CAN THEY JUST FIRE ME?

Public Employees' Right to Due Process

NATIONAL EDITION

by Steve Diamond

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INSTITUTE OF INDUSTRIAL RELATIONS
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STEVE DIAMOND is a Program Representative on the staff of the Center for Labor Research and Education, Institute of Industrial Relations at the University of California, Berkeley. He is a member of AFSCME District Council 10 and was previously a member of CSEA/SEIU 1000. He has served as a shop steward, labor council delegate, local and statewide union officer. He is also the author of *Hey, the Boss Just Called Me Into the Office.....*, a pamphlet published by the University of California which describes union members' right to representation on the job.

PREFACE

In a major decision issued on March 19, 1985, the United States Supreme Court held that all public employees with a "property interest" in their employment are entitled to due process prior to dismissal from their jobs. This decision, *Cleveland Board of Education v. Loudermill, et. al.*,* clarified an earlier decision by the Court in which a range of opinions by several justices left the status of discipline of public employees rather confused. While this latest decision is clear and unambiguous in its requirements and, as a 7-2 decision, has the backing of a strong majority on the Court, it does not go as far to protect public employees as two justices had hoped. This pamphlet discusses the basis of the decision, the specific guarantees it offers public workers, and how union representatives can best implement it in the workplace.

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* 84 L.Ed.2d 494; 105 S.Ct. 1487; 118 LRRM 3041. Citations in this pamphlet refer to LRRM.

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Public Employees' Right to Due Process

BACKGROUND

In late 1975, the Cleveland, Ohio, School Board hired James Loudermill as a security guard. As is quite common on job application forms, Loudermill was asked whether he had ever been convicted of a felony. Loudermill said that he had not. Eleven months later during "a routine examination of his employment records"* the Board found that Loudermill had been convicted of grand larceny in 1968. In a letter dated November 3, 1980, the Board informed Loudermill of its discovery and notified him that he was being dismissed for dishonesty in filling out the job appli-

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* All quotes are from Justice White's majority opinion in *Loudermill*, unless otherwise indicated.

cation. Loudermill was not allowed "to respond to the charge of dishonesty or to challenge the dismissal." Ten days later, on November 13, the Board passed a resolution which made the dismissal official.

Because Loudermill was a "classified civil servant," under Ohio law he could only be terminated for cause and was entitled to an administrative review of the discharge. Loudermill requested such a review from the Cleveland Civil Service Commission on November 12. A referee appointed by the Commission held a hearing on January 29, 1981. Loudermill maintained "that he thought his 1968 larceny conviction was for a misdemeanor rather than a felony." The referee recommended reinstatement, but on July 21, 1981, the full Commission heard the case and announced that it would uphold the dismissal. Its decision became final on August 21.

Loudermill then filed suit against the Board alleging that the Ohio statute that granted him administrative review was unconstitutional "because it did not pro-

vide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. His complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt pre-removal hearings."

The U.S. District Court dismissed the case, arguing that it had no basis upon which to grant relief to Loudermill because the statute granting him a "property right" to his job also explicitly provided a form of protection against wrongful discharge--the post-discharge hearing. They argued that a post-termination hearing "adequately protected Loudermill's liberty interests." Finally, they held that the nine month period it took to make a final decision about the discharge was "constitutionally acceptable" because of the Civil Service Commission's crowded calendar.

At about the same time, the same U.S. District Court heard a second case which

was argued on similar grounds. Richard Donnelly was dismissed from his position as a bus mechanic by the Parma, Ohio, Board of Education in August 1977, for failing an eye examination. His appeal to the Civil Service Commission took more than a year. He was reinstated but without back pay. Donnelly also challenged the constitutionality of the post-termination hearing process in the U.S. District Court. The Court dismissed his complaint and in doing so relied on its *Loudermill* opinion.

