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Conducting an Adequate Predismissal Hearing: A Practical Guide for North Carolina Local Government Employers

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The Fourteenth Amendment to the United States Constitution prohibits state and local governments from depriving any individual of the right to life, liberty, or property without due process of law.[1] In 1972 in *Board of Regents v. Roth*, the United States Supreme Court extended the definition of *property* beyond the meaning of material assets by recognizing that some public employees possess a constitutionally protected property right to continued public employment.[2] The *Roth* court said the requirement for procedural due process set out in the Fourteenth Amendment applies to dismissal actions directed at such employees—actions that could result in employees being deprived of their property interest.

For many years the Court did not indicate what procedures were mandated by due process in these dismissal actions. In 1985, however, in *Cleveland Board of Education v. Loudermill*, the Court noted that due process generally requires that some form of hearing occur before the government can deprive someone of any significant property interest, and held that a government employer must give an employee who possesses a property right in continued public employment a "pretermination hearing" before deciding whether to dismiss him or her.[3] (In this bulletin, the terms *pretermination hearing* and *predismissal hearing* are used synonymously.) While in *Loudermill* the Court provided clear guidance on certain required aspects of a predismissal hearing, it left unanswered questions on several other aspects. Since then, lower courts have responded to some of *Loudermill*'s open issues. This *Local Government Law Bulletin* discusses the *Loudermill* decision, explains its applicability to North Carolina local governments, canvasses lower court decisions rendered since *Loudermill*, and reviews the elements that go to make up an adequate predismissal hearing.[4]

The United States Supreme Court's Due Process Interpretation: Notice and an Opportunity to Respond

A property interest in continued public employment arises only in certain situations, in which a government employee may legitimately expect continued employment:

- A government employee who has a contract for a specified term owns a constitutionally protected property interest in his or her employment for the duration of that term.[5]
- A government employee who, according to state[6] law, may not be dismissed without "just cause" owns a constitutionally protected property interest in his or her employment.[7]
- A government employee covered by a county or municipal ordinance[8] that specifies detailed proce-

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1. U. S. Const. amend. XIV, § 1.
2. 408 U. S. 564 (1972).
3. 470 U. S. 532 (1985).
4. Lower courts have interpreted *Loudermill* to permit predismissal conferences or meetings rather than hearings. *See, e.g., infra* text accompanying notes 23 through 25.
5. *Roth*, 408 U. S. at 576.
6. *See, e.g.*, G.S. 126-35.
7. *Loudermill*, 470 U. S. at 541–42; Leiphart v. NC School of the Arts, 80 N.C. App. 339, 354 S.E.2d 914, 924, *cert denied*, 318 N.C. 507, 349 S.E.2d 862 (1986); Faulkner v. N.C. Dep't. of Corrections, 428 F. Supp. 100 (W.D.N.C. 1977).
8. *See, e.g.*, HIGH POINT, N.C., CODE tit. 4, art. D.; REIDSVILLE, N.C., CODE ch. 16, art.V; TARBORO, N.C., CODE ch. 13, art. X.

> dures for dismissal for reasons of personal conduct or performance owns a constitutionally protected property interest in his or her employment.[9]

In any of the above situations, a government employer may not deprive an employee of his or her property right[10] (may not discharge the employee) without due process.

In *Loudermill*,[11] the Supreme Court held that at a pretermination hearing required by due process, a government employer must give the employee

1. oral or written notice of the charges against him or her,
2. an explanation of the evidence for the charges, and
3. an opportunity to present his or her side of the story.[12]

Citing previous decisions, the Court described the above as the minimum procedures required by due process before an individual can be deprived of any substantive interest guaranteed by the Fourteenth Amendment.[13]

The Court did not elaborate on the precise format required at the pretermination hearing, and it also failed to mention whether any other due process procedures must be followed. Due process generally requires a hearing at which procedures beyond the minimum ones listed in *Loudermill* are applied. These include (1) the right to counsel, (2) the right to a neutral decision maker, (3) the right to present evidence, (4) the right to present witnesses and cross-examine accusers before the decision maker, (5) the right to have a record prepared of the proceeding, and (6) the right to receive a written statement of the reason(s) for the decision.[14]

