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BISHOP V. WOOD

Public Employee Discharges and Due Process Rights

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THE U.S. SUPREME COURT'S most recent pronouncement [No. 74-1303, 44 L.W. 4820 (June 10, 1976)] concerning the due process rights of discharged public employees deserves very careful reading, not merely because the case arose out of Marion, North Carolina, but for the more important reason that press reports and a casual reading of the case may create the mistaken impression that it marks a very significant retreat from the principles established by earlier cases dealing with similar matters. In fact, because of the slightly peculiar way in which the majority disposed of the petitioner's claim that he had been deprived of a property interest, this case neither greatly modifies nor amplifies previous doctrine in this area; nor does it provide a strong basis for concluding that other cases involving ordinances similar to Marion's will necessarily be resolved in the same manner.

The best way to put Bishop v. Wood into perspective is to set out some of the major principles established by the three previous leading cases in this area--Regents v. Roth [408 U.S. 564 (1972)], Perry v. Sindermann [408 U.S. 593 (1972)], and Arnett v. Kennedy [416 U.S. 134 (1974)], and then to analyze this case in terms of its impact on those principles.

First, Roth and Sindermann clearly established that, before a discharged employee is entitled to due process, he must demonstrate that the loss of his job deprives him of "liberty" or "property" as those terms are used in the Fourteenth Amendment. Bishop affirms that principle.

Second, according to Roth: "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." [408 U.S. at 577]. In other words, in the employment context, one looks to state law to determine the relationship that exists between employer and employee, but whether that relationship gives rise to a "property" interest protected by the Fourteenth Amendment is a matter of federal law. As explained more fully below, Bishop strongly re-emphasizes that principle.

Third, Roth, Sindermann, and Arnett, taken together, provide some guidance as to the kinds of employment relationships that give rise to protected property rights. Again, Bishop does not alter the principles outlined

in the earlier cases, but it does lend some insight into the process by which the nature of the employment relationship is determined.

The three earlier cases made clear that if by contract, ordinance, or regulation an employee may be dismissed only "for cause," then he has a "legitimate claim of entitlement" to his job, and therefore a property right. Bishop explicitly recognizes (majority opinion, note 8) that this was the holding in Arnett v. Kennedy.¹ And as indicated above, Bishop does not change the law on this point. Three Justices agreed with Justice White's dissent, which found "unequivocal language in the city ordinance that [an employee] may be dismissed only for certain kinds of cause . . ." and concluded from that that the employee had a property right in his job. But the majority decided that "such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." The majority then deferred to the judgment of the United States district judge, who, the Court concluded, had interpreted this ordinance to mean that the employee "held this position at the will and pleasure of the city." In other words, it appears that the majority believed that the district court had concluded that the Marion ordinance provided a representative list of reasons why an employee might be dismissed (as well as a set of procedures to follow in the dismissal) but did not prevent the firing of an employee for other reasons, or for no reason, and therefore did not change the common law of North Carolina that, absent a contract or equivalent limitation, an employee holds his job "at the will and pleasure" of his employer. Mr. Justice Brennan characterized this interpretation of the ordinance as "strained," and Mr. Justice White, writing also for the three other dissenters, disagreed that the district court had interpreted the ordinance as found by the majority. Nevertheless, the majority held that this interpretation was "tenable" and concluded that "[u]nder that view of the law, petitioner's discharge did not deprive him of property interest protected by the Fourteenth Amendment."

It is important to note that, given this disposition of the issue concerning the existence of a property interest, Bishop does not necessarily provide accurate guidance to North Carolina local governments as to whether their personnel ordinance gives their employees property rights in their jobs.

1. Under North Carolina law, if an employee has a contract for a fixed term, he can be dismissed during the contract term only for cause. Still v. Lance, 279 N.C. 254 (1971).