Both cases were joined together for an appeal to the U.S. Sixth Circuit Court of Appeals. In a 1981 decision the Court upheld the first allegation of the employees. They had been "deprived of due process" because of the failure to provide a hearing prior to termination. The Court of Appeals "disagreed with the District Court's original rationale," Supreme Court Justice White later wrote. "Instead it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed

the added administrative burden of a predetermination hearing." The Appeals Court was split, however, and the dissenting judge argued that a requirement that dismissal be for "cause," when combined with a post-termination hearing, satisfied the requirements of due process.

On the second allegation, that the post-termination hearings took so long to complete that due process was denied, the Court of Appeals agreed with the District Court and found no constitutional violation.

Both the Cleveland and Parma School Boards appealed the cases to the United States Supreme Court. Loudermill also sought review of the Court of Appeals decision that the nine-month delay he had suffered was constitutional. The Supreme Court granted the petitions for review and heard arguments by the parties on December 3, 1984. The Court issued its precedent-setting ruling on March 19, 1985.

WHAT IS DUE PROCESS?

Reinstatement of discharged workers is quite common. Arbitrators often agree with a union (or other worker representative) that dismissal, considered "capital punishment" in the workplace, is too harsh. They then reinstate employees with back pay or with only a token suspension. But in its *Loudermill* and *Donnelly* decisions the United States Supreme Court broke new ground for all public employees when they found that the dismissal of these two workers violated their constitutional rights.

The employees had contended that it was not enough to provide them with a hearing on their dismissal after the fact, but that the **due process** clauses of the 5th and 14th Amendments to the U.S. Constitution required that they be given a chance to respond to the proposed discipline, and to the charges of misconduct upon which the discipline was based, **before** the dismissal.

The Fifth Amendment provides, in part, that "No person shall be deprived of life, liberty, or property, without due process of law;...." The Fourteenth Amendment extends this prohibition to the States: "...nor shall any State deprive any person of life, liberty, or property, without due process of law;...." Loudermill and Donnelly contended that the constitutionally recognized "property interest" in their jobs entitled them to pre-termination due process.

A majority of the Court agreed with them. We will examine in detail the Court's reasoning below, but first we will review the major cases by the Court which led up to this most recent decision.

Earlier Cases

In 1972, the Court ruled that certain public employees have a **property** interest in their job. Because the Constitution forbids the government from taking property from individuals "without due process of law," the government, as an employer, is prohibited from taking away this

"property" without due process. In that decision, *Board of Regents v. Roth* (408 U.S. 564 [1972]) the Court explained its definition of a job as personal property:

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

In 1974, the Court moved to examine in greater detail the precise nature of this due process requirement. In *Arnett v. Kennedy* (416 U.S. 134 [1974]) the Lloyd-LaFollette Act came under the court's scrutiny. Under this law, which regulates the working conditions of federal

employees, "the employee is entitled to 30 days advance notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of action....The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceeding."

The Court was divided in its *Arnett* decision when it came to the precise nature of due process requirements. Three dissenting justices, for example, argued that a dismissal had such a serious impact on an employee that (s)he "was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine witnesses." If the majority of the Court had agreed with this reasoning, all federal

employees would be able to have an arbitration or civil service hearing **before** they could be fired. The remaining six justices, however, did not agree. Instead, the minimal safeguards of the Lloyd-LaFollette Act were upheld as adequate protection prior to job loss. Only after dismissal would the employee be entitled to a full hearing.

Loudermill: Due Process Required

In *Loudermill*, the Supreme Court relied on the logic of these earlier decisions to reaffirm the constitutional, not statutory, nature of the right to due process. They laid to rest the occasional argument that when a legislative body grants a right to a citizen and also defines procedures to protect that right, the procedures are not subject to a constitutional test. Justice White, author of the majority opinion, wrote:

> If a clearer hearing is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain sub-

stantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' *Arnett v. Kennedy, supra*, at 167 (Powell, J.); see *id.*, at 185 (White, J.).

(*Loudermill*, 3044)

Justice White then moved on to outline the requirements of due process. Again, he relied on doctrine developed by the Court over many years:

> 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 and 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 a 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 (1971). This principle requires 'some kind of 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. Sinderman*, 408 U.S. 593, 599 (1972)....this rule has been settled for some time now....
>
> (*Loudermill*, 3044-45)

White then concludes that a need for this pretermination hearing "is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." (*Loudermill*, 3045).

