Cleveland Board Of Education v. Loudermill: Procedural Due Process Protection For Public Employees

I. INTRODUCTION

The procedural due process safeguards that must be afforded public employees have been uncertain since the United States Supreme Court's decision in *Board of Regents v. Roth*,[1] which recognized that a public employee's constitutional property interest in continued public employment requires "some kind" of due process protection. In its most recent decision involving the issue, *Cleveland Board of Education v. Loudermill*,[2] the United States Supreme Court held that an Ohio statute[3] governing the discharge of state civil service employees plainly creates a property interest in continued employment for those public employees protected by the statute.[4] The Court further held that the due process clauses of the fifth and fourteenth amendments require that a person cannot be deprived of his or her substantive rights to life, liberty, and property except pursuant to constitutionally adequate procedures, and that the state statute from which the property interest is derived cannot dictate which procedures are adequate.[5] Thus, the Court held that because those public

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1. 408 U.S. 564 (1972).
2. 105 S. Ct. 1487 (1985).
3. OHIO REV. CODE ANN. § 124.34 (Page 1978). Section 124.34 provides in part:

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such section or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102.02 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal.
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> In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.
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> Within ten days following the filing of such an order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.
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> In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officers or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

See also OHIO REV. CODE ANN. § 124.11 (Page 1978).

4. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1491 (1985).
5. *Id.* at 1493; "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . U.S. CONST. amend. V; "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . U.S. CONST. amend. XIV, §1.

employees protected by the statute possess a property interest in continued employment, the due process clauses require "some kind of hearing" prior to discharge.[6] The need for a hearing is evident, the Court found, from a balancing of the competing interests at stake: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and avoidance of administrative burdens, and the risk of an erroneous termination.[7] Although the Court directed that a pretermination hearing is necessary, it failed to delineate what procedural due process is necessary beyond notice and an opportunity to respond.

This Comment examines (1) the development of judicial recognition of a property interest in continued public employment; (2) the evolution of the requirements of procedural due process in the discharge of public employees; and (3) the holding and implications of the *Loudermill* decision in the area of public employment.

II. Recognition of a Property Interest in Continued Public Employment—The Historical Perspective

Historically, the constitutional rights of public employees were governed by the "doctrine of privilege." Under the doctrine of privilege, courts considered it a privilege rather than a right to retain employment in government. Thus, because public employment was considered a privilege, the government could deny an individual this privilege through discharge for no reason, and without complying with any constitutional standards. The public employee had no constitutional protection. The relationship between public employment and the Constitution was described by Justice Oliver Wendell Holmes, then a member of the Massachusetts Supreme Judicial Court, in *McAuliffe v. Mayor of New Bedford*.[8] In *McAuliffe*, the court dismissed an action brought by a discharged policeman who had violated a police department regulation forbidding political comment both on and off duty.[9] Justice Holmes stated:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.[10]

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6. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1493 (1985).
7. *Id.* at 1494.
8. 155 Mass. 216, 29 N.E. 517 (1892).
9. *Id.*
10. *Id.* at 220, 29 N.E. at 517–18. *See also* Reagan v. United States, 182 U.S. 419 (1901). The Court in *Reagan* held that the absence of causes for removal in a statute creating the position of commissioners in the Indian Territory (later Oklahoma) precluded any right to due process protection. "The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient." *Id.* at 425.

Thus, public employment was a privilege for which the individual surrendered his or her constitutional rights and, as a result, no constitutional relief was available if the individual was discharged.[11]

As late as 1951, the United States Supreme Court continued to use the right/privilege distinction in determining whether discharged public employees are entitled to due process protections. In *Bailey v. Richardson*,[12] a per curiam decision, the Court affirmed a District of Columbia Circuit Court of Appeals decision which found civil service employment to be a statutory privilege, not a constitutionally protected right.[13] However, the Warren Court in the late 1950s and 1960s moved away from a focus on the actions of government to a focus on the nature of the interest asserted by the individual. With this new focus, the Warren Court repudiated the right/privilege dichotomy as applied to public employment in *Bailey*. In a series of cases, the Court dealt with the issue of which due process protections a state must observe before it may constitutionally infringe upon the liberty and property interests of individuals. These cases laid the foundation for the Court's recognition of a property interest in continued public employment.

