Fordham Law Review

Volume 57 | Issue 6 Article 15

1989

Bias and the Loudermill Hearing: Due Process or Lip Service to Federal Law?

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BIAS AND THE *LOUDERMILL* HEARING: DUE PROCESS OR LIP SERVICE TO FEDERAL LAW?

INTRODUCTION

In *Cleveland Board of Education v. Loudermill*,[1] the Supreme Court held that a public employee who holds a constitutionally protected interest[2] in his job must be granted a hearing before being terminated.[3] This requirement protects the employee from erroneous discharge and is derived from the due process clauses of the fifth and fourteenth amendments to the United States Constitution.[4]

While *Loudermill* held that a pretermination hearing was required,[5] the Court did not prescribe specific requirements for the hearing. Instead, the Court described the hearing generally as "an opportunity to respond,"[6] and concluded that "something less" than a full evidentiary hearing would suffice.[7] The specific purpose of the hearing is to provide an initial check against erroneous termination by allowing the employee to respond to the charges before losing his source of income.[8] The facts in *Loudermill* did not involve biased decisionmakers and the majority did not reach the question whether a biased[9] decisionmaker[10] may conduct the pretermination hearing.

Since *Loudermill*, courts have disagreed whether and to what extent personal bias may invalidate a pretermination hearing. This disagreement is confounded by the fact that some forms of bias are not prejudicial, while others are inherently unfair and thus offend due process.[11] In cases where the decisionmaker harbors malice toward the employee or

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1. 470 U.S. 532 (1985).
2. *See infra* notes 36-46 and accompanying text.
3. *See Loudermill*, 470 U.S. at 542, 545-46.
4. *See* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law"); U.S. Const. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law").
5. *See Loudermill*, 470 U.S. at 545-46.
6. *Id.* at 546.
7. *Id.* at 545 (quoting Mathews v. Eldridge, 424 U.S. 319, 343 (1976)).
8. *See infra* notes 54-59 and accompanying text.
9. Bias is the tendency to rule against the employee because of a conflict of interest. Professor Tribe has categorized conflicts as institutional and personal. *See* L. Tribe, American Constitutional Law § 10-16, at 745 (2d ed. 1988); *infra* notes 64-67 and accompanying text.
10. The decisionmaker is the official responsible for discharging the employee. *See* Duchesne v. Williams, 849 F.2d 1004, 1007 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989). He is usually a supervisor or other administrator of the agency for which the employee works. *See, e.g.*, Page v. DeLaune, 837 F.2d 233, 235-36 (5th Cir. 1988) (supervisor); Matthews v. Harney County School Dist. No. 4, 819 F.2d 889, 890 (9th Cir. 1987) (school board); Washington v. Kirksey, 811 F.2d 561, 562-63 (11th Cir.) (school superintendent), *cert. denied*, 108 S. Ct. 96 (1987); Brown v. Texas A & M Univ., 804 F.2d 327, 329 (5th Cir. 1986) (university administrator); Buschi v. Kirven, 775 F.2d 1240, 1255-56 (4th Cir. 1985) (hospital administrator); Brasslett v. Cota, 761 F.2d 827, 829 (1st Cir. 1985) (town manager).
11. *See infra* notes 64-67 and accompanying text.

has a personal or financial stake in the termination, the protections afforded by a fair hearing are lost.[12] The employee is denied a meaningful opportunity to respond to factual determinations because the outcome reflects the decisionmaker's own bias.[13] Moreover, a personally biased decisionmaker is unlikely to exercise any discretion in favor of the employee; once termination takes effect, the employer is unlikely to reverse itself.[14]

Some courts have recognized the unfairness of hearings conducted by such decisionmakers.[15] However, other courts have held that bias is not a factor at all in determining the validity of the hearing. These courts ignore the purpose of the pretermination hearing and rely on post-termination process to remedy the bias present in the earlier hearing.[16]

Part I of this Note discusses procedural due process and the right of public employees to a pretermination hearing. Part II examines the due process right to an impartial decisionmaker and the kinds of bias permitted in due process hearings. Part III analyzes *Loudermill*'s pretermination hearing requirement and argues for the removal of personal bias from these hearings. This Note concludes that personal bias defeats the purpose of pretermination hearings and thereby violates due process.

I. DUE PROCESS AND THE PUBLIC EMPLOYEE'S RIGHT TO A PRETERMINATION HEARING

A. *Procedural Due Process*

The due process clauses of the fifth and fourteenth amendments[17] pro-

12. *See infra* notes 100-102 and accompanying text.

13. *See Duchesne*, 849 F.2d at 1010 (Ryan, J., dissenting).

14. *See infra* note 75 and accompanying text.