2. The ordinance provided: "A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice."

If an ordinance merely states that an employee may be discharged by the appropriate city or county official and places no limits on that official's discretion, then undoubtedly no property right is implicated. On the other hand, if the ordinance clearly states that an employee may be discharged only for cause, or only for a specified list of reasons, then just as clearly the employee does have a property right. But if the ordinance is somewhat ambiguously written, like Marion's, then the existence of a property right will hinge upon the court's (i. e., the trial court in the first instance, and the appellate court to the degree that it is willing to review the lower court's determination) interpretation of whether the ordinance changes the common law rule that the employee can be fired for any reason or for no reason. And since even the majority conceded in Bishop v. Wood that the Marion ordinance could be read both ways, this case should affect the resolution of such questions in future cases only to the extent that the trial judges find the district court's interpretation of the Marion ordinance persuasive.

Roth and Sindermann also established that a property right in the employment context can arise without explicit contractual or statutory provisions. In Roth, the Court held that a "legitimate claim of entitlement" to a job creates a property right. It noted that more than a "unilateral expectancy" of continued employment is needed to give rise to this entitlement but allowed that the entitlement can be created by an implied as well as an express contract. And the Court added in Sindermann that such an entitlement may also arise out of the unwritten "common law" of the workplace. All of this remains essentially unchanged by Bishop, although the case helps to draw the line more distinctly between a unilateral expectancy, which cannot create a property right, and an implied contract or the common law of the workplace, which can. Mr. Justice Brennan, joined by Marshall, argued that a property right should be found whenever it is "objectively reasonable" for the employee to believe that he can rely on continued employment. Apparently, under this view, a unilateral expectancy of continued employment creates a property right if the expectation is reasonably justified by objective circumstances. The majority rejected this position, characterizing it [note 14] as a "remarkably innovative suggestion that we develop a federal common law of property right. . . ." Implicit in the majority's approach to the case is the concept that whether an implied contract or the common law of the workplace creates an entitlement to the job is a matter of state law, quite apart from the expectations of the employee, objectively reasonable or not. Thus, the law remains that an employee need not necessarily prove the existence of an express contract or other explicit "for cause" provision to establish a property right, but he must be able to show that the circumstances of his employment relationship, when measured by principles of state law, create an entitlement to his job.

The fourth major principle established by the earlier cases was that a discharge could deprive an employee of "liberty" protected by the Fourteenth Amendment in two situations: (a) "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him"--for example, when the discharge is based on allegations that the employee

has been guilty of dishonesty or immorality [Roth, 408 U.S. at 573]; and (b) when the discharge is accomplished in such circumstances that it imposes "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities [id.]" Bishop does not change these principles, but it does shed some light on the circumstances in which they may become applicable.

Bishop's most important contribution to clarifying the law here is its holding that a discharged employee cannot claim that his good name, reputation, honor, or integrity is impaired if the reasons for his dismissal are not publicly disclosed. (In Bishop, the reasons were communicated privately in writing to the discharged employee.) Further, public disclosure that occurs only as the result of a lawsuit filed by the employee is not relevant because, for a claim founded upon a liberty interest to be valid in the first place, the disclosure must precede the filing of the claim. In other words, the employee cannot be allowed to create one of the elements necessary to establish a valid claim by resort to the very mechanism (a lawsuit) that is designed to determine the validity of that claim.

With respect to the second type of situation in which a discharge may affect protected liberty--when the discharge imposes a stigma that may foreclose future employment opportunities--the Court clarified one matter and left some confusion in another. Roth revealed that the mere nonrenewal of a teacher's contract did not constitute a deprivation of liberty, even though this circumstance might make the employee less attractive to other employers; Bishop held that the "same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." In other words, the Court held that the mere fact of discharge does not foreclose future employment opportunities to such an extent that the employee is deprived of protected liberty, regardless of who is informed of the discharge. However, assuming that stigmatizing reasons are involved in a dismissal, Bishop leaves some doubt as to the sort of public disclosure of these reasons that will trigger the need for a due process hearing. The reason for this doubt is that the majority opinion, in discussing public disclosure, does not differentiate clearly between the two ways in which a discharge can deprive an employee of liberty. It is apparent that damage to reputation cannot occur unless there is disclosure of the reasons for dismissal to some substantial element of the public, while significant damage to future employment opportunities can occur if stigmatizing reasons are disclosed to only a very small and select group--potential future employers. Yet the majority opinion focuses exclusively on the question of disclosure to the general public and completely ignores the argument made by Mr. Justice Brennan in dissent that the narrower type of disclosure--to future employers--ought to constitute a sufficient basis to implicate a liberty interest and necessitate a due process hearing. Perhaps Brennan's argument was weakened by the apparent lack of proof at the trial level that the reasons for prior dismissals were routinely requested by future employers in petitioner's line of work and that these reasons, as a matter of course, would be disclosed by the city. Passage by the 1975