The *Loudermill* Court did, however, state that the hearing provided at the predismissal stage "need not be elaborate."[15] According to the Court, an adequate pretermination hearing could be "something less than a full evidentiary hearing."[16] The Court reasoned that at the predismissal stage a formal evidentiary proceeding is unnecessary because "the pretermination hearing need not definitively resolve the propriety of the discharge."[17] Rather it is simply "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. . . ."[18]

The Court specifically held that dispensing with trial-like procedural formalities at the pretermination hearing would be permissible only if the employee, if dismissed, would have the option of pursuing a full post-dismissal hearing to resolve the appropriateness of the dismissal.[19] The Court implied that if this option would not be available, then the pretermination hearing must include all the trappings of a formal evidentiary proceeding.[20]

Lower Court Applications: Clarification of *Loudermill*

Besides being vague on the precise format of a predismissal hearing, the Supreme Court also failed to address other employer disciplinary actions (e.g., suspensions and demotions) and the applicability of due process requirements to those. Furthermore, the Court did not discuss remedies for violations of due process in the public employment context. Since *Loudermill*, lower courts have filled in some of the gaps left by the Supreme Court. In North Carolina, the State Personnel Commission (SPC) has also responded to *Loudermill* by establishing predismissal, presuspension, and predemotion hearing regulations for state and applicable local government employers whose employees have a property right in continued employment.[21] While the SPC regulations apply only to local government employers subject to the North Carolina State Personnel Act,[22] they are an example of the implemen-

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9. Pittman v. Wilson County, 839 F.2d 225 (4th Cir. 1988) (The property right must be established by ordinance and not by resolution. For a discussion on the distinction between the two, *see id.* at 228–229.); Kearney v. County of Durham, 99 N. C. App. 349, 393 S.E.2d 129 (1990); Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E. 2d 277 (1992).

10. In these three illustrations the property right each employee owns is generally the right to receive economic benefits from continued employment and does not include the right to possess and retain a particular job or to perform particular services. *See* Huang v. Bd. of Governors, 902 F.2d 1134 (4th Cir. 1990); Royster v. Bd. of Trustees, 774 F.2d 618, *cert. denied*, 475 U.S. 1121, 106 S. Ct. 1638, 90 L.Ed. 2d 184 (1985).

11. 470 U. S. 532 (1985).

12. *Id.* at 546.

13. *Id.* at 541–42.

14. *See* discussion and cases cited in RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, 255–264 (1985).

15. *Loudermill*, 470 U.S. at 545.

16. *Id.*

17. *Id.*

18. *Id.* at 546.

19. *Id.* at 546–47.

20. *Id.* at 547; *see also* Salisbury v. Housing Authority, 615 F. Supp. 1433, 1438 (E.D. Ky. 1985).

21. For state employers: 25 N.C. ADMIN. CODE tit. 01J, § .0606 (1976, amended 1991) (dismissals), § .0610 (1976, amended 1990) (suspensions), § .0611 (1984, amended 1989) (demotions). Identical regulations for local government employers are found at 25 N.C. ADMIN. CODE tit. 01I § .2303 (1992) (dismissals), § .2305 (1992) (suspensions), and § .2306 (1992) (demotions).

22. Local government employers in this category include the following: public health departments; social services departments; emergency management agencies; and area mental health, mental retardation, and substance abuse authorities. For an overview of the N.C. General Statutes identifying which local government employers are subject to the State Personnel Act, *see generally* STEVE ALLRED, EMPLOYMENT LAW—A GUIDE FOR NORTH CAROLINA PUBLIC EMPLOYERS 109–111 (Chapel Hill: Institute of Government, 1992).

tation of the federal due process predismissal hearing requirement and thus can also provide guidance to local government employers not covered by the act. The lower court decisions and the SPC's regulations incorporate *Loudermill*'s notice and opportunity to respond requirements, identify whether any additional due process procedures are necessary, and specify what form the predismissal hearing should take. These lower court rulings, as well as the SPC's rules, are examined below.

