BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	**Case No.: CSM 4499**
Government Code Sections 3300 through 3311 Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675	*Peace Officers Procedural Bill of Rights*
	ADMINISTRATIVE RECORD
Filed on December 21, 1995	
By the City of Sacramento, Claimant	

Reconsideration Order: Statutes 2005, Chapter 72 (Assem. Bill No. 138)	1

Administrative Record

I HEREBY CERTIFY that each of the following documents is a true and correct copy of the corresponding documents contained in the administrative record of the Commission on State Mandates for the *Peace Officers Procedural Bill of Rights* Test Claim.

A. COMMISSION HEARING, TEST CLAIM, August 26, 1999	
Agenda	13
HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 Item 2, Staff Analysis	17
Exhibit A: Case Law Authorities	55
Exhibit B: Draft Staff Analysis	373
Exhibit C: Test Claim Filed by the City of Sacramento	403
Exhibit D: Response Filed by the Department of Finance, Dated July 17, 1996	435
Exhibit E: Rebuttal Filed by the City of Sacramento, Dated December 6, 1996	443
Exhibit F: Supplemental Brief Filed by the City of Sacramento, Dated September 5, 1997	447
Exhibit G: Letter from the Commission Staff to Parties Requesting Additional Briefing, Dated March 19, 1998	451
Exhibit H: Response from the Department of Finance to Staff Request, Dated April 22, 1998	453

Exhibit I: Response from the City of Sacramento to Staff Request, Dated June 17, 1998	457
Exhibit J: Response from the California State Personnel Board to Staff Request, Dated June 17, 1998	459
Exhibit K: Claimant's Comments to Draft Staff Analysis, Dated August 6, 1999	463
Exhibit L: Department of Finance and State Personnel Board's Comments to Draft Staff Analysis, Dated August 12, 1999	501
Exhibit M: State Personnel Board Decision, *Ramallo* (1995) SPB No. 95-19, Dated August 13, 1999	507
Transcript	519
Minutes	557

B. COMMISSION HEARING, PROPOSED STATEMENT OF DECISION, SEPTEMBER 30, 1999 (Item Continued at Request of Claimant)	
Agenda	567
HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 Item 6, Executive Summary	575
Proposed Statement of Decision	577
Exhibit A: Hearing Transcript, August 26, 1999 Commission Hearing	611
Exhibit B: Staff Analysis of Test Claim	655

C. COMMISSION HEARING, PROPOSED STATEMENT OF DECISION, NOVEMBER 30, 1999	
Agenda	715
HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 Item 5, Executive Summary	717
Proposed Statement of Decision	719
Exhibit A: Hearing Transcript, August 26, 1999 Commission Hearing	753
Exhibit B: Staff Analysis of Test Claim	797
Transcript	833
Minutes	847
Adopted Statement of Decision	859

D. COMMISSION HEARING, PROPOSED PARAMETERS AND GUIDELINES, JULY 27, 2000	
Agenda	889
HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 Item 10, Staff Analysis, Proposed Parameters and Guidelines, As Modified by Staff	895
Exhibit A: Statement of Decision	927
Exhibit B: Claimant's Proposed Parameters and Guidelines, Dated December 29, 1999	963
Exhibit C: Department of Finance's Comments, Dated January 19, 2000	975

Exhibit D: Claimant's Reply to the Department of Finance Comments, Dated February 23, 2000	979
Exhibit E: Staff Letter Requesting Further Comments, Dated May 26, 2000	985
Exhibit F: Claimant's Comments in Response to Staff Request, Dated June 7, 2000	991
Exhibit G: State Controller's Office Comments, Dated June 14, 2000	1005
Exhibit H: Draft Staff Analysis and Claimant's Draft Parameters and Guidelines, As Modified by Staff, Dated June 20, 2000	1009
Exhibit I: Claimant's Comments on Draft Staff Analysis, Dated July 5, 2000	1039
Exhibit J: *Fukuda v. City of Angels* (1999) 20 Cal.4th 805	1047
Exhibit K: Code of Civil Procedure Section 1094.5	1061
Exhibit L: *Mounger v. Gates* (1987) 193 Cal.App.3d 1248	1073
Exhibit M: Claimant's Test Claim Filings	1083
Exhibit N: August 26, 1999 Commission Hearing Transcript (Test Claim Hearing)	1167
Exhibit O: November 30, 1999 Commission Hearing Transcript (Statement of Decision Hearing)	1211
Transcript	1229
Minutes	1259
Adopted Parameters and Guidelines	1273

E. COMMISSION HEARING, PROPOSED STATEWIDE COST ESTIMATE, MARCH 29, 2001	
Agenda	1283
INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 Item 6, Revised Proposed Statewide Cost Estimate	1289
Transcript	1297
Minutes	1301
Adopted Statewide Cost Estimate	1309

G. CORRESPONDENCE NOT INCLUDED IN AGENDA ITEMS	
Letter to Ms. Pamela Stone and Mr. Paige Vorhies, From CSM, Dated August 17, 2000	1323
Letter to Ms. Pamela Stone and Mr. James Lombard, From CSM, Dated May 16, 2000	1337
Letter to Ms. Pamela Stone, From CSM, Dated January 12, 2000	1343
Letter to CSM, From Ms. Pamela Stone, Dated January 10, 2000	1349
Letter to Mr. Edward J. Takach, From CSM, Dated October 1, 1999	1353
Letter to CSM, From Ms. Pamela Stone, Dated September 28, 1999	1357
Letter to CSM, From Department of Finance, Dated August 12, 1999	1359
Letter to Mr. Edward J. Takach and Mr. Floyd D. Shimomura, Dated June 2, 1998	1365
Letter to CSM, From Department of Finance, Dated May 29, 1998	1369
Letter to Mr. Edward J. Takach and Mr. Jim Apps, From CSM, Dated April 27, 1998	1371
Letter to Ms. Dee Contreras, From CSM, Dated August 6, 1997	1375
Agreements Regarding Briefing and Hearing Schedule	1377
Letter to Ms. Dee Contreras, From CSM, Dated January 31, 1997	1385
Letter to Ms. Dee Contreras, From CSM, Dated January 8, 1997	1389
Letter to Ms. Dee Contreras, From CSM, Dated December 23, 1996	1391

Letter to CSM, From Ms. Dee Contreras, Dated December 20, 1996	1395
Letter to Ms. Dee Contreras, From CSM, Dated November 19, 1996	1397
Letter to Ms. Dee Contreras, From CSM, Dated April 26, 1996	1399
Letter to CSM, From Ms. Dee Contreras, Dated March 8, 1996	1403
Letter to Ms. Dee Contreras, From CSM, Dated January 26, 1996	1405

H. Documents Regarding the Audit by Bureau of State Audits	
Bureau of State Audits Report Titled, *State Mandates: The High Level of Questionable Costs Claimed Highlights the Need for Structural Reforms of the Process*, Dated October 2003	1407
Letter to Ms. Elaine M. Howle, From CSM, Dated December 10, 2003	1521
Letter to Ms. Elaine M. Howle, From CSM, Dated April 14, 2004	1525
Letter to Ms. Elaine M. Howle, From CSM, Dated October 12, 2004	1531

I further certify that the above-listed documents constitute the record of the original administrative proceedings before the Commission on State Mandates on the *Peace Officers Procedural Bill of Rights* test claim.

Dated: October 18, 2005

Paula Higashi, Executive Director

Assembly Bill No. 138

CHAPTER 72

An act to amend Sections 13304, 15151, and 15375 of the Elections Code, to amend Sections 17556, 17581, 17581.5, and 17617 of, to add Section 3313 to, and to repeal and add Sections 54954.2 and 54957.1 of, the Government Code, and to repeal Section 33672.7 of the Health and Safety Code, relating to state mandates, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 19, 2005. Filed with Secretary of State July 19, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 138, Committee on Budget. State mandates.

(1) Existing law requires local elections officials to notify voters of the location of their polling places. These notices are required to inform the voter as to whether the polling place is accessible to the physically handicapped and to inform the voter of his or her right to assistance in voting, if applicable.

This bill would instead authorize, but not require, local elections officials to make these notices.

(2) Existing law requires, among other things, that elections officials transmit to the Secretary of State in the prescribed manner prior to each election and within 35 days of the election, a copy of the results at the presidential primary for candidates for President to whom delegates of a political party are pledged, reported in the specified manner.

This bill would repeal this requirement. It would state the intent of the Legislature to repeal the presidential primaries reimbursable state mandate imposed by a specified statute.

(3) Under the California Constitution, whenever the Legislature or a state agency mandates a new program or higher level of service on any local government, including school districts, the state is required to provide a subvention of funds to reimburse the local government, with specified exceptions. Existing law establishes a procedure for local governmental agencies to file a test claim for reimbursement of these costs with the Commission on State Mandates.

This bill would require the commission to review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with the California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates and other applicable court decisions.

(4) Under the California Constitution, whenever the Legislature or a state agency mandates a new program or higher level of service on any

local government, including school districts, the state is required to provide a subvention of funds to reimburse the local government, with specified exceptions.

Existing law provides that no local agency or school district shall be required to implement or give effect to any statute or executive order, or portion thereof that imposes a mandate during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if specified conditions are met, including that the statute or executive order, or portion thereof, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year.

(5) Existing law also requires that the total amount due to each city, county, city and county, and special district, for which the state has determined, as of June 30, 2005, that reimbursement is required under the California Constitution, shall be appropriated for payment to these entities over a period of not more than 5 years, commencing with the Budget Act for the 2006–07 fiscal year and concluding with the Budget Act for the 2011–12 fiscal year.

This bill would extend the repayment date to these entities to the 2020–21 fiscal year.

This bill would provide that, under these provisions, the mandate also could be specifically identified by the Legislature in the Budget Act by reference to the commission's test claim number.

(6) Existing law establishes procedures for making reimbursement to local government whenever the Legislature or a state agency mandates a new program or higher level of services and define a reasonable reimbursement methodology for this purpose.

Existing law establishes the Commission on State Mandates to determine whether costs are mandated by the state for reimbursement to local agencies, including a school district, requires the commission to adopt parameters and guidelines for reimbursement to local agencies and school districts of claims for reimbursement for state mandates pursuant to statute, and requires the commission to not find costs mandated by the state for specified claims, if the commission, after a hearing, makes a specified finding.

This bill would require the commission not to find costs mandated by the state if the commission finds that the statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in a ballot measure.

(7) The Ralph M. Brown Act requires that all meetings of a legislative body of a local agency be open and public, except that closed sessions may be held under prescribed circumstances. The act also requires that the agenda be posted and include a general description of items to be discussed in closed session, and that the legislative body of a local agency publicly report any action taken in closed session, as prescribed.

The California Constitution provides that the people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writing of public officials' agencies shall be open to public scrutiny.

This bill would state legislative findings that these agenda and closed session reporting requirements of the act are necessary to implement, and reasonably within the scope of, the above-described provision of the California Constitution. The bill would require the Commission on State Mandates to set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act and Brown Act Reform test claims. The bill would require the commission to amend the appropriate parameters and guidelines, and the Controller to revise the appropriate reimbursement claiming instructions, as necessary to be consistent with this bill.

(8) The Community Redevelopment Law requires the county auditor to prepare on or before August 15 of each year, a statement for each project area that provides the amount of disbursements made in the prior fiscal year pursuant to specified provisions relating to tax-increment revenues and related provisions.

This bill would repeal this requirement.

(9) The California Constitution provides that whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall reimburse the local government. Existing statutory provisions establish procedures requiring the Commission on State Mandates to determine when reimbursement is required and providing for reimbursement.

This bill would require the Commission on State Mandates, no later than June 30, 2006, to reconsider its decision regarding whether the statutory reimbursement procedure constitutes a reimbursable mandate in light of federal and state statutes enacted and federal and state court decisions rendered since these statutes were enacted.

(10) This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in amending Section 13304 of the Elections Code to relieve local governments of the reimbursable state mandate to provide handicapped voter access information imposed by Chapter 494 of the Statutes of 1979. Since the passage of that chapter, other state and federal laws have been enacted to provide expanded rights to disabled voters. However, local elections officials may, at their option, continue to provide the information required by Chapter 494 of the Statutes of 1979.

SEC. 2. Section 13304 of the Elections Code is amended to read:

13304. The notice of the polling place which is sent to each voter as provided in Section 13303 may, at the option of the local elections official, inform the voter as to whether the polling place is accessible to the physically handicapped. In addition, this notice may inform the voter of his or her rights under Section 14282, if applicable.

SEC. 3. It is the intent of the Legislature in amending Sections 15151 and 15375 of the Elections Code to repeal, pursuant to Section 6 of Article XIII B of the California Constitution, the presidential primaries reimbursable state mandate imposed by Chapter 18 of the Statutes of 1999.

SEC. 4. Section 15151 of the Elections Code is amended to read:

15151. (a) The elections official shall transmit the semifinal official results to the Secretary of State in the manner and according to the schedule prescribed by the Secretary of State prior to each election, for the following:

(1) All candidates voted for statewide office.

(2) All candidates voted for the following offices:

(A) State Assembly.

(B) State Senate.

(C) Member of the United States House of Representatives.

(D) Member of the State Board of Equalization.

(E) Justice of the Court of Appeals.

(3) All persons voted for at the presidential primary or for electors of President and Vice President of the United States.

(4) Statewide ballot measures.

(b) The elections official shall transmit the results to the Secretary of State at intervals no greater than two hours, following commencement of the semifinal official canvass.

SEC. 5. Section 15375 of the Elections Code is amended to read:

15375. The elections official shall send to the Secretary of State within 35 days of the election in the manner requested one complete copy of all results as to all of the following:

(a) All candidates voted for statewide office.

(b) All candidates voted for the following offices:

(1) Member of the Assembly.

(2) Member of the Senate.

(3) Member of the United States House of Representatives.

(4) Member of the State Board of Equalization.

(5) Justice of the Court of Appeal.

(6) Judge of the superior court.

(7) Judge of the municipal court.

(c) All persons voted for at the presidential primary. The results for all persons voted for at the presidential primary for delegates to national conventions shall be canvassed and shall be sent within 28 days after the election.

(d) The vote given for persons for electors of President and Vice President of the United States. The results for presidential electors shall be endorsed "Presidential Election Returns."

(e) All statewide measures.

SEC. 6. Section 3313 is added to the Government Code, to read:

3313. In the 2005–06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with the California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions. If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Officer Procedural Bill of Rights activities occurring after the date the revised decision is adopted.

SEC. 7. Section 17556 of the Government Code is amended to read:

17556. The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

(c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in a ballot measure approved by the voters in a statewide or local election. This

subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

SEC. 8. Section 17581 of the Government Code is amended to read:

17581. (a) No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:

(1) The statute or executive order, or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring reimbursement of local agencies pursuant to Section 6 of Article XIII B of the California Constitution.

(2) The statute or executive order, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.

(b) Notwithstanding any other provision of law, if a local agency elects to implement or give effect to a statute or executive order described in subdivision (a), the local agency may assess fees to persons or entities which benefit from the statute or executive order. Any fee assessed pursuant to this subdivision shall not exceed the costs reasonably borne by the local agency.

(c) This section shall not apply to any state-mandated local program for the trial courts, as specified in Section 77203.

(d) This section shall not apply to any state-mandated local program for which the reimbursement funding counts toward the minimum General Fund requirements of Section 8 of Article XVI of the Constitution.

SEC. 9. Section 17581.5 of the Government Code is amended to read:

17581.5. (a) A school district may not be required to implement or give effect to the statutes, or portion thereof, identified in subdivision (b) during any fiscal year and for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year if all of the following apply:

(1) The statute or portion thereof, has been determined by the Legislature, the commission, or any court to mandate a new program or

higher level of service requiring reimbursement of school districts pursuant to Section 6 of Article XIII B of the California Constitution.

(2) The statute, or portion thereof, or the commission's test claim number, has been specifically identified by the Legislature in the Budget Act for the fiscal year as being one for which reimbursement is not provided for that fiscal year. For purposes of this paragraph, a mandate shall be considered to have been specifically identified by the Legislature only if it has been included within the schedule of reimbursable mandates shown in the Budget Act and it is specifically identified in the language of a provision of the item providing the appropriation for mandate reimbursements.

(b) This section applies only to the following mandates:

(1) The School Bus Safety I (CSM-4433) and II (97-TC-22) mandates (Chapter 642 of the Statutes of 1992; Chapter 831 of the Statutes of 1994; and Chapter 739 of the Statutes of 1997).

(2) The School Crimes Reporting II mandate (97-TC-03; and Chapter 759 of the Statutes of 1992 and Chapter 410 of the Statutes of 1995).

(3) Investment reports (96-358-02; and Chapter 783 of the Statutes of 1995 and Chapters 156 and 749 of the Statutes of 1996).

(4) County treasury oversight committees (96-365-03; and Chapter 784 of the Statutes of 1995 and Chapter 156 of the Statutes of 1996).

SEC. 10. Section 17617 of the Government Code is amended to read:

17617. The total amount due to each city, county, city and county, and special district, for which the state has determined that reimbursement is required under paragraph (2) of subdivision (b) of Section 6 of Article XIII B of the California Constitution, shall be appropriated for payment to these entities over a period of not more than 15 years, commencing with the Budget Act for the 2006–07 fiscal year and concluding with the Budget Act for the 2020–21 fiscal year.

SEC. 11. Section 54954.2 of the Government Code is repealed.

SEC. 12. Section 54954.2 is added to the Government Code, to read:

54954.2. (a) (1) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public. If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. The agenda shall include information regarding how, to whom, and when a request for disability related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.

(2) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3. In addition, on their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities. Furthermore, a member of a legislative body, or the body itself, subject to rules or procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda.

(b) Notwithstanding subdivision (a), the legislative body may take action on items of business not appearing on the posted agenda under any of the conditions stated below. Prior to discussing any item pursuant to this subdivision, the legislative body shall publicly identify the item.

(1) Upon a determination by a majority vote of the legislative body that an emergency situation exists, as defined in Section 54956.5.

(2) Upon a determination by a two-thirds vote of the members of the legislative body present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted as specified in subdivision (a).

(3) The item was posted pursuant to subdivision (a) for a prior meeting of the legislative body occurring not more than five calendar days prior to the date action is taken on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.

(c) This section is necessary to implement and reasonably within the scope of paragraph (1) of subdivision (b) of Section 3 of Article I of the California Constitution.

SEC. 13. Section 54957.1 of the Government Code is repealed.

SEC. 14. Section 54957.1 is added to the Government Code, to read:

54957.1. (a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

(1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:

(A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

(2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

(A) If the legislative body accepts a settlement offer signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.

(4) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

(6) Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

(7) Pension fund investment transaction decisions made pursuant to Section 54956.81 shall be disclosed at the first open meeting of the

legislative body held after the earlier of the close of the investment transaction or the transfer of pension fund assets for the investment transaction.

(b) Reports that are required to be made pursuant to this section may be made orally or in writing. The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

(c) The documentation referred to in paragraph (b) shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.

(d) Nothing in this section shall be construed to require that the legislative body approve actions not otherwise subject to legislative body approval.

(e) No action for injury to a reputational, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section.

(f) This section is necessary to implement and reasonably within the scope of paragraph (1) of subdivision (b) of Section 3 of Article I of the California Constitution.

SEC. 15. Section 33672.7 of the Health and Safety Code is repealed.

SEC. 16. The Legislature finds and declares that Sections 54954.2 and 54957.1 of the Government Code are necessary to implement and reasonably within the scope of paragraph (1) of subdivision (b) of Section 3 of Article I of the California Constitution.

SEC. 17. (a) Notwithstanding any other provision of law, the Commission on State Mandates, no later than June 30, 2006, shall reconsider its test claim statement of decision in CSM-4202 on the Mandate Reimbursement Program to determine whether Chapter 486 of the Statutes of 1975 and Chapter 1459 of the Statutes of 1984 constitute a reimbursable mandate under Section 6 of Article XIII B of the California Constitution in light of federal and state statutes enacted and federal and state court decisions rendered since these statutes were enacted. If a new test claim is filed on Chapter 890 of the Statutes of 2004, the commission shall, if practicable, hear and determine the new test claim at the same time

as the reconsideration of CSM-4202. The commission, if necessary, shall revise its parameters and guidelines in CSM-4485 to be consistent with this reconsideration and, if practicable, shall include a reasonable reimbursement methodology as defined in Section 17518.5 of the Government Code. If the parameters and guidelines are revised, the Controller shall revise the appropriate claiming instructions to be consistent with the revised parameters and guidelines. Any changes by the commission to the original statement of decision in CSM-4202 shall be deemed effective on July 1, 2006.

(b) Notwithstanding any other provision of law, the Commission on State Mandates shall set-aside all decisions, reconsiderations, and parameters and guidelines on the Open Meetings Act (CSM-4257) and Brown Act Reform (CSM-4469) test claims. The operative date of these actions shall be the effective date of this act. In addition, the Commission on State Mandates shall amend the appropriate parameters and guidelines, and the Controller shall revise the appropriate reimbursement claiming instructions, as necessary to be consistent with any other provisions of this act.

SEC. 18. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to make the necessary statutory changes to implement the Budget Act of 2005 at the earliest possible time, it is necessary that this act take effect immediately.

O

NOTICE AND AGENDA

COMMISSION ON STATE MANDATES

Public Meeting and Hearing
State Capitol, Room 437
Sacramento, California

August 26, 1999

9:15 a.m. - Closed Executive Session
9:45 a.m. - Public Meeting and Hearing

I. CALL TO ORDER AND ROLL CALL

II. CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTION 11126.

Pending Litigation

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

- *Carmel Valley Fire Protection District et al.* v. *State of California et al.*, Case Number S078828, California Supreme Court.
- *County of San Bernardino* v. *State of California, et al.*, Case Number SCV52190, in the Superior Court of the State of California, County of Los Angeles.
- *Gary D. Hori* v. *Commission on State Mandates, et al.*, Case Number 99AS01517, in the Superior Court of the State of California, County of Sacramento.
- *Goff* v. *Commission on State Mandates, County of Sacramento et al.*, remanded to Superior Court by the Court of Appeal, Third District, Case Number 95CS01215. (Re: County of Sacramento's First SB 1033 Application.)

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

III. REPORT FROM CLOSED EXECUTIVE SESSION - 9:45 a.m.

IV. APPROVAL OF MINUTES (action)

Item 1 July 29, 1999

V. PROPOSED CONSENT CALENDAR

Note: If there are no objections to any of the following action items, the Executive Director will include it on the Proposed Consent Calendar that will be presented at the hearing. The Commission will determine which items will remain on the Consent Calendar.

VI. HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

A. TEST CLAIM (action)

Item 2 *Peace Officers Procedural Bill of Rights* – CSM-4499
City of Sacramento, Claimant
Statutes of 1976, Chapter 465
Statutes of 1978, Chapters 775, 1173, 1174, 1178
Statutes of 1979, Chapter 405
Statutes of 1980, Chapter 1367
Statutes of 1982, Chapter 944
Statutes of 1983, Chapter 964
Statutes of 1989, Chapter 1165
Statutes of 1990, Chapter 675

B. ADOPTION OF PROPOSED STATEMENT OF DECISION (action)

Item 3 *Annual Parent Notification - Staff Development* – CSM-97-TC-24
Irvine Unified School District, Claimant
Education Code Section 48980
Statutes of 1997, Chapter 929

VII. INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8.

A. ADOPTION OF PARAMETERS AND GUIDELINES (action)

Item 4 *Very High Fire Hazard Severity Zones* – CSM-97-TC-13
City of Redding, Claimant
Government Code Sections 51175 through 51189
Health and Safety Code Sections 13108.5 & 13132.7
Statutes of 1992, Chapter 1188
Statutes of 1994, Chapter 843
Statutes of 1995, Chapter 333

B. REQUESTS TO AMEND PARAMETERS AND GUIDELINES (action)

Item 5 *Mandate Reimbursement Process - Amendment*
CSM-4485-PGA-98-01
Statutes of 1975, Chapter 486
Statutes of 1984, Chapter 1459
Statutes of 1995, Chapter 303 (Budget Act of 1995)
Statutes of 1996, Chapter 162 (Budget Act of 1996)
Statutes of 1997, Chapter 282 (Budget Act of 1997)
Statutes of 1998, Chapter 324 (Budget Act of 1998)
Statutes of 1999, Chapter 50 (Budget Act of 1999)

Item 6 *Custody of Minors-Child Abduction and Recovery* - CSM-98-PGA-4237-11
(Civil Code Sections 4600.1, 4604, 5157, 5160, and 5169)
Family Code Sections 3060 to 3064, 3130 to 3134.5, 3408, 3411, and 3421
Penal Code Sections 277, 278, and 278.5
Welfare and Institutions Code Section 11478.5
Statutes of 1976, Chapter 1399

C. ADOPTION OF STATEWIDE COST ESTIMATES (action)

Item 7 *Domestic Violence Treatment Services - Authorization and Case Management* - CSM-96-281-01
County of Los Angeles, Claimant
Penal Code Section 273.5, Subdivisions (e), (f), (g), (h) and (i)
Penal Code Sections 1000.93, 1000.94 and 1000.95
Penal Code Section 1203.097
Statutes of 1992, Chapters 183 and 184
Statutes of 1994, Chapter 28X
Statutes of 1995, Chapter 641

Item 8 *Airport Land Use Commissions/Plans* - CSM 4507
County of San Bernardino, Claimant
Public Utilities Code Sections 21670 and 21670.1
Statutes of 1994, Chapter 644
Statutes of 1995, Chapters 66 and 91

VIII. EXECUTIVE DIRECTOR'S REPORT

Item 9 Proposed Policy on Ethics Orientation (action)

Item 10 Legislation, Workload, and September Agendas

IX. PUBLIC COMMENT

X. ADJOURNMENT

Hearing Date: August 26, 1999
File Number: CSM 4499
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Item # 2

Staff Analysis

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994;
Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and
Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Table of Contents

Executive Summary A-1

Blue Volume

Exhibits A through J 001

Agenda Binder

Exhibit K

Claimant's Comments to Draft Staff Analysis
August 6, 1999 0413

Exhibit L

Department of Finance and State Personnel Board's Comments
to Draft Staff Analysis 0453

Exhibit M

State Personnel Board Decision, *Ramallo* (1995) SPB No. 95-19 0459

Item # 2

Staff Analysis

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994;
Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and
Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Executive Summary

Introduction

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted the Peace Officers Procedural Bill of Rights (POBOR).

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency, and peace officers on probation who have not reached permanent status.

Claimant's Position

The claimant, the City of Sacramento, contends that the test claim legislation constitutes a reimbursable state mandated program. The claimant acknowledges that due process principles apply to this claim. However, the claimant asserts that the requirements imposed by the test claim legislation are broader than those imposed by the due process clause. The claimant states that "[t]he basic intent of the City's test claim is to seek reimbursement of costs associated with activities specifically afforded peace officers that go beyond what the court has set as minimum requirements for public employees."

State Agency Comments

The Department of Finance contends that the test claim legislation does not constitute a reimbursable state mandated program because the due process principles set forth in *Skelly* v. *State Personnel Board*[1], which predate the enactment of the test claim legislation, require local agencies to perform the same activities.

The State Personnel Board contends that the procedural protections accorded a peace officer by the test claim legislation all further important due process values. The State Personnel Board

[1] (1975) 15 Cal.3d 194 (Exhibit A, Bates page 0149).

states that "[g]iven that a recognized value in federal due process is, to a great extent, to promote accuracy in its decision-making, one can assume that a governmental entity implementing POBOR will achieve a greater accuracy in its decision-making in the personnel arena" and less retaliatory litigation. Thus, the State Personnel Board asserts that the cost savings resulting from the test claim legislation should more than offset any costs that might be attributable solely to the test claim legislation.

Staff Analysis

Several courts have recognized a connection between the test claim legislation and the due process clause of the United States and California Constitutions. The due process clause, like the test claim legislation, affords notice and hearing protections to permanent employees when the employee is subject to a dismissal, demotion, suspension, reduction in salary or written reprimand. The due process clause also affords procedural protections to probationary and at-will employees when the employee's reputation and ability to obtain future employment is harmed by a dismissal.

Under these circumstances, the due process clause requires public employers to provide the employee with notice of the proposed action, reasons for the action, 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 the disciplinary action.

The test claim legislation imposes some of the same due process notice and hearing protections to peace officers. This connection between the due process clause and the test claim legislation is relevant to the analysis of this claim in two respects. First, the due process clause of the United States and California Constitutions were in effect before the enactment of the test claim legislation. Thus, the Commission must determine whether the test claim legislation imposes a new program or higher level of service on local agencies and school districts.

Second, the due process clause of the United States Constitution is a form of federal law. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation." Thus, the Commission must also determine if the test claim legislation results in "costs mandated by the state."

<u>Issues Raised After Issuance of Draft Staff Analysis</u>

On July 6, 1999, the Draft Staff Analysis was issued. The claimant and the Department of Finance in conjunction with the State Personnel Board filed comments to the Draft Staff Analysis, copies of which are included in the agenda binders as Exhibits K and L.

The claimant contends the following:

- That written reprimands are not protected by the due process clause and, thus, the test claim requirements pertaining to written reprimands are new and constitute a new program or higher level of service.
- That the activity of providing the peace officer with the tape recording of the interrogation is required by section 3303, subdivision (g), and, thus, constitutes a reimbursable state mandated activity.

The Department of Finance and the State Personnel Board contend the following:

- That Government Code section 3304, subdivision (b), which describes the right to an administrative appeal, does not apply to probationary and at-will employees.
- That the due process clause applies when a permanent employee is transferred for purposes of punishment and, thus, the test claim requirements pertaining to transfers are not new and do not impose a new program or higher level of service.
- That "*State civil service* probationary or at-will employees are entitled to *Skelly* rights by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees.

For the reasons stated in the Staff Analysis, staff disagrees with all of these contentions and has not modified the recommendation in the Draft Staff Analysis. (See pages A-11, A-12, A-16, A-19, A-20, A-22.)

Conclusion and Staff Recommendation

Based on a comparison of the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation, staff concludes that the test claim legislation constitutes a partial reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are *not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

   (a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

5. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If the adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;

- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If the adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve this test claim accordingly.

Claimant

City of Sacramento

Chronology

12/21/95	Claimant files test claim with the Commission
01/26/96	Staff notifies claimant that the test claim is incomplete
03/08/96	Claimant files letter providing statutory code sections included in the test claim
04/26/96	Staff notifies claimant that the test claim is complete
07/17/96	Response filed by the Department of Finance
11/19/96	Staff issues letter to claimant requesting status of claimant's rebuttal.
12/06/96	Claimant files rebuttal
12/20/96	Claimant requests continuance of hearing
12/23/96	Staff issues letter to parties regarding revised schedule
01/27/97	Informal conference
01/31/97	Staff issues letter to parties regarding revised schedule
08/06/97	Staff issues letter to claimant requesting status of additional requested information
09/05/97	Claimant files supplemental information
03/19/98	Staff issues letter to parties requesting supplemental briefing on due process issues
06/17/98	Claimant files supplemental comments in response to staff request of March 19, 1998
06/17/98	State Personnel Board files comments in response to staff request of March 19, 1998
07/06/99	Draft Staff Analysis issued
08/06/99	Claimant files comments on Draft Staff Analysis
08/12/99	Department of Finance and State Personnel Board file comments on Draft Staff Analysis

Test Claim Legislation

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law

enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California."

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[2] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[3] and peace officers on probation who have not reached permanent status.[4]

STAFF ANALYSIS

Issue: Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[5]?

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation.

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[2] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[3] *Gray* v. *City of Gustine* (1990) 224 Cal.App.3d 621 (Exhibit A, Bates page 0213); *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795 (Exhibit A, Bates page 0193).

[4] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643 (Exhibit A, Bates page 0187); *Barnes* v. *Personnel Department of the City of El Cajon* (1978) 87 Cal.App.3d 502 (Exhibit A, Bates page 0183).

[5] Government Code section 17514 defines "costs mandated by the state" as follows: "'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[6]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, staff finds that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

Several California courts have analyzed the test claim legislation, however, and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution.* . . . The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements*, which must afford the officer a chance to refute the charges or clear his name." (Emphasis added.)[7]

Thus, the Commission must continue its inquiry and compare the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

Furthermore, the Commission must determine whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, Government Code section 17556, subdivision (c), is triggered. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by

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[6] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

[7] *Riveros* v. *City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359 (Exhibit A, Bates page 0279).

the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation."[8]

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[9] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[10]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[11]

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[8] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government' does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[9] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[10] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577 (Exhibit A, Bates page 0045).

[11] *Slochower* v. *Board of Education* (1956) 350 U.S. 551 (Exhibit A, Bates page 0101), where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert* v. *Homar* (1997) 520 U.S. 924 (Exhibit A, Bates page 0071), where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194 (Exhibit A, Bates

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed[12], demoted[13], suspended[14], receives a reduction in salary[15] or receives a written reprimand.[16]

The Department of Finance and the State Personnel Board contend that due process property rights attach when an employee is transferred. They cite *Runyon* v. *Ellis* and an SPB Decision (*Ramallo* SPB Dec. No. 95-19) for support.[17]

Staff disagrees with the State's argument in this regard. First, in *Runyon* v. *Ellis*, the court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay*. The court did not address the situation where the employee receives a transfer alone.[18] In addition, in *Howell* v. *County of San Bernardino*, the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."[19] Thus, staff finds that local government employers are not required to provide due process protection in the case of a transfer.

Furthermore, although the SPB decision may apply to the State as an employer, there is no indication, or support for the proposition that the SPB decision applies to actions taken by a local government employer.

Accordingly, staff finds that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California Supreme Court in *Skelly* prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and

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page 0149), where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[12] *Skelly, supra*, 15 Cal.3d 194.

[13] *Ng*, v. *State Personnel Board* (1977) 68 Cal.App.3d 600 (Exhibit A, Bates page 0269).

[14] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560 (Exhibit A, Bates page 0123).

[15] *Ng, supra*, 68 Cal.App.3d 600, 605.

[16] *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438 (Exhibit A, Bates page 0309).

[17] Exhibit L, Comments to Draft Staff Analysis.

[18] *Runyon* v. *Ellis* (1995) 40 Cal.App.4th 961 (Exhibit A, Bates page 0293).

[19] *Howell* v. *County of San Bernardino* (1983) 149 Cal.App.3d 200, 205 (Exhibit A, Bates page 0243).

- The right to respond, either orally or in writing, to the authority initially imposing discipline.[20]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter*.[21]

Similarly, staff finds that in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards *before* the effective date of the written reprimand. Instead, the court in *Stanton* found that an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[22]

The claimant disagrees with staff's interpretation of the *Stanton* case (Exhibit A, Bates page 309) and its application to written reprimands.

The claimant contends *Stanton* stands for the proposition that the due process guarantees outlined in *Skelly* do not apply to a written reprimand. Thus, the claimant concludes that an employee is not entitled to any due process protection when the employee receives a written reprimand. The claimant cites the following language from *Stanton* (Bates page 311) in support of its position:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in *Skelly*. Courts have required adherence to *Skelly* in cases in which an employee is demoted [citations omitted]; suspended without pay [citations omitted]; or dismissed [citations omitted]. We find no authority mandating adherence to *Skelly* when a written reprimand is issued."
>
> "We see no justification for extending *Skelly* to situations involving written reprimands. Demotions, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee."

The facts in *Stanton* are as follows. A police officer received a written reprimand for discharging a weapon in violation of departmental rules. After he received the reprimand, he appealed to the police chief in accordance with the memorandum of understanding and the police chief upheld the reprimand. The officer then filed a lawsuit contending that he was entitled to an administrative appeal. The court denied the plaintiff's request finding that that the meeting with the police chief satisfied the administrative appeals provision in the test claim legislation (Government Code section 3304), and thus, satisfied the employee's due process rights.

Staff agrees that the court in *Stanton* held the rights outlined in *Skelly* do not apply when an employee receives a written reprimand. Thus, under *Skelly*, the rights to receive notice, the reasons for the reprimand, a copy of the charges and the right to respond are not required to be given to an employee *before* the reprimand takes effect.

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[20] *Skelly, supra*, 15 Cal.3d 194, 215.

[21] *Civil Service Assn., supra*, 22 Cal.3d 552, 564.

[22] *Stanton, supra*, 226 Cal.App.3d 1438, 1442 (Exhibit A, Bates page 0309. 0311).

However, the court found that the employee *is* guaranteed due process protection upon receipt of a written reprimand. The court found that when the appeals process takes places *after* the reprimand, due process is satisfied. The court in *Stanton* also states the following:

> "Moreover, Government Code section 3303 et seq., the Public Safety Officer Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. [Citation omitted.] Even without the protection afforded by Skelly, plaintiff's *procedural due process rights*, following a written reprimand, ***are protected*** by the appeals process mandated by Government Code section 3304, subdivision (b)." (Emphasis added.)[23]

Accordingly, staff finds that the due process clause of the United States and California Constitutions apply when a permanent employee is

- Dismissed;
- Demoted;
- Suspended;
- Receives a reduction in salary; and
- Receives a written reprimand.

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as,...employment. [Citations omitted.]"[24]

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[23] *Stanton, supra*, 226 Cal.App.3d 1438, 1442 (Exhibit A, Bates page 0309. 0311).

[24] *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308 (Exhibit A, Bates page 0261), quoting from *Board of Regents* v. *Roth, supra*, 408 U.S. at p. 573. See also *Paul* v. *Davis* (1976) 424 U.S. 693, 711-712

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[25]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place *after* the actual dismissal.[26]

Accordingly, staff finds that the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for dismissals, demotions, suspensions, reductions in salary and written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[27]

(Exhibit A, Bates page 0079); and *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340 (Exhibit A, Bates page 0249).

[25] *Murden, supra.* 160 Cal.App.3d 302, 308 (Exhibit A, Bates page 0261)

[26] *Murden, supra*, 160 Cal.App.3d 302, 310 (Exhibit A, Bates page 0261); *Arnett v. Kennedy* (1974) 416 U.S. 134, 157 (Exhibit A, Bates page 0001); and *Codd v. Velger* (1977) 429 U.S. 624, 627 (Exhibit A, Bates page 0061).

[27] In the Claimant's comments to the Draft Staff Analysis (Exhibit K), the claimant recites Government Code section 3304, *as amended in 1997 (Stats. 1997, c. 148) and 1998 (Stats. 1998, c. 786)*. These amendments made substantive changes to Government Code section 3304 by adding subdivisions (c) through (g). These changes include a statute of limitations concerning how long the agency can use acts as a basis for discipline, a provision prohibiting the removal of a chief of police without providing written notice describing the reasons for the removal and an administrative hearing, and a provision limiting the right to an administrative appeal to officers who successfully complete the probationary period. ***Neither the 1997 nor 1998 statutes are alleged in this test claim.***

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[28], written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[29] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[30, 31]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[32] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[33]

Finally, the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local agency and school district.[34] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process.[35, 36]

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[28] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, Exhibit A, Bates page 0255)), pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, Exhibit A, Bates page 0111)), rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, Exhibit A, Bates page 0165)), and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250, Exhibit A, Bates page 0221)).

[29] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676 (Exhibit A, Bates page 0165).

[30] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560 (Exhibit A, Bates page 0231); *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756 (Exhibit A, Bates page 0225); *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289 (Exhibit A, Bates page 0275).

[31] The claimant wants the Commission to keep in mind when finding a mandate, or at the parameters and guidelines phase, that what constitutes a transfer for purposes of punishment is in the eyes of the employee. The claimant states that in the field if labor relations, peace officers will often request a full POBOR hearing and procedure on a transfer which is not acceptable to the officer in question, even though the transfer is not accompanied by a reduction in pay or benefits and no disciplinary action has been taken. (Exhibit K, Claimant's comments to Draft Staff Analysis.)

[32] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354 (Exhibit A, Bates page 0237), relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

[33] *Id* at p. 353-354.

[34] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806 (Exhibit A, Bates page 0193); *Runyan, supra*, 40 Cal.App.4th 961, 965 (Exhibit A, Bates page 0293).

[35] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684 (Exhibit A, Bates page 0205). In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442 (Exhibit A, Bates page 0309), held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code

The Department of Finance and the State Personnel Board contend that Government Code section 3304 does not require an administrative appeal for probationary and at-will employees. They cite Government Code section 3304, subdivision (b), as it is *currently* drafted, which provides the following: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer *who has successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal."[37]

However, the italicized language in section 3304, subdivision (b), was added by the Legislature in 1998 and became effective on January 1, 1999. (Stats. 1998, c. 768). When Government Code section 3304, subdivision (b), was originally enacted in 1976, it did not limit the right to an administrative appeal to permanent employees only. Rather, that section stated the following:

> "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Accordingly, staff finds that an administrative appeal under Government Code section 3304, subdivision (b), was required to be provided to probationary and at-will employees faced with punitive action or a denial of promotion until December 31, 1998.

The Department of Finance also contends that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

Staff agrees that in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.

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section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. (*Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340, Exhibit A, Bates page 0249; *Murden, supra,* Exhibit A, Bates page 0261.)

[36] Staff notes that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.)

[37] Exhibit L, Comments to Draft Staff Analysis.

Due Process	Test Claim Legislation
Dismissal of a permanent employee	Dismissal of permanent, *probationary* or *at-will employees*
Demotion of a permanent employee	Demotion of permanent, *probationary* or *at-will employees*
Suspension of a permanent employee	Suspension of permanent, *probationary* or *at-will employees*
Reduction in salary for a permanent employee	Reduction in salary for permanent, *probationary* or *at-will employees*
Written reprimand of a permanent employee	Written reprimand of permanent, *probationary* or *at-will employees*
Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment	Dismissal of a probationary or at-will employee which harms the employee's reputation and ability to find future employment
	Transfer of a permanent, probationary or at-will employee for purposes of punishment
	Denial of promotion for permanent, probationary or at-will employees on grounds other than merit
	Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee

Thus, staff finds that the administrative appeal would be required in the absence of the test claim legislation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the administrative appeal *does not* constitute a new program or higher level of service because prior law requires such an appeal under the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the administrative appeal in the above circumstances would not constitute "costs mandated by the state" since the administrative appeal merely implements the requirements of the United States Constitution.

Staff finds, however, that the due process clauses of the United States and California Constitutions do not require an administrative appeal in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and

- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Thus, in these situations, staff finds that the administrative appeal required by Government Code section 3304 constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Compensation and Timing of an Interrogation

Government Code section 3303 describes the procedures for the interrogation of a peace officer. The procedures and rights given to peace officers under section 3303 do *not* apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[38]

Government Code section 3303, subdivision (a), establishes procedures for the timing and compensation of a peace officer subject to investigation and interrogation by an employer. This section requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the "normal waking hours" of the peace officer, unless the seriousness of the investigation requires otherwise. If the interrogation takes place during the off-duty time of the peace officer, the peace officer "shall" be compensated for the off-duty time in accordance with regular department procedures.

The claimant contends that Government Code section 3303, subdivision (a), results in the payment of overtime to the investigated employee and, thus, imposes reimbursable state mandated activities. The claimant states the following:

> "If a typical police department works in three shifts, such as the Police Department for this City, two-thirds of the police force work hours [that are] not consistent with the work hours of Investigators in the Internal Affairs section. Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."[39]

Staff agrees. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, staff finds that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

[38] Gov. Code, § 3303, subd. (i).

[39] Claimant filing dated September 5, 1997. (Exhibit F.)

Under due process principles, an employee with a property interest is entitled to notice of the disciplinary action proposed by the employer.[40] Thus, an employee is required to receive notice when the employee receives a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, staff finds that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

The claimant contends that the activity of providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitutes a reimbursable state mandated activity. The claimant states the following:

> "As shown above, Government Code, section 3303 (g) allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings."[41]

The Department of Finance disagrees contending that the cost of providing recordings of interrogations is required under the due process clause.

For the reasons stated below, staff finds that providing a copy of the recording of the interrogation when further proceedings are contemplated or prior to further interrogation at a subsequent time is *not* a reimbursable state mandated activity.

One of the conditions imposed by the test claim statute requires employers to provide the tape recording to interrogated peace officers if further proceedings are contemplated. If the further proceeding is disciplinary action, then under certain circumstances, due process requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

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[40] *Skelly, supra,* 15 Cal.3d 194.

[41] Claimant's comments to Draft Staff Analysis. (Exhibit K.)

Accordingly, even in the absence of the test claim legislation, the due process clause requires employers to provide such materials, including the tape recording of the interrogation when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal[42]; and when
- The disciplinary action is based, in whole or in part, on the interrogation of the employee.

Under these circumstances, the requirement to produce the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause.

Moreover, recent court decisions explain that when a local agency performs a permissive act or has alternatives other than performing the action under the test claim statute, the "downstream" or consequential activities, although statutorily required, are *not* state mandated.[43] For example, in *Lucia Mar,* the California Supreme Court found that a newly enacted ten percent payment by a school district was a "new program" when the district sent its disabled pupils to a state school for the severely handicapped. While the ten percent payment was required by the Education Code, the court did *not* find the sum was state mandated and, therefore, reimbursable. The court recognized that school districts may have several options for furnishing special education to its disabled pupils, only one of which is sending them to a state school. Thus, the court remanded to the Commission the question of whether the ten percent payment was state mandated.

Although the claimant contends that a local agency always tape records an interrogation when the employee records the same, the test claim statute does *not* require employers to record the interrogation. Rather, the statute expressly states that the employer "may", at its discretion, record the interrogation. Thus, staff finds that the downstream activity of providing the tape recording to the officer, if the employer chooses to record the interrogation, is also not mandated or required by the test claim statute.[44]

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or

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[42] *Skelly, supra*; *Ng, supra*; *Civil Service Assn., supra*; *Stanton, supra*; *Murden, supra.*

[43] *Lucia Mar Unified School Dist.* v. *Honig*, *supra*, 44 Cal.3d 830, 836-837; *County of Los Angeles* v. *Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818.

[44] This analysis is consistent with the Commission's findings in *Nonprofit, Special Use Property Requirements* (CSM – 97-TC-01, decided December 17, 1998). There, the Commission *rejected* the argument that the provisions of former Revenue and Taxation Code section 2207, which required reimbursement for increased costs due to test claim legislation that added new requirements to an existing optional program if the local agency had no reasonable alternative other than to continue the optional program, were subsumed within the present statutory scheme in Government Code section 17500 and following. The Commission found that former Revenue and Taxation Code section 2207 was expressly repealed and replaced with Government Code section 17514, which does *not* require reimbursement for increased costs incurred in an optional program.

complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance and the SPB contend that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association*, the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with misconduct.[45] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation.[46]

The court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based when the officer is charged with misconduct.[47]

Accordingly, even in the absence of the test claim legislation, the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, staff finds that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);

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[45] *Pasadena Police Officers Assn.* v. *City of Pasadena* (1990) 51 Cal.3d 564, 575 (Exhibit A, Bates page 0135).

[46] *Id.* at 579.

[47] *Skelly, supra.*

- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

The Department of Finance and the State Personnel Board disagree with this conclusion.[48] They contend that "*State civil service* probationary or at-will employees are entitled to [the due process rights prescribed by] *Skelly* . . . . by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees. However, they cite no authority for this proposition.

The Department of Finance and the State Personnel Board also contend that Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program when a permanent employee is transferred based on their assertion that a transfer is covered by the due process clause. As noted earlier in the staff analysis, staff disagrees with this contention and finds that a permanent employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

Accordingly, in the circumstances described above, staff finds that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Representation at Interrogation

Government Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contends that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.[49]

Staff disagrees with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 3510, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers.[50]

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[48] Exhibit L, Comments to Draft Staff Analysis.

[49] Claimant's filing dated September 5, 1997. (Exhibit F)

[50] *Santa Clara County Dist. Attorney Investigators Assn.* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255. (Exhibit A, Bates page 0301.)

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in *Civil Service Association* v. *City and County of San Francisco*, a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions.

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (*Steen* v. *Board of Civil Service Commr.* (1945) 26 Cal.2d 716, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen*."[51]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[52]

Based on the foregoing, staff finds that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Comments in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[53] If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[54]
- To provide an opportunity to review and sign the adverse comment;
- To provide an opportunity to respond to the adverse comment within 30 days; and

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[51] *Civil Service Assn.*, *supra*, 22 Cal.3d 552, 568.

[52] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

[53] The court in *Aguilar* v. *Johnson* (1988) 202 Cal.App.3d 241, 249-252 (Exhibit A, Bates page 0171), held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[54] Staff finds that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, staff finds that the officer must receive notice of the comment before he or she can read or sign the document.

- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

The claimant contends that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 31011. The claimant further states that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse comments. Thus, the claimant contends that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

As described below, staff finds that Government Code sections 3305 and 3306 constitute a *partial* reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[55] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[56] Under such circumstances, staff finds that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

In their comments to the Draft Staff Analysis, the Department of Finance and the State Personnel Board state the following: "If the adverse comment can be considered a 'written reprimand,' however, the POBOR required 'notice' and the 'opportunity to respond' may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear." [57]

Staff agrees that if the adverse comment results in, or is considered a written reprimand, then notice and an opportunity to respond is already required by the due process clause and are not reimbursable state mandated activities. However, due process does not require the local agency to obtain the signature of the peace officer on the adverse comment, or note the peace officer's

[55] *Skelly, supra,* 15 Cal.3d 194.

[56] *Hopson, supra,* 139 Cal.App.3d 347.

[57] Exhibit L.

refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances. Accordingly, staff finds that that these two activities required by the test claim legislation when an adverse comment is received constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514 even where there is due process protection.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

Existing Statutory Law Relating to Counties

Government Code section 31011, enacted in 1974,[58] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.
>
> The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.
>
> The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.
>
> *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.*" (Emphasis added.)

Therefore, under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[59] Under such circumstances, staff finds that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or

[58] Stats. 1974, c. 315.

[59] Staff finds that Government Code section 31011 does *not* impose a notice requirement on counties since section 31011 does not require the county employee to review the comment *before* the comment is placed in the personnel file.

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975,[60] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense.* It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or commission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or commission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not

[60] Stats. 1975, c. 908, § 1.

apply to public school districts with respect to employees covered by Section 44031 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information."[61] (Emphasis added.)

Therefore, under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[62] Under such circumstances, staff finds that the review provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 44031 establishes notice, review and response protections to peace officers employed by school districts. Section 44031 provides in relevant part the following:

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[61] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses..."

[62] Staff finds that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

"(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.

"(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.* An employee shall have the right to enter, and have attached to any derogatory statement, his own comments thereon...." (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees.[63]

Therefore, existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was not* obtained in connection with a promotional examination. Under such circumstances, staff finds that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, staff finds that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, staff finds that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

[63] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

Conclusion and Staff Recommendation

Based on the foregoing analysis, staff finds that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)

4. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

   (a) When the investigation *does not* result in disciplinary action; and

   (b) When the investigation results in:

   - A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
   - A transfer of a permanent, probationary or at-will employee for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
   - Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

5. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

School Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Staff Recommendation

Staff recommends that the Commission approve this test claim accordingly.

Hearing Date: August 26, 1999
File Number: CSM 4499
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Item # 2

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Table of Contents for Test Claim
(Exhibits A through J)

Exhibit A

Case Law Authorities 0001

Exhibit B

Draft Staff Analysis 0313

Exhibit C

Test Claim Filed by the City of Sacramento 0347

Exhibit D

Response Filed by the Department of Finance
July 17, 1996 0383

Exhibit E

Rebuttal Filed by the City of Sacramento
December 6, 1996 0393

Exhibit F

Supplemental Brief Filed by the City of Sacramento
September 5, 1997 0397

Exhibit G

Letter from Commission Staff to Parties Requesting Additional Briefing
March 19, 1998 0401

Exhibit H

Response from the Department of Finance to Staff Request
April 22, 1998 0403

Exhibit I

Response from the City of Sacramento to Staff Request
June 17, 1998 0407

Exhibit J

Response from the California State Personnel Board to Staff Request
June 17, 1998 0409

Table of Case Law Authorities

Government Code Sections 3300 through 3310

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights

Contents **Page**

United States Supreme Court

Arnett v. *Kennedy*
(1974) 416 U.S. 134 0001

Board of Regents v. *Roth*
(1972) 408 U.S. 564 0045

Codd v. *Velger*
(1977) 429 U.S. 624 0061

Gilbert v. *Homar*
(1997) 520 U.S. 924 0071

Paul v. *Davis*
(1976) 424 U.S. 693 0079

Slochower v. *Board of Education*
(1956) 350 U.S. 551 0101

California Supreme Court

Baggett v. *Gates*
(1982) 32 Cal.3d 128 0111

Civil Service Assn. v. *City and County of San Francisco*
(1978) 22 Cal.3d 552 0123

Pasadena Police Officers Assn. v. *City of Pasadena*
(1990) 51 Cal.3d 564 0135

Skelly v. *State Personnel Board*
(1975) 15 Cal.3d 194 0149

White v. *County of Sacramento*
(1982) 31 Cal.3d 676 0165

Runyan v. *Ellis*
(1995)40 Cal.App.4th 961.....0293

Santa Clara County District Attorney Investigators Assn. v. *County of Santa Clara*
(1975) 51 Cal.App.3d 255.....0301

Stanton v. *City of West Sacramento*
(1991) 226 Cal.App.3d 1438.....0309

94 S.Ct. 1633
40 L.Ed.2d 15
(Cite as: 416 U.S. 134, 94 S.Ct. 1633)

Alvin J. ARNETT, Director, Office of Economic Opportunity, et al., Appellants,
v.
Wayne KENNEDY, etc., et al.

No. 72--1118.

Supreme Court of the United States

Argued Nov. 7, 1973.

Decided April 16, 1974.
Rehearing Denied June 17, 1974.

**1633 See 417 U.S. 977, 94 S.Ct. 3187.

Action was brought by discharged nonprobationary federal employee in the Office of Economic Opportunity for declaratory and injunctive relief on ground of denial of due process in discharge procedure and standards which were followed and infringement of rights to freedom of speech. A three-judge District Court for the Nothern District of Illinois, 349 F.Supp. 863, held that the Lloyd-La Follette Act and attendant regulations denied employee due process, and government appealed. Mr. Justice Rehnquist announced the judgment of the Supreme Court that the Lloyd-La Follette Act, in at once conferring on employee the right not to be discharged except for 'cause' and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention requiring procedural protection under the due process clause beyond that afforded by the Act and related agency regulations; that post termination hearing procedures provided by the Civil Service Commission and OEO adequately protected federal employees' liberty interest in not being wrongfully stigmatized by untrue and unsupported administrative charges, and that standard of employment protection imposed by Congress in the Act is not impermissibly vague or overbroad in its regulation of speech of federal employees.

Reversed and remanded.

The Chief Justice and Mr. Justice Stewart joined in the opinion by Mr. Justice Rehnquist.

Mr. Justice Powell, with whom Mr. Justice Blackmun joined, filed opinion concurring in part and concurring in the result in part.

Mr. Justice White filed opinion concurring in part and dissenting in part.

Mr. Justice Douglas filed dissenting opinion.

Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan concurred, filed dissenting opinion.

[1] OFFICERS AND PUBLIC EMPLOYEES ⚷72.10
283k72.10
Formerly 283k72(1)
The Lloyd-LaFollette Act, in granting nonprobationary federal employees the right not to be removed save for cause and in specifying the procedure for determination of cause, did not create any additional expectancy of job retention of which employee could not be divested without first affording a full adversary hearing for the determination of "cause." (Per Mr. Justice Rehnquist, joined by two Justices. Two Justices were of the opinion that procedures under the Act comported with due process.) 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 5.