White recalled first, that the Court has "frequently recognized the severity of depriving a person of the means of livelihood....While a fired worker may find employment elsewhere, doing so will take time and is likely to be burdened by the questionable circumstances under which he left his previous job." White then discussed the value of such a pretermination hearing for making an informed decision

about discipline. "Some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes....Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." (*Loudermill*, 3045.)

Finally, Justice White provided several arguments supporting his position that the time and effort taken by a government agency to hold a hearing was not outweighed by their interest in an immediate termination:

> The governmental interest in immediate termination does not outweigh these interests...[A]ffording an employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.

Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

(*Loudermill*, 3046)

Loudermill: The Hearing

With these three arguments in place, White moved to describe in greater detail the components of the pretermination hearing itself.

He began by noting that the hearing "though necessary, need not be elaborate." He argued against the proposal for a full evidentiary hearing with cross-examination of witnesses:

> In general, 'something less' than a full evidentiary hearing is sufficient prior to administrative action....the pretermination hearing need not definitively resolve the propriety of the discharge. It 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.
>
> (*Loudermill*, 3046)

He went on to list the specific actions management must take to satisfy the due process requirement and drew a line beyond which management need not go:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement....The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story....To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.
>
> (*Loudermill*, 3046)

The Court provided no detailed guide to the implementation of these safeguards. This was left open for employees, their unions and public employers to develop in the workplace and at the bargaining table. Finally, the Court held that the nine month delay that James Loudermill experienced after his termination before a final decision was made was not a constitutional violation.

INNOCENT UNTIL PROVEN GUILTY: ANOTHER VIEW OF DUE PROCESS

Although he concurred in the final decision in *Loudermill*, Justice Marshall wrote an articulate defense of the right of public employees "to more than the respondents sought in this case." Marshall took the opportunity to restate his earlier dissenting opinion from *Arnett v. Kennedy*:

> I continue to believe that **before the decision is made to terminate an employee's wages**, the employee is entitled to an opportunity to test the strength of the evidence by confronting and cross-examining adverse witnesses and by presenting witnesses on [their] own behalf, whenever there are substantial disputes in testimonial evidence," *Arnett v. Kennedy*, 416 U.S. 134, 214 (1974) (Marshall, J. dissenting). Because the Court suggests that even in this situation due process requires no more than notice and an opportunity to

be heard before wages are cut off, I am not able to join the Court's opinion in its entirety.

(*Loudermill*, 3047, emphasis in original)

From Justice Marshall's perspective, the impact of termination is potentially so great that the need for a full pre-termination proceeding outweighs the disadvantages to the employer in providing such an opportunity. Though Marshall's opinion does not carry the weight of a majority opinion, it does provide a basis for future improvements in due process for public employees. His arguments could be of significant value to public employee unionists in negotiating for better contract provisions and lobbying for legislation on discipline and discharge procedures.

Marshall begins by outlining the importance of a thorough proceeding prior to termination:

To my mind, the disruption caused by a loss of wages may be

so devastating to an employee that, whenever there are substantial disputes about the evidence, additional deprivation procedures are necessary to minimize the risk of erroneous termination. That is, I place significantly greater weight than does the Court on the public employee's substantial interest in the accuracy of the pre-termination proceeding. After wage termination, the employee often must wait months before his case is finally resolved, during which time he is without wages from his public employment. By limiting the procedures due prior to termination of wages, the Court accepts an impermissibly high risk that a wrongfully discharged employee will be subjected to this often lengthy wait for vindication, and to the attendant and often traumatic disruptions to his personal and economic life.

(*Loudermill*, 3047)

And then, in forceful and unusually clear language, Marshall details the damage done by a dismissal:

> Considerable amounts of time may pass between the termination of wages and the decision in a post-termination evidentiary hearing -- indeed, in this case nine months passed before Loudermill received a decision from his post-deprivation hearing. During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many States

deny unemployment to workers discharged for cause.