Predismissal meetings or conferences. As noted above, though the Supreme Court specified in *Loudermill* that trial-like procedural formalities are unnecessary, it also implied the opposite by using the formal term "pretermination hearing." Lower courts have not interpreted *Loudermill* to require a formal predismissal hearing, and they have upheld as constitutionally adequate predismissal meetings or conferences, provided employees receive ample opportunity to respond to charges and have access to a full post-dismissal evidentiary hearing.[23] The SPC interprets *Loudermill* similarly, and has replaced the word *hearing* with *conference* in its predismissal regulations.[24] Thus North Carolina local government employers may properly provide a conference or meeting, rather than a formal evidentiary hearing, as the forum for an employee's predismissal opportunity to defend his or her actions and rebut any erroneous allegations.[25]

The SPC regulations also require the supervisor recommending dismissal to notify appropriate management and obtain authorization before initiating a predismissal conference.[26] The rules do not state the purpose for this internal review or elaborate on the mechanics for carrying it out. Such procedure could ensure that higher levels of management are briefed on the evidence supporting dismissal and have an opportunity early on to participate in the decision whether or not to pursue dismissal. In some instances a decision may be made at this preliminary stage that dismissal is unnecessary or inappropriate.

Advance notice of the predismissal conference. Must an employer give an employee advance notice of the predismissal conference? *Loudermill* is silent on this point, but federal courts in a number of circuits have held that prior notice of the time and date of the conference is unnecessary, provided that at the commencement of the session the employee receives notice of the charges against him or her and has an adequate opportunity to present evidence and arguments against dismissal.[27] Neither the Fourth Circuit Court of Appeals nor any court in North Carolina has addressed this issue. The SPC's regulations require that advance notice of the conference be provided, but the rules do not say how *much* in advance of the conference the notice must be.[28] The North Carolina Office of Administrative Hearings (OAH)[29] generally upholds cases involving application of the SPC regulations where the employers gave some period of advance notice rather than scheduling a conference immediately.[30] OAH approved same-day notice in two cases in which the employers notified the employees in the morning that predismissal conferences were scheduled for 4:00 P.M. that afternoon.[31] Until the North Carolina courts decide this issue, a North Carolina government employer who is not subject to

23. *See, e.g.*, Linton v. Frederick County Bd. of County Comm'rs, 964 F.2d 1436 (4th Cir. 1992); Garraghty v. Jordan *et. al*, 830 F.2d 1295 (4th Cir. 1987); Brasslett v. Cota, 761 F.2d 827, 836 (1st Cir. 1985); Leiphart v. N.C. School of the Arts, 80 N.C. App. 339, 354, 324 S.E.2d 914, 924, *cert denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

24. 25 N.C. ADMIN. CODE tit. 01J, § .0606 (1) (1976, amended 1991).

25. As required by *Loudermill*, some local government employers have established an internal post-dismissal review process that enables a dismissed employee to appeal his or her dismissal in a formal evidentiary hearing before a review board (e.g., personnel appeals board, civil service commission, city council, etc.). Employees subject to the State Personnel Act may obtain such review by filing a contested case at the North Carolina Office of Administrative Hearings. *See infra*. note 29.

26. 25 N.C. ADMIN. CODE tit. 01J, § .0606 (1) (1976, amended 1991).

27. Brasslett v. Cota, 761 F.2d 827, 836 (1st Cir. 1985); Gniotek v. City of Philadelphia, 808 F.2d 241, 244 (3rd Cir. 1986); Panozzo v. Rhoads, 905 F.2d 135 (7th Cir. 1990); Riggins v. Bd. of Regents of the Univ. of Nebraska, 790 F.2d 707 (8th Cir. 1989); Kelly v. Smith, 764 F.2d 1412, 1414 (11th Cir. 1985).

28. 25 N.C. ADMIN. CODE tit. 01J, § .0606 (2) (1976, amended 1991).

29. OAH was created by the North Carolina General Assembly in 1985 as an independent, quasi-judicial agency. State agency employees and local government employees subject to the State Personnel Act may appeal disciplinary or dismissal actions to OAH within thirty days after receipt of a final decision rendered under the agency or local government employer's internal grievance process. The appeal is heard as a contested case in a hearing presided over by an assigned OAH Administrative Law Judge. OAH issues a recommended decision for review by the North Carolina State Personnel Commission which then has 120 days to issue a final decision. G.S. 150B-23; G.S. 126-35, -37, -38; 25 N.C. ADMIN. CODE tit. 01J, § .0603 (1976, amended 1989).