[2] OFFICERS AND PUBLIC EMPLOYEES ⚷72.16(1)
283k72.16(1)
Formerly 283k72.16, 283k72(1)
The Lloyd-LaFollette Act does not require that determination of "cause" for termination of nonprobationary federal employee be made by a hearing officer other than the officer bringing the charges. (Per Mr. Justice Rehnquist, joined by two Justices and with two Justices concurring in part and concurring in result in part.) 5 U.S.C.A. § 7501.

[3] OFFICERS AND PUBLIC EMPLOYEES ⚷72.27
283k72.27
Formerly 283k72(1)
Civil Service Commission and OEO post-termination procedures adequately protected the liberty interest of nonprobationary OEO employee from stigma of charges that employee without any proof and in reckless disregard of facts had publicly

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stated that OEO official and his administrative assistant had attempted to bribe a representative of a community action organization, and delay attending vindication of employee's reputation through hearing procedures did not entail any separate deprivation of liberty interest. (Per Mr. Justice Rehnquist joined by two Justices and with two Justices concurring in part and concurring in result in part.) 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 5.

[4] OFFICERS AND PUBLIC EMPLOYEES ⚷65
283k65
Provisions of Lloyd-LaFollette Act authorizing removal or suspension of nonprobationary federal employee without pay "for such cause as will promote the efficiency of the service" excludes constitutionally protected speech, and provisions are not unconstitutionally vague or overbroad. 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 1.

[4] OFFICERS AND PUBLIC EMPLOYEES ⚷66
283k66
Provisions of Lloyd-LaFollette Act authorizing removal or suspension of nonprobationary federal employee without pay "for such cause as will promote the efficiency of the service" excludes constitutionally protected speech, and provisions are not unconstitutionally vague or overbroad. 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 1.

[4] STATUTES ⚷47
361k47
Provisions of Lloyd-LaFollette Act authorizing removal or suspension of nonprobationary federal employee without pay "for such cause as will promote the efficiency of the service" excludes constitutionally protected speech, and provisions are not unconstitutionally vague or overbroad. 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 1.

[5] OFFICERS AND PUBLIC EMPLOYEES ⚷65
283k65
In prescribing standard of "cause" for removal or suspension of nonprobationary federal employees, Congress was not confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all. (Per Mr. Justice Rehnquist, joined by two Justices and with two Justices concurring in part and concurring in result in part.) 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 1.

[5] OFFICERS AND PUBLIC EMPLOYEES ⚷66
283k66
In prescribing standard of "cause" for removal or suspension of nonprobationary federal employees, Congress was not confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all. (Per Mr. Justice Rehnquist, joined by two Justices and with two Justices concurring in part and concurring in result in part.) 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 1.

[6] OFFICERS AND PUBLIC EMPLOYEES ⚷66.
283k66
The phrase "such cause as will promote the efficiency of the service" as a standard of job protection for nonprobationary federal employees is intended to authorize dismissal for speech as well as other conduct. (Per Mr. Justice Rehnquist, joined by two Justices and with two Justices concurring in part and concurring in result in part.) 5 U.S.C.A. § 7501; U.S.C.A.Const. Amend. 1.

[7] CONSTITUTIONAL LAW ⚷90.1(7.2)
92k90.1(7.2)
Formerly 92k90.1(1), 92k0(1)
In certain situations, the discharge of a government employee may be based on his speech without offending guarantees of the First Amendment. (Per Mr. Justice Rehnquist, joined by two Justices and with two Justices concurring in part and concurring in result in part.) U.S.C.A.Const. Amend. 1.

**1634 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*134 Appellee, a nonprobationary employee in the competitive Civil Service, was dismissed from his position in the Office of Economic Opportunity (OEO) for allegedly having made recklessly false and defamatory statements about other OEO employees. Though previously advised of his right under OEO and Civil Service Commission (CSC)

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regulations to reply to the charges and that the material on which the dismissal notice was based was available for his inspection, he did not respond to the substance of the charges but brought this suit for injunctive and declaratory relief, contending that the standards and procedures established by and under the Lloyd-La Follette Act, 5 U.S.C. s 7501, for the removal of nonprobationary employees from the federal service unwarrantedly interfere with such employees' **1635 freedom of expression and deny them procedural due process. A three-judge District Court held that the Act and attendant regulations denied appellee due process because they failed to provide for a trial-type preremoval hearing before an impartial official and were unconstitutionally vague because they failed to furnish sufficiently precise guidelines as to what kind of speech might be made the basis for removal action. Section 7501 of the Act provides for removal of nonprobationary federal employees 'only for such cause as will promote the efficiency of the service' and prescribes that the employing agency must furnish the employee with written notice of the proposed removal action and a copy of the charges; given him a reasonable time for a written answer and supporting affidavits; and promptly furnish him with the agency's decision. The Act further provides, however, that '(e)xamination of witnesses, trial, or hearing is not required,' but is discretionary with the individual directing the removal. CSC and OEO regulations enlarge the statutory provisions by requiring 30 days' advance notice before removal and in other respects, and entitle the employee to a post-removal evidentiary trial-type hearing at the appeal stage. If the employee is reinstated on appeal, he receives full backpay. In addition *135 to his First Amendment claims, appellee contends that, absent a full adversary hearing before removal he could not consistently with due process requirements be divested of his property interest or expectancy in employment or be deprived of his 'liberty' to refute the charges of dishonesty on which he asserts his dismissal was based. Held: The judgment is reversed and the case remanded. Pp. 1641--1652.

349 F.Supp. 863, reversed and remanded.

Mr. Justice REHNQUIST, joined by THE CHIEF JUSTICE and Mr. Justice STEWART, concluded that:

1. In conferring upon nonprobationary federal employees the right not to be discharged except for 'cause' and at the same time conditioning the grant of that right by procedural limitations, the Act did not create and the Due Process Clause does not require any additional expectancy of job retention. Cf. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548. Pp. 1641--1645.

2. The CSC and OEO post-termination hearing procedures adequately protect the liberty interest of federal employees, recognized in Roth, supra, in not being wrongfully stigmatized by untrue and unsupported administrative charges. Pp. 1645--1646.

3. The Act's standard of employment protection, which describes as explicitly as is feasible in view of the wide variety of factual situations where employees' statements might justify dismissal for 'cause' the conduct that is ground for removal, is not impermissibly vague or overbroad in regulating federal employees' speech. CSC v. Letter Carriers, 413 U.S. 548, 578--579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796. Pp. 1646--1649.

Mr. Justice POWELL, joined by Mr. Justice BLACKMUN, while agreeing that 5 U.S.C. s 7501(a) is not unconstitutionally vague or overbroad, concluded with respect to the due process issue that appellee, as a nonprobationary federal employee who could be discharged only for 'cause,' had a legitimate claim of entitlement to a property interest under the Fifth Amendment and his employment could not be terminated without notice and a full evidentiary hearing. On the other hand, the Government as an employer must have discretion expeditiously to remove employees who hinder efficient operation. Since the procedures under the Act and regulations minimize the risk of error in the initial removal decision and provide for a post-removal evidentiary hearing with reinstatement and backpay should that decision be wrongful, a reasonable accommodation comporting with due process *136 is provided between the competing **1636 interests of the employee and the Government as employer. Pp. 1649-- 1652.

Daniel M. Friedman, Washington, D.C., for appellants.

Charles Barnhill, Jr. Chicago, Ill., for appellees.

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Mr. Justice REHNQUIST announced the judgment of the Court in an opinion in which THE CHIEF JUSTICE and Mr. Justice STEWART join.

Prior to the events leading to his discharge, appellee Wayne Kennedy [FN1] was a nonprobationary federal employee *137 in the competitive Civil Service. He was a field representative in the Chicago Regional Office of the Office of Economic Opportunity (OEO). In March 1972, he was removed from the federal service pursuant to the provisions of the Lloyd-La Follette Act, 5 U.S.C. s 7501, after Wendell Verduin, the Regional Director of the OEO, upheld written administrative charges made in the form of a 'Notification of Proposed Adverse Action' against appellee. The charges listed five events occurring in November and December 1971; the most serious of the charges was that appellee 'without any proof whatsoever and in reckless disregard of the actual facts' known to him or reasonably discoverable by him had publicly stated that Verduin and his administrative assistant had attempted to bribe a representative of a community action organization with which the OEO had dealings. The alleged bribe consisted of an offer of a $100,000 grant of OEO funds if the representative would sign a statement against appellee and another OEO employee.

FN1. 'Appellee' refers to appellee Wayne Kennedy, the named plaintiff in the original complaint. The participation of the 18 other named plaintiffs, who were added in the amended complaint, see n. 3, infra, appears to have been little more than nominal. The amended complaint alleged that the added named plaintiffs' exercise of their rights of free speech were chilled because they feared that any off-duty public comments made by them would constitute grounds for discharge or punishment under the Lloyd-La Follette Act. Two conclusory affidavits supporting that bare allegation (one signed by one of the added named plaintiffs, the other by the remaining 17) were filed in connection with plaintiffs' motion for summary judgment or temporary injunctive relief.

Appellee was advised of his right under regulations promulgated by the Civil Service Commission and the OEO to reply to the charges orally and in writing, and to submit affidavits to Verduin. He was also advised that the material on which the notice was based was available for his inspection in the Regional Office, the that a copy of the material was attached to the notice of proposed adverse action.

Appellee did not respond to the substance of the charges against him, but instead asserted that the charges were unlawful because he had a right to a trial-type hearing before an impartial hearing officer before he could be removed from his employment, and because statements *138 made by him were protected by the First Amendment to the United States Constitution. [FN2] On March 20, 1972, Verduin notified appellee in writing that he would be removed from his position at the close of business on March 27, 1972. Appellee was also notified of his right to appeal Verduin's decision either to the OEO or to the Civil Service Commission.

FN2. Appellee's response to the 'Notification of Proposed Adverse Action,' made through counsel, set forth briefly his position that the charges against him were unlawful under the Fifth and First Amendments. One of the three sentences devoted to his First Amendment claim noted parenthetically that the 'conversations . . . with union members and the public' for which he was being punished were 'inaccurately set forth in the adverse action.' Appellee's response did not explain in what respects the charges against him were inaccurate, nor did it offer any alternative version of the events described in the charges.

Appellee then instituted this suit in the United States District Court for the Northern District of Illinois on behalf of **1637 himself and others similarly situated, seeking both injunctive and declaratory relief. In his amended complaint, [FN3] appellee contended that the standards and procedures established by and under the Lloyd-La Follette Act for the removal of nonprobationary employees *139 from the federal service unwarrantedly interfere with those employees' freedom of expression and deny them procedural due process of law. The three-judge District Court, convened pursuant to 28 U.S.C. ss 2282 and 2284, granted summary judgment for appellee. 349 F.Supp. 863. The court held that the discharge procedures authorized by the Act and attendant Civil Service Commission and OEO regulations denied appellee due process of law because they failed to provide for a trial-type hearing before an impartial agency official prior to removal; the court also held the Act and implementing regulations unconstitutionally vague because they failed to furnish sufficiently precise guidelines as to what kind of speech may be made the basis of a removal action. The court ordered

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that appellee be reinstated in his former position with backpay, and that he be accorded a hearing prior to removal in any future removal proceedings. Appellants were also enjoined from further enforcement of the Lloyd-La Follette Act, and implementing rules, as 'construed to regulate the speech of competitive service employees.' [FN4]

FN3. Appellee's original complaint, filed March 27, 1972, contained two counts. In the first count appellee sought, on behalf of himself and others similarly situated, to enjoin his removal pending a full, trial-type hearing before an impartial hearing officer. In the second count appellee sought to enjoin his removal for the exercise of his rights of free speech. The single-judge court referred the constitutional question presented in the first count to a three-judge court, and dismissed the second count pending appellee's exhaustion of available administrative remedies before the Civil Service Commission. Appellee then amended the second count of his complaint to allege, on behalf of himself, 18 added named plaintiffs, see n. 1, supra, and others similarly situated, that the Lloyd-La Follette Act's removal standard was unconstitutionally vague and overbroad and violated the plaintiffs' First Amendment rights.

FN4. The court ordered appellee's reinstatement but deferred determination whether the suit was maintainable as a class action. Appellee's appeal to the Civil Service Commission was first delayed as a result of the pendency of this suit, then 'terminated' because of appellee's reinstatement following the decision of the District Court.

I

The numerous affidavits submitted to the District Court by both parties not unexpectedly portray two widely differing versions of the facts which gave rise to this lawsuit. Since the District Court granted summary judgment to appellee, it was required to resolve all genuine disputes as to any material facts in favor of appellants, and we therefore take as true for purposes *140 of this opinion the material particulars of appellee's conduct which were set forth in the notification of proposed adverse action dated February 18, 1972. The District Court's holding necessarily embodies the legal conclusions that, even though all of these factual statements were true, the procedure which the Government proposed to follow in this case was constitutionally insufficient to accomplish appellee's discharge, and the standard by which his conduct was to be judged in the course of those procedures infringed his right of free speech protected by the First Amendment.

The statutory provisions which the District Court held invalid are found in 5 U.S.C. s 7501. Subsection (a) of that section provides that '(a)n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.'

Subsection (b) establishes the administrative procedures by which an employee's rights under subsection (a) are to be determined, providing:

'(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to-

**1638 '(1) notice of the action sought and of any charges preferred against him;

'(2) a copy of the charges;

'(3) a reasonable time for filing a written answer to the charges, with affidavits; and

'(4) a written decision on the answer at the earliest practicable date.

'Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order *141 of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.'

This codification of the Lloyd-La Follette Act is now supplemented by the regulations of the Civil Service Commission, and, with respect to the OEO, by the regulations and instructions of that agency. Both the Commission and the OEO have by regulation given further specific content to the general removal standard in subsection (a) of the Act. The regulations of the Commission [FN5] and the OEO, [FN6] in nearly identical language, require *142 that employees 'avoid any action . . . which might result in, or create the appearance of . . . (a) ffecting adversely the confidence of the public in the integrity of (OEO and) the Government,' and that employees not 'engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful or other conduct prejudicial to the Government.' The OEO further provides by regulation that its Office of

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General Counsel is available to supply counseling on the interpretation of the laws and regulations relevant to the conduct of OEO employees.' [FN7]

FN5. 5 CFR ss 735.201a, 735.209. Section 735.201a provides: 'An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:
'(a) Using public office for private gain;
'(b) Giving preferential treatment to any person;
'(c) Impeding Government efficiency or economy;
'(d) Losing complete independence or impartiality;
'(e) Making a Government decision outside official channels; or
'(f) Affecting adversely the confidence of and public in the integrity of the Government.'
Section 735.209 provides:
'An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.'

FN6. 45 CFR ss 1015.735--1, 1015.735--24. Section 1015.735--1 provides:
'The purpose of this part is to guide OEO employees toward maintaining the high standard of integrity expected of all Government employees. It is intended to require that employees avoid any action which might result in, or create the appearance of:
'(a) Using public office for private gain; '(b) Giving preferential treatment to any organization or person;
'(c) Impeding Government efficiency or economy;
'(d) Marking a Government decision outside official channels;
'(e) Losing complete independence or impartiality of action; or
'(f) Affecting adversely the confidence of the public in the integrity of OEO and the Government.'
Section 1015.735--24 provides:
'No employee shall engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government.'

FN7. 45 CFR s 1015.735--4. Section 1015.735--4 provides:
'The Office of General Counsel of OEO is available to advise on the interpretation of the provisions of this part and the other laws and regulations relevant to the conduct of OEO employees. The General Counsel is designated as OEO counselor for this purpose.'

Both the Commission and the OEO also follow regulations enlarging the procedural protections accorded by the Act itself. [FN8] The Commission's regulations **1639 provide, *143 inter alia, that the employing agency must give 30 days' advance written notice to the employee prior to removal, and make available to him the material on which the notice is based. [FN9] They also provide that the employee shall have an opportunity to appear before the official vested with authority to make the removal decision in order to answer the charges against him, [FN10] *144 that the employee must receive notice of an adverse decision on or before its effective date, and that the employee may appeal from an adverse decision. [FN11] This **1640 appeal may be either to a reviewing authority within the employing agency, [FN12] or directly to the Commission, [*145 FN13] and the employee is entitled to an evidentiary trial-type hearing at the appeal stage of the proceeding. [FN14] The only trial-type hearing available within the OEO is, by *146 virtue of its regulations and practice, **1641 typically held after actual removal; [FN15] but if the employee is reinstated on appeal, he receives full backpay, less any amounts earned by him through other employment during that period. [FN16]

FN8. The Civil Service Commission regulations governing procedures for adverse actions implement, in addition to the Lloyd-La Follette Act, the Veterans' Preference Act of 1944 and Executive Order No. 11491. The Veterans' Preference Act, Act of June 27, 1944, c. 287, 58 Stat. 387, imposed procedural requirements for processing adverse actions in action to those imposed by the Lloyd-La Follette Act. Those additional requirements include an opportunity for the employee to respond orally or in writing to the charges on which his dismissal is based; the Veterans' Preference Act also authorizes Civil Service Commission appeals from adverse agency decisions. See 5 U.S.C. s 7701. The Act itself applies only to veterans of military service, 5 U.S.C. ss 2108, 7511, but Executive Order No. 11491, printed in note following 5 U.S.C. s 7301, extends the Act's protections to all nonpreference eligible employees in the classified service.

FN9. 5 CFR s 752.202(a). Section 752.202(a) provides:
'(a) Notice of proposed adverse action. (1) Except

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as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.

'(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material.

'(3) Material which cannot be disclosed to the employee, or to his designated physician under s 294.401 of this chapter, may not be used by an agency to support the reasons in the notice.'

FN10. 5 CFR s 752.202(b). Section 752.202(b) provides:

'(b) Employee's answer. Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.'

FN11. 5 CFR s 752.202(f). Section 752.202(f) provides:

'(f) Notice of adverse decision. The employee is entitled to notice of the agency's decision at the earliest practicable date. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

'(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained;

'(2) Of his right of appeal to the appropriate office of the Commission;

'(3) Of any right of appeal to the agency under Subpart B of Part 771 of this chapter, including the person with whom, or the office with which, such an appeal shall be filed;

'(4) Of the time limit for appealing as provided in s 752.204;

'(5) Of the restrictions on the use of appeal rights as provided in s 752.205; and

'(6) Where he may obtain information on how to pursue an appeal.'

FN12. 5 CFR ss 771.205, 771.208. Section 771.205 provides.

'An employee is entitled to appeal under the agency appeals system from the original decision. The agency shall accept and process a properly filed appeal in accordance with its appeals system.

Section 771.208 provides:

'(a) Entitlement. Except as provided in paragraph (b) of this section, an employee is entitled to a hearing on his appeal before an examiner. The employee is entitled to appear at the hearing personally or through or accompanied by his representative. The hearing may precede either the original decision or the appellate decision, at the agency's option. Only one hearing shall be held unless the agency determines that unusual circumstances require a second hearing.

'(b) Denial of hearing. The agency may deny an employee a hearing on his appeal only (1) when a hearing is impracticable by reason of unusual location or other extraordinary circumstance, or (2) when the employee failed to request a hearing offered before the original decision.

'(c) Notice. The agency shall notify an employee in writing before the original decision or before the appellate decision of (1) his right to a hearing, or (2) the reasons for the denial of a hearing.'

FN13. 5 CFR s 752.203. Section 752.203 provides: 'An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is about to submit.'

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Appeals to both the discharging agency and the Commission from an original adverse action will not be processed concurrently, 5 CFR s 752.205(a), and a direct appeal to the Commission from an initial removal decision constitutes a waiver of appeal rights within the employing agency. 5 CFR s 752.205(b). However, if the employee first appeals within the employing agency, he is entitled, if necessary, to an appeal to the Commission. 5 CFR s 752.205(c).

FN14. 5 CFR ss 771.208, 771.210--771.212, 772.305(c). Sections 771.210--771.212 govern the conduct of hearings by the discharging agency. Those sections provide:

's 771.210 Conduct of hearing.

'(a) The hearing is not open to the public or the press. Except as provided in paragraph (h) of this section, attendance at a hearing is limited to persons determined by the examiner to have a direct connection with the appeal.

'(b) The hearing is conducted so as to bring out pertinent facts, including the production of pertinent records.

'(c) Rules of evidence are not applied strictly, but the examiner shall exclude irrelevent or unduly repetitious testimony.

'(d) Decisions on the admissibility of evidence or testimony are made by the examiner.

'(e) Testimony is under oath or affirmation.

'(f) The examiner shall give the parties opportunity to cross-examine witnesses who appear and testify.

'(g) The examiner may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

'(h) An agency may provide through a negotiated agreement with a labor organization holding exclusive recognition for the attendance at hearings under this subpart of an observer from that organization. When attendance is provided for, the agreement shall further provide that when the employee who requested the hearing objects to the attendance of an observer on grounds of privacy, the examiner shall determine the validity of the objection and make the decision on the question of attendance.

's 771.211 Witnesses.

'(a) Both parties are entitled to produce witnesses.

'(b) The agency shall make its employees available as witnesses before an examiner when requested by the examiner after consideration of a request by the employee or the agency.

'(c) If the agency determines that it is not administratively practicable to comply with the request of the examiner, it shall notify him in writing of the reasons for that determination. If, in the examiner's judgment, compliance with his request is essential to a full and fair hearing, he may postpone the hearing until such time as the agency complies with his request.

'(d) Employees of the agency are in a duty status during the time they are made available as witnesses.

'(e) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

's 771.212 Record of hearing

'(a) The hearing shall be recorded and transcribed verbatim. All documents submitted to and accepted by the examiner at the hearing shall be made a part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the employee. If the employee submits a document that is accepted, he shall make the document available to the agency representative for reproduction.

'(b) The employee is entitled to be furnished a copy of the hearing record at or before the time he is furnished a copy of the report of the examiner.'

Section 772.305(c) governs the conduct of hearings before the Civil Service Commission. It provides:

'(c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative. The agency is also entitled to participate in the hearing. Both parties are entitled to produce witnesses. The Commission is not authorized to subpoena witnesses.

'(2) An agency shall make its employees available as witnesses at the hearing when (i) requested by the Commission after consideration of a request by the appellant or the agency and (ii) it is administratively practicable to comply with the request of the Commission. If the agency determines that it is not administratively practicable to comply with the request of the Commission, it shall submit to the Commission its written reasons for the declination. Employees of the agency shall be in a duty status during the time they are made available as witnesses. Employees of the agency shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

'(3) Hearings are not open to the public or the press. Attendance at hearings is limited to persons determined by the Commission to have a direct connection with the appeal. '(4) A representative of the Commission shall conduct the hearing and shall afford the parties opportunity to introduce evidence (including testimony and statements by the appellant, his representative, representatives of the agency, and witnesses), and to cross-examine

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witnesses. Testimony is under oath or affirmation. Rules of evidence are not applied strictly, but the representative of the Commission shall exclude irrelevant or unduly repetitious testimony.

'(5) The office of the Commission having initial jurisdiction of the appeal shall determine how the hearing will be reported. When the hearing is reported verbatim, that office shall make the transcript a part of the record of the proceedings and shall furnish a copy of the transcript to each party. When the hearing is not reported verbatim, the representative of the Commission who conducts the hearing shall make a suitable summary of the pertinent portions of the testimony. When agreed to in writing by the parties, the summary constitutes the report of the hearing and is made a part of the record of the proceedings. Each party is entitled to be furnished a copy of the report of the hearing. If the representative of the Commission and the parties fail to agree on the summary, the parties are entitled to submit written exceptions to any parts of the summary which are made a part of the record of the proceedings for consideration in deciding the appeal.'

FN15. OEO Staff Instruction No. 771-2 (1971).

FN16. 5 U.S.C. s 5596.

*147 We must first decide whether these procedures established for the purpose of determining whether there is 'cause' under the Lloyd-La Follette Act for the dismissal *148 of a federal employee comport with procedural due process, and then decide whether that standard of 'cause' for federal employee dismissals was within the constitutional power of Congress to adopt.

II

For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reasons might appeal to the respnsibile executive hiring officer. Following the Civil War, grass-roots sentiment for 'Civil Service reform' began to grow, and it was apparently brought to a head by the assassination of President James A. Garfield on July 2, 1881. Garfield, having then held officer only four months, was accosted in Washington's Union Station and shot by a dissatisfied office seeker who believed that the President had been instrumental in refusing his request for appointment as United States Consul in Paris. During the *149 summer, while President Garfield lingered prior to his death in September, delegates from 13 Civil **1642 Service reform associations met and formed the National Civil Service Reform League. Responding to public demand for reform led by this organization, Congress in January 1883 enacted the Pendleton Act. [FN17]

FN17. Act of Jan. 16, 1883, c. 27, 22 Stat. 403.

While the Pendleton Act is regarded as the keystone in the present arch of Civil Service legislation, by present-day standards it was quite limited in its application. It dealt almost exclusively with entry into the federal service, and hardly at all with tenure, promotion, removal, veterans' preference, pensions, and other subjects addressed by subsequent Civil Service legislation. The Pendleton Act provided for the creation of a classified Civil Service, and required competitive examination for entry into that service. Its only provision with respect to separation was to prohibit removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service. [FN18]

FN18. Id., s 2.

For 16 years following the effective date of the Pendleton Act, this last- memtioned provision of that Act appears to have been the only statutory or regulatory limitation on the right of the Government to discharge classified employees. In 1897, President William McKinley promulgated Civil Service Rule II, [FN19] which provided that removal from the competitive classified service should not be made except for just cause and for *150 reasons given in writing. While job tenure was thereby accorded protection, there were no administrative appeal rights for action taken in violation of this rule, and the courts declined to judicially enforce it. Thus matters stood with respect to governmental authority to remove federal employees until the enactment of the Lloyd-La Follette Act.

FN19. Fifteenth Report of the Civil Service Commission 70 (1897–1898): Rule II, s 8, provided: 'No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer, and of which the accused shall have full

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notice and an opportunity to make defense.'

The Lloyd-La Follette Act was enacted as one section of the Post Office Department appropriation bill for the fiscal year 1913. That Act guaranteed the right of federal employees to communicate with members of Congress, and to join employee organizations. It also substantially enacted and enlarged upon Civil Service Rule II in the following language:

'(N)o person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses not any trial or hearing shall be required except in the discretion of the officer making the removal, and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same. . . .' [FN20]

FN20. Act of Aug. 24, 1912, c. 389, s 6, 37 Stat. 555.

*151 [1] That Act, as now codified, 5 U.S.C. s 7501, together with the administrative regulations issued by the Civil Service Commission and the OEO, provided the statutory and administrative framework which the Government contends **1643 controlled the proceedings against appellee. The District Court, in its ruling on appellee's procedural contentions, in effect held that the Fifth Amendment to the United States Constitution prohibited Congress, in the Lloyd-La Follette Act, from granting protection against removal without cause and at the same time--indeed, in the same sentence--specifying that the determination of cause should be without the full panoply of rights which attend a trial-type adversary hearing. We do not believe that the Constitution so limits Congress in the manner in which benefits may be extended to federal employees.

Appellee recognizes that our recent decisions in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), are those most closely in point with respect to the procedural rights constitutionally guaranteed public employees in connection with their dismissal from employment. Appellee contends that he had a property interest or an expectancy of employment which could not be divested without first affording him a full adversary hearing.

In Board of Regents v. Roth, we said:

'Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' 408 U.S. at 577, 92 S.Ct. at 2709.

Here appellee did have a statutory expectancy that he not be removed other than for 'such cause as will promote *152 the efficiency of (the) service.' But the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing, Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 896--897, 81 S.Ct. 1743, 1749--1750, 6 L.Ed.2d 1230 (1961), we do not believe that a statutory enactment such as the Lloyd-La Follette Act may be parsed as discretely as appellee urges. Congress was obviously intent on according a measure of statutory job security to governmental employees which they had not

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previously enjoyed, but was likewise intent on excluding more elaborate procedural exquirements which it felt would make the operation of the new scheme unnecessarily burdensome in practice. Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. 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 Congress has designated for the determination of cause.

The Court has previously viewed skeptically the action of a litigant in challenging the constitutionality of portions *153 of a statute under which it has simultaneously claimed benefits. In Fahey v. **1644 Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), it was observed:

'In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. . . . It would be intolerable that the Congress should endow an Association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions.' Id., at 255--256, 67 S.Ct., at 1557.

'It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' United States v. San Francisco, 310 U.S. 16, 29 (60 S.Ct. 749, 84 L.Ed. 1050). As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (56 S.Ct. 466, 80 L.Ed. 688), 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'' Id., at 255, 67 S.Ct., at 1557.

This doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach. We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in *154 determining that right, a litigant in the position of appellee must take the bitter with the sweet.

To conclude otherwise would require us to hold that although Congress chose to enact what was essentially a legislative compromise, and with unmistakable clarity granted governmental employees security against being dismissed without 'cause,' but refused to accord them a full adversary hearing for the determination of 'cause,' it was constitutionally disabled from making such a choice. We would be holding that federal employees had been granted, as a result of the enactment of the Lloyd-La Follette Act, not merely that which Congress had given them in the first part of a sentence, but that which Congress had expressly withheld from them in the latter part of the same sentence. Neither the language of the Due Process Clause of the Fifth Amendment nor our cases construing it require any such hobbling restrictions on legislative authority in this area.

[2] Appellees urge that the judgment of the District Court must be sustained on the authority of cases such as Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), and Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Goldberg held that welfare recipients are entitled under the Due Process Clause of the Fifth and Fourteenth Amendments to an adversary hearing before their benefits are terminated. Fuentes v. Shevin held that a hearing was generally required before one could have his property seized under a writ of replevin. In Bell v. Burson the Court held that due process required a procedure for determining whether there was a reasonable possibility of a judgment against a driver as a result of an accident before his license and vehicle registration could be suspended for failure to post security under Georgia's uninsured motorist statute. And in Sniadach *155 v. Family Finance Corp. a Wisconsin statute providing for prejudgment garnishment without notice to the debtor or prior

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hearing was struck down as violative of the principles of due process. These cases deal with areas of the law **1645 dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here. The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.

'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' Cafeteria and Restaurant Workers v. McElroy, 367 U.S., at 895, 81 S.Ct., at 1748.

Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest. The Government might, then, under our holdings deal with Government employees in Roth, supra, and Sindermann, supra, constitutionally deal with appellee's claims as it proposed to do here. [FN21]

FN21. Our Brother WHITE would hold that Verduin himself might not make the initial decision as to removal on behalf of the agency, because he was the victim of the alleged slander which was one of the bases for appellee's removal. Because of our holding with respect to appellee's property-type expectations under Roth and Sindermann, we do not reach this question in its constitutional dimension. But since our Brother WHITE suggests that he reaches that conclusion as a matter of statutory construction, albeit because of constitutional emanations, we state our reasons for disagreeing with his conclusion. We, of course, find no constitutional overtones lurking in the statutory issue, because of our holding as to the nature of appellee's property interest in his employment. The reference in the Lloyd-La Follette Act itself to the discretion 'of the officer making the removal' suggests rather strongly that he is likewise the officer who will have brought the charges, and there is no indication that during the 60 years' practice under the Act it has ever been administratively construed to require the initial hearing on the discharge to be before any official other than the one making the charges. And while our Brother WHITE's statement of his conclusion suggests that it may be limited to facts similar to those presented here, post, at 1666, we doubt that in practice it could be so confined. The decision of an employee's supervisor to dismiss an employee 'for such cause as will promote the efficiency of the service' will all but invariably involve a somewhat subjective judgment on the part of the supervisor that the employee's performance is not 'up to snuff.' Employer-employee disputes of this sort can scarcely avoid involving clashes of personalities, and while a charge that an employee has defamed a supervisor may generate a maximum of personal involvement on the part of the latter, a statement of more typical charges will necessarily engender some degree of personal involvement on the part of the supervisor.

Additional difficulties in applying our Brother WHITE's standard would surely be found if the official bringing the charges were himself the head of a department or an agency, for in that event none of his subordinates could be assumed to have a reasonable degree of detached neutrality, and the initial hearing would presumably have to be conducted by someone wholly outside of the department or agency. We do not believe that Congress, clearly indicating as it did in the Lloyd-La Follette Act its preference for relatively simple procedures, contemplated or required the complexities which would be injected into the Act by our Brother WHITE.

*156 [3] Appellee also contends in this Court that because of the nature of the charges on which his dismissal was based, he was in effect accused of dishonesty, and that therefore a hearing was required before he could be deprived of this element of his 'liberty' protected by the Fifth Amendment against deprivation without due process. In Board of Regents v. Roth, 408 U.S., at 573, 92 S.Ct., at 2707, we said:

'The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of *157 his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. . . . In such a case, due process would accord an opportunity **1646 to refute the charge before University officials.' [FN22]

FN22. The Court's footnote there stated:

'The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.' 408 U.S., at 573 n. 12, 92 S.Ct., at 2707 n. 12.

The liberty here implicated by appellants' action is not the elemental freedom from external restraint such as was involved in Morrissey v. Brewer, 408

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U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), but is instead a subspecies of the right of the individual 'to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923). But that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause. Here appellee chose not to rely on his administrative appeal, which, if his factual contentions are correct, might well have vindicated his reputation and removed any wrongful stigma from his reputation.

Appellee urges that the delays in processing agency and Civil Service Commission appeals, amounting to more than three months in over 50% of agency appeals, [FN23] mean that the available administrative appeals do not *158 suffice to protect his liberty interest recognized in Roth. During the pendency of his administrative appeals, appellee asserts, a discharged employee suffers from both the stigma and the consequent disadvantage in obtaining a comparable job that result from dismissal for cause from Government employment. We assume that some delay attends vindication of an employee's reputation throughout the hearing procedures provided on appeal, and conclude that at least the delays cited here do not entail any separate deprivation of a liberty interest recognized in Roth.

FN23. See, Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va.L.Rev. 196, 206 (1973).

III

Appellee also contends that the provisions of 5 U.S.C. s. 7501(a), authorizing removal or suspension without pay 'for such cause as will promote the efficiency of the service,' are vague and overbroad. The District Court accepted this contention:

'Because employees faced with the standard of 'such cause as will promote the efficiency of the service' can only guess as to what utterances may cost them their jobs, there can be little question that they will be deterred from exercising their First Amendment rights to the fullest extent.' 349 F.Supp., at 866.

A certain anomaly attends appellee's substantive constitutional attack on the Lloyd-La Follette Act just as it does his attack on its procedural provisions. Prior to the enactment of this language in 1912, there was no such statutory inhibition on the authority of the Government to discharge a federal employee, and an employee could be discharged with or without cause for conduct which was not protected under the First Amendment. Yet under the District Court's holding, a federal employee after the enactment of the Lloyd-La Follette Act may not even be discharged for conduct which constitutes 'cause' for discharge and which is not protected *159 by the First Amendment, because the guarantee of job security which Congress chose to accord employees is 'vague' and 'overbroad.'

[4][5] We hold the standard of 'cause' set forth in the Lloyd-La Follette Act as a limitation on the Government's authority to discharge federal employees **1647 is constitutionally sufficient against the charges both of overbreadth and of vagueness. In Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 578--579, 93 S.Ct. 2880, 2897, 37 L.Ed.2d 796 (1973), we said:

'(T)here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '(T)he general class of offense to which . . . (the provisions are) directed is plainly within (their) terms . . ., (and they) will not be struck down as vague, even though marginal cases could be put where doubts might arise.' United States v. Hariss, 347 U.S. 612, 618 (74 S.Ct. 808, 812, 98 L.Ed. 989) (1954).'

Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection. We do not

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believe that Congress was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all. As we said in Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972):

'The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties *160 in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.' Id., at 110, 92 S.Ct., at 1957.

Here the language 'such cause as will promote the efficiency of the service' was not written upon a clean slate in 1912, and it does not appear on a clean slate now. The Civil Service Commission has indicated that what might be said to be longstanding principles of employer-employee relationships, like those developed in the private sector, should be followed in interpreting the language used by Congress. [FN24] Moreover, the OEO has provided by regulation that its Office of General Counsel is available to counsel employees who seek advice on the interpretation of the Act and its regulations. [FN25] We found the similar procedure offered by the Civil Service Commission important in rejecting the respondents' vagueness contentions in Civil Service Commission v. National Association of Letter Carriers, 413 U.S., at 580, 93 S.Ct., at 2897.

FN24. The Federal Personnel Manual, Subchapter S3--1. a., states: 'Basically a 'cause' for disciplinary adverse action is a recognizable offense against the employer-employee relationship. Causes for adverse action run the entire gamut of offenses against the employer-employee relationship, including inadequate performance of duties and improper conduct on or off the job. . . .' Supp. 752--1, Adverse Action by Agencies, Feb. 1972.

FN25. See n. 7, supra.

[6][7] The phrase 'such cause as will promote the efficiency of the service' as a standard of employee job protection is without doubt intended to authorize dismissal for speech as well as other conduct. Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), makes it clear that in certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment:

'At the same time it cannot be gainsaid that the State has interests as an employer in regulating the *161 speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of **1648 the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'

Because of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal. The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal, writing for a panel of the United States Court of Appeals for the District of Columbia Circuit in Meehan v. Macy, 129 U.S.App.D.C. 217, 230, 392 F.2d 822, 835 (1968), modified, 138 U.S.App.D.C. 38, 425 F.2d 469, aff'd en banc, 138 U.S.App.D.C. 41, 425 F.2d 472 (1969):

'(I)t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' We think it is inherent in the employment relationship as a matter of common sense if not (of) common law that (a Government) employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory (cartoons). . . . (Dismissal in such circumstances *162 neither) comes as an unfair surprise (nor) is so unexpected . . . as to chill . . . freedom to engage in appropriate speech.'

Since Congress when it enacted the Lloyd-La Follette Act did so with the intention of conferring job protection rights on federal employees which they had not previously had, it obviously did not intend to authorize discharge under the Act's

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removal standard for speech which is constitutionally protected. The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. Indeed the Act is not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency. We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad. Colten v. Kentucky, 407 U.S., at 111, 92 S.Ct., at 1957. We have observed previously that the Court has a duty to construe a federal statute to avoid constitutional questions where such a construction is reasonably possible. United States v. 12 200--ft. Reels of Film, 413 U.S. 123, 130 n. 7, 93 S.Ct. 2665, 2670, 37 L.Ed.2d 500 (1973); United States v. Thirty-seven photographs, 402 U.S. 363, 368--369, 91 S.Ct. 1400, 1404--1405, 28 L.Ed.2d 822 (1971).

We have no hesitation, as did the District Court, in saying that on the facts alleged in the administrative charges against appellee, the appropriate tribunal would infringe no constitutional right of appellee in concluding that there was 'cause' for his discharge. Pickering v. Board of Education, 391 U.S., at 569, 88 S.Ct., at 1735. Nor have we any doubt that satisfactory proof of these allegations could constitute 'such cause as will promote the efficiency *163 of the service' within the terms of 5 U.S.C. s 7501(a). Appellee's contention then boils down to the assertion that although no constitutionally protected conduct of his own was the basis for his discharge on the Government's version of the facts, the statutory language in question must be declared inoperative, and a set of more particularized regulations substituted for it, because the generality of its language might result in marginal situations in which other persons seeking to engage in constitutionally protected conduct would be deterred from doing so. **1649 But we have held that Congress in establishing a standard of 'cause' for discharge did not intend to include within that term any constitutionally protected conduct. We think that our statement in Colten v. Kentucky, is a complete answer to appellee's contention:

'As we understand this case, appellant's own conduct was not immune under the First Amendment and neither is his conviction vulnerable on the ground that the statute threatens constitutionally protected conduct of others.' 407 U.S., at 111, 92 S.Ct., at 1958.

In sum, we hold that the Lloyd-La Follette Act, in at once conferring upon nonprobationary federal employees the right not to be discharged except for 'cause' and prescribing the procedural means by which that right was to be protected, did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations. We also conclude that the post-termination hearing procedures provided by the Civil Service Commission and the OEO adequately protect those federal employees' liberty interest, recognized in Roth, supra, in not being wrongfully stigmatized by untrue and unsupported administrative charges. Finally, we hold that *164 the s[illegible] of employment protection imposed by Congress in the Lloyd- La Follette Act, is not impermissibly vague or overbroad in its regulation of the speech of federal employees and therefore unconstitutional on its face. Accordingly, we reverse the decision of the District Court on both grounds on which it granted summary judgment and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL, with whom Mr. Justice BLACKMUN joins, concurring in part and concurring in the result in part.

For the reasons stated by Mr. Justice REHNQUIST, I agree that the provisions of 5 U.S.C. s 7501(a) are neither unconstitutionally vague nor overbroad. I also agree that appellee's discharge did not contravene the Fifth Amendment guarantee of procedural due process. Because I reach that conclusion on the basis of different reasoning, I state my views separately.

I

The applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate 'property' or 'liberty' interest within the meaning of the Fifth or

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Fourteenth Amendment. Governmental deprivation of such an interest must be accompanied by minimum procedural safeguards, including some form of notice and a hearing. [FN1] *165 The Court's decisions in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), provide the proper framework for analysis of whether appellee's employment constituted a 'property' interest under the Fifth Amendment. In Roth, the Court stated:

FN1. As the Court stated in Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), 'The formality and procedural requisities for (a due process) hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' In this case, we are concerned with an administrative hearing in the context of appellee's discharge from public employment.

'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He 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. **1650 It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. 'Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' 408 U.S., at 577, 92 S.Ct., at 2709.

The Court recognized that the 'wooden distinction' between 'rights' and 'privileges' was not determinative of the applicability of procedural due process and that a property interest may be created by statute as well as by contract. Id., at 571, 92 S.Ct., at 2706. In particular, the Court stated that a person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent 'sufficient cause' for discharge. Id., at 576--578, 92 S.Ct., at 2708--2710.

In Sindermann, the Court again emphasized that a person may have a protected property interest in continued *166 public employment. There, a state college teacher alleged that the college had established a de facto system of tenure and that he had obtained tenure under that system. The Court stated that proof of these allegations would establish the teacher's legitimate claim of entitlement to continued employment absent 'sufficient cause' for discharge. In these circumstances, the teacher would have a property interest safeguarded by due process, and deprivation of that interest would have to be accompanied by some form of notice and a hearing.

Application of these precedents to the instance case makes plain that appellee is entitled to invoke the constitutional guarantee of procedural due process. Appellee was a nonprobationary federal employee, and as such he could be discharged only for 'cause.' 5 U.S.C. s 7501(a). The federal statute guaranteeing appellee continued employment absent 'cause' for discharge conferred on him a legitimate claim of entitlement which constituted a 'property' interest under the Fifth Amendment. Thus termination of his employment requires notice and a hearing.

The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in Roth and Sindermann. Indeed, it would lead directly to the conclusion that whatever the nature *167 of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a

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property interest in federal employment, [FN2] it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest **1651 must be analyzed in constitutional terms. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); [FN3] Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Board of Regents of State Colleges v. Roth, supra; Perry v. Sindermann, supra.

FN2. No property interest would be conferred, for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent 'cause.' See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578, 92 S.Ct. 2701, 2709--2710, 33 L.Ed.2d 548 (1972).

FN3. In Goldberg, for example, the statutes and regulations defined both eligibility for welfare benefits and the procedures for termination of those benefits. The Court held that such benefits constituted a statutory entitlement for persons qualified to receive them and that the constitutional guarantee of procedural due process applied to termination of benefits. 397 U.S., at 261--263, 90 S.Ct., at 1016--1018.

II

Having determined that the constitutional guarantee of procedural due process applies to appellee's discharge from public employment, the question arises whether an evidentiary hearing, including the right to present favorable witnesses and to confront and examine adverse witnesses, must be accorded before removal. The resolution of this issue depends on a balancing process in which the Government's interest in expeditious removal *168 of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment. Goldberg v. Kelly, supra, at 263--266, 90 S.Ct., at 1018--1020. As the Court stated in Cafeteria and Restaurant Workers Union Local 473, AFL--CIO v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'

In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [FN4]

FN4. My Brother MARSHALL rejects the Government's interest in efficiency as insignificant, citing Goldberg v. Kelly, 397 U.S. 254, 266, 90 S.Ct. 1011, 1019--1020, 25 L.Ed.2d 287 (1970), and Fuentes v. Shevin, 407 U.S. 67, 90--91, n. 22, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972). He also notes that nine federal agencies presently accord prior evidentiary hearings. Post, at 1678, 1679.

Neither Goldberg nor Fuentes involved the Government's substantial interest in maintaining the efficiency and discipline of its own employees. Moreover, the fact that some federal agencies may have decided to hold prior evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings.

Nor do I agree with my Brother WHITE's argument that suspension with pay would obviate any problem posed by prolonged retention of a disruptive or unsatisfactory employee. Aside from the additional financial burden which would be imposed on the Government, this procedure would undoubtedly inhibit warranted discharges and weaken significantly the deterrent effect of immediate removal. In addition, it would create a strong incentive for the suspended employee to attempt to delay final resolution of the issues

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surrounding his discharge.

*169 Appellee's countervailing interest is the continuation of his public employment pending an evidentiary hearing. Since appellee would be reinstated and awarded backpay if he prevails on the **1652 merits of his claim, appellee's actual injury would consist of a temporary interruption of his income during the interim. To be sure, even a temporary interruption of income could constitute a serious loss in many instances. But the possible deprivation is considerably less severe than that involved in Goldberg, for example, where termination of welfare benefits to the recipient would have occurred in the face of 'brutal need,' 397 U.S., at 261, 90 S.Ct., at 1017. Indeed, as the Court stated in that case, 'the crucial factor in this context-- a factor not present in the case of . . . the discharged government employee . . . --is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.' Id., at 264, 90 S.Ct., at 1018 (emphasis added). By contrast, a public employee may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

*170 Appellee also argues that the absence of a prior evidentiary hearing increases the possibility of wrongful removal and that delay in conducting a post-termination evidentiary hearing further aggravates his loss. The present statute and regulations, however, already respond to these concerns. The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR ss 771.208 and 772.305; 5 U.S.C. s 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [FN5]

FN5. My Brother WHITE argues that affirmance is required because the supervisory official who would have conducted the preremoval hearing was the 'object of slander that was the basis for the employee's proposed discharge.' Post, at 1666. He would conclude that this violated the statutory requirement of an 'impartial decisionmaker.' I find no such requirement anywhere in the statute or the regulations. Nor do I believe that due process so mandates at the preremoval stage. In my view, the relevant fact is that an impartial decisionmaker is provided at the post- removal hearing where the employee's claims are finally resolved.

There are also significant practical considerations that argue against such a requirement. In most cases, the employee's supervisor is the official best informed about the 'cause' for termination. If disqualification is required on the ground that the responsible supervisor could not be wholly impartial, the removal procedure would become increasingly complex. In effect, a 'mini-trial' would be necessary to educate the impartial decisionmaker as to the basis for termination.

*171 On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests. [FN6]

FN6. Appellee also argues that the failure to provide a prior evidentiary hearing deprived him of his 'liberty' interest in violation of the Fifth Amendment. For the reasons stated above, I find that the present statute comports with due process even with respect to appellee's liberty interest.

Mr. Justice WHITE, concurring in part and dissenting in part.

The Lloyd-La Follette Act, 5 U.S.C. s 7501(a), provides that '(a)n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.' [FN1] The *172 regulations of the **1653 Civil Service Commission and the Office of Economic Opportunity (OEO), at which appellee was employed, give content to 'cause' by specifying grounds for removal which include 'any action . . . which might result in . . . (a)ffecting adversely the confidence of the public in the integrity of (OEO and) the Government' and any 'criminal, infamous, dishonest, immoral, or notoriously disgraceful

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conduct, or other conduct prejudicial to the Government.' [FN2]

FN1. The full text of the Act's pertinent provisions provides:
'(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.
'(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to--
'(1) notice of the action sought and of any charges preferred against him;
'(2) a copy of the charges;
'(3) a reasonable time for filing a written answer to the charges, with affidavits; and
'(4) a written decision on the answer at the earliest practicable date.
'Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and on request, shall be furnished to the individual affected and to the Civil Service Commission.
'(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title.' 5 U.S.C. s 7501.

FN2. The regulation of the Civil Service Commission as to 'Proscribed actions,' 5 CFR s 735.201a, provides:
'An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:
'(a) Using public office for private gain;
'(b) Giving preferential treatment to any person;
'(c) Impeding Government efficiency or economy;
'(d) Losing complete independence or impartiality;
'(e) Making a Government decision outside official channels; or
'(f) Affecting adversely the confidence of the public in the integrity of the Government.'
The regulations, 5 CFR s 735.209, also provided: 'An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.'

Aside from specifying the standards for discharges, Congress has also established the procedural framework in which the discharge determinations are to be made. The employee is to receive 30 days' advance written notice of the action sought and of any charges preferred against him, a copy of the charges, and a *173 reasonable time for filing a written answer to the charges. Before being terminated he may also make a personal appearance before an agency official, and implementing Civil Service Commission regulations provide that '(t)he right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or a formal hearing with examination of witnesses.' The regulations further provide that the 'representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.' The employee is entitled to notice of the agency's decision in writing, and the notice must inform the employee '(w)hich of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained.' [FN3] **1654 The employee *174 may appeal from an adverse decision and is entitled to an evidentiary trial-type hearing at this stage. [FN4] This later hearing affords the employee certain rights not available with OEO at the pretermination stage, particularly *175 the taking of testimony under oath and the cross-examination of witnesses.

FN3. The Civil Service Procedural Regulations, 5 CFR s 752.202, provide in relevant part:
'(a) Notice of proposed adverse action. (1) Except as provided in paragraph (c) of this section, an employee against whom adverse action is sought is entitled to at least 30 full days' advance written notice stating any and all reasons, specifically and in detail, for the proposed action.
'(2) Subject to the provisions of subparagraph (3) of this paragraph, the material on which the notice is based and which is relied on to support the reasons in that notice, including statements of witnesses, documents, and investigative reports or extracts therefrom, shall be assembled and made available to the employee for his review. The notice shall inform the employee where he may review that material. '(3) Material which cannot be disclosed to the employee, or to his designated physician under s 294.401 of this chapter, may not

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be used by an agency to support the reasons in the notice.

'(b) Employee's answer. Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency to support the reason in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

'(f) Notice of adverse decision. The employee is entitled to notice of the agency's decision at the earliest practicable date. The agency shall deliver the notice of decision to the employee at or before the time the action will be made effective. The notice shall be in writing, be dated, and inform the employee:

'(1) Which of the reasons in the notice of proposed adverse action have been found sustained and which have been found not sustained. . . .'

FN4. The Veterans' Preference Act of 1944 authorizes Civil Service Commission appeals from adverse agency decisions. See 5 U.S.C. s 7701. The Act itself applies only to veterans of military service, 5 U.S.C. ss 2108, 7511, but Executive Order No. 11491, printed in note following 5 U.S.C. s 7301, extends the Act's protections to all nonpreference eligible employees in the classified service.

Appellee Kennedy was a nonprobationary federal employee in the competitive civil service and held the position of field representative in the Chicago Regional Office of OEO. As such, he was entitled to the protection of the statutes and regulations outlined above. On February 18, 1972, Kennedy received a 'Notification of Proposed Adverse Action' from the Regional Director of OEO, Wendell Verduin. The notice charged, among other things, that Kennedy had made slanderous statements about Verduin and another coworker charging them with bribing or attempting to bribe a potential OEO grantee and had thereby caused disharmony in his office by preventing its smooth functioning. Verduin then ruled on March 20, 1972, after Kennedy had filed a written answer objecting to the lack of certain procedures furnished at this pretermination hearing, but had declined to appear personally, that Kennedy be removed from his job with OEO, effective March 27, 1972. [FN5]

FN5. Appellee's response stated:

'The charges and proceedings brought against Mr. Kennedy are invalid and, in fact, unlawful for the following two reasons among others:

'First, Mr. Kennedy is entitled to a fair and impartial hearing prior to any adverse action being taken against him. This means a proceeding where there is a genuinely impartial hearing officer, a proceeding where there is an opportunity to offer witnesses and confront and cross examine those furnishing evidence against him, a proceeding where he will have an opportunity to respond to all evidence offered against him, a proceeding where a written record is made of all evidence, testimony and argument, a proceeding where the decision will be based exclusively on the record, a proceeding where the decision will contain findings of fact and conclusions of law with regard to all controverted issues, together with an analysis indicating the manner in which the controversies were resolved.

'The present adverse action procedure fails in substantial ways to provide all of these rudimentary elements required for a due process hearing. It therefore fails to meet the requirements of due process secured by the Fifth Amendment to the Constitution of the United States and is hence, invalid, null and void.

'Second, the charges brought against Mr. Kennedy are facially insufficient and illegal. As the adverse action makes clear, Mr. Kennedy is being punished for his conversations (inaccurately set forth in the adverse action) with union members and the public. Since the First Amendment protects such conversations these allegations are totally without merit.' App. 62.

**1655 *176 Kennedy then appealed directly to the

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Civil Service Commission and also instituted the present action. The first count of his complaint alleged that the discharge procedure of the Lloyd-La Follette Act, and the attendant Civil Service Commission regulations, deprived him of due process by failing to provide for a full hearing prior to termination. The second count alleged that he was discharged because of certain conversations, in violation of his rights under the First Amendment. The single judge who reviewed the complaint convened a three-judge court to hear the first count, and dismissed the second, without prejudice to refiling after the Civil Service Commission ruled on his appeal. It was the court's view that it should not act until the agency had the opportunity to review the rights of appellee's First Amendnemtn claim.

After the convening of the three-judge court, appellee amended his complaint, then limited to the due process claim, to include a challenge to the Lloyd-La Follette Act on the grounds that it was vague and overbroad and violated the First Amendment.

The three-judge District Court, convened pursuant to 28 U.S.C. ss 2282 and 2284, granted summary judgment for appellee. Kennedy v. Sanchez, D.C., 349 F.Supp. 863. It held that the discharge procedures violated due process because '(t)here was no provision .. . for the decision on removal or suspension to be made by an impartial agency *177 official, or for Kennedy (by his own means) to present witnesses; or for his right to confront adverse witnesses.' Id., at 865. The court also held that s 7501 was unconstitutional on vagueness and overbreadth grounds. The Government was ordered to reinstate Kennedy to his former position with backpay and to conduct any future removal proceedings with a hearing consistent with its opinion. Appellants were also enjoined from further enforcement of the Lloyd-La Follette Act, and implementing regulations, as 'construed to regulate the speech of competitive service employees.' Id., at 866.

I

In my view, three issues must be addressed in this case. First, does the Due Process Clause require that there be a full trial-type hearing at some time when a Federal Government employee in the competitive service is terminated? Secondly, if such be the case, must this hearing be held prior to the discharge of the employee, and, if so, was the process afforded in this case adequate? Third, and as an entirely separate matter, are the Lloyd-La Follette Act and its attendant regulations void for vagueness or overbreadth? I join the Court as to the third issue.

II

I differ basically with the plurality's view that 'where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet,' and that 'the property interest which appellee had in his employment was itself conditioned by the **1656 procedural limitations which had accompanied the grant of that interest.' Ante, at 1644, 1645. The rationale of this position quickly leads to the conclusion that even though *178 the statute requires cause for discharge, the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pre-termination or post- termination.

The past cases of this Court uniformly indicate that some kind of hearing is required at some time before a person is finally deprived of his property interests. [FN6] The principles of due process 'come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law.' Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 234, 32 L.Ed. 623 (1889). The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

FN6. My views as to the requirements of due process where property interests are at stake does not deal with the entirely separate matter and requirements of due process when a person is deprived of liberty.