15. *See, e.g.*, Matthews v. Harney County School Dist. No. 4, 819 F.2d 889, 893 (9th Cir. 1987) (pretermination hearing before school board that had already decided to terminate employee violated due process); Washington v. Kirksey, 811 F.2d 561, 564 (11th Cir.) (due process violated when decisionmaker failed to honor agreement made at pretermination hearing), *cert. denied*, 108 S. Ct. 96 (1987); Rosario Torres v. Hernandez Colon, 672 F. Supp. 639, 652-53 (D.P.R. 1987) (politically biased pretermination hearing violated due process); Cook v. Board of Educ., 671 F. Supp. 1110, 1116 (S.D.W. Va. 1987) (employee permitted to prove lack of impartial decisionmaker); Salisbury v. Housing Auth., 615 F. Supp. 1433, 1441 (E.D. Ky. 1985) (personal involvement in termination process rendered housing authority members so biased that they could not conduct pretermination hearing).

16. *See, e.g.*, *Duchesne*, 849 F.2d at 1008 (full post-termination hearing serves to ferret out bias by the employer); Schaper v. City of Huntsville, 813 F.2d 709, 716 (5th Cir. 1987) (allegations of bias and conspiracy do not state a claim under 42 U.S.C. § 1983 (1982)).

17. Due process rights arise from the fifth and fourteenth amendments. The fifth amendment applies to actions by the federal government, *see* Mathews v. Eldridge, 424 U.S. 319, 332 (1976), and the fourteenth amendment applies to actions by state and local governments, *see* Goldberg v. Kelly, 397 U.S. 254, 255-56 (1970). The Supreme Court has interpreted the guarantees of both amendments to provide equal safeguards and has used the term "due process" to include rights under either amendment. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-46 (1985) (discussing due process cases under both amendments without distinction); Arnett v. Kennedy, 416 U.S. 134, 164

hibit federal and state governments from depriving individuals of "liberty, or property, without due process of law."[18] This is a procedural right to "some kind of hearing"[19] that arises when the government deprives an individual of a constitutionally protected liberty or property interest.[20] This hearing must occur "at a meaningful time and in a meaningful manner."[21] The essence of this right "reflects a fundamental value in our American constitutional system."[22]

As a general rule, due process requires that the hearing occur *before* the deprivation takes effect.[23] Exceptions arise only when a state interest of "overriding significance"[24] justifies postponing the hearing until after the deprivation occurs.[25] In public employment cases, due process requires some form of hearing before termination combined with a full evidentiary hearing after termination takes effect.[26]

The Supreme Court has developed a two-step analysis to determine whether hearings are required and, if so, the formal requirements and timing of the hearings. First, the interest being deprived must rise to a constitutional dimension; unless the interest meets this threshold, due process is not implicated and no hearing is required.[27] Second, when a protected interest does exist, the Court applies a balancing test to determine the form of hearing required.[28] The balancing test considers three factors in determining what process is due: the private interest affected

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(1974) (Powell, J., concurring) ("constitutional guarantee of procedural due process depends . . . on the presence of a legitimate 'property' or 'liberty' interest within the meaning of the Fifth or Fourteenth Amendment").

18. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; *see also* H. Perritt, Employee Dismissal Law and Practice § 6.9, at 336 (2d ed. 1987) (discussion of due process rights of public employees).

19. Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

20. *See id.*

21. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

22. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

23. *See id.* at 379.

24. *Id.* at 377.

25. *See id.* at 379.

26. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985); *infra* notes 47-58 and accompanying text.

27. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (court must first determine whether the interest at stake is within the constitutional protection of liberty or property). In applying this analysis, the Supreme Court has recognized various governmental entitlements as property interests protected under the due process clause. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (Social Security disability benefits); Goldberg v. Kelly, 397 U.S. 254, 261-62 & n.8 (1970) (welfare benefits); Sherbert v. Verner, 374 U.S. 398, 402 (1963) (unemployment compensation). *See generally* Reich, *The New Property*, 73 Yale L.J. 733 (1964) (discussing various forms of government entitlements). The Court has also found property interests in licenses required for revenue producing activities. *See, e.g.*, Barry v. Barchi, 443 U.S. 55, 63-64 (1979) (horse trainer's license); Bell v. Burson, 402 U.S. 535, 542 (1971) (driver's license); Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963) (admission to the bar); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117, 123 (1926) (accountant's license); Dent v. West Virginia, 129 U.S. 114, 121-22 (1889) (physician's license).