General Assembly of legislation protecting the privacy of state and local governmental employee personnel records minimizes the possibility that public employees could make such a showing in future cases.³ However, if such a showing could be made as a matter of fact rather than assumption, the plaintiff might well stand a good chance of convincing a court that his dismissal in such circumstances affects his liberty and entitles him to a hearing.

Finally, Arnett v. Kennedy established the principle that, while state law (or, in the context of the federal service, federal regulations) controls the question of whether the employment relationship creates an "entitlement" to the job (and therefore a property right of which a person cannot be deprived without due process), what process is due is a matter of federal constitutional law. Six members of the Court in Arnett specifically rejected the contrary view that a statute or regulation that creates a property interest in a job (by authorizing dismissal only for cause) can at the same time place limits on the procedural protections that must be afforded before an employee can be deprived of that job. Mr. Justice White, writing for the four dissenting justices in Bishop, expressed the view that the majority in this case had embraced the doctrine that six members had rejected in Arnett. His opinion states:

The majority's holding that petitioner had no property interest in his job in spite of the unequivocal language in the city ordinance that he may be dismissed only for certain kinds of cause rests, then, on the fact that state law provides no procedures for assuring that the City Manager dismiss him only for cause. The right to his job apparently given by the first two sentences of the ordinance is thus redefined, according to the majority, by the procedures provided for in the third

3. N.C. Gen. Stat. §§ 126-22 through -28; N.C. Gen. Stat. § 160A-168; N.C. Gen. Stat. § 153A-98. This legislation provides that, with respect to covered employees, the date of dismissal is a public record, but the reasons for dismissal, if placed in a personnel file, must be kept confidential. However, this legislation may not completely eliminate the possibility that reasons for dismissals may be transmitted to potential future employers. First, if a local government does not keep personnel files, it is not clear whether the record privacy statutes require that information concerning dismissals be kept confidential. Second, the legislation provides certain exceptions to the policy of nondisclosure, including the following: "An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be inspected to be necessary and essential to the pursuance of a proper function of the inspecting agency..." This language is open to the interpretation that, if a former employee of city A applies for work with city B, the personnel official of city A may determine that it is "necessary and essential to the pursuance of a proper function" of the personnel officer of city B for this latter official to have access to the records of the former employee of city A to determine his fitness for employment with city B.

sentence and as redefined is infringed only if the procedures are not followed.

This is precisely the reasoning which was embraced by only three and expressly rejected by six Members of this Court in Arnett v. Kennedy....

However, it appears that the dissenters have misconstrued the majority opinion. As explained above, the majority simply disagreed that the first two sentences of the Marion ordinance gave the petitioner any right to his job because they did not read these sentences as stating that an employee could be dismissed only for cause. Therefore, the dissenters views notwithstanding, this case does not alter the law on this point as outlined in Arnett.

Perhaps the most important single point to remember about Bishop v. Wood is that it does not change the essential principle that whether North Carolina local governmental employees (at least those not covered by the State Personnel Act) are to be entitled to full due process protection before final discharge is a matter totally within the control of the local governments themselves. As suggested above, personnel ordinances can be written to guarantee that employees do or do not have property rights in their jobs, or they can be left ambiguous enough that a court will have to decide the issue (of course, the decision to leave the ordinance ambiguous is made by the local government). Further, by the manner in which it discloses reasons for a dismissal, or refuses to disclose such reasons, the local government can control whether the employee is deprived of his liberty and therefore entitled to due process. And so, if a North Carolina local governmental employee is discharged, his legal rights depend on what the local government itself does or does not do. It may be hoped that in making these choices, local governments will be motivated less by what the law requires them to do than by what the principles of good personnel management indicate they ought to do.