LEGAL ANALYSIS OF APPLICATION OF CLEVELAND BOARD OF EDUCATION V. LOUDERMILL TO FEDERAL EXCEPTED SERVICE EMPLOYEES

EXECUTIVE SUMMARY

Cleveland Board of Education v. Loudermill, No. 83-1362 (USSC 3-19-85), together with Parma Board of Education v. Donnelly, No. 83-1363, concerned whether employees of the state of Ohio could be dismissed without a hearing. In the first case Loudermill, who had been hired as a security guard, had stated on his job application that he had never been convicted of a felony. In the course of a routine job check, the Board discovered that Loudermill had been convicted in 1968 of grand larceny. He was then dismissed by letter and was not given an opportunity to respond to the charge of dishonesty or to challenge his dismissal.

According to section 124.11 of the Ohio Revised Code Annotated, Loudermill was a "classified civil servant." These employees can be terminated only for cause and may obtain administrative review if they are discharged. Ohio Rev. Code Ann. § 124.34. Loudermill brought suit alleging that section 124.34 was unconstitutional because it did not provide the employee the opportunity to respond to the charges against him before removal, thus depriving him of liberty and property without due process.

The other case concerned similar facts and was brought on the same alleged due process violation. In it, Donnelly was a bus mechanic who was fired because he failed an eye examination. The Civil Service Commission heard the case a year later and ordered him reinstated but without backpay.

The Court held that these jobs were property rights which could not be taken away without due process. As for the kind of due process required, the Court found that at a minimum the employees should have been given hearings in order to respond to the allegations.

It would appear to be arguable that due process requirements emanating from a property interest in employment as set forth by the Loudermill case would in most cases not apply to excepted service federal employees. Federal statutes do not presently provide for procedural or substantive rights in the event of dismissal. Only in certain situations would it appear that a fired excepted service federal employee is entitled to procedural or substantive rights. These situations would include the statutory rights of a preference eligible, a situation involving past agency practices, and a situation involving the stigmatization of an employee. As for other situations, the cases have been quite uniform in holding that excepted service federal employees do not have the substantive and procedural rights of competitive service employees.
There also are no specific tenure provisions for excepted service federal employees. However, two cases taken together, Board of Regents v. Roth, 408 U.S. 504 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), may possibly give some credence to the theory that, if an excepted service federal employee has been employed for a number of years, he may be entitled to certain due process rights deriving from a property interest in his job. One of these rights may be a hearing before dismissal, as the Supreme Court indicated should possibly have been provided to Sindermann. Yet, research did not produce any federal cases in which this theory has been the basis for a holding.

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The other case concerned similar facts and was brought on the same alleged due process violation. In it, Donnelly was a bus mechanic who was fired because he had failed an eye examination. The Civil Service Commission heard the case a year later and order him reinstated but without backpay.
The Court's ratiocination revolved around the requirement that the constitutional claims involved here depended upon the respondents having had a property right in continued employment. The Court went on to state that property rights are not created by the Constitution; instead, they are created by existing rules or understandings that stem from an independent source such as state law. In the situations involved here,

[t]he Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev. Code Ann. § 124.11 (1984) entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except ... for ... misfeasance, malfeasance, or nonfeasance in office," § 124.34. The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. slip op. at 5.

Thus, before such property rights in employment could be taken away, the authorities were required to use due process.

The Court then went on to consider what kind of due process was constitutionally required in these cases. At page 8 of the slip opinion the Court stated:

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for hearing before he is deprived of any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis in original) see Bell v. Burson, 402 U.S. 535, 542 (1972). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. Board of Regents v. Roth, 408 U.S., at 569-570; Perry v. Sindermann, 408 U.S. 593, 599 (1972).
Thus, the Court held that in both cases the employees were entitled to notice and an opportunity to respond before dismissal.

Loudermill further asserted as a separate constitutional violation that his administrative proceedings took too long. However, the Court disagreed, stating at pages 13-14 of the slip opinion:

The Due Process Clause requires provision of a hearing "at a meaningful time." E.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See Barry v. Barchi, 443 U.S., at 66. In the present case, however, the complaint merely recites the course of proceedings and concludes that the denial of a "speedy resolution" violated due process. App. 10 .... Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.