28. *See Roth*, 408 U.S. at 570; *Goldberg*, 397 U.S. at 263.

by the deprivation; the risk of erroneous deprivation and the value of additional or substitute procedures; and the government's interest, including the function involved and the burden of additional or substitute procedures.[29]

Application of the balancing test in different contexts has resulted in a range of procedural requirements. For example, welfare recipients are entitled to a full evidentiary hearing before the state terminates benefits,[30] while disability recipients are not entitled to a prior hearing.[31] This dichotomy exists because erroneous termination would cut off the eligible welfare recipients' only means of support,[32] while most disability recipients can rely on alternative economic sources.[33] In addition, welfare recipients are not likely to be able to articulate in writing their qualification for benefits,[34] while decisions concerning eligibility for disability depend upon objective medical reports which eliminate the need for further pretermination inquiry.[35]

B. *Public Employment*

Termination from public employment involves both property[36] and liberty[37] interests.[38] A property interest exists when the employee possesses a legitimate claim of entitlement to continued employment.[39] This claim may arise under statute,[40] contract,[41] tenure[42] or other employ-

29. *See Mathews*, 424 U.S. at 334-35; *infra* note 48 and accompanying text.

30. *See Goldberg*, 397 U.S. at 264, 266-71.

31. *See Mathews*, 424 U.S. at 349.

32. *See Goldberg*, 397 U.S. at 264. Welfare provides the means to obtain basic needs; without independent sources, the recipient's situation becomes desperate. *See id.* These private interests, combined with the state's interest in providing subsistence to the poor, outweigh the government's interest in preserving the public fisc. *See id.* at 264-66.

33. *See Mathews*, 424 U.S. at 342-43. For example, disabled workers may derive financial assistance from several other sources, "such as earnings of other family members, workmen's compensation awards, tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance," or other programs. *Id.* at 341 (footnote omitted).

34. *See Goldberg*, 397 U.S. at 269.

35. *See Mathews*, 424 U.S. at 344, 349.

36. *See* Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972); H. Perritt, *supra* note 18, § 6.10, at 337-41.

37. *See Roth*, 408 U.S. at 572-75; H. Perritt, *supra* note 18, § 6.11, at 341-46.

38. *See Roth*, 408 U.S. at 577.

39. *See id.*

40. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) (statutory entitlement to continued employment "during good behavior and efficient service") (quoting Ohio Rev. Code Ann. § 124.34).

The property interest in federal employment is governed by federal statute. *See* Arnett v. Kennedy, 416 U.S. 134, 164-67 (1974) (Powell, J., concurring) (discussion of federal statute prohibiting discharge except for cause). In *Arnett*, the plurality concluded that the statute granting a right to continued employment could constitutionally circumscribe the employee's due process rights at termination. Thus, a statute granting a property right could prescribe the process due the employee prior to discharge. *See id.* at 154. The *Loudermill* Court rejected this rationale and held that once a statute creates a property interest in continued employment, the Constitution determines what process is due. *See*

ment relationships.[43] The liberty interest is implicated when discharge jeopardizes the employee's "good name, reputation, honor, or integrity."[44] The stigma caused by such charges can foreclose or seriously inhibit the employee's ability to secure other employment.[45] When discharge affects either of these interests, the employer must provide minimum procedural safeguards guaranteed by the due process clause.[46]

The *Loudermill* Court held that where discharge of public employees triggers due process protection, a hearing is required before termination takes effect.[47] Like recipients of welfare and disability, the employee's interest is in uninterrupted income, while the government's interest is in the expeditious removal of unsatisfactory or disruptive employees and in keeping citizens gainfully employed.[48] Employment termination also de-

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Loudermill, 470 U.S. at 541; L. Tribe, *supra* note 9, § 10-12, at 706-14. Thus, the *Loudermill* Court separated the constitutional due process requirements from the property interest in continued employment.

41. *See* Board of Regents v. Updegraff, 205 Okla. 301, 302, 237 P.2d 131, 134-35 (1951), *rev'd on other grounds sub nom.* Wieman v. Updegraff, 344 U.S. 183 (1952).

42. *See* Slochower v. Board of Higher Educ., 350 U.S. 551, 554-55 (1956).

43. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 602 (1972) (*de facto* tenure arising from officially promulgated rules and understandings); Connell v. Higginbotham, 305 F. Supp. 445, 448-49 (M.D. Fla. 1969) (clearly implied promise of continued employment), *aff'd per curiam*, 403 U.S. 207 (1971). *See generally* H. Perritt, *supra* note 18, § 6.10, at 337-41 (discussing employment relationships).

44. Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

45. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976); *Roth*, 408 U.S. at 573-74; *see also* Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 898 (1961).

Deprivation of the liberty interest requires publication; absent publication, the employee's interest in his reputation is not affected. *See* Bishop v. Wood, 426 U.S. 341, 348 (1976); *cf.* Kendall v. Board of Educ., 627 F.2d 1, 5 (6th Cir. 1980) (school board deprived teacher's liberty rights by maintaining inaccurate personnel file because it was most likely that the file would be given to prospective employers). Liberty interests also include "First Amendment rights . . . and *penumbral* rights of privacy." H. Perritt, *supra* note 18, § 6.11, at 342 (emphasis in original).

46. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 & n.3 (1985).

47. *See id.* at 547-48. The pretermination hearing is part of an overall due process scheme that includes a full hearing at some point in the termination process. Specifically, the *Loudermill* Court held that even when a full hearing is provided after termination, the employee is still entitled to an abbreviated hearing before discharge takes effect. *See id.* at 546-48. Accordingly, absent post-termination process, the employee is entitled to a full hearing before termination. *See* Salisbury v. Housing Auth., 615 F. Supp. 1433, 1442 n.7 (E.D. Ky. 1985).

48. *See Loudermill*, 470 U.S. at 542-44. The employer has an equal interest in avoiding costs associated with additional procedures and erroneous discharge. However, affording the employee a fair pretermination hearing does not impose a "significant administrative burden [or] intolerable delays," *id.* at 544, and the employee continues to provide services until discharge takes effect, *see id.* Where the decisionmaker is impermissibly biased, the official normally responsible for the termination decision "need only recuse and transfer the file to a person qualified to make the initial decision." *See* Arnett v. Kennedy, 416 U.S. 134, 199 (1974) (White, J., concurring in part and dissenting in part). *But see id.* at 170-71 n.5 (Powell, J., concurring) (disqualification would increasingly complicate removal).

In some situations, disqualification may present the problem that no qualified decisionmaker exists within the agency. *See, e.g.*, Brasslett v. Cota, 761 F.2d 827, 837 (1st

prives a person of his livelihood,[49] but the Court distinguished welfare.[50] Whereas welfare represents the recipient's last source of financial support,[51] a discharged employee can secure employment elsewhere.[52] In addition, the suspension with pay pending the pretermination hearing is a less drastic alternative to immediate discharge. Accordingly, the pretermination hearing need not be a full evidentiary proceeding.[53]

The purpose of the hearing is twofold. Because dismissal for cause often involves factual disputes,[54] the hearing provides an opportunity to refute or explain inaccurate factual conclusions which may have led to the employee's predicament.[55] The hearing also provides the "only meaningful opportunity to invoke the discretion of the decisionmaker,"[56] and thus reaches beyond the facts underlying the termination decision.[57] "It should be an initial check against mistaken decisions—essentially, a determination that the charges against the employee are true and support [termination]."[58]

II. THE RIGHT TO AN IMPARTIAL DECISIONMAKER

The Supreme Court has stressed the need for an unbiased decisionmaker whenever a hearing is required.[59] Examination of bias claims

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Cir. 1985) (town manager issued both initial and final decisions to discharged fire chief). In such cases, the pretermination hearing can be conducted by a separate body, such as a personnel appeals board. *See id.* at 830.

49. *See Loudermill*, 470 U.S. at 543.

50. *See id.* at 545 (distinguishing *Goldberg v. Kelly*).

51. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (unlike public employment, termination of welfare "may deprive an *eligible* recipient of the very means by which to live" (emphasis in original)).

52. *See Loudermill*, 470 U.S. at 543-45. Although the worker may find employment elsewhere, doing so will take time, and questionable circumstances surrounding his discharge will likely hamper the subsequent job search. *See id.* at 543.

53. *See Loudermill*, 470 U.S. at 545.

54. *See id.*

55. *See id.* Conversely, reliance on objective medical reports submitted by the disability recipient's own physician reduces the risk of erroneous factual conclusions and obviates the need to explain factual conclusions. *See* Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

56. *Loudermill*, 470 U.S. at 543.

57. *See id.* The need for an opportunity to explain the facts was apparent in *Loudermill*. One of the employees in that case had been terminated for lying about his criminal record on his employment application, and not on the objective fact that he was a convicted felon. The Court noted that the employee's explanation for the misstatement was plausible because he had received only a suspended six month sentence. *See id.* at 544 n.9.

The second employee in *Loudermill* had a stronger case for a pretermination hearing because he was eventually reinstated. A bus mechanic who had failed an eye examination, the employee might have avoided discharge by presenting evidence that at least one other employee had been retained despite failing the same examination. *See* Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 562 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985).

58. *Id.* at 545-46.

59. *See In re* Murchison, 349 U.S. 133, 136 (1955); L. Tribe, *supra* note 9, § 10-16, at 744-45; Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279 (1975).

generally begins with the basic requirement of neutrality[60] in the judicial forum and the limited toleration of bias in certain non-judicial settings.[61] In some cases, due process violations occur in the mere appearance of bias,[62] while in others the Court has noted potential due process violations even when partiality was not an issue.[63] Thus, impartiality is an underlying concern in all due process cases.