(*Loudermill*, 3047-48)

At this point, Justice Marshall turns the oft-heard argument made by conservatives about "welfare cheats" on its head in favor of pubic employees:

> Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to cash before becoming eligible for public assistance. Even in that instance 'the substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may

be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted." (*Arnett v. Kennedy*, Marshall, J., p. 221.)

(*Loudermill*, 3048)

Marshall points out further that there is no guarantee that a post-termination hearing, which might occur months down the road, will fully reimburse the employee's lost wages. And even in such a situation there is no way to reimburse the employee for "the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and loss of an opportunity to perform work." Such an effect "will never be able to be recompensed, and indeed probably could not be with dollars alone."

If the employer were faced with the incentive of continuing to pay the worker

wages while the dispute is resolved then there would be a strong incentive to move quickly, saving the employee the risk of long-term unemployment. But as Marshall points out, "the employer loses this incentive if the only suffering as a result of the delay is borne by the wage earner, who eagerly awaits the decision on his livelihood." And the Court in *Loudermill* "gives a stamp of approval to a process that took nine months."

Marshall calls, then, for a full hearing which allows the employee a meaningful response--a chance to present his/her own evidence and witnesses and to cross-examine witnesses relied upon by management to make their termination decision. Justice Marshall closes his argument with a strong statement of support for the constitutional protection of discharged public employees:

> The hardship inevitably increases as days go by, but nevertheless the Court countenances such delay. The adequacy of pre- and post-deprivation procedures are inevitably intertwined, and only

a constitutional guarantee that the latter will be immediate and complete might alleviate my concern about the possible wrongful termination of wages. The opinion for the Court does not confront this reality. I cannot and will not close my eyes today -- as I could not ten years ago -- to the economic situation of great numbers of public employees, and to the potentially traumatic effects of wrongful discharge on a working person. Given that so very much is at stake, I am unable to accept the Court's narrow view of the process due to a public employee before his wages are terminated, and before he begins the long wait for a public agency to issue a final decision in his case.

(*Loudermill*, 3048)

Brennan Backs Marshall

In a partial concurrence and partial dissent, Justice Brennan's opinion also argues for a more extensive hearing procedure prior to dismissal. Brennan shares Marshall's concern about "substantial disputes in testimonial evidence" regarding the basis of a firing action. He argues that:

> When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to contront an accusor in front of the decisionmaker. Such an opportunity might not necessitate 'elaborate' procedures...but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are

'reasonable grounds' to believe the accusations are 'true.'

(*Loudermill*, 3049)

There was no factual dispute in the *Loudermill* and *Donnelly* cases, so Brennan did not argue that due process had been denied here. He did, however, differ with the majority of the Court on the issue of time delays after the dismissals.

The Court's decision to dismiss Loudermill's complaint of an unconstitutional time delay does not, in Brennan's view, mean that a nine-month delay will always "pass constitutional scrutiny as a matter of course." He agrees that the post-termination hearing must be held at "a meaningful time," as the majority opinion states. He, too, shares the concern of Justice Marshall that the damage done to an employee increases over time. But he is unwilling to go any further than stating that "at some point" a Constitutional violation may occur. When he applies this logic to the cases at hand he concludes that there is not enough information

available to decide the matter. He dissents from the Court's decision on this question and suggests that the case should have been sent back to the U.S. District Court for additional testimony about the delay.

LONE JUSTICE FOR STATES' RIGHTS

Only Justice Rehnquist argued in a full dissent that the *Loudermill* decision went too far in favor of public employees. Rehnquist recalled the earlier Supreme Court opinion in *Arnett* where three justices (Burger, Stewart, and Rehnquist) held that an employee was owed only those protections provided by the legislature. Rehnquist himself had written in that 1974 decision that "the employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which [the Ohio legislature] has designated for the determination of cause." (*Arnett* 416 U.S., at 152).

