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Opinion No. 05-158

Tenn. Code Ann. § 49-2-301(b)(GG)

QUESTIONS

1. Does a non-licensed, non-tenured school employee have a property interest in his employment pursuant to Tenn. Code Ann. § 49-2-301(b)(FF) or some other operation of law that entitles the employee to due process upon termination of employment by the superintendent?

2. Does due process for a non-licensed school employee upon termination require the right to attend the termination hearing, the right to be assisted by counsel at the hearing, the right to call witnesses and produce evidence on the employee's behalf and the right to know and have the opportunity to challenge the evidence against the employee and the right to the possibility of judicial review at the post-termination stage?

3. Does Tenn. Code Ann. § 49-2-301(b)(GG)(i) when applied to a non-licensed, non-tenured employee meet the minimum requirements of due process for termination of such an employee, particularly in light of *Mitchell v. Fankhauser*, 375 F.3d 477 (6th Cir. 2004)?

4. Is the decision of the superintendent to uphold the termination of an employee subject to the possibility of judicial review, and if so by what procedure?

OPINIONS

1. Yes. A non-licensed, non-tenured employee has a property interest in the one year term of the employee's contract. If the director of schools discharges the employee for cause during the year, the employee is entitled to due process.

2.-3. Tennessee Code Ann. § 49-2-301(b)(1)(GG) is not facially unconstitutional. Under the statute, a non-licensed, non-tenured employee is entitled to prior notice of the charges against the employee and an opportunity to rebut the charges in a hearing. In light of *Mitchell*, a local school system can avoid potential procedural due process challenges by terminated employees by incorporating procedural features generally present in a post-termination administrative proceeding, including the opportunity to confront and cross-examine adverse witnesses, oral argument, presentation of evidence, the right to retain an attorney and a neutral decisionmaker.

4. Yes. A non-licensed employee may seek judicial review of the superintendent's decision by filing a petition for a common law writ of certiorari. Tenn. Code Ann. §§ 27-8-101, -102

ANALYSIS

1. You first ask whether a non-licensed school employee has a property interest in his employment that would entitle the employee, if terminated, to due process under the Fourteenth Amendment. Property interests protected by the Constitution stem from an independent source, such as state law, rules or understandings and are not created by the Constitution itself. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The United States Supreme Court cases in which the Court has found a property right in public employment have involved individuals who could be dismissed only for "cause." See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (finding Ohio statute prohibiting dismissal except for cause created property right).

Subparts (EE), (FF) and (GG) of Tenn. Code Ann. § 49-2-301 address the employment of non-licensed school personnel in Tennessee. The director of schools of a local school system, also known as the superintendent, has the responsibility and authority to hire, suspend, non-renew and dismiss non-licensed personnel. Tenn. Code Ann. § 49-2-301(b)(1)(EE). Subpart (FF) directs that these personnel "shall be hired on a year-to-year contract" and "[t]he director shall provide a person who is employed in such a position fifteen (15) days' notice of nonrenewal of the contract before the end of the contract period." Subpart (GG) addresses midyear dismissals of these employees. The provision states in relevant part:

(i) The director may dismiss any employee under the director's jurisdiction for incompetence, inefficiency, insubordination, improper conduct or neglect of duty, after giving the employee, in writing, due notice of the charge or charges and providing a hearing. . . .

. . .

(ii) Factual findings and decisions in all dismissal cases shall be reduced to written form and delivered to the affected employee within ten (10) working days following the close of the hearing. . . .

Tenn. Code Ann. § 49-2-301(b)(1)(GG). Thus, a non-licensed employee is hired for a fixed one-year term during which the employee has a contractual and statutory right to continued employment. During the one-year term, the superintendent may not dismiss the employee except for cause, as set forth in Tenn. Code Ann. § 49-2-301(b)(1)(GG); and prior to dismissal, the superintendent must give the employee written notice of the charges and provide a hearing. Finally, the employee has no statutory right to continued employment beyond the one-year term, because the superintendent has sole discretion whether or not to renew the contract.