In *Slochower v. Board of Higher Education*,[14] decided in 1956, the Court held that a discharged public employee's due process rights were violated when he was summarily fired for invoking his fifth amendment privilege against self-incrimination while being questioned about his affiliation with the Communist Party.[15] The Court found that requiring Slochower to answer the questions would place an unconstitutional condition on public employment.[16]

In *Greene v. McElroy*,[17] the Court found a presumption of due process in a statute governing a public employee.[18] In *Greene*, the Court was confronted with a petition from a discharged engineer who had been precluded from the continued practice of his profession by the government's denial of a security clearance. This denial was made without affording Greene an opportunity to confront or cross-examine witnesses against him. In overriding the decision to revoke Greene's security clearance by the Army-Navy-Air Force Personnel Security Board (the government agency authorized to make security clearance decisions), Chief Justice Warren, writing for the majority, stated that "[i]n the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."[19] Chief Justice Warren's opinion also seemed to indicate that Greene could have used a purely constitutional, procedural due process claim to challenge the denial of a security clearance.[20]

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11. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517–18 (1892).
12. 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (per curiam).
13. *Id.*
14. 350 U.S. 551 (1956).
15. *Id.* at 559.
16. *Id.* at 557.
17. 360 U.S. 474 (1959).
18. *Id.* at 502–03.
19. *Id.* at 508.
20. *Id.*

The Warren Court's movement from a focus on the actions of government to a focus on the nature of the interest asserted by the individual during this period, however, was not absolute. In *Cafeteria Workers v. McElroy*,[21] the Court balanced the interest of the discharged employee in keeping her position against the interest of the state in maintaining security at a military installation, and held that due process did not require a pretermination hearing.[22] In *Cafeteria Workers*, the plaintiff was a short-order cook who, while working on a Naval base for a private employer, was refused a security badge and therefore was not allowed to enter the base. The contract between the government and the private employer reserved to the security officer of the base the right to determine which employees met security regulatons, and the contract also provided that the employer could not engage employees at the base if they did not meet the security standards. The Court upheld the government's actions even though it did not provide a hearing or statement of the reasons for its denial of security clearance.[23] *Cafeteria Workers*, however, can be distinguished from *Greene*: in the former, the discharged employee was working for a private employer on the base and had sufficient opportunities to work elsewhere with the same employer. Thus, *Greene* and *Slochower* foreshadowed the Court's recognition of a property interest in public employment and the right to procedural due process protection by failing to retreat to the notion of public employment as a privilege.

The Court's movement away from the right/privilege dichotomy toward a consideration of the interest involved was also evident in cases involving parole revocation,[24] seizure of goods under a writ of replevin,[25] revocation of a driver's license,[26] and termination of welfare benefits.[27] Justice Blackmun announced the end of the right/privilege dichotomy in *Graham v. Richardson*,[28] in which he stated that the Court "now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.'"[29] This case and the other cases discussed above heralded the downfall of the right/privilege dichotomy[30] and laid the foundation for the recognition of a property interest in public employment and a corresponding right to procedural due process in *Board of Regents v. Roth*[31] and *Perry v. Sindermann*.[32]

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21. 367 U.S. 886 (1961).
22. *Id.* at 894–98.
23. *Id.* at 898–99.
24. Morrisey v. Brewer, 408 U.S. 471 (1972).
25. Fuentes v. Sheven, 407 U.S. 67 (1972).
26. Bell v. Burson, 402 U.S. 535 (1971).
27. Goldberg v. Kelly, 397 U.S. 254 (1970).
28. 403 U.S. 365 (1971).
29. *Id.* at 374.
30. *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916).
31. 408 U.S. 564 (1972).
32. 408 U.S. 593 (1972).