This basic principle has unwaveringly been applied when private property has been taken by the State. A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234

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U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). 'It is an opportunity which must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Where the Court has rejected the need for a hearing prior to the initial 'taking,' a principal rationale has been that a hearing would be provided before the taking became final. See North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (seizure of food unfit for consumption); Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S.Ct. 214, 65 L.Ed. 403 (1921) (seizure of property under Trading with the *179 Enemy Act); Corn Exchange Bank v. Coler, 280 U.S. 218, 50 S.Ct. 94, 74 L.Ed. 378 (1930) (seizure of assets of an absconding husband); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931) (collection of a tax); Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944) (setting of price regulations); Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) (appointment of conservator of assets of savings and loan association); Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.

This principle has also been applied in situations where the State has licensed certain activities. Where the grant or denial of a license has been involved, and the 'right' to engage in business has been legitimately limited by the interest of the State in protecting its citizens from inexpert or unfit performance, the decision of the State to grant or deny a license has been subject to a hearing requirement. See, e.g., Dent v. West Virginia, supra (licensing of physicians); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926) (licensing of accountant); Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963) (admission to the bar). The Court has put particular stress on the fact that the absence of a hearing would allow the State to be arbitrary in its grant or denial, and to make judgments on grounds **1657 other than the fitness of a particular person to pursue his chosen profession. In the context of admission to the bar, the Court has stated: 'Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no *180 basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.' Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957). The hearing requirement has equally been applied when the license was to be removed. In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), or a licensee has been subject to state regulation, Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937).

Similar principles prevail when the State affords its process and mechanism of dispute settlement, its law enforcement officers, and its courts, in aiding one person to take property from another. Where there is a 'taking' before a final determination of rights, as in some cases when the State seizes property, to protect one of the parties pendente lite, the Court has acted on the assumption that at some time a full hearing will be available, as when there is an attachment of property preliminary to resolution of the merits of a dispute, Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921); Coffin Brothers v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); McKay v. McInnes, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929). The opportunity to defend one's property before it is finally taken is so basic that it hardly bears repeating. Adequate notice of the court proceeding must be furnished, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and there must be jurisdiction over the person, Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878).

Since there is a need for some kind of hearing before a person is finally deprived of his property, the argument in the instant case, and that adopted in the plurality opinion, is that there is something different about a final taking from an individual or property rights which have their origin in the public rather than the private sector of the economy, and, as applied here, that there is no need for any hearing at any time when the Government *181 discharges a person from his job, even though good cause for the

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discharge is required.

In cases involving employment by the Government, the earliest cases of this Court have distinguished between two situations, where the entitlement to the job is conditioned 'at the pleasure' of the employer and where the job is to be held subject to certain requirements being met by the employee, as when discharge must be for 'cause.' The Court has stated: 'The inquiry is, therefore, whether there were any causes of removal prescribed by law . . .. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.' Reagan v. United States, 182 U.S. 419, 425, 21 S.Ct. 842, 845, 45 L.Ed. 1162 (1901); Shurtleff v. United States, 189 U.S. 311, 314, 23 S.Ct. 535, 536, 47 L.Ed. 828 (1903). The Court has thus made clear that Congress may limit the total discretion of the Executive in firing an employee, by providing that terminations be for cause, and only for cause, and, if it does so, notice and a hearing are 'essential.'

Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided that employment was conditioned on "maintain(ing) the respect due to courts of justice and judicial officers," Ex parte Secombe, 19 How. 9, 14, 15 L.Ed. 565 (1857) (attorney and counsellor of court), or was subject **1658 to no conditions at all, Ex parte Hennen, 13 Pet. 225, 10 L.Ed. 138 (1839) (clerk of the court), no hearing is required. See also Crenshaw v. United States, 134 U.S. 99, 10 S.Ct. 431, 33 L.Ed. 825 (1890) (Navy officer could be removed at will); Parsons v. United States, 167 U.S. 324, 17 S.Ct. 880, 42 L.Ed. 185 (1897) (district attorney could be terminated by the President at his pleasure); Keim v. United States, 177 U.S. 290, 20 S.Ct. 574, 44 L.Ed. 774 (1900) (post office *182 clerks removable at pleasure). To like effect is Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), where the Court held that no hearing need be provided to a cook employed by a private concessionaire of the Navy before the Government revoked her security clearance. The revocation of security clearances was within the 'unfettered control' of the Navy in order 'to manage the internal operation of an important federal military establishment.' Id., at 896, 81 S.Ct., at 1749. The Court there assumed that 'Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory . . . ..' Id., at 898, 81 S.Ct. at 1750.

Where the Congress has confined Executive discretion, notice and hearing have been required. In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 952 L.Ed. 817 (1951), an organization was put on the Attorney General's list, as disloyal to the United States, without a hearing before the Attorney General. The Executive Order, as defined by implementing regulations, required the executive to make an 'appropriate determination' of disloyalty. It was apparent that members of organizations employed by the Government who belonged to an organization on the Attorney General's list would be in danger of losing their jobs. The Court held, assuming the facts as alleged by the complaints were true, that it would be arbitrary, and not consistent with an 'appropriate determination,' to deny a hearing on the matter to the affected organizations. As Mr. Justice Frankfurter observed in his concurring opinion, '(t)he heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.' Id., at 170, 71 S.Ct., at 647.

*183 To some extent, McGrath, and like cases, see Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), depended on statutory construction--the intent of Congress to require that procedural fairness be observed in making decisions on security clearances or status, which affected employment--but it is obvious that the constitutional requirements of fairness were a guiding hand to the Court's statutory interpretation. 'Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process,' and it has been 'the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit

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action by the Nation's law- makers . . . .' Id., at 507--508, 79 S.Ct., at 1419.

The concern of the Court that fundamental fairness be observed when the State deals with its employees has not been limited to action which is discriminatory and infringes on constitutionally protected rights, as in Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). See also Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971). It has been observed that 'constitutional protection does extend **1659 to the public servant whose exclusion pursuant to a statute is patently arbitrary or disciminatory.' Wieman v. Updegraff, supra, 344 u.S., at 192, 73 S.Ct., at 219; Slochower v. Board of Education, supra, 350 U.S., at 556, 76 S.Ct., at 640. (Emphasis added.) In Slochower, supra, New York law provided that a tenured employee taking the Fifth Amendment before a legislative committee inquiring into his official conduct could be fired. Quite apart from the Fifth Amendment 'penalty' assessed by the State, the Court was concerned with the arbitrariness of drawing a conclusion, without a hearing, that any employee who *184 took the Fifth Amendment was guilty or unfit for employment. The Court stated:

> 'This is not to say that Slochower has a constitutional right to be an associated professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here.' Id., at 559, 76 S.Ct., at 641.

The Court's decisions in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), reiterate the notion that the Executive Branch cannot be arbitrary in depriving a person of his job, when the Legislative Branch has provided that a person cannot be fired except for cause, and, if anything, extend the principles beyond the facts of this case.

In Sindermann, a teacher who had held his position for a number of years but was not tenured under contract, alleged that he had de facto tenure under contract law due to 'the existence of rules or understandings' with the college which employed him, id., at 602, 92 S.Ct., at 2700. The Court held that if the professor could prove the existence of a property interest it would 'obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.' Id., at 603, 92 S.Ct., at 2700. In Roth, an assistant professor was hired for a fixed term of one academic year, and had no tenure. The Court held that the teacher had no property interest in the job, since the terms of employment allowed that his contract not be renewed. The critical consideration was that the terms 'did not provide for contract renewal absent 'sufficient cause.'" 408 U.S., at 578, 92 S.Ct., at 2709. The rights to continued employment were determined by state law. The Court took great pains, *185 however, to point out that a tenured appointment, providing for entitlement to a job, absent cause, would be a far different case.

These cases only serve to emphasize that where there is a legitimate entitlement to a job, as when a person is given employment subject to his meeting certain specific conditions, due process requires, in order to insure against arbitrariness by the State in the adminstration of its law, that a person be given notice and a hearing before he is finally discharged. As the Court stated in Dismuke v. United States, 297 U.S. 167, 172, 56 S.Ct. 400, 403, 80 L.Ed. 561 (1936):

> 'If (the adminsitrative officer) is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority . . . by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized.'

To be sure, to determine the existence of the property interest, as for example, whether a teacher is tenured or not, one looks to the controlling law, in this case federal statutory law, the Lloyd-La Follette Act, which provides that a person can only be fired for cause. The fact that the origins of the property right are with the State makes no difference **1660 for the nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution

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defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition.

I conclude, therefore, that as a matter of due process, a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct. Here, the Constitution and the Lloyd-La Follette Act converge, because a full trial-type hearing *186 is provided by statute before termination from the service becomes final, by way of appeal either through OEO, the Civil Service Commission, or both. [FN7]

FN7. Bailey v. Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46 (1950), aff'd by an equally divided court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352 (1951), is not controlling. 'The basis of this holding has been thoroughly undermined in the ensuing years' with the rejection of the 'right-privilege' distinction. Board of Regents v. Roth, 408 U.S. 564, 571 n. 9, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972).

A different case might be put, of course, if the termination were for reasons of pure inefficiency, assuming such a general reason could be given, in which case it would be at least arguable that a hearing would serve no useful purpose and that judgments of this kind are best left to the discretion of administrative officials. This is not such a case, however, since Kennedy was terminated on specific charges of misconduct.

III

The second question which must be addressed is whether a hearing of some sort must be held before any 'taking' of the employee's property interest in his job occurs, even if a full hearing is available before that taking becomes final. I must resolve this question because in my view a full hearing must be afforded at some juncture and the claim is that it must occur prior to termination. If the right to any hearing itself is a pure matter of property definition, as the plurality opinion suggests, then that question need not be faced, for any kind of hearing, or no hearing at all, would suffice. As I have suggested, the State may not dispense with the minimum procedures defined by due process, but different considerations come into play when deciding whether a pretermination hearing is required and, if it is, what kind of hearing must be had.

*187 In passing upon claims to a hearing before preliminary but nonfinal deprivations, the usual rule of this Court has been that a full hearing at some time suffices. 'We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective.' 'It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.' Ewing v. Mytinger & Casselberry, 339 U.S., at 598--599, 70 S.Ct., at 872. See also Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596--597, 51 S.Ct. 608, 611-- 612, 75 L.Ed. 1289 (1931); Scottish Union & National Insurance Co. v. Bowland, 196 U.S. 611, 631--632, 25 S.Ct. 345, 351--352, 49 L.Ed. 619 (1905); Springer v. United States, 102 U.S. 586, 593--594, 26 L.Ed. 253 (1881). This has seemingly been the rule whether the State was taking property from the person, as in the above-cited cases, or whether one person was taking it from another through the process of state courts. See Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921); Coffin Brothers v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); McKay v. McInnes, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929).

In recent years, however, in a limited number of cases, the Court has held that a hearing must be furnished at the first stage of taking, even where a later hearing was provided. This has been true in the revocation of a state-granted license, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), and in suits **1661 between private parties, where summary replevin procedures, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), or garnishment procedures, Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), were attacked, and when the State has sought to terminate welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). [FN8]

FN8. Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), is not properly part of this quartet of cases, since no hearing was apparently ever provided to challenge the posting of one's name as an excessive drinker.

*188 These conflicting lines of cases demonstrate, as the Court stated in Cafeteria & Restaurant

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Workers Union v. McElroy, 367 U.S., at 895, 81 S.Ct., at 1748, that 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 363 U.S. 420, 440, 442, 80 S.Ct. 1502, 1513, 1514, 4 L.Ed.2d 1307 (1960); Goldberg v. Kelly, supra, 397 U.S., at 263, 90 S.Ct., at 1018. In assessing whether a prior hearing is required, the Court has looked to how the legitimate interests asserted by the party asserting the need for a hearing, and the party opposing it, would be furthered or hindered.

In many cases, where the claim to a pretermination hearing has been rejected, it appears that the legitimate interest of the party opposing the hearing might be defeated outright if such hearing were to be held. [FN9] For example, when the Government or a private party lays claim to property there is often the danger that the person in possession of the property may alienate or waste it, and the Government or private party may be without recourse. Thus, the Court has held that there is no need for a prior hearing where the Government has taken preliminary custody of alleged enemy property before actual title to the property is determined, Central Union Trust Co. v. Garvan, 254 U.S. 554, 41 S.Ct. 214, 65 L.Ed. 403 (1921); Stoehr v. Wallace, 255 U.S. 239, 41 S.Ct. 293, 65 L.Ed. 604 (1921), or where a private creditor has sought to attach property of a debtor. See Ownbey v. Morgan, supra; Coffin Brothers v. Bennett, supra; McKay v. McInnes, supra. Of course, such summary action must be authorized in such a manner as to minimize the possibilities of a mistaken deprivation, by a *189 public official in the case of administrative action, or a judge where the processes of the court are used. Fuentes v. Shevin, supra.

FN9. See generally Freedman, Summary Action by Administrative Agencies, 40 U.Chi.L.Rev. 1 (1972).

The danger that the purpose of the action may be defeated, or made exceedingly difficult, by requiring a prior hearing, is illustrated by North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908), where the Court sustained the constitutionality of an Illinois statute permitting health inspectors to enter cold-storage houses and 'forthwith seize, condemn and destroy' unfit food. The defendants in the action claimed that while it may be necessary to seize the food pending a hearing, surely destruction of that food could not be justified. Nenetheless, the Court observed:

> 'If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of the investigation, which would involve expense, **1662 and might not even then prove effectual.' Id., at 320, 29 S.Ct., at 106.

Similar inabilities of the party claiming a right to a prior hearing, to make the moving party in the suit whole, have appeared where incompetence and malfeasance in the administration of a bank could precipitate a financial collapse in the community, which would go uncompensated, see Fahey v. Mallonee, 332 U.S., at 250, 67 S.Ct., at 1554, or where, in the absence of a jeopardy assessment by the Tax Commissioner, a taxpayer might waste or conceal his assets, see Phillips v. Commissioner of Internal Revenue, supra. In all *190 such cases it is also significant that the party advancing the claim to a summary procedure stands ready to make whole the party who has been deprived of his property, if the initial taking proves to be wrongful, either by the credit of the public fisc or by posting a bond.

Of course, this principle cannot be applied with success to explain the Court's decisions in cases holding that a pretermination hearing is required; it is not true that the party entitled to the hearing stands ready to compensate the adversary for what may be the wrongful possession of the property in question during the pendency of the litigation. This is vividly illustrated in Goldberg v. Kelly where the Court observed that 'the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment proof.' 397 U.S., at 266, 90 S.Ct., at 1019. However, other considerations have proved decisive, such as: the risk that the initial

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deprivation may be wrongful; the impact on the claimant to a hearing of not having the property while he waits for a full hearing; the interest of the party opposing the prior hearing and asserting the need for immediate possession in not alerting the current possessor to the lawsuit; and the risk of leaving the property in possession of the current possessor between the time notice is supplied and the time of the preliminary hearing.

In Goldberg and Sniadach, the Court observed that there was a substantial chance that the claimant to the property, be it the State or garnishor, would lose in the ultimate resolution of the controversy. In Goldberg, the Court took note of the 'welfare bureaucracy's difficulties in reaching correct decisions on eligibility.' 397 U.S., at 264 n. 12, 90 S.Ct., at 1019. Since the time of the decision in Goldberg, at least one study has shown that decisions to terminate benefits have been reversed with a fair degree of frequency. [*191 FN10] Concern was also expressed with the use of garnishment in a vast number of cases where the debt was fraudulent. Sniadach, 395 U.S., at 341, 89 S.Ct., at 1822. In Fuentes, although no such empirical evidence was available, the risk of wrongful deprivations was unnecessarily increased by allowing a clerk, rather than a judge, to pass on the creditor's claim for summary replevin. In Bell, the Court held unconstitutional a state statute requiring summary suspension of a driver's license of any uninsured motorist who was unable after an accident to post security for the amount of the damages claimed against him. The only hearing held by the State on the issue of suspension excluded any consideration of fault, the standard on which the validity would ultimately turn. Without some kind of probable-cause determination of fault, it was obvious that many suspensions would prove to be unwarranted.

FN10. See Handler, Justice for the Welfare Recipient: Fair Hearings in AFDC--The Wisconsin Experience, 43 Soc.Serv.Rev. 12, 22 (1969).

As for the impact on the current property possessor of not having an early pretermination hearing, the Court has held that without possession of the property a person may be unable to exist at even a minimum standard of decency. In Goldberg, where the person would have lost the last source of support available, aside from charity, the Court observed that 'termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while **1663 he waits. Since he lacks independent resources, his situation becomes immediately desperate.' 397 U.S., at 264, 90 S.Ct., at 1018. In fact, the magnitude of deprivation may be such as to prevent the welfare recipient from pursuing his right to a later full hearing. Ibid. In Sniadach, the seizure of an individual's wages could 'as a practical *192 matter drive a wage-earning family to the wall.' 395 U.S., at 341--342, 89 S.Ct., at 1823 (footnote omitted). In Bell, the petitioner was a clergyman whose ministry required him to travel by car to cover three rural Georgia communities, and he was 'severely handicapped in the performance of his ministerial duties by a suspension of his licenses.' 402 U.S., at 537, 91 S.Ct., at 1588. The impact of deprivation increases, of course, the longer the time period between the initial deprivation and the opportunity to have a full hearing. In Goldberg, the Court noted that although pertinent New York regulations provided that a 'fair hearing' be held within 10 working days of the request, with decision within 12 working days thereafter, '(i)t was conceded in oral argument that these time limits are not in fact observed.' 397 U.S., at 260 n. 5, 90 S.Ct., at 1016. In Sniadach and Fuentes, there was no indication of the speed with which a court ruling on garnishment and possession would be rendered, and of course the ultimate issues on the merits in such cases must wait for a still later determination. In Bell, the issue of liability might not be determined until full trial proceedings in court.

The last factor to be weighed in the balance is the danger to the party claiming possession occasioned by alerting the current possessor to the lawsuit, and then leaving the property in his hands pending the holding of the preliminary hearing. In Goldberg and Sniadach, the property right seized was a flow of income, in one case from the Government, and in the other from the private employer, pending the preliminary hearing. The Government ran no special risk by supplying notice in advance of the cutoff, since the Government was in possession of the flow of income until it was turned over piecemeal to the welfare recipient. Further, though the Government could assert in the welfare case that it would incur an uncompensated loss, that risk would only be *193 incurred from the time the last check is delivered until the pretermination hearing is

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held and the administrative agency certainly has the power to offer a speedy hearing before that time is reached. See Goldberg v. Kelly, supra, at 266, 90 S.Ct., at 1019. In Sniadach, while it was true that the inability to garnish wages could leave the creditor uncompensated, if the debtor proved judgment proof, this was a risk the creditor assumed at the outset by being unsecured. Further, notice to the debtor of the pendency of the lawsuit is not likely to increase the risk that the debtor will prove to be judgment proof, since the debtor is not likely to leave his job due to the pendency of the suit. Likewise, the risk to the creditor of the debtor's drawing on his wages between the time of notice and the availability of a court hearing on the claim in no way interferes with the creditor's claim to the future flow of earnings after the hearing has been held. The garnishor, therefore, asserts not only the right to take the debtor's wages, but to take them before the controversy has been resolved. In Bell, the risk to the State of supplying notice to the licensee and of leaving the person in possession of the license until the hearing, was not at issue, since the state statute provided for notice and a presuspension hearing. There were few costs attached to expanding the scope of that hearing to include a probable-cause determination of fault.

With the above principles in hand, is the tenured civil-service employee entitled to a pretermination hearing, such as that provided by the Lloyd-La Follette Act?

There would be a problem of uncompensated loss to the Government, if the employee were to draw wages without working for the period between notice of a discharge and a preliminary hearing. **1664 Yet, if the charge against the employee did not indicate that the employee should be *194 excluded from the workplace pending this hearing, some work could be exacted by the Government in exchange for its payment of salary. One must also consider another type of cost to the Government if preseparation hearings were provided--the necessity of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the workplace. However, suspension with pay would obviate this problem.

On the employee's side of the ledger, there is the danger of mistaken termination. Discharge decisions, made ex parte, may be reversed after full hearing. One study reveals that in fiscal year 1970, in agencies where full pretermination hearings were routine, employees contesting removal were successful almost 20% of the time. Merrill, Procedures for Adverse Actions Against Federal Employees, 59 Va.L.Rev. 196, 204 n. 35 (1973).

The impact on the employee of being without a job pending a full hearing is likely to be considerable because '(m)ore than 75 percent of actions contested within employing agencies require longer to decide than the 60 days prescribed by (Civil Service) Commission regulations. Over 50 percent take more than three months, and five percent are in process for longer than a year.' Id., at 206. Of course, the discharged civil servant, deprived of his source of income, can seek employment in the private sector and so cut or minimize his losses, opportunities largely unavailable to the welfare recipient in Goldberg or the debtor in Sniadach. Nonetheless, the employee may not be able to get a satisfactory position in the private sector, particularly a tenured one, and his marketability may be under a cloud due to the circumstances of his dismissal. See Lefkowitz v. Turley, 414 U.S. 70, 83--84, 94 S.Ct. 316, 325, 38 L.Ed.2d 274 (1973). Cf. Board of Regents v. Roth, 408 U.S., at 574 n. 13, 92 S.Ct., at 2707. It should be stressed that *195 if such employment is unavailable the Government may truly be pursuing a partially counter-productive policy by forcing the employee onto the welfare rolls.

Finally, by providing a pretermination hearing, the Government runs no risk through providing notice, since the employee cannot run away with his job, and can surely minimize its risk of uncompensated loss by eliminating the provision for personal appearances and setting early dates for filing written objections. Altogether different considerations as to notice might be applicable, if the employee would be likely to do damage to the Government if provided with such notice. See 5 CFR s 752.202(c)(2) (1972), providing that an agency may dispense with the 30-day notice requirement '(w)hen there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed.'

Perhaps partly on the basis of some of these constitutional considerations, Congress has provided for pretermination hearings. Certainly the debate on

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the Lloyd-La Follette Act indicates that constitutional considerations were present in the minds of Congressmen speaking in favor of the legislation. [FN11] In any event, I conclude that the statute and regulations to the extent they require 30 days' advance notice and a right to make ***196** a written****1665** presentation satisfy minimum constitutional requirements.

FN11. Congressman Calder stated that the Act would 'give assurance and confidence to the employees that they will at least get a square deal and will not permit of supervisory or executive officers filing charges of one kind against an employee and having him removed from the service or reduced in salary on evidence submitted on matters entirely foreign to the original charges that the employee has answered in writing.' 48 Cong.Rec. 4654 (1912).

Congressman Konop stated:

'Any man in public service should have a right as a citizen to know why he is discharged from public duty, and as a citizen should certainly have a chance to be heard.' Id., at 5207.

IV

Appellee in this case not only asserts that he is entitled to a hearing at some time before his property interest is finally terminated, and to a pretermination hearing of some kind before his wages are provisionally cut off, which are currently provided to him, but also argues that he must be furnished certain procedures at this preliminary hearing not provided by Congress: an impartial hearing examiner, an opportunity to present witnesses, and the right to engage in cross-examination. In other words, his claim is not only to a pretermination hearing, but one in which full trial-type procedures are available.

A

The facts in this case show that the Regional Director, Verduin, who charged appellee Kennedy with making slanderous statements about him as to an alleged bribe offer, also ruled in the preliminary hearing that Kennedy should be terminated.

The 'Notification of Proposed Adverse Action,' signed by Verduin, charged that appellee had 'made statements knowingly against officials of this agency which could harm or destroy their authority, official standing or reputation' and that appellee had engaged 'in a course of conduct intended to produce public notoriety and conclusions on the part of the public, without any proof whatsoever and in reckless disregard of the actual facts known to you (appellee), or reasonably discoverable by you (appellee), that officials of this agency had committed or attempted to commit acts of misfeasance, non- feasance and malfeasance.' Facts were marshaled to support the charges; that appellee had spoken at a union ***197** meeting 'to the effect that (Verduin and his assistant) had attempted to bribe Mr. James White Eagle Stewart by offering him a $100,000 grant of OEO funds if he would sign a statement against you (appellee) and another employee,' and that appellee had spoken of the bribe to a newspaper reporter and to a radio station.

After appellee had received this notice, he made no response to the merits of the charges, but instead wrote to Verduin requesting that he was entitled to certain procedural rights at the hearing, one of which was to have 'a genuinely impartial hearing officer,' thus furnishing Verduin with the opportunity to recuse himself and provide an alternative hearing examiner. This was not done.

In considering appellee's claim to have an impartial hearing examiner, we might start with a first principle: '(N)o man shall be a judge in his own cause.' Bonham's Case, 8 Co. 114a, 118a, 77 Eng.Rep. 646, 652 (1610). Verduin's reputation was certainly at stake in the charges brought against Kennedy. Indeed, the heart of the charge was that Kennedy had spoken of Verduin in reckless disregard of the truth. That Verduin almost seemed to be stating a libel complaint against Kennedy under New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 686 (1964), dramatizes the personal conflict which precipitated the proposed termination.

Our decisions have stressed, in situations analogous to the one faced here, that the right to an impartial decision-maker is required by due process. The Court has held that those with a substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). The Court has observed that disqualification because of interest has been extended with equal force to administrative

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adjudications. Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973).

*198 In the context of contempt before a judge, where a judge trying a defendant is the object of 'efforts to denounce, insult, and slander the court,' and **1666 'marked personal feelings were present on both sides,' the Court has held that criminal contempt proceedings should be held before a judge other than the one reviled by the contemnor. Mayberry v. Pennsylvania, 400 U.S. 455, 462, 464, 91 S.Ct. 499, 503, 504, 27 L.Ed.2d 532 (1971). See In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); cf. In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

We have also stressed the need for impartiality in administrative proceedings, stating in Goldberg v. Kelly, supra, that an 'impartial decision maker is essential,' 397 U.S., at 271, 90 S.Ct., at 1022. (Citations omitted.) To the same effect was Morrissey v. Brewer, 408 U.S. 471, 485--486, 92 S.Ct. 2593, 2602--2603, 33 L.Ed.2d 484 (1972), involving revocation of parole. In both Goldberg and Morrissey, this requirement was held to apply to pretermination hearings. [FN12]

FN12. In Pickering v. Board of Education, 391 U.S. 563, 579 n. 2, 88 S.Ct. 1731, 1740 n. 2, 20 L.Ed.2d 811 (1968), where the Court set aside a discharge by a Board of Education of a teacher for writing a letter to a newspaper attacking the Board, the trier of fact, the Board, was the same body that was the object of accusations in the letter. Although the Court did not rule on the due process question, since it was first raised here, it observed that 'we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a -vis appellant,' citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

It may be true that any hearing without an impartial hearing officer will reflect the bias of the adjudicator. The interest of the Government in not so providing would appear slim. Given the pretermination hearing, it would seem in the Government's interest to avoid lengthy appeals occasioned by biased initial judgments, and it would be reasonable to expect more correct decisions at the initial stage at little cost if the hearing officer is impartial.

*199 My view is a narrower one, however. Fairness and accuracy are not always threatened simply because the hearing examiner is the supervisor of an employee, or, as in this case, the Regional Director over many employees, including appellee. But here the hearing official was the object of slander that was the basis for the employee's proposed discharge. See Mayberry v. Pennsylvania, supra. In ruling that the employee was to be terminated, the hearing examiner's own reputation, as well as the efficiency of the service, was at stake; and although Mr. Verduin may have succeeded, in fact, in disassociating his own personal feelings from his decision as to the interests of OEO, the risk and the appearance that this was not the case were too great to tolerate. In such situations the official normally charged with the discharge decision need only recuse and transfer the file to a person qualified to make the initial decision. We need not hold that the Lloyd-La Follette Act is unconstitutional for its lack of provision for an impartial hearing examiner. Congress is silent on the matter. We would rather assume, because of the constitutional problems in not so providing, that, if faced with the question (at least on the facts of this case) Congress would have so provided. Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968). 'Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process.' Greene v. McElroy, 360 U.S., at 507, 79 S.Ct., at 1419. (citations omitted). [FN13]

FN13. We further note that appellants suggest that 'the Act and regulations, fairly construed, require the determination of cause to be made without bias.' Brief for Appellants 24 n. 12.

*200 B

Appellee also claims a right to a full trial-type hearing at the pretermination stage, particularly asserting that he is **1667 denied due process, if not given the opportunity to present and cross-examine witnesses.

While fully realizing the value of a full trial-type hearing as a method for ultimate resolution of the facts, see id., 360 U.S., at 496--497, 79 S.Ct., at

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1413--1414, the pretermination hearing is not held for the purpose of making such an ultimate determination. This is provided for through the appeal procedure where the employee is afforded the procedural rights he now seeks at an earlier stage of the proceedings. The function of the pretermination hearing is, and no more is required by due process, to make a probable-cause determination as to whether the charges brought against the employee are or are not true. Where the Court has held that pretermination hearings are required, in past decisions, it has spoken sparingly of the procedures to be required. Sniadach was silent on the matter, and Fuentes merely required something more than an ex parte proceeding before a court clerk. In Bell, the Court held that the hearing must involve a probable-cause determination as to the fault of the licensee, and 'need not take the form of a full adjudication of the question of liability,' realizing that '(a) procedural rule that may satisfy due process in one context may not necessarily satisfy due process in every case.' 402 U.S., at 540, 91 S.Ct., at 1590. Thus, 'procedural due process (was to) be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee.' Ibid. We think the clear implication of Bell to be that 'full adjudication,' including presentation of witnesses and cross-examination,' need not be provided in every case where a pretermination *201 hearing of some kind is required by due process or provided by the statute.

In Goldberg v. Kelly, the Court struck a different note on procedures. Although stating that the only function of the pretermination hearing was 'to produce an initial determination of the welfare department's grounds for discontinuance of payments,' and seemingly adopting a probable-cause standard, the Court required cross-examination of witnesses relied upon by the department. The Court was careful to observe, however, that these procedural rules were 'tailored to the capacities and circumstances of those who are to be heard.' 397 U.S., at 267, 268--269, 90 S.Ct., at 1021. The decision to cut off AFDC welfare payments leaves the recipient literally without any means to survive or support a family. While this level of deprivation may not be insisted upon as a necessary condition for requiring some kind of pretermination hearing, it may well be decisive in requiring the Government to provide specific procedures at the pretermination stage. The greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision, cf. Morrissey v. Brewer, supra, and thus the Court in Goldberg, while maintaining that the pretermination hearing was in the nature of a probable-cause determination, was less willing to allow a margin of error as to probable cause. Rules of procedure are often shaped by the risk of making an erroneous determination. See In re Winship, 397 U.S. 358, 368, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Indeed, all that was specifically not required in Goldberg was a complete record and a comprehensive opinion. 397 U.S., at 267, 90 S.Ct., at 1020.

In this case, the employee is not totally without prospect for some form of support during the period between the pretermination and final hearing on appeal, though it may not be equivalent in earnings or tenure *202 to his prior competitive service position. Although the employee may not be entitled to unemployment compensation, see Christian v. New York Dept. of Labor, 414 U.S. 614, 94 S.Ct. 747, 39 L.Ed.2d 38 (1974), since he has been terminated for cause he may get some form of employment in the private sector, and, if necessary, may draw **1668 on the welfare system in the interim. Given this basic floor of need, which the system provides, we should not hold that procedural due process is so inflexible as to require the Court to hold that the procedural protections, of a written statement and oral presentation to an impartial hearing examiner provided by regulation, are insufficient. The Court stated in Richardson v. Wright, 405 U.S. 208, 92 S.Ct. 788, 31 L.Ed.2d 151 (1972), that new regulations of the Department of Health, Education, and Welfare, required that Social Security disability payments were not to be suspended in a pretermination hearing without 'notice of a proposed suspension and the reasons therefor, plus an opportunity to submit rebuttal evidence,' but could be without an oral presentation, since '(i)n the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise.' Cf. Torres v. New York State Department of Labor, 333 F.Supp. 341 (SDNY 1971), aff'd, 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed.2d 228 (1972). Necessarily, to some extent, the Court must share with Congress, in an area where one is called upon to judge the

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efficacy of particular procedures, a role in defining constitutional requirements, and Congress explicitly left it to the discretion of the agency as to whether such procedures were required. I would not upset that judgment in this case.

In accord with these views, I would affirm the judgment of the three-judge court, ordering reinstatement and backpay, due to the failure to provide an impartial hearing officer at the pretermination hearing. I would *203 reverse that part of the court's order enjoining the application of the statute on First Amendment vagueness and overbreadth grounds.

Mr. Justice DOUGLAS, dissenting.

The federal bureaucracy controls a vast conglomerate of people who walk more and more submissively to the dictates of their superiors. Our federal employees have lost many important political rights. CSC v. Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796, held that they could be barred from taking 'an active part in political management or in political campaigns,' a restriction that some of us thought to be unconstitutional, id., at 595 et seq., 93 S.Ct., at 2905 (Douglas, J., dissenting). Today's decision deprives them of other important First Amendment rights.

Heretofore, as my Brother MARSHALL has shown, we have insisted that before a vital stake of the individual in society is destroyed by government he be given a hearing on the merits of the government's claim. Among these personal and vital stakes are welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; the weekly wage of a worker, Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; a person's driver's license, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; repossession of household goods, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; the position of a tenured professor in a state educational institution, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; revocation of parole, Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484.

There is more than employment and a job at issue in this case. The stake of the federal employee is not only in a livelihood, but in his right to speak guaranteed by the First Amendment. He is charged with having stated that his superior and the superior's assistant had attempted to bribe a representative of a community action organization with whom the agency (OEO) had *204 dealings. He is charged with having stated that those men offered a bribe of $100,000 in OEO funds to that organization if its representative would sign a statement against appellee and another OEO employee. This statement in my view was on a subject in the public domain. We all know merely by living in Washington, D.C., the storms that have swept **1669 through that agency and its branches. It has dealt with inflammatory problems in the solution of which inflammatory utterances are often made. I realize that it is the tradition of the Court to 'balance' the right of free speech against other governmental interests and to sustain the First Amendment right only when the Court deems that in a given situation its importance outweighs competing interests. That was the approach in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, where the Court deemed what a teacher said against the school board was more important than the board's sensibilities. The Court, however, reserved decision where the comments of an employee involved 'either discipline by immediate superiors or harmony among coworkers,' id., at 570, 88 S.Ct. at 1735. That is one reason why Mr. Justice Black and I concurred in the result citing, inter alia, our opinion in Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456. Mr. Justice Black said that the 'balancing' or 'weighing' doctrine 'plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that all judges are not always dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up,' id., at 399--400, 87 S.Ct. at 548.

The fact that appellee in the present case inveighed *205 against his superior is irrelevant. The matter on which he spoke was in the public domain. His speaking may well have aroused such animosity in his superior as to disqualify him from being in charge of disciplinary proceedings; [FN1] and conceivably it could cause disharmony among

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workers. And these consequences are quite antagonistic to the image which agencies have built. Their dominant characteristic is the application of Peter's Inversion. See L. Peter & R. Hull, The Peter Principle 24--26 (Bantam ed. 1970). In a few words Peter's Inversion marks the incompetent cadre's interest in an employee's input, not his output. [FN2]

FN1. A judge so reviled is normally not the one to sit in judgment in a criminal contempt proceeding. Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532. Cf. Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287.

FN2. 'The competence of an employee is determined not by outsiders but by his superior in the hierarchy. If the superior is still at a level of competence, he may evaluate his subordinates in terms of the performance of useful work--for example, the applying of medical services or information, the production of sausages or table legs or achieving whatever are the stated aims of the hierarchy. That is to say, he evaluates output.
'But if the superior has reached his level of incompetence, he will probably rate his subordinates in terms of institutional values; he will see competence as the bahavior that supports the rules, rituals and forms of the status quo. Promptness, neatness, courtesy to superiors, internal paperwork, will be highly regarded. In short, such an official evaluates input . . .
'In such instances, internal consistency is valued more highly than efficient service: this is Peter's Inversion. A professional automation may also be termed a 'Peter's Invert.' He has inverted the means-end relationship.' L. Peter & R. Hull, The Peter Principle 25 (Bantam ed. 1970).

His input reflects his attitude toward the cadré, and toward his work. A pleasant manner, promotion of staff harmony, servility to the cadre, and promptness, civility, and submissiveness are what count. The result is a *206 great leveling of employees. They hear the beat of only one drum and march to it. These days employers have psychological tests by which they can separate the ingenious, offbeat character who may make trouble from the more subservient type. It is, of course, none of a court's problem what the employment policies may be. [FN3] But once an employee speaks out **1670 on a public issue and is punished for it, we have a justiciable issue. Appellee is in my view being penalized by the Federal Government for exercising his right to speak out. The excuse or pretense is an Act of Congress and an agency's regulations promulgated under it in the teeth of the First Amendment: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . ..' Losing one's job with the Federal Government because of one's discussion of an issue in the public domain is certainly an abridgment of speech.

FN3. Apart from discrimination based on race, Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, or on other suspect classifications such as sex. See id., at 436, 91 S.Ct., at 856; 42 U.S.C. s 2000e--2; Frontiero v. Richardson, 411 U.S. 677, 682 et seq., 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583.

Mr. Justice MARSHALL, with whom Mr. Justice DOUGLAS and Mr. Justice BRENNAN concur, dissenting.

I would affirm the judgment of the District Court, both in its holding that a tenured Government employee must be afforded an evidentiary hearing prior to a dismissal for cause and in its decision that 5 U.S.C. s 7501 is unconstitutionally vague and overbroad as a regulation of employees' speech.

I

The first issue in this case is a relatively narrow one--whether a federal employee in the competitive service, entitled by statute to serve in his job without fear of *207 dismissal except for cause, [FN1] must be given an evidentiary hearing before he is discharged. We are hardly writing on a clean slate in this area. In just the last five years, the Court has held that such a hearing must be afforded before wages can be garnished, Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); welfare benefits terminated, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); a driver's license revoked, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); consumer goods repossessed, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); parole revoked, Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); or a tenured college professor fired by a public educational institution, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

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FN1. 5 U.S.C. s 7501(a).

A

In the Roth and Sindermann cases, Mr. Justice STEWART established the framework for analysis to determine in what circumstances the Due Process Clause demands a hearing. He observed that although due process is a flexible concept, it is not unlimited in application. 'The requirements of procedural due process apply only to the deprivation of interests encompassed 'by the Fourteenth Amendment's protection of liberty and property.' Roth, supra, 408 U.S. at 569, 92 S.Ct. at 2705. Thus the first issue to be decided is whether appellee had an interest in his tenured Government employment such that his discharge amounts to a deprivation of liberty or property.

The decisions of this Court have given constitutional recognition to the fact that in our complex modern society, wealth and property take many forms. [FN2] **1671 We *208 have said that property interests requiring constitutional protection 'extend well beyond actual ownership of real estate, chattels, or money.' Roth, supra, at 572, 92 S.Ct. at 2706. They extend as well to 'safeguard . . . the security of interests that a person has already acquired in specific benefits.' Id., at 576, 92 S.Ct., at 2708. The test for whether a protected interest has been infringed reflects this broad concept of 'property':

FN2. One noted commentator has observed:

'Changes in the forms of wealth are not remarkable in themselves; the forms are constantly changing and differ in every culture. But today more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.' Reich, The New Property, 73 Yale L.J. 733, 738 (1964).

'Society today is built around entitlement (and m)any of the most important of these entitlements now flow from government . . .. Such sources of security . . . are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.' Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965).

'To have a property interest in a benefit, a person . . . must . . . 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.' Id., at 577, 92 S.Ct. at 2709.

Accordingly, in Goldberg v. Kelly, supra, the Court found that public assistance recipients had such a claim of entitlement to welfare benefits grounded in the statute defining eligibility. In Bell v. Burson, supra the Court held that a driver's license, once issued, becomes an important property interest because its 'continued possession may become essential in the pursuit of a livelihood.' 402 U.S., at 539, 91 S.Ct., at 1589. More to the point, in Roth the Court *209 surveyed the constitutional restraints applicable in the area of public employment:

'(T)he Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, have interests in continued employment that are safeguarded by due process.' 408 U.S., at 576--577, 92 S.Ct., at 2709.

See also Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971). In Perry v. Sindermann, supra, we found a property interest in the implied tenure policy of a state university.

We have already determined that a legitimate claim of entitlement to continued employment absent 'sufficient cause' is a property interest requiring the protections of procedural due process. [FN3] Thus, there can be little doubt that appellee's tenured Government employment, from which he could not legally be dismissed except for cause, must also be a 'property' interest for the purposes of the Fifth Amendment. The job security appellee enjoyed is clearly one of 'those claims upon which people rely in their daily lives.' Roth, supra, 408 U.S. at 577, 92 S.Ct. at 2709. And appellee's interest in continued public employment encompassed more than just the periodic accrual of wages. His

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dismissal also affects his valuable statutory entitlements to retirement credits and benefits, 5 U.S.C. ss 8301, 8311--8322, 8331--8348; periodic salary increases, 5 U.S.C. s 5335; and life and health insurance, 5 U.S.C. ss 8701--8716, 8901--8913 (1970 ed. and Supp. II).

FN3. Board of Regents v. Roth, 408 U.S. 564, 576--578, 92 S.Ct. 2701, 2708--2710, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 599--603, 92 S.Ct. 2694, 2698--2700, 33 L.Ed.2d 570 (1972).

We are in agreement that appellee does have a claim of entitlement to his Government job, absent proof of *210 specified misconduct. Mr. JUSTICE REHNQUIST explains, however, that this claim is founded only in statute, and that the statute which guarantees tenure also provides that a hearing is not required before discharge. He concludes that 'the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,' ante, at 1645, wryly observing **1672 that 'a litigant in the position of appellee must take the bitter with the sweet,' ante, at 1644.

Courts once considered procedural due process protections inapplicable to welfare on much the same theory--that 'in accepting charity, the appellant has consented to the provisions of the law under which charity is bestowed.' [FN4] Obviously, this Court rejected that reasoning in Goldberg, supra, where we held that conditions under which public assistance was afforded, which did not include a pretermination hearing, were violative of due process. [FN5] In Sindermann, supra, the Court held that the Constitution required a hearing before dismissal even where the implicit grant of tenure did not encompass the right to such a hearing. In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Court held that although the limited grant of liberty afforded by parole was conditioned by statute on the possibility of revocation without a prior evidentiary hearing, such a hearing was constitutionally required. In Bell v. Burson, supra, the *211 state statute under which drivers' licenses were issued provided for the suspension of an uninsured motorist's license without a prior hearing. The Court nonetheless held that a hearing was required before the suspension could be effected. In none of these cases did the Court consider a statutory procedure to be an inherent limitation on the statutorily created liberty or property interest. [FN6] Rather, once such an interest was found, the Court determined whether greater procedural protections were required by the Due Process Clause than were accorded by the statute.

FN4. Wilkie v. O'Connor, 261 App.Div. 373, 375, 25 N.Y.S.2d 617, 620 (1941).

FN5. The mechanism for welfare terminations is described in Goldberg v. Kelly, 397 U.S. 254, 258--260, 90 S.Ct. 1011, 1014--1016, 25 L.Ed.2d 287 (1970). In short, the procedure involved prior notice and an opportunity to respond in writing before termination as well as a full trial-type hearing before an independent state official after the termination had been effected. If the recipient prevailed at the later hearing he would be entitled to recover any funds wrongfully withheld.

FN6. Although Perry v. Sindermann, supra, did not involve a statutorily created interest, it is plainly analogous in that the de facto tenure program on which Sindermann's claim of entitlement was grounded did not explicitly include the right to a hearing.

Applying that analysis here requires us to find that although appellee's property interest arose from statute, the deprivation of his claim of entitlement to continued employment would have to meet minimum standards of procedural due process regardless of the discharge procedures provided by the statute. Accordingly, a majority of the Court rejects Mr. Justice REHNQUIST's argument that because appellee's entitlement arose from statute, it could be conditioned on a statutory limitation of procedural due process protections, an approach which would render such protection inapplicable to the deprivation of any statutory benefit--any 'privilege' extended by Government--where a statute prescribed a termination procedure, no matter how arbitrary or unfair. It would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [FN7]

FN7. In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that procedural due process protections did not apply to Government employment because it was merely a privilege and not a right. Bailey v.

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Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46 (1950), aff'd by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352 (1951). As we have previously observed, '(t)he basis of this holding has been thoroughly undermined in the ensuing years.' Board of Regents v. Roth, 408 U.S., at 571 n. 9, 92 S.Ct., at 2706. '(T)he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' . . . .' Id., at 571, 92 S.Ct. at 2706. For example, the Court has found constitutional restraints applicable to disqualification for unemployment compensation, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1709, 10 L.Ed.2d 965 (1963); denial of a tax exemption, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); termination of welfare benefits, Goldberg v. Kelly, supra; and dismissal from public employment, e.g., Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).

**1673 *212 B

We have repeatedly observed that due process requires that a hearing be held 'at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) but it remains for us to give content to that general principle in this case by balancing the Government's asserted interests against those of the discharged employee. Goldberg v. Kelly, 397 U.S., at 263, 90 S.Ct., at 1018; see Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

The interests of a public employee in a secure Government job are as weighty as other interests which we have found to require at least the rudimentary protection of an evidentiary hearing as a precondition to termination. 'This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. . . . Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life.' Roth, 408 U.S., at 589, 92 S.Ct., at 2715 (Marshall, J., dissenting).

See Perry v. Sindermann, supra; Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971); Keyishian v. Board of *213 Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Cramp v. Board of Public Instruction, 368 U.S. 278, 288, 82 S.Ct. 275, 281, 7 L.Ed.2d 285 (1961); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817 (1951) (Jackson, J., concurring); United States v. Lovett, 328 U.S. 303, 316--317, 66 S.Ct. 1073, 1079--1080, 90 L.Ed. 1252 (1946). The Court has recognized the vital importance of employment in related contexts. In Sniadach v. Family Finance Corp., the Court expressed its particular concern that 'garnishment (of wages) often meant the loss of a job,' 395 U.S., at 340, 89 S.Ct., at 1822, and in Bell v. Burson, supra, we relied heavily on the fact that a driver's license may be 'essential in the pursuit of a livelihood,' 402 U.S., at 539, 91 S.Ct., at 1589. In Greene v. McElroy, 360 U.S. 474, 508, 79 S.Ct. 1400, 1420, 3 L.Ed.2d 1377 (1959), the Court construed federal security clearance regulations to avoid the constitutional issues that would be presented if the petitioner were deprived 'of his job in a proceeding in which he was not afforded the safeguards of (procedural due process).' See id., at 506--507, 79 S.Ct., at 1418--1419; Willner v. Committee on Character, 373 U.S. 96, 103--104, 83 S.Ct. 1175, 1180--1181, 10 L.Ed.2d 224 (1963).

An exhaustive study by the United States Administrative Conference of the problem of agency dismissals led the author of the Conference's report to observe:

'One cannot escape the conclusion, however, that the government employee who is removed from his job loses something of tremendous value that in a market of declining demand for skills may not be replaceable.' [FN8]

FN8. Merrill, Report in Support of Recommendation 72--8, Procedures for Adverse Actions Against Federal Employees, in 2 Recommendations and Reports of the Administrative Conference of the United States 1007, 1015 (1972) (hereinafter Merrill).

And the report also observes:

'(O)ne must acknowledge what seems to be an accepted, if regrettable, fact of life: Removal from government employment for cause carries a stigma *214 that is probably impossible to outlive. Agency personnel officers are generally prepared to concede . . . that **1674 it is difficult for the fired government worker to find employment in the private sector.' [FN9]

FN9. Ibid. The report of the Administrative Conference seems to bear out my Brother Douglas'

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recent observation:

'Once there is a discharge from a . . . federal agency, dismissal may be a badge that bars the employee from other federal employment. The shadow of that discharge is cast over the area where private employment may be available.' Sampson v. Jurray, 415 U.S. 61, 95, 94 S.Ct. 937, 955, 39 L.Ed.2d 166 (1974) (dissenting).'

Dismissal from public employment for cause may also, therefore, implicate liberty interests in imposing on the discharged employee a stigma of incompetence or wrongdoing that forecloses 'his freedom to take advantage of other employment opportunities.' Roth, supra, 408 U.S., at 573, 92 S.Ct., at 2707; see Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971).

Given the importance of the interest at stake, the discharged employee should be afforded an opportunity to test the strength of the evidence of his misconduct by confronting and cross-examining adverse witnesses and by presenting witnesses in his own behalf, whenever there are substantial disputes in testimonial evidence. See Morrissey v. Brewer, 408 U.S., at 487, 92 S.Ct., at 2603. A dismissal for cause often involves disputed questions of fact raised by accusations of misconduct. Mistakes of identity, distortions caused by the failure of information sources, faulty perceptions or cloudy memories, as well as fabrications born of personal antagonisms are among the factors which may undermine the accuracy of the factual determinations upon which dismissals are based. The possibility of error is not insignificant. Almost a fourth of all appeals from adverse agency actions result in reversal. [FN10]

FN10. Merrill 1014 n. 33.

In our system of justice, the right of confrontation ***215** provides the crucible for testing the truth of accusations such as those leveled by appellee's superior and strenuously denied by appellee. 'In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.' Goldberg v. Kelly, 397 U.S., at 269, 90 S.Ct., at 1021 (citations omitted). [FN11] The Goldberg Court's citation to a well-known passage from Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), is equally applicable to a dismissal from public employment for cause as to a termination of welfare benefits.

FN11. This case presents no question as to the requirements of due process 'where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues.' Goldberg v. Kelly, 397 U.S., at 268 n. 15, 90 S.Ct., at 1020; see Mills v. Richardson, 464 F.2d 995, 1001 (CA2 1972); cf. FCC v. WJR, 337 U.S. 265, 275--277, 69 S.Ct. 1097, 1103--1104, 93 L.Ed. 1353 (1949); 1 K. Davis, Administrative Law Treatise 412 (1958).

"Certain principles have remained immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination." Id., (at 496--497, 79 S.Ct., at 1413, quoted in Goldberg v. Kelly, supra, 397 U.S., at 270, 90 S.Ct., at 1021.

See also Chambers v. Mississippi, 410 U.S. 284, 295--298, 93 S.Ct. 1038, 1045--1047, 35 L.Ed.2d 297 (1973); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

****1675 *216** This case and Goldberg involve the termination of income, whether in salary or public assistance payments, upon which the recipient may depend for basic sustenance. A person should not be deprived of his livelihood 'in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.' Greene, supra, 360 U.S., at 508, 79 S.Ct., at 1420; see Jenkins v. McKeithen, 395 U.S. 411, 423--429, 89 S.Ct. 1843, 1849--1853, 23 L.Ed.2d 404 (1969); Willner v. Committee on Character, 373 U.S., at 103, 83 S.Ct., at 1180. The stakes are just too high and the possibility of misjudgment too great to allow dismissal without giving the tenured public employee an opportunity to contest its basis and produce

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evidence in rebuttal. See Goldberg, supra, 397 U.S., at 266, 90 S.Ct., at 1019.

It also seems clear that for the hearing to be meaningful, the hearing officer must be independent and unbiased and his decision be entitled to some weight. We addressed the importance of this element of due process in Goldberg, supra, where we found the requirements of due process were not met by the review of a welfare termination decision by the caseworker who was, in effect, also the complainant. 397 U.S., at 271, 90 S.Ct., at 1022. In Morrissey v. Brewer, supra, we held that an independent decisionmaker must determine whether reasonable grounds exist for parole revocation because an 'officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.' 408 U.S., at 486, 92 S.Ct., at 2602. The need for an independent decisionmaker is particularly crucial in the public employment context, where the reason for the challenged dismissal may well be related to some personal antagonism between the employee and his superior, as appears to be the case here. [FN12] See Pickering v. Board of Education, 391 U.S. 563, 578--579, Appendix n. 2, 88 S.Ct. 1731, 1739--1740, 20 L.Ed.2d 811 (1968).

FN12. See ante, at 1636. Cf. T. Arnold, Fair Fights and Foul 151 (1965) (describing the potential abuse in a situation where the head of a department is the decisionmaker in a public employee discharge proceeding).

*217 C

A discharged federal worker in the competitive service is, in fact, guaranteed a full evidentiary hearing before an impartial decisionmaker whose report is entitled to considerable weight. [FN13] But the timing of the hearing is discretionary with the employing agency, see 5 CFR s 771.208(a) (1972), and in many agencies, such as the OEO, the hearing comes long after the employee has been removed from the Government service and payroll. In a sense, then, the real issue is not whether appellee must be accorded an evidentiary hearing, but only whether that hearing should have been afforded before his discharge became effective. Although the nature of the hearing required by due process is determined by a balancing process, that hearing must be held at a meaningful time. Accordingly, the Court has embraced a general presumption that one who is constitutionally entitled to a hearing should be heard before the deprivation of his liberty or property takes place. Thus, in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the Court observed that the fact that 'the hearing . . . is not fixed in form does not affect its root requirement *218 that an individual be given **1676 an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Id., at 378--379, 91 S.Ct. at 786. (Emphasis in original.) In Bell v. Burson, supra, we held that 'except in emergency situations . . . due process requires that when a State seeks to terminate an (important property) interest . . . it must afford 'notice and opportunity for hearing . . .' before the termination becomes effective.' 402 U.S., at 542, 91 S.Ct., at 1591 (emphasis in original) (footnote omitted). In Goldberg v. Kelly, supra, the Court found that an evidentiary hearing held after the termination of welfare benefits was inadequate to satisfy constitutional requirements. [FN14]

FN13. The discharged employee is entitled to a full trial-type proceeding before a single examiner who may not occupy a position directly or indirectly under the jurisdiction of the official who proposed the dismissal or who bears ultimate responsibility for that decision. The examiner's decision is afforded substantial weight; if it is rejected, the rejection must be accompanied by a full statement of reasons that is subject to review. Both the employee and the agency may produce, examine, and cross-examine witnesses under oath or affirmation, and documentary evidence may also be introduced. Rigorous trial formality is avoided and care taken not to place an uncounseled employee at a disadvantage. See Merrill 1038--1040; 5 CFR ss 771.209--771.211 (1972).

FN14. The procedure in Goldberg also involved a pretermination right of reply and a full trial-type hearing after termination, see n. 5, supra, but the scheme was nonetheless found not to satisfy due process requirements and a full pretermination hearing was required. See O'Neil, Of Justice Delayed and Justice Denied; The Welfare Prior Hearing Cases, 1970 Sup.Ct.Rev. 161, 169.

Even if we accept appellants' assertion that a subsequent hearing affords the discharged employee an opportunity to clear his name, [FN15] the worker still has a significant interest in retaining his job pending a full hearing. [FN16] Almost a fourth of

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all appeals from agency *219 dismissals result in a finding that the termination was illegal. [FN17] And, the delay from discharge to ultimate vindication at a hearing on appeal is far from insubstantial. More than 75% of adverse personnel actions take more than two months to process; over half take more than three months and a not insignificant number take more than a year. [FN18] The longer the period between the discharge and the hearing, the more devastating will be the impact of the loss of employment.

FN15. See n. 9, supra, at n. 19, infra.

FN16. Both Mr. Justice REHNQUIST and Mr. Justice WHITE dismiss the need for a full prior hearing partially by reference to the Court's decision in Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). That case is entirely inapposite. First, it involved not the dismissal for cause of a tenured civil service employee, but rather the withdrawal of the security clearance of the employee of a private contractor, which, in effect, barred the worker from her job in the commissary at a military base. The employer was prepared to employ the worker at another of his restaurants, so the withdrawal of her security clearance was not apt to cause the serious financial hardship that appellee's dismissal from public employment might entail. See Board of Regents v. Roth, 408 U.S., at 584--585, 92 S.Ct., at 2712--2713 (Douglas, J., dissenting). Moreover, the Court has since read Cafeteria Workers to be a case where the Government's 'exceptional' interest in national security justified an abridgment of the right to a hearing. Fuentes v. Shevin, 407 U.S. 67, 91 n. 23, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972); see Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).