30. *See, e.g.*, Oats, 92 OSP 0226 (OAH, 1992) (employer provided absent employee notice of predismissal conference by mail) *recommendation to let dismissal stand affirmed,* State Personnel Commission (1993); Hanton, 91 OSP 1106 (OAH, 1993) (employer provided twenty-four hours advance notice of conference) *recommendation to let dismissal stand affirmed, modified in part,* State Personnel Commission (1993); Price v. NCCU, 91 OSP 0219 (OAH, 1992) (employer gave several days' advance notice to provide employee time to prepare her responses for predismissal conference) *recommendation to let dismissal stand affirmed,* State Personnel Commission (1992).

31. Spencer, 92 OSP 0584 (OAH, 1993) (no decision yet by State Personnel Commission); Clark, 92 OSP 0402 (OAH, 1991) *recommendation to let dismissal stand affirmed,* State Personnel Commission (1992).

the SPC rules may exercise discretion in providing advance notice of a predismissal conference, provided at the beginning of the meeting the employer presents the charges and gives the employee a full opportunity to present his or her reasons against dismissal.

Neutral decision maker. Due process does not require that the predismissal conference be conducted by a management representative with no prior involvement in the matter. Lower federal courts have interpreted *Loudermill* to permit a procedure providing the employee a "right-of-reply" before the same supervisor responsible for initiating the proposed dismissal.[32] The supervisor may conduct the conference either alone with the employee or together with other management representatives. Although due process generally requires that a neutral decision maker review the proposed deprivation of a constitutional right, the courts do not require a neutral decision maker at the predismissal conference in public employment cases, because they reason that to do so would formalize the process and make it more complex than that contemplated by the Supreme Court.

Impartial decision maker. In contrast to the above, due process does require that the decision maker (whether an individual or group) participating in a full post-dismissal evidentiary hearing be impartial.[33] Impartiality is lacking when a decision maker has "the kind of personal or financial stake in the decision that might create a conflict of interest."[34] If such circumstance exists, the employee's right to procedural due process is violated because the decision maker is said to have a "disqualifying personal bias." A decision maker at a post-dismissal hearing who had gained prior knowledge about the facts of the case, or had been involved in an earlier stage of investigation leading to the dismissal (e.g., the supervisor), is not per se disqualified. A due process violation does exist, however, if the decision maker at the post-dismissal hearing fails to disclose such prior knowledge or involvement.[35]

No attorney representation at the conference. The Supreme Court did not comment on the right of either side to have counsel at the predismissal conference. Both the Fourth Circuit and Seventh Circuit Courts of Appeals have held that the right to have attorney representation at the predismissal conference is not required by due process.[36] The employee must present his or her own case against dismissal unless the employer provides more rights than required by due process and permits an employee to have attorney representation at the conference. The SPC's regulations prohibit attorneys from representing either side at the predismissal conference.[37]

Employer actions before and after the conference. In *Bishop v. Dept. of Human Resources*, the North Carolina Court of Appeals outlined steps a government employer should take before and after conducting a predismissal conference, in order to comply with the federal requirement for due process.[38] That case involved a North Carolina Department of Human Resources (DHR) permanent employee, Margaret Bishop, who was employed at the O'Berry Center in Goldsboro. DHR management representatives (including Bishop's supervisor) met with Bishop on October 15, 1986, in a predismissal conference. Management had drafted and executed a letter on October 13 that dismissed Bishop effective on October 15 for violation of a no-smoking rule and for insubordination. At the conference, management listened to Bishop's responses to the charges and, at the end of the meeting, handed her the previously prepared final dismissal letter. The court of appeals found a due process violation because it appeared that DHR had made the final decision to dismiss Bishop before she had an opportunity to respond to the charges against her at the predismissal conference. The court of appeals reached the conclusion that management had made its decision before the conference, as indicated by: (1) the execution of the final dismissal letter before the conference; (2) the lack of deliberation over Bishop's responses after the conference; and (3) the timing of Bishop's dismissal, effective immediately at the conclusion of the conference. It can be inferred from the court of appeals' decision in *Bishop* that North Carolina government employers should conduct a predismissal conference before preparing any final dismissal letter, confer after a predismissal conference and consider whether the employee's responses warrant a different action from dismissal, and wait twenty-four hours before communicating a final dismissal decision to an employee. OAH and SPC adhere to the above interpretation of *Bishop* in their review of dismissal actions.[39]

