accompanying text.
Loosen the Shackles

performance. It also recognizes that an individual is unlikely to achieve an identical score on consecutive administrations of the same examination. Because some measurement error is inevitable, strict rank order promotions will not necessarily reflect the correct comparative abilities of the candidates. The smaller the difference between observed scores, the more likely it is a result of measurement error, and not a variance in job-related skills and abilities.\(^{86}\)

There are two recognized versions of banding—"fixed bands" and "sliding bands." The fixed bands method classifies all test scores within a given range as equal.\(^{87}\) The employer determines the ranges according to accepted testing principles, such as standard error of measurement.\(^{88}\) Each band member is qualified for the vacant job because she has passed the examination. The hiring authority may appoint any member of the highest available band and may not appoint from the next highest band until the pool from the highest available band is depleted.\(^{89}\)

The sliding bands method mirrors the fixed band technique in all respects but one. When the hiring authority appoints a member of the highest available band, the highest scoring member of the next highest band moves into the highest band.\(^{90}\) Using this technique, the hiring authority need not exhaust the highest available band before appointing other candidates.\(^{91}\)

Banding enables a government hiring authority to secure a workforce that is competent and capable by modern standards without sacrificing historical principles of merit. Instead of being locked into appointing the first-, second-, or third-highest scorer on a practical test, the hiring authority may evaluate the modern workplace competencies of a broad range of candidates who passed a qualifying examination.\(^{92}\) Whereas the current rules prevent the hiring authority from considering some candidate

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86. Officers for Justice v. Civil Service Commission of San Francisco, 979 F. 2d 721, 723-24 (9th Cir. 1992) (banding is a valid selection technique to determine San Francisco police sergeant and assistant inspector promotions). See Sheldon Zedeck, Use of Sliding Bands Offers a Way to Select a Diverse Workforce, EMPLOYMENT TESTING, March, 1996 (multiple administrations of the same examination instrument to the same test taker will produce different scores).

87. See Zedeck, supra note 86.

88. See Wollack, supra note 63, at 222.

89. See Zedeck, supra note 86.

90. Id.

91. Id.

92. See supra notes 60-66 and accompanying text.
because of testing imprecision, banding removes testing's knockout effect.\textsuperscript{93}

Banding also allows a local government to focus its employment selection on the particular needs of its region. Modern human resources management requires successful organizations to customize their hiring practices. Instead of hiring individuals who would flourish in other organizations, the hiring authority should appoint candidates who match the hiring organization's goals and strategies.\textsuperscript{94} This approach is contrary to turn-of-the-century industrial hiring (the civil service model), when employees' cookie-cutter key attributes of physical strength and redundant task completion did not affect an organization's goals and strategies. To hire employees who match a specific organization's goals and strategies in the modern world, the hiring authority must have some level of selection discretion and not be compelled to appoint an ill-fitting candidate.\textsuperscript{95} Banding allows the needed discretion and, thereby, enables the hiring authority to match a candidate's knowledge, skills, abilities, and other characteristics to the specific municipality's vision.

A comparison of the legislated selection method and banding illustrates the hiring official's greater chance of appointing a successful employee through the latter method. The City of Pittsburgh hires police officers by administering practical examinations, a requirement of both selection techniques because both require that eligible candidates meet baseline qualifications.\textsuperscript{96} What changes is the method of appointment. Under the current law, the hiring official must appoint one of the three highest scoring candidates. Under banding, the hiring authority must appoint from a group that could number as high as fifty or more candidates (depending on the test takers' scores and the width of the band).

The current "Rule of Three" method is rigid and virtually decides the issue of which candidate is appointed, but it assumes one of the three highest scorers is the best candidate for the job. However, police officer responsibilities are not clearly capable of being tested. Police officer duties require incumbents to engage in complex analysis, and errors in judgment carry potentially

\textsuperscript{93} See supra notes 67-74.
\textsuperscript{95} See Rousseau, supra note 43.
\textsuperscript{96} See supra note 34 and infra note 101 and accompanying text.
catastrophic consequences. Because they often work alone, officers must be able to perform their duties and responsibilities without the aid of back up; thus, the position requires independent judgment ability. It is feasible that none of the top three examination scorers ever held a job or interacted with diverse groups of people. It is further feasible that none of the top three scorers have backgrounds that demonstrate success under pressure. Regardless of these possible deficits, the “Rule of Three” offers the hiring authority two choices: appoint one of the three or appoint no one. Under a banding system, the hiring authority may select from a large number of candidates with test scores that are similar to the top three scorers. The appointment would go to one who has a demonstrated record of maturity, self-control, judgment, and interpersonal communication ability—all traits required of a modern police officer.

Those who propose a careful approach to civil service reform often cite invited patronage and government officials’ inability to make good hiring decisions as reasons for caution. Banding as a reform should satisfy cautious observers. Just as new business practices and employee selection techniques have emerged since Pennsylvania enacted its civil service statutes, so, too, have new candidate and employee protections that counter banding abuse.