FN17. Merrill 1014 n. 33.

FN18. Id., at 1016.

During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [FN19] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal **1677 is successful. [FN20] *220 And in many States, including Illinois, where appellee resides, a worker discharged for cause is not even eligible for unemployment compensation. [FN21]

FN19. My Brother REHNQUIST argues that the stigma imposed by dismissal is only temporary in that the discharged employee can clear his name at the post-hoc hearing, hence does not 'foreclose(d) his freedom to take advantage of other employment opportunities.' Board of Regents v. Roth, 408 U.S., at 573, 92 S.Ct., at 2707; see n. 9, supra. But the stigma of outstanding charges would nonetheless be borne by the employee in the interim period while he waits for his hearing and seeks alternative employment to tide himself over.

FN20. See, e.g., Hearings on Postal Labor Relations and Employee Morale before the Subcommittee on Postal Operations of the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969); Kennedy, Adverse Actions in the Agencies--Words and Deeds--Postal Adverse Action Procedures, 19 Am.U.L.Rev. 398, 412 (1970).

FN21. See, e.g., Ill.Rev.Stat., c. 48, s 432 (1973); see Christian v. New York State Dept. of Labor, 414 U.S. 614, 94 S.Ct. 747, 39 L.Ed.2d 38 (1974).

Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages. Few public employees earn more than enough to pay their expenses from month to month. See Sampson v. Murray, 415 U.S. 61, 97, 94 S.Ct. 937, 956, 39 L.Ed.2d 166 (1974) (Marshall, J., dissenting). Like many of us, they may be required to meet substantial fixed costs on a regular basis and lack substantial savings to meet those expenses while not receiving a salary. The loss of income for even a few weeks may well impair their ability to provide the essentials of life--to buy food, meet mortgage or rent payments, or procure medical services. Ricucci v. United States, 425 F.2d 1252, 1256--1257, 192 Ct.Cl. 1, 9--11, (1970) (Skelton, J., concurring). The plight of a discharged employee may not be far different from that of the welfare recipient in Goldberg who, 'pending resolution of a controversy . . . may (be) deprive(d) . . . of the very means by which to live while he waits.' 397 U.S., at 264, 90 S.Ct., at 1018. Appellee, although earning an annual salary of $16,000 before his dismissal, far above the mean salary for federal employees,

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[FN22] was nonetheless driven to the brink of financial ruin while he waited. He had to borrow money to support his family, his debts went unpaid, his family lost the protection of his health insurance and, finally, he was forced to apply for public *221 assistance. App., 128 et seq. In this context justice delayed may well be justice denied.

FN22. See Mandate for Merit: 1972 Annual Report of the United States Civil Service Commission 64--65.

To argue that a dismissal from tenured Government employment is not a serious enough deprivation to require a prior hearing because the discharged employee may draw on the welfare system in the interim, is to exhibit a gross insensitivity to the plight of these employees. First, it assumes that the discharged employee will be eligible for welfare. Often welfare applicants must be all but stripped of their worldly goods before being admitted to the welfare roles, hence it is likely that the employee will suffer considerable hardship before becoming eligible. He may be required not only to exhaust his savings but also to convert many of his assets into cash for support before being able to fall back on public assistance. He may have to give up his home or cherished personal possessions in order to become eligible. The argument also assumes all but instant eligibility which is, sadly, far from likely even when all the employee's other sources of support have been depleted. Moreover, rightly or wrongly, many people consider welfare degrading and would decline public assistance even when eligible. Finally, the level of subsistence provided by welfare is minimal, certainly less than one is apt to expect from steady employment. 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.

Nor does the availability of backpay upon an ultimate *222 finding that the dismissal **1678 was improper alleviate the compelling nature of the employee's plight. Cf. Sampson v. Murray, --- U.S. ---, 94 Cf. Sampson v. Murray, 415 U.S., at 97, 94 S.Ct., at 956 (Marshall, J., dissenting). In Sniadach v. Family Finance Corp., supra, the Court recognized that the employee had an interest in the enjoyment of his wages as they accrued and noted that even a temporary loss of salary could put a wage earner below the poverty level or 'drive a wage-earning family to the wall.' 395 U.S., at 341--342, 89 S.Ct., at 1823. Thus, we held that a wage earner is entitled to a hearing prior to the garnishment of his wages even though he would ultimately get his frozen earnings back when and if he prevailed in a suit on the merits. See also id., at 343, 89 S.Ct. at 1823 (Harlan, J., concurring). And, in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), the Court held that due process required a hearing before a seizure of property by writ of replevin, observing:

'If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process had already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'' Id., at 81--82, 92 S.Ct., at 1994.

The Fuentes Court, applying these considerations, albeit in dicta, observed that, '(i)n cases involving deprivations of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh the right to a prior hearing.' Id., at 91 n. 23, 92 S.Ct., at 2000.

*223 The Court has recognized a number of instances where a vital governmental interest may outweigh the right to a prior hearing, including the need to seize property to 'collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated foods.' Id., at 92, 92 S.Ct., at 2000 (footnotes omitted). [FN23] Such a vital interest is clearly lacking here.

FN23. See, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403 (1921); Phillips v. Commissioner of

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Internal Revenue, 283 U.S. 589, 597, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931); Ewing v. Mytinger & Casselberry, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950).

The Government's asserted interests in not affording a predismissal hearing are twofold. First, appellants argue that the delay in holding the hearing makes the functioning of the agency more efficient. We rejected a similar rationale in Goldberg, 397 U.S., at 266, 90 S.Ct., at 1019, and observed in Fuentes, supra:

'A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. . . . Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions (or property) are about to be taken.

". . . (T)he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry **1679 from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre *224 ones." 407 U.S., at 90--91, n. 22, 92 S.Ct., at 1999 (citations omitted).

Moreover, the Government's interest in efficiency in this case is entirely unconvincing. The applicable statute does not prohibit prior hearings but rather makes them discretionary with the agency. Nine federal agencies, including the FCC, NLRB, HUD, HEW, the Department of Justice, and the Civil Service Commission itself, regularly accord evidentiary hearings prior to the dismissal of a tenured employee. [FN24] The Administrative Conference of the United States, on the basis of its exhaustive study of federal agency proceedings for the dismissal of employees in the competitive service, strongly recommended that evidentiary hearings be held prior to discharge. [FN25]

FN24. Merrill 1056.

FN25. Recommendation 72--8, Adverse Actions Against Federal Employees, in 2 Recommendations and Reports of the Administrative Conference of the United States 73--75 (1972).

The Administrative Conference found that the evidence, although inconclusive, indicates that the agencies that provided pretermination hearings closed adverse action proceedings more quickly than those which did not hold an evidentiary hearing until after the dismissal had been effected. It also found that the delays in closing cases involving hearings are typically caused not by the length of the hearings--almost all are completed within a day--but rather by scheduling difficulties. And those agencies which take three months or more to hold post-termination hearings have little incentive to decide dismissal cases more promptly, since the employee has already been discharged and he bears most of the costs of delay. If the hearing were required before termination, agencies would have a far greater incentive to decide *225 these cases expeditiously. [FN26] Finally, providing an evidentiary hearing before the discharge might well obviate the practical and constitutional need for a full post-termination proceeding. [FN27]

FN26. Merrill 1017, 1056--1057, 1060. Scheduling problems might be largely overcome by more skillful use of personnel. See Goldberg v. Kelly, 397 U.S., at 266, 90 S.Ct., at 1019.

FN27. As we observed id., 397 U.S., at 267 n. 14, 90 S.Ct., at 1020, due process does not, of course, require two hearings. Under current procedures, an employee is afforded one and sometimes two post-hoc evidentiary hearings (one before the agency and the other before the Civil Service Commission). See Merrill 1013, 1043. If an adequate review mechanism is maintained, a single pretermination hearing might obviate the need for these later proceedings.

The Government also argues that if a supervisor were unable to effect an immediate removal of a troublesome employee from his agency, the discipline and efficiency of the whole office might be disrupted. Under the prevailing practice, an agency may not dismiss an employee until 30 days after he has received notice of the charges against him and has had an opportunity to reply. Thus, fellow workers and supervisors must now function with the threatened employee in their midst for at least a month, and there seems little reason why a hearing could not be held during that 30-day period.

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[FN28] If the employee actually threatens to disrupt the operation of the office, he could be put on administrative leave or temporarily assigned to a less sensitive position pending his hearing, as currently provided for by regulation. 5 CFR s 752.202(d).

FN28. See, e.g., U.S. Dept. of Justice, Adverse Action Hearings, Appeals and Grievance Policies and Regulations, c. 2 (Sept. 28, 1972); Recommendation 72--8, n. 25, supra, at B, 74. The notice requirement need not be any impediment to holding the hearing within the 30-day period. In Goldberg v. Kelly, supra, at 268, 90 S.Ct., at 1020, for example, the Court found a seven-day period between notice and termination hearing constitutionally permissible.

**1680 *226 The only pretermination proceeding accorded appellee was a 'right of reply,' see 5 CFR s 752.202(b), but the 'right of reply' falls far short of being the meaningful hearing which, in my view, is constitutionally required. As the author of the Administrative Conference Report observed:

'In most agencies . . . an employee's right to reply simply means that he may meet informally with a representative of the agency and advance oral representations that he hopes will sway the final decision. He has no right at this stage to present witnesses or to confront and cross-examine the agency's witnesses.' [FN29] (Footnotes omitted.)

FN29. Merrill 1033.

The agency official before whom the employee appears need not be the decisionmaker; he need only be able to recommend a decision. Moreover, the hearing examiner or the person responsible for the decision to discharge the employee may well be the complainant or his direct subordinate. In the case before us, for example, the decision as to whether appellee should be discharged was made by the OEO Regional Director whom appellee had accused of misconduct. The Regional Director assembled the evidence against appellee, proposed the dismissal, then decided it should be effected; he acted as complaining witness, prosecutor, and judge. The meaningless bureaucratic paper shuffling afforded appellee before his discharge would surely not alone satisfy the stringent demands of due process when such an important interest is at stake.

The decisions of this Court compel the conclusion that a worker with a claim of entitlement to public employment absent specified cause has a property interest protected by the Due Process Clause and therefore *227 the right to an evidentiary hearing before an impartial decisionmaker prior to dismissal. Accordingly, I would affirm the decision of the court below that appellee had been discharged in violation of his procedural due process rights.

II

The court below also held that the provision of the Lloyd-La Follette Act which authorizes dismissal of tenured Government employees for 'such cause as will promote the efficiency of the service' is unconstitutionally vague and overbroad. [FN30]

FN30. Other cases in this area hardly provide substantial guidance as to what speech is or is not protected. See, e.g., Pickering v. Board of Education, 391 U.S. 563, 570 n. 3, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811 (1968). Nor do the extant regulations provide substantial guidance; they merely repeat the language of the statute and provide examples as unelucidating as the particular regulation relevant to this case which proscribed 'any action . . . which might result in, or create the appearance of . . . (c) (i)mpeding Government efficiency or economy . . . (or) (f) (a)ffecting adversely the confidence of the public in the integrity of the Government.' 5 CFR s 735.201a; see 45 CFR s 1015.735--1.

There is no dispute that the phrase "such cause as will promote the efficiency of the service' as a standard of employee job protection is without doubt intended to authorize dismissal for speech,' ante, at 1647. The majority finds this permissible because in Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), we observed that 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.' But, the majority seems to have ignored the passage in Pickering that directly precedes the quoted material:

'(T)o suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights *228 they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of **1681 the public schools in which they work, . . . proceeds on a premise that has been unequivocally rejected in

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numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).' 391 U.S., at 568, 88 S.Ct., at 1734.

The importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors, must be self-evident in these times. In Pickering, this Court specifically upheld the right of a public employee to criticize the conduct of his superiors. Id., at 573--574, 88 S.Ct. at 1737-- 1738. In fact, it appears that one of the primary purposes of the LloydLa Follette Act was to protect such criticism from official retribution. Senator La Follette gave the following example of an abuse sought to be cured by the bill:

'The cause for (the employee's) dismissal was that he gave publicity to the insanitary conditions existing in some part of the post-office building in Chicago where the clerks were required to perform their services . . .

(H)e furnished some facts to the press of Chicago, and the publication was made of the conditions. They were simply horrible . . .. The public health officers of Chicago, as soon as their attention was called to the conditions, condemned the situation as they found it; and yet this young man, one of the brightest fellows I have met, was removed from the service because, he had given publicity to these outrageous conditions.' 48 Cong.Rec. 10731 (1912).

*229 The 'efficiency of the service' standard would appear to bring within its reach, as permissible grounds for dismissal, even truthful criticism of an agency that in any way tends to disrupt its operation. One can be sure, for example, that the young man's criticism in Senator La Follette's example disrupted the operation of the Chicago Post Office. It seems clear that the standard could be construed to punish such protected speech.

The majority purports to solve this potential overbreadth problem merely by announcing that the standard in the Act 'excludes protected speech.' Nonetheless, it leaves the statutory standard intact and offers no guidance other than general observation as to what conduct is or is not punishable. [FN31] The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious.

FN31. The Administrative Conference Report reserved particularly harsh criticism for the 'efficiency of the service' standard, terming it 'deficient both as a guide to agency management and as a warning to employees of the sorts of behavior that will get them in trouble,' warning that it is 'an invitation to arbitrary action by government agencies.' Merrill 1054; see id., at 1053.

The majority misunderstands the overbreadth principle which concerns the potential deterrent effect on constitutionally protected speech of a statute that is overbroad or vague on its face. The focus of the doctrine is not on the individual actor before the court but on others who may forgo protected activity rather than run afoul of the statute's proscriptions. Hence, the Court has reversed convictions where the subject speech could have been punished under a more narrowly drawn statute because the statute as drawn purported to cover, and *230 might deter others from engaging in, protected speech. The Court explained **1682 this vagueness-overbreadth relationship in Keyishian v. Board of Regents, 385 U.S., at 603--604, 87 S.Ct., at 684:

'We emphasize once again that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' N.A.A.C. P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405; '(f) or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' Id., at 432--433, 83 S.Ct. 328--338. . . . When one must guess what conduct or utterances may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . ..' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. For '(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.' N.A.A.C.P. v. Button, supra, 371

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U.S. at 433, 83 S.Ct. at 338. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform (public employees) what is being proscribed.'

By the uncertainty of its scope, the standard here creates the very danger of a chilling effect that concerned the Court in Keyishian. [FN32] Employees are likely to limit *231 their behavior to that which is unquestionably safe, for 'the threat of dismissal from public employment is . . . a potent means of inhibiting speech.' Pickering, 391 U.S., at 574, 88 S.Ct., at 1737. The dismissal standard hangs over their heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the 'efficiency of the service.' That this Court will ultimately vindicate an employee if his speech is constitutionally protected is of little consequence-- for the value of a sword of Damocles is that it hangs--not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all.

FN32. Further refinement of the statutory 'efficiency of the service' standard, is not, as the majority implies, impossible. The Administrative Conference points out that the agencies and the Civil Service Commission 'have developed a large, still essentially secret body of law on the meaning of 'efficiency.' Merrill 1054. Reference to this body of precedent might well serve as a basis for the amplification of the statutory standard. Relevant guidelines might, for example, distinguish between statements made in an official as opposed to a private capacity, see Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); between knowingly false statements and those which are reasonably believed to be true, see e.g., Pickering, supra, at 569, 88 S.Ct., at 1735; New York Times Co. v. Sullivan, 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964); cf. Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971); and between statements which pertain to a legitimate subject of public comment and those which disclose confidential Government information, see Pickering, supra, 391 U.S., at 570 n. 3 and 571--572, 88 S.Ct., at 1735 n. 3 and 1736--1737; cf. Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

The District Court found that '(b)ecause employees faced with the standard of 'such cause as will promote the efficiency of the service' can only guess as to what utterances may cost them their jobs, there can be little question that they will be deterred from exercising their First Amendment rights to the fullest extent.' I agree with that characterization of the effect of the standard and would, therefore, uphold the conclusion of the District Court that the statute is unconstitutionally vague and overbroad.

I respectfully dissent.

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The BOARD OF REGENTS OF STATE COLLEGES et al., Petitioners,
v.
David F. ROTH, etc.

No. 71--162.

Supreme Court of the United States

Argued Jan. 18, 1972.

Decided June 29, 1972.

Action by assistant professor at state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after first academic year, alleging that decision not to rehire him infringed his Fourteenth Amendment rights. The United States District Court for the Western District of Wisconsin, 310 F.Supp. 972, granted summary judgment for assistant professor on procedural issue, ordering university officials to provide him with reasons and a hearing, and appeal was taken. The Court of Appeals, 446 F.2d 806, affirmed the partial summary judgment, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that where state did not make any charge against assistant professor that might seriously damage his standing and associations in his community and there was no suggestion that state imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, he was not deprived of 'liberty' protected by the Fourteenth Amendment when he simply was not rehired in the job but remained as free as before to seek another. The Court further held that where terms of appointment of assistant professor secured absolutely no interest in reemployment for the next year and there was no state statute or university rule or policy that secured his interest in reemployment or that created any legitimate claim to it, he did not have a property interest protected by Fourteenth Amendment that was sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice Douglas filed a dissenting opinion.

Mr. Justice Marshall filed a dissenting opinion.

For concurring opinion of Mr. Chief Justice Burger, see 92 S.Ct. 2717.

For dissenting opinion of Mr. Justice Brennan in which Mr. Justice Douglas joined, see 92 S.Ct. 2717.

Mr. Justice Powell took no part in decision of case.

[1] CONSTITUTIONAL LAW ⚷252.5
92k252.5
Formerly 92k255(1)
Requirements of procedural due process apply only to deprivation of interests encompassed by Fourteenth Amendment's protection of liberty and property, and when protected interests are implicated the right to some kind of prior hearing is paramount. U.S.C.A.Const. Amend. 14.

[1] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
Requirements of procedural due process apply only to deprivation of interests encompassed by Fourteenth Amendment's protection of liberty and property, and when protected interests are implicated the right to some kind of prior hearing is paramount. U.S.C.A.Const. Amend. 14.

[2] CONSTITUTIONAL LAW ⚷252.5
92k252.5
Formerly 92k255(1)
To determine whether due process requirements apply in the first place, court must look not to the "weight" but to the nature of the interest at stake and must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. U.S.C.A.Const. Amend. 14.

[2] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
To determine whether due process requirements apply in the first place, court must look not to the "weight" but to the nature of the interest at stake and must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. U.S.C.A.Const. Amend. 14.

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[3] CONSTITUTIONAL LAW ⚷254.1
92k254.1
Formerly 92k255(1)
Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money, and due process protection is required for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. U.S.C.A.Const. Amend. 14.

[3] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money, and due process protection is required for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process. U.S.C.A.Const. Amend. 14.

[4] CONSTITUTIONAL LAW ⚷251.6
92k251.6
Formerly 92k251
Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. U.S.C.A.Const. Amend. 14.

[5] CONSTITUTIONAL LAW ⚷90(2)
92k90(2)
Whatever may be a teacher's right of free speech, interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

[6] CONSTITUTIONAL LAW ⚷278.5(3)
92k278.5(3)
Formerly 92k255(2)
Where state in declining to rehire assistant professor at state university, who had no tenure rights to continued employment, did not make any charge against him that might seriously damage his standing and associations in his community and there was no suggestion that state imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities, he was not deprived of "liberty" protected by the Fourteenth Amendment when he simply was not rehired but remained as free as before to seek another. U.S.C.A.Const. Amend. 14; W.S.A. 37.31(1).

[7] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
Fourteenth Amendment's procedural protection of property is a safeguard of security of interests that a person has already acquired in specific benefits. U.S.C.A.Const. Amend. 14.

[8] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
To have a property interest in a benefit, a person must have more than an abstract need or desire for it or a unilateral expectation of it, and he must have a legitimate claim of entitlement to it, it is a purpose of ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined, and it is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. U.S.C.A.Const. Amend. 14.

[9] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
Property interests are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. U.S.C.A.Const. Amend. 14.

[10] CONSTITUTIONAL LAW ⚷277(2)
92k277(2)
Where terms of appointment of assistant professor at state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after first academic year, secured absolutely no interest in reemployment for the next year and there was no state statute or university rule or policy that secured his interest in reemployment or that created any legitimate claim to it, he did not have a property interest protected by Fourteenth Amendment that was sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment. U.S.C.A.Const. Amend. 14; W.S.A. 37.31(1).

**2702 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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*564 Respondent, hired for a fixed term of one academic year to teach at a state **2703 university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment 'during efficiency and good behavior,' with procedural protection against separation. University rules gave a nontenured teacher 'dismissed' before the end of the year some opportunity for review of the 'dismissal,' but provided that no reason need be given for nonretention of a nontenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his nonretention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed. Held: The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a nontenured state teacher's contract, unless he can show that the nonrenewal deprived him of an interest in 'liberty' or that he had a 'property' interest in continued employment, despite the lack of tenure or a formal contract. Here the nonretention of respondent, absent any charges against him or stigma or disability foreclosing other employment, is not tantamount to a deprivation of 'liberty,' and the terms of respondent's employment accorded him no 'property' interest protected by procedural due process. The courts below therefore erred in granting summary judgment for the respondent on the procedural due process issue. Pp. 2705--2710.

446 F.2d 806, reversed and remanded.

*565 Charles A. Bleck, Asst. Atty. Gen., Madison, Wis., for petitioners.

Steven H. Steinglass, Milwaukee, Wis., for respondent.

*566 Mr. Justice STEWART delivered the opinion of the Court.

In 1968 the respondent, David Roth, was hired for his first teaching job as assistant professor of political science at Wisconsin State University-Oshkosh. He was hired for a fixed term of one academic year. The notice of his faculty appointment specified that his employment would begin on September 1, 1968, and would end on June 30, 1969. [FN1] The respondent completed that term. But he was informed that he would not be rehired for the next academic year.

FN1. The respondent had no contract of employment. Rather, his formal notice of appointment was the equivalent of an employment contract.

The notice of his appointment provided that: 'David F. Roth is hereby appointed to the faculty of the Wisconsin State University Position number 0262. (Location:) Oshkosh as (Rank:) Assistant Professor of (Department:) Political Science this (Date:) first day of (Month:) September (Year:) 1968.' The notice went on to specify that the respondent's 'appointment basis' was for the 'academic year.' And it provided that '(r)egulations governing tenure are in accord with Chapter 37.31, Wisconsin Statutes. The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.' See n. 2, infra.

The respondent had no tenure rights to continued employment. Under Wisconsin statutory law a state university teacher can acquire tenure as a 'permanent' employee only after four years of year-to-year employment. Having acquired tenure, a teacher is entitled to continued employment 'during efficiency and good behavior.' A relatively new teacher without tenure, however, is under Wisconsin law entitled to nothing **2704 beyond his one-year appointment. [FN2] There are no statutory *567 or administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.

FN2. Wis.Stat. s 37.31(1) (1967), in force at the time, provided in pertinent part that:

'All teachers in any state university shall initially be employed on probation. The employment shall be permanent, during efficiency and good behavior after 4 years of continuous service in the state university system as a teacher.'

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The procedural protection afforded a Wisconsin State University teacher before he is separated from the University corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be 'discharged except for cause upon written charges' and pursuant to certain procedures. [FN3] A nontenured teacher, similarly, is protected to some extent during his one-year term. Rules promulgated by the Board of Regents provide that a nontenured teacher 'dismissed' before the end of the year may have some opportunity for review of the 'dismissal.' But the Rules provide no real protection for a nontenured teacher who simply is not re-employed for the next year. He must be informed by February 1 'concerning retention or non-retention for the ensuing year.' But 'no reason for non-retention need be given. No review or appeal is provided in such case.' [FN4]

FN3. Wis.Stat. s 37.31(1) further provided that:
'No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision.'

FN4. The Rules, promulgated by the Board of Regents in 1967, provide:
'RULE I--February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning retention or non-retention for the ensuing year. The President of each University shall give such notice each year on or before this date.'
'RULE II--During the time a faculty member is on probation, no reason for non-retention need be given. No review or appeal is provided in such case.
'RULE III--'Dismissal' as opposed to 'Non-Retention' means termination of responsibilities during an academic year. When a non-tenure faculty member is dismissed he has no right under Wisconsin Statutes to a review of his case or to appeal. The President may, however, in his discretion, grant a request for a review within the institution, either by a faculty committee or by the President, or both. Any such review would be informal in nature and would be advisory only.
'RULE IV--When a non-tenure faculty member is dismissed he may request a review by or hearing before the Board of Regents. Each such request will be considered separately and the Board will, in its discretion, grant or deny same in each individual case.'

*568 In conformance with these Rules, the President of Wisconsin State University-Oshkosh informed the respondent before February 1, 1969, that he would not be rehired for the 1969--1970 academic year. He gave the respondent no reason for the decision and no opportunity to challenge it at any sort of hearing.

The respondent then brought this action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. He attacked the decision both in substance and procedure. First, he alleged that the true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech. [FN5] **2705 *569 Second, he alleged that the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.

FN5. While the respondent alleged that he was not rehired because of his exercise of free speech, the petitioners insisted that the non-retention decision was based on other, constitutionally valid grounds. The District Court came to no conclusion whatever regarding the true reason for the University President's decision. 'In the present case,' it stated, 'it appears that a determination as to the actual bases of (the) decision must await amplification of the facts at trial. . . . Summary judgment is inappropriate.' 310 F.Supp. 972, 982.

The District Court granted summary judgment for the respondent on the procedural issue, ordering the University officials to provide him with reasons and a hearing. 310 F.Supp. 972. The Court of Appeals, with one judge dissenting, affirmed this partial summary judgment. 446 F.2d 806. We granted certiorari. 404 U.S. 909, 92 S.Ct. 227, 30 L.Ed.2d 181. The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. [FN6] We hold that he did not.

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FN6. The courts that have had to decide whether a nontenured public employee has a right to a statement of reasons or a hearing upon nonrenewal of his contract have come to varying conclusions. Some have held that neither procedural safeguard is required. E.g., Orr v. Trinter, 444 F.2d 128 (CA6); Jones v. Hopper, 410 F.2d 1323 (CA10); Freeman v. Gould Special School District, 405 F.2d 1153 (CA8). At least one court has held that there is a right to a statement of reasons but not a hearing. Drown v. Portsmouth School District, 435 F.2d 1182 (CA1). And another has held that both requirements depend on whether the employee has an 'expectancy' of continued employment. Ferguson v. Thomas, 430 F.2d 852, 856 (CA5).

I

[1] The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right **570 to some kind of prior hearing is paramount. [FN7] But the range of interests protected by procedural due process is not infinite.'

FN7. Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113. 'While '(m)any controversies have raged about . . . the Due Process Clause,' . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.' Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, see, e.g., Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403; Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 597, 51 S.Ct. 608, 611, 75 L.Ed. 1289; Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088.'

[2] The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved. It concluded that the respondent's interest in re-employment at Wisconsin State University-Oshkosh outweighed the University's interest in denying him re-employment summarily. 310 F.Supp., at 977--979. Undeniably, the respondent's re-employment prospects were of major concern to him--concern that we surely cannot say was insignificant. And a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. [FN8] But, to determine whether *571 due **2706 process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. See Morrissey v. Brewer, 408 U.S. 471, at 481, 92 S.Ct. 2593, at 2600, 33 L.Ed.2d 484. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

FN8. 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' Boddie v. Connecticut, supra, 401 U.S., at 378, 91 S.Ct., at 786. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287; Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307. The constitutional requirement of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process. See n. 7, supra.

[3] 'Liberty' and 'property' are broad and majestic terms. They are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (Frankfurter, J., dissenting). For that reason, the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights. [FN9] The Court has also made clear that the property interests protected by *572 procedural due process extend well beyond actual ownership of real estate, chattels, or money. [FN10] By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the

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criminal process. [FN11]

FN9. In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a 'privilege,' not a 'right,' and that procedural due process guarantees therefore were inapplicable. Bailey v. Richardson, 86 U.S.App.D.C. 248, 182 F.2d 46, aff'd by an equally divided Court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352. The basis of this holding has been thoroughly undermined in the ensuing years. For, as Mr. Justice Blackmun wrote for the Court only last year, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. See, e.g., Morrissey v. Brewer, supra, 408 U.S., at 482, 92 S.Ct., at 2600; Bell v. Burson, supra, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, supra, 397 U.S., at 262, 90 S.Ct., at 1017; Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600; Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811; Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965.

FN10. See, e.g., Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418; Bell v. Burson, supra; Goldberg v. Kelly, supra.

FN11. 'Although the Court has not assumed to define 'liberty' (in the Fifth Amendment's Due Process Clause) with any great precision, that term is not confined to mere freedom from bodily restraint.' Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884. See, e.g., Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning.

II

'While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely **2707 freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499--500, 74 S.Ct. 693, 694, 98 L.Ed. 884; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

*573 There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

[4] The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '(w)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti- Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316--317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials. [FN12] In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

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FN12. The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would *574 be a different case. For '(t)o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . .' Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S. at 185, 71 S.Ct. at 655 (Jackson, J., concurring). See Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene(s) . . . Due Process,' Schware v. Board of Bar Examiners, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, and, specifically, in a manner that denies the right to a full prior hearing. Willner v. Committee on Character, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224. See Cafeteria Workers v. McElroy, supra, 367 U.S. at 898, 81 S.Ct. at 1750. In the present case, however, this principle does not come into play. [FN13]

FN13. The District Court made an assumption 'that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.' 310 F.Supp., at 979. And the Court of Appeals based its affirmance of the summary judgment largely on the premise that 'the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor' amounts to a limitation on future employment opportunities sufficient invoke procedural due process guarantees. 446 F.2d, at 809. But even assuming, arguendo, that such a 'substantial adverse effect' under these circumstances would constitute a state-imposed restriction on liberty, the record contains no support for these assumptions. There is no suggestion of how nonretention might affect the respondent's future employment prospects. Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

**2708 [5] To be sure, the respondent has alleged that the nonrenewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that *575 the decision not to rehire him was, in fact, based on his free speech activities. [FN14]

FN14. See n. 5, supra. The Court of Appeals, nonetheless, argued that opportunity for a hearing and a statement of reasons were required here 'as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights.' 446 F.2d, at 810 (emphasis supplied). While the Court of Appeals recognized the lack of a finding that the respondent's nonretention was based on exercise of the right of free speech, it felt that the respondent's interest in liberty was sufficiently implicated here because the decision not to rehire him was made 'with a background of controversy and unwelcome expressions of opinion.' Ibid.

When a State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards. Thus, we have required fair notice and opportunity for an adversary hearing before an injunction is issued against the holding of rallies and public meetings. Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325. Similarly, we have indicated the necessity of procedural safeguards before a State makes a large-scale seizure of a person's allegedly obscene books, magazines, and so forth. A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809; Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584. See generally Monaghan, First Amendment 'Due Process', 83 Harv.L.Rev. 518.

In the respondent's case, however, the State has not directly impinged upon interests in free speech or free press in any way comparable to a seizure of books or an injunction against meetings. Whatever may be a teacher's rights of free speech, the

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interest in holding a teaching job at a state university, simpliciter, is not itself a free speech interest.

[6] Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. Cafeteria Workers v. McElroy, supra, 367 U.S. at 895--896, 81 S.Ct. at 1748--1749, 6 L.Ed.2d 1230.

*576 III

[7] The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests--property interests--may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287. [FN15] **2709 See Flemming v. Nestor, 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, and college professors and *577 staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 1773, 29 L.Ed.2d 418.

FN15. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had 'published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the states, and the District of Columbia, as well as certified public accountants duly qualified under the law of any state or the District are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission.' Id., at 119, 46 S.Ct., at 216. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power 'must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.' Id., at 123, 46 S.Ct., at 217.

[8] Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He 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 the constitutional right to a hearing to provide an opportunity for a person to vendicate those claims.

[9] Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

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*578 Just as the welfare recipients' 'property' interest in welfare payments was created and defined by statutory terms, so the respondent's 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent 'sufficient cause.' Indeed, they made no provision for renewal whatsoever.

**2710 [10] Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. [FN16] In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

FN16. To be sure, the respondent does suggest that most teachers hired on a year-to-year basis by Wisconsin State University-Oshkosh are, in fact, rehired. But the District Court has not found that there is anything approaching a 'common law' of re-employment, see Perry v. Sindermann, 408 U.S. 593, at 602, 92 S.Ct. 2694, at 2705, 33 L.Ed.2d 570, so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public *579 colleges and universities. [FN17] For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution.

FN17. See, e.g., Report of Committee A on Academic Freedom and Tenure, Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments, 56 AAUP Bulletin No. 1, p. 21 (Spring 1970).

We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion. It is so ordered. Reversed and remanded.

Mr. Justice POWELL took no part in the decision of this case.

Mr. Justice DOUGLAS, dissenting.

Respondent Roth, like Sindermann in the companion case, had no tenure under Wisconsin law, and, unlike Sindermann, he had had only one year of teaching at Wisconsin State University-Oshkosh--where during 1968--1969 he had been Assistant Professor of Political Science and International Studies. Though Roth was rated by the faculty as an excellent teacher, he had publicly criticized the administration for suspending an entire group of 94 black students without determining individual guilt. He also criticized the university's regime as being authoritarian and autocratic. He used his classroom to discuss what was being done about the *580 black episode; and one day, instead of meeting his class, he went to the meeting of the Board of Regents.

In this case, as in Sindermann, an action was started in Federal District Court under 42 U.S.C. s 1983 [FN1] claiming in part that the decision of the school authorities not to rehire was in retaliation for his expression of opinion. The District Court, in partially granting Roth's motion for summary judgment, held that the Fourteenth Amendment required the university to give a hearing **2711 to teachers whose contracts were not to be renewed and to give reasons for its action. 310 F.Supp. 972, 983. The Court of Appeals affirmed. 446 F.2d 806.

FN1. Section 1983 reads as follows:
'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

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liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

Professor Will Herberg, of Drew University, in writing of 'academic freedom' recently said:

'(I)t is sometimes conceived as a basic constitutional right guaranteed and protected under the First Amendment. 'But, of course, this is not the case. Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty. Clearly, the right to academic freedom is an acquired one, yet an acquired right of such value to society that in the minds of many it has verged upon the constitutional.'

Washington Sunday Star, Jan. 23, 1972, B-3, col. 1.

*581 There may not be a constitutional right to continued employment if private schools and colleges are involved. But Prof. Herberg's view is not correct when public schools move against faculty members. For the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to freedom of speech and of press and the related freedoms guaranteed by the First Amendment; and the Fourteenth protects 'liberty' and 'property' as stated by the Court in Sindermann.

No more direct assault on academic freedom can be imagined than for the school authorities to be allowed to discharge a teacher because of his or her philosophical, political, or ideological beliefs. The same may well be true of private schools, if through the device of financing or other umbilical cords they become instrumentalities of the State. Mr. Justice Frankfurther stated the constitutional theory in Sweezy v. New Hampshire, 354 U.S. 234, 261–262, 77 S.Ct. 1203, 1217, 1 L.Ed.2d 1311 (concurring in result):

'Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good--if understanding be an essential need of society--inquires into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered *582 as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well- being, except for reasons that are exigent and obviously compelling.'

We repeated that warning in Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629:

'Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'

When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. A statutory analogy is present under the National Labor Relations Act, 29 U.S.C. s 151 et seq. While discharges of employees for 'cause' are **2712 permissible (Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 217, 85 S.Ct. 398, 406, 13 L.Ed.2d 233), discharges because of an employee's union activities are banned by s 8(a)(3), 29 U.S.C. s 158(c)(3). So the search is to ascertain whether the stated ground was the real one or only a pretext. See J. P. Stevens & Co. v. NLRB, 380 F.2d 292, 300 (2 Cir.).

In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the Sweezy case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the Keyishian case, one of the petitioners (Keyishian himself) had only a 'one-year-term contract' that was not renewed. 385 U.S., at 592, 87 S.Ct., at 678. In Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, one of the petitioners was *583 a teacher whose 'contract for

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the ensuing school year was not renewed' (id., at 483, 81 S.Ct., at 249) and two others who refused to comply were advised that it made 'impossible their re-employment as teachers for the following school year.' Id., at 484, 81 S.Ct., at 250. The oath required in Keyishian and the affidavit listing memberships required in Shelton were both, in our view, in violation of First Amendment rights. Those cases mean that conditioning renewal of a teacher's contract upon surrender of First Amendment rights is beyond the power of a State.

There is sometimes a conflict between a claim for First Amendment protection and the need for orderly administration of the school ststem, as we noted in Pickering v. Board of Education, 391 U.S. 563, 569, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811. That is one reason why summary judgments in this class of cases are seldom appropriate. Another reason is that careful factfinding is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one.

It is said that since teaching in a public school is a privilege, the State can grant it or withhold it on conditions. We have, however, rejected that thesis in numerous cases, e.g., Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968). In Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586, we said that Congress may not by withdrawal of mailing privileges place limitations on freedom of speech which it could not do constitutionally if done directly. We said in American Communications Ass'n v. Douds, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925, that freedom of speech was abridged when the only restraint on its exercise was withdrawal of the privilege to invoke the facilities of the National Labor Relations Board. In Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, we held that an applicant could not be denied the opportunity *584 for public employment because he had exercised his First Amendment rights. And in Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, we held that a denial of a tax exemption unless one gave up his First Amendment rights was an abridgment of Fourteenth Amendment rights.

As we held in Speiser v. Randall, supra, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. '(T)he 'protection of the individual against arbitrary action' . . . (is) the very essence of due process,' Slochower v. Board of Higher Education, 350 U.S. 551, 559, 76 S.Ct. 637, 641, 100 L.Ed. 692, but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such 'arbitrary action.'

**2713 Moreover, where 'important interests' of the citizen are implicated (Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90) they are not to be denied or taken away without due process. Ibid. Bell v. Burson involved a driver's license. But also included are disqualification for unemployment compensation (Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965), discharge from public employment (Slochower v. Board of Education, supra), denial of tax exemption (Speiser v. Randall, supra), and withdrawal of welfare benefits (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287). And see Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515. We should now add that nonrenewal of a teacher's contract, whether or not he has tenure, is an entitlement of the same importance and dignity.

Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, is not opposed. It held that a cook employed in a cafeteria in a military installation was not entitled to a hearing prior *585 to the withdrawal of her access to the facility. Her employer was prepared to employ her at another of its restaurants, the withdrawal was not likely to injure her reputation, and her employment opportunities elsewhere were not impaired. The Court held that the very limited individual interest in this one job did not outweigh the Government's authority over an important federal military establishment. Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.

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If this nonrenewal implicated the First Amendment, then Roth was deprived of constitutional rights because his employment was conditioned on a surrender of First Amendment rights; and, apart from the First Amendment, he was denied due process when he received no notice and hearing of the adverse action contemplated against him. Without a statement of the reasons for the discharge and an opportunity to rebut those reasons--both of which were refused by petitioners--there is no means short of a lawsuit to safeguard the right not to be discharged for the exercise of First Amendment guarantees.

The District Court held, 310 F.Supp., at 979--980:

'Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non- retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed ***586** time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.'

It was that procedure that the Court of Appeals approved. 446 F.2d, at 809--810. The Court of Appeals also concluded that though the s 1983 action was pending in court, the court should stay its hand until the academic procedures ****2714** had been completed. [FN1a] As stated by the Court of Appeals in Sindermann v. Perry, 430 F.2d 939 (CA5):

FN1a. Such a procedure would not be contrary to the well-settled rule that s 1983 actions do not require exhaustion of other remedies. See, e.g., Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 419 (1971); Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). One of the allegations in the complaint was that respondent was denied any effective sate remedy, and the District Court's staying its hand thus furthered rather than thwarted the purposes of s 1983.

'School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.' Id., at 944--945.

That is a permissible course for district courts to take, though it does not relieve them of the final determination ***587** whether nonrenewal of the teacher's contract was in retaliation for the exercise of First Amendment rights or a denial of due process.

Accordingly I would affirm the judgment of the Court of Appeals.

Mr. Justice MARSHALL, dissenting.

Respondent was hired as an assistant professor of political science at Wisconsin State University-Oshkosh for the 1968--1969 academic year. During the course of that year he was told that he would not be rehired for the next academic term, but he was never told why. In this case, he asserts that the Due Process Clause of the Fourteenth Amendment to the United States Constitution entitled him to a statement of reasons and a hearing on the University's decision not to rehire him for another year. [FN1] This claim was sustained by the District Court, which granted respondent summary judgment, 310 F.Supp. 972, and by the Court of Appeals which affirmed the judgment of the District Court. 446 F.2d 806. This Court today reverses the judgment of the Court of Appeals and rejects respondent's claim. I dissent.

FN1. Respondent has also alleged that the true reason for the decision not to rehire him was to punish him for certain statements critical of the University. As the Court points out, this issue is not before us the present time.

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While I agree with Part I of the Court's opinion, setting forth the proper framework for consideration of the issue presented, and also with those portions of Parts II and III of the Court's opinion that assert that a public employee is entitled to procedural due process whenever a State stigmatizes him by denying employment, or injures his future employment prospects severely, or whenever the State deprives him of a property *588 interest. I would go further than the Court does in defining the terms 'liberty' and 'property.'

The prior decisions of this Court, discussed at length in the opinion of the Court, establish a principle that is as obvious as it is compelling--i.e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory [FN2] or contractual [FN3] controls, a government employer is different. The government may only act fairly and reasonably.

FN2. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); 42 U.S.C. s 2000e.

FN3. Cf. Note, Procedural 'Due Process' in Union Disciplinary Proceedings, 57 Yale L.J. 1302 (1948).

**2715 This Court has long maintained that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.' Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Hughes, J.). See also Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). It has also established that the fact that an employee has no contract guaranteeing work for a specific future period does not mean that as the result of action by the government he may be 'discharged at any time, for any reason or for no reason.' Truax v. Raich, supra, 239 U.S., at 38, 36 S.Ct., at 9.

In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right that I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due process of law.' And it is also liberty--*589 liberty to work--which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment.

This Court has often had occasion to note that the denial of public employment is a serious blow to any citizen. See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185, 71 S.Ct. 624, 655, 95 L.Ed. 817 (1951) (Jackson, J., concurring); United States v. Lovett, 328 U.S. 303, 316--317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946). Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.

Mr. Justice Douglas has written that:

'It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.' Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S., at 179, 71 S.Ct., at 652 (concurring opinion).

And Mr. Justice Frankfurter has said that '(t)he history of American freedom is, in no small measure, the *590 history of procedure.' Malinski v. New York, 324 U.S. 401, 414, 65 S.Ct. 781, 787, 89 L.Ed. 1029 (1945) (separate opinion). With respect to occupations controlled by the government, one lower court has said that '(t)he public has the right to expect its officers . . . to make adjudications

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on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.' Hornsby v. Allen, 326 F.2d 605, 610 (CA5 1964).

We have often noted that procedural due process means many different things in the numerous contexts in which it applies. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). Prior decisions have held that an applicant for admission to practice as an attorney before the United States Board of Tax Appeals may not be rejected without a statement of reasons **2716 and a chance for a hearing on disputed issues of fact; [FN4] that a tenured teacher could not be summarily dismissed without notice of the reasons and a hearing; [FN5] that an applicant for admission to a state bar could not be denied the opportunity to practice law without notice of the reasons for the rejection of his application and a hearing; [FN6] and even that a substitute teacher who had been employed only two months could not be dismissed merely because she refused to take a loyalty oath without an inquiry into the specific facts of her case and a hearing on those in dispute. [FN7] I would follow these cases and hold that respondent was denied due process when his contract was not renewed and he was not informed of the reasons and given an opportunity to respond.

FN4. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926).

FN5. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).

FN6. Willner v. Committee on Character, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963).

FN7. Connell v. Higginbotham, 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971).

*591 It may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden on the machinery of government. Cf. Goldberg v. Kelly, supra. The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever an application for employment is denied, an employee is discharged, or a decision not to rehire an employee is made, there should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action.

Where there are numerous applicants for jobs, it is likely that few will choose to demand reasons for not being hired. But, if the demand for reasons is exceptionally great, summary procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely when it is most necessary.

It might also be argued that to require a hearing and a statement of reasons is to require a useless act, because a government bent on denying employment to one or more persons will do so regardless of the procedural hurdles that are placed in its path. Perhaps this is so, but a requirement of procedural regularity at least renders arbitrary action more difficult. Moreover, proper procedures will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error. 'Experience teaches . . . that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits *592 from occurring.' Silver v. New York Stock Exchange, 373 U.S. 341, 366, 83 S.Ct. 1246, 1262, 10 L.Ed.2d 389 (1963). When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful, and correct.

Professor Gellhorn put the argument well:

'In my judgment, there is no basic division of interest between the citizenry on the one hand and officialdom on the other. Both should be interested equally in the quest for procedural safeguards. I echo the late Justice Jackson in saying: 'Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice'--blunders which are **2717 likely to occur when reasons need not be given and

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when the reasonableness and indeed legality of judgments need not be subjected to any appraisal other than one's own. . . .' Summary of Colloquy on Administrative Law, 6 J. Soc. Pub. Teachers of Law, 70, 73 (1961).

Accordingly, I dissent.

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Michael J. CODD, Police Commissioner, City of New York, et al., Petitioners,
v.
Elliott H. VELGER.

No. 75-812.

Supreme Court of the United States

Feb. 22, 1977.

Former probationary city police officer brought civil rights action, alleging that he was entitled to a hearing prior to dismissal due to the stigmatizing effect of certain material placed by the police department in his personnel file and seeking damages on the grounds that the derogatory information had caused his dismissal from a subsequent job and prevented him from finding other employment. The United States District Court for the Southern District of New York rendered judgment adverse to the former officer, but the Court of Appeals for the Second Circuit reversed. 525 F.2d 334. On certiorari, the Supreme Court held that, because the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely to provide the person an opportunity to clear his name, where the officer did not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him and a hearing was thus not required.

Judgment of Court of Appeals reversed with instructions to reinstate judgment of District Court.

Mr. Justice Blackmun filed a concurring opinion.

Mr. Justice Brennan, with whom Mr. Justice Marshall joined, filed a dissenting opinion.

Mr. Justice Stevens filed a dissenting opinion.

Mr. Justice Stewart filed a dissenting opinion.

[1] MUNICIPAL CORPORATIONS ⚷218(8)
268k218(8)
Nontenured city employee was not entitled to hearing prior to dismissal due to stigmatizing effect of certain material placed in his personnel file where employee did not challenge substantial truth of material in question, because hearing required where nontenured employee has been stigmatized in course of decision to terminate his employment is solely to provide that person an opportunity to clear his name and, if he does not challenge substantial truth of material in question, no hearing would afford promise of achieving that result for him. U.S.C.A.Const. Amend. 14; 42 U.S.C.A. § 1983.

[2] MUNICIPAL CORPORATIONS ⚷218(8)
268k218(8)
Where city employee has no Fourteenth Amendment property interest in continued employment, adequacy or even existence of reasons for failing to rehire him present no federal constitutional question, but only if employer creates and disseminates false and defamatory impression about employee in connection with his termination is such hearing required. U.S.C.A.Const. Amend. 14; 42 U.S.C.A. § 1983.

***624 **882** PER CURIAM.

Respondent Velger's action shifted its focus, in a way not uncommon to lawsuits, from the time of the filing of his complaint in the United States District Court for the Southern District of New York to the decision by the Court of Appeals for the Second Circuit which we review here. His original complaint alleged that he had been wrongly dismissed without a hearing or a statement of reasons from his position as a patrolman with the New York City Police Department, and under 42 U.S.C. s 1983, sought reinstatement and damages for the resulting injury to his reputation and future employment prospects. After proceedings in ***625** which Judge Gurfein (then of the District Court) ruled that respondent had held a probationary position and therefore had no hearing right based on a property interest in his job, respondent filed an amended ****883** complaint. That complaint alleged more specifically than had the previous one that respondent was entitled to a hearing due to the stigmatizing effect of certain material placed by the City Police Department in his personnel file. He alleged that the derogatory material had brought about his subsequent dismissal from a position with the Penn-Central Railroad Police Department, and that it had also prevented him from finding other

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employment of a similar nature for which his scores on numerous examinations otherwise qualified him. [FN1]

FN1. Respondent's amended complaint did not seek a delayed Roth hearing to be conducted by his former employer at which he would have the opportunity to refute the charge in question. Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972). The relief he sought was premised on the assumption that the failure to accord such a hearing when it should have been accorded entitled him to obtain reinstatement and damages resulting from the denial of such hearing. We therefore have no occasion to consider the allocation of the burden of pleading and proof of the necessary issues as between the federal forum and the administrative hearing where such relief is sought.

The case came on for a bench trial before Judge Werker, who, in the words of his opinion on the merits, found "against plaintiff on all issues." He determined that the only issue which survived Judge Gurfein's ruling on the earlier motions was whether petitioners, in discharging respondent had "imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities." After discussing the evidence bearing upon this issue, Judge Werker concluded that "(i)t is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants."

Among the specific findings of fact made by the District Court was that an officer of the Penn-Central Railroad *626 Police Department was shown the City Police Department file relating to respondent's employment, upon presentation of a form signed by respondent authorizing the release of personnel information. From an examination of the file, this officer "gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt." The Penn-Central officer tried to verify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In rendering judgment against the respondent, the court also found that he had failed to establish "that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers."

Respondent successfully appealed this decision to the Court of Appeals for the Second Circuit. That court held that the finding of no stigma was clearly erroneous. It reasoned that the information about the apparent suicide attempt was of a kind which would necessarily impair employment prospects for one seeking work as a police officer. It also decided that the mere act of making available personnel files with the employee's consent was enough to place responsibility for the stigma on the employer, since former employees had no practical alternative but to consent to the release of such information if they wished to be seriously considered for other employment. Velger v. Cawley, 525 F.2d 334 (1975).

We granted certiorari, sub nom. Cawley v. Velger, 427 U.S. 904, 96 S.Ct. 3188, 49 L.Ed.2d 1197 (1976), and the parties have urged us to consider whether the report in question was of a stigmatizing nature, and whether the circumstances of its apparent dissemination were such as to fall within the language of Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) and Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). We find it unnecessary to reach these issues, however, because of respondent's failure to allege or prove one essential element of his case.

*627 Assuming all of the other elements necessary to make out a claim of stigmatization under Roth and Bishop, the remedy mandated by the Due Process Clause of the **884 Fourteenth Amendment is "an opportunity to refute the charge." 408 U.S., at 573, 92 S.Ct., at 2707. "The purpose of such notice and hearing is to provide the person an opportunity to clear his name," id., at 573 n. 12, 92 S.Ct., at 2707. But if the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation. Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report of the apparent suicide attempt was substantially false. Neither the District Court nor the Court of Appeals made any such finding. When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation or finding is fatal to respondent's claim under the Due Process Clause that he should have been given a hearing.

Where the liberty interest involved is that of

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conditional freedom following parole, we have said that the hearing required by the Due Process Clause in order to revoke parole must address two separate considerations. The first is whether the parolee in fact committed the violation with which he is charged, and the second is whether if he did commit the act his parole should, under all the circumstances, therefore be revoked. Morrissey v. Brewer, 408 U.S. 471, 479-480, 92 S.Ct. 2593, 2599, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 784, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973). The fact that there was no dispute with respect to the commission of the act would not necessarily obviate the need for a hearing on the issue of whether the commission of the act warranted the revocation of parole.

[1][2] (1, 2) But the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth *628 of the material in question, no hearing would afford a promise of achieving that result for him. For the contemplated hearing does not embrace any determination analogous to the "second step" of the parole revocation proceeding, which would in effect be a determination of whether or not, conceding that the report were true, the employee was properly refused re-employment. Since the District Court found that respondent had no Fourteenth Amendment property interest in continued employment, [FN2] the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question. Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required. Roth, supra; Bishop, supra.

FN2. The Court of Appeals did not pass on this "property interest" question. Respondent has not urged it as an alternative basis for affirming the judgment of that court, and indeed has all but conceded in his brief that the District Court's interpretation of the relevant New York cases is correct in this respect. Brief for Respondent 14. The opinion of the District Court on this point reflects a proper understanding of Roth, supra, and of Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), and we see no reason to disturb its application of those cases to particular facets of the New York law of entitlement to public job tenure. Id., at 602 n. 7, 92 S.Ct., at 2700 n. 7.

Our decision here rests upon no overly technical application of the rules of pleading. Even conceding that the respondent's termination occurred solely because of the report of an apparent suicide attempt, a proposition which is certainly not crystal clear on this record, respondent has at no stage of this litigation affirmatively stated that the "attempt" did not take place as reported. The furthest he has gone is a suggestion by his counsel that "i(t) might have been all a mistake, (i)t could also have been a little horseplay." This is not enough to raise an issue about the substantial accuracy of the report. Respondent has therefore made out no claim under the Fourteenth Amendment that he was harmed by the denial of a hearing, even were we to **885 accept in its entirety *629 the determination by the Court of Appeals that the creation and disclosure of the file report otherwise amounted to stigmatization within the meaning of Board of Regents v. Roth, supra.

The judgment of the Court of Appeals is reversed with instructions to reinstate the judgment of the District Court.

So ordered.

Mr. Justice BLACKMUN, concurring.

I join the Court's per curiam opinion, but I emphasize that in this case there is no suggestion that the information in the file, if true, was not information of a kind that appropriately might be disclosed to prospective employers. We therefore are not presented with a question as to the limits, if any, on the disclosure of prejudicial, but irrelevant, accurate information.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

I dissent from today's holding substantially for the reasons expressed by my Brother STEVENS in Part I of his dissent, despite my belief that the Court's ruling is likely to be of little practical importance.

Respondent alleged that he suffered deprivation of his liberty when petitioners terminated his employment and retained stigmatizing information in his employment file, information later disseminated

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to a prospective employer. Under Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), respondent therefore was entitled to a timely pretermination hearing. The Court today reaffirms Roth, but holds that respondent's retrospective claim for damages and equitable relief under 42 U.S.C. s 1983 must be denied because "at no stage of this litigation," [FN1] ante, at 884, has he "raise(d) an issue *630 about the substantial accuracy of the report" in question. [FN2] Ibid. That holding, I believe, erroneously allocates the burden of introducing truth or falsity into the lawsuit.

FN1. The Court fortunately makes clear that it is not calling for an "overly technical application of the rules of pleading." Ante, at 884. Indeed, there may be instances where a plaintiff reasonably cannot be held responsible for failing to plead falsity in his complaint. For example, in this instance, respondent cannot be faulted for his failure to plead falsity, since his complaint alleged that he "does not know the contents of his personnel file and has never seen or been advised of any derogatory matter placed in his file." App. 51a. Thus, his undoing occurred, according to the Court, in the later "stage(s) of this litigation," when he learned of the specific contents of the employment file but made little effort "to raise an issue about the substantial accuracy of the report." Ante, at 884.

FN2. Respondent has never argued that the disseminated information, while truthful, was not properly informative of his role as policeman or employee. As Mr. Justice BLACKMUN notes, ante, at 885, the Court's opinion, therefore, does not address and does not foreclose the question of whether the Constitution imposes separate constraints upon the collection and dissemination of stigmatizing information that bears only an attenuated relationship to one's job performance or qualifications.

Twice before this Term we have reasserted the principle that once a plaintiff establishes that another has interfered with his constitutional rights, the burden shifts to the wrongdoer to demonstrate that any such interference was strictly harmless. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 555, 270-271, 97 S.Ct. 555, 566, 50 L.Ed.2d 450; Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471. In this case respondent met his initial burden, for he adequately alleged that he has suffered injury to his reputation and job prospects in conjunction with a discharge from public employment, and that petitioners failed to comply with Roth's resulting requirement of a due process hearing. I agree that the District Court remains open to a determination that petitioners' denial of respondent's due process rights produced little [FN3] or no **886 compensable injury, since, even had the *631 hearing properly been held, the stigmatizing charges would have remained unrefuted. But any such allegation and proof of truthful material properly is a defense to be raised by the defendant wrongdoer subject, of course, to appropriate disposition of the case by way of summary judgment should the employee thereupon fail to contest the "substantial accuracy of the report." Since petitioners interposed no such defense in this case, respondent's due process claim should be upheld.

