

Changing of the Guard: How Much Change Is Legal?

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Once the excitement of the campaign is over, and the election results are official, newly elected (and re-elected) officials face a number of decisions, including decisions relating to employees and staffing. Every newly-elected official considers “changing the guard” to assure that the individuals who work in the office’s key positions will be loyal and actively supportive of the official’s public agenda. Can an incumbent employee be terminated legally? The answer is that there are restrictions, but the basic rule to remember is that employees may be dismissed if they can be classified as “policymakers” or “confidential” employees, as the courts have defined those terms. Although this classification will be simple in some cases, in others it will be problematic.

Legal Issues

The First Amendment prohibits a public employer from making an employment decision about an employee (or an independent contractor) based on political affiliation, unless party affiliation is an appropriate requirement for the position involved. The U.S. Supreme Court has established the general proposition that a public employer can dismiss an employee for political reasons only if the employee is in a *policymaking* or *confidential* position. The Court has also acknowledged that there may be circumstances under which political affiliation may be an appropriate consideration though the position is neither policymaking nor confidential in nature. Nevertheless, most cases ultimately turn on whether the employee fits into either the policymaking or confidential category.

Determining whether a position is a policymaking or confidential one is difficult and the result has been a rapid increase in litigation. The Supreme Court has stated that the ultimate question is really not whether the above labels fit a particular position, but “*whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.*”

The leading Seventh Circuit decisions defining the policymaker exception state that the test to determine if a person is a policymaker requires the official to ask this question: *Does the position authorize, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation?* This is obviously a very subjective standard. The analysis that a newly-elected official must make is also difficult because the Court has stated that the job analysis must focus on the powers of the office, not on the activities of the person holding the office. This means that some positions in which individuals have informally functioned as policymakers, appearing otherwise to meet the test for the exception, may not, in fact, be policymakers because the inherent or statutory powers of the office are not that of a policymaker under the test. The courts have also considered as relevant whether the individual has a high salary, which indicates he or she is in a position of influence, whether the individual has responsibility for many employees and broad duties, or whether the individual acts as an advisor or formulates plans for the implementation of broad goals. However, no one factor is conclusive as to whether an employee is a policymaker. A few examples of positions found to be policymaking are as follows:

A city park administrator was a policymaker where he organized and coordinated recreation programs, prepared budgets, interviewed and recommended candidates for hire, and negotiated and signed contracts for the construction of a new civic center and all other contracts and leases executed by the parks and recreation commission.

A deputy county auditor was a policymaker as a function of the office since a deputy has the same power and authority under state law as the Auditor.

An executive director of a county housing authority fit the description of an official whose political views can promote or defeat a political program and, as such, he was found to be a policymaker subject to political firing.

A chief administrative law judge of a state department of professional regulation was a policymaker where he oversaw activities of subordinates, developed hearing program goals, formulated procedures for hearing programs, and provided legal advice to professional discipline boards.

The department head of the city's animal shelter and animal control operations was a policymaker where he had broad authority to implement, flesh out, and enforce animal control policies.

Conversely, a few recent decisions give some examples of positions that are not policymaking:

A municipal street foreman was not a policymaker, even though he investigated citizen complaints regarding city streets, because the foreman lacked the discretion to determine when, where, and whether repairs would take place.

A deputy clerk-treasurer was not a policymaker even if the deputy frequently filled in for the elected clerk-treasurer for extended periods of time, when there was no evidence that the deputy had any authority to directly or indirectly change the decision-making process of the department.

Sergeants in a sheriff's department were not policymakers because they had only modest supervisory authority over cops "on the beat," and they did not formulate departmental policy.

The courts consider a "confidential employee" as a person in a position that has *special access to and close communications* with an elected official or appointed policymaker. For a person to be considered in a confidential position, he or she would likely need to be a party to politically sensitive communications and information which are critical to the policymaking

process. The official can also consider whether loyalty is such an issue for a position that the individual might, if disloyal, interfere with a given political program. Personal secretaries, speech writers, agency heads, and policy-making supervisors are generally deemed to be in positions in which loyalty is a reasonable requirement. As noted above, the question is answered by looking at the position's general scope of responsibility, not the particular activities engaged in by the incumbent employee. The fact that an employee legally serves at the pleasure of an elected official or body is legally irrelevant; the *nature of duties* is the determinative factor. Examples of confidential employees include:

A mayor's secretary was a confidential employee where she was in a position that would make her privy to confidential information and maintained a role in various projects and initiatives of the mayor.