In terms of a constitutionally protected property interest, a non-licensed employee has a property interest in his employment that is created and defined by his one-year contract and Tenn.

Code Ann. § 49-2-301(b)(1)(FF) and (GG). *Sharp v. Lindsey*, 285 F.3d 479 (6th Cir. 2002) (finding principal had protected property interest in his position as principal because of principal employment contract); *Kendall v. Board of Educ. of Memphis City*, 627 F.2d 1 (6th Cir. 1980) (non-tenured teacher had a protected property right in her one-year employment contract); *White v. Banks*, 614 S.W.2d 331, 334 (Tenn. 1981) (noting tenured teacher employed as athletic coach had two sets of rights -- position as teacher protected by tenure and position as coach protected by contract). Accordingly, if a superintendent decides to terminate a non-licensed employee midyear, the employee has a property interest in employment for the remainder of the contract term. As a result, the employee cannot be deprived of this property interest without due process of law. *Kendall*, 627 F.2d at 4.

2. and 3. The next issue raised is whether the termination procedure set out in Tenn. Code Ann. § 49-2-301(b)(1)(GG) for non-licensed employees satisfies the employee's right to due process under the Fourteenth Amendment. As explained above, a non-licensed employee has a property interest limited to the one year term of his contract. If a superintendent decides to dismiss a non-licensed employee for cause before the term ends, he may do so only "after giving the employee, in writing, due notice of the charge or charges and providing a hearing." Tenn. Code Ann. § 49-2-301(b)(1)(GG). The statute does not define the term "hearing" or specify any other procedures that the non-licensed employee's hearing must include.¹ Rather, the statute simply entitles the employee to written notice of the specific grounds for the proposed dismissal and a pre-termination hearing with the superintendent.

Case law relating to the due process rights of public employees establishes that the "root requirement" of due process is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (Emphasis added.). The formality of the pre-termination hearing depends upon the importance of the interest at stake and the availability and nature of subsequent proceedings. *Farhat v. Jopke*, 370 F.3d 580 (6th Cir. 2004); *Duchesne v. Williams*, 849 F.2d 1004, 1006-07 (6th Cir. 1988); *Purisch*, 76 F.3d at 1423-24.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985), the Supreme Court set the standard for a pre-termination proceeding for a tenured public employee who has an opportunity for a more comprehensive post-termination hearing. An employee is not entitled to a full evidentiary hearing prior to termination, but is entitled, at a minimum, to "oral or written notice

¹By contrast, subpart (GG) specifically provides that a non-tenured teacher, who, like a non-licensed employee, has a property interest in a one-year contract, has the right to a hearing before an impartial hearing officer selected by the local board of education. Moreover, the teacher is entitled to be represented by counsel, present witnesses and other evidence, and cross-examine witnesses. A teacher also has the opportunity to petition the board of education for review of the hearing officer's decision. Tenn. Code Ann. § 49-2-301(b)(1)(GG). Although the statutory language specifies that these additional procedural safeguards apply only to licensed employees, the Tennessee Court of Appeals noted in a footnote in *Fulks v. Watson*, 2001 WL 673573 *10 n.9 (Tenn. Ct. App.), that a non-licensed employee "is entitled to board and judicial review" under subpart (GG).

of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. The due process standard enunciated for pre-termination hearings in *Loudermill* was based in part on the scope of post-termination process provided by the Ohio statute at issue in the case, which statute entitled Ohio civil servants to a full administrative hearing and judicial review. *Id.* at 547- 48. The *Loudermill* court reasoned that the pre-termination process "should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-546. The subsequent post-termination hearing "serve[s] to ferret out bias, pretext, deception and corruption by the employer in discharging the employee." *Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir. 1988).

The pre-termination procedure required under Tenn. Code Ann. § 49-2-302(b)(1)(GG) satisfies the *Loudermill* requirement for a pre-termination proceeding, because the superintendent must give the employee written notice and an opportunity to challenge the dismissal in some sort of hearing. Unlike the statute at issue in *Loudermill*, however, the Tennessee law provides the employee with no opportunity for a post-termination proceeding.