Bias claims fall into the categories of "personal" and "institutional" conflicts of interest.[64] Personal conflicts arise when the decisionmaker has a personal or financial stake in the outcome of the issue being decided.[65] Personal bias can also take the form of a "personal spleen" or personal grievance.[66] Personal bias is always impermissible.

In contrast, institutional bias occurs when the decisionmaker is a member of an administrative agency that performs a dual function of investigation and adjudication.[67] The Court is more tolerant of bias in this category, and affords the decisionmaker a presumption of honesty and integrity.[68] For example, the Court has found no due process violation when a legislative enactment bestows investigative and adjudicative

60. *See* L. Tribe, *supra* note 9, § 10-16, at 744-45.

61. *See infra* notes 67-74 and accompanying text.

62. *See* Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972). In *Morrissey*, the Court found that a parole officer need not be presumed to be biased: "It would . . . be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality . . . ." *Id.* at 485-86 & n.13 (citing Note, *Observations on the Administration of Parole*, 79 Yale L.J. 698, 704-06 (1970)) (noting that parole officers act as social workers rather than "adjunct[s] of the police"). Nonetheless, the Court held that a decision to revoke parole must be made by a person not directly involved in the case. *See Morrissey*, 408 U.S. at 486; *see also* Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

63. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 579 n.2 (1968) ("we do not propose to blind ourselves" to obvious defects present where the school board performs a dual function).

64. L. Tribe, *supra* note 9, § 10-16, at 745.

65. *See* Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part) (disputes should not be adjudicated by persons with substantial personal or financial interest in the outcome); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (mayor not permitted to adjudicate traffic offenses where town received proceeds of fines); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (prohibiting town from reimbursing mayor for acting as judge in prohibition cases where court costs assessed against convicted defendants); *see also* L. Tribe, *supra* note 9, § 10-16, at 745 (discussing due process impartiality requirements).

66. Offutt v. United States, 348 U.S. 11, 14 (1954); *see also* Mayberry v. Pennsylvania, 400 U.S. 455, 463-65 (1971) (where contempt citation for vilifying trial judge is handed down after trial, due process requires a public hearing before a judge other than the judge so vilified); L. Tribe, *supra* note 9, § 10-16, at 746 & n.6.

67. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 47 (1975) (state examining board that investigates professional misconduct and disciplines physicians); Morrissey v. Brewer, 408 U.S. 471, 475 (1972) (investigation and determination of parole violation performed by parole board); Richardson v. Perales, 402 U.S. 389, 408-09 (1971) (investigation and hearings concerning eligibility for Social Security benefits performed within same agency). *See generally* 3 K. Davis, Administrative Law Treatise § 18.5, at 353-61 (2d ed. 1980) (discussing cases upholding dual function); L. Tribe, *supra* note 9, § 10-16, at 745-49 (discussing due process claims against dual role in government agencies).

68. *See* Withrow v. Larkin, 421 U.S. 35, 47 (1975).

duties upon a federal or state agency.[69] In such cases, the Court upholds the dual role, deferring to the legislative wisdom in vesting both functions in the same agency.[70] Where the decisionmaker does not possess a personal or financial stake in the outcome, his association with the agency usually does not offend due process.[71]

Cases validating the dual role, however, have involved agencies that routinely conduct administrative hearings.[72] While the dual role within the same agency does not ordinarily offend due process, different considerations arise when the individual decisionmaker reviews his own decision.[73] For example, a welfare official who participates in the determination that a recipient no longer qualifies for benefits may not preside over that recipient's hearing.[74] In such a case, a decisionmaker who has made a decision before the hearing is less likely to reverse himself.[75] Accordingly, while due process allows an *agency* to perform a dual function, an *individual* within that agency may not.

III. BIAS AND THE PRETERMINATION HEARING

Despite the requirement for an impartial decisionmaker, some courts have taken the position that bias is not a due process violation at the pretermination hearing. For example, in *Duchesne v. Williams*,[76] the Sixth Circuit concluded that even a meaningless pretermination hearing would not offend due process. In such cases, post-termination process would "ferret out bias, pretext, deception and corruption by the employer in discharging the employee."[77] However, this reasoning ignores

69. *See, e.g.*, Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 495-96 (1976); *Withrow*, 421 U.S. at 55. *Hortonville* involved a school board's dual role of negotiating collective bargaining contracts with its teachers and deciding how to deal with illegal strikes. *See Hortonville*, 426 U.S. at 487, 495-96. Despite the board's involvement in the contract dispute that led to the strike, *see id.* at 484-85, the Court upheld the hearings as an exercise of the board's statutory policymaking authority, *see id.* at 497. By permitting the board to decide whether to terminate striking teachers, the Court preserved the Board's control over school affairs, and assured that the decision was made by the body responsible for that decision under state law. *See id.* at 496.