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32. Garraghty v. Jordan *et al.*, 830 F.2d 1295, 1302 (4th Cir. 1987); Schaper v. City of Huntsville, 813 F.2d 704, 715 (5th Cir. 1987); Duchesne v. Williams and the City of Inkster, 849 F.2d 1004 (6th Cir. 1988); Boston v. Webb, 783 F.2d 1163, 1166 (4th Cir. 1986).

33. Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n., 426 U. S. 482, 491–92 (1976); Leiphart v. NC School of the Arts, 80 N.C. App. 339, 354, 324 S.E.2d 914, 924, *cert denied*, 318 N.C. 507, 349 S.E.2d 862 (1986); Salisbury v. Housing Authority, 615 F. Supp. 1433, 1441 (E. D. Ky. 1985).

34. *Hortonville*, 426 U.S. at 491.

35. Crump v. Hickory Bd. of Educ., 326 N.C. 603, 392 S. E.2d 579 (1990).

36. Buschi v. Kirven, 775 F.2d 1240, 1254–56 (4th Cir. 1985); Panazzo v. Rhoads, 905 F.2d 135, 139–140 (7th Cir. 1990).

37. 25 N.C. ADMIN. CODE tit. 01J, § .0606 (2) (1976, amended 1991); *but see* Newton, 93 OSP 0589 (OAH, 1993) (due process grants an employee the right to have an attorney at the predismissal conference when the employer has three management representatives present) (no decision yet by State Personnel Commission).

38. 100 N.C. App. 175, 394 S.E.2d 702, *disc rev. allowed*, 327 N.C. 481, 396 S.E.2d 614 (1990), *rev. denied as improvidently granted*, 328 N.C. 325, 481 (1991).

39. *See, e.g.*, Devenny v. UNC-Charlotte, 92 OSP 0301 (1992) *recommendation to let dismissal stand affirmed, modified in part*, State Personnel Commission (1993).

Suspension. The *Loudermill* Court stated that if an employer is concerned that safety will be compromised if an employee is kept on the job, the employer could suspend the employee immediately but not without pay.[40] The Court did not comment on whether an employer not confronted with a safety hazard could impose a disciplinary suspension without pay and without first conducting a presuspension conference. The Fourth Circuit Court of Appeals has held that a government employer must give an employee with a property interest in continued employment a presuspension conference before imposing a disciplinary suspension of five days or longer without pay.[41] The presuspension conference must be conducted in the same manner as a predismissal conference. The Fourth Circuit Court of Appeals will sustain a disciplinary suspension of less than five days without pay that is imposed with no prior presuspension conference.[42] The court views a less than five-day suspension without pay as a deprivation of property not significant enough to trigger due process.[43] The SPC follows the above rule with the exception that it also permits an "investigatory suspension" without pay (without a prior presuspension conference) for up to forty-five days, at the end of which time if the employer takes no disciplinary action, the employer must reinstate the employee with full back pay.[44]

Demotion. Lower courts have also applied the federal due process requirement to demotion actions involving public employees who possess a property interest in continued employment. If an employer wants to demote such an employee for disciplinary reasons to a position paying less than the employee's current job, a predemotion conference must be held.[45] Like the presuspension conference, the predemotion conference is conducted in the same fashion as a predismissal conference. Where demotion will not result in the employee's receiving lower pay or losing other economic benefits, no predemotion conference is required, unless the employee has a contractual right to hold a specific job or perform specific duties or unless the employee is subject to a state statute or local ordinance establishing a legitimate expectation that the employee will not be demoted to a position of reduced responsibilities without cause.[46] The SPC has also enacted a rule providing for predemotion conferences. Per this rule, the employer must conduct a predemotion conference whether or not the employee's demotion results in a loss of pay.[47]