In *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. 1985) and *Mitchell v. Fankhauser*, 375 F.3d 477 (6th Cir. 2004), the Sixth Circuit Court of Appeals addressed the interplay between pre-and post-termination procedures. In *Carter*, the Sixth Circuit held that an employee having only the abbreviated pre-termination hearing approved in *Loudermill* is entitled to a post-termination hearing that is "substantially more 'meaningful.'" *Carter*, 767 F.2d at 273. The Court elaborated: "At a minimum, this requires that the discharged employee be permitted to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf, and to know and have an opportunity to challenge the evidence against him." *See also Case v. Shelby County Civil Serv. Merit Bd.*, 98 S.W.3d 167 (Tenn. Ct. App. 2002) (holding that due process requires that employee be given right to confront and cross-examine witnesses at post-termination hearing when pre-termination hearing was abbreviated *Loudermill* type hearing).

More recently, in *Mitchell v. Fankhauser*, the Sixth Circuit again addressed the issue of the sufficiency of due process hearings for public employees. In *Mitchell*, a custodian in a Kentucky public high school was terminated. The plaintiff's status entitled him under Kentucky law to be discharged only for cause. Furthermore, in contrast to Tenn. Code Ann. § 49-2-301(b)(1)(GG), the plaintiff in *Mitchell* had the additional right to renewal of his contract for additional years unless the employer could show adequate cause for not doing so. *See Ky. Rev. Stat. § 161.011(5)(b), (7)*. Kentucky law did not set forth a termination procedure but required local school boards to adopt written policies that included termination procedures "that satisfy due process requirements." *Id.* at 478 (quoting *Ky. Rev. Stat. § 161.011(9)(c)*). The defendant school system in *Mitchell* employed a pre-termination hearing procedure where the employee met with the superintendent, was provided oral notice of the charges and had an opportunity to present his side of the story. The school system had no post-termination process, and the plaintiff was denied his request for a post-termination

hearing. *Id.* at 481.

Based on the *Carter* holding, the Court in *Mitchell* held that the plaintiff had been denied his right to procedural due process. The Court, however, stopped short of holding that the absence of an opportunity for a post-termination proceeding violates an employee's right to due process. The Court held:

Mitchell, like the employee discharged in *Carter*, was afforded only an abbreviated pre-termination hearing. He is therefore entitled to a more meaningful post-termination hearing. This is not to say that two hearings are always required to satisfy due process. If the pre-termination hearing is more "meaningful," as described in *Carter*, then no post-termination hearing would be necessary. But, as in *Carter* itself, that is not what took place in the case before us.

Id. Accord, Bartlett v Krause, 551 A.2d 710 (Conn. 1988) (holding terminated employee denied due process when he received only abbreviated pre-termination hearing with no opportunity for a post-termination proceeding).

In light of *Carter* and *Mitchell*, a non-licensed employee is entitled, either as part of a pre-termination hearing or in a later post-termination proceeding, to the opportunity to confront and cross-examine adverse witnesses, oral argument, presentation of evidence and the right to retain an attorney.² *Carter*, 767 F.2d at 273. Although Tenn. Code Ann. § 49-2-302(b)(1)(GG) is not constitutionally deficient on its face because it does entitle a non-licensed school employee to a "hearing" prior to termination, such hearing should go beyond the abbreviated hearing approved in *Loudermill*. Consequently, a local school system can avoid potential procedural due process