In looking at the situation of excepted service federal employees to determine whether they have property rights similar to the Court's findings of property rights for the Ohio employees, it is necessary to look at the federal statutes, cases, and agency practices concerning excepted service federal employees. 5 U.S.C. § 2101(1) states that the "civil service consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." The competitive service, for which applicants must take an examination, consists of all civil service positions in the executive branch, except positions which are specifically excepted from the competitive service by or under statute, positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs, and positions in the Senior Executive Service. The competitive service also
consists of civil service positions not in the executive branch which are specifically included in the competitive service by statute and positions in the government of the District of Columbia which are specifically included in the competitive service by statute. 5 U.S.C. § 2102(a). Most employees in the competitive service are entitled to certain rights if an adverse action, such as removal, suspension for more than fourteen days, or reduction in grade or pay, is instituted against them. See 5 U.S.C. §§ 7511 et seq.

The excepted service consists of those civil service positions which are not in the competitive service or the Senior Executive Service. 5 U.S.C. § 2103. In most adverse action cases, people in the excepted service are not entitled to the substantive or procedural rights that people in the competitive service have. This is made clear by the definition of "employee" at the beginning of the adverse action provisions:

"Employee" means -
(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and
(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions. 5 U.S.C. § 7511(a)(1).

Case law has also made quite clear that in most situations people in the excepted service can be terminated without substantive or procedural rights by the employer. In Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980), the court takes the opportunity to discuss the absence of such rights for excepted service employees. At 1260 the court states:

While the above provisions extended significant and theretofore unknown benefits to a broad
class of federal employees, the rights thus conferred remain dependent upon the statutes creating them. The government is generally free to withhold, and has withheld, such benefits from a variety of other federal positions. The authority to except positions from the requirements of competitive entrance, and hence from the guarantees of Section 7513 (substantive and procedural guarantees under the Lloyd-LaFalollette Act), is expressly conferred in 5 U.S.C. §§ 3301 and 3302.

The court goes on further at 1262 to state:

[I]t is the well-recognized rule that federal employees in the excepted service may be terminated at any time, without either a statement of reasons for discharge or adverse action appeal rights. Paige v. Harris, 584 F.2d 178, 181 (7th Cir. 1978); Elkin v. Roudebush, 564 F.2d 810, 812 (8th Cir. 1977).

However, in certain cases employees in the excepted service have the substantive and procedural rights of employees in the competitive service. Preference eligibles in the excepted service have the rights of competitive service employees in the event of an adverse action. See, 5 U.S.C. § 7511(a) (1). For the most part, these preference eligibles are veterans, but others may also have preference eligible status. See, 5 U.S.C. § 2108(3).

A fairly recent case, Horne v. Merit Systems Protection Board, 684 F.2d 155 (D.C. Cir. 1980), held that, unless proper procedures are followed by an agency, an excepted service employee cannot be demoted. In this case two Interstate Commerce Commission career attorneys were demoted from GS-15 to GS-14 positions. They had been on the staffs of two of the commissioners who were replaced. The new commissioners chose attorneys other than the plaintiffs, and the chairman of the Commission, believing that they were political appointees, summarily demoted the attorneys. The court found that the Commission had conducted a reduction in force (RIF) and that, although it might have been able to demote the attorneys if proper RIF procedures had
been followed, it had not conducted the demotion properly. Therefore, the
case was remanded for proper disposition. The court stated at 158-159:

A remand would be unnecessary if petitioners
had no job tenure rights. If petitioners held
their jobs entirely at the pleasure of someone
at the ICC, their rights would not be compromised
by that individual's failure to follow proper
procedures in demoting them. As employees in the
"excepted" service, it is true that petitioners
lacked most of the procedural protections and
tenure rights of employees in the "competitive"
service. That does not mean, however, that
petitioners were utterly without rights. Prior
practices or the rules of a particular agency
may confer tenure status cognizable as "property"
under the Due Process Clause. More importantly,
an excepted employee is not the same as a political
employee. In Branti v. Finkel, 445 U.S. 507, 100
S. Ct. 1287, 63 L. Ed. 2d 574 (1980), and Elrod v.
Burns, 427 U.S. 347 96 S. Ct. 2673, 49 L. Ed. 2d
547 (1975), the Supreme Court held that "a non-
policymaking, nonconfidential government employee
[not] be discharged . . . from a job that he is
satisfactorily performing upon the sole ground of
his political beliefs" even if he has no state-
conferred tenure. 427 U.S. at 375, 96 S. Ct. at
2690. See also Perry v. Sindermann, 408 U.S. 593,
92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Civil
service regulations suggest that petitioners in
this case are not political employees. Thus, the
First Amendment may protect them against some
actions by their employer . . .

In addition, an excepted employee has RIF
rights, which are largely determined by the size
of his or her competitive area . . .

Hence, petitioners in this case had several
rights that require protection through proper RIF
procedures. In reviewing the ICC's action, the
Board and this court must determine whether the
agency deprived petitioners of those rights.

Another protection which members of the excepted service may enjoy is
provided by 5 U.S.C. § 7511(c), which states:

The Office [of Personnel Management] may
provide for this application of this subchapter
[dealing with removal, suspension for more than
fourteen days, reduction in grade or pay, or furlough for thirty days or less) to any position or group of positions excepted from the competitive service by regulation of the Office.

Thus, this avenue to substantive and procedural protections may be open for excepted service employees.

Further, if there has been a violation of 5 U.S.C. § 2302(b), the Special Counsel under 5 U.S.C. § 1206 may investigate any of the violations listed.

These violations are as follows:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall act, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 13 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Equal Employment Opportunity Act of 1972 (29 U.S.C. 701); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3118 (a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3118(a)(3) of this title) or over which such employee exercises jurisdiction or control as such an official;
(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Finally, a very recent case, Jane Doe v. United States, Civil Action No. 83-1499 (D.C. Cir. 2-1-85), indicates that some protection is afforded an excepted service employee if the employee has been stigmatized in the course of dismissal. The plaintiff in this case was a Department of Justice attorney who was discharged from her position with charges of unprofessional conduct, such as drinking on the job and dishonesty. She unsuccessfully petitioned the government for a hearing and then brought suit, claiming that her termination violated Department regulations and that it deprived her of a constitutionally protected liberty interest without due process. She also sued several
Department officials in their individual capacities. Although the District of Columbia Circuit Court ruled that her termination did not violate Department regulations and that the officials were not individually liable, it held that she had a liberty interest claim against the Department because of the damaging statements made concerning her professional reputation. At 18 of the slip opinion the court stated:

Doe's liberty interest implicates her post-employment reputation rather than any right to continued employment with the Department; if Doe can demonstrate that the DOJ harmed her professional standing without providing the proper procedural protections, her remedy is a "name-clearing" hearing.

At 22-23 the court goes on to state:

Taking the plaintiff's factual allegations as true, we now find that the stigmatizing nature of the Department's charges, her discharge, and the subsequent foreclosure of future employment opportunities, including government job opportunities, combined to deprive Doe of a constitutionally protected liberty interest in reputation without due process.

The district court rightly voted that:
A government employee's liberty interests are implicated where in terminating the employee the government "makes[s] any charge against him that might seriously damage his standing and associations in the community" or "impose[s] on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."
Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

From this discussion it would appear to be arguable that due process requirements emanating from a property interest in employment as set forth by the Loudermill case would in most cases not apply to excepted service federal employees. Federal statutes do not presently provide for procedural or
substantive rights in the event of dismissal. Only in certain situations, such as those involving past agency practices or those in which the employee is stigmatized, would it appear that a fired excepted service federal employee is entitled to procedural or substantive rights.