Presentation and cross-examination of witnesses. The courts have not said that a public employee has a due process right to present and cross-examine witnesses at a predismissal conference. In *Loudermill*, the Supreme Court implied that employers may exercise discretion in the degree of formality applied to the conference, and thus an employee may or may not be permitted to engage in such activity, provided a full post-dismissal hearing is available later.[48] Justices Brennan and Marshall, in their concurring opinions, argued that due process may require presentation and cross-examination of witnesses in cases where the facts are disputed.[49]

Employer evidence supporting charges. Focusing on the Supreme Court's description of the purpose of the predismissal process as providing "an initial check against mistaken decisions," the Fourth Circuit Court of Appeals recently said: "Due process does not mandate that all the evidence on a charge or even the documentary evidence be provided [by the employer at the predismissal conference],

40. *Loudermill*, 470 U.S. at 545.

41. Garraghty v. Jordan *et al.*, 830 F.2d 1295, 1299 (4th Cir. 1987).

42. *Compare* Carter v. Western Reserve Psychiatric Habilitation, 767 F.2d 270 (6th Cir. 1985) (no presuspension conference necessary for two-day suspension).

43. Such disciplinary actions do not violate federal due process, but a government employer might have problems trying to impose them on a white-collar employee who is exempt from the overtime compensation requirements of the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 213 (a) (1) (1988 & Supp. III 1991). An employee must be paid on a salary basis (i.e., the employee regularly receives a predetermined amount each pay period that is not subject to reduction because of variation in quality or quantity of work performed) to enable the employer to qualify for an exemption from the obligation to pay for overtime, 29 C.F.R. § 541.118 (a) (1991). Certain pay deductions imposed for disciplinary reasons affect an employee's salaried status, resulting in the employer's incurring overtime liability. *See* Shockley v. City of Newport News, 997 F.2d 18, 24–25 (4th Cir. 1993) [applying 29 C.F.R. 541.118 (a) (5) (1991) and finding disciplinary suspensions without pay for insubordination, insolence, abuse of sick leave, tardiness, and misuse of property eliminate employee's salaried status, making the employer liable for overtime]. Disciplinary suspensions without pay will not affect an employee's salaried status if imposed for major safety-rule infractions, including those relating to the prevention of serious danger to the workplace or to other employees. The salary basis requirement also specifies that "an employee need not be paid for any workweek in which he performs no work," 29 C.F.R. § 541.118 (a) (1991). The Department of Labor has interpreted this to permit a disciplinary suspension without pay for one full week (at least five days) without affecting the employee's salaried status, Wage-Hour Opinion Letter (September 10, 1991).

44. 25 N.C. ADMIN. CODE tit. 01J, § .0610 (2) (1976, amended 1990); considering the *Garraghty* court's finding that a five-day suspension without pay is not a de minimus deprivation and thus must be preceded by a predisciplinary conference, the constitutionality of this regulation could be challenged.

45. Shawgo v. Spradlin, 701 F.2d 420, 426 (5th Cir. 1983); Jett v. Dallas Independent School Dist., 798 F.2d 748, 754 (5th Cir. 1986).

46. Garvie v. Jackson, 845 F.2d 647, 651 (6th Cir. 1988); *Dallas Independent School Dist.*, 798 F.2d at 754.

47. 25 N.C. ADMIN. CODE tit. 01J, § .0611 (1984, amended 1989).

48. 470 U.S. 532 (1985).

49. *Loudermill*, 470 U.S. at 533, 538 (1985).

only that such descriptive explanation be afforded as to permit [the employee] to identify the conduct leading to the dismissal and thereby enable him to make a [meaningful] response."[50] The above standard is not satisfied if the explanation provided is so general and nonspecific that the employee cannot focus on the operative conduct relied on to fire him or her.

Right to record conference. An Ohio state court has held that no federal due process right exists to have a stenographic record or tape recording made of a predismissal conference.[51] An employer should probably record or take notes of the meeting to ensure later accuracy on recall. Any such recordings or notes become part of the employer's investigative records and need not be made available to the employee. The employer may permit the employee to tape record the conference, but is not obligated to do so.