Rehnquist argues that the definition of property is created by the legislative act, not by the Constitution. Therefore, any procedure which the legislature provides to protect that "property" is considered adequate. The protection granted is not subject to constitutional scrutiny. In Rehnquist's words in *Loudermill*, "one who avails himself of government entitlements

accepts the grant of tenure along with its inherent limitations." Also inherent in this perspective, of course, is the "marketplace" concept that one freely chooses a particular job.

In other words, public employees must take the "bitter with the sweet." Of course, were the Court to return to this perspective, public employees would be subject to the constantly shifting moods of the state legislatures. The weight and tradition of the Constitution would be left at the doorstep of every state capitol building. That both Chief Justice Burger and Justice Stewart no longer agree with their fellow Justice is strong evidence that the Rehnquist dissent represents a last gasp for a State's right to define the boundaries of public employment.

HOW WILL THE LOUDERMILL DECISION BE IMPLEMENTED?

It will take several years for the impact of this decision to be felt in every public sector workplace. A number of states, however, already have a *Loudermill*-type procedure in place. If we examine more closely the record of public sector labor relations in such a state we can make a fair approximation of the impact of *Loudermill.*

California public employees have had the benefit of pre-disciplinary due process for more than a decade. In 1975, the California Supreme Court held in *John F. Skelly v. State Personnel Board, et. al.* (15 C.3d 194; 124 Cal.Rptr. 14, 539 P.2d 774 [1975]) that California public employees are entitled to "as a minimum...preremoval safeguards [which] must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly*, 15 C.3d 194, 215). These are pre-

cisely the four areas outlined by the U.S. Supreme Court in *Loudermill.* In a valuable article in the journal *California Public Employee Relations* (No. 45, June 1980, pp. 19-35) labor attorney Richard J. Silber has concisely analyzed each of these four safeguards.

Silber notes that "the crux of these constitutional safeguards is the opportunity to be heard at a meaningful time and in a meaningful manner.'" He then reviews the steps outlined by the California Court:

> 1) **'Notice of the proposed action.'** If an employee did not have an opportunity to respond in a real and meaningful manner to the discipline actually imposed, procedural due process would not be satisfied. Consequently, notice must be given of the type of discipline proposed. In this regard, it is probable that a disciplinary demotion and a suspension from employment would be considered mutually exclusive punitive

actions, each of which would require specific notice before either form of discipline could be imposed.

2. **'Reasons for the proposed discipline.'** An employee would not have a meaningful opprtunity to respond to a proposed disciplinary action if the employer, either when discipline is imposed or at the post-disciplinary evidentiary hearing, alleges a violation of employer policies or rules that differ from that specified in the intended notice of action. In such an instance, procedural due process would not be satisfied.

3) **'A copy of the charges and the material upon which the action is based.'** In specifying this safeguard, the state Supreme Court has made it clear that mere allegations of wrongful behavior would be insufficient in order for an employee to have an opportunity to be heard in a

meaningful manner. Accordingly, the employee must receive copies of the charges, which should set forth all instances of alleged wrongful conduct or violations of employer policy, which must be accompanied by copies of the policies and rules allegedly violated, and which should further be supported by all other materials and documents which have served as the basis for the proposed disciplinary action. It is reasonable to assume that copies of statements furnished to the employer, which have served as the basis for the proposed disciplinary action, must also be included.

4) **'The right to respond, either orally or in writing, to the authority initially imposing the discipline.'** In order to conform with this safeguard, it is probable that the employee should be afforded an opportunity to review the proposed disciplinary action and

material with his or her representative counsel, and be afforded sufficient time, including released time, to review the materials relied on by the employer in order to prepare a response. The State Supreme Court specifically designated that the authority who initially imposed the discipline must hold the hearing, in order that the employee might have the opportunity to be heard in a meaningful manner, therefore, an attempt utilize another official, who does not have the authority to amend, modify, or revoke the proposed discipline would presumably deny the employee the procedural due process right to a meaningful preremoval hearing.

Since the original *Skelly* decision, several state court, Public Employment Relations Board and arbitrator's decisions have further defined the right of California public employees to due process prior to dismissal. Though *Skelly* dealt with employees of the State of California it-

self, these other decisions have extended the safeguards to University of California, state college, and university, county and city employees.