III. The Recognition of a Property Interest in Continued Public Employment—*Roth* and *Perry*

David Roth was hired by the Wisconsin State University at Oshkosh as a political science professor for one academic year. Under Wisconsin law a professor gained the tenure rights of a permanent employee after serving four years in the Wisconsin state college system. Rules promulgated by the State Board of Regents provided that a decision not to renew a nontenured professor's contract need not be accompanied by a statement of reasons, and that the professor was not entitled to a hearing. Near the end of his contract term, Roth was informed that he would not be rehired. Roth filed suit in federal district court alleging that school officials had decided not to renew his contract because he had exercised his protected first amendment right to free speech. He also claimed that the university's failure to provide him with a hearing violated his right to due process.[33]

In his majority opinion in *Board of Regents v. Roth*,[34] Justice Stewart discounted Roth's first amendment claim because Roth had failed to prove any specific infringement of a first amendment right.[35] Focusing instead on the status of the liberty and property interest involved in Roth's due process claim, Justice Stewart stated:

> [A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.[36]

Justice Stewart then went on to define "property" as it applies in the context of public employment:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as the state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[37]

Justice Stewart then concluded:

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely, in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.[38]

The Court found that Roth's property interest in his job was created and controlled by his contract of employment and by the governing Wisconsin statutes.[39]

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33. Board of Regents v. Roth, 408 U.S. 564, 566–69 (1972).
34. 408 U.S. 564 (1972).
35. *Id.* at 574.
36. *Id.* at 570–71 (emphasis added).
37. *Id.* at 577.
38. *Id.*
39. *Id.* at 566.

Neither provided support for a legitimate expectation of reemployment. Thus, because Roth did not have a property interest in continued public employment, he did not have a right to a hearing.

Using the *Roth* criteria, the Court found a property interest in continued public employment in *Perry v. Sindermann*.[40] Robert Sindermann taught at Texas state colleges for ten years prior to the decision of the State Board of Regents not to renew his contract.[41] The Texas state college network had no formal tenure system, but Sindermann contended that he was entitled to a hearing under an alleged de facto tenure system.[42] He cited in support of this contention a provision in the official faculty guide which indicated that employment would be made permanent for those who satisfactorily, cooperatively, and enthusiastically performed their work. He also cited guidelines promulgated by the Coordinating Board of the Texas College and University system that provided tenure protecton to those employed in the system for seven or more years.[43] The Court concluded that Sindermann's alleged de facto tenure system would, if proven, establish a property interest in continued employment.[44] Thus, under the *Roth* analysis, this property interest would entitle Sindermann to a statement of the reasons and a hearing prior to any dismissal so that he could vindicate his claim to continued employment.

Because both *Roth* and *Perry* involved a failure to rehire rather than a discharge of the faculty members, the Court did not reach the issue of which pretermination procedures meet the requirements of procedural due process. The Court did note, however, that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[45] The issues of what creates a property interest in continued public employment and what procedural safeguards are required before termination of public employment would again confront the Court.

IV. Procedural Due Process

Once a property or liberty interest is established, a discharged public employee is entitled to the protection of the due process clauses of the fifth and fourteenth amendments.[46] Although due process has been the foundation of many of the Supreme Court's decisions, the Court has never clearly defined what constitutes procedural due process. Chief Justice Warren, writing in *Hannah v. Larche*,[47] commented that the "exact boundaries [of procedural due process] are undefinable, and its content varies according to specific factual contexts."[48] Justice Frankfurter

40. 408 U.S. 593 (1972).
41. *Id.* at 594–95.
42. *Id.* at 599–600.
43. *Id.* at 600.
44. *Id.* at 602–03.
45. Board of Regents v. Roth, 408 U.S. 564, 570 n.8 (1972) (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971)).
46. Board of Regents v. Roth, 408 U.S. 564, 576–78 (1972).
47. 363 U.S. 420 (1960).
48. *Id.* at 442.

further stated in his concurring opinion in *Joint Anti-Fascist Committee v. McGrath*[49] that "[d]ue process is not a mechanical instrument. It is not a yardstick. It is a process."[50]

Although the concept of procedural due process is nebulous, the Court has established some basic guidelines: "A fundamental requirement of due process is 'the opportunity to be heard.'"[51] The opportunity must be granted at a meaningful time and in a meaningful manner.[52] Justice Jackson, writing for the Court in *Mulane v. Central Hanover Trust Co.*,[53] went further in delineating what he considered to constitute due process:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[54]

This uncertainty over what constitutes due process has had an impact on the field of public employment. As discussed above,[55] the Court in *Roth* recognized that when a legitimate entitlement or property interest in continued public employment exists, corresponding due process rights also exist. The Court, however, failed to establish which procedures are required by due process in the discharge of a public employee. The Court faced this issue in *Arnett v. Kennedy*.[56]