Remedies for failing to conduct a predismissal conference. What penalties may the public employer face for failing to conduct a constitutionally adequate predismissal or predisciplinary conference? An employer's failure to conduct an adequate predismissal or predisciplinary conference is a procedural due process violation that enables the employee to file a lawsuit under title 42, Section 1983 of the U.S. Code.[52] Such suit is heard by a jury, and can result in an award to the employee of compensatory damages, including back pay and other consequential damages (e.g., for emotional or mental distress) for demonstrated actual injury.[53] Reinstatement is not a remedy for lack of a predismissal conference. This remedy is applicable only if insufficient cause to support the dismissal is shown. If the employer can prove that had a proper conference occurred the employee would still be dismissed, the employee will not recover back pay—only those damages which the employee can demonstrate are attributable to the procedural due process violation itself.[54]

50. Linton v. Frederick County Bd. of County Commissioners, 964 F.2d 1436, 1440 (4th Cir. 1992).

51. Local 4501, Communications Workers of America v. Ohio State University, 49 Ohio St. 3d. 1, 7 (1990).

52. For local government employees subject to the State Personnel Act, the act and its implementing regulations provide remedies (including back pay and recovery for attorney's fees) for failure to receive an adequate predismissal conference, G.S. 126-4(11), 25 N.C. ADMIN. CODE tit. 1B § .0432(c) (1987, amended 1991). The regulations do not provide recovery for compensatory damage claims. Local government employees subject to the act may be permitted to bypass these state administrative remedies by filing a Section 1983 lawsuit in state or federal court. *See, e.g.*, Snuggs v. Stanly County Dep't of Public Health, 310 N.C. 739, 314 S.E. 2d 528, (1984).

53. Carey v. Piphus, 435 U.S. 247 (1978); Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

54. *Carey*, 435 U.S. 247; Burt v. Abel, 585 F.2d 613 (4th Cir. 1978).

Hypothetical Case Example

At 8:45 A.M. on February 15, 1994, the newly appointed city manager of Tar Heel County, North Carolina, met with her personnel director to discuss the proposed discharge of Norm Peters, a senior accountant in the city's finance department. Peters, who had worked for the city since 1982, started as a finance clerk and worked his way up until he reached his current position in 1992. The circumstances leading the city manager to consider dismissing Peters are as follows: While auditing the finance department's records, the city manager discovered approximately $5,000 missing from accounts handled by Peters. The money appeared to have been withdrawn from the accounts in $50.00 increments over a two-year period. The personnel director, doubtful that Peters could have embezzled money from the city, informs the city manager that Peters has an impeccable reputation among his colleagues and has an excellent performance record. The city manager reminds her personnel director that the city has enacted a personnel ordinance applicable to finance department employees that provides for dismissal on the basis of specified reasons, including when an employee's accounts reflect a shortage of $100 or more. The city manager has rechecked her audit findings twice with the same result. She wants to dismiss Peters immediately.

The personnel director must point out to the city manager that before Peters can be dismissed, the city must determine if Peters has a protected property interest in continued employment. If Peters has such a property interest, then he has a Fourteenth Amendment due process right to respond to the charges against him before dismissal. As noted above, Peters is not an at-will employee as his employment is governed by a Tar Heel County personnel ordinance that specifies reasons for dismissal. Thus he has a due process right to a predismissal conference.

At a minimum per *Loudermill*, the city must give Peters notice of the charges against him and an opportunity to respond to those charges in a predismissal conference before anyone decides whether to dismiss him. *Loudermill* alone, however, provides insufficient guidance to employers who must comply with this federal due process requirement. The city must also look at lower court rulings providing more precise guidance on the elements of an adequate predismissal conference. The personnel director should advise the county manager of the holdings in these cases.