In *Withrow*, a statute empowered a state medical board to investigate complaints against physicians and to suspend their licenses. Upholding this dual role, the Court deferred to the legislative wisdom in vesting both functions in the same agency. *See Withrow*, 421 U.S. at 52.

70. *See Hortonville*, 426 U.S. at 497; *Withrow*, 421 U.S. at 46-52 & n.16.

71. *See Hortonville*, 426 U.S. at 491-94; *Withrow*, 421 U.S. at 47.

72. *See Withrow*, 421 U.S. at 47-50.

73. *See id.* at 58 n.25.

74. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) (independent decisionmaker required in probation revocation hearing); Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (same requirement applies to parole revocation hearings).

75. *See generally* 3 K. Davis, *supra* note 67, § 19.4, at 382-89 (disqualification based on prejudgment of adjudicative facts); *infra* notes 98-99 and accompanying text.

76. 849 F.2d 1004 (6th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1535 (1989).

77. *Id.* at 1008; *see also* Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987). *Duchesne* involved the termination of a chief building inspector who had criticized the

the two-fold purpose of the pretermination hearing.[78]

A. Arnett v. Kennedy *Revisited*

Courts that do not consider bias to be a due process violation in pretermination hearings improperly rely on *Loudermill* to validate such hearings.[79] *Loudermill* held that due process requires a "pretermination opportunity to respond, coupled with [a] post-termination [hearing],"[80] but the Court did not reach the bias issue.[81] Some of the Justices would have made bias a factor, especially when facts are disputed,[82] but the majority simply could not agree on specific requirements. This conclusion finds additional support in *Arnett v. Kennedy*,[83] an earlier employment termination case that involved a significant bias issue.[84]

In *Arnett*, the plurality avoided the bias issue by concluding that the terminated employee had no right to a pretermination hearing. However, Justice White, concurring in part and dissenting in part, opined that a biased decisionmaker would have violated due process.[85] He recognized that although fairness and accuracy were not always threatened when an employee's supervisor acts as decisionmaker, some situations present a risk of bias "too great to tolerate."[86] For example, individuals

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city manager for approving payments for work that did not conform to specifications. *See* 849 F.2d at 1005. The city manager decided to terminate the inspector, then conducted the pretermination himself. *See id.* Despite the manager's personal involvement in the termination process, *see id.* at 1011 (Ryan, J., dissenting), the court found no due process violation. *See id.* at 1008.

78. *See infra* notes 91-106 and accompanying text.

79. *See, e.g.*, *Duchesne*, 849 F.2d at 1008; Schaper v. City of Huntsville, 813 F.2d 709, 716 (5th Cir. 1987).

80. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547-48 (1985).

81. *See* Salisbury v. Housing Auth., 615 F. Supp. 1433, 1442 (E.D. Ky. 1985).

82. Justice Brennan concluded that when facts are disputed, the employee may deserve a fair opportunity to produce contrary evidence or to confront his accuser before the decisionmaker. *See Loudermill*, 470 U.S. at 553 (Brennan, J., concurring in part and dissenting in part). Justice Marshall would have held that before a decision is made to terminate an employee's wages, the employee is entitled to an opportunity to confront and cross-examine the witnesses against him. *See id.* at 548 (Marshall, J., concurring in part and concurring in judgment); Kendall v. Board of Educ., 627 F.2d 1, 5 (6th Cir. 1980).

83. 416 U.S. 134 (1974).

84. In *Arnett*, a representative of the federal Office of Economic Opportunity was charged with publicly accusing his regional director of bribery without proof. *See id.* at 136-37 (plurality opinion). The regional director terminated the representative without a prior hearing pursuant to federal statute. *See id.* at 136-38. The plurality concluded that the representative had no right to a pretermination hearing and thus avoided the bias issue presented by the director's involvement in the employee's bribery claims. *See id.* at 153-55.

85. *See id.* at 199 (White, J., concurring in part and dissenting in part). Justice White observed that the regional director, as a hearing officer, would have made a decision in which his own reputation was at stake. *See id.*

86. *Id.* at 199 (White, J., concurring in part and dissenting in part). Justice White began with the principle that "[N]o man shall be a judge in his own cause." *Id.* at 197 (quoting Bonham's Case, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610)). He then noted that impartiality was required in welfare and parole revocation hearings. *See id.* at

with substantial pecuniary interests in legal proceedings should not adjudicate those proceedings.[87] Writing for the *Loudermill* majority, Justice White did not modify the concern for impartiality he expressed in *Arnett*.[88]

Some of the other Justices in *Loudermill* preferred to make bias a factor, but could not agree on a standard. Justice Brennan, concurring with the majority on the pretermination hearing issue, concluded that when facts are disputed, the employee may deserve a fair opportunity to produce contrary evidence or to confront his accuser before the decisionmaker.[89] Similarly, Justice Marshall, also concurring, repeated his belief that before a decision is made to terminate wages, the employee is entitled to confront and cross examine the witnesses against him.[90] Thus, some of the Justices in *Loudermill* expressed concern for bias either by requiring an evidentiary hearing before discharging the employee or by disqualifying decisionmakers who are personally biased.