In *Arnett*, the Court specifically considered the issue of the need for a pretermination hearing. Wayne Kennedy, a non-probationary federal civil service employee, was dismissed for allegedly making recklessly false defamatory statements about other employees.[57] Under the regulations governing the discharge of a federal civil service employee,[58] Kennedy was provided at least thirty days' advance written notice prior to his removal, an opportunity to appear and answer the charges before the official authorized to make the removal decision, and an opportunity to appeal the decision, at which time an evidentiary, trial-type hearing was provided.[59]

In his plurality opinion, Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, stated that "[an] employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which [the state] has designated for the determination of the cause."[60] Kennedy was thus entitled only to those procedures provided by the federal statute governing the discharge of federal civil service employees because his

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49. 341 U.S. 123 (1951).
50. *Id.* at 163 (Frankfurter, J., concurring).
51. Arnett v. Kennedy, 416 U.S. 134, 178, *reh'g denied*, 417 U.S. 977 (1974) (White, J., concurring in part) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
52. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
53. 339 U.S. 306 (1950).
54. *Id.* at 313.
55. *See supra* notes 31–43 and accompanying text.
56. 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974).
57. *Id.* at 136.
58. 5 U.S.C. § 7501 (1970), 5 C.F.R. § 752.202(a)(1986).
59. Arnett v. Kennedy, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974).
60. *Id.* at 152.

interest in continued employment was based on his expectation that he would receive those procedures. "[W]here the grant of substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[61]

In his concurring opinion, Justice Powell disagreed with the plurality's contention that statutorily defined procedures for the discharge of public employees are sufficient. Justice Powell stated that the right to procedural due process is "conferred not by legislative grace, but by constitutional guarantee."[62] Balancing the government's interest in expediting the removal of an unsatisfactory employee with the individual's interest in continued employment, much like the balancing test later used in *Mathews v. Eldridge*,[63] Justice Powell concluded that the procedures provided Kennedy satisfied the requirements of due process.[64]

Justice White also concurred in the result, finding that while an evidentiary hearing was not required prior to dismissal, the discharged employee deserved an evidentiary hearing at some time, either before or after discharge.[65] In his dissent, Justice Marshall stated his belief that the due process clause mandates a full evidentiary hearing prior to discharge.[66] Although supported by a plurality of only three justices, Justice Rehnquist's opinion in *Arnett* governed the procedural due process rights of public employees until the Court's recent decision in *Cleveland Board of Education v. Loudermill*.[67]

V. THE HOLDING AND ANALYSIS OF *Cleveland Board of Education v. Loudermill*

A. *Facts of* Loudermill

James Loudermill was hired by the Cleveland Board of Education as a school security guard on September 25, 1979. He was classified as a civil service employee. By statute, as a civil service employee, Loudermill could only be discharged for "incompetency, inefficiency, dishonesty . . . or any other failure of good behavior, or acts of misfeasance, malfeasance, or nonfeasance in office" and was entitled to an administrative review of his dismissal.[68] On his employment application Loudermill had stated that he had never been convicted of a felony. Additionally, he had signed his name after a paragraph at the end of the application which stated that he certified the veracity of his responses and acknowledged that false statements would result in his dismissal.[69]

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61. *Id.* at 153–54.
62. *Id.* at 167 (Powell, J., concurring).
63. 424 U.S. 319 (1976).
64. Arnett v. Kennedy, 416 U.S. 134, 171 (1974) (Powell, J., concurring).
65. *Id.* at 200–02 (1974) (White, J., concurring).
66. *Id.* at 206 (Marshall, J., dissenting).
67. 105 S. Ct. 1487 (1985).
68. OHIO REV. CODE ANN. § 124.34 (Page 1978).
69. Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 552 (6th Cir. 1983).

After one year on the job, Loudermill was transferred to a newly created department. A routine review of his records revealed that Loudermill had in fact been convicted of grand larceny in 1968. The Board's business manager informed Loudermill by a letter, dated November 3, 1980, that he was being discharged for dishonesty in filling out his job application. Loudermill contended that had he been provided an opportunity to explain before the Board took action regarding his employment, he could have shown that he mistakenly believed that the crime of which he was convicted was only a misdemeanor.[70]

On January 29, 1981, approximately two months after his discharge, a referee appointed by the Cleveland Civil Service Commission held a hearing to decide Loudermill's claims. The referee recommended that Loudermill be reinstated, but the Civil Service Commission rejected that recommendation and affirmed Loudermill's discharge on July 20, 1981.[71] Although the Civil Service Commission's decision was subject to review in the state courts,[72] Loudermill filed suit in the District Court for the Northern District of Ohio in October 1981, alleging that the Ohio statute providing for administrative review of the discharge of a public employee covered by the statute was unconstitutional on its face because it provided no opportunity for the discharged employee to respond to the charges against him prior to discharge, thus depriving him of liberty and property without due process.