FN3. A determination of truthful material would preclude an award of damages for false stigmatization of plaintiff's reputation. Nonetheless, because of petitioners' failure to satisfy Roth's requirement of a pretermination due process hearing, respondent still would have suffered deprivation of an established constitutional right. As with any infringement of an intangible constitutional right, e. g., Nixon v. Herndon, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927) (damages allowable for unlawful denial of the right to vote), a jury should be permitted to decide whether to fix and award damages perhaps only nominal for the very denial of a timely due process forum where a stigmatized individual could participate in the process of attempting to clear his name.

I also agree with Part III of Mr. Justice STEVENS' dissenting opinion, and I would therefore remand this case to the Court of Appeals for further proceedings.

Mr. Justice STEWART, dissenting.

Although sharing generally the views expressed in the Court's opinion, I agree with Part III of Mr. Justice STEVENS' dissenting opinion, and I would for that reason remand this case to the Court of Appeals for further proceedings.

Mr. Justice STEVENS, dissenting.

There are three aspects of the Court's disposition of

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this case with which I disagree. First, I am not persuaded that a person who claims to have been "stigmatized" by the State without being afforded due process need allege that the charge against him was false in order to state a cause of action under 42 U.S.C. s 1983. Second, in my opinion the Court should not assume that this respondent was stigmatized, because the District Court's contrary finding was not ***632** clearly erroneous. Third, I would remand the case to the Court of Appeals to consider the claim that respondent had a property interest in his job, since that court did not decide this issue.

I

The Court holds that respondent's failure to allege falsity negates his right to damages for the State's failure to give him a hearing. This holding does not appear to rest on the view that a discharged employee has no right to a hearing unless the charge against him is false. [FN1] If it did, it would represent a radical departure from a principle basic to our legal system the principle that the guilty as well as the innocent are entitled to a fair trial. [FN2] It would also be a departure from Board of Regents v. Roth, 408 U.S. 564, 572-575, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548. In that case the Court concluded that a person is deprived of liberty when the State's refusal to rehire him destroys his "good name" in the community or forecloses him from practicing his ***633** profession. ****887** A hearing may establish that such a deprivation of liberty is warranted because the charges are correct. But Bishop v. Wood, 426 U.S. 341, 349, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684, makes it clear that the truth or falsity of the charge "neither enhances nor diminishes (the employee's) claim that his constitutionally protected interest in liberty has been impaired." If the charge, whether true or false, involves a deprivation of liberty, due process must accompany the deprivation. And normally, as Roth plainly states, the Constitution mandates "a full prior hearing." 408 U.S. at 574, 92 S.Ct. at 2707. [FN3]

FN1. The Court indicates, ante, at 883 n. 1, that its holding is premised on the form of relief sought. If falsity were a precondition to the existence of a constitutional violation, the form of relief would be irrelevant. For to grant any relief, the federal court would first have to determine that a violation had occurred, which would in turn require a finding of falsity. I recognize that there is authority for the view that falsity is an element of the violation. See Sims v. Fox, 505 F.2d 857, 863-864 (CA5 1974) (en banc), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678. Cf. Paul v. Davis, 424 U.S. 693, 709-710, 96 S.Ct. 1155, 1164-1165, 47 L.Ed.2d 405 (describing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, as involving government "defamation").

FN2. "When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension.
"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Anti-Fascist Committee v. McGrath, 341 U.S. 123, 179, 71 S.Ct. 624, 652, 95 L.Ed. 817 (Douglas, J., concurring).

FN3. As I read Part II of Roth, supra, at 572-575, 92 S.Ct., at 2706- 2708, which discusses the kind of "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment, there are two quite different interests which may be implicated when a nontenured employee is discharged. First, the Court, 408 U.S., at 573, 92 S.Ct., at 2707, considers the individual's interest in " 'good name, reputation, honor, or integrity.' " It is with respect to this reputational interest that the Court indicates, id., at 573 n. 12, 92 S.Ct., at 2707, that a name-clearing hearing is constitutionally required. That footnote does not tell us whether that hearing must precede the injury to reputation, and surely does not imply that such a hearing is the only remedy available to an employee whose constitutional right to due process has been violated.
Second, in the ensuing paragraphs, the Roth opinion considers the individual interest in avoiding "a stigma or other disability" that forecloses employment opportunities. With respect to this interest, the Court rather clearly indicates, id., at 574, 92 S.Ct., at 2707, that no such stigma may be imposed without a "full prior hearing."

This hearing must include consideration of whether the charge, if true, warrants discharge. The discharge itself is part of the deprivation of liberty against which the employee is entitled to defend. Release of unfavorable information can damage an

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employee's reputation and employment prospects, but far greater injury is caused by an official determination, based on such information, that the employee is unfit for public employment. Indeed the Court has held that an injury to reputation had not resulted in a deprivation of liberty because it was not associated with the termination of *634 employment. Paul v. Davis, 424 U.S. 693, 709-710, 96 S.Ct. 1155, 47 L.Ed.2d 405. Since allowing the employee to keep his job would eliminate (or at least lessen) the loss of liberty, due process requires that the hearing include the issue whether the facts warrant discharge. [FN4] In short, the purpose of the hearing, as is true of any other hearing which must precede a deprivation of liberty, is two-fold: First, to establish the truth or falsity of the charge, and second, to provide a basis for deciding what action is warranted by the facts. [FN5] Even when it is perfectly clear that the charge is true, the Constitution requires that procedural safeguards be observed. Cf. Groppi v. Leslie, 404 U.S. 496, 503, 92 S.Ct. 582, 586, 30 L.Ed.2d 632. For these reasons, I disagree with the Court's assertion that the purpose of the hearing is "solely" to provide **888 the person with an opportunity to clear his name. [FN6]

FN4. Similarly, since disclosure of the charges is also part of the deprivation of liberty, Bishop v. Wood, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684, the hearing could properly include the issue whether the charges should remain confidential, or whether the written record should at least be modified to reflect a less one-sided description of the events.

FN5. The Court states, ante, at 884:
"Where the liberty interest involved is that of conditional freedom following parole, we have said that the hearing required by the Due Process Clause in order to revoke parole must address two separate considerations. The first is whether the parolee in fact committed the violation with which he is charged, and the second is whether if he did commit the act his parole should, under all the circumstances, therefore be revoked. Morrissey v. Brewer, 408 U.S. 471, 479-480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Gagnon v. Scarpelli, 411 U.S. 778, 784, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656 (1973). The fact that there was no dispute with respect to the commission of the act would not necessarily obviate the need for a hearing on the issue of whether the commission of the act warranted the revocation of parole."
This reasoning is equally applicable to a decision to revoke a person's employment for a stigmatizing reason. The fact that there is no dispute with respect to the commission of the act involved does not necessarily obviate the need for a hearing on the issue of whether employment should be terminated.

FN6. The Court states, ibid., that "the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely 'to provide the person an opportunity to clear his name.' " (Emphasis added.) Earlier, on p. 883, the Court states: "Assuming all of the other elements necessary to make out a claim of stigmatization under Roth and Bishop, the remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge.' 408 U.S., at 573, 92 S.Ct., (2701,) at 2707." Of course, in neither Roth nor Bishop did the Court state or imply that a name-clearing hearing was the only remedy mandated by the Constitution.

*635 Even if I agreed with the Court that this was the sole purpose of the hearing, I could not agree with its holding that failure to demonstrate falsity is fatal to the employee's suit. Surely the burden should be on the State to show that failure to provide due process was harmless error because the charges were true. See Mr. Justice BRENNAN's dissent, ante, p. 885. [FN7] Moreover, failure to provide a hearing might give rise to damages unrelated to the possible outcome of the hearing. [FN8]

FN7. The Court's contrary approach would produce perverse results when the relief sought by the plaintiff includes an administrative hearing. To establish his right to such relief, the plaintiff would have to plead and presumably prove that the charges against him are false. But once it is established that the charges are false, there is no longer any reason to hold an administrative hearing on that subject.
This problem is squarely presented by this case because respondent did request such a hearing. At trial, respondent's counsel made the following statement:
"And therefore, he should be reinstated and he should be given a full hearing, an adversary hearing." App. 93a.
Under modern trial practice, no more formal request was necessary. The amended complaint had requested a declaratory judgment that "the action of defendants in terminating plaintiff's employment without charges and without a hearing (was) in violation of the Constitution . . ." and had sought

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"such additional alternative relief as may seem to this Court to be just, proper and equitable." Id., at 55a-56a. And, of course, Fed.Rule Civ.Proc. 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

FN8. See Judge Tone's thoughtful discussion of this problem in Hostrop v. Board of Junior College Dist. 515, 523 F.2d 569, 578-580 (CA7 1975).

*636 Today's holding may have the unfortunate effect of encouraging public officials to deny hearings when they feel confident of the correctness of their decision. But, in Mr. Justice Frankfurter's oft-quoted words:

"That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." Anti-Fascist Committee v. McGrath, 341 U.S. 123, 171-172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (concurring opinion).

As the last sentence in this quotation demonstrates, if state action has consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty, it is essential that fair procedures be followed for reasons that have nothing to do with the merits of the individual case. Today's holding is only a minor impairment of this principle. But the principle is one that admits of no compromise.

II

Although the plaintiff does not have the burden of proving that he was discharged for a false reason, if he claims that the discharge deprived him of liberty, he does have the burden of proving that he was stigmatized. The District Court found that respondent did not meet that burden in this case. Under the proper standard of appellate **889 review, [FN9] I cannot say that *637 finding was clearly erroneous, particularly when the record discloses that the respondent did not prove exactly what the unfavorable information in his file was, or exactly what information was disseminated to others.

FN9. The general principle governing review of a District Court's findings of fact is clear:

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate court's must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)." Zenith Corp. v. Hazeltine, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129.

The District Court found that unfavorable information from respondent's police record reached a prospective employer in only one instance. In that instance, a private employer was allowed to see the file with respondent's permission. The private employer then discharged respondent, who was on probationary status. The District Court expressly found that no information was released to any government agency to which respondent had applied. App. 113a-114a. [FN10] Thus, as far *638 as the past effects of the unfavorable file are concerned, we have only the finding that one employer discharged respondent on the basis of the information. This does not in itself constitute a "stigma" as that term is used in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. [FN11]

FN10. The Court of Appeals found "every indication" that respondent would have obtained a job except for the contents of his file. Velger v. Cawley, 525 F.2d 334, 335 (CA2 1975). Apart from the one instance of disclosure found by the District Court, this conclusion seems to have been based on an incident in which respondent was told he would be hired if his character investigation was satisfactory, and on the fact that he had passed numerous civil service examinations and received several job interviews but no jobs. The incident

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referred to by the Court of Appeals proves nothing about the effect of the contents of the file, since respondent testified that he refused to give that employer permission to inspect the file. App. 81a. The fact that respondent was unsuccessful in obtaining a job, despite numerous attempts, good examination scores, and several interviews, does not prove that he was stigmatized by information in his file since the District Court found that those employers had not had access to the file. Entirely apart from the file, there may have been factors which made respondent less attractive to employers than other available applicants.

FN11. Roth recognizes two types of stigma. See n. 3, supra. First, the State's action "might seriously damage (the employee's) standing and associations in his community." 408 U.S., at 573, 92 S.Ct., at 2707. The release of information to a single employer at the employee's request can hardly be considered an injury to the employee's community standing. Second, the State's action might have the effect of "foreclos(ing) his freedom to take advantage of other employment opportunities." Ibid. It is not enough, however, to make him "somewhat less attractive to some other employers," for that "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' " Id., 408 U.S. at 574 n. 13, 92 S.Ct. at 2708. The fact that one employer considered the information a bar to employment does not necessarily mean that most other employers would have the same reaction. In short, on the basis of the entire record the District Court could find that this single incident of disclosure and its aftermath do not establish a sufficiently grievous harm to reputation to constitute a deprivation of liberty.

The Court of Appeals also relied on the nature of the information itself as demonstrating that future release to employers would bar respondent from obtaining employment. Velger v. Cawley, 525 F.2d 334, 336 (CA2 1975). Notwithstanding the broad discovery authorized by the Federal Rules of Civil Procedure, respondent failed to prove precisely what adverse information was in his personnel file. The revolver incident occurred sometime before respondent's 21st birthday, when he was still a trainee; as his counsel points out, it might well have been "a little horseplay"; and his subsequent conduct as a police officer was **890 presumably good. There was no finding that the revolver incident was the official reason for discharge. [FN12] On this record, it cannot be said as a matter of law *639 that prospective employers would reject respondent's attempts to explain this incident and would uniformly refuse to hire him.

FN12. The District Court did find that a private employer who inspected the file had "gleaned" from the file that this was the reason for the discharge.

In the performance of our appellate function "(i)t is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' " United States v. Real Estate Boards, 339 U.S. 485, 495-496, 70 S.Ct. 711, 717, 94 L.Ed. 1007.

I conclude that the Court of Appeals was incorrect in setting aside the District Court's findings of fact. Since those findings do not establish the existence of a stigma, the Court of Appeals erred in holding on this basis that a hearing was required.

III

It is possible, however, that a hearing was required because the discharge deprived respondent of a property interest. The District Court rejected the claim that he had an entitlement to his job as a matter of state law, but the Court of Appeals found it unnecessary to reach this issue. I believe there is enough merit to the property claim to justify a remand to the Court of Appeals with directions to consider it.

In Bishop v. Wood, the plaintiff's job was "terminable at the will of either party irrespective of the quality of performance by the other party." 426 U.S., at 345 n. 9, 96 S.Ct., at 2078, and accompanying text. There was no right to state judicial review. In this case, however, the state law may afford the employee some protection against arbitrary discharge. According to the state case cited by Judge Gurfein, App. 37a, the Police Commissioner may terminate only "unsatisfactory employee(s)," [FN13] and his determination is reviewable in the *640 state courts on an "arbitrary and capricious" standard. In re Going v. Kennedy, 5 A.D.2d 173, 176-177, 170 N.Y.S.2d 234, 237-238 (1958), aff'd, 5 N.Y.2d 900, 183 N.Y.S.2d 81, 156 N.E.2d 711 (1959); see In re Talamo v. Murphy, 38

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N.Y.2d 637, 382 N.Y.S.2d 3, 345 N.E.2d 546 (1976). [FN14] Unlike Bishop, in which a hearing would have been pointless because nothing plaintiff could prove would entitle him to keep his job, in this case the plaintiff may have had a right to continued employment if he could rebut the charges against him. [FN15]

FN13. In Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15, the employee could be discharged only for " 'such cause as will promote the efficiency of (the) service,' " id., at 151-152, 94 S.Ct., at 1643 (opinion of Rehnquist, J.). Six Members of the Court were satisfied that that standard was sufficient to create an entitlement protected by the Due Process Clause. This respondent had a right to keep his job if he proved "satisfactory." I do not know whether the difference between Kennedy's entitlement and this respondent's is of constitutional dimensions, but the similarity to Arnett is sufficient to justify a remand.

FN14. In re Going v. Kennedy, the Appellate Division noted that the appointing officer had been delegated the authority to terminate "unsatisfactory employee(s)," and compared the probation period to an additional employment test designed to determine whether an employee is "able to meet all requirements or expectations in filling the position." 5 A.D.2d, at 178, 170 N.Y.S.2d at 239. The New York Court of Appeals, citing Going with approval, applied the "arbitrary and capricious" standard in Talamo to determine whether there was a "rational basis" for the police commissioner's decision to discharge a probationary police officer. 38 N.Y.2d, at 639, 382 N.Y.S.2d, at 4, 345 N.E.2d, at 547. See also In re Farrell v. New York City Police Dept., 44 A.D.2d 782, 355 N.Y.S.2d 99 (1974), aff'd, 37 N.Y.2d 843, 378 N.Y.S.2d 35, 340 N.E.2d 469 (1975).

FN15. Cf. Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570:

"A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Even if respondent's entitlement is a sufficient property interest to trigger due process, he is not necessarily entitled to an elaborate adversary hearing. "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484. But at least respondent would be entitled to notice of the charge against him and an opportunity to respond, if only in writing.

***641 **891** By directing the Court of Appeals to reinstate the District Court judgment, the Court summarily rejects this claim without the benefit of briefing or oral argument on the point. [FN16] I would remand the case to the Court of Appeals for consideration of this claim.

FN16. Respondent did not abandon that claim in this Court. The portion of his brief cited by the majority, ante, at 884 n. 2, concerns the issue whether state law itself requires a hearing, see Brief for Respondent 14; this is an entirely different issue than whether state law creates a sufficient entitlement to trigger a federal right to a hearing. To preserve his right to a remand, the party prevailing below need not argue the merits of claims the lower court failed to reach. See generally Dandridge v. Williams, 397 U.S. 471, 475-476, n. 6, 90 S.Ct. 1153, 1156-1157, 25 L.Ed.2d 491.

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James E. GILBERT, President, East Stroudsburg University, et al., Petitioners,
v.
Richard HOMAR.

No. 96-651.

Supreme Court of the United States

Argued March 24, 1997.

Decided June 9, 1997.

State university employee, who had been suspended without pay following his arrest on drug-related charges, brought action against university officials alleging due process violations. The United States District Court for the Middle District of Pennsylvania, Thomas I. Vanaskie, J., entered summary judgment in favor of employer and officials. Employee appealed. The Court of Appeals for the Third Circuit, 89 F.3d 1009, Sarokin, Circuit Judge, reversed as to issue of pre-suspension hearing, and certiorari was granted. Employer appealed. The Supreme Court, Justice Scalia, held that employee was not entitled under due process clause to notice and hearing prior to his suspension without pay based on his arrest on drug-related charges.

Reversed and remanded.

[1] CONSTITUTIONAL LAW ⚷278.4(1)
92k278.4(1)
Protections of due process clause apply to government deprivation of those perquisites of government employment in which employee has constitutionally protected property interest. U.S.C.A. Const.Amends. 5, 14.

[2] CONSTITUTIONAL LAW ⚷277(2)
92k277(2)
Public employees who can be discharged only for cause have constitutionally protected property interest in their tenure and cannot be fired without due process. U.S.C.A. Const.Amends. 5, 14.

[2] CONSTITUTIONAL LAW ⚷278.4(3)
92k278.4(3)
Public employees who can be discharged only for cause have constitutionally protected property interest in their tenure and cannot be fired without due process. U.S.C.A. Const.Amends. 5, 14.

[3] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
Public employee dismissable only for cause is entitled under due process clause to a very limited hearing prior to termination, to be followed by a more comprehensive post-termination hearing. U.S.C.A. Const.Amends. 5, 14.

[4] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
Pretermination hearing granted to tenured public employee, as required by due process clause, should be initial check against mistaken decisions, that is, it should be essentially a determination of whether there are reasonable grounds to believe that charges against employee are true and support the proposed action. U.S.C.A. Const.Amends. 5, 14.

[5] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
To comply with due process clause, pretermination process involving tenured public employee need only include oral or written notice of charges, explanation of employer's evidence, and opportunity for employee to tell his or her side of the story. U.S.C.A. Const.Amends. 5, 14.

[6] OFFICERS AND PUBLIC EMPLOYEES ⚷72.16(1)
283k72.16(1)
There is no absolute rule that governmental employer may not suspend employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing employee with notice and opportunity to be heard. U.S.C.A. Const.Amends. 5, 14.

[7] CONSTITUTIONAL LAW ⚷251.1
92k251.1
Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. U.S.C.A. Const.Amends. 5, 14.

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[8] CONSTITUTIONAL LAW ⚷251.1
92k251.1
Due process is flexible and calls for such procedural protections as the particular situation demands. U.S.C.A. Const.Amends. 5, 14.

[8] CONSTITUTIONAL LAW ⚷251.5
92k251.5
Due process is flexible and calls for such procedural protections as the particular situation demands. U.S.C.A. Const.Amends. 5, 14.

[9] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
Where state must act quickly, or where it would be impractical to provide predeprivation process to public employee dismissable only for cause, postdeprivation process satisfies requirements of due process clause. U.S.C.A. Const.Amends. 5, 14.

[10] CONSTITUTIONAL LAW ⚷278(1.1)
92k278(1.1)
Due process does not always require state to provide hearing prior to initial deprivation of property. U.S.C.A. Const.Amends. 5, 14.

[11] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
An important government interest, accompanied by substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing opportunity to be heard until after the initial deprivation of public employee's property interest in employment. U.S.C.A. Const.Amends. 5, 14.

[12] CONSTITUTIONAL LAW ⚷251.1
92k251.1
To determine what process is constitutionally due, Supreme Court generally has balanced three distinct factors consisting of, first, private interest that will be affected by official action, second, risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards, and, third, government's interest. U.S.C.A. Const.Amends. 5, 14.

[12] CONSTITUTIONAL LAW ⚷251.5
92k251.5
To determine what process is constitutionally due, Supreme Court generally has balanced three distinct factors consisting of, first, private interest that will be affected by official action, second, risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards, and, third, government's interest. U.S.C.A. Const.Amends. 5, 14.

[13] COLLEGES AND UNIVERSITIES ⚷8.1(5)
81k8.1(5)
Police officer employed by state university was not entitled under due process clause to notice and hearing prior to his suspension without pay based on his arrest on drug-related charges; fact that officer had been arrested and charged served to assure that suspension decision was not baseless or unwarranted, officer's lost income was relatively insubstantial, and state had significant interest in immediately suspending employee who occupied position of great public trust and who had had felony charges filed against him. U.S.C.A. Const.Amend. 14.

[13] CONSTITUTIONAL LAW ⚷278.5(4)
92k278.5(4)
Police officer employed by state university was not entitled under due process clause to notice and hearing prior to his suspension without pay based on his arrest on drug-related charges; fact that officer had been arrested and charged served to assure that suspension decision was not baseless or unwarranted, officer's lost income was relatively insubstantial, and state had significant interest in immediately suspending employee who occupied position of great public trust and who had had felony charges filed against him. U.S.C.A. Const.Amend. 14.

[14] CONSTITUTIONAL LAW ⚷251.5
92k251.5
In determining what process is due, account must be taken of length and finality of deprivation. U.S.C.A. Const.Amends. 5, 14.

[15] CONSTITUTIONAL LAW ⚷278.4(5)
92k278.4(5)
Assuming that public employer had discretion not to suspend tenured public employee despite fact that employee had been arrested and charged with drug offense, existence of such discretion did not compel finding that employee was entitled under due process

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clause to opportunity to persuade employer of his innocence before decision to suspend him without pay was made. U.S.C.A. Const.Amends. 5, 14.

[15] OFFICERS AND PUBLIC EMPLOYEES ⚷72.16(1)
283k72.16(1)
Assuming that public employer had discretion not to suspend tenured public employee despite fact that employee had been arrested and charged with drug offense, existence of such discretion did not compel finding that employee was entitled under due process clause to opportunity to persuade employer of his innocence before decision to suspend him without pay was made. U.S.C.A. Const.Amends. 5, 14.

**1809 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*924 On August 26, 1992, while employed as a policeman at East Stroudsburg University (ESU), a Pennsylvania state institution, respondent was arrested by State Police and charged with a drug felony. Petitioners, ESU officials, suspended him without pay, effective immediately, pending their own investigation. Although the criminal charges were dismissed on September 1, his suspension remained in effect. On September 18, he was provided the opportunity to tell his side of the story to ESU officials. Subsequently, he was demoted to groundskeeper. He then filed suit under 42 U.S.C. § 1983, claiming, inter alia, that petitioners' failure to provide him with notice and a hearing before suspending him without pay violated due process. The District Court granted petitioners summary judgment, but the Third Circuit reversed.

Held: In the circumstances here, the State did not violate due process by failing to provide notice and a hearing before suspending a tenured public employee without pay. Pp. 1811-1815.

(a) In Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494, this Court held that before being fired a public employee dismissable only for cause was entitled to a limited pre-termination hearing, to be followed by a more comprehensive post-termination hearing. The Third Circuit erred in relying on dictum in Loudermill to conclude that a suspension without pay must also be preceded by notice and a hearing. Due process is flexible and calls for such procedural protections as the particular situation demands. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; FDIC v. Mallen, 486 U.S. 230, 240, 108 S.Ct. 1780, 1787-88, 100 L.Ed.2d 265. Pp. 1811-1812.

(b) Three factors are relevant in determining what process is constitutionally due: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18. Respondent asserts an interest in an uninterrupted paycheck; but account must be taken of the length and finality of the temporary deprivation of his pay. Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265. So long as a suspended employee receives a sufficiently prompt post-suspension hearing, the lost *925 income is relatively insubstantial, and fringe benefits such as health and life insurance are often not affected at all. On the other side of the balance, the State has a significant interest in immediately suspending employees charged with felonies, who occupy positions of public trust and visibility, such as police officers. While this interest could have been accommodated by suspending respondent with pay, the Constitution does not require the government to give an employee charged with a felony paid leave at taxpayer expense. The remaining Mathews factor is the most important in this case: The purpose of a pre-suspension hearing--to assure that there are reasonable grounds to support the suspension without pay, cf. Loudermill, supra, at 545-546, 105 S.Ct., at 1495--has already been assured by the arrest and the filing of charges. See FDIC, supra. That there may have been discretion not to suspend does not mean that respondent had to be given the opportunity to **1810 persuade officials of his innocence before the decision was made. See id., at 234-235, 108 S.Ct., at 1784- 1785. Pp. 1812-1814.

(c) Whether respondent received an adequately prompt post-suspension hearing should be considered by the Third Circuit in the first instance.

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Pp. 1814-1815.

89 F. 3d 1009, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Gwendolyn T. Mosley, Harrisburg, PA, for petitioners.

Ann Hubbard, for U.S. as amicus curiae, by special leave of the Court.

James V. Fareri, Stroudsburg, for Respondent.

Gregory O'Duden, Washington, DC, for National Treasury Employees Union as amicus curiae, by special leave of the Court.

For U.S. Supreme Court Briefs See:

1997 WL 58580 (Pet.Brief)

1997 WL 101641 (Resp.Brief)

1997 WL 55845 (Amicus.Brief)

1997 WL 58621 (Amicus.Brief)

1997 WL 63320 (Amicus.Brief)

1997 WL 65850 (Amicus.Brief)

1997 WL 88001 (Amicus.Brief)

1997 WL 96940 (Amicus.Brief)

1997 WL 101644 (Amicus.Brief)

1997 WL 101646 (Amicus.Brief)

1997 WL 106432 (Amicus.Brief)

For Transcript of Oral Argument See:

1997 WL 143823 (U.S.Oral.Arg.)

*926 Justice SCALIA delivered the opinion of the Court.

This case presents the question whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.

I

Respondent Richard J. Homar was employed as a police officer at East Stroudsburg University (ESU), a branch of Pennsylvania's State System of Higher Education. On August 26, 1992, when respondent was at the home of a family friend, he was arrested by the Pennsylvania State Police in a drug raid. Later that day, the state police filed a criminal complaint charging respondent with possession of marijuana, *927 possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony. The state police notified respondent's supervisor, University Police Chief David Marazas, of the arrest and charges. Chief Marazas in turn informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline ESU employees. Levanowitz suspended respondent without pay effective immediately. Respondent failed to report to work on the day of his arrest, and learned of his suspension the next day, when he called Chief Marazas to inquire whether he had been suspended. That same day, respondent received a letter from Levanowitz confirming that he had been suspended effective August 26 pending an investigation into the criminal charges filed against him. The letter explained that any action taken by ESU would not necessarily coincide with the disposition of the criminal charges.

Although the criminal charges were dismissed on September 1, respondent's suspension remained in effect while ESU continued with its own investigation. On September 18, Levanowitz and Chief Marazas met with respondent in order to give him an opportunity to tell his side of the story. Respondent was informed at the meeting that the state police had given ESU information that was "very serious in nature," Record, Doc. No. 26, p. 48, but he was not informed that that included a report of an alleged confession he had made on the day of his arrest; he was consequently unable to respond to damaging statements attributed to him in the police report.

In a letter dated September 23, Levanowitz notified respondent that he was being demoted to the position

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of groundskeeper effective the next day, and that he would receive backpay from the date the suspension took effect at the rate of pay of a groundskeeper. (Respondent eventually received backpay for the period of his suspension at the rate of pay of a university police officer.) The letter maintained *928 that the demotion was being imposed "as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own **1811 use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the [ESU] Police Department Manual." App. 82a. Upon receipt of this letter, the president of respondent's union requested a meeting with President Gilbert. The requested meeting took place on September 24, at which point respondent had received and read the police report containing the alleged confession. After providing respondent with an opportunity to respond to the charges, Gilbert sustained the demotion.

Respondent filed this suit under Rev. Stat. § 1979, 42 U.S.C. § 1983, in the United States District Court for the Middle District of Pennsylvania against President Gilbert, Chief Marazas, Levanowitz, and a Vice President of ESU, Curtis English, all in both their individual and official capacities. He contended, inter alia, that petitioners' failure to provide him with notice and an opportunity to be heard before suspending him without pay violated due process. The District Court entered summary judgment for petitioners. A divided Court of Appeals reversed the District Court's determination that it was permissible for ESU to suspend respondent without pay without first providing a hearing. 89 F.3d 1009 (1996). We granted certiorari. 519 U.S. ----, 117 S.Ct. 678, 136 L.Ed.2d 604 (1997).

II

[1][2] The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected "property" interest. Although we have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in *929 their tenure and cannot be fired without due process, see Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578, 92 S.Ct. 2701, 2709-2710, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 602-603, 92 S.Ct. 2694, 2700-2701, 33 L.Ed.2d 570 (1972), we have not had occasion to decide whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination. Petitioners, however, do not contest this preliminary point, and so without deciding it we will, like the District Court, "[a]ssum[e] that the suspension infringed a protected property interest," App. to Pet. for Cert. 59a, and turn at once to petitioners' contention that respondent received all the process he was due.

A

[3][4][5] In Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), we concluded that a public employee dismissable only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. Stressing that the pretermination hearing "should be an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," id., at 545-546, 105 S.Ct., at 1495, we held that pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, id., at 546, 105 S.Ct., at 1495. In the course of our assessment of the governmental interest in immediate termination of a tenured employee, we observed that "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." Id., at 544-545, 105 S.Ct., at 1495 (emphasis added; footnote omitted).

[6] Relying on this dictum, which it read as "strongly suggest[ing] that suspension without pay must be preceded by notice and an opportunity to be heard in all instances," 89 F.3d, at 1015 (emphasis added), and determining on its own that *930 such a rule would be "eminently sensible," id., at 1016, the Court of Appeals adopted a categorical prohibition: "[A] governmental employer may not suspend an employee without pay unless that suspension is

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preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." Ibid. Respondent (as well as most of his amici) makes no attempt to defend this absolute**1812 rule, which spans all types of government employment and all types of unpaid suspensions. Brief for Respondent 8, 12-13. This is eminently wise, since under our precedents such an absolute rule is indefensible.

[7][8][9][10][11] It is by now well established that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. See, e.g., United States v. James Daniel Good Real Property, 510 U.S. 43, 53, 114 S.Ct. 492, 500- 501, 126 L.Ed.2d 490 (1993); Zinermon v. Burch, 494 U.S. 113, 128, 110 S.Ct. 975, 984-985, 108 L.Ed.2d 100 (1990) (collecting cases); Barry v. Barchi, 443 U.S. 55, 64-65, 99 S.Ct. 2642, 2649-2650, 61 L.Ed.2d 365 (1979); Dixon v. Love, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172 (1977); North American Cold Storage Co. v. Chicago, 211 U.S. 306, 314-320, 29 S.Ct. 101, 103-106, 53 L.Ed. 195 (1908). Indeed, in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), we specifically noted that "we have rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property." 451 U.S., at 540, 101 S.Ct., at 1915. And in FDIC v. Mallen, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988), where we unanimously approved the Federal Deposit Insurance Corporation's suspension, without prior hearing, of an indicted private bank employee, we said: "An important government *931 interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." Id., at 240, 108 S.Ct., at 1787-1788. [FN1]

FN1. It is true, as respondent contends, that in Mallen we did not expressly state whether the bank president's suspension was with or without pay. But the opinion in Mallen recites no order from the FDIC, if it had authority to issue such an order, that the bank pay its president; only an order that the bank suspend its president's participation in the bank's affairs. Our opinion in Mallen certainly reflects the assumption that the suspension would be without pay. For example, in discussing the private interest at stake we considered "the severity of depriving someone of his or her livelihood." 486 U.S., at 243, 108 S.Ct., at 1789 (citing cases). And, Mallen argued to this Court that "denial of an income stream to underwrite these extraordinary expenses can be crucial, not only to Mallen's financial condition in general, but to his ability to pay for his criminal defense." Brief for Appellee in FDIC v. Mallen, O.T.1987, No. 87-82, pp. 7-8.

The dictum in Loudermill relied upon by the Court of Appeals is of course not inconsistent with these precedents. To say that when the government employer perceives a hazard in leaving the employee on the job it "can avoid the problem by suspending with pay" is not to say that that is the only way of avoiding the problem. Whatever implication the phrase "with pay" might have conveyed is far outweighed by the clarity of our precedents which emphasize the flexibility of due process as contrasted with the sweeping and categorical rule adopted by the Court of Appeals.

B

[12] To determine what process is constitutionally due, we have generally balanced three distinct factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural *932 safeguards; and finally, the Government's interest." Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). See also, e.g., Mallen, supra, at 242, 108 S.Ct., at 1788-1789; Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265 (1982).

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**1813 [13][14] Respondent contends that he has a significant private interest in the uninterrupted receipt of his paycheck. But while our opinions have recognized the severity of depriving someone of the means of his livelihood, see, e.g., Mallen, supra, at 243, 108 S.Ct., at 1789; Loudermill, 470 U.S., at 543, 105 S.Ct., at 1493-1494, they have also emphasized that in determining what process is due, account must be taken of "the length " and "finality of the deprivation." Logan, supra, at 434, 102 S.Ct., at 1157 (emphasis added). Unlike the employee in Loudermill, who faced termination, respondent faced only a temporary suspension without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all, Brief for United States as Amicus Curiae 18; Record, Doc. No. 19, p. 7.

On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers. Respondent contends that this interest in maintaining public confidence could have been accommodated by suspending him with pay until he had a hearing. We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him. ESU's interest in preserving public confidence in its police force is at least as significant as the State's interest in preserving the integrity of the sport of horse racing, see Barry v. Barchi, 443 U.S., at 64, 99 S.Ct., at 2649, *933 an interest we "deemed sufficiently important ... to justify a brief period of suspension prior to affording the suspended trainer a hearing," Mallen, 486 U.S., at 241, 108 S.Ct., at 1788.

The last factor in the Mathews balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and the likely value of any additional procedures. Petitioners argue that any presuspension hearing would have been worthless because pursuant to an Executive Order of the Governor of Pennsylvania a state employee is automatically to be suspended without pay "[a]s soon as practicable after [being] formally charged with ... a felony." 4 Pa.Code § 7.173 (1997). According to petitioners, supervisors have no discretion under this rule, and the mandatory suspension without pay lasts until the criminal charges are finally resolved. See Tr. of Oral Arg. 20. If petitioners' interpretation of this order is correct, there is no need for any presuspension process since there would be nothing to consider at the hearing except the independently verifiable fact of whether an employee had indeed been formally charged with a felony. See Codd v. Velger, 429 U.S. 624, 627-628, 97 S.Ct. 882, 883-884, 51 L.Ed.2d 92 (1977). Compare Loudermill, supra, at 543, 105 S.Ct., at 1493-1494. Respondent, however, challenges petitioners' reading of the Code, and contends that in any event an order of the Governor of Pennsylvania is a "mere directiv[e] which do[es] not confer a legally enforceable right." Brief for Respondent 20. We need not resolve this disputed issue of state law because even assuming the Code is only advisory (or has no application at all), the State had no constitutional obligation to provide respondent with a presuspension hearing. We noted in Loudermill that the purpose of a pre- termination hearing is to determine "whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action." 470 U.S., at 545-546, 105 S.Ct., at 1495. By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. *934 Cf. Mallen, 486 U.S., at 240, 108 S.Ct., at 1787-1788. But here that has already been assured by the arrest and the filing of charges.

In Mallen, we concluded that an "ex parte finding of probable cause" such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. Id., at **1814 240-241, 108 S.Ct., at 1787-1788. The same is true when an employee is arrested and then formally charged with a felony. First, as with an indictment, the arrest and formal charges imposed upon respondent "by an independent body demonstrat[e] that the suspension is not arbitrary." Id., at 244, 108 S.Ct., at 1790. Second, like an indictment, the imposition of felony charges "itself is an objective fact that will in most cases raise serious public concern." Id., at 244-245, 108 S.Ct., at 1790. It is true, as respondent argues,

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that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," id., at 240, 108 S.Ct., at 1788, in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

[15] Respondent further contends that since (as we have agreed to assume) Levanowitz had discretion not to suspend despite the arrest and filing of charges, he had to be given an opportunity to persuade Levanowitz of his innocence before the decision was made. We disagree. In Mallen, despite the fact that the FDIC had discretion whether to suspend an indicted bank employee, see 64 Stat. 879, as amended, 12 U.S.C. § 1818(g)(1); Mallen, supra, at 234-235, and n. 5, 108 S.Ct., at 1784-1785, and n. 5 we nevertheless did not believe that a presuspension hearing was necessary to protect the private interest. Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect," Loudermill, supra, at 543, 105 S.Ct., at 1494, in the case of a suspension there will be ample opportunity to invoke **935 discretion later--and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. Respondent "has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste." Mallen, 486 U.S., at 243, 108 S.Ct., at 1789. If the State is forced to act too quickly, the decision maker "may give greater weight to the public interest and leave the suspension in place." Ibid.

C

Much of respondent's argument is dedicated to the proposition that he had a due process right to a presuspension hearing because the suspension was open- ended and he "theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay." Brief for Respondent 23. But, as respondent himself asserts in his attempt to downplay the governmental interest, "[b]ecause the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during the suspension minimal." Id., at 24-25.

Whether respondent was provided an adequately prompt post-suspension hearing in the present case is a separate question. Although the charges against respondent were dropped on September 1 (petitioners apparently learned of this on September 2), he did not receive any sort of hearing until September 18. Once the charges were dropped, the risk of erroneous deprivation increased substantially, and, as petitioners conceded at oral argument, there was likely value in holding a prompt hearing, Tr. of Oral Arg. 19. Compare Mallen, supra, at 243, 108 S.Ct., at 1789 (holding that 90 days before the agency hears and decides the propriety of a suspension does not exceed the permissible limits where coupled with factors that minimize the risk of an erroneous deprivation). Because neither the Court of Appeals nor the District Court addressed whether, under the particular facts of this case, petitioners*936 violated due process by failing to provide a sufficiently prompt postsuspension hearing, we will not consider this issue in the first instance, but remand for consideration by the Court of Appeals.

* * *

**1815 The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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Edgar PAUL, etc., et al., Petitioners,
v.
Edward Charles DAVIS, III.

No. 74-891.

Supreme Court of the United States

Argued Nov. 4, 1975.

Decided March 23, 1976.
Rehearing Denied May 19, 1976.

See 425 U.S. 985, 96 S.Ct. 2194.

Plaintiff whose name and photograph appeared on a flyer which was captioned "Active Shoplifters" and which was distributed among merchants by police chiefs brought class action. The United States District Court for the Western District of Kentucky dismissed the complaint and plaintiff appealed. The Court of Appeals, 505 F.2d 1180, reversed and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that reputation alone does not implicate any "liberty" or "property" interests sufficient to invoke the procedural protection of the due process clause, and something more than simple defamation by the state official must be involved to establish a claim under section 1983; that police chiefs' action in distributing flyer did not deprive plaintiff of any "liberty" or "property" rights secured against state deprivations by the due process clauses; and that the flyer did not deprive plaintiff of right to privacy.

Judgment of Court of Appeals reversed.

Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Marshall joined and in which Mr. Justice White joined in part.

[1] CONSTITUTIONAL LAW ⚷253(1)
92k253(1)
Not every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishes a violation of the Fourteenth Amendment. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

[2] CONSTITUTIONAL LAW ⚷299.2
92k299.2
Formerly 92k299(2), 92k253(1)
The Fourteenth Amendment's due process clause does not ex proprio vigore extend to a person a right to be free of injury wherever the state may be characterized as the tort-feasor. U.S.C.A.Const. Amend. 14.

[3] CONSTITUTIONAL LAW ⚷252.5
92k252.5
Formerly 92k255(1)
The procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter interests comprehended within meaning of either "liberty" or "property." U.S.C.A.Const. Amend. 14.

[3] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
The procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter interests comprehended within meaning of either "liberty" or "property." U.S.C.A.Const. Amend. 14.

[4] CONSTITUTIONAL LAW ⚷255(2)
92k255(2)
Any harm or injury to interest in reputation, even where inflicted by an officer of the state, does not result in a deprivation of any "liberty" or "property" and does not invoke the procedural protection of the due process clause. U.S.C.A.Const. Amend. 14.

[4] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
Formerly 92k278(1)
Any harm or injury to interest in reputation, even where inflicted by an officer of the state, does not result in a deprivation of any "liberty" or "property" and does not invoke the procedural protection of the due process clause. U.S.C.A.Const. Amend. 14.

[5] CIVIL RIGHTS ⚷115
78k115
Formerly 78k13.4(1)
To establish a claim under § 1983 and the Fourteenth Amendment more must be involved than simple defamation by a state official. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

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[6] CONSTITUTIONAL LAW ⚷255(2)
92k255(2)
Plaintiff whose name and photograph appeared on flyer which was captioned "Active Shoplifters" and which was distributed by police chiefs to merchants did not have any legal guarantee of present enjoyment of reputation which was altered as the result of police chiefs' actions and thus suffered no deprivation of any "liberty" or "property" interests within due process guarantee. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.
See publication Words and Phrases for other judicial constructions and definitions.

[6] CONSTITUTIONAL LAW ⚷277(1)
92k277(1)
Plaintiff whose name and photograph appeared on flyer which was captioned "Active Shoplifters" and which was distributed by police chiefs to merchants did not have any legal guarantee of present enjoyment of reputation which was altered as the result of police chiefs' actions and thus suffered no deprivation of any "liberty" or "property" interests within due process guarantee. 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.
See publication Words and Phrases for other judicial constructions and definitions.

[7] CONSTITUTIONAL LAW ⚷82(7)
92k82(7)
Formerly 92k82
While no "right of privacy" is found in any specific guarantee of the Constitution, "zones of privacy" may be created by more specific constitutional guarantees and thereby impose limits upon government power. U.S.C.A.Const. Amends. 1, 4, 5, 9, 14.

[8] CONSTITUTIONAL LAW ⚷82(7)
92k82(7)
Formerly 92k82
Actions of police chiefs in distributing to merchants a flyer which was captioned "Active Shoplifters" and which contained plaintiff's name and photograph did not violate any constitutionally protected right to privacy inasmuch as claim was based not upon any challenge to the state's ability to restrict his freedom of action in a sphere intended to be "private," but instead on a claim that state may not publicize a record of an official act such as an arrest. U.S.C.A.Const. Amends. 1, 4, 5, 9, 14.

**1157 *693 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

A photograph of respondent bearing his name was included in a "flyer" of "active shoplifters," after he had been arrested on a shoplifting charge in Louisville, Ky. After that charge had been dismissed respondent brought this action under 42 U.S.C. s 1983 against petitioner police chiefs, who had distributed the flyer to area merchants, alleging that petitioners' action under color of law deprived him of his constitutional rights. The District Court granted petitioners' motion to dismiss. The Court of Appeals reversed, relying on Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515. Held:

1. Petitioners' action in distributing the flyer did not deprive respondent of any "liberty" or "property" rights secured against state deprivation by the Due Process Clause of the Fourteenth Amendment. Pp. 1159-1165.

(a) The Due Process Clause does not Ex proprio vigore extend to a person a right to be free of injury wherever the State may be characterized as the tortfeasor. Pp. 1159-1161.

(b) Reputation alone, apart from some more tangible interests such as employment, does not implicate any "liberty" or "property" interests sufficient to invoke the procedural protection of the Due Process Clause; hence to establish a claim under s 1983 and the Fourteenth Amendment more must be involved than simply defamation by a state official. Wisconsin v. Constantineau, supra, distinguished. Pp. 1160-1166.

(c) Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation that has been altered by petitioners' actions, and the interest in reputation alone is thus quite different from the "liberty" or "property" recognized in such decisions as Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, and Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, where the guarantee of due process required certain procedural safeguards before the State could alter

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the status of the complainants. Pp. 1165-1166.

2. Respondent's contention that petitioners' defamatory flyer deprived him of his constitutional right to privacy is without ***694** merit, being based not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private" but on a claim that the State may not publicize a record of an official act like an arrest. P. 1166.

6 Cir., 505 F.2d 1180, reversed.

Carson P. Porter, Louisville, Ky., for petitioners.

Daniel T. Taylor, III, Louisville, Ky., for respondent.

Mr. Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari, 421 U.S. 909, 95 S.Ct. 1556, 43 L.Ed.2d 773 (1975), in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. s 1983 and the Fourteenth Amendment. For the reasons hereinafter stated, we conclude that it does not.

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during ***695** the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a "flyer," which began as follows:

"TO: BUSINESS MEN IN THE METROPOLITAN AREA

"The Chiefs of The Jefferson County and City of Louisville Police Departments, ****1158** in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field.

"This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.

"Only the photograph and name of the subject is shown on this flyer, if additional information is desired, please forward a request in writing . . . ."

The flyer consisted of five pages of "mug shot" photos, arranged alphabetically. Each page was headed:

"NOVEMBER 1972

CITY OF LOUISVILLE

JEFFERSON COUNTY

POLICE DEPARTMENTS

ACTIVE SHOPLIFTERS"

In approximately the center of page 2 there appeared photos and the name of the respondent, Edward Charles Davis III.

Respondent appeared on the flyer because on June 14, 1971, he had been arrested in Louisville on a charge of shoplifting. He had been arraigned on this charge in September 1971, and, upon his plea of not guilty, the ***696** charge had been "filed away with leave (to reinstate)," a disposition which left the charge outstanding. Thus, at the time petitioners caused the flyer to be prepared and circulated respondent had been charged with shoplifting but his guilt or innocence of that offense had never been resolved. Shortly after circulation of the flyer the charge against respondent was finally dismissed by a judge of the Louisville Police Court.

At the time the flyer was circulated respondent was employed as a photographer by the Louisville Courier-Journal and Times. The flyer, and respondent's inclusion therein, soon came to the attention of respondent's supervisor, the executive director of photography for the two newspapers. This individual called respondent in to hear his version of the events leading to his appearing in the flyer. Following this discussion, the supervisor informed respondent that although he would not be fired, he "had best not find himself in a similar situation" in the future.

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Respondent thereupon brought this s 1983 action in the District Court for the Western District of Kentucky, seeking redress for the alleged violation of rights guaranteed to him by the Constitution of the United States. Claiming jurisdiction under 28 U.S.C. s 1343(3), respondent sought damages as well as declaratory and injunctive relief. Petitioners moved to dismiss this complaint. The District Court granted this motion, ruling that "(t)he facts alleged in this case do not establish that plaintiff has been deprived of any right secured to him by the Constitution of the United States."

Respondent appealed to the Court of Appeals for the Sixth Circuit which recognized that, under our decisions, for respondent to establish a claim cognizable under s 1983 he had to show that petitioners had deprived *697 him of a right secured by the Constitution [FN1] of the United States, and that any such deprivation was achieved under color of law. [FN2] Adickes v. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 2, 150 (1970). The Court of Appeals concluded that respondent had set forth a s 1983 claim "in that he has alleged facts that constitute a denial of due process of law." 505 F.2d 1180, 1182 (1974). In its view our decision in Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d **1159 515 (1971), mandated reversal of the District Court.

FN1. The "and laws" provision of 42 U.S.C. s 1983 is not implicated in this case.

FN2. It is not disputed that petitioners' actions were a part of their official conduct and that this element of a s 1983 cause of action is satisfied here.

I

Respondent's due process claim is grounded upon his assertion that the flyer, and in particular the phrase "Active Shoplifters" appearing at the head of the page upon which his name and photograph appear, impermissibly deprived him of some "liberty" protected by the Fourteenth Amendment. His complaint asserted that the "active shoplifter" designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyer in question, respondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State. Imputing criminal behavior to an individual is generally considered defamatory Per se, and actionable without proof of special damages.

Respondent brought his action, however, not in the state courts of Kentucky, but in a United States District *698 Court for that State. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.

In Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966), in the course of considering an important and not wholly dissimilar question of the relationship between the National and the State Governments, the Court said that "(i)t is worth contemplating what the result would be if the strained interpretation of s 1443(1) urged by the individual petitioners were to prevail." Id., at 832, 86 S.Ct., at 1814, 16 L.Ed.2d, at 959. We, too, pause to consider the result should respondent's interpretation of s 1983 and of the Fourteenth Amendment be accepted.

If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under s 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983.

[1] It is hard to perceive any logical stopping place to such *699 a line of reasoning. Respondent's

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construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

II

The result reached by the Court of Appeals, which respondent seeks to sustain here, must be bottomed on one of two premises. The first is that the Due Process Clause of the Fourteenth Amendment and s 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims. The second premise **1160 is that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from the infliction by the same official of harm or injury to other interests protected by state law, so that an injury to reputation is actionable under s 1983 and the Fourteenth Amendment even if other such harms are not. We examine each of these premises in turn.

A

The first premise would be contrary to pronouncements in our cases on more than one occasion with respect to the scope of s 1983 and of the Fourteenth Amendment. In the leading case of Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), the Court considered the proper application of the criminal counterpart of s 1983, likewise intended by Congress to enforce the guarantees of the Fourteenth *700 Amendment. In his opinion for the Court plurality in that case, Mr. Justice Douglas observed:

> "Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States," 325 U.S., at 108-109, 65 S.Ct., at 1039, 89 L.Ed., at 1506.

After recognizing that Congress' power to make criminal the conduct of state officials under the aegis of the Fourteenth Amendment was not unlimited because that Amendment "did not alter the basic relations between the States and the national government," the plurality opinion observed that Congress should not be understood to have attempted

> "to make all torts of state officials federal crimes. It brought within (the criminal provision) only specified acts 'under color' of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States." Id., at 109, 65 S.Ct., at 1039, 89 L.Ed., at 1507.

[2] This understanding of the limited effect of the Fourteenth Amendment was not lost in the Court's decision in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There the Court was careful to point out that the complaint stated a cause of action under the Fourteenth Amendment because it alleged an unreasonable search and seizure violative of the guarantee "contained in the Fourth Amendment (and) made applicable to the States by Reason of the Due Process Clause of the Fourteenth Amendment." Id., at 171, 81 S.Ct., at 476, 5 L.Ed.2d, at 496. Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. *701 Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-102, 91 S.Ct. 1790, 1797-98, 29 L.Ed.2d 338, 347-48 (1971); A fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law.

B

The second premise upon which the result reached by the Court of Appeals could be rested that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests

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protected by state law is equally untenable. The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently **1161 drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. As we have said, the Court of Appeals, in reaching a contrary conclusion, relied primarily upon Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). We think the correct import of that *702 decision, however, must be derived from an examination of the precedents upon which it reed, as well as consideration of the other decisions by this Court, before and after Constantineau, which bear upon the relationship between governmental defamation and the guarantees of the Constitution. While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth [FN3] or Fourteenth Amendment.

FN3. If respondent is correct in his contention that defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the cognate Due Process Clause of the Fifth Amendment. Surely the Fourteenth Amendment imposes no more stringent requirements upon state officials than does the Fifth upon their federal counterparts. We thus consider this Court's decisions interpreting either Clause as relevant to our examination of respondent's claim.

In United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Court held that an Act of Congress which specifically forbade payment of any salary or compensation to three named Government agency employees was an unconstitutional bill of attainder. The three employees had been proscribed because a House of Representatives subcommittee found them guilty of "subversive activity," and therefore unfit for Government service. The Court, while recognizing that the underlying charges upon which Congress' action was premised "stigmatized (the employees') reputation and seriously impaired their chance to earn a living," Id., at 314, 66 S.Ct., at 1078, 90 L.Ed., at 1259, also made it clear that "(w)hat is involved here is a Congressional proscription of (these employees), prohibiting their ever holding a government job." Ibid.

Subsequently, in Joint Anti-Fascist Refugee Comm. *703 v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951), the Court examined the validity of the Attorney General's designation of certain organizations as "Communist" on a list which he furnished to the Civil Service Commission. There was no majority opinion in the case; Mr. Justice Burton, who announced the judgment of the Court, wrote an opinion which did not reach the petitioners' constitutional claim. Mr. Justice Frankfurter, who agreed with Mr. Justice Burton that the petitioners had stated a claim upon which relief could be granted, noted that "publicly designating an organization as within the proscribed categories of the Loyalty Order does not directly deprive anyone of liberty or property." Id., at 164, 71 S.Ct., at 644, 95 L.Ed., at 849. Mr. Justice Douglas, who likewise concluded that petitioners had stated a claim, observed in his separate opinion:

"This is not an instance of name calling by public officials. This is a determination of status a proceeding to ascertain whether the organization is or is not 'subversive.' This determination has consequences that are serious to the condemned organizations. Those consequences flow in part, of course, from public opinion. But they also flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination to penalize or police these organizations." Id., at 175, 71 S.Ct., at 650, 95 L.Ed., at 855.

Mr. Justice Jackson, who likewise agreed that petitioners had stated a claim, commented:

**1162 "I agree that mere designation as subversive deprives the organizations themselves of no legal right or immunity. By it they are not dissolved, subjected to any legal prosecution, punished, penalized, or prohibited from carrying on any of their activities. Their claim of injury is that they cannot attract audiences, enlist members,

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or obtain contributions *704 as readily as before. These, however, are sanctions applied by public disapproval, not by law." Id., at 183-184, 71 S.Ct., at 655, 95 L.Ed., at 860.

He went on to say:

"(T)he real target of all this procedure is the government employee who is a member of, or sympathetic to, one or more accused organizations. He not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation. . . . To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." Id., at 184-185, 71 S.Ct., at 655, 95 L.Ed., at 860.

Mr. Justice Reed, writing for himself, The Chief Justice, and Mr. Justice Minton, would have held that petitioners failed to state a claim for relief. In his dissenting opinion, after having stated petitioners' claim that their listing resulted in a deprivation of liberty or property contrary to the procedure required by the Fifth Amendment, he said:

"The contention can be answered summarily by saying that there is no deprivation of any property or liberty of any listed organization by the Attorney General's designation. It may be assumed that the listing is hurtful to their prestige, reputation and earning power. It may be such an injury as would entitle organizations to damages in a tort action against persons not protected by privilege. . . . This designation, however, does not prohibit any business of the organizations, subject them to any punishment or deprive them of liberty of speech or other freedom." Id., at 202, 71 S.Ct., at 664, 95 L.Ed., at 869.

Thus at least six of the eight Justices who participated *705 in that case viewed any "stigma" imposed by official action of the Attorney General of the United States, divorced from its effect on the legal status of an organization or a person, such as loss of tax exemption or loss of government employment, as an insufficient basis for invoking the Due Process Clause of the Fifth Amendment.

In Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), the Court again recognized the potential "badge of infamy" which might arise from being branded disloyal by the government. Id., at 191, 73 S.Ct., at 218, 97 L.Ed., at 222. But it did not hold this sufficient by itself to invoke the procedural due process guarantees of the Fourteenth Amendment; indeed, the Court expressly refused to pass upon the procedural due process claims of petitioners in that case. Id., at 192, 73 S.Ct. at 219, 97 L.Ed. at 222. The Court noted that petitioners would, as a result of their failure to execute the state loyalty oath, lose their teaching positions at a state university. It held such state action to be arbitrary because of its failure to distinguish between innocent and knowing membership in the associations named in the list prepared by the Attorney General of the United States. Id., at 191, 73 S.Ct., at 218, 97 L.Ed., at 222. See also Peters v. Hobby, 349 U.S. 331, 347, 75 S.Ct. 790, 99 L.Ed. 1129 (1955).

A decade after Joint Anti-Fascist Refugee Comm. v. McGrath, supra, the Court returned to consider further the requirements of procedural due process in this area in the case of Cafeteria Workers v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Holding that the discharge of an employee of a Government contractor in the circumstances there presented comported with the due process required by the Fifth Amendment, the Court observed:

**1163 "Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. See *706 Wien v. Updegraff, 344 U.S. 183, 190-191, 73 S.Ct. 215, 218-219, 97 L.Ed. 216; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140-141, 71 S.Ct. 624, 632, 95 L.Ed. 817. . . ." Id., at 898, 81 S.Ct., at 1750, 6 L.Ed.2d, at 1238. (Emphasis supplied.)

Two things appear from the line of cases beginning with Lovett. The Court has recognized the serious damage that could be inflicted by branding a government employee as "disloyal," and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment. [FN4]

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FN4. We cannot agree with the suggestion of our Brother BRENNAN, dissenting, Post, at 1173, that the actions of these two petitioner law enforcement officers come within the language used by Mr. Justice Harlan in his dissenting opinion in Jenkins v. McKeithen, 395 U.S. 411, 433, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). They are not by any conceivable stretch of the imagination, either separately or together, "an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing." Id., at 438, 89 S.Ct., at 1857, 23 L.Ed.2d, at 426. Indeed, the actions taken by these petitioners in this case fall far short of the more formalized proceedings of the Commission on Civil Rights established by Congress in 1957, the procedures of which were upheld against constitutional challenge by this Court in Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). There the Court described the functions of the Commission in this language:

> "It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any Legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's Legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." Id., at 441, 80 S.Ct., at 1514, 4 L.Ed.2d, at 1321 (emphasis supplied).
>
> Addressing itself to the question of whether the Commission's "proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions," the Court said that "even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function." Id., at 443, 80 S.Ct., at 1515, 4 L.Ed.2d, at 1322.

*707 It is noteworthy that in Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and Howard v. Lyons, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959), this Court had before it two actions for defamation brought against federal officers. But in neither opinion is there any intimation that any of the parties to those cases, or any of the Members of this Court, had the remotest idea that the Due Process Clause of the Fifth Amendment might itself form the basis for a claim for defamation against federal officials.

It was against this backdrop that the Court in 1971 decided Constantineau. There the Court held that a Wisconsin statute authorizing the practice of "posting" was unconstitutional because it failed to provide procedural safeguards of notice and an opportunity to be heard, prior to an individual's being "posted." Under the statute "posting" consisted of forbidding in writing the sale or delivery of alcoholic beverages to certain persons who were determined to have become hazards to themselves, to their family, or to the community by reason of their "excessive drinking." The statute also made it a misdemeanor to sell or give liquor to any person so posted. See 400 U.S., at 434 n. 2, 91 S.Ct., at 508, 27 L.Ed.2d, at 517.

There is undoubtedly language in Constantineau, which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals:

> **1164 "Yet certainly where the State attaches 'a badge of infamy' to the citizen due process comes into play. *708 Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 218-219, 97 L.Ed. 216. '(T)he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (Frankfurter, J., concurring).
>
> "Where a person's good name, reputation, honor, or integrity is at stake Because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. 433, 437, 91 S.Ct. 507, at 510, 27 L.Ed.2d 515, at 519 (emphasis supplied).

The last paragraph of the quotation could be taken to mean that if a government official defames a person, without more, the procedural requirements of the Due Process Clause of the Fourteenth Amendment are brought into play. If read that way, it would represent a significant broadening of the holdings of Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), and Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951), relied upon by the Constantineau Court in its analysis in the immediately preceding paragraph. We should not read this language as significantly broadening those holdings without in any way adverting to the fact if

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there is any other possible interpretation of Constantineau's language. We believe there is.

We think that the italicized language in the last sentence quoted, "because of what the government is doing to him," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting *709 from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

This conclusion is reinforced by our discussion of the subject a little over a year later in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). There we noted that "the range of interests protected by procedural due process is not infinite," Id., at 570, 92 S.Ct., at 2705, 33 L.Ed.2d at 556, and that with respect to property interests they are,

> "of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," Id., at 577, 92 S.Ct., at 2709, 33 L.Ed.2d, at 561.

While Roth recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment:

> "The State, In declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. . . .
>
> "Similarly, there is no suggestion that the State, In declining to re-employ the respondent, imposed on *710 him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id., at 573, 92 S.Ct., **1165 at 2707, 33 L.Ed.2d, at 558 (emphasis supplied).

Thus it was not thought sufficient to establish a claim under s 1983 and the Fourteenth Amendment that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment. Certainly there is no suggestion in Roth to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee.

This conclusion is quite consistent with our most recent holding in this area, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation, Id., at 574-575, 95 S.Ct., at 736-737, 42 L.Ed.2d, at 734-735, it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right.

III

[3] It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, [FN5] and we *711 have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. In Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), for example, the State by issuing drivers' licenses recognized in its citizens a right to operate a vehicle on the highways of the State. The Court held that the State could not withdraw this right without giving petitioner due process. In Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the State

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afforded parolees the right to remain at liberty as long as the conditions of their parole were not violated. Before the State could alter the status of a parolee because of alleged violations of these conditions, we held that the Fourteenth Amendment's guarantee of due process of law required certain procedural safeguards.

FN5. There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been "incorporated" into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law. See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Our discussion in Part III is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action which may be encompassed within the concept of "liberty" expressed in the Fourteenth Amendment. Cf. Part IV, Infra.

[4][5][6] In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a *712 result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, **1166 providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case is neither "liberty" nor "property" guaranteed against state deprivation without due process of law.

Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause.

IV

Respondent's complaint also alleged a violation of a "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." The Court of Appeals did not pass upon this claim since it found the allegations of a due process violation sufficient to require reversal of the District Court's order. As we have agreed with the District Court on the due process issue, we find it necessary to pass upon respondent's other theory in order to determine whether there is any support for the litigation he seeks to pursue.

[7] While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by *713 more specific constitutional guarantees and thereby impose limits upon government power. See Roe v. Wade, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726, 35 L.Ed.2d 14 176-178 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 581 (1967); Terry v. Ohio, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889, 898 (1968). And our other "right of privacy" cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In Roe the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection matters relating to marriage, procreation, contraception, family relationships, and child

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rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

[8] Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

None of respondent's theories of recovery were based upon rights secured to him by the Fourteenth Amendment. *714 Petitioners therefore were not liable to him under s 1983. The judgment of the Court of Appeals holding otherwise is

Reversed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

**1167 Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL concurs and Mr. Justice WHITE concurs in part, dissenting.

I dissent. The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar Ex parte punishment by those primarily charged with fair enforcement of the law. The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character of or necessity for the government's actions. The result, which is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur.

To clarify what is at issue in this case, it is first necessary to dispel some misconceptions apparent in the Court's opinion. 42 U.S.C. s 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within *715 the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other prop proceeding for redress."

Thus, as the Court indicates, Ante, at 1158, respondent's complaint, to be cognizable under s 1983, must allege both a deprivation of a constitutional right [FN1] and the effectuation of that deprivation under color of law. See, E. g., Adickes v. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142, 150 (1970). But the implication, see Ante, at 1158-1160, that the existence Vel non of a state remedy for example, a cause of action for defamation is relevant to the determination whether there is a cause of action under s 1983, is wholly unfounded. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492, 503 (1961). See also, E. g., McNeese v. Board of Education, 373 U.S. 668, 671-672, 83 S.Ct. 1433, 1435, 10 L.Ed.2d 622, 624-625 (1963). Indeed, even if the Court were creating a novel doctrine that state law is in any way relevant, it would be incumbent upon the Court to inquire whether respondent has an adequate remedy under Kentucky law or whether petitioners would be immunized by state doctrines of official or sovereign immunity. The Court, however, undertakes no such inquiry.

FN1. Deprivations of rights secured by "laws" as well as by the Constitution are actionable under s 1983. Only an alleged constitutional violation is involved in this case. Ante, at 1158 n. 1.

Equally irrelevant is the Court's statement that "(c)oncededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation

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under state law." Ante, at 1159. The action complained of here is "state *716 action" allegedly in violation of the Fourteenth Amendment, and that Amendment, which is Only designed to prohibit "state" action, clearly renders unconstitutional actions taken by state officials that would merely be criminal or tortious if engaged in by those acting in their private capacities. Of course, if a private citizen enters the home of another, manacles and threatens the owner, and searches the house in the course of a robbery, he would be criminally and civilly liable under state law, but no constitutional **1168 rights of the owner would be implicated. However, if state police officials engage in the same acts in the course of a narcotics investigation, the owner may maintain a damages action against the police under s 1983 for deprivation of constitutional rights "under color of" state law. Cf. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 390-392, 91 S.Ct. 1999, 2001-2002, 29 L.Ed.2d 619, 623- 624 (1971). See also, E. g., Monroe v. Pape, supra. In short, it is difficult to believe that the Court seriously suggests, see Ante, at 1158-1159, that there is some anomaly in the distinction, for constitutional purposes, between tortious conduct committed by a private citizen and the same conduct committed by state officials under color of state law.

It may be that I misunderstand the thrust of Part I of the Court's opinion. Perhaps the Court is not questioning the involvement of a constitutional "liberty" or "property" interest in this case, but rather whether the deprivation of those interests was accomplished "under color of" state law. The Court's expressed concern that but for today's decision, negligent tortious behavior by state officials might constitute a s 1983 violation, see Ante, at 1159, suggests this reading. [FN2] But that concern is *717 groundless. An official's actions are not "under color of" law merely because he is an official; an off-duty policeman's discipline of his own children, for example, would not constitute conduct "under color of" law. The essential element of this type of s 1983 action [FN3] is Abuse of his Official position. "Congress, in enacting (s 1983), meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's Abuse of his position." Monroe v. Pape, supra, 365 U.S., at 172, 81 S.Ct., at 476, 5 L.Ed.2d, at 497 (emphasis supplied). Section 1983 focuses on "(m)isuse of power, possessed by virtue of state law and Made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368, 1383 (1941) (emphasis supplied). Moreover, whether or not mere negligent official conduct in the course of duty can ever constitute such abuse of power, the police officials here concede that their conduct was intentional and was undertaken in their official capacities. Therefore, beyond peradventure, it is action taken under color of law, see Ante, at 1158, and n. 2, and it is disingenuous for the Court to argue, see Ante, at 1160-1161, that respondent is seeking to convert s 1983 into a generalized font of tort law. The only issue properly presented by this case is whether petitioners' intentional conduct infringed any of respondent's "liberty" or "property" interests without due process of law, and that is the question to be addressed. I am *718 persuaded that respondent has alleged a case of such infringement, and therefore of a violation of s 1983.

FN2. Indeed, it would be difficult to interpret that discussion as anything but a discussion of the "under color of" law requirement of s 1983, which is not involved in this case and which has no relationship to the question whether a "liberty" or "property" interest is involved here. There is simply no way in which the Court, despite today's treatment of the terms "liberty" and "property," could declare that the loss of a person's life is not an interest cognizable within the "life" portion of the Due Process Clause. See Ante, at 1159.

FN3. Of course, in addition to providing a remedy when an official abuses his position, s 1983 is designed to provide a remedy when a state statute itself abridges constitutional rights, when a remedy under state law is inadequate to protect constitutional rights, and when a state remedy, though adequate in theory, is unavailable in practice. See, E. g., Monroe v. Pape, 365 U.S. 167, 173-174, 81 S.Ct. 473, 476-477, 5 L.Ed.2d 492, 497-498 (1961).

The stark fact is that the police here have officially imposed on respondent the stigmatizing label "criminal" without the salutary and constitutionally mandated safeguards of a criminal trial. The Court concedes that this action will have deleterious consequences for respondent. For 15 years, the police had prepared and circulated similar lists, not with respect to shoplifting alone, but also for other offenses. App., 19, 27-28. Included in the five-page list in **1169 which respondent's name and "mug

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shot" appeared were numerous individuals who, like respondent, were never convicted of any criminal activity and whose only "offense" was having once been arrested. [FN4] *719 Indeed, respondent was arrested over 17 months before the flyer was distributed, [FN5] not by state law enforcement authorities, but by a store's private security police, and nothing in the record appears to suggest the existence at that time of even constitutionally sufficient probable cause for that single arrest on a shoplifting charge. [FN6] Nevertheless, petitioners had 1,000 flyers printed (800 were distributed widely throughout the Louisville business community) proclaiming that the individuals identified *720 by name and picture were "subjects known to be active in this criminal field (shoplifting)," and trumpeting the "fact" that each page depicted "Active Shoplifters" (emphasis supplied). [FN7]

FN4. Petitioners testified:

"Q. And you didn't limit this to persons who had been convicted of the offense of shoplifting, is that correct?

"A. That's correct.

"Q. Now, my question is what is the basis for your conclusion that a person a person who has been arrested for the offense of shoplifting is an active shoplifter?

"A. The very fact that he's been arrested for the charge of shoplifting and evidence presented to that effect.

"Q. And this is not based on any finding of the court?

"A. No, sir." App. 26.

"Q. All right. So that if my understanding is correct, this included all persons who were arrested in '71 and '72?

"A. That's true.

"Q. And selected persons from who were arrested in previous years?

"A. . . . I assume from the number of persons here that many of these have been arrested many years back down the line consecutively . . . .

"Q. So there's no distinction made between persons whose arrest terminated in convictions and persons whose arrest did not terminate in convictions?

"A. No, sir." Id. 29.

FN5. Respondent was arrested on June 14, 1971. He pleaded not guilty and the charge was "filed away with leave (to reinstate)" on September 22, 1971. The distribution of the flyer was on December 5, 1972. The shoplifting charge was dismissed on December 11, 1972, and respondent filed his complaint the following day. He sought compensatory and punitive damages, and an injunction prohibiting similar dissemination of such flyers in the future and ordering petitioners to obtain the return of the flyers and to instruct those who received them that respondent and the others pictured in the flyers were not "active shoplifters," and had not been convicted of shoplifting or any similar offense. Respondent's only other arrest took place five years previously for a speeding offense.

FN6. The Court, by totally excluding a person's interest in his reputation from any cognizance under the Due Process Clause, would be forced to reach the same conclusion that there is no cause of action under s 1983 even to obtain injunctive relief if petitioners had randomly selected names from the Louisville telephone directory for inclusion in the "active shoplifters" flyer. Of course, even if a person has been arrested on a constitutionally sufficient basis, that does not justify the State's treating him as a criminal.

"The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated." Schware v. Board of Bar Examiners, 353 U.S. 232, 241, 77 S.Ct. 752, 757, 1 L.Ed.2d 796, 803 (1957). The constitutional presumption of innocence, the requirement that conviction for a crime must be based on proof beyond a reasonable doubt, and the other safeguards of a criminal trial are obviously designed at least in part to give concrete meaning to this fact.

FN7. At one point in the flyer, there was also an indication that "(t)hese persons have been arrested during 1971 and 1972 Or have been active in various criminal fields in high density shopping areas." The stated purpose of the flyer was "so that you, the businessman . . . may inform your security personnel to Watch for these subjects." Ante, at 1158 (emphasis supplied).

Although accepting the truth of the allegation, as we must on the motion to dismiss, see, E. g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-175, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247, 249-250 (1965); cf. Conley v. **1170 Gibson, 355 U.S. 41,

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78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that dissemination of this flyer would "seriously impair (respondent's) future employment opportunities" and "inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended," Ante, at 1159, the Court characterizes the allegation as "mere defamation" involving no infringement of constitutionally protected interests. E. g., ante, at 1163. This is because, the Court holds neither a "liberty" nor a "property" interest was invaded by the injury done respondent's reputation and therefore no violation of s 1983 or the Fourteenth Amendment was alleged. I wholly disagree.

It is important, to paraphrase the Court, that "(w)e, too, (should) pause to consider the result should (the Court's) interpretation of s 1983 and of the Fourteenth Amendment be accepted." Ante, at 1159. There is no attempt by the Court to analyze the question as one of reconciliation of constitutionally protected personal rights and the exigencies of law enforcement. No effort is made to distinguish the "defamation" that occurs when a grand jury indicts an accused from the "defamation" that occurs when executive officials arbitrarily and without *721 trial declare a person an "active criminal." [FN8] Rather, the Court by mere fiat and with no analysis wholly excludes personal interest in reputation from the ambit of "life, liberty, or property" under the Fifth and Fourteenth Amendments, thus rendering due process concerns never applicable to the official stigmatization, however arbitrary, of an individual. The logical and disturbing corollary of this holding is that no due process infirmities would inhere in a statute constituting a commission to conduct ex parte trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person as a Communist, a traitor, an "active murderer," a homosexual, or any other mark that "merely" carries social opprobrium. The potential of today's decision is frightening for a free people. [FN9] That decision surely finds no support in our relevant constitutional jurisprudence.

FN8. Indeed, the Court's opinion confuses the two separate questions of whether reputation is a "liberty" or "property" interest and whether, in a particular context, state action with respect to that interest is a violation of due process. E. g., ante, at 1159, 1160-1161, and n. 3 (assuming that if reputation is a cognizable liberty or property interest, every defamation by a public official would be an offense against the Due Process Clause of the Fifth or Fourteenth Amendment).

FN9. Today's holding places a vast and arbitrary power in the hands of federal and state officials. It is not difficult to conceive of a police department, dissatisfied with what it perceives to be the dilatory nature or lack of efficacy of the judicial system in dealing with criminal defendants, publishing periodic lists of "active rapists," "active larcenists," or other "known criminals." The hardships resulting from this official stigmatization loss of employment and educational opportunities, creation of impediments to professional licensing, and the imposition of general obstacles to the right of all free men to the pursuit of happiness will often be as severe as actual incarceration, and the Court today invites and condones such lawless action by those who wish to inflict punishment without compliance with the procedural safeguards constitutionally required of the criminal justice system.

*722 "In Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, E. g., Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884; Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551." Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548, 558 (1972). "Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 1045 (1923). [FN10] Certainly the enjoyment of *723 one's **1171 good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal "liberty."

FN10. One of the more questionable assertions made by the Court suggests that "liberty" or "property" interests are protected only if they are recognized under state law or protected by one of the specific guarantees of the Bill of Rights. Ante, at 1165 and n. 5. To be sure, the Court has held that "(p) roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source Such as state law rules or understandings

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that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972) (emphasis supplied). See also, E. g., Goss v. Lopez, 419 U.S. 565, 572-573, 95 S.Ct. 729, 734, 42 L.Ed.2d 725, 733 (1975). However, it should also be clear that if the Federal Government, for example, creates an entitlement to some benefit, the States cannot infringe a person's enjoyment of that "property" interest without compliance with the dictates of due process. Moreover, we have never restricted "liberty" interests in the manner the Court today attempts to do. The Due Process Clause of the Fifth Amendment, like the Due Process Clause of the Fourteenth Amendment, protects "liberty" interests. But the content of "liberty" in those Clauses has never been thought to depend on recognition of an interest by the State or Federal Government, and has never been restricted to interests explicitly recognized by other provisions of the Bill of Rights:

" 'While this Court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042." Board of Regents v. Roth, supra, 408 U.S. at 572, 92 S.Ct. at 2706, 33 L.Ed.2d at 558.

See also, E. g., Arnett v. Kennedy, 416 U.S. 134, 157, 94 S.Ct. 1633, 1645, 40 L.Ed.2d 15, 35 (1974) (opinion of Rehnquist, J.). It should thus be clear that much of the content of "liberty" has no tie whatsoever to particular provisions of the Bill of Rights, and the Court today gives no explanation for its narrowing of that content.

"(A)s Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name

" 'reflects no more than our basic concept of the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.' Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (concurring opinion)." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789, 806 (1974). [FN11]

FN11. It is strange that the Court should hold that the interest in one's good name and reputation is not embraced within the concept of "liberty" or "property" under the Fourteenth Amendment, and yet hold that that same interest, when recognized under state law, is sufficient to overcome the specific protections of the First Amendment. See, E. g., Gertz v. Robert Welch, Inc.; Time, Inc. v. Firestone, ante, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

*724 We have consistently held that

" '(W)here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (Douglas, J., concurring). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230." Board of Regents v. Roth, supra, 408 U.S. at 573, 92 S.Ct. at 2707, 33 L.Ed.2d at 558.

**1172 See also, E. g., Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377, 1390 (1959); Cafeteria Workers v. McElroy, 367 U.S. 886, 899-902, 81 S.Ct. 1743, 1750-1752, 6 L.Ed.2d 1230, 1238-1240 (1961) (Brennan, J., dissenting); Goss v. Lopez, 419 U.S. 565, 574-575, 95 S.Ct. 729, 736-737, 42 L.Ed.2d 725 (1975). In the criminal justice system, this interest is given concrete protection through the presumption of innocence and the prohibition of state-imposed punishment unless the State can demonstrate beyond a reasonable doubt, at a public trial with the attendant constitutional safeguards, that a particular individual has engaged in proscribed criminal conduct. "(B)ecause of the certainty that (one found

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guilty of criminal behavior) would be stigmatized by the conviction . . . a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." In re Winship, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970). "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing *725 a proper factfinder of his guilt with utmost certainty." Id., at 364, 90 S.Ct., at 1073, 25 L.Ed.2d, at 375. [FN12]

FN12. The Court's insensitivity to these constitutional dictates is particularly evident when it declares that because respondent had never been brought to trial, "his guilt or innocence of that offense (shoplifting) had never been resolved." Ante, at 1158. It is hard to conceive of a more devastating flouting of the presumption of innocence, 25 L.Ed.2d, at 375, "that bedrock 'axiomatic and elementary' principle whose 'enforcement' lies at the foundation of the administration of our criminal law." In re Winship, 397 U.S., at 363, 90 S.Ct., at 1072, quoting Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 402, 39 L.Ed. 481, 491 (1895). Moreover, even if a person was once convicted of a crime, that does not mean that he is "actively engaged" in that activity now.

Today's decision marks a clear retreat from Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969), a case closely akin to the factual pattern of the instant case, and yet essentially ignored by the Court. Jenkins, which was also an action brought under s 1983, both recognized that the public branding of an individual implicates interests cognizable as either "liberty" or "property," and held that such public condemnation cannot be accomplished without procedural safeguards designed to eliminate arbitrary or capricious executive action. Jenkins involved the constitutionality of the Louisiana Labor-Management Commission of Inquiry, an executive agency whose "very purpose . . . is to find persons guilty of violating criminal laws without trial or procedural safeguards, and to publicize those findings." 395 U.S., at 424, 89 S.Ct., at 1850, 23 L.Ed.2d, at 418.

"(T)he personal and economic consequences alleged to flow from such actions are sufficient to meet the requirement that appellant prove a legally redressable injury. Those consequences would certainly be actionable if caused by a private party and thus should be sufficient to accord appellant standing. See Greene v. McElroy, 360 U.S. 474, 493, n. 22, 79 S.Ct. 1400, 1411, 3 L.Ed2d 1377 *726 (1959); Joint Anti-Fascist Refugee Committee v. McGrath, supra, 341 U.S. at 140-141, 71 S.Ct. (624), at 632 (95 L.Ed. 817) (opinion of Burton, J.); Id., at 151-160, 71 S.Ct. (624), at 637-642 (95 L.Ed. 817) (Frankfurter, J., concurring). It is no answer that the Commission has not itself tried to impose any direct sanctions on appellant; it is enough that the Commission's alleged actions will have a substantial impact on him. . . . Appellant's allegations go beyond the normal publicity attending criminal prosecution; he alleges a concerted attempt publicly to brand him a criminal without a trial." Id., at 424-425, 89 S.Ct., at 1850, 23 L.Ed.2d, at 418.

**1173 Significantly, we noted that one defect in the Commission was that it "exercises a function very much akin to making an official adjudication of criminal culpability," and that it was "concerned only with exposing violations of criminal laws by specific individuals." Id., at 427, 89 S.Ct., at 1852, 23 L.Ed.2d, at 420. "(I)t is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public." Id., at 428, 89 S.Ct., at 1852, 23 L.Ed.2d, at 420. See also Ibid., quoting Hannah v. Larche, 363 U.S. 420, 488, 80 S.Ct. 1502, 1543, 4 L.Ed.2d 1307, 1353 (1960) (Frankfurter, J., concurring in result). Although three Justices in dissent would have dismissed the complaint for lack of standing, since there were no allegations that the appellant would be investigated, called as a witness, or named in the Commission's findings, 395 U.S., at 436, 80 S.Ct., at 1512, 4 L.Ed.2d, at 1318 (Harlan, J., dissenting), they nevertheless observed, Id., at 438, 80 S.Ct., at 1857, 4 L.Ed.2d, at 1318:

"(There is) a constitutionally significant distinction between two kinds of governmental bodies. The first is an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing. To the extent that such a determination whether called a 'finding' or an 'adjudication' *727 finally and directly affects the substantial personal interests, I do not doubt that the Due Process Clause may require that it be accompanied by many of the traditional adjudicatory procedural safeguards. Cf. Joint Anti-

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Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951)."

See also Id., at 442, 89 S.Ct., at 1859, 23 L.Ed.2d, at 428. Thus, although the Court was divided on the particular procedural safeguards that would be necessary in particular circumstances, the common point of agreement, and the one that the Court today inexplicably rejects, was that the official characterization of an individual as a criminal affects a constitutional "liberty" interest.

The Court, however, relegates its discussion of Jenkins to a dissembling footnote. First, the Court ignores the fact that the Court in Jenkins clearly recognized a constitutional "liberty" or "property" interest in reputation sufficient to invoke the strictures of the Fourteenth Amendment. [FN13] It baffles me how, in the face of that holding, the Court can come to today's conclusion by reliance on the fact that the conduct in question does not "come within the language" of the Dissent in Jenkins, ante, at 1163 n. 4. Second, and more important, the Court's footnote manifests the same confusion that pervades the remainder of its opinion; it simply fails to recognize the crucial difference between the question whether there is a personal interest in one's good name and reputation that is constitutionally cognizable as a "liberty" or "property" interest within the Fourteenth and Fifth Amendment Due Process Clauses, and the totally separate question whether particular government ***728** action with respect to that interest satisfies the mandates of due process. See, e. g., supra, at 1170 and n. 8. Although the dissenters in Jenkins thought that the Commission's procedures complied with due process, they clearly believed that there was a personal interest that had to be weighed in reaching that conclusion. [FN14] The ****1174** dissenters in Jenkins, like the Court in Hannah v. Larche, supra, held the view that in the context of a purely investigatory, factfinding agency, full trial safeguards are not required to comply with due process. But that question would never have been reached unless there were some constitutionally cognizable personal interest making the inquiry necessary the interest in reputation that is affected ***729** by public "exposure." The Court, by contrast, now implicitly repudiates a substantial body of case law and finds no such constitutionally cognizable interest in a person's reputation, thus foreclosing any inquiry into the procedural protections accorded that interest in a given situation.

FN13. Of course, such oversights are typical of today's opinion. Compare, E. g., the discussions of Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), Ante, at 1165 and n. 15, Infra; the discussions of Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), Ante, at 1163-1164, and Infra, at 1174-1175.

FN14. For example, in addition to the statements already quoted in text, the dissenters observed: The Commission thus bears close resemblance to certain federal administrative agencies . . .. These agencies have one salient feature in common, which distinguishes them from those designed simply to 'expose.' None of them is the Final arbiter of anyone's guilt or innocence. Each, rather, plays only a Preliminary role designed, in the usual course of events, to Initiate a subsequent formal proceeding in which the accused will enjoy the full panoply of procedural safeguards. For this reason, and because such agencies could not otherwise practicably pursue their investigative functions, they have not been required to follow 'adjudicatory' procedures. 395 U.S., at 439, 442, 89 S.Ct., at 858, 23 L.Ed.2d at 427.

"Although in this respect the Commission is not different from the federal agencies discussed above, I am not ready to say that the collateral consequences of government-sanctioned opprobrium may not under some circumstances entitle a person to some right, consistent with the Commission's efficient performance of its investigatory duties, to have his public say in rebuttal. However, the Commission's procedures are far from being niggardly in this respect. . . .

" . . . It may be that some of my Brethren understand the complaint to allege that in fact the Commission acts primarily as an agency of 'exposure,' rather than one which serves the ends required by the state statutes. If so although I do not believe that the complaint can be reasonably thus construed the area of disagreement between us may be small or nonexistent." Id., at 442, 89 S.Ct., at 858.

In short, it is difficult to fathom what renders respondent's interest in his reputation somehow different from the personal interest affected by " 'an agency whose sole or predominant function, without serving any other public interest, is to expose and publicize the names of persons it finds guilty of wrongdoing.' " Ante, at 1163 n. 4, quoting 395 U.S., at 438, 89 S.Ct., at 1857, 23 L.Ed.2d, at 426. Surely the difference cannot be found in the fact that

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police officials rather than a statutory "agency" engaged in the stigmatizing conduct, for both situations involve the requisite action "under color of" law. Ante, at 1158 n. 2. Nor can the difference be found in the argument that petitioners' actions were "serving any other public interest," for that consideration Only affects the outcome of the due process balance in a particular case, not whether there is a personal "liberty" interest to be weighed against the government interests supposedly justifying the State's official actions. It is remarkable that the Court, which is so determined to parse the language of other cases, see generally Ante, Part II, can be thus oblivious to the fact that Every Member of the Court so recently felt that the intentional, public exposure of alleged wrongdoing like the branding of an individual as an "active shoplifter" implicates a constitutionally protected "liberty" or "property" interest and requires analysis as to whether procedures adequate to satisfy due process were accorded the accused by the State.

Moreover, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), which was relied on by the Court of Appeals in this case, did not rely at all on the fact asserted by the *730 Court today as controlling namely, upon the fact that "posting" denied Ms. Constantineau the right to purchase alcohol for a year, ante, at 1164. Rath, Constantineau stated: "The Only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." 400 U.S., at 436, 91 S.Ct., at 509, 27 L.Ed.2d, at 518 (emphasis supplied). In addition to the statements quoted by the Court, Ante, at 1163-1164, the Court in Constantineau continued: " 'Posting' under the Wisconsin Act may to some be merely the **1175 mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." 400 U.S., at 437, 91 S.Ct., at 510, 27 L.Ed.2d, at 519. " '(T)he right to be heard before being condemned to suffer grievous loss of any kind, Even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' " Ibid., quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817, 852 (1951) (Frankfurter, J., concurring) (emphasis supplied). There again, the fact that government stigmatization of an individual implicates constitutionally protected interests was made plain. [FN15]

FN15. Even more recently, in Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), we recognized that students may not be suspended from school without being accorded due process safeguards. We explicitly referred to "the liberty interest in reputation" implicated by such suspensions, Id., at 576, 95 S.Ct., at 737, 42 L.Ed.2d, at 735, based upon the fact that suspension for certain actions would stigmatize the student, Id., at 574-575, 95 S.Ct., at 736, 42 L.Ed.2d, at 735:

"The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); Board of Regents v. Roth, supra, 408 U.S. at 573, 92 S.Ct. (2701) at 2707 (33 L.Ed.2d 548). School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution."

The Court states that today's holding is "quite consistent" with Goss because "Ohio law conferred a right upon all children to attend school, and . . . the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right." Ante, at 1165. However, that was only one-half of the holding in Goss. The Ohio law established a Property interest of which the Court held a student could not be deprived without being accorded due process. 419 U.S., at 573- 574, 95 S.Ct., at 735, 42 L.Ed.2d, at 733-734. However, the Court also specifically recognized that there was an independent Liberty interest implicated in the case, not dependent upon the statutory right to attend school, but based, as noted above, on the fact that suspension for certain conduct could affect a student's "good name,

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reputation, honor, or integrity." Id., at 574-575, 95 S.Ct., at 736, 42 L.Ed.2d, at 735.

Similarly, the idea that the language in Board of Regents v. Roth, supra, is "quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable," Ante, at 1164, borders on the absurd. The Court in Roth, like the Court in Goss, explicitly quoted the language from Constantineau that the Court today denigrates, Ante, at 1163-1164, and it was clear that Roth was focusing on stigmatization as such. We said there that when due process safeguards are required in such situations, the "purpose of such notice and hearing is to provide the person an opportunity To clear his name," 408 U.S., at 573 n. 12, 92 S.Ct., at 2707, 33 L.Ed.2d, at 558 (emphasis supplied), and only found no requirement for due process safeguards because "(i)n the present case . . . there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake." Id., at 573, 92 S.Ct., at 2707, 33 L.Ed.2d, at 558. See also Arnett v. Kennedy, 416 U.S., at 157, 94 S.Ct., at 1646, 40 L.Ed.2d 15 (opinion of Rehnquist, J.) ("(L)iberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee . . . (T)he purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name' . . ."). The fact that a stigma is imposed by the government in terminating the employment of a government employee may make the existence of state action unquestionable, but it surely does not detract from the fact that the operative "liberty" concept relates to the official stigmatization of the individual, whether imposed by the government in its status as an employer or otherwise.

*731 **1176 Thus Jenkins and Constantineau, and the decisions upon which they relied, are cogent authority that a person's interest in his good name and reputation falls *732 within the broad term "liberty" and clearly require that the government afford procedural protections before infringing that name and reputation by branding a person as a criminal. The Court is reduced to discrediting the clear thrust of Constantineau and Jenkins by excluding the interest in reputation from all constitutional protection "if there is any other possible interpretation" by which to deny their force as precedent according constitutional protection for the interest in reputation. [FN16] Ante, at 1164. The Court's approach oblivious both to Mr. Chief Justice Marshall's admonition that "we must never forget, that it is A constitution we are expounding," McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579, 601 (1819), and to the teaching of cases such as Roth and Meyer, which were attentive to the necessary breadth of constitutional "liberty" and "property" interests, see nn. 10, 15, supra-- is to water down our prior precedents by reinterpreting *733 them as confined to injury to reputation that affects an individual's employment prospects or, as "a right or status previously recognized by state law (that the State) distinctly altered or extinguished." Ante, at 1165. See also, E. g., ante, at 1160, 1162-1163, 1164-1165. The obvious answer is that such references in those cases (when there even were such references) concerned the particular fact situations presented, and in nowise implied any limitation upon the application of the principles announced. E. g., ante, at 1164-1165, quoting Board of Regents v. Roth, 408 U.S., at 573, 92 S.Ct., at 2707, 33 L.Ed.2d, at 558. See n. 15, Supra. Discussions of impact upon future employment opportunities were nothing more than recognition of the logical and natural consequences flowing from the stigma condemned. E. g., ante, at 1162-1163, quoting Cafeteria Workers v. McElroy, 367 U.S., at 898, 81 S.Ct. 1743, 6 L.Ed.2d 1230, 1238. [FN17]

FN16. Similar insensitivity is exhibited by the Court when it declares that respondent "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." Ante, at 1160. The gravamen of respondent's complaint is that he has been stigmatized as a criminal without Any of the constitutional protections designed to prevent an erroneous determination of criminal culpability.

FN17. The import of these cases and the obvious impact of official stigmatization as a criminal were not lost on the Court of Appeals in this case:

"This label ("active shoplifter") carries with it the badge of disgrace of a criminal conviction. Moreover, it is a direct statement by law enforcement officials that the persons included in the flyer are presently pursuing an active course of criminal conduct. All of this was done without the slightest regard for due process. There was no notice nor opportunity to be heard prior to the distribution of the flyer, and appellant and others have never been accorded the opportunity to refute the charges in a criminal proceeding. It goes without saying that the Police Chiefs cannot determine the guilt or innocence of an accused in an administrative proceeding. Such a determination

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can be made only in a court of law.

"The harm is all the more apparent because the branding has been done by law enforcement officials with the full power, prestige and authority of their positions. There can be little doubt that a person's standing and associations in the community have been damaged seriously when law enforcement officials brand him an active shoplifter, accuse him of a continuing course of criminal conduct, group him with criminals and distribute his name and photograph to the merchants and businessmen of the community. Such acts are a direct and devastating attack on the good name, reputation, honor and integrity of the person involved. The fact of an arrest without more may impair or cloud a person's reputation. Michelson v. United States, 335 U.S. 469, 482, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Such acts on the part of law enforcement officials may result in direct economic loss and restricted opportunities for schooling, employment and professional licenses. Menard v. Mitchell, 139 U.S.App.D.C. 113, 430 F.2d 486, 490 (1970)." 505 F.2d 1180, 1183 (1974).

*734 Moreover, the analysis has a hollow ring in light of the Court's acceptance of the truth of the allegation that the "active shoplifter" label would "seriously impair **1177 (respondent's) future employment opportunities." Ante, at 1159. This is clear recognition that an official "badge of infamy" affects tangible interests of the defamed individual and not merely an abstract interest in how people view him; for the "badge of infamy" has serious consequences in its impact on no less than the opportunities open to him to enjoy life, liberty, and the pursuit of happiness. It is inexplicable how the Court can say that a person's status is "altered" when the State suspends him from school, revokes his driver's license, fires him from a job, or denies him the right to purchase a drink of alcohol, but is in no way "altered" when it officially pins upon him the brand of a criminal, particularly since the Court recognizes how deleterious will be the consequences that inevitably flow from its official act. See, E. g., ante, at 1164, 1165-1166. Our precedents clearly mandate that a person's interest in his good name and reputation is cognizable as a "liberty" interest within the meaning of the Due Process Clause, and the Court has simply failed to distinguish those precedents in any rational manner in holding that no invasion of a "liberty" interest was effected in the official stigmatizing of respondent as a criminal without any "process" whatsoever.

I have always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards *735 securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth. It is a regrettable abdication of that role and a saddening denigration of our majestic Bill of Rights when the Court tolerates arbitrary and capricious official conduct branding an individual as a criminal without compliance with constitutional procedures designed to ensure the fair and impartial ascertainment of criminal culpability. Today's decision must surely be a short- lived aberration. [FN18]

FN18. In light of my conviction that the State may not condemn an individual as a criminal without following the mandates of the trial process, I need not address the question whether there is an independent right of privacy which would yield the same result. Indeed, privacy notions appear to be inextricably interwoven with the considerations which require that a State not single an individual out for punishment outside the judicial process. Essentially, the core concept would be that a State cannot broadcast even such factual events as the occurrence of an arrest that does not culminate in a conviction when there are no legitimate law enforcement justifications for doing so, since the State is chargeable with the knowledge that many employers will treat an arrest the same as a conviction and deny the individual employment or other opportunities on the basis of a fact that has no probative value with respect to actual criminal culpability. See, E. g., Michelson v. United States, 335 U.S. 469, 482, 69 S.Ct. 213, 221, 93 L.Ed. 168, 177 (1948); Schware v. Board of Bar Examiners, 353 U.S., at 241, 77 S.Ct., at 757, 1 L.Ed.2d, at 802. A host of state and federal courts, relying on both privacy notions and the presumption of innocence, have begun to develop a line of cases holding that there are substantive limits on the power of the government to disseminate unresolved arrest records outside the law enforcement system, see, E. g., Utz v. Cullinane, 172 U.S.App.D.C. 67, 520 F.2d 467 (1975); Tarlton v. Saxbe, 165 U.S.App.D.C. 293, 507 F.2d 1116 (1974); United States v. Dooley, 364 F.Supp. 75 (E.D.Pa.1973); Menard v. Mitchell, 328 F.Supp. 718, 725-726 (D.C.1971), rev'd on other grounds, 162 U.S.App.D.C. 284, 498 F.2d 1017 (1974); United States v. Kalish, 271 F.Supp. 968 (P.R.1967); Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Eddy v. Moore, 5 Wash.App. 334, 487 P.2d 211 (1971). I fear that after today's decision, these nascent doctrines will never have the opportunity for full growth and

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analysis. Since the Court of Appeals did not address respondent's privacy claims, and since there has not been substantial briefing or oral argument on that point, the Court's pronouncements are certainly unnecessary. Of course, States that are more sensitive than is this Court to the privacy and other interests of individuals erroneously caught up in the criminal justice system are certainly free to adopt or adhere ... to higher standards under state law. See, E. g., Michigan v. Mosley, 423 U.S. 96, 111, 120-121, 96 S.Ct. 321, 330, 334-335, 46 L.Ed.2d 313, 326, 331-332 (1975) (Brennan, J., dissenting).

Mr. Justice WHITE does not concur in this footnote.

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See 351 U.S. 944, 76 S.Ct. 843.

Harry SLOCHOWER, Appellant,

v.

The BOARD OF HIGHER EDUCATION OF The CITY OF NEW YORK.

No. 23.

Supreme Court of the United States

Argued Oct. 19, 1955.

Decided April 9, 1956.
As Modified on Denial of Rehearing May 28, 1956.

Proceeding to annul petitioners' dismissal from their city college positions and for reinstatement. The New York Supreme Court, Special Term, dismissed the petition, 202 Misc. 915, 118 N.Y.S.2d 487, and the Appellate Division affirmed, 282 App.Div. 718, 122 N.Y.S.2d 286. The Court of Appeals also affirmed, 306 N.Y. 532, 119 N.E.2d 373. The case of one petitioner, a professor, came to the United States Supreme Court by appeal, and that Court, Mr. Justice Clark, held that where questions asked the professor by a congressional committee were asked for a purpose unrelated to his college functions and where the Board of Education had possessed for 12 years the pertinent information as to which the professor refused, under the Fifth Amendment, to testify, summary dismissal of the professor under a charter provision terminating office or employment of any city employee who utilizes privilege against self-incrimination to avoid answering a question relating to his official conduct was violative of due process.

Reversed and remanded.

Mr. Justice Reed, Mr. Justice Burton, Mr. Justice Minton and Mr. Justice Harlan dissented.

[1] **FEDERAL COURTS ⚷504.1**
170Bk504.1
Formerly 170Bk504, 106k394(10)
Because of importance of question presented as to whether professor's dismissal from his position with city college, solely because of his refusal to testify on ground of self-incrimination, comported with due process, Supreme Court noted probable jurisdiction of appeal. New York City Charter, § 903; U.S.C.A. Const.Amends. 5, 14.

[2] **OFFICERS AND PUBLIC EMPLOYEES ⚷18**
283k18
Problem of balancing state's interest in loyalty of those in its service with traditional safeguards of individual rights is a continuing one, and to state that person does not have constitutional right to government employment is only to say that he must comply with reasonable, lawful and nondiscriminatory terms laid down by proper authorities. New York City Charter, § 903; Education Law N.Y. § 6206, subds. 2, 10; U.S.C.A.Const. Amends. 5, 14.

[3] **CONSTITUTIONAL LAW ⚷278.4(1)**
92k278.4(1)
Formerly 92k277(2)
Constitutional protection extends to public servant whose exclusion from public employment pursuant to a statute is patently arbitrary or discriminatory. New York City Charter, § 903; Education Law N.Y. § 6206, subds. 2, 10; U.S.C.A. Const.Amends. 5, 14.

[4] **WITNESSES ⚷309**
410k309
No sinister meaning should be imputed to one's exercise of his constitutional right, under Fifth Amendment, to refuse to testify, and such refusal is not to be taken as equivalent to confession of guilt or conclusive presumption of perjury. New York City Charter, § 903; U.S.C.A. Const.Amends. 5, 14.

[5] **CONSTITUTIONAL LAW ⚷278.5(3)**
92k278.5(3)
Formerly 92k275(1)
Where questions asked professor of city college by congressional committee were asked for purpose unrelated to his college functions and where board of education had possessed for 12 years the pertinent information as to which the professor refused, under Fifth Amendment, to testify, summary dismissal of professor under charter provision terminating office or employment of any city employee who utilizes privilege against self-incrimination to avoid answering a question relating to his official conduct was violative of due process. New York City

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Charter, § 903; Education Law N.Y. § 6206, subds. 2, 10; U.S.C.A. Const.Amends. 5, 14.

[6] OFFICERS AND PUBLIC EMPLOYEES ⚷6
283k6
State has broad powers in selection and discharge of its employees. New York City Charter, § 903; Education Law N.Y. § 6206, subds. 2, 10; U.S.C.A.Const. Amends. 5, 14.

[6] OFFICERS AND PUBLIC EMPLOYEES ⚷7
283k7
State has broad powers in selection and discharge of its employees. New York City Charter, § 903; Education Law N.Y. § 6206, subds. 2, 10; U.S.C.A.Const. Amends. 5, 14.

**638 *552 Mr. Ephraim S. London, New York City, for appellant.

Mr. Daniel T. Scannell, Brooklyn, N.Y., for appellee.

Mr. Justice CLARK.

This appeal brings into question the constitutionality of s 903 of the Charter of the City of New York. That section provides that whenever an employee of the City utilizes the privilege against self-incrimination to avoid answering a question relating to his official conduct, 'his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.' [FN1] Appellant Slochower invoked the privilege against self-incrimination *553 under the Fifth Amendment before an investigating committee of the United States Senate, and was summarily discharged from his position as associate professor at Brooklyn College, an institution maintained by the City of New York. He now claims that the charter provision as applied to him, violates both the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment.

FN1. The full text of s 903 provides:
'If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.'

On September 24, 1952, the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate held open hearings in New York City. The investigation, conducted on a national scale, related to subversive influences in the American educational system. At the beginning of the hearings the Chairman stated that education was primarily a state and local function, and therefore the inquiry would be limited to 'considerations affecting national security, which are directly within the purview and authority of the subcommittee.' Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of Senate Committee on the Judiciary, 82d Cong., 2d sess. 1. Professor Slochower, when called to testify, stated that he was not a member of the Communist Party, and indicated complete willingness to answer all questions about his associations or political beliefs since 1941. But he refused to answer questions concerning his membership during 1940 and 1941 on the ground that his answers might tend to incriminate him. The Chairman of the Senate Subcommittee accepted Slochower's claim as a valid assertion of an admitted constitutional right.

It had been alleged that Slochower was a Communist in 1941 in the testimony of one Bernard Grebanier before the Rapp-Coudert Committee of the New York Legislature. See Report of the Subcommittee of the Joint Legislative Committee to Investigate Procedures and Methods of *554 Allocating State Moneys for Public School Purposes and Subversive Activities, Legislative Document (1942), **639 No. 49, State of New York, at 318. Slochower testified that he had appeared twice

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before the Rapp-Coudert Committee, and had subsequently testified before the Board of Faculty relating to this charge. He also testified that he had answered questions at these hearings relating to his Communist affiliations in 1940 and 1941.

Shortly after testifying before the Internal Security Subcommittee, Slochower was notified that he was suspended from his position at the College; three days later his position was declared vacant 'pursuant to the provisions of Section 903 of the New York City charter.' [FN*]

FN* (Reporter's Note: A sentence which was reported in the Preliminary Print at p. 554, lines 13--18, was deleted by an order of the Court entered May 28, 1956, 351 U.S. 944, 76 S.Ct. 843.)

Slochower had 27 years' experience as a college teacher and was entitled to tenure under state law. McKinney's New York Consol.Laws, c. 16, Education Law, s 6206(2). Under this statute, appellant may be discharged only for cause, and after notice, hearing, and appeal. s 6206(10). The Court of Appeals of New York, however, has authoritatively interpreted s 903 to mean that 'The assertion of the privilege against self incrimination is equivalent to a resignation'. Daniman v. Board of Education of City of New York, 306 N.Y. 532, 538, 119 N.E.2d 373, 377. Dismissal under this provision is therefore automatic and there is no right to charges, notice, hearing, or opportunity to explain.

[1] The Supreme Court of New York, County of Kings, concluded that appellant's behavior fell within the scope of s 903, and upheld its application here. 202 Misc. 915, 118 N.Y.S.2d 487. The Appellate Division, 282 App.Div. 718, 122 N.Y.S.2d 286, reported sub nom. Shlakman v. Board of Higher Education of City of New York, and the Court of Appeals, reported *555 sub nom. Daniman v. Board of Education of City of New York, supra, each by a divided court, affirmed. We noted probable jurisdiction, 348 U.S. 935, 75 S.Ct. 356, 99 L.Ed. 733, because of the importance of the question presented. [FN2]

FN2. Thirteen other individuals brought suit for reinstatement after their dismissal for pleading the privilege against self-incrimination in the same federal investigation. We dismissed the appeal of these individuals 'for want of a properly presented federal question.' Daniman v. Board of Education of City of New York, 348 U.S. 933, 75 S.Ct. 355, 99 L.Ed. 732. See Daniman v. Board of Education of City of New York, 307 N.Y. 806, 121 N.E.2d 629, where the New York Court of Appeals declined to amend its remittitur to state that a federal question had been presented and passed on as to these appellants but did so amend its remittitur as to Slochower.

Slochower argues that s 903 abridges a privilege or immunity of a citizen of the United States since it in effect imposes a penalty on the exercise of a federally guaranteed right in a federal proceeding. It also violates due process, he argues, because the mere claim of privilege under the Fifth Amendment does not provide a reasonable basis for the State to terminate his employment. Appellee insists that no question of 'privileges or immunities' was raised or passed on below, and therefore directs its argument solely to the proposition that s 903 does not operate in an arbitrary or capricious manner. We do not decide whether a claim under the 'privileges or immunities' clause was considered below, since we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law.

[2] The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he **640 must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, upheld the New York Feinberg Law which authorized the public school authorities to *556 dismiss employees who, after notice and hearing, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. [FN3] Likewise Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 720, 71 S.Ct. 909, 912, 95 L.Ed. 1317, upheld the right of the city to inquire of its employees as to 'matters that may prove relevant to their fitness and suitability for the public service', including their membership, past and present, in the Communist Party or the Communist Political Association. There it was held

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that the city had power to discharge employees who refused to file an affidavit disclosing such information to the school authorities. [FN4]

FN3. Mr. Justice Black and Mr. Justice Douglas dissented. Mr. Justice Frankfurter dissented on grounds of standing and ripeness.

FN4. Mr. Justice Black and Mr. Justice Douglas dissented. Mr. Justice Frankfurter and Mr. Justice Burton concurred in this aspect of the case, but dissented from other portions of the decision in separate opinions.

[3] But in each of these cases it was emphasized that the State must conform to the requirements of due process. In Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, we struck down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. [FN5] This case rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.' 344 U.S. at page 192, 73 S.Ct. at page 219.

FN5. Mr. Justice Black and Mr. Justice Frankfurter concurred in separate opinions in which Mr. Justice Douglas joined. Mr. Justice Burton concurred in the result.

Here the Board, in support of its position, contends that only two possible inferences flow from appellant's claim *557 of self-incrimination: (1) that the answering of the question would tend to prove him guilty of a crime in some way connected with his official conduct; or (2) that in order to avoid answering the question he falsely invoked the privilege by stating that the answer would tend to incriminate him, and thus committed perjury. Either inference, it insists, is sufficient to justify the termination of his employment. The Court of Appeals, however, accepted the Committee's determination that the privilege had been properly invoked and it further held that no inference of Communist Party membership could be drawn from such a refusal to testify. It found the statute to impose merely a condition on public employment and affirmed the summary action taken in the case. With this conclusion we cannot agree.

[4] At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen'. Brown v. Walker, 161 U.S. 591, 610, 16 S.Ct. 644, 652, 40 L.Ed. 819. We have reaffirmed our faith in this principle recently in Quinn v. United States, 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964. In Ullmann v. United**641 States, 350 U.S. 422, 76 S.Ct. 497, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might *558 be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955).

[5] With this in mind, we consider the application of s 903. As interpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of Wieman v. Updegraff, supra.

It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property,

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affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information.

Without attacking Professor Slochower's qualification for his position in any manner, and apparently with full knowledge of the testimony he had given some 12 years *559 before at the state committee hearing, the Board seized upon his claim of privilege before the federal committee and converted it through the use of s 903 into a conclusive presumption of guilt. Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 302, 57 S.Ct. 724, 729, 81 L.Ed. 1093.

[6] This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice BLACK and Mr. Justice DOUGLAS join the Court's judgment and opinion, but also adhere to the views **642 expressed in their dissents in Adler v. Board of Education of City of New York, and Garner v. Board of Public Works of City of Los Angeles, supra, and to their concurrences in Wieman v. Updegraff, supra.

Mr. Justice REED, with whom Mr. Justice BURTON and Mr. Justice MINTON join, dissenting.

In reliance upon the Due Process Clause of our Constitution, the Court strikes deep into the authority of New York to protect its local governmental institutions from influences of officials whose conduct does not meet *560 the declared state standards for employment. This New York City Charter, s 903, adopted in 1936 to take effect in 1938, was designed to eliminate from public employment individuals who refused to answer legally authorized inquiries as to the 'official conduct of any officer or employee of the city * * * on the ground that his answer would tend to incriminate him'. Its provisions, as applicable to Professor Slochower and others, have been upheld by the Court of Appeals of New York under multipronged state grounds of attack in the instances where he and other city teachers of New York have sought to bar their removal from their positions. [FN1]

FN1. Daniman v. Board of Education of City of New York (Shlakman v. Board of Higher Education of City of New York), 306 N.Y. 532, 119 N.E.2d 737.

'In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. * * * We are also all in agreement that an inquiry into the past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. * * * Communism is opposed to such loyalty. * * * Internal security affects local as well as National Governments.' Id., 306 N.Y. at pages 540--541, 119 N.E.2d at page 379. The majority decided s 903 was applicable to a 'hearing before a Federal legislative committee' and that this appellant was an employee of the city. Id., 306 N.Y. at page 541, 119 N.E.2d at page 379.

The sole reliance of the Court for reversal of the New York Court of Appeals is that s 903, as here applied, violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

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The Court of Appeals amended its remittitur to show that it held federal due process was not violated. 307 N.Y. 806, 121 N.E.2d 629. In view of the conclusions of the Court of Appeals we need deal only with that problem. The Court of Appeals has exclusive power to determine the reach of its own statute.

*561 The Court finds it a denial of due process to discharge an employee merely because he relied upon the Fifth Amendment plea of self-incrimination to avoid answering questions which he would be otherwise required to answer. We assert the contrary--the city does have reasonable ground to require its employees either to give evidence regarding facts of official conduct within their knowledge or to give up the positions they hold. Petitioners never contended that error or inadvertence led them to refuse to answer. Their contention is set out in the margin below. [FN2] Discharges under s 903 do not depend upon any conclusion **643 as to the guilt of the employee of some crime that might be disclosed by his testimony or as to his guilt of perjury, if really there was no prosecution to fear. We disagree with the Court's assumption that s 903 as a practical matter takes the questions asked as confessed. Cities, like other employers, may reasonably conclude that a refusal to furnish appropriate information is enough to justify discharge. Legally authorized bodies have a right to demand that citizens furnish facts pertinent to official inquiries. The duty to respond may be refused for personal protection against prosecution only, but such avoidance of public duty to furnish information can properly *562 be considered to stamp the employee as a person unfit to hold certain official positions. Such a conclusion is reinforced when the claimant for protection has the role of instructor to youth. The fact that the witness has a right to plead the privilege against self-incrimination protects him against prosecution but not against the loss of his job. [FN3]

FN2. Appellant's petition to the Supreme Court of the State of New York stated in pertinent part as follows:

'9. Petitioners answered some and refused to answer others of the questions referred to in paragraph 8 on various and numerous grounds, including the ground that the Subcommittee had not jurisdiction to inquire into such matters, the ground that the First Amendment to the Constitution of the United States forbade such inquiry, the ground that the procedures of the Subcommittee violated their rights under the Fifth Amendment to the Constitution of the United States and that they could not be required under the Fifth Amendment to answer such questions, and on other grounds. The Subcommittee acquiesced in the refusal of petitioners to answer such questions.'