In light of the Justices' concern for impartiality when facts are in dispute, reliance on *Loudermill* for the proposition that a pretermination hearing satisfies due process even if the decisionmaker is personally biased is misplaced. Rather, the opinions in *Loudermill* and *Arnett* suggest the contrary.

B. *Bias Defeats the Purpose of the* Loudermill *Hearing*

The purpose of the pretermination hearing is to provide an "initial check" against erroneous discharge.[91] While a post-termination hearing reviews the merits of the termination, it cannot cure defects in the pretermination hearing itself.[92] When impermissible bias infects the

198 (citing Goldberg v. Kelly, 397 U.S. 254, 271 (1974) (termination of welfare benefits); Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972) (revocation of parole)). Justice White concluded that the same requirement of impartiality applied in employment termination cases. *See* 416 U.S. at 199.

87. *See Arnett*, 416 U.S. at 197 (citing Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927)).

88. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (citing *Arnett*, 416 U.S. at 170-71 (Powell, J., concurring in part)). The facts in *Loudermill* did not present a bias issue and Justice White simply did not address the issue. *See* Salisbury v. Housing Auth., 615 F. Supp. 1433, 1442 (E.D. Ky. 1985).

89. *See Loudermill*, 470 U.S. at 553. This conclusion is consistent with his dissenting opinion in *Arnett*, where he joined Justices Marshall and Douglas in concluding that the employee is entitled to an evidentiary hearing before an impartial, independent decisionmaker. *See Arnett*, 416 U.S. at 215-16 (Marshall, J., dissenting).

90. *See Loudermill*, 470 U.S. at 548 (Marshall, J., concurring in part and concurring in judgment) (citing *Arnett*, 416 U.S. at 214 (Marshall, J., dissenting)).

91. *See Loudermill*, 470 U.S. at 545; Matthews v. Harney County School Dist. No. 4, 819 F.2d 889, 892 (9th Cir. 1987).

92. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 267 (1970). In *Goldberg*, the Court noted that the sole purpose of the pretermination hearing in the welfare context is to produce an initial determination of the validity of terminating welfare benefits. *See id.* Arguably, a hearing held by the official who investigated the recipient's case would not be cured by a post-termination hearing. *See id.* at 271 (decisionmaker should not have participated in the determination under review). The damage sought to be avoided through the

pretermination hearing, it becomes a "sham process paying lip service to federal law."[93]

In examining the validity of pretermination hearings, courts should focus on the decisionmaker's involvement in the discharge process and determine whether the employee was afforded a fair hearing.[94] A common problem is the decisionmaker's familiarity with the employee's case. While a decisionmaker is generally familiar with the facts in dispute, his decision to terminate should not be made before the hearing.[95] Such a prior determination renders the hearing meaningless.[96] The hearing is also suspect when a decisionmaker's prior public statements commit him to a position beforehand.[97] In these situations, the employee's right to a meaningful hearing is lost.

Pretermination hearings conducted by individuals who have investigated the employee's case have also been held invalid.[98] A grievance procedure that requires an employee to appear before administrators who have investigated his case is inherently unfair, regardless of the existence of post-termination relief in state court.[99] As an investigator, the decisionmaker will have already reached a factual determination before the hearing. Where the employee disputes the facts, the decisionmaker's predisposition against the employee's version of the facts renders the hearing meaningless.

Personal animosity also renders a pretermination hearing meaningless. Dismissal for cause can involve "fabrications born of personal antago-

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pretermination hearing will have already occurred. *See id.* at 266 (stakes too high and possibility of error too great to allow termination without prior hearing).

93. Rosario Torres v. Hernandez Colon, 672 F. Supp. 639, 652 (D.P.R. 1987).

94. *See* Arnett v. Kennedy, 416 U.S. 134, 199 (1974) (White, J., concurring in part and dissenting in part). Justice White concluded that a pretermination hearing conducted by the employee's supervisor did not violate due process *per se*. However, individual cases may present a due process violation created by the supervisor's involvement in the employee's case. *See id.* In such cases, courts should examine the circumstances and determine whether such a violation has occurred.

95. *See, e.g., Loudermill*, 470 U.S. at 543 & n.8; Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 488-97 (1976). In *Loudermill*, the Court noted that the employer's discretion would be more informed and the risk of error "substantially reduced." 470 U.S. at 543-44 n.8 (quoting Goss v. Lopez, 419 U.S. 565, 583-84 (1975)). However, the decisionmaker's prior knowledge should be limited merely to being informed of factual disputes, without having already made his own determination. *See Loudermill*, 470 U.S. at 543 n.8.