The district court, in a brief unpublished opinion, dismissed the suit for failure to state a claim upon which relief could be granted, stating that because the very statute that created the property right in continued employment also specified the procedures for discharge, no other procedures were required and these procedures had been followed in Loudermill's case.[73] Because those specified procedures were followed, the court held that Loudermill was, by definition, afforded all the process due.[74]

On appeal, the Court of Appeals for the Sixth Circuit reversed in part and remanded, holding that civil service employees have an interest in continued employment which cannot be discontinued unless the requirements of due process are met.[75] In determining whether the requirements of due process were met by the Ohio statute, the court applied the balancing test established by the Supreme Court in *Mathews v. Eldridge*.[76] Under the *Mathews* test, the factors to be balanced are: the importance of the private interest affected, the risk of error created by the use of the procedure in question, and the strength of the governmental interest involved.[77] The court concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal to reduce the risk of error, outweighed the added administrative burden of a pretermination hearing. Thus, the

70. *Id.* at 553.
71. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1490 (1985).
72. *Id.*
73. *Id.*
74. *Id.*
75. Cleveland Bd. of Educ. v. Loudermill, 721 F.2d 550, 559 (6th Cir. 1983).
76. 424 U.S. 319 (1976).
77. *Id.* at 321.

court found that the Board's failure to provide Loudermill with a pretermination hearing violated the due process clause of the fourteenth amendment.[78]

B. *The Supreme Court's Holding and Analysis*

The Supreme Court, by an eight-to-one majority, affirmed the Sixth Circuit Court of Appeals' decision on March 19, 1985.[79] Justice White, writing for the majority, rejected the reasoning of Justice Rehnquist's plurality opinion in *Arnett*, which held that the procedural due process rights of public employees may be limited by state statutes.[80] Justice White stated that the "categories of substance and procedure are distinct."[81] Therefore, because Loudermill had a property interest in continued employment, he was entitled to due process—"some kind of hearing."[82]

Justice White's opinion then applied the three factor balancing test from *Mathews* to the facts in *Loudermill*. The Court first determined that Loudermill's interest in continued public employment was extremely significant, as evidenced by the Court's past findings which "recognized the severity of depriving a person of the means of livelihood."[83] Secondly, because "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect," the risk of erroneous discharges would be greatly reduced by allowing a pretermination hearing.[84] Finally, "[t]he governmental interest in an immediate termination does not outweigh these interests" because "affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delay."[85]

Justice White concluded that "the pretermination 'hearing,' though necessary, need not be elaborate."[86] It would serve only as an "initial check against mistaken decisions."[87] Justice White stated that "[a] tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[88] He further emphasized the limitations on these procedural requirements: "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."[89] Justice White then found it significant that the Ohio statute provides for a "full post-termination hearing" that would supplement any pretermination procedures, thereby providing additional safeguards for public employees covered by the statute.[90]

78. Cleveland Bd. of Educ. v. Loudermill, 721 F.2d 550, 563 (6th Cir. 1983).
79. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985).
80. *Id.* at 1493.
81. *Id.*
82. *Id.*
83. *Id.* at 1494.
84. *Id.*
85. *Id.* at 1495.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 1495–96.
90. *Id.* at 1496.