²As noted earlier, a distinguishing feature between the plaintiff in *Mitchell* and a non-licensed employee seeking a hearing under Tenn. Code Ann. § 49-2-301(b)(GG) is that the *Mitchell* plaintiff had a right to continued employment much like a tenured employee has. A non-licensed employee's interest is limited to the one-year contract term. Some trial courts in the Sixth Circuit have made a distinction between the types of property interests. The courts have held that where a person's employment is for a specific term pursuant to a contract, such as a non-licensed person employed under Tenn. Code Ann. § 49-2-301(b)(FF), such employee would not be deprived of due process of law if the employee receives only a *Loudermill* hearing, because a subsequent breach of contract action provides adequate redress. See *Heath v. Highland Park School Dist.*, 800 F. Supp. 1470 (E.D. Mich. 1992) (rejecting argument of plaintiff, employed under four-year contract, who claimed he was entitled to a full pre-termination evidentiary hearing where there was no post-termination hearing available); *Bennett v. Marshall Pub. Library*, 746 F. Supp. 671 (W.D. Mich. 1990) (holding no due process violation where state remedies adequate to redress plaintiff's discharge under one year contract). See also *Ramsey v. Board of Educ.*, 844 F.2d 1268, 1274 (6th Cir. 1988) (recognizing the argument that a breach of contract action is adequate redress for some claims of due process violations). Notably, however, the Sixth Circuit Court of Appeals has never decided a case on point, and a recent decision suggests the Sixth Circuit would be reluctant to find a breach of contract action as adequate redress in any situation where a plaintiff is discharged and his livelihood, thus, jeopardized. See *Sharp v. Lindsey*, 285 F.3d 479 (6th Cir. 2002) (ruling reassignment of principal, who was also a tenured teacher, to teaching position, effected termination of "principal employment contract" and deprived plaintiff of property interest, but deprivation of the finite interest could be compensated adequately by breach of contract action because plaintiff still held property interest as tenured teacher).

challenges by terminated employees by incorporating the procedural features mentioned in *Carter*.

Another aspect of Tenn. Code Ann. § 49-2-301(b)(1)(GG) that could raise due process concerns is the statute's directing the superintendent to direct the hearing instead of requiring a neutral decisionmaker. The Sixth Circuit Court of Appeals addressed this issue in *Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir. 1988). The plaintiff in *Duchesne* argued that his pre-termination hearing did not comply with federal procedural due process requirements because the city manager who fired him was both a witness and the decisionmaker at his hearing. The Court held that *Loudermill* does not require that a discharged employee receive a pre-termination hearing before a neutral and impartial decisionmaker rather than before the supervisor who fired him. Consistent with the Supreme Court's rationale in *Loudermill*, the *Duchesne* court examined the differences in the function and purpose of the pre- and post-termination hearings:

We acknowledge that there may be cases -- perhaps this is one of them -- in which the supervisory official is so biased that the *Loudermill* "right-of-reply" process is meaningless. The full, post-termination, adversary, trial-type hearing will serve to ferret out bias, pretext, deception and corruption by the employer in discharging the employee. The adversary processes employed in an adjudicatory, post-termination hearing controlled by an impartial judge lend themselves to proving wrongful conduct by the employer. The limited, "right-of-reply" pretermination hearing, as defined in *Loudermill*, is designed "to invoke the employer's discretion," his sense of fairness and mutual respect, his willingness to reconsider. It is not designed or well-adapted to uncover the employer's bias or corrupt motivation.

Id. at 1008. Thus, the *Duchesne* court held that a discharged employee's right to due process is not violated when the pre-termination hearing is before the supervisor who fired the employee *if* there is an opportunity for a post-termination hearing before a neutral and impartial decisionmaker. In light of the *Duchesne* holding, local school systems should consider using a neutral decisionmaker in the pre-termination hearing, at least in cases where the supervisor would also be a witness and, arguably, more biased.

4. In Tennessee, actions by administrative agencies involving the termination of employees may be reviewed by the courts. Tenn. Code Ann. § 27-9-101, *et seq.* (2000). This review is afforded to the courts by the common law writ of certiorari. Tenn. Code Ann. §§ 27-8-101, -102. *See Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274 (Tenn. 1980). Tennessee Code Ann. § 27-8-101 provides:

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Accordingly, a non-licensed employee who is dismissed for cause may seek judicial review of the superintendent's decision by filing a petition for writ of certiorari even though Tenn. Code Ann. § 49-2-301(b)(1)(GG) provides no other administrative review. *See Johnson v. Metropolitan Govt. For Nashville Davidson County*, 54 S.W.3d 772 (Tenn. Ct. App. 2001) (finding terminated employee on probationary status who was not entitled to administrative appeal could file a writ).

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