California cases also have held that **probationary employees** may have a property or liberty interest in their employment under certain circumstances, even though they do not have an expectation of permanent employment, and, therefore, are entitled to due process prior to dismissal. California courts also have extended due process requirements to other forms of **less serious discipline.** Even a one-day suspension could be considered a denial of property, but the California courts have decided that only suspensions longer than ten days, demotions or dismissals are serious enough loss of property to warrant spending the time and money necessary for a due process hearing prior to the imposition of discipline.

In addition to the above provisions, due process rights are applicable in California to discipline given in response to **alleged criminal actions,** "since," according

to labor attorney Silber, "only the employee has the right to decide whether or not to respond to the proposed disciplinary action in view of the potential effects of the criminal proceedings."

Further, if an employee is disciplined without being afforded due process rights, (s)he is entitled to **full back pay** for the period of time from the implementation of the discipline until that point where a proper due process hearing has been held, even if the discipline itself is sustained after the hearing. Finally, because the pre-disciplinary hearing is not "a full trial-type evidentiary hearing" the parties are **not entitled to have the proceedings reviewed in court.** Also, both sides **may** request that additional evidence in the form of documents, affidavits or witnesses be accepted in the hearing. However, the employer is **not required** to accept anything beyond a written or verbal response to the charges by the employee or his/her representaive. This is, of course, a key difference between a pretermination hearing and a later arbitration or trial.

DUE PROCESS AND NEGOTIATED AGREEMENTS BETWEEN THE EMPLOYER AND THE UNION

To provide better for its members, the union can attempt to negotiate into its contract or memorandum of understanding the basic provisions of the *Loudermill* decision. Contract language of this kind will also provide a strong educational tool for the union. Too often court decisions in favor of workers, the few that exist, are written about only in obscure journals. If it's in the contract, then the union membership is in the best position to understand and exercise its legal rights. If the due process requirements are outlined in the contract, they will be subject to the grievance procedure and can be enforced with less time and expense than is involved in going to court.

The contract negotiation process can also be used to clarify or extend those rights which the courts have established. A court's ruling, when in favor of employees, could be viewed by the union as a starting point--not a limitation on the

constitutional rights. In the *Skelly* case the California Supreme Court said it was describing "**minimum** preremoval safeguards" for public employees. (Emphasis added.) In *Loudermill*, Justices Marshall and Brennan open the door to the additional protection of a full hearing prior to termination.

Here are some of the ways in which a union might use its contract to expand upon those "minimum" safetuards. In California, the State's Civil Service rules provide only five days notice in advance of the imposition of discipline. Is this adequate? Can the background to a case that may have evolved over a period of years be understood properly in five days? Will "cool" heads prevail at a meeting only a few days after the notice of discipline? A union could negotiate a more appropriate time period.

As noted above, due process is accorded those with a property or liberty interest at stake. The precise definition of these terms will vary. It will always be of use to attempt to define, in the contract,

those instances when such interests are denied, while not preventing the possibility of expanding contractual coverage to additional classifications of employees and other types of discipline in the future.

As a starting point, the union could place the minimum requirements found in *Loudermill* into the contract. A California public employees union local, representing a park district, did precisely that in its negotiations. A section of their contract is entitled "Pre-Disciplinary Notice and Meeting." Though it was based on the *Skelly* decision, the provisions apply equally well to the *Loudermill* case. It is worded as follows:

> **Pre-disciplinary Notice and Meeting.** In the event the District intends to discharge an employee, to impose a suspension without pay, to demote an employee or to reduce an employee's pay; the District shall, if the employee has completed the original probation-

ary period, utilize the following procedure:

(1) The employee and the employee's steward shall be given notice in writing of the proposed disciplinary action not less than five (5) calendar days prior to the effective date of action. The notice shall set forth the reasons for the action and shall be accompanied by copies of written materials, if any, upon which the action is based.