In his concurring opinion, Justice Marshall stressed his belief that the importance of the individual's interest in continued employment mandates that the pretermination procedure consist of a trial-type hearing with an opportunity to present witnesses and cross-examine adverse witnesses.[91] Justice Marshall reasoned that a post-termination hearing may not "make the employee whole again," and, thus, a less than rigorous pretermination hearing could still leave open the possiblity of "irreparable injury."[92]

Justice Brennan concurred in part and dissented in part. He agreed with Justice Marshall that "an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accusor in front of the decisionmakers."[93] Justice Brennan dissented to a further holding of the majority that a nine-month delay in Loudermill's post-termination hearing was not a violation of due process.[94]

Justice Rehnquist, author of the plurality opinion in *Arnett*, dissented. Quoting his opinion in *Arnett*, he stated that "the substantive right may [not] be viewed wholly apart from the procedure provided for its enforcement."[95] Arguing that *Roth* dictated that "state law [is] the source of property interests for purposes of applying the Due Process Clause of the Fourteenth Amendment," Justice Rehnquist suggested that the majority had incorrectly defined the state-created property right in this case, and that a clearer rule is needed in the area of due process.[96]

VI. The Impact of *Loudermill*

It is difficult to conjecture what impact the *Loudermill* decision will have. The decision clearly mandates that when a property interest in continued public employment is created by a state statute, the government must take one additional step, a pretermination hearing, before discharging an employee. The Court's decision, however, leaves open the question of the creation of property interests in continued public employment through other mechanisms, such as an implied contract. Courts have used an implied contract theory in dealing with wrongful discharge cases involving private employers.[97] Whether such a theory can be applied to public employment is unclear.

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91. *Id.* at 1497 (Marshall, J., concurring).

92. *Id.* at 1497–98.

93. *Id.* at 1499 (Brennan, J., concurring in part).

94. *Id.* at 1502.

95. *Id.* at 1503 (Rehnquist, J., dissenting).

96. *Id. See also* Jaff, *Hiding Behind the Constitution: The Supreme Court and Procedural Due Process in* Cleveland Board of Education v. Loudermill, 18 Akron L. Rev. 631 (1985). Jaff argued that the Court should have affirmed Justice Rehnquist's plurality opinion in Arnett v. Kennedy:

> [T]he Supreme Court should have adopted Justice Rehnquist's approach in *Arnett* because it articulates a clear rule of law. Such clarity would have two effects. First, holders of entitlements would know what procedures they would be afforded at the time the entitlement was granted thereby allowing them to fully appreciate the nature and contours of that entitlement. Second, and more significantly, a clearly articulated rule would enable the public to appreciate the political nature of the judicial process.

Id.

97. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 403 Mich. 579, 292 N.W.2d 880 (1980); Rulon-Miller v. International Business Machs. Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

The Fifth Circuit Court of Appeals considered the issue of what gives rise to a public employee's property interest in continued employment in *Henderson v. Sotelo*.[98] In *Henderson*, the plaintiff, the discharged Chief Building Inspector of Harlingen, Texas, brought suit against his supervisor, the City Manager, other city officials, and the city itself, claiming that his summary dismissal deprived him of property without due process of law. Henderson had been appointed Chief Building Inspector by the City Manager in March 1982. On July 9, 1982, Henderson was fired by his supervisor, the city's Director of Urban Development. At the time of his discharge, Henderson was given a handwritten memo stating reasons for the decision.[99]

On July 15, at a meeting with his supervisor and the City Manager, Henderson agreed to accept a three-day suspension and a demotion to the position of Senior Building Inspector. On July 16, Henderson received a paycheck which reflected a decrease in salary. On July 19, he delivered a letter to the City Manager refusing to accept the demotion and suspension. By a letter dated the same day, the City Manager informed Henderson that his employment was terminated because he would not accept the agreed-upon position. No hearing was ever held on the issue of Henderson's dismissal.[100]

The court, in determining whether Henderson had a property interest in continued public employment, looked, in the absence of a state law governing Henderson's employment, to the city's charter. The charter permitted the City Manager to preemptorily discharge an appointed officer or employee if done so with the "advice and consent" of the City Commission. The court found that this provision did not create a property interest in continued employment:

> In this case, the properly determined purpose and function of the provision requiring the advice and consent of the City Commissioners is to keep the Commissioners informed of the Manager's actions and to give them an opportunity to respond when they think it necessary—thus maintaining an appropriate balance and allocation of governmental power between the Manager and the Commissioners—rather than to afford employees a proprietary interest in continued employment absent a showing of just cause for dismissal.[101]

Upholding the district court's dismissal of Henderson's due process claim, the Fifth Circuit concluded:

> [W]e hold that under the City Charter, notwithstanding its provisions that employees such as appellant could be discharged only with the "advice and consent" of the City Commissioners, appellant had no entitlement to continued employment absent good cause for termination and had no property interest in his status as a city employee. Further, the fact that his discharge may have violated the Charter's "advice and consent" clause does not suffice to sustain appellant's claim of deprivation of property without due process.[102]

98. 761 F.2d 1093 (5th Cir. 1985).
99. *Id.* at 1094.
100. *Id.* at 1095.
101. *Id.* at 1097.
102. *Id.* at 1098.