Banding works alongside two protections that are designed to ward off a return to patronage. The first protection is that only test passers may be included in a band, so the only candidates eligible for appointment under a banding system are those with proven qualifications for the vacant position. Banding prevents a hiring authority from appointing an individual who lacks the basic, practical skills to perform the job. In effect, banding will produce a result no less acceptable than the current statutory requirement, for

99. See Madsen, supra note 71, at 117.
100. See Chmill v. City of Pittsburgh, 412 A.2d 860, 874-75 (Pa. 1980) (court accepted that all firefighter test takers with examination scores of at least 75% were equally qualified). Note that only those applicants who meet established position prerequisites may participate in a civil service examination. See 53 PA. CONS. STAT. § 23442 (1907)("The said commission may refuse to examine an applicant . . . who is found to lack any of the established preliminary requirements for the examination or position of employment for which he applies . . .").
both techniques compel appointment of a candidate with a high test score.

The second protection against a return to patronage is settled spoils case law. The Elrod\textsuperscript{101}-Branti\textsuperscript{102}-Rutan\textsuperscript{103} trilogy, each decided long after the patronage debate had produced civil service systems, severely limits government's ability to inject spoils into the hiring process. In holding that government employees' First Amendment rights trump government's political patronage rights, \textit{Elrod} and \textit{Branti} provided a cause of action for government employees who are terminated for their political affiliations.\textsuperscript{104} \textit{Rutan} extended the availability of the cause of action to politically-motivated government hiring.\textsuperscript{105} These protections subject government hiring decisions to scrutiny and act as a shield against abuse.

Banding itself does not produce hiring results that discriminate based on applicants' race or gender and does not shield government employers from anti-discrimination mandates. Because discrimination case law is so well developed, it is unlikely that a government employer could successfully use a test administration and subsequent banding-produced appointment to surreptitiously prefer candidates on the basis of race or gender.\textsuperscript{106}

An example of the scrutiny associated with judicial review of preference-based hiring is \textit{Quirin v. City of Pittsburgh.}\textsuperscript{107} When the City of Pittsburgh attempted to prefer females for firefighter positions regardless of their competitive eligibility list rank, a male brought suit in federal court alleging unlawful gender discrimination.

\begin{itemize}
  \item \textsuperscript{101} Elrod v. Burns, 427 U.S. 347 (1976).
  \item \textsuperscript{102} Branti v. Finkel, 445 U.S. 507 (1980).
  \item \textsuperscript{103} Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).
  \item \textsuperscript{104} Elrod, 427 U.S. at 372-73 (1976); Branti, 445 U.S. at 514-15 (1980). Note that First Amendment protection does not extend to policy-making government employees, who may be terminated at will for political reasons. \textit{Elrod}, 427 U.S. 376-68, 372.
  \item \textsuperscript{105} Rutan, 497 U.S. at 79 (1990).
  \item \textsuperscript{106} See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) and progeny. A prima facie employment discrimination case exists when an employer denies a job to a qualified protected group member who applies for the job and hires a non-protected group member. In such a case, the employer must then show non-discriminatory reasons for the hiring decision, which the denied candidate may refute as a pretext. \textit{See also Griggs v. Duke Power Co.}, 401 U.S. 424, 431 (1971) and progeny (an employment examination must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used"); City of Richmond v. J.R. Croson Co., 488 U.S. 469 (1989) (racial classifications must result from a compelling state interest and be narrowly tailored to achieve the result); Police Ass'n of New Orleans v. New Orleans, 100 F.3d 1159, 1170 (5th Cir. 1996) (using a banding system solely to promote affirmative action "eviscerate[s]" the banding system).
  \item \textsuperscript{107} 801 F.Supp. 1486 (W.D. Pa. 1992).
\end{itemize}
discrimination. The court held in his favor, finding that the city failed to prove a history of firefighter gender discrimination and that evidence showed that few females applied for firefighter positions, the associated examination was job related, and the veterans' preference caused the hiring disparity. Integral to the court's holding was that the city's method was too "extreme" (i.e., not narrowly sufficiently tailored) to remedy any possible gender discrimination.

The Quirin case, at minimum, stands for the proposition that race or gender preferences in hiring must satisfy extensive judicial examination. Although banding allows a level of appointment discretion, and with discretion comes a potential for race or gender preferences, the availability of a cause of action for discrimination is strongly entrenched and should provide a proper shield against discriminatory hiring.

In conclusion, Pennsylvania's local government units are asked to meet the demands of society while utilizing fewer resources. To satisfy these demands, government entities require an able workforce. However, because the legislated civil service hiring methods do not reflect modern human resource practices, Pennsylvania governments do not possess the ability to ensure that effective employees are charged with delivering government services.

Banding is a hiring technique that respects the traditional Pennsylvania public service notions of merit employment. By making only a minor change to existing law, banding will produce a full-functioning, broad-skilled municipal workforce that will be better able to provide public service.

John W. Lasky

109. Id. at 1490-91.
110. Id. at 1492.