Case law does not appear to indicate that the concept of tenure has been applied to excepted service federal employees. Just as there is no statutory framework providing property rights for excepted service federal employees like the property rights enjoyed by Loudermill and Donnelly, so also are there no statutes indicating that long-term excepted service federal employees have tenure rights. Two cases concerning state university teachers help to illustrate how the Supreme Court has approached tenure rights.

In the first case Board of Regents v. Roth, 408 U.S. 504 (1972), Roth was hired for a fixed term of one academic year to teach at a state university. He was informed by the stated deadline that he would not be rehired for the next academic year and was not given any reason for nonretention or a hearing. Roth brought suit alleging that the decision not to rehire him for the next year violated his Fourteenth Amendment rights, alleging that the failure of the officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his rights to procedural due process of law.

The Court held that Roth did not have a constitutional right to a statement of reason and a hearing on the decision not to rehire him for another year. The Court examined the procedural protection afforded tenured and non-tenured teachers in Wisconsin and summarized at 567:

The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be "discharged except for cause upon written charges and
pursuant to certain procedures. A nontenured
teacher, similarly, is protected to some
extent during his one-year term. Rules promul-
gated by the Board of Regents provide that a
nontenured teacher "dismissed" before the end
of the year may have some opportunity for
review of the "dismissal." But the Rules
provide no real protection for a nontenured
teacher who simply is not re-employed for
the next year. He must be informed by Febru-
ary 1, "concerning retention or non-retention
for the ensuing year." But no reason for
non-retention need be given. No review or
appeal is provided in such case."
The Court went on to find that Roth's reputation had not been damaged and
that no stigma had been imposed on him. If either of these situations had
existed, the Court implied, the case would have been different and some kind
of due process may have been required. In summarizing at 578 the Court
stated:

In those circumstances, the respondent
surely had an abstract concern in being rehired,
but he did not have a property interest suffi-
cient to require the University authorities to
give him a hearing when they declined to renew
his contract of employment.

In the second case, Perry v. Sindermann, 408 U.S. 593 (1972), Sindermann
brought suit because he had been employed in the state college system for ten
years under a series of one-year written contracts and was then told that
his employment would not be renewed for the next year without being given an
explanation or prior hearing. One of the bases for his case was that the
failure to afford him a hearing violated his procedural due process rights.
As in the Roth case, no protections were statutorily provided for nontenured
professors. However, Sindermann alleged that the college had a de facto
tenure policy which arose from rules and understandings officially promulgated
and fostered and that this entitled him to an opportunity of proving the
legitimacy of his claim to job tenure. The Court agreed with Sindermann that, if he could prove his allegations, the college would be obligated to afford him a hearing at which he could be informed of the grounds for his nonretention and challenge their sufficiency. At 602-603 the Court stated:

A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service — and from other relevant facts — that he has a legitimate claim of entitlement to job tenure ....

In this case, the respondent has alleged the existence of rules and understandings promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient causes ...." Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof obligates college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.

From this discussion it can be seen that there are no specific tenure provisions for excepted service federal employees. However, the Roth and Sindermann cases may possibly give some credence to the theory that, if an excepted service federal employee has been employed for a number of years, he may be entitled to certain due process rights deriving from a property interest in his job. One of these rights may be a hearing before dismissal, as the Supreme Court indicated should possibly have been provided to Sindermann. Yet, it must be kept in mind that research did not produce any federal cases in which this theory has been the basis for a holding.

It is possible to speculate that, if due process requirements are applied to excepted service federal employees, then at a minimum a hearing must be provided to an employee before he is terminated from his job. See, e.g., Sindermann, discussed above. As to whether the entire panoply of protections
provided by the adverse action provisions presently applied to competitive service federal employees would be applied to excepted service federal employees, case law would appear to indicate that, without statutory authorization, minimum due process requirements would possibly entail only a hearing and the opportunity to respond to charges. See, e.g., Bell v. Burson, 402 U.S. 535 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In any event, it would appear that the Fifth Amendment's Due Process Clause, rather than the Fourteenth Amendment's which was applied in the Loudermill case and which usually restrains only states, would be the appropriate clause to examine in looking at the rights of excepted service federal employees.

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