In *Gleason v. Board of County Commissioners of the County of Weld*,[103] the district court found that a county policy manual created a protected property interest and a legitimate claim of entitlement to continued employment. "Under the provisions of this policy manual, plaintiff was a 'permanent' employee since she had been employed by the [County] Health Department for 13 years. As a 'permanent' employee, she could only be terminated 'for cause.'"[104] Thus, because she had a "legitimate, objective expectation of continued employment," she was entitled to "some kind of hearing" prior to discharge.[105]

Other courts have been reluctant to find a property interest in continued public employment in the absence of a statute, contract, or implied contract clearly creating a protected interest. In *Gomez v. City of Sheridan*,[106] the district court found no property interest in employment for a police officer who had been employed for less than the one-year probationary period. "Since there was no property interest at stake, the Fourteenth Amendment's protections were not implicated and the plaintiff was not entitled to a prior hearing complying with due process."[107] In *Vodila v. Clelland*,[108] the district court found that a dentist, formerly employed with the Department of Mental Retardation and Developmental Disabilities for the State of Ohio, was an "unclassified civil servant" under the Ohio Revised Code and that, under state law, an unclassified civil servant had no property interest in continued employment. The court thus granted the defendant's motion to dismiss.[109]

Under the *Loudermill* analysis, once a property interest is established the question then becomes: What kind of pretermination hearing complies with due process of law? Justice White's opinion in *Loudermill* required only "some kind of hearing" in which the holder of the property interest is afforded an opportunity to respond. Justice White's opinion failed to reach other issues concerning the hearing such as whether the discharged public employee has a right to a "neutral decision maker; to present evidence and witnesses, and to confront and cross-examine evidence and witnesses used by the opposition before the decisionmaker; the right to have an attorney make the presentation; a decision based on the record; and a statement of the reasons for the decision."[110] These issues are being addressed by courts in the wake of the *Loudermill* decision.

In *DeSarno v. Department of Commerce*,[111] the plaintiffs were discharged from employment with the National Weather Service for filing fraudulent travel vouchers. The plaintiffs claimed their discharge violated their rights to due process because the same individual acted in the capacity of both proposing and deciding official in their

103. 620 F. Supp. 632 (D. Colo. 1985).
104. *Id.* at 634.
105. *Id.* at 634–35.
106. 611 F. Supp. 230 (D. Colo. 1985).
107. *Id.* at 235.
108. 613 F. Supp. 69 (N.D. Ohio 1985).
109. *Id.* at 72.
110. Note, *Discharge of Employees within the State Personnel System: The Due Process Requirements for the Deprivation of Property and Liberty*, 20 WAKE FOREST L. REV. 413, 422–23 (1984).
111. 761 F.2d 657 (Fed. Cir. 1985).

pretermination hearing. The Court of Appeals for the Federal Circuit held that the plaintiffs had received due process:[112]

> At the pretermination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person. The law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case. Further, it is of interest that in this case the record refutes DeSarno and Carter's implication that Telesetsky was biased, his investigation inadequate, or his decision factually erroneous. At the Board hearing, Telesetsky responded point by point to everything on which DeSarno and Carter relied in their pretermination oral and written replies. The record demonstrates that, as deciding officer, Telesetsky carefully considered the proferred evidence and conducted a full, impartial, and independent review of the charges at the pretermination state.[113]

Although the *Loudermill* decision dealt with the issue of a property interest in employment, other courts have also been confronted with the corresponding issue of a property interest in a specific position. The district court in *Click v. Board of Police Commissioners*[114] held that a police officer who was suspended for three days for using unnecessary force in performance of his duties had a right to continued employment which included "the right to the office and its emoluments such as rank and compensation."[115] The court concluded that the police officer could not be "suspended from employment without pay unless given . . . (1) oral or written notice of the charge; (2) an explanation of the basis for the charge; and (3) an opportunity to present his/her side of the story."[116]

The court in *Williams v. City of Seattle*[117] similarly found a property interest in rank and a right to a hearing for a police officer demoted from the rank of sergeant to police officer. The court, however, held that the police officer was not entitled to a full evidentiary hearing prior to his demotion.[118]

In *Carter v. Western Reserve Psychiatric Habilitation Center*,[119] however, the Sixth Circuit Court of Appeals, in a per curiam decision, upheld the district court's finding that "since the plaintiffs had been disciplined, but had not been discharged, they had not been deprived of any property interest."[120] Thus, for a hearing to be required, the deprivation of a property interest must involve more than just ordinary discipline.