After the city manager and the personnel director evaluate the facts, if they believe dismissal may be appropriate, one of them should schedule a predismissal conference with Peters. The personnel director should stress to the city manager that no final dismissal decision may be made until after the predismissal conference is concluded, and that it is essential that they maintain open minds. An employer must keep an

open mind at the conference and give the employee a meaningful opportunity to respond to charges, even if the evidence is clear supporting dismissal (as appears evident in this case) and there are no factual disputes. According to the Supreme Court, in such instances even though the facts are clear, the necessity or appropriateness for dismissal may not be, and the employer is unable to make this assessment until after the employee has had an opportunity to give his or her reasons against dismissal.[55]

Another reason for an employer to maintain an open mind at a predismissal conference is to provide a defense against an employee's claim, in any subsequent lawsuit, that the employer made up its mind beforehand and did not really give the employee a meaningful opportunity to respond at the conference. If the employee succeeds in convincing the court that the employer has violated due process, then the employee may obtain monetary damages, even if the employer can also demonstrate that a proper conference would not change the appropriateness of dismissal. The personnel director and city manager may succeed in preventing a suit claiming violation of procedural due process by conveying to Peters (preferably in writing but at least orally) at the commencement of the conference that the purpose of the meeting is to discuss a "proposed" and not a final dismissal action.

Before holding the conference, the personnel director and city manager may (but are not required to) give Peters advance notice of the date and time of the conference to allow him a reasonable amount of time to prepare his responses. Peters must be provided an explanation for the dismissal, including sufficient detail so that he clearly understands the reasons for the proposed action. Peters may request time to check his own records to find an explanation for the financial discrepancies. If no prior notice of the conference is provided, he must be given adequate time during the meeting to respond to the dismissal charges. Peters may want to present and cross-examine witnesses. The personnel director and city manager may exercise discretion on such a request. Neither side may have attorney representation at the meeting; the city may waive this restriction and allow attorneys to represent both sides. Finally, the personnel director or city manager should take notes during the meeting and, at the conclusion, should tell Peters that the city will provide him notice of its final decision after they review his responses.

Following the conference, the personnel director and city manager should review Peters' responses and decide if it is appropriate to dismiss him. If they decide to dismiss, they should consider waiting at least twenty-four hours after the conference before communicating this decision to Peters. They must inform Peters in writing of the specific reasons for the dismissal and give him written information regarding his post-dismissal appeal rights.[56]

Conclusion

Loudermill may be vague in some respects, but the decision makes it clear that government employers do not possess the unrestricted right to dismiss all employees at will. Some government employers may feel burdened by the restrictions *Loudermill* places on them. Indeed, the Supreme Court recognized the employer's need to avoid unnecessary administrative burdens, particularly involving removal of unsatisfactory employees, but the Court also recognized the employee's desire to continue working. The Court tried to balance these opposing interests by requiring an informal predismissal hearing that only minimally restricts the employer's flexibility, while at the same time giving the employee a "meaningful opportunity to invoke the discretion of the decision maker."[57]

The lower courts and the State Personnel Commission have clarified many of the uncertainties created by *Loudermill* concerning the extent of procedural due process mandated in the public employment context. The result continues to be that eligible public employees are entitled only to the minimal due process requisites before they may be dismissed. The employer need not provide the full range of due process procedures, including a formal evidentiary hearing, provided a post-dismissal hearing is also available.

Instead of viewing the predismissal conference as a legal impediment, government employers should consider it a useful management practice that makes good business sense. As the Supreme Court noted in *Loudermill*, the employer shares with the employee a significant interest in avoiding the disruptions caused by an unnecessary dismissal.[58] Dismissals can result in work left unfinished, the need to hire and train new employees, morale problems among other employees, and the use of significant management time and resources defending legal actions brought by dismissed employees. Because of these serious consequences, many private employers, who have no legal obligations to do so, nevertheless follow some due process practices, including meeting with an employee to obtain his or her reasons against dismissal before final action is taken. Government employers should use the predismissal conference as the final opportunity to evaluate the situation and decide if dismissal is an appropriate or necessary action.

55. *Loudermill*, 470 U.S. at 543–544.

56. Employment Sec. Comm'n v. Wells, 50 N.C. App. 389, 274 S.E.2d 256 (1981).

57. *Loudermill*, 470 U. S. at 543–544

58. *Id.* at 543.

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