FN3. Cf. Ullmann v. United States, 350 U.S. 422 at 438–439, 76 S.Ct. 497: 'For the history of the privilege establishes not only that it is not to be interpreted literally, but also that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts * * *.''

The Court may intend merely to hold that since the facts of Slochower's alleged Communist affiliations prior to 1941 were known to the Board before the federal claim, and since the inquiries of the Committee were asked for a purpose unrelated to his college functions, therefore it was a denial of due process to vacate his office. If so, its conclusion is likewise, we think, erroneous. We agree that this case is not like Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, an attempt to elicit information about professional qualifications. But s 903 is directed at the propriety of employing a man who refuses to give needed information to appropriate public bodies.

Consideration of the meaning of 'due process' under the Fourteenth Amendment supports our position that s 903 of the City Charter does not violate that concept. For this Court to hold that state action in the field of its unchallenged powers violates the due process of the Federal Constitution requires far more than mere disagreement with the legal conclusions of state courts. To require, as the Court does, that New York stay its hand in discharging a teacher whom the city deems unworthy to occupy a chair in its Brooklyn College, demands that this Court say, if it follows our prior cases, that the action of the Board in declaring Professor Slochower's position *563 vacant was inconsistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. [FN4] A denial of due process is 'a practice repugnant to the conscience of mankind.' [FN5] Surely no such situation exists here.

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FN4. Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270; Cf. Twining v. State of New Jersey, 211 U.S. 78, 100, 29 S.Ct. 14, 20, 53 L.Ed. 97.

FN5. Palko v. State of Connecticut, 302 U.S. 319, 323, 325, 326, 58 S.Ct. 149, 151, 152, 83 L.Ed. 288. Cf. State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 376, 91 L.Ed. 422; Adamson v. People of State of California, 332 U.S. 46, 53, 67 S.Ct. 1672, 1676, 91 L.Ed. 1903.

Those charged with educational duties in a State bear heavy responsibilities. Only a few years ago, in Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 385, 96 L.Ed. 517, we upheld against three dissents the Feinberg Law of New York making ineligible for employment as a teacher in any public school a member of any subversive organization, if he knew its purpose. The argument that the 'fact found bears no relation to the fact presumed', **644 i.e., 'disqualification for employment', was rejected. There also the contention was denial of due process. We said:

'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty.' Id., 342 U.S. at page 493, 72 S.Ct. at page 385.

A great American university has declared that members of its faculty who invoked the Fifth Amendment before committees of Congress were guilty of 'misconduct' *564 though not grave enough to justify dismissal. [FN6] Numerous other colleges and universities have treated the plea of the Fifth Amendment as a justification for dismissal of faculty members. [FN7] When educational institutions themselves feel the impropriety of reserving full disclosure of facts from duly authorized official investigations, can we properly say a city cannot protect itself against such conduct by its teachers?

FN6. 42 American Association of University Professors Bulletin 96. Compare The Rights and Responsibilities of Universities and their Faculties, Association of American Universities, March 24, 1953, III:

'As in all acts of association, the professor accepts conventions which become morally binding. Above all, he owes his colleagues in the university complete candor and perfect integrity, precluding any kind of clandestine or conspiratorial activities. He owes euqal candor to the public. If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor. Refusal to do so, on whatever legal grounds, cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak and the maximum protection of that freedom available in our society. In this respect, invocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to reexamine his qualifications for membership in its society.

'* * * When the powers of legislative inquiry are abused, the remedy does not lie in noncooperation or defiance; it is to be sought through the normal channels of informed public opinion.'

FN7. 42 American Ass'n of University Professors Bulletin 61--94.

The New York rule is not the patently arbitrary and discriminatory statute of Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216. There 'A state servant may have joined a proscribed organization unaware of its activities and purposes.' 344 U.S. at page 190, 73 S.Ct. at page 218. This Court unanimously condemned as arbitrary the requirement of an oath that covered both innocent and knowing membership without distinction. A different situation exists here. Section 903 was included *565 in the Seabury Report to help in the elimination of graft and corruption. [FN8] Numerous employees had refused to testify as to criminal acts on the ground of self- incrimination. New York decided it did not want that kind of public employees. We think New York had that right. We would affirm the judgment of the Court of Appeals.

FN8. In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury, December 27, 1932, pp. 9--10.

Mr. Justice HARLAN, dissenting.

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I dissent because I think the Court has misconceived the nature of s 903 as construed and applied by the New York Court of Appeals, and has unduly circumscribed **645 the power of the State to ensure the qualifications of its teachers.

As I understand Mr. Justice Clark's opinion, the Court regards s 903 as raising some sort of presumption of guilt from Dr. Slochower's claim of privilege. That is not the way the Court of Appeals construed the statute. On the contrary, that Court said: 'we do not presume, of course, that these petitioners (one of whom was Dr. Slochower) by their action have shown cause to be discharged under the Feinberg Law, L.1949, ch. 360 since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination.' [FN1] Since s 903 is inoperative if even incriminating answers are given, it is apparent that it is the exercise of the privilege itself which is the basis for the discharge, quite apart from any inference of guilt. Thus the Court of Appeals could say that 'The assertion of the privilege against self incrimination is equivalent to a resignation'. [FN2] It is also clear that the Board of Education's discharge of Dr. Slochower was on this same *566 premise. The question this case presents, therefore, is not whether any inferences can constitutionally be drawn from a claim of privilege, but whether a State violates due process when it makes a claim of privilege grounds for discharge.

FN1. 306 N.Y. 532, 538, 119 N.E.2d 373, 377.

FN2. Ibid.

In effect, what New York has done is to say that it will not employ teachers who refuse to cooperate with public authorities when asked questions relating to official conduct. Does such a statute bear a reasonable relation to New York's interest in ensuring the qualifications of its teachers? The majority seems to decide that it does not. This Court has already held, however, that a State may properly make knowing membership in an organization dedicated to the overthrow of the Government by force a ground for disqualification from public school teaching. Adler v. Board of Education, of City of New York, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. A requirement that public school teachers shall furnish information as to their past or present membership in the Communist Party is a relevant step in the implementation of such a state policy, and a teacher may be discharged for refusing to comply with that requirement. Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317. Moreover, I think that a State may justifiably consider that teachers who refuse to answer questions concerning their official conduct are no longer qualified for public school teaching, on the ground that their refusal to answer jeopardizes the confidence that the public should have in its school system. On either view of the statute, I think Dr. Slochower's discharge did not violate due process.

It makes no difference that the question which Dr. Slochower refused to answer was put to him by a federal rather than a state body. The authority of the subcommittee to ask the question is not controverted. While as an original matter I would be doubtful whether s 903 was intended to apply to federal investigations, the *567 Court of Appeals has ruled otherwise, and its interpretation is binding on us. Dr. Slochower cannot discriminate between forums in deciding whether or not to answer a proper and relevant question, if the State requires him to answer before every lawfully constituted body. Here, the information sought to be elicited from Dr. Slochower could have been considered by state authorities in reviewing Dr. Slochower's qualifications, and the effect of his claim of privilege on the public confidence in its school system was at least as great as it would have been had his refusal to answer been before a state legislative committee.

There is some evidence that Dr. Slochower had already answered, before a **646 state committee, the same question which he refused to answer before the congressional subcommittee. [FN3] Even assuming that New York already had the information, I cannot see how that would prevent New York from constitutionally applying s 903 to this claim of privilege. Apart from other considerations, who can tell whether Dr. Slochower would have answered the question the same way as he had before?

FN3. At the Senate subcommittee hearing, in response to Senator Ferguson's inquiry whether or not Dr. Slochower had 'ever' answered a question concerning Communist Party membership in 1940 or 1941, Dr. Slochower replied: 'Yes, I did answer

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it.'

On this record I would affirm the decision of the Court of Appeals. A different question would be presented under the Privileges and Immunities Clause of the Fourteenth Amendment. But that question was not raised below, and is therefore not open here. Dewey v. City of Des Moines, 173 U.S. 193, 19 S.Ct. 379, 43 L.Ed. 665.

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LAWRENCE L. BAGGETT et al., Plaintiffs and Appellants,
v.
DARYL GATES, as Chief of Police, etc., et al., Defendants and Appellants.
DAVID B. ZELHART, Plaintiff and Appellant,
v.
DARYL GATES, as Chief of Police, etc., et al., Defendants and Appellants

L.A. No. 31533.

Supreme Court of California.

Aug 23, 1982.

SUMMARY

Police officers employed by a charter city petitioned the trial court for a writ of mandate and other relief after they had been reassigned to lower paying positions pursuant to departmental findings that their performance had been negligent and unsatisfactory, alleging that they had not been afforded their rights under the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The trial court granted the requested writ of mandate and permanently enjoined defendant department from transferring or reassigning any officers to lower paygrades without first affording them an opportunity for an administrative appeal. The trial court also denied plaintiffs' motion for attorney fees. (Superior Court of Los Angeles County, Nos. C 308353 and C 314138, Jerry Pacht, Judge.)

The Supreme Court reversed and remanded with respect to the denial of attorney fees and affirmed in all other respects. The court first held that the home rule provisions of the California Constitution (Cal. Const., art. XI, § 5) did not preclude application of the Public Safety Officers' Procedural Bill of Rights Act to charter cities, since the maintenance of stable labor relations was a matter of statewide concern, and since the total effect of the legislation was not to deprive local governments of the right to manage and control their police departments, but to secure basic rights and protections to a segment of public employees. The court also held that a decision to reassign a peace officer to a lower *129 paying position is per se disciplinary or punitive in nature, for purposes of the act, and that plaintiffs were thus entitled to an administrative appeal (Gov. Code, § 3304, subd. (b)), notwithstanding the assertion that the salary reductions were not imposed for purposes of punishment and were thus excluded from the reach of the statute. As to attorney fees, the court held plaintiffs were entitled to an award under the private attorney general doctrine (Code Civ. Proc., § 1021.5), since the action resulted in securing for plaintiffs and many others the basic rights and protections of the act, which were matters of statewide concern, since a significant benefit had been conferred on the general public, and since the financial burden placed on plaintiffs was out of proportion to their personal stake in the case. (Opinion by Bird, C. J., with Mosk, Newman, Broussard and Reynoso, JJ., concurring. Separate concurring and dissenting opinion by Kaus, J. Separate dissenting opinion by Richardson, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Public Safety Officers' Procedural Bill of Rights Act--Applicability to Charter Cities.

The home rule provisions of the California Constitution (Cal. Const., art. XI, § 5) did not preclude application of the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) to charter cities, where the maintenance of stable labor relations was a matter of statewide concern and where the total effect of the legislation was not to deprive local governments of the right to manage and control their police departments, but to secure basic rights and protections to a segment of public employees. General laws seeking to assure fair labor practices may be applied to police departments, even though they impinge on local control to a limited extent.

[See Cal.Jur.3d, Law Enforcement Officers, § 33; Am.Jur.2d, Sheriffs, Police, and Constables, § 11 et seq.]

(2) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Public Safety Officers' Procedural Bill of Rights Act--Applicability to Reassignments to Lower Paying Positions.

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A decision to reassign a peace officer to a lower paying position is per se *130 disciplinary or punitive in nature, for purposes of the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). Accordingly, police officers who were subjected to such action were entitled to an administrative appeal (Gov. Code, § 3304, subd. (b)), notwithstanding the assertion that the salary reductions were not imposed for purposes of punishment and were thus excluded from the reach of the statute. In any event, it was evident that the reassignments were the result of alleged improper prior conduct by the officers and thus were for purposes of punishment.

(3) Costs § 7--Amount and Items Allowable--Attorney Fees--Under Private Attorney General Doctrine.

Police officers who successfully challenged their reassignments to lower paying positions on grounds that they had not been afforded their appeal rights under the Public Safety Officers' Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) were entitled to recover attorney fees under the private attorney general doctrine (Code Civ. Proc., § 1021.5), where the action resulted in securing for plaintiffs and many others the basic rights and protections of the act, which were matters of statewide concern, where a significant benefit had been conferred on the general public, and where the financial burden placed on plaintiffs was out of proportion to their personal stake in the case.

COUNSEL

Cecil W. Marr, Robert J. Loew and Loew & Marr for Plaintiffs and Appellants.

William H. Sortor, David P. Clisham and Carroll, Burdick & McDonough as Amici Curiae on behalf of Plaintiffs and Appellants.

Ira Reiner and Burt Pines, City Attorneys, Frederick N. Merkin, Senior Assistant City Attorney, and Catharine H. Vale, Assistant City Attorney, for Defendants and Appellants.

Burke, Williams & Sorensen, Royal M. Sorensen and Virginia R. Pesola as Amici Curiae on behalf of Defendants and Appellants. *131

BIRD, C. J.

The primary issue presented by this case is whether the Public Safety Officers' Procedural Bill of Rights Act (Bill of Rights Act) applies to chartered cities. (See Gov. Code, §§ 3300-3311.)

I.

Plaintiffs, Lawrence Baggett, David Butler, John Spencer and David Zelhart, are police officers employed by the Los Angeles Police Department (Department). Defendants are the chief of police, the board of police commissioners and the City of Los Angeles.

Under the Department's salary structure, known as the Jacobs Plan, each of the several civil service job classes - i.e., police officer, sergeant, lieutenant, captain and deputy chief - may have more than one "paygrade" or salary level. (L.A. Admin. Code, § 4.140(n).) Officers "appointed ... to a class having more than one pay grade may be assigned and reassigned within that class" in accord with the regulations promulgated by the board of police commissioners. (Ibid.) These regulations are set forth in the Los Angeles Police Department Manual (Department Manual).

The paygrades within the civil service class of police officer, the class held by plaintiffs here, are police officers I, II, and III. (See L.A. Admin. Code, § 4.140(n).) Police officer I is the entry-level paygrade. Police officer II applies to officers who have completed one and one-half years of service. Police officer III applies to officers assigned to certain specialized positions involving increased responsibilities or calling for special qualifications. Such assignments are called "advanced paygrade assignments" and are compensated at higher rates. (See generally, 3 Department Manual, § 763 et seq.)

The Jacobs Plan also provides for additional compensation, over and above that attached to class and paygrade, for those officers assigned to positions involving particularly hazardous duties. (L.A. Admin. Code, § 4.159(g)(2), pt. B.)

Until July 1979, plaintiffs worked in the firearms and explosives unit of the Department's scientific investigation division. All four of them had been assigned to the unit for a number of years and had acquired extensive, specialized training and

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experience in the handling of firearms *132 and explosives. Since positions in this unit are classified as "advanced paygrade assignments" and as particularly hazardous, plaintiffs received extra compensation for both. That is, they were compensated at the rate of a "Police Officer III-3." The extra salary received totaled approximately $5,000 per year.

In July 1979, the Department received information that plaintiffs and several others had engaged in misconduct during work hours. The alleged misconduct included: drinking while on duty or while on police premises; shooting pellet and/or BB rifles inside police premises and into the streets; mishandling evidence, including explosives; and various "pranks." Shortly thereafter, the Department's internal affairs division began an investigation.

Early in the course of the investigation, each plaintiff was interrogated at some length. The Department told plaintiffs of the nature of the investigation prior to questioning them. They were also warned that it could lead to formal charges of misconduct. [FN1]

FN1 Officers Spencer, Baggett, and Zelhart were questioned at the Department on July 11, 1979, for periods ranging from four to eleven hours. Baggett and Zelhart's interrogation did not end until several hours after their watch was over. Spencer's interrogation took place during the evening hours after his watch.
Although he was on vacation, Officer Butler was questioned at home on July 13, 1979. He had been asked to come to the Department but was unable to do so due to the illness of a family member. The interrogation ended after only a few hours due to the death of the family member.

Each officer was asked to consent to a search of his home. Baggett and Butler did so, but only Baggett's home was searched. Spencer and Zelhart refused to give their consent. The Department searched plaintiffs' personal desks on July 11, 1979. No effort was made to obtain plaintiffs' consent to these searches.

On July 12, 1979, the commanding officer of the scientific investigation division, Captain Brennan, placed Officers Baggett, Spencer and Zelhart on temporary loan to other divisions within the Department. Officer Butler was placed on temporary loan outside the division when he returned from vacation on August 2, 1979. While on temporary loan, plaintiffs received the same salary as before.

The investigation failed to substantiate some of the alleged acts of misconduct and revealed that the remaining acts had occurred over a *133 year earlier. As a result, no formal charges were brought against plaintiffs. [FN2] However, under the Department's regulations, "An officer below the rank of lieutenant in an advanced paygrade position may be reassigned to a lower paygrade position within his classification when .... [such] officer clearly demonstrates his failure or inability to satisfactorily perform the duties of the position." (3 Department Manual, § 763.55.) [FN3] Based on the investigation, Captain Brennan concluded that plaintiffs' performance had been negligent and unsatisfactory. Accordingly, in December 1979, he formally recommended that plaintiffs be reassigned to lower-paying police officer II positions outside the firearms and explosives unit.

FN2 Section 202, subdivision (1), of the Los Angeles City Charter provides, in pertinent part, that "charges [against an officer] must be based upon some act committed or omitted by such officer ... within one (1) year prior to the filing of [a] complaint" against him or her.

FN3 Section 763.55 provides that "An officer below the rank of lieutenant in an advanced paygrade position may be reassigned to a lower paygrade position within his classification when one of the following conditions exists:
"An officer requests reassignment, OR
"An officer completes a fixed tour of duty in a position, OR
"A position is eliminated, OR
"When an officer clearly demonstrates his failure or inability to satisfactorily perform the duties of the position."

The Department approved Brennan's recommendation and notified plaintiffs that they would be reassigned to police officer II positions in January and February of 1980. [FN4] Their request for a hearing or administrative appeal was denied. Departmental regulations provide for a hearing only when a formal personnel complaint is also filed against an officer. (See 3 Department Manual, § 763.60; see also L.A. City Charter, § 202.)

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FN4 Under the Department's regulations, although the commanding officer may temporarily reassign an officer to a lower paygrade position, as was done here, the officer's compensation is not reduced until a formal recommendation is forwarded to and approved by the director of the office of administrative services. (3 Department Manual, § 763.60.)

Seeking to prevent their reassignment, plaintiffs filed a petition for writ of mandate and complaint for declaratory and injunctive relief in Los Angeles Superior Court. [FN5] Relying primarily on the Bill of Rights Act (Gov. Code, §§ 3300-3311), [FN6] plaintiffs contended that defendants could not reassign them to lower paying positions without affording ***134** them an administrative appeal as provided in section 3304, subdivision (b) of the act. [FN7]

FN5 Officers Baggett, Spencer and Butler filed their action in December 1979. Officer Zelhart filed his in February 1980. The trial court ordered the actions consolidated since they raised identical issues. (See Code Civ. Proc., § 1048.)

FN6 All statutory references are to the Government Code unless otherwise indicated.

FN7 Section 3304, subdivision (b) provides: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."
The term "punitive action" is defined in section 3303 as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

In their answer, defendants asserted that the act could not constitutionally be applied to a charter city such as Los Angeles. Defendants further asserted that plaintiffs had no right to an administrative appeal under the act. According to defendants, the transfer or downgrading of plaintiffs did not constitute "punitive action" since it was not undertaken "for purposes of punishment."

After the hearing, the trial court granted plaintiffs the relief they requested. The court's judgment and order, entered July 23, 1980, directed issuance of a peremptory writ of mandate ordering defendants (1) to give plaintiffs an administrative appeal before taking any action which would reduce their salary and (2) to otherwise comply fully with the provisions of the Bill of Rights Act. In addition, the court permanently enjoined defendants "from transferring or reassigning any officer(s) from advanced paygrade assignments to duties at lower paygrades until such officer(s) have been afforded an opportunity for an administrative appeal." Subsequently, the court denied plaintiffs' motion for attorney fees.

Defendants appealed. Although agreeing that the act applies to charter cities, the Court of Appeal held that the right to an administrative appeal provided by section 3304, subdivision (b) arises only when an officer is reassigned to a lower paygrade assignment "solely or substantially for purposes of punishment."

Plaintiffs also appealed from the trial court's denial of their motion to recover attorney fees under section 1021.5 of the Code of Civil Procedure.

This court granted hearing to consider the case in connection with White v. County of Sacramento (1982) 31 Cal.3d 676 [183 Cal.Rptr. 520, 646 P.2d 191]. ***135**

II.

(1) The first issue this court must decide is whether application of the Bill of Rights Act to charter cities violates the home rule provisions of the California Constitution. (Cal. Const., art. XI, § 5.)

As its title suggests, the act sets forth a list of basic rights and protections which must be afforded all peace officers (see § 3301) by the public entities which employ them. It is a catalogue of the minimum rights (§ 3310) the Legislature deems necessary to secure stable employer-employee relations (§ 3301).

In brief, the act (1) secures to officers the right to engage in political activity, if they so desire, when off-duty and out of uniform, "[e]xcept as otherwise provided by law" (§ 3302); (2) prescribes certain protections that must be afforded officers during interrogations which could lead to punitive action against them (§ 3303); [FN8] (3) gives officers the right to review and respond in writing to adverse comments entered in their personnel files (§§ 3305,

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3306); (4) allows officers to refuse to submit to a lie-detector test (§ 3307); (5) prohibits searches of officers' personal storage spaces or lockers except when they are present, or have been notified, or give their consent, or a valid warrant is obtained (§ 3309); (6) limits the circumstances in which officers may be compelled to disclose their personal financial status (§ 3308); (7) gives officers the right to an administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit (§ 3304); and (8) protects officers from retaliation for the exercise of their rights under the act (ibid.).

FN8 For example, before being interrogated an officer must be told of the nature of the investigation (§ 3303, subd. (c)), the name of the officer in command, and the names of the interrogating officers (§ 3303, subd. (b)). Both the agency and the officer have the right to record interrogation sessions. (§ 3303, subd. (f).)

Unless the seriousness of the investigation requires otherwise, interrogations must be conducted at a reasonable hour (§ 3303, subd. (a)) and for a reasonable time (§ 3303, subd. (d)). There must be no browbeating, or threat of punitive action, or promise of reward used to induce an officer to answer questions. (§ 3303, subd. (e).) An officer may, however, be told that his or her failure to answer may result in punitive action. (Ibid.)

An officer has a right to be represented by a person of his choice when it appears likely that punitive action may be taken against him. (§ 3303, subd. (h).) If it appears that an officer may be charged with a criminal offense, he must be informed of his constitutional rights. (§ 3303, subd. (g).)

The general home rule provision of the Constitution gives chartered cities the power to "make and enforce all ordinances and regulations in ***136** respect to municipal affairs, subject only to [the] restrictions and limitations provided in their several charters ...." (Cal. Const., art. XI, § 5, subd. (a).) [FN9] Further, charter provisions, ordinances or regulations "relating to matters which are purely 'municipal affairs'" prevail over state laws covering the same subject. (Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 539 [86 Cal.Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036]; Cal. Const., art. XI, § 5, subd. (a).)

FN9 The cited text reads: "(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

"As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters ...." (Bishop v. City of San Jose (1969) 1 Cal.3d 56, 61 [81 Cal.Rptr. 465, 460 P.2d 137].) Accordingly, the applicability of the Bill of Rights Act to charter cities turns on whether the matters it addresses are of statewide concern or are "strictly" a municipal affair. (Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 315-316 [152 Cal.Rptr. 903, 591 P.2d 1] [Sonoma County].)

Although what constitutes a matter of statewide concern is ultimately an issue for the courts to decide, [FN10] it is well settled that this court will accord "great weight" to the Legislature's evaluation of this question. (Bishop v. City of San Jose, supra, 1 Cal.3d at p. 63.) Therefore, it is significant that the Legislature has expressly declared that "the rights and protections provided to peace officers [by the Bill of Rights Act] constitute a matter of statewide concern." (§ 3301.)

FN10 "'Because the various sections of article XI fail to define municipal affairs, it becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern.'" (Bishop v. City of San Jose, supra, 1 Cal.3d at p. 62, quoting from Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 294 [32 Cal.Rptr. 830, 384 P.2d 158].)

Moreover, this is not the usual case in which the Legislature has left the courts to divine why this is so. (See, e.g., Sonoma County, supra, 23 Cal.3d at p. 316 and fn. 20.) Instead, the Legislature has set forth the findings underlying its conclusion: "[E]ffective law enforcement depends upon the maintenance of stable employer-employee relations, between ***137** public safety employees and their employers. In order to assure that such stable

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relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers ... wherever situated within the State of California." (§ 3301.)

Defendants, however, argue vigorously that the Bill of Rights Act is nothing more than an attempt by the Legislature to impose rigid rules regarding the internal affairs of city police departments. That this is a province the Legislature cannot invade is established, they contend, by section 5, subdivision (b) of article XI. That subdivision provides in pertinent part: "It shall be competent in all city charters to provide ... for: (1) the constitution, regulation, and government of the city police force ...." Moreover, cities are granted "plenary authority" to provide, in their charters for the "compensation, method of appointment, qualifications, tenure of office and removal" of their employees. (Cal. Const., art. XI, § 5, subd. (b)(4).) [FN11]

FN11 The cited text reads: "(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

Superficially, these provisions raise some doubt as to whether the Bill of Rights Act may be applied to charter cities. On closer scrutiny, however, it becomes clear that it may. In the first place, the act impinges only minimally on the specific directives of section 5, subdivision (b). Review of the act's provisions (see ante, at p. 135) demonstrates that the act does not interfere with the setting of peace officers' compensation. [FN12] (Compare Sonoma County, supra, 23 Cal.3d at pp. 316-318 [invalidating legislative attempt to impose a pay freeze on municipal employees]; see also San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d 785, 790-791 [163 Cal.Rptr. 460, 608 P.2d 277] [invalidating legislative attempt to impose *138 a prevailing wage requirement].) Nor does the act purport to regulate their qualifications for employment (compare Ector v. City of Torrance (1973) 10 Cal.3d 129, 132-133 [109 Cal.Rptr. 849, 514 P.2d 433] [invalidating legislative attempt to prohibit charter cities from imposing residency requirements]), nor "the manner in which," or "the method by which," or "the times at which," or "the terms for which" peace officers "shall be elected or appointed." (Cal. Const., art. XI, § 5, subd. (b)(4).) Similarly, it does not affect their tenure of office or purport to regulate or specify the causes for which they may be removed. (Compare Pearson v. County of Los Angeles (1957) 49 Cal.2d 523, 533, 536 [319 P.2d 624] [holding state statute providing for removal of peace officers convicted of a felony inapplicable to a charter county].)

FN12 The only place compensation is mentioned is in section 3303, subdivision (a) which provides: "If [the] interrogation [of a public safety officer] ... occur[s] during off-duty time ... the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures ...."

The act does, however, impinge on the city's implied power to determine the manner in which its employees may be removed. Although the act in no way interferes with the city's exclusive jurisdiction over removal of its employees (compare Curphey v. Superior Court (1959) 169 Cal.App.2d 261, 268 [337 P.2d 169] [holding state statute providing for removal of employees by action of a grand jury inapplicable to a charter county]), it does require the city to provide peace officers "an opportunity for administrative appeal." (§ 3304, subd. (b).) [FN13] And, of course, it cannot be gainsaid that other provisions impinge to a limited extent on the city's general regulatory power over the department.

FN13 Of course, to the extent this right is coextensive with the requirements of due process, it cannot be said to impinge upon the city's powers. It should be noted that a number of the act's provisions have a constitutional basis, including:

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(1) the right to engage in political activity provided by section 3302 (see, e.g., Kinnear v. San Francisco (1964) 61 Cal.2d 341 [38 Cal.Rptr. 631, 392 P.2d 391]); and (2) the limitations on financial disclosures provided by section 3308 (see, e.g., City of Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259 [85 Cal.Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313]).

However, in Professional Fire Fighters Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, this court specifically rejected the notion that any intrusion upon matters connected with public employment is necessarily an intrusion upon "municipal affairs." (Id., at p. 291.) Professional Fire Fighters involved the right of Los Angeles firemen to join a labor union. Relying on the home rule provisions of the Constitution, the city there contended that the statutes purporting to confer this right on its fire department employees unlawfully interfered with its exclusive and ***139** plenary authority over all matters bearing on its relation with its public employees. (Id., at pp. 280, 291; see Cal. Const., art. XI, § 5, subd. (b)(4).) [FN14]

FN14 The home rule provisions of the Constitution were revised in 1970. The provisions in effect at the time Professional Fire Fighters was decided were set forth in former article XI, sections 6, 8 and 8 1/2.

As relevant here, the 1970 revision effected no substantive change in these provisions. Article XI, section 13 declares, "The provisions of Section[] ... 5 of this article relating to matters affecting the distribution of powers between the Legislature and cities ... shall be construed as a restatement of all related provisions of the Constitution in effect immediately prior to the effective date of this amendment [June 2, 1970], and as making no substantive change."

In rejecting the city's contention, this court observed that general laws seeking to accomplish an objective of statewide concern may prevail over conflicting local regulations even if they impinge to a limited extent upon some phase of local control. (Professional Fire Fighters, supra, 60 Cal.2d at pp. 292, 295.) Accordingly, this court held that the state statutes which gave firemen the right to join a labor union were applicable to charter cities. "The total effect of all this legislation was not to deprive local government (chartered city or otherwise) of the right to manage and control its fire departments but to create uniform fair labor practices throughout the state. As such, the legislation may impinge upon local control to a limited extent, but it is nonetheless a matter of state concern." (Id., at pp. 294- 295.)

Of course, the matter is no different when it comes to the police departments of chartered cities. General laws seeking to assure fair labor practices may be applied to police departments, just as they may be applied to fire departments, even though they impinge upon local control to a limited extent. (Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 500-502 [129 Cal.Rptr. 893]; see also Los Angeles County Civil Service Com. v. Superior Court (1978) 23 Cal.3d 55, 65-66 and fn. 12 [151 Cal.Rptr. 547, 588 P.2d 249].) [FN15]

FN15 It has long been recognized that the home rule provisions of the Constitution do not place the police departments of charter cities beyond the reach of state laws addressing matters of statewide concern, even where such laws intrude upon local regulation. (E.g., Healy v. Industrial Acc. Com. (1953) 41 Cal.2d 118, 121-122 [258 P.2d 1]; Long Beach Police Officers Assn. v. City of Long Beach (1976) 61 Cal.App.3d 364, 371 [132 Cal.Rptr. 348]; Lossman v. City of Stockton (1935) 6 Cal.App.2d 324, 332-333 [44 P.2d 397].)

Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a ***140** matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.

Moreover, there is a direct, substantial connection between the rights provided by the Bill of Rights Act and the Legislature's asserted purpose. To give but one example, the administrative appeal provided is akin to a grievance system. It allows an officer who believes that his conduct or performance does not

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warrant punitive action an opportunity to present his side of the matter. Grievance systems have proved to be highly successful devices for helping to maintain labor peace. (Final Rep. Assem. Advisory Council on Public Employee Relations (Mar. 1973) at p. 186.)

In sum, here, as in Professional Fire Fighters, the total effect of this legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves.

"[T]he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate." (Pac. Tel. & Tel. Co. v. City & County of S. F. (1959) 51 Cal.2d 766, 771 [336 P.2d 514].) There must always be doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as "strictly a municipal affair." Such doubt, however, "must be resolved in favor of the legislative authority of the state." (Abbott v. City of Los Angeles (1960) 53 Cal.2d 674, 681 [3 Cal.Rptr. 158, 349 P.2d 974], citations omitted.)

For these reasons, this court holds that the Bill of Rights Act may constitutionally be applied to charter cities. *141

III.

(2) The next issue this court must decide is whether the right to an administrative appeal provided by the Bill of Rights Act extends to peace officers who, like plaintiffs, are reassigned to lower paying positions.

Section 3304, subdivision (b) of the act provides, "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." The term "punitive action" is defined in section 3303 as "any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

Plaintiffs assert that their reassignments will result in a loss in pay and are, therefore, punitive actions giving rise to a right of appeal under sections 3303 and 3304. Defendants, however, contend that the phrase "for purposes of punishment" qualifies each of the preceding terms in section 3303. Therefore, they argue that "reductions in salary" which are not imposed "for purposes of punishment" are excluded from the reach of the statute. Since defendants argue that plaintiffs' reassignments were not imposed for purposes of punishment, they contend that plaintiffs are not entitled to a hearing under section 3304.

For the reasons set forth in White v. County of Sacramento, supra, 31 Cal.3d 676, at pages 679-684, this court has concluded that the phrase "for purposes of punishment" qualifies only the term "transfer." "[A] decision to reassign a peace officer to a lower paying position is per se disciplinary, or punitive in nature ...." (Id., at pp. 683-684.) Accordingly, under section 3304 an officer subject to such action must be accorded the opportunity for an administrative appeal. (Ibid.) It follows that plaintiffs here are entitled to an administrative appeal.

Moreover, "looking through form to substance," it is evident that plaintiffs' reassignments came about because of their alleged improper prior conduct. (Heyenga v. City of San Diego (1979) 94 Cal.App.3d 756, 759 [156 Cal.Rptr. 496].) The record before this court compels the conclusion that plaintiffs were reassigned "for purposes of punishment." *142

IV.

(3) As to plaintiffs' appeal, the only question to be decided is whether the trial court abused its discretion in denying their motion for attorney fees under section 1021.5 of the Code of Civil Procedure. [FN16]

FN16 Section 1021.5 provides: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be

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paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

Section 1021.5 provides for court-awarded attorney fees under a private attorney general theory. (See also Serrano v. Priest (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d 1303].) As this court explained in Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 933 [154 Cal.Rptr. 503, 593 P.2d 200], the private attorney general doctrine "rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions .... [W]ithout some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]"

The decision as to whether an award of attorney fees is warranted rests initially with the trial court. (Id., at pp. 938, 940-941, 942.) "[U]tilizing its traditional equitable discretion," that court "must realistically assess the litigation and determine, from a practical perspective" (id., at p. 938) whether or not the statutory criteria have been met. In this case, the trial court had to evaluate whether plaintiffs' action: (1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter. (See Code Civ. Proc., § 1021.5; Woodland Hills, supra, at pp. 935-942.) [FN17]

FN17 Since plaintiffs' action did not produce any monetary recovery, factor "(c)" of Code of Civil Procedure section 1021.5 is not applicable. In addition, no one contested the need for private, as compared with public, enforcement in this case, which is one of the criteria under factor "(b)." (See ante, fn. 16.)

Where, as here, a trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial *143 abuse of discretion. "'To be entitled to relief on appeal ... it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice ....'" (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 242, p. 4234, citations omitted.) However, "discretion may not be exercised whimsically and, accordingly, reversal is appropriate 'where no reasonable basis for the action is shown.' [Citation.]" (Marini v. Municipal Court (1979) 99 Cal.App.3d 829, 835-837 [160 Cal.Rptr. 465]; see generally, 6 Witkin, Cal. Procedure, supra, § 244, pp. 4235-4236.)

Analysis of plaintiffs' action leads to the conclusion that there was no reasonable basis for the trial court's denial of their motion for attorney fees. Plaintiffs' action resulted in securing for themselves and many others the basic rights and protections of the Bill of Rights Act. This court has today concluded that these rights and protections are matters of statewide concern. It follows that the rights vindicated by plaintiffs are sufficiently "important" to justify an attorney fee award. (See Woodland Hills, supra, 23 Cal.3d at p. 936.)

Moreover, it can scarcely be contended that plaintiffs' litigation has not conferred a "significant benefit" on the "general public." Since enforcement of the Bill of Rights Act should help to maintain stable relations between peace officers and their employers and thus to assure effective law enforcement, plaintiffs' action directly inures to the benefit of the citizenry of this state. (See ante, at pp. 139-140.) No one can be heard to protest that effective law enforcement is not a "significant benefit."

Finally, although this is a closer question, the record before this court indicates that the financial burden this suit placed on plaintiffs was out of proportion to their personal stake in the case. By their action, plaintiffs have secured the enforcement of basic procedural rights, including the right to an administrative appeal of disciplinary actions. However, enforcement of these procedural rights may well not result in any pecuniary benefit to plaintiffs themselves. (See Serrano v. Priest, supra, 20 Cal.3d 25, 45.) For example, plaintiffs' newly won right to an administrative appeal of the Department's decision to reassign them to lower paying positions will not necessarily result in the reversal of that decision. Plaintiffs' reassignment and consequent reduction in salary may be approved.

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This court is satisfied that plaintiffs' action meets the requirements of section 1021.5 of the Code of Civil Procedure. Therefore, plaintiffs are entitled to recover their attorney fees. *144

V.

Since no reasonable basis for denying plaintiffs' motion for attorney fees appears in the record, the trial court's refusal to award fees was an abuse of discretion and its denial order must be reversed. In all other respects, the judgment is affirmed. The case is remanded for further proceedings consistent with this opinion. Plaintiffs-appellants shall recover their costs on appeal.

Mosk, J., Newman, J., Broussard, J., and Reynoso, J., concurred.

KAUS, J.,

Concurring and Dissenting.

I concur in parts II and III of the court's opinion, but dissent from the court's conclusion in part IV that the trial court abused its discretion in denying plaintiffs' motion for attorney fees under Code of Civil Procedure section 1021.5. On the facts of this case, I believe the trial court could very reasonably conclude that a "private attorney general" attorney fee award was not warranted because the financial burden of the lawsuit did not transcend plaintiffs' personal interest in the litigation.

In establishing the parameters of this state's private attorney general doctrine, section 1021.5 provides that a trial court may award attorneys fees against a losing party in an action resulting in the enforcement of an important right if, inter alia, "the necessity and financial burden of private enforcement are such as to make the award appropriate." In analyzing this requirement in Woodland Hills Resident Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 941-942 [154 Cal.Rptr. 503, 593 P.2d 200], we explained that this limitation was intended to reserve a private attorney general fee award for those cases in which such an award is needed to effectuate an important public policy, i.e., those cases in which a private plaintiff's personal interest alone is insufficient to make it likely that he would have incurred the attorney fees to bring the action. Quoting from the Court of Appeal decision in County of Inyo v. City of Los Angeles (1978) 78 Cal.App.3d 82, 89 [144 Cal.Rptr. 71], we held: "'An award on the "private attorney general " theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff "out of proportion to his individual stake in the matter."'" (23 Cal.3d at p. 941; see also Serrano v. Priest (1977) 20 Cal.3d 25, 45-46 & fn. 18 [141 Cal.Rptr. 315, 569 P.2d 1303].) *145

On the facts of this case, the trial court could well have determined that a statutory fee award was not needed as an incentive to insure that plaintiff's statutory rights would be vindicated and that the cost of the lawsuit did not place a burden on plaintiffs "out of proportion to [their] individual stake in the matter."

The attorney fees at issue total about $8,400. As the court's opinion notes, each of the four plaintiffs is challenging the validity of a disciplinary sanction which threatens to reduce his salary by $5,000 a year. Although there is, of course, no guarantee that plaintiffs will prevail on the merits once they are afforded an administrative hearing, assuming - as we must - that plaintiffs believe in the validity of their case, the total amount of money at stake in this proceeding - $20,000 every year - certainly provided the plaintiffs with a substantial financial incentive to pursue this litigation.

Furthermore, contrary to the court's suggestion (ante, p. 143), this litigation will provide a substantial monetary benefit to the individual officers even if they do not ultimately prevail on the merits after an administrative hearing. The reduction in the officers' salaries proposed by the city was scheduled to take effect early in 1980, but that reduction has been stayed during the course of this litigation by an injunction issued by the trial court. As a consequence, the lawsuit to date has apparently permitted plaintiffs to receive more than $40,000 in additional income. Thus, even if we consider the matter solely from the point of view of the individual plaintiffs' financial interest, I do not see how we can conclude that the trial court abused its discretion in finding that in light of their personal stake in the litigation, the cost of the litigation - $8,400 in attorney fees - did not place a disproportionate burden on plaintiffs. [FN1]

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FN1 The fact that other persons may gain the benefit of the general legal principle established in this case cannot, of course, in itself justify a fee award. As we explained in Woodland Hills, supra, 23 Cal.3d 917, 946: "Although 'it is a built-in consequence of [the Anglo-American principle of] stare decisis that "a legal doctrine established in a case involving a single litigant characteristically benefits all others similarly situated"' [citations], the doctrine of stare decisis has never been viewed as sufficient justification for permitting an attorney to obtain fees from all those who may, in future cases, utilize a precedent he has helped to secure. [Citations.] As the Second Circuit Court of Appeals stated in rejecting a plea for attorney fees based on a comparable theory: 'It is a novel assertion that attorneys who are victorious in one case may, like the holder of a copyright, claim fees from all subsequent litigants who might rely on or use it in one way or another.' [Citation.]"

In addition, it is not at all clear to me that the trial court - in conducting the "realistic assessment" of the situation mandated by Woodland ***146** Hills (see 23 Cal.3d at pp. 938, 940, 941-942 & fn. 13) - was required to confine its consideration to the financial costs and benefits of the four individual plaintiffs. The record discloses that the attorney fees at issue have not been paid by the individual plaintiffs; instead, this litigation has been financed by plaintiffs' employee association - the Los Angeles Police Protection League. There is, of course, absolutely nothing improper in such an arrangement. (See, e.g., Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217 [19 L.Ed.2d 426, 88 S.Ct. 353]; Railroad Trainmen v. Virginia Bar (1964) 377 U.S. 1 [12 L.Ed.2d 89, 84 S.Ct. 1113, 11 A.L.R.3d 1196].) Nonetheless, in determining whether a private attorney general fee award is needed to insure that lawsuits will be brought to enforce a particular statutory policy, it seems eminently reasonable for a trial court to consider whether the existence of such an organization means that - as a practical matter - private lawsuits to enforce the enactment will in fact be forthcoming even without the promise of a private attorney general award. [FN2] Surely, when the role of the employees' association is taken into account, there can be no question but that the trial court did not abuse its discretion in concluding that an attorney fee award under section 1021.5 was not warranted in this case.

FN2 Unlike the legal aid offices and "public interest" law firms discussed in Serrano v. Priest, supra, 20 Cal.3d 25, 47-48, an employee organization - like the homeowners' association involved in Woodland Hills - is an organization which exists, in large measure, in order to further the common personal interests of its members. Insofar as a particular lawsuit is likely to provide direct benefits to a large number of members who are contributing to the legal fees, it would belie reality to ignore the members' collective interest in assessing whether the financial burden imposed by the lawsuit is "out of proportion" to the personal interests at stake in the matter.

Although the Court of Appeal decision in County of Inyo v. City of Los Angeles, supra, involved a public, rather than a private, entity, its reasoning is instructive on this point: "Inyo County went to court as champion of local environmental values, which it sought to preserve for the benefit of its present and future inhabitants. This action is not a 'public interest' lawsuit in the sense that it is waged for values other than the petitioner's. The litigation is self-serving. The victory won by the county in 1977 bulked large enough to warrant the cost of winning it. The necessity for enforcement by Inyo County did not place on it 'a burden out of proportion to [its] individual stake in the matter.' [Citation.]" (78 Cal.App.3d at p. 90.)

I would affirm the trial court judgment in its entirety.

RICHARDSON, J.

I respectfully dissent. In my view, matters relating to the employment, compensation and discipline of police officers are municipal affairs. Accordingly, chartered cities such as Los Angeles may make and enforce ordinances on these subjects without limitation or restriction by any contrary state law. This seems to me to be mandated ***147** by article XI, section 5, subdivision (a), of the California Constitution which provides that "City charters ... shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." (Italics added.)

The majority concedes that the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) "impinge[s] on the city's implied power to determine the manner in which its employees may be removed," as well as the city's "general regulatory power over the [police] department." (Ante, p. 138.) The act contains numerous restrictions upon the city's power to

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discipline its police officers, including provision for an administrative appeal following any "punitive action," broadly defined to include even mere reprimands or transfers. (Gov. Code, §§ 3303, 3304.)

Notwithstanding the breadth of article XI, section 5, subdivision (a), the majority concludes that "the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern." (Ante, pp. 139-140.) The majority fails to appreciate that if "stable employment relations" with public employees were the dispositive factor, every state law which called for terms or conditions of public employment less restrictive than those required by municipal charter would override all conflicting local ordinances on the subject. We have previously rejected any such approach. (See, e.g., Ector v. City of Torrance (1973) 10 Cal.3d 129, 132-133 [109 Cal.Rptr. 849, 514 P.2d 433] [local residence requirement for city employees overrides contrary state law]; Bishop v. City of San Jose (1969) 1 Cal.3d 56, 62-63 [81 Cal.Rptr. 465, 460 P.2d 137] [state prevailing wage law inapplicable to charter city employees].)

In the context of employment relations, the state Constitution seems to me to be quite explicit in establishing supervision of city police as a "municipal affair." Not only does the Constitution provide that charter provisions regarding municipal affairs "shall supersede" any contrary state laws, but the very next subdivision of article XI empowers cities to provide by charter for "the constitution, regulation, and government of the city police force ...." (Id., § 5, subd. (b).) That same subdivision also recites that "plenary authority is hereby granted [charter cities] ... to provide ... the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees ... shall be elected and appointed, and for their removal, and for their compensation, and for the number of ... employees *148 that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such ... employees." (Ibid., italics added.)

It is difficult for me to see how the framers of our Constitution could have been more explicit in declaring their intention that the employment and regulation of local police officers be considered "municipal affairs."

The express constitutional grant of "plenary authority" to charter cities furnishes conclusive "constitutional guidance" in this regard. (See Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 316-317 [152 Cal.Rptr. 903, 591 P.2d 1]; Ector v. City of Torrance, supra, 10 Cal.3d 129, 132.) As was recently expressed in Brown v. City of Berkeley (1976) 57 Cal.App.3d 223, 236 [129 Cal.Rptr. 1], "'It has been uniformly held that the organization, maintenance and operation of a police and fire department by a chartered city is a municipal affair and as such not subject to the control of the legislature.' [Citation.] Moreover, under article XI, section 5(b), of the California Constitution chartered cities are specifically provided the authority to constitute, regulate and govern city police departments."

The majority relies for its contrary conclusion almost exclusively upon Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276 [32 Cal.Rptr. 830, 384 P.2d 158], but that case is inapposite. It held only that the right of municipal employees to join a labor union was a matter of statewide rather than municipal concern. This holding is correct, but I see no inconsistency between it and the views which I herein express. Union activities neither directly nor inevitably conflict with nor infringe upon the cities' constitutional power to employ, compensate and discipline its own municipal employees.

I would reverse the judgment. *149

Cal.,1982.

Baggett v. Gates

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CIVIL SERVICE ASSOCIATION, LOCAL 400 et al., Plaintiffs and Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents

S.F. No. 23621.

Supreme Court of California

October 26, 1978.

SUMMARY

Eight individuals employed in civil service positions, and two labor organizations, sought a writ of mandate challenging the legality of short term suspensions imposed on the employees for disciplinary reasons. The petition alleged that in none of the suspensions were the individuals permitted full union representation and none of the employees were given a copy of the charges and an opportunity to respond in advance of the discipline imposed. It was further alleged the denial of union representation and of prediscipline rights was a denial of due process and the statutory protection of the Meyers-Milias- Brown Act (Gov. Code, §§ 3500-3510), governing union representation of public employees. The trial court denied the petition. (Superior Court of the City and County of San Francisco, No. 696317, Byron Arnold, Judge. [FN*])

The Supreme Court reversed and remanded, except as to one of the petitioners who was employed by the police department, who had an opportunity for a postdisciplinary hearing but did not allege a demand for a hearing nor a denial of such demand. As to her, the court affirmed for failure to exhaust her administrative remedies. The court held that while plaintiffs may not in fact have been deprived of a salary earned, but only of the opportunity to earn it, they had the expectation of earning it free from arbitrary administrative action, and that expectancy was entitled to some due process protection. The court held such protection would be adequately provided by a procedure that would apprise the employee of the proposed action, the reasons therefor, provide them with a copy of the charges including materials on which the action was based, and the right to respond either orally or in writing, to the authority *553 imposing the discipline either during the suspension or within a reasonable time thereafter. The court rejected the contention that in the case of short term suspensions of five days or less, such procedures had to be implemented before the suspension. The court further held that plaintiffs' right of representation by a labor organization in the informal hearing followed from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation by counsel. Thus, the court held the labor organization could participate in the hearing if requested by the employee, provided it was a 'recognized' organization.

FN* Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.(Opinion by Manuel, J., with Mosk, Clark and Richardson, JJ., concurring. Separate concurring and dissenting opinion by Tobriner, J., with Bird, C. J., and Newman, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 107--Procedural Due Process--Temporary Deprivation.
Suspension of a right or of a temporary right of enjoyment may amount to a 'taking' for due process purposes. Thus, due process applied to the five-day suspension of civil service employees for disciplinary reasons.

(2) Civil Service § 9--Discharge, Demotion, Suspension and Dismissal-- Administrative Hearing and Decision--Short Term Suspension--Pretermination Procedures.
Due process of law does not require that governmental employees be given an opportunity in advance of the imposition of discipline to rebut the charges made against them where the discipline consists of a suspension of five days or less.

(3) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal-- Administrative Hearing and Decision--Short Term Suspension.
City civil service employees suspended for five days without pay for disciplinary reasons, while they may not have been deprived of a salary earned but only of the opportunity to earn it, had the

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expectation of earning it free from arbitrary administrative action, which expectancy was entitled to some due process protection. Accordingly, the employees had the right to be apprised of the proposed action, the reasons therefor, provided with a copy of the charges, including materials on which the action was based, and the ***554** right to respond either orally or in writing to the authority imposing the discipline either during the suspension or within a reasonable time thereafter.

[See Cal.Jur.2d, Public Officers, § 239; Am.Jur.2d, Civil Service, § 68.]

(4) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Suspension--Exhaustion of Administrative Remedies.
A civil service employee suspended for five days without pay was not entitled to judicial relief for alleged violation of her rights of due process, where she had an opportunity for a postdisciplinary hearing but did not allege a demand for a hearing nor a denial of such a demand. Under these circumstances, the employee did not exhaust her administrative remedies, which was a prerequisite to seeking judicial relief.

(5) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal-- Administrative Hearing and Decision--Union Representation.
Under Gov. Code, § 3503, providing that employee organizations have a right to represent their members in connection with all matters coming within the scope of representation, including disciplinary matters, a public employees' labor organization had the right to participate in disciplinary proceedings against suspended civil service employees, provided the labor organization was recognized, and the employee requested such representation. However, where the suspension was for no more than five days, and the employees had not right to a hearing prior to the suspension, they were not entitled to presuspension union representation.

COUNSEL

Van Bourg, Allen, Weinberg & Roger and Stewart Weinberg for Plaintiffs and Appellants.

Carroll, Burdick & McDonough, Christopher D. Burdick, Silver & Wells, Stephen H. Silver and George W. Shaeffer, Jr., as Amici Curiae on behalf of Plaintiffs and Appellants.

Thomas M. O'Connor, City Attorney, Milton H. Mares and Burk E. Delventhal, Deputy City Attorneys, for Defendants and Respondents. ***555**

MANUEL, J.

Appellants are eight individuals who are employed in civil service positions by respondent City and County of San Francisco, and two labor organizations of which the employees, among them, are members. They appeal from a judgment denying their petition for a writ of mandate challenging the legality of short term suspensions imposed upon them for disciplinary reasons. We affirm the judgment as to appellant Jacqueline Robinson and reverse as to the remaining appellants.

Each of the employees is alleged to be a permanent employee in the civil service system. The two labor unions are both labor organizations within the meaning of the Meyers-Milias-Brown Act. Each of the eight employees incurred a short-term suspension of five days or less from employment imposed for disciplinary reasons by his or her respective department. The allegations of the petition filed in the trial court describing the various suspensions are as follows:

'IX. In none of the [eight] suspensions ... were the individuals permitted full Union representation, and in none of the suspensions were the employees given a copy of the charges and an opportunity to respond in advance of the discipline imposed.

'X. In all of the suspensions, the employee and the Union demanded hearings and the right of Union representation of the disciplined employee. In each case, these rights were denied.

'XI. The denial of Union representation and the denial of pre-discipline rights is a denial of due process of law and the statutory protection of the Meyers-Milias-Brown Act.' [FN1] ***556**

FN1 While the proceedings may indicate that some of the appellants base their claims upon lack of any hearing (whether before or after their suspension), their briefs have approached this matter simply as a case where predisciplinary procedures of the kind

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explained in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774] are sought rather than a complaint that no hearing at all was afforded them. We note here in addition to paragraphs IX, X, and XI of the complaint the following portions of the complaint:

'IV.

The City and County of San Francisco is a chartered City and County of the State of California which employs employees for the purpose of carrying out the functions set forth in the Charter of the City and County of San Francisco. The City and County of San Francisco has various departments through which employees are employed. The San Francisco Police Department employs many classifications of employees, including Parking Control Persons. Jacqueline Robinson was and is at all times material hereto an employee of the City and County of San Francisco in the classification of Parking Control Person. The Airport Commission employs many classifications of employees, including Airport Policeman. Robert Quinn, Gary Pierce, Larry Lottie, Dominic Tringali were and are at all times material hereto employees of the City and County of San Francisco in the classification of Airport Policemen. Pamela Nash was employed by the City and County of San Francisco in the Department of Public Health as a Clerk Typist, and Benny Cross was and is employed by the City and County of San Francisco in the Department of Public Health at all times material hereto, as was Pamela Nash. Thomas Fowler was employed by the City and County of San Francisco working in the San Francisco Public Library at all times material hereto.

'V.

'On or about April 2, 1975, Jacqueline Robinson was suspended by her immediate employer, the San Francisco Police Department for an alleged transgression. Ms. Robinson requested and was denied representation by her Employee Organization, Local 400.

'VI.

'Robert Quinn was suspended by the Airport Commission on October 22, 1974 for three working days. Garry Pierce, Larry Lottie and Dominic Tringali were each suspended on April 25, 1974. Employees Quinn, Pierce, Lottie and Tringali each requested but were denied Employee Organization representation by Local 400 prior to the suspensions and were denied a hearing on their suspensions.

'VII.

'In the Spring of 1975, Benny Cross was suspended for a period of five days and was transferred in his position without a prior hearing and without the right of Union representation by his Employee Organization, Local 250. On January 20, 1975, Pamela Nash was suspended for five days and was denied a full hearing and Union representation.

'VIII.

'In December of 1974 Thomas Fowler was suspended by the San Francisco Public Library for five days and was denied Union representation and a hearing.

'IX.

'In none of the suspensions set forth hereinabove were the individuals permitted full Union representation, and in none of the suspensions were the employees given a copy of the charges and all of the materials and an opportunity to respond in advance of the discipline imposed.

'X.

'In all of the suspensions, the employee and the Union demanded hearings and the right of Union representation of the disciplined employee. In each case, these rights were denied.

'XI.

'The denial of Union representation and the denial of pre-discipline rights is a denial of due process of law and the statutory protection of the Meyers-Milias-Brown Act.

'XII.

'The Unions and the employees have exhausted all of their administrative remedies and have no adequate remedy at law.'

Appellants filed with their petition a declaration, by

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their attorney, which authenticated and incorporated several items of correspondence written by counsel of some of the respondents in connection with some of *557 the suspensions alleged. [FN2] In a memorandum of points and authorities filed a few days later, appellants expressly stated that their claim to relief was based upon the decision in

FN2 The declaration and documentation were apparently intended to support the issuance of an alternative writ of mandate. Skelly v. State Personnel Bd., supra, 15 Cal.3d 194.