Another issue raised by the *Loudermill* decision is what kind of notice of the claims and evidence against the property interest holder is required by due process. In *Davis v. Alabama State University*,[121] the court held that a state university academic advisor was denied due process when the university president considered

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112. *Id.* at 660.
113. *Id.*
114. 609 F. Supp. 1199 (W.D. Mo. 1985).
115. *Id.* at 1204.
116. *Id.* at 1206.
117. 607 F. Supp. 714 (W.D. Wash. 1985).
118. *Id.*
119. 767 F.2d 270 (6th Cir. 1985) (per curiam).
120. *Id.* at 272.
121. 613 F. Supp. 134 (M.D. Ala. 1985).

other evidence in the plaintiff's personnel file in making a final decision to discharge the advisor, without notifying him or allowing him to respond to that evidence.[122] Thus, due process requires that the protected employee be given notice of the claims and evidence to be used against him so that he may adequately respond.

Perhaps the most difficult issue for a court is that of fashioning a remedy for the violation of a public employee's right to due process. In *Royster v. Board of Trustees of Anderson County School District Number Five*,[123] the plaintiff, discharged from his position as superintendent of schools, claimed that his "legitimate expectancy in continued employment included not only the right to receive the compensation guaranteed under the contract, but also the right to actively engage in and execute the duties of his office."[124] The Fourth Circuit disagreed:

> Royster has directed us to no authority which supports the proposition that a property interest in the continued expectation of public employment includes the right to physically possess a job, in defiance of the stated desire of the employer, nor has our review revealed such authority. Indeed, to hold that Royster had a constitutionally protected property interest in continuing to perform his services would make it impossible for a public employer, dissatisfied with an employee's performance, but without specific contractual cause to discharge him, to relieve the employee from his duties although willing to compensate the employee in full.[125]

Thus, the court refused to reinstate Royster to his former position.

VII. Conclusion

The impact of the *Loudermill* decision on public employment may be far reaching. One legal commentator has speculated, for example, that the decision may require that a public employer notify and provide an opportunity to respond to tenured employees involved in an economic strike prior to any hiring of permanent replacements.[126] By analogy, then, *Loudermill* may affect any situation which threatens a protected property interest of a public employee. On the other hand, the decision may only govern, as some courts have held, the termination of public employment of those public employees holding a property interest in continued employment.

At the least, the *Loudermill* decision mandates that public employers provide employees having a property interest in continued public employment with a pretermination hearing prior to discharge. This should provide those employees an additional check against arbitrary or hasty decisions to discharge. A pretermination hearing has additional purposes:

> Giving the employee this opportunity to be heard not only accords due process to the employee (even though the employee may not be entitled to due process) but also serves several other purposes. The employee may make admissions at this time which would

122. *Id.* at 138.
123. 774 F.2d 618 (4th Cir. 1985).
124. *Id.* at 621.
125. *Id.*
126. Wilson, *The Replacement of Lawful Economic Strikers in Ohio*, 46 Ohio St. L.J. 639, 680 (1985).

> reinforce the employer's decision if the discharge is later litigated. On the other hand, the employee may have a good defense and the employer may wish to retract the discharge decision.[127]

Thus, the procedural due process rights of discharged employees are vindicated and the risk of an erroneous decision diminished when a pretermination hearing is held.

Although many questions are left unanswered by the *Loudermill* decision, one thing is certain—the decision will provide the basis for a multitude of cases involving the issues of what creates a property interest in continued public employment and what corresponding right to a pretermination hearing is required by the due process clauses of the fifth and fourteenth amendments.

Lowell B. Howard, Jr.

127. Smith and Vlasicak, *The Fair and Legal Way to Discharge the Public Employee*, 10 CURRENT MUN. PROBS. 265, 270 (1984).

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