96. For example, a pretermination hearing held by a school board *after* it has made an irrevocable decision against the employee may very well be invalid. *See* Matthews v. Harney County School Dist. No. 4, 819 F.2d 889, 893 (9th Cir. 1987). In that case, the court reversed the district court's summary judgment in the employer's favor because a jury could find such a hearing meaningless. *See id.* at 893-94.

97. For example, hearings conducted by school board members, whose firm public statements concerning "hotly contested" issues have committed them to deciding against the employee, do not meet the due process demand for fairness. *See* Staton v. Mayes, 552 F.2d 908, 914 & n.11 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977) (distinguishing *Hortonville*, where the facts were not in dispute).

98. *See* Kendall v. Board of Educ., 627 F.2d 1, 5 (6th Cir. 1980).

99. *See id.*

nisms" that may undermine the accuracy of factual determinations.[100] This form of bias occurs where the employee's public criticism of his employer leads to dismissal.[101] In these situations, the decisionmaker's bias can so taint the pretermination hearing that due process guarantees become illusory.[102]

In rejecting bias claims, courts have cited the existence of a post-termination hearing as an adequate remedy.[103] These courts reason that the post-termination hearing serves to "ferret out bias" in the pretermination hearing.[104] However, this reasoning ignores the procedural protection compromised by the decisionmaker's bias. Where the decisionmaker is impermissibly biased against the employee, both the initial review of factual conclusions and the opportunity to invoke the employer's discretion are lost.[105] Consequently, the employee is discharged without the protection of a fair *Loudermill* hearing.[106]

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100. Arnett v. Kennedy, 416 U.S. 134, 214 (1974) (Marshall, J., dissenting).

101. *See, e.g., id.* at 199 (White, J., concurring in part and dissenting in part) (hearing examiner was target of slander that led to employee's discharge; examiner's own reputation was at stake); Buschi v. Kirven, 775 F.2d 1240, 1243 (4th Cir. 1985) (state hospital employees alleged that their public complaints about hospital management led to their dismissal); Salisbury v. Housing Auth., 615 F. Supp. 1433, 1436 (E.D. Ky. 1985) (employee claimed discharge was in retaliation for public criticism of her employer).

102. *See Salisbury*, 615 F. Supp. at 1442. An extreme case occurred in Rosario Torres v. Hernandez Colon, 672 F. Supp. 639 (D.P.R. 1987), where political bias rendered the pretermination hearing "nothing more than sham process paying lip service to federal law." *Id.* at 652.

103. *See, e.g.*, Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1535 (1989); Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987).

104. *Duchesne*, 849 F.2d at 1008.

105. *See supra* notes 54-57 and accompanying text.

106. A second argument against the employee's bias claim improperly applies the immunity standard under 42 U.S.C. § 1983 (1982). In Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986), the Supreme Court held that liability under § 1983 did not lie for negligent deprivation of property where state law provided an adequate post-deprivation damage remedy. *See Parratt*, 451 U.S. at 543; *cf.* Daniels v. Williams, 474 U.S. 327, 328 (1986) (due process not implicated for negligent acts regardless of availability of post-deprivation remedy). Later, in Hudson v. Palmer, 468 U.S. 517 (1984), the Court extended the *Parratt* rule to intentional deprivations of property that result from random and unauthorized conduct of state actors. *See id.* at 529-30. Under this analysis, the existence of post-termination process is adequate because the presence of bias is random and unauthorized. *See* Schaper v. City of Huntsville, 813 F.2d 709, 715-16 (5th Cir. 1987); Crocker v. Fluvanna County Bd. of Pub. Welfare, 676 F. Supp. 711, 717 (W.D. Va. 1988), *aff'd*, 859 F.2d 14 (4th Cir. 1988).

However, the rule stated in *Parratt* and *Daniels* does not apply to public officials authorized to terminate employees. Their acts are indeed authorized and deliberate; moreover, decisionmakers in employment termination cases are high-ranking public officials. As policymakers themselves, their acts are policy decisions subject to scrutiny under § 1983. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480-84 (1986). Therefore, the availability of a post-deprivation hearing does not cure the deprivation of a fair pretermination hearing. *See* Salisbury v. Housing Auth., 615 F. Supp. 1433, 1442 n.9 (E.D. Ky. 1985).

CONCLUSION

Pretermination hearings under the due process clause provide an initial check against erroneous termination. The objective is to prevent the employee from unnecessary interruption of his primary source of income and the serious hardship that may result. Decisionmakers who participate substantially in the termination decision or who have other conflicts of interest are impermissibly biased against the employee. To preserve the public employee's due process rights, such decisionmakers should not be permitted to conduct pretermination hearings.

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