Following the issuance of the alternative writ of mandate respondents filed an 'Answer And Return' to the petition in which they specifically denied several of its allegations, including those made in its paragraphs IX, X and XI (quoted above). They also filed a memorandum of points and authorities in which they opposed the petition, urging (1) that Skelly did not pertain to 'minor' employee disciplinary action of the nature alleged; (2) that Skelly did not reach these eight suspensions, in any event, because it was not to be applied retroactively; and (3) that the Meyers-Milias-Brown Act did not support any part of the relief prayed for in the petition.

It would appear that all of the eight appellant employees except Jacqueline Robinson were suspended pursuant to section 8.342 of respondent city and county's charter; Robinson was suspended pursuant to section 8.343 thereof because she, alone among the eight, was employed in - and suspended by - respondent's police department. Section 8.342 provides: 'Disciplinary Suspensions. The appointing officer may, for disciplinary purposes, suspend a subordinate for a period not exceeding thirty days; and suspension shall carry with it the loss of salary for the period of suspension. The suspended employee shall be notified in writing of the reason for such suspension, and if the suspension be for more than five days the employee shall, at his request, be given a hearing by the appointing officer. The decision of the appointing officer in all cases of suspension for disciplinary purposes shall be final.'

Section 8.343 provides: 'Fine, Suspension and Dismissal in Police and Fire Departments. Members of the fire or the police department guilty of any offense or violation of the rules and regulations of their respective departments, shall be liable to be punished by reprimand, or by fine not exceeding one month's salary for any offense, or by suspension for not to exceed three months, or by dismissal, after trial and hearing by the commissioners of their respective departments; provided, however, that the chief of each respective department for disciplinary purposes may suspend a member for a period not to exceed ten days for violation of the *558 rules and regulations of his department. Any member so suspended shall have the right to appeal such suspension to the fire commission or to the police commission, as the case may be, and have a trial and hearing on such suspension. ...'

In addition it is claimed that in none of the suspensions were the individual employees permitted full union representation; that while demanded, said representation was denied. It is thus claimed that the denial of union representation is a denial of the statutory protection of the Meyers-Milias- Brown Act (Gov. Code, §§ 3500-3510).

The trial court heard no evidence but considered the arguments of counsel and, as if a motion for judgment on the pleading had been filed by respondent, gave judgment for respondent.

Issues Presented

The issues presented by this appeal are (1) whether due process of law requires governmental employees be given an opportunity in advance of the imposition of discipline, consisting of suspension of five days or less, to rebut the charges made against them and (2) whether petitioners were denied rights guaranteed them under Government Code sections 3500-3510 (Meyers- Milias-Brown Act).

The first issue relates to the application of Skelly v. State Personnel Bd., supra, 15 Cal.3d 194, and Barber v. State Personnel Bd. (1977) 18 Cal.3d 395 [134 Cal.Rptr. 206, 556 P.2d 306], to these short-term suspensions. The second issue involves the application of Social Workers' Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382 [113 Cal.Rptr. 461, 521 P.2d 453], upon which appellants rely.

Discussion

I

Application of Skelly v. State Personnel Bd.

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Appellants base their claim to prediscipline rights upon Skelly v. State Personnel Bd., supra, 15 Cal.3d 194. In Skelly we held that before the employee therein involved could be terminated from his permanent civil service position with the State of California he was entitled to preremoval safeguards. After analyzing the opinion of the various justices in Arnett v. Kennedy (1973) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], we concluded: 'It is clear that due process does not require the state to *559 provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, 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.' (15 Cal.3d at p. 215.)

Both Skelly and Arnett involved discharges from employment of the employees therein involved. Skelly states at 15 Cal.3d 207-208: '... when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (Goldberg v. Kelly (1970) 397 U.S. 254, 261- 262 [25 L.Ed.2d 287, 295-296; 90 S.Ct. 1011]; see Geneva Towers Tenants Org. v. Federated Mortgage Inv. (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing 'the existence of rules and understandings, promulgated and fostered by state officials, that ... justify his legitimate claim of entitlement to continued employment absent 'sufficient cause,'' has a property interest in such continued employment within the purview of the due process clause. (Perry v. Sindermann (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; see also Board of Regents v. Roth [1972] supra 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562].) And, in Arnett v. Kennedy, supra, 416 U.S. 134, six members of the court, relying upon the principles set forth in Roth, concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal .... [Citation to various opinions in Arnett.]

'The California Act endows state employees who attain permanent status with substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting ' cause' for such discipline. ... In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these punitive measures (§ 19500). This statutory right constitutes 'a legitimate claim of entitlement' to a government benefit within the meaning of Roth. Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.' *560

The question before us today is the extent to which the above principles apply to the short-term suspensions here involved.

Prior to Skelly it was determined by our Court of Appeal that a two-day suspension pursuant to the charter provision not preceded by a hearing did not violate the employee's constitutional rights. (Apostoli v. City etc., of San Francisco (1969) 268 Cal.App.2d 728 [74 Cal.Rptr. 435].) In Patton v. Board of Harbor Commissioners (1970) 13 Cal.App.3d 536, 541 [91 Cal.Rptr. 832], another pre-Skelly case, it was concluded '... The detriment to an employee of no more than 5 days' suspension in a 12-month period, while not negligible, is, in our view, not sufficient to justify a holding that a hearing is in the employee's constitutional right. ... The employee is not deprived of a salary already earned, but merely of the opportunity to earn for several days.'

Respondent city and county, relying heavily on these cases, contends that the punitive actions involved in this matter are minor actions not requiring predisciplinary action procedures of the kind required by Skelly. With this position we agree. However, our conclusion that Skelly itself is not controlling cannot lead us to ignore the principles expressed in formulating the rule to be applied in the instant case.

In agreeing with the respondent we do not mean to imply that a property right is not involved herein. We are of a contrary mind. (1) Suspension of a right

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or of a temporary right of enjoyment may amount to a 'taking' for 'due process purposes' (Goss v. Lopez (1975) 419 U.S. 565, 572-76 [42 L.Ed.2d 725, 733-736, 95 S.Ct. 729]; Connolly Development, Inc. v. Superior Court (1976) 17 Cal.3d 803, 811 [132 Cal.Rptr. 477, 553 P.2d 637]). We have no hesitancy in holding that 'due process' applies here; the question remains what process is due? (Morrissey v. Brewer (1972) 408 U.S. 471, 481 [33 L.Ed.2d 484, 494, 92 S.Ct. 2593]; In re Bye (1974) 12 Cal.3d 96, 100-101 [115 Cal.Rptr. 382, 524 P.2d 854].)

Skelly recognized that due process requirements are not so inflexible as to require an evidentiary trial at the preliminary stage in every situation involving the taking of property. The majority of the United States Supreme Court was characterized as adhering to the principle that some form of notice and hearing must preclude a final deprivation of property, yet the timing and content of the notice as well as the nature of the hearing will depend upon appropriate accommodation of the competing *561 interests involved. (15 Cal.3d at p. 209.) We then said: '... In balancing such 'competing interests involved' so as to determine whether a particular procedure permitting a taking of property without a prior hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property proves to have been wrongful. ...' (15 Cal.3d at p. 209; italics in original.)

Subsequent to Arnett and Skelly the United States Supreme Court further acted in this area of the law. In Mathews v. Eldridge (1976) 424 U.S. 319 [47 L.Ed.2d 18, 96 S.Ct. 893] the court concluded that an evidentiary hearing is not required prior to terminating social security disability benefits. The court stated: '... "[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). ' [D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, at 167-168 [40 L.Ed.2d 15, 94 S.Ct. 1633] (Powell, J. concurring in part); Goldberg v. Kelly, supra, at 263-266; Cafeteria Workers v. McElroy, supra, at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See e.g., Goldberg v. Kelly, supra, at 263-271,' (424 U.S. at pp. 334-335 [47 L.Ed.2d at p. 33]; italics added.) [FN3] *562

FN3 Although the principles thus stated are clear, their application in particular cases by the high court has proved somewhat difficult to predict. Thus, in Dixon v. Love (1977) 431 U.S. 105 [52 L.Ed.2d 172, 97 S.Ct. 1723], decided soon after Mathews, it was held that an Illinois regulation providing for the automatic suspension of a driver who had been convicted repeatedly of traffic offenses was constitutionally valid, the court emphasizing inter alia that the driver had 'had the opportunity for a full judicial hearing in connection with each of the traffic convictions ...' (431 U.S. at p. 113 [52 L.Ed.2d at p. 181]), and that there was no dispute as to the factual basis for the administrator's decision (id., at pp. 113-114 [52 L.Ed.2d at p. 181]). In Oregon State Penitentiary v. Hammer (1977) 434 U.S. 945 [54 L.Ed.2d 306, 98 S.Ct. 469], however - a case decided six months later - a majority of the court in an opinion per curiam (Stevens, Brennan, Stewart, and Marshall, JJ., dis.) vacated and remanded for reconsideration in light of Dixon a judgment of the Oregon Supreme Court holding that a tenured corrections officer was improperly discharged for cause absent the affording of pretermination rights such as those required by Skelly (i.e., fair notice of the charges against him and an opportunity to respond). The dissenters, characterizing the action of the majority as 'cavalier' (434 U.S. at p. 945) [54 L.Ed.2d at p. 306, 98 S.Ct. at p. 469], pointed out that none of

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the factors held to be decisive in Dixon - notably the absence of factual dispute due to prior adjudication - was here present, and that therefore the court's action was unjustified.

(2) With the above principles stated we first explain our determination that pretermination procedures of the kind required by Skelly are not here required. In the case of suspensions of the magnitude involved here it would appear that while the risk of error may be just as great as in a termination case, the consequences are not. This fact tends to weigh against the need for predisciplinary procedures. Whether surrounding circumstances warrant the action taken here is not shown in the record. The promptness of the postdisciplinary hearing would be very important in a termination or long-term suspension. Obviously, the uncertain quality of an employee's status and other harm accruing to him is greater the longer the issues remain unresolved by hearing. In a short-term suspension the employee will usually be back at work while the postdisciplinary hearing remains pending.

The shortness of the suspension tends to demonstrate that the interim loss should not be deemed 'substantial' within the meaning of Skelly in the absence of special circumstances being indicated in any particular case. None are shown here. [FN4] A short suspension is not a destruction of the employee's employment but rather is an interruption. Usually in the event of a wrongful deprivation being shown the employee can be made whole by back wages for the period of wrongful suspension. We note in passing that historically the state has treated suspensions of 10 days or less as being somewhat minor with less procedural safeguards offered. (See ***563** Gov. Code, § 19576;

FN4 Absent the showing of exigent circumstances, nothing akin to the brutal need attendent in the termination of welfare payments and compelling a pretermination hearing in such cases seems to be present in these short- term suspension situations. Rather, the brevity of the period of suspension and remedy by way of hearing as hereinafter noted, likens the short-term suspension to the temporary taking of property upheld in Mitchell v. W. T. Grant Co. (1974) 416 U.S. 600 [40 L.Ed.2d 406, 94 S.Ct. 1895] and Connolly Development, Inc. v. Superior Court, supra, 17 Cal.3d 803. Skelly, supra, 15 Cal.3d 194, 203, fn. 16; Keeler v. Superior Court (1956) 46 Cal.2d 596, 599 [297 P.2d 967].)

We also note that, during the period pending hearing, the employee in the minor suspension case does not face the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him. (See Skelly, supra, 15 Cal.3d 194, 213.)

It is true that in Goss v. Lopez (1975) 419 U.S. 565 [42 L.Ed.2d 725, 95 S.Ct. 729], the United States Supreme Court held that certain public high school students who had been suspended from school for 10 days without a hearing had interests qualifying for the due process protection, and that such protection required that as a general rule [FN5] oral or written notice of charges and an opportunity to respond be afforded prior to removal. It also indicated, however, that 'total exclusion from the educational process for more than a trivial period and certainly if the suspension is for 10 days' (

FN5 The high court recognized that in certain cases - namely in cases involving '[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process' (419 U.S. at p. 582 [42 L.Ed.2d at p. 739]) - immediate removal would be justified, the 'necessary notice and rudimentary hearing' in such cases to follow 'as soon as practicable.' (Id., at pp. 582-583 [42 L.Ed.2d at p. 739].) id., at p. 576 [42 L.Ed.2 at p. 736]) is a matter which could have serious and long-lasting repercussions in the life of a child, especially when such exclusion was the result of disciplinary action. [FN6] (

FN6 The recent case of Bd. of Curators, University of Mo. v. Horowitz (1978) 431 U.S. 78 [55 L.Ed.2d 124, 98 S.Ct. 948], indicates that dismissal of a student for academic reasons is to be distinguished from disciplinary dismissals. '[W]e have frequently emphasized,' the high court there stated, 'that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' [Citation.] The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rule of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.' (Id., at p. 86 [55 L.Ed.2d at pp. 132-133]; fn. omitted.) Id., at pp. 574-575 [42 L.Ed.2d at p. 735].) In any event, the court noted, 'the timing and content of the notice and the nature of the hearing will depend on appropriate

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accomodation of the competing interests involved.' (Id., at p. 579 [42 L.Ed.2d at p. 737].) Here, for reasons we have stated, we are of the view that the employee's interest in continued employment, viewed in the context of the shortness of the suspensions here involved and the city's competing interest in prompt action for the maintenance of discipline, does not demand an accommodation of the nature we required in Skelly. (Cf. Smith v. Organization of Foster Families (1977) 431 U.S. 816 [53 L.Ed.2d 14, 97 S.Ct. 2094, 2113].) In light *564 of this determination we need not further explore the question of the retroactive application of Skelly and Barber to this case.

(3) However, while the principles underlying Skelly do not here compel the granting of predisciplinary procedures there mentioned, it does not follow that the employees are totally without right to hearing. While due process does not guarantee to these appellants any Skelly-type predisciplinary hearing procedure, minimal concepts of fair play and justice embodied in the concept of due process require that there be a 'hearing,' of the type hereinafter explained. [FN7] The interest to be protected, i.e., the right to continuous employment, is accorded due process protection. While appellants may not in fact have been deprived of a salary earned but only of the opportunity to earn it, they had the expectancy of earning it free from arbitrary administrative action. (Compare Patton v. Board of Harbor Commissioners, supra, 13 Cal.App.3d 536, 541.) This expectancy is entitled to some modicum of due process protection. (Perry v. Sindermann, supra, 408 U.S. 593, 599-603 [33 L.Ed.2d 570, 578-581].)

FN7 Cf. Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal.3d 294, 308 [138 Cal.Rptr. 53, 562 P.2d 1302]; Arroyo v. Regents of University of California (1975) 48 Cal.App.3d, 793, 799 [121 Cal.Rptr. 918].

For the reason stated above, however, we believe that such protection will be adequately provided in circumstances such as these by procedure of the character outlined in Skelly, (i.e., one that will apprise the employee of the proposed action, the reasons therefor, provide for a copy of the charges including materials upon which the action is based, and the right to respond either orally or in writing, to the authority imposing the discipline) if provided either during the suspension or within a reasonable time thereafter. Such a procedure will, in our view, provide a meaningful hedge against erroneous action. Along with providing an opportunity to recover lost wages, it will also provide an opportunity for the employee to protect his reputation, honor and integrity - items of importance to him at any time but especially in case of later disciplinary action where the present action might be deemed to be in aggravation of the penalty then to be imposed, or in case of later promotional opportunities available but where the present disciplinary action would tend to have a harmful effect. (See Codd v. Velger (1977) 429 U.S. 624 [51 L.Ed.2d 92, 97 S.Ct. 882]; Board of Regents v. Roth (1971) 408 U.S. 564, 573 [33 L.Ed.2d 548, 558, 92 S.Ct. 2701].) *565

Appellants Quinn, Pierce, Lottie, Tringali, Nash and Fowler allege denial of hearings and are entitled to a hearing as described herein. [FN8] Appellant Cross alleges simply a five-day suspension, and transfer of position without a prior hearing. Because as we have shown due process does not require for such employees a prior hearing in these short-term suspensions, Cross has not alleged any right to a prior hearing as such. However, it appears he is entitled to some type of hearing as should be accorded to Quinn, Pierce, Lottie, Tringali, Nash and Fowler.

FN8 As noted above, section 8.342 affords these employees no right to hearing, their suspensions being five days or less.

(4) It appears that appellant Jacqueline Robinson, an employee of the police department, had an opportunity for a postdisciplinary hearing. (S.F. Charter, § 8.343.) The complaint does not allege a demand for a hearing nor a denial of such demand. Thus, it does not appear that appellant Robinson has exhausted her administrative remedies, a prerequisite to seeking judicial relief. (Fiscus v. Dept. of Alcoholic Bev. Control (1957) 155 Cal.App.2d 234 [317 P.2d 993]; cf. South Coast Regional Com. v. Gordon (1977) 18 Cal.3d 832 [135 Cal.Rptr. 781, 558 P.2d 867].) As to appellant Robinson the complaint thus shows no ground for judicial intervention.

II

Meyers-Milias-Brown Act

Appellants next claim unlawful employer interference with the exercise of their rights under

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the Meyers-Milias-Brown Act (Gov. Code, §§ 3502-3504), prior to the imposition of the five-day suspensions. They observe that under section 3502 government employees have a right to join and participate in the affairs of employee organizations; that under section 3503 employee organizations have a right to represent their members in connection with all matters within the scope of representation including disciplinary matters. Citing Social Workers' Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382 [113 Cal.Rptr. 461, 521 P.2d 453], for the proposition that 'in all matters involving discipline, employees were entitled to be represented by their employee organization,' they conclude that the representation in question must include the opportunity to discuss the employees' case and to represent the employee in advance of the imposition of discipline. ***566**

(5) We have, in the prior section of this opinion explained the employees' rights to a short-term suspension procedure. Since the employees have thus been held to have no rights under Skelly v. State Personnel Board, supra, 15 Cal.3d 194, to a hearing prior to the imposition of the five-day suspension imposed, the appellant's claims to presuspension representation must to that extent fall. However, our treatment of the matter has not left the appellant employees (with the exception of appellant Robinson) [FN9] entirely without a right to be heard. We analyze such appellants' claims to representation in light of the limited procedures recognized hereinabove.

FN9 Hereafter the use of the term 'appellants' shall be used to exclude appellant Robinson from its coverage.

Appellants refer us to Government Code section 3503. That section reads in part as follows: 'Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies .... Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.' [FN10] (Italics in original.) Their sole case citation for the proposition they advanced is to Social Workers' Union, Local 535, which held that 'a public employee's right to union representation under section 3504 attaches to an employer-employee interview which an employee reasonably fears may investigate and sanction his union-related activities.'

FN10 Government Code section 3504 provides: 'The scope of representation shall include all matters relating to employment conditions and employer- employee relations, including, but not limited to wages, hours, and other terms and conditions of employment.' (11 Cal.3d at p. 390.)

We do not deem Social Workers' Union, Local 535 entirely dispositive of the matter at bench. Appellants herein make no claim of fear of adverse action by respondent city by reason of union activity. We did, however, in Social Workers' Union, Local 535 demonstrate our sensitivity to developments in the federal law in interpreting state legislation (11 Cal.3d 382, 391), noting that the phrase 'wages, hours and other terms and conditions of employment' as used in Government Code section 3504 seems to be taken from the federal Labor Management Relations Act (see also: Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp. (1972) 24 Cal.App.3d 400, 408-409 [101 Cal.Rptr. 69]; see Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 749). ***567** Under the provisions of section 7 of the National Labor Relations Act, [FN11] an employee is entitled to the presence of his union representative during an investigatory interview according to recent United States Supreme Court cases. (NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [43 L.Ed.2d 171, 95 S.Ct. 959]; Garment Workers v. Quality Mfg. Co. (1975) 420 U.S. 276 [43 L.Ed.2d 189, 95 S.Ct. 972].) We note that in Weingarten the United States Supreme Court speaking through Justice Brennan stated

FN11 Section 7 confers the right of the employees 'to engage in ... concerted activities ... for mutual aid or protection.' (420 U.S. 260- 263 [43 L.Ed.2d 179-181]): 'The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that '[e]mployees shall have the right ... to engage in ... concerted activities for the purpose of ... mutual aid or protection.' Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847 (CA7 1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular

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employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.

. . . . . .

'The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. ...'

Although the court's statement was made to justify representation at an investigational stage, because of the informal nature of the procedures ***568** recognized herein this statement has meaning and cogency in the circumstances here presented. We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (Steen v. Board of Civil Service Commrs. (1945) 26 Cal.2d 716, 727 [160 P.2d 816]; cf. Borror v. Department of Investment (1971) 15 Cal.App.3d 531, 540-544 [92 Cal.Rptr. 525].) While Steen may have dealt with representation by a licensed attorney, the right of representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyer-Milias-Brown Act and the right to representation recognized in Steen. Thus, the labor organization may here participate if requested by the employee. However, we note that the labor organization entitled under the act must be 'recognized' (Gov. Code, §§ 3501, subd. (b), 3503), a point highly disputed by respondent city. On remand this factual issue may be clarified by the proofs of the parties.

III

It is clear from the record that the right to the procedures provided for herein were not considered by the trial court. The judgment is affirmed as to appellant Jacqueline Robinson and is reversed as to all other appellants. The trial court will then be in a position to determine if factually the procedures provided for here have been observed and if so whether the appellant labor organization has participated fully. In this latter connection appellants' declarations and documents filed below showing extensive correspondence may be of importance in determining the extent of union representation and whether and to what extent the procedural rights of appellant employees have been observed. [FN12] Accordingly, the cause is remanded to the trial court with directions to conduct further proceedings consistent with the views expressed herein. All appellants save Jacqueline Robinson to recover costs on appeal. Respondents to bear their own costs.

FN12 The state of the record and briefing leaves resolution of these points too conjectural at this juncture.

Mosk, J., Clark, J., and Richardson, J., concurred.

TOBRINER, J.,

Concurring and Dissenting.

I concur in the majority's conclusion that under the Meyers-Milias-Brown Act the employees are entitled to union representation during the entire course of the employer-initiated disciplinary proceedings. In addition, I agree with the majority ***569** that a permanent employee's 'right to continuous employment' constitutes a 'legitimate claim of entitlement' under the relevant constitutional authorities so that such an employee must be accorded procedural due process whenever the government seeks to suspend him from employment without pay. (Ante, pp. 559-560.)

I cannot agree with the majority, however, that in this context the demands of due process are fully satisfied so long as the employer, within a reasonable time after the effective date of the employees' suspension without pay, gives the employee an opportunity to answer the charges

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against him. In my view, the governing authorities establish that, in the absence of an emergency, a public employee must be afforded notice of any charges and an opportunity informally to answer such charges before incurring a suspension without pay.

As the majority recognizes, in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [724 Cal.Rptr. 14, 539 P.2d 774], this court addressed the question of the procedures required by the Constitution in the case of the dismissal of a permanent public employee. Skelly held that 'due process ... mandate[s] that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards 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.' (Italics added.) (15 Cal.3d 194, 215.)

Procedural protection prior to the imposition of discipline is important, the Skelly court pointed out, because even if postdiscipline proceedings ultimately vindicate the employee and provide a back-pay remedy, the employee is removed from the payroll pending such proceedings. Unless the employee has accumulated significant savings, he may be unable to support himself and his family during the interim. The suspension of an employee's regular earnings for as long as a week can impose a serious deprivation upon the worker and his family.

Pretermination procedures also serve the important, if more subtle, purpose of according the accused individual a measure of respect and dignity, assuring him that he is not so insignificant that the government may curtail his livelihood - even for relatively short periods of time - without giving him some opportunity to explain or rebut the *570 charges against him. (Cf. Davis & Gilhool, The Economics of Constitutionalized Repossession: A Critique of Professor Johnson, and a Partial Reply (1975) 47 So.Cal.L.Rev. 116, 147- 149; Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality (1973) 46 So.Cal.L.Rev. 617, 631.)

The majority would distinguish Skelly on two grounds: 'the shortness of the suspensions here involved' and 'the city's competing interest in prompt action for the maintenance of discipline.' (Ante, p. 563.) In my view, neither of these considerations supports the majority's conclusion that absolutely no procedural safeguards need be afforded an employee prior to suspending him from his job without pay.

The city's interest in imposing prompt discipline does not distinguish Skelly. In fact, that interest is more compelling in termination cases such as Skelly because the alleged transgression is generally more serious than in suspension cases. Yet Skelly established the principle that, absent an emergency, notice and an opportunity to respond must precede termination; the same principle should apply in suspension cases.

Thus the majority's conclusion can only be based on its first ground: that the employee suffers a smaller deprivation when suspended rather than terminated. Certainly the severity of the deprivation is one element to be considered in determining how much process is due. But Goss v. Lopez (1975) 419 U.S. 565 [42 L.Ed.2d 725, 95 S.Ct. 729] and subsequent cases refute the majority's contention that an employee has no right to respond to the charges against him before he is suspended without pay for as much as a week.

In Goss the Supreme Court ruled that, absent an emergency, public school authorities could not suspend pupils for 10 days without first affording the students a chance to respond to the charges against them. 'The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, this is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.' (Id., at pp. 579-580 [42 L.Ed.2d at p. 738].) *571

Although Goss dealt with suspensions from school, the courts have applied its holding to public employment. In Muscare v. Quinn (7th Cir. 1975) 520 F.2d 1212, 1215, certiorari dismissed (1976)

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425 U.S. 560 [48 L.Ed.2d 165, 96 S.Ct. 1752], the court, citing Goss, ruled that '[p]ublic employees facing temporary suspension for less than 30 days have interests qualifying for protection under the Due Process Clause, and due process requires at the minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency.' (See also, Waite v. Civil Service Commission (1978) ___ W.Va. ___ [241 S.E.2d 164, 170]; Bagby v. Beal (M.D. Pa. 1977) 439 F.Supp. 1257, 1261 [two-week suspension]; Eley v. Morris (N.D. Ga. 1975) 390 F.Supp. 913, 923.)

The majority claims that Goss is inapposite here, but fails to point to any relevant distinction. The suspensions here not only deprive the employees of 'protected interests,' but also of the funds they need to support themselves and their families. I cannot understand how the majority can conclude that a suspension from a job without pay creates a lesser hardship than a suspension from school.

Naturally, presuspension safeguards need not be as extensive as those preceding termination. The due process clause does not mandate that the employer permit workers to retain counsel, call witnesses or confront and cross-examine their accusers prior to suspension. But employers should be required to inform employees of the charges against them and give them a chance to respond informally, either orally or in writing, to the accusations. (Goss v. Lopez, supra, 419 U.S. at pp. 582-583 [42 L.Ed.2d at pp. 739- 740].) ''Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied.' (Id., at p. 574 [42 L.Ed.2d at p. 735], quoting Wisconsin v. Constantineau (1971) 400 U.S. 433, 437 [27 L.Ed.2d 515, 519, 91 S.Ct. 507].)

I would grant a writ of mandate requiring the employer to afford plaintiffs an opportunity to respond to the charges against them before ordering suspensions.

Bird, C. J., and Newman, J., concurred.

On November 6, 1978, the judgment was modified to read as printed above. *572

Cal.,1978.

Civil Service Ass'n, Local 400 v. City and County of San Francisco

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PASADENA POLICE OFFICERS ASSOCIATION et al., Plaintiffs and Respondents,

v.

CITY OF PASADENA et al., Defendants and Appellants

No. S007915.

Supreme Court of California.

Oct 11, 1990.

SUMMARY

The trial court issued a preliminary injunction enjoining a city from ordering a police officer, the president of the city's police officers' association, to participate in an internal affairs investigation unless the city provided nonconfidential notes made by investigators, prior to any interrogation of the officer. Previously, the association had decided to send letters discussing a negotiating impasse between the city and the association to the block captains of a neighborhood watch program. Although an officer was warned that the list of block captains was intended solely for the purposes of crime prevention, the association nonetheless obtained the list and contacted them. After that officer was interrogated in an internal affairs investigation, an investigator denied the request of the association's president for a copy of the notes from that officer's interview, prior to the president's interrogation. Thereafter, the association filed a complaint seeking an injunction. (Superior Court of Los Angeles County, No. C603533, Jack M. Newman, Judge.) The Court of Appeal, Second Dist., Div. One, No. B024968, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal with directions to vacate the order of the superior court granting the preliminary injunction and to remand the case to the superior court. It held that the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), which balances peace officers' basic procedural rights with the need for prompt, thorough, and fair internal investigations to maintain public confidence in law enforcement agencies, does not compel preinterrogation discovery. (Opinion by Kennard, J., with Lucas, C. J., Mosk, Broussard, Eagleson and Arabian, JJ., concurring. Separate concurring and dissenting opinion by Panelli, J.) *565

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 3--Police--High Standard of Personal Conduct.

While the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be above suspicion of violation of the very laws they are sworn to enforce. Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of police officer misconduct; if warranted, it must institute disciplinary proceedings.

(2) Law Enforcement Officers § 11--Police--Disciplinary Proceedings--Purpose of Public Safety Officers Procedural Bill of Rights Act.

The purpose of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) is to maintain stable employer-employee relations and thereby assure effective law enforcement. The act requires the law enforcement agencies throughout the state afford minimal procedural rights to their peace officer employees. Thus, the act secures for peace officers-when off duty and not in uniform-certain specified rights. Although notions of fundamental fairness for police officers underlie the act, a number of its provisions also reflect the Legislature's recognition of the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community.

[See Cal.Jur.3d, Law Enforcement Officers, § 22 et seq.]

(3) Law Enforcement Officers § 11--Police--

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Disciplinary Proceedings-- Advisement of Rights to Remain Silent.

If criminal charges are contemplated against a police officer who is undergoing an internal investigation, Gov. Code, § 3303, subd. (h), requires advisement of the officer's right to remain silent. The officer must be told that, although he has a right to remain silent and not incriminate himself, his silence could be deemed insubordination, leading to administrative discipline, ***566** and any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding.

(4a, 4b, 4c, 4d, 4e) Law Enforcement Officers § 11--Police-- Disciplinary Proceedings--Investigation--Officer's Right to Nonconfidential Notes Before Interrogation.

The Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) does not compel preinterrogation discovery of notes relating to an internal affairs investigation to an officer who is the subject of an investigation regarding his conduct. Although Gov. Code, § 3303, subd. (f), entitles an officer to reports, notes, and reports incident to an investigation, it does not address an officer's entitlement to discovery in the event he or she is administratively charged with misconduct, nor does it address when the entitlement arises. Under established rules of statutory construction, the correct interpretation is that the officer's entitlement arises after any interrogation. Also, preinterrogation discovery is not essential to the fundamental fairness of the investigation, and such discovery could frustrate the effectiveness of the investigation, thus jeopardizing public confidence in the integrity of the police force. Thus, in a proceeding by a police officers' association against a city, as to an investigation by the city after the association had obtained an unauthorized police department list of block captains of a neighborhood watch program, the trial court erred in granting a preliminary injunction enjoining the city from proceeding with the interrogation of a police officer, who was the association's president, in an internal affairs investigation unless the city provided him, prior to any interrogation, the nonconfidential notes made by investigators of a previous interview of another officer.

(5) Statutes § 31--Construction--Language--Words and Phrases--Common Interpretation.

When a statute does not define some of its terms, the court generally looks to the common knowledge and understanding of members of the particular vocation or profession to which the statute applies, for the meaning of those terms.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 92 et seq.]

(6) Statutes § 29--Construction--Language--Legislative Intent.

To discern legislative intent, the court looks first to the words of the statute and its provisions, reading them as a whole, keeping in mind the statutory purpose and harmonizing statutes or statutory sections ***567** relating to the same subject, both internally and with each other, to the extent possible.

(7) Statutes § 48--Construction--Reference to Other Laws--Exclusion of Specific Words Employed Elsewhere.

When the Legislature has employed a term or phrase in one place in a statute and excluded it in another, it should not be implied where excluded.

(8) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Balancing Officers' Rights With Protection of Integrity of Law Enforcement Agency.

Protection of police officers from abusive or arbitrary treatment in their employment is the essence of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). To accomplish this, the Legislature set out certain rights and procedures relating to investigation of officers. Some of the rights that the act affords peace officers resemble those available in a criminal investigation. However, to accommodate the administrative setting, the act also allows investigative procedures that might not meet constitutional standards for criminal investigations. This accommodation suggests a recognition by the Legislature that a law enforcement agency should retain greater latitude when it investigates suspected officer misconduct than would be constitutionally permissible in a criminal investigation. Limitations on the rights of those employed in law enforcement are a necessary adjunct to the employing department's substantial interest in maintaining discipline, morale, and uniformity. That interest is increased when preservation of public confidence in the

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trustworthiness and integrity of its police force is at stake.

(9) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Officer's Right to Remain Silent.

An officer under administrative investigation does not have the right to remain silent free of all sanctions. A peace officer has no absolute right under the Constitution to refuse to answer potentially incriminating questions asked by his or her employer; instead, the officer employee's right against self-incrimination is deemed adequately protected by precluding any use of his or her statements at a subsequent criminal trial should such charges be filed.

(10) Law Enforcement Officers § 11--Police--Disciplinary Proceedings-- Officer's Right to Discovery.

Although the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) does not compel preinterrogation discovery of internal affairs investigation *568 documents, the act does not preclude a law enforcement agency from providing such discovery.

COUNSEL

Victor J. Kaleta and Gary L. Gillig, City Attorneys, Martin J. Mayer and Irving Berger for Defendants and Appellants.

Cotkins, Collins & Franscell, Anthony P. Serritella, De Witt W. Clinton, County Counsel (Los Angeles), Lester J. Tolnai and Gordon W. Trask, Deputy County Counsel, Louise H. Renne, City Attorney (San Francisco), Burk E. Delventhal and Mariam M. Morley, Deputy City Attorneys, as Amici Curiae on behalf of Defendants and Appellants.

Green & Shinee, Helen L. Schwab and Richard A. Shinee for Plaintiffs and Respondents.

Williams, Kelly, Polverari & Skelton, Richard J. Romanski, Anthony M. Santana, Benjamin C. Sybesma, Teresa M. Snodgrass, Stone & Healey, Michael P. Stone, Mary Ann Healey, Hank Hernandez and Patrick J. Thistle as Amici Curiae on behalf of Plaintiffs and Respondents.

KENNARD, J.

To keep the peace and enforce the law, a police department needs the confidence and cooperation of the community it serves. Even if not criminal in nature, acts of a police officer that tend to impair the public's trust in its police department can be harmful to the department's efficiency and morale. Thus, when allegations of officer misconduct are raised, it is essential that the department conduct a prompt, thorough, and fair investigation. Nothing can more swiftly destroy the community's confidence in its police force than its perception that concerns raised about an officer's honesty or integrity will go unheeded or will lead only to a superficial investigation.

This case concerns one important aspect of the procedures governing internal police department investigations into suspected officer misconduct. The narrow issue before us is whether subdivision (f) of Government Code *569 section 3303 [FN1] manifests a legislative intent to grant preinterrogation discovery rights to a peace officer who is the subject of an internal affairs investigation. After careful consideration of the language and the purpose of the statute, we conclude it does not.

FN1 Unless otherwise indicated, all further statutory references are to the Government Code.

The provision in question appears in the Public Safety Officers Procedural Bill of Rights Act(§ 3300 et seq.; hereafter the Act), which sets forth the basic rights that law enforcement agencies must provide to their peace officer employees. By devoting a substantial portion of the Act to internal affairs investigations, the Legislature has implicitly recognized the importance of such investigations.

The law enforcement agency conducting the investigation into alleged misconduct by an officer employee represents the public interest in maintaining the efficiency and integrity of its police force, which, in enforcing the law, is entrusted with the protection of the community it serves. The officer under investigation, on the other hand, has a personal interest in receiving fair treatment. The procedural protections that the Act affords in this regard reflect the Legislature's balancing of these competing interests. These considerations and our

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analysis of the statute's language and purpose lead us to conclude that, in allowing an officer under administrative investigation access to reports and complaints, the Legislature intended the right to such access to arise after, rather than before, the officer's interrogation.

Background

This lawsuit arises from a labor dispute between the police department for the City of Pasadena (the Department) and the Pasadena Police Officers Association (PPOA), which is the recognized bargaining agent for the Department's nonsupervisory sworn police personnel. In early 1986, the Department and PPOA were engaged in negotiations intended to produce a memorandum of understanding. Negotiations broke down, and an impasse was declared when the parties could not agree on a wage package.

Shortly thereafter, Officer Robert Ford, PPOA's vice-president, asked Commander Richard Emerson, a divisional supervisor for the Department, for a computer printout of the names and addresses of individuals designated as block captains in the Pasadena Neighborhood Watch program. [FN2] Ford wanted the list for PPOA so it could send letters to the block captains to solicit their support for the wage package favored by the officers. Because *570 the Department used the list solely to administer the Neighborhood Watch program, Emerson considered it confidential, and therefore denied Ford's request.

FN2 Neighborhood Watch is a program that enlists citizens to assist local police agencies with crime prevention and detection.

In May 1986, apparently as the result of information from Officer Ford, the Department learned that Officer Dennis Diaz, PPOA's president, had obtained an "unauthorized" copy of the list. Diaz assertedly used the list to distribute a letter from PPOA to block captains of Neighborhood Watch soliciting their support for PPOA's proposed resolution of the wage dispute.

On May 26, 1986, the Department began an internal affairs investigation into the circumstances surrounding PPOA's use of the list to determine whether there was sufficient cause to charge Officer Diaz with insubordination. In the course of that investigation, Lieutenant Donnie Burwell interviewed Officer Ford. Burwell then notified Diaz to appear on June 5, 1986, for an administrative interrogation. Because Diaz was under investigation and the interrogation might lead to punitive action, Burwell complied with the Act by advising Diaz of the general nature of the investigation. (§ 3303, subd. (c).)

Officer Diaz appeared as scheduled, with counsel. Before Diaz would respond to questioning, however, he demanded to see the notes that Lieutenant Burwell had taken during his interview of Officer Ford. Relying on section 3303, subdivision (f), which allows officers who are subject to interrogation to have access to "reports or complaints made by investigators or other persons," Diaz maintained he did not have to submit to an administrative interrogation until the Department had given him access to its notes of the Ford interview. Based on his understanding of the requirements of subdivision (f) and the Department's policy, Burwell refused to turn over the notes.

Thereafter, Officer Diaz and PPOA filed this lawsuit to enjoin the Department from proceeding with the interrogation of Diaz until it had disclosed to him the notes of the Ford interview. In their complaint, they alleged these grounds for relief: (1) subdivision (f) of section 3303 requires disclosure of reports and complaints to an officer under investigation before interrogation; (2) although it had been the Department's practice to provide investigative reports and witness statements to officers before interrogation, it unilaterally changed that practice in this case, thus violating its obligation to "meet and confer in good faith" on a term or condition of employment (§ 3505); and (3) the Department's investigation into the purported misuse of the Neighborhood Watch mailing list constituted statutorily prohibited *571 interference with, or intimidation of, a public employee engaged in protected labor activity (§§ 3502, 3506).

In opposing the request for an injunction, the Department argued that subdivision (f) of section 3303 required only postinterrogation disclosure of reports and complaints. In the alternative, the Department maintained that its notes of the Ford interview were confidential and therefore exempt from disclosure under subdivision (f). The

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Department also submitted declarations disputing the allegation that it had established a practice of disclosing investigative materials before interrogation.

The superior court interpreted subdivision (f) of section 3303 as requiring preinterrogation disclosure of reports and complaints, and issued a preliminary injunction prohibiting the Department from proceeding with the interrogation of Officer Diaz until it had provided him with its notes of the Ford interview. [FN3] (§ 3309.5, subd. (c).) The Department appealed.

FN3 In its statement of decision, the superior court acknowledged that the facts pertaining to past practice were in dispute. Thus it did not decide whether the Department had breached its obligation to meet and confer. And because the Department and PPOA had reached agreement on a "successor" memorandum of understanding before the hearing on the preliminary injunction, the superior court did not address whether the Department had interfered with or intimidated a public employee engaged in protected labor activity, considering that issue to be moot.

The Court of Appeal affirmed the trial court's order granting the preliminary injunction. It interpreted subdivision (f) of section 3303 as entitling "a public safety officer who is the subject of an internal affairs investigation ... to copies of nonconfidential reports or complaints ... prior to being interrogated." It rejected the Department's claim that the notes of the Ford interview were confidential, but it did not define the appropriate standard for determining confidentiality.

Discussion

A. Legislative Intent to Provide for Postinterrogation Disclosure of Reports and Complaints

(1) Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws [they are] sworn ... to enforce." (McCain v. Sheridan (1958) 160 Cal.App.2d 174, 177 [324 P.2d 923]; see also Cranston v. City of Richmond (1985) 40 Cal.3d 755, 770, fn. 13 [221 Cal.Rptr. 779, 710 P.2d 845]; Cleu v. *572 Board of Police Commissioners (1906) 3 Cal.App. 174, 176 [84 P. 672].) Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." (Christal v. Police Commission (1939) 33 Cal.App.2d 564, 567 [92 P.2d 416].) To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.

(2) The purpose of the Act is "to maintain stable employer-employee relations and thereby assure effective law enforcement." (Lybarger v. City of Los Angeles (1985) 40 Cal.3d 822, 826 [221 Cal.Rptr. 529, 710 P.2d 329]; § 3301.) The Act requires that law enforcement agencies throughout the state afford minimum procedural rights to their peace officer [FN4] employees. (§ 3300 et seq.; Baggett v. Gates (1982) 32 Cal.3d 128, 135 [185 Cal.Rptr. 232, 649 P.2d 874]; White v. County of Sacramento (1982) 31 Cal.3d 676, 679 [183 Cal.Rptr. 520, 646 P.2d 191].) Thus the Act secures for peace officers - when off duty and not in uniform - the right to engage, or to refrain from engaging, in political activity (§ 3302); it protects against punitive action or denial of promotion for the exercise of procedural rights granted under its own terms or under an existing grievance procedure (§ 3304, subd. (a)); it provides that no adverse comment be entered in an officer's personnel file until after the officer has been given an opportunity to read and sign the comment (§ 3305); it mandates that when an adverse comment is entered in a personnel file, the officer shall have 30 days to file a written response to be attached to the adverse comment in the file (§ 3306); and it protects against compelled disclosure, except in limited circumstances, of an officer's financial status (§ 3308).

FN4 The Act, by its terms, applies only to "peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5 of the Penal Code." (§ 3301.)

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Although notions of fundamental fairness for police officers underlie the Act, a number of its provisions also reflect the Legislature's recognition of the necessity for internal affairs investigations to maintain the efficiency and integrity of the police force serving the community. For instance, while the Act allows administrative searches of an officer's workplace locker or storage space only under certain conditions (§ 3309), the authorization of administrative searches in itself manifests an acknowledgment by the Legislature that such searches are integral to law enforcement employment. This *573 balancing of two competing interests is also present in section 3303, [FN5] the statute at issue here. *574

FN5 That section provides: "When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

"(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

"(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

"(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

"(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his own personal physical necessities.

"(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action,except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under interrogation to be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

"(f) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

"(g) If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights.

"(h) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result in punitive action against any public safety officer, that officer, at his request, shall have the right to be represented by a representative of his choice who may be present at all times during such interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

"This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling,instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and directly with alleged criminal activities.

"(i) No public safety officer shall be loaned or

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temporarily reassigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

Section 3303 prescribes protections that apply when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to punitive action, such as "dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." (Ibid.) Inherent in this protective scheme is a recognition that such investigations are a necessary component of employment in law enforcement. Indeed, the Act requires officers to comply with administrative interrogations: under section 3303, subdivision (e), refusal to answer questions is a ground for punitive action.

To ensure fair treatment of an officer during an internal affairs interrogation, section 3303 requires that the employing agency notify the officer to be interrogated of the identity of the interrogating officers (§ 3303, subd. (b)), and of "the nature of the investigation prior to any interrogation" (§ 3303, subd. (c)). It also prohibits abusive interrogation techniques. (§ 3303, subds. (a) [interrogation to be conducted at a reasonable hour], (b) [no more than two interrogators], (d) [length of the interrogation session not to be unreasonable; subject must be allowed to attend to physical necessities], and (e) [no abusive language, promises or threats].) If the interrogation focuses on matters likely to result in punitive action against the peace officer, section 3303 allows the officer to designate a representative to be present at the interrogation, provided that the representative is not someone subject to the same investigation. (§ 3303, subd. (h).) (3) If criminal charges are contemplated, section 3303 requires immediate advisement of the so-called Miranda rights. [FN6] (§ 3303, subd. (g); Lybarger v. City of Los Angeles, supra, 40 Cal.3d 822, 829.) In other words, the officer must be told that although he has a right to remain silent and not incriminate himself, "(1) his silence could be deemed insubordination, leading to administrative discipline, and (2) any statement made under the compulsion of the threat of such discipline could not be used against him in any subsequent criminal proceeding." (Lybarger v. City of Los Angeles, supra, at p. 829.)

FN6 Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974].

(4a) In this case, the relevant provision of section 3303 is subdivision (f), which entitles an officer to tape recordings, transcribed notes, and to ***575** reports and complaints made by the investigators or other persons. Subdivision (f) defines only disclosure requirements incident to an investigation; it does not address an officer's entitlement to discovery in the event he or she is administratively charged with misconduct.

Subdivision (f) of section 3303 provides: "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential maybe entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation." (Italics added.) The statutory language requiring interpretation is the italicized sentence.

Preliminarily, we note that the Act nowhere defines "reports" or "complaints," as used in subdivision (f) of section 3303. (5) When a statute does not define some of its terms, we generally look to "the common knowledge and understanding of members of the particular vocation or profession to which the statute applies" for the meaning of those terms. (Cranston v. City of Richmond, supra, 40 Cal.3d 755, 765.) (4b) Here, however, we need not engage in that task because the Department does not dispute that its notes of the Ford interview are the type of documents subject to disclosure under this provision.

Because subdivision (f) of section 3303 does not specify when an officer's entitlement to the reports and complaints arises, we must determine whether the Legislature intended such disclosure to occur before or after interrogation. (6) To discern

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legislative intent, we look first to the words of the statute and its provisions, reading them as a whole, keeping in mind the statutory purpose and harmonizing "statutes or statutory sections relating to the same subject ... both internally and with each other, to the extent possible. " (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67, 743 P.2d 1323].)

(4c) Subdivision (f) of section 3303 generally provides for recording the interrogation of an officer who is under administrative investigation. Although it grants the officer access to tape recordings or transcribed notes of the interrogation "if any further proceedings are contemplated or prior to *576 any further interrogation at a subsequent time," it does not specify when that access must be given. The recordings and notes memorialize the interrogation. It follows, therefore, that access to them would be after the interrogation. Thus, with respect to recordings and notes, subdivision (f) must be read to provide for their production after an interrogation. If we are to harmonize subdivision (f) as a whole, as we must, then the provision should also be interpreted as requiring that, as is the case with recordings and notes, reports and complaints be produced after interrogation.

We also note that the Legislature placed the provision regarding disclosure of reports and complaints and the provision specifying entitlement to transcribed notes in the same sentence in subdivision (f). That sentence states that the officer "shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential." (§ 3303, subd. (f), italics added.) This placement is an additional indication that the Legislature must have intended the discovery rights in each instance to be coextensive, entitling the officer to copies of reports and complaints and transcribed stenographer's notes after the interrogation.

Moreover, in other parts of section 3303 where the Legislature has required that certain acts be performed before interrogation, it manifested that intent by including the words "prior to" in the provision. (§ 3303, subds. (b) ["The public safety officer ... shall be informed prior to such interrogation of the rank, name and command of the officer in charge ..., the interrogating officers, and all other persons to be present during the interrogation"], (c) ["The public safety officer ... shall be informed of the nature of the investigation prior to any interrogation"] and (g) ["If prior to or during the interrogation ... it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights"], italics added.) But the words "prior to" do not appear in that part of subdivision (f) requiring disclosure of reports and complaints. (7) When the Legislature " has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." (Phillips v. San Luis Obispo County Dept. etc.Regulation (1986) 183 Cal.App.3d 372, 379 [228 Cal.Rptr. 101]; see also People v. Drake (1977) 19 Cal.3d 749, 755 [139 Cal.Rptr. 720, 566 P.2d 622].) (4d) Therefore, in this instance, the omission of the words " prior to" is another indicator of legislative intent to provide for production of reports and complaints after interrogation.

As our review of the statutory language has shown, there is nothing in the statute that can be interpreted as indicative of the Legislature's intent to *577 grant an officer under administrative investigation the right to discovery of reports and complaints before the officer's interrogation. Consideration of the competing interests underlying the Act lends further support for this conclusion, as we shall explain.

(8) Protection of peace officers from abusive or arbitrary treatment in their employment is the essence of the Act.To accomplish this, the Legislature set out certain rights and procedures. Some of the rights that the Act affords peace officers resemble those available in a criminal investigation. [FN7] For example, section 3309 to some extent echoes the Fourth Amendment's prohibition against unreasonable searches and seizures in that it permits searches of an officer's workplace locker or storage space only if conducted under a warrant (see, e.g., U.S. Const., 4th Amend.; Pen. Code, § 1524, subd. (a); Illinois v. Gates (1983) 462 U.S. 213, 238-239 [76 L.Ed.2d 527, 548-549, 103 S.Ct. 2317]; United States v. Ventresca (1965) 380 U.S. 102 [13 L.Ed.2d 684, 85 S.Ct. 741]) or with the officer's consent (see, e.g., United States v. Mendenhall (1980) 446 U.S. 544,

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557-558 [64 L.Ed.2d 497, 511-512, 100 S.Ct. 1870]; United States v. Watson (1976) 423 U.S. 411, 424-425 [46 L.Ed.2d 598, 609-610, 96 S.Ct. 820]). To accommodate the administrative setting, however, the Act also provides that, if the officer is present during a search performed without a warrant or consent, the search is permissible, even though it would not meet Fourth Amendment standards. (§ 3309.) This accommodation suggests a recognition by the Legislature that a law enforcement agency should retain greater latitude when it investigates suspected officer misconduct than would be constitutionally permissible in a criminal investigation. Limitations on the rights of those employed in law enforcement have long been considered "a necessary adjunct to the[employing] department's substantial interest in maintaining discipline, morale and uniformity." (Kannisto v. City and County of San Francisco (9th Cir. 1976) 541 F.2d 841, 843.) That interest is increased when preservation of public confidence in the trustworthiness and integrity of its police force is at stake.

FN7 In a letter urging passage of the Act, the Los Angeles Police Protective League, which in this case has filed an amicus curiae brief on behalf of PPOA, explained: "Under [the proposed Act] a policeman will no longer find himself in the contradictory situation of having to enforce the law and protect the rights of others, and yet be denied the same fundamental rights by his own department."

The presence of subdivision(g) in section 3303 is another indicator that the Legislature looked to criminal procedure as a model for the Act but then provided somewhat reduced protections. For example, similar to the Fifth Amendment's protection against self-incrimination, subdivision (g) requires that if the officer is deemed a criminal suspect, Miranda warnings *578 must precede the interrogation even in a noncustodial, administrative setting. (§ 3303, subd. (g); Lybarger v. City of Los Angeles, supra, 40 Cal.3d 822, 828.) But if no criminal charges are contemplated, a peace officer under administrative interrogation must respond to questioning. (§ 3303, subd. (e); see Lefkowitz v. Turley (1973) 414 U.S. 70, 84 [38 L.Ed.2d 274, 285, 94 S.Ct. 316].) (9) Thus, an officer under administrative investigation does not have "the right to remain silent free of all sanctions." (Williams v. City of Los Angeles (1988) 47 Cal.3d 195, 200, fn. 3 [252 Cal.Rptr. 817, 763 P.2d 480].) As we observed in Lybarger, supra, at page 827, a peace officer has no absolute right under the Constitution to refuse to answer potentially incriminating questions asked by his or her employer; instead, the officer employee's right against self-incrimination is deemed adequately protected by precluding any use of his or her statements at a subsequent criminal proceeding should such charges be filed.

(4e) PPOA maintains that subdivision (f) of section 3303 entitles peace officers under administrative investigation to discover reports and complaints in their employer's possession before submitting to interrogation. We disagree. Unlike other protections set forth in the Act, a right to preinterrogation discovery is not essential to the fundamental fairness of an internal affairs investigation. Indeed, the right to discovery before interrogation and before charges have been filed, as PPOA seeks here, is without precedent.

For instance, during a criminal investigation a suspect has no right to discovery. In a criminal case, the right to discovery does not arise until charges have been filed and the suspect becomes an accused. (Pen. Code, § 859; Weatherford v. Bursey (1977) 429 U.S. 545, 559 [51 L.Ed.2d 30, 42, 97 S.Ct. 837] ["no general constitutional right to discovery in a criminal case "]; Brady v. Maryland (1963) 373 U.S. 83, 87 [10 L.Ed.2d 215, 218, 83 S.Ct. 1194]; Pitchess v. Superior Court (1974) 11 Cal.3d 531,535-536 [113 Cal.Rptr. 897, 522 P.2d 305]; see generally, 2 LaFave & Israel, Criminal Procedure (1984) Defense Pretrial Discovery, § 19.3, pp. 481-482; 2 Witkin, Cal. Evidence (3d ed. 1986) Discovery and Production of Evidence, § 1637 et seq., pp. 1578-1607.)

Moreover, granting discovery before interrogation could frustrate the effectiveness of any investigation, whether criminal or administrative. Underlying every administrative inquiry into suspected officer misconduct is the obligation of the law enforcement agency to assure public confidence in the integrity of its officers. The purpose of the inquiry is to determine whether there is any truth to the allegations of misconduct made against an officer and, if so, whether to commence disciplinary proceedings. PPOA's *579 interpretation of subdivision (f) of section 3303 would impair the reliability of such a determination and the

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effectiveness of the agency's efforts to police itself.

Disclosure before interrogation might color the recollection of the person to be questioned or lead that person to conform his or her version of an event to that given by witnesses already questioned. Presumably, a related concern led the Legislature to limit an officer's choice of a representative during interrogation to someone who is not a subject of the same investigation. (§ 3303, subd. (h).) That limitation seeks to ensure that participants in the same incident are not privy to evidence provided by other witnesses. Because in this case both Officer Ford and Officer Diaz were involved in the same investigation, under subdivision (h) neither could have designated the other as his representative. Furnishing Officer Diaz before his interrogation with the notes of the Ford interview would require the Department to disclose the same type of information that subdivision (h) seeks to shield from exposure.

Furthermore, to require disclosure of crucial information about an ongoing investigation to its subject before interrogation would be contrary to sound investigative practices. During an interrogation, investigators might want to use some of the information they have amassed to aid in eliciting truthful statements from the person they are questioning. Mandatory preinterrogation discovery would deprive investigators of this potentially effective tool and impair the reliability of the investigation. This is true in any interrogation, whether its purpose is to ferret out criminal culpability or, as in this case, to determine if a peace officer used a mailing list in contravention of a direct order by his superiors.

In interpreting subdivision (f) of section 3303, our role is limited to ascertaining legislative intent. Based on our review of the statutory language and the purpose underlying the Act, we conclude that the Legislature intended subdivision (f) to require law enforcement agencies to disclose reports and complaints to an officer under an internal affairs investigation only after the officer's interrogation. Because entitlement to preinterrogation discovery is neither apparent from the language of subdivision (f) nor fundamental to the fairness of an internal affairs investigation, and because such mandatory discovery might jeopardize public confidence in the efficiency and integrity of its police force, we decline to engraft such a right onto the Act. (10) Although the statute does not compel preinterrogation discovery, it does not preclude a law enforcement agency from providing such