A secretary to a sheriff was a confidential employee since the nature of the position placed her in a position controlling lines of communication.

An executive coordinator to the village manager was a confidential employee because she reported directly to and worked closely with a policymaker.

For both policymaking and confidential positions, the courts will usually allow elected officials to rely on official job descriptions to determine whom they may replace on political grounds. However, the job description represents only a *provisional safe harbor*. Elected officials may rely on job descriptions only to the extent that they are *objective* and *reliable*, as shown by the methods by which they are created and updated. The courts will not allow an elected official to rely on the official job description if evidence suggests that it has been altered not to reflect actual changes in the duties of a position but, rather, to allow him or her to fill the position with a political favorite.

Practical Recommendations for the Newly-Elected Official

The newly-elected official can take certain precautions and steps to reduce the likelihood of litigation:

1. Don't make any public statements, or private ones to the extent possible, about replacing, demoting, or transferring people upon being elected to office. You can talk about improving government efficiency and performance by making personnel changes, but you should indicate that these decisions will be based on non-political job performance criteria.
2. Don't promise anyone a job, promotion, salary increase, or other benefit. Such promises may be used as evidence that subsequent employment decisions were made on the basis of impermissible political considerations.
3. After the election, prepare a list of all positions and analyze which ones fall within the exceptions to the anti-patronage principles described above. You can then begin to make plans as to how you want to fill those positions.

4. Gather all job descriptions for non-merit employees and categorize them into three groups: clearly ministerial, clearly policymaking/confidential, and those involving mixed functions. Individuals holding jobs in the clearly ministerial category may not be dismissed merely because they are affiliated with the other party. Dismissals of these employees for competency or budgetary reasons should be well-documented before being implemented. In order to have sufficient time to review personnel records and investigate financial considerations, you should consider postponing termination decisions until after you take office. Those holding jobs in the clearly policymaking/confidential category may be dismissed simply because they belong to the other party, as the newly-elected official will want to have the policymaking team on board from the first day in order to set the tone for the new administration.

5. The mixed function category will be the largest and, by far, the most problematic. The job descriptions should be studied to determine the duties for which political affiliation is an appropriate requirement for effective performance. There may be opportunities to revise job descriptions, and the development of these descriptions should stress formal job-related criteria. In order to rely on that job description in making future employment decisions, any revisions must be justified by actual changes in duties. Any reasons for discharge other than political affiliation should be clearly documented before the discharge is initiated. If performance or competency is doubted, there should be documentation to support that conclusion. The record should show how the transition team found the employee to be incompetent, as compared to the superior qualifications of the person's replacement. Before employees are terminated for budgetary reasons, a financial plan should be available showing that decisions were made irrespective of the political affiliations of the affected employees. Study and discussion of all of these factors must occur before any talk of terminations begins. It might be most sensible to develop a reorganization plan which might eliminate some positions and redefine others. Employee qualifications should then be reviewed in detail. A comparison of the backgrounds of the to-be-dismissed employees and the replacement candidates should then occur. The record should demonstrate that the replacements had superior qualifications.

6. It would be useful to compile a record of campaign promises and acknowledged areas of disagreement between the newly-elected official and the prior administration. This record will assist in substantiating the defense that a particular position involved duties for which political affiliation was an appropriate requirement to implement the public's mandate.

7. Legal advice should be sought before any employment decisions are made by any individual who is given the authority to make those decisions, especially when the position change could be viewed as politically motivated.

8. Once in office, the newly-elected official should be encouraged to establish and follow a system for making all employment-related decision making as objectively as possible. This includes establishing and updating personnel policies and job descriptions and implementing all procedures necessary for ensuring conformance with those policies. **Job descriptions should be detailed** and reflect the policymaking or confidential nature of a position and specifically designate whether that position is considered policymaking or confidential.

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