(2) Prior to the effective date of the disciplinary action the employee may request and, if so, shall be granted an informal hearing to discuss the proposed disciplinary action. The informal hearing shall be conducted by the employee's Department Head and shall be attended by the next immediate supervisor of the employeee who is not a member of the bargaining unit covered by this Agreement. The employee

may be represented by one of the following: The Union President, Vice President, Secretary, Chief Steward or Steward. The purpose of this meeting is not to gather evidence for future meetings within the grievance procedure and, therefore, no record will be made. Failing reconciliation, the formal grievance procedure may be used.

This contract language provides two clear advantages. First, the language goes beyond the specific requirements of the U.S. and California Supreme Courts. It requires that the Union Steward as well as the employee be given notice of the proposed disciplinary action. Although not required by the constitutional rights outlined in *Loudermill* or *Skelly*, such a provision is certainly within the spirit of those decisions, whose intent is to provide a chance for the employee to be heard "at a meaningful time and in a meaningful manner." The employee's representative is guaranteeed a maximum amount of time to prepare for the informal hearing.

Second, the contract's language spells out who is to be present at the hearing. The California Supreme Court decision required that the authority who imposed the discipline, not necessarily the person who tells the employee of the pending action, must be present. Only in this way does the employee have a chance to confront his/her accuser. In *Loudermill*, the Court makes no mention of this issue; however, one can presume from the opinion's emphasis on the employee's chance to respond in a meaningful manner, that such a provision follows the Court's rationale.

HOW SHOULD THE DUE PROCESS HEARING BE CONDUCTED?

The *Loudermill* decision is fundamentally an extension of the grievance procedure itself. In practice the pre-termination hearing will function in much the same way as an informal meeting held to resolve a typical grievance. The meeting can be any or all of the following:

- An opportunity to resolve the dispute through withdrawal or reduction of the proposed discipline;

- A chance to find out how much the employer really knows and, sometimes more important, how far it is willing to push the action against the employee;

- The union can demonstrate to the employer that it will strongly back up the employee.

The time available to a shop steward or union representative prior to the hear-

ing may be short, depending on what procedures have been established. In California, for example, the Civil Service Commission has established a five day period. In the post-disciplinary period, on the other hand, the steward usually has ten to thirty days to prepare a response to management's actions. Nonetheless, the same principles apply during the pre-disciplinary process. Here are some suggestions to keep in mind:

1) **Investigate** the situation thoroughly, as though the grievance were a potential arbitration case. Get all the facts: **Who** is involved? **What** did they say and do? **When** did it happen? **Where** did it happen?

2) These basic four W's are very important, but so are the less obvious three W's: **Why** did it happen--what is the underlying cause? **What** do you want from the employer as a remedy? **Which** clauses or provisions of the contract will you rely on if you file a grievance?

3) It is to the advantage of both parties to **settle grievances as early as possible.** This may be difficult at the stage of the pre-disciplinary hearing--management may view the hearing as simply an opportunity for the employee to say "I didn't do it." But a strong, well reasoned and prepared defense of the employee could make a difference. As a minimum, try to get management to start questioning its decision to impose discipline.

4) **Pressure helps settle grievances**--a concept which grows out of number three. Make it clear to management that the union and the individual employee's shop or unit support the employee (if that is indeed the case). If publicity is a possibility, you may want to consider that as a response to poor management actions. Public employers are particularly vulnerable to publicity.

5) **Keep notes at the hearing**, or, as soon as you leave, write down your recollection of the discussion. Although the notes can't be used as evidence in a post-disciplinary arbitration or trial, they can

be very useful in preparing the union's defense through future steps in the grievance procedure.

6) **Bring the employee along.** Constitutional rights to due process would mean little if the employee were excluded from the hearing. The presence of the employee through all steps of the procedure will increase the confidence of the employee in the union representative and demonstrate to management the union's close relationship with its rank and file members. However, it usually makes sense to ask that the employee allow the union representative to "do the talking" in order to avoid an emotional hassle with management. Such hassles may lead the employee to admitting facts, or non-facts, which are best left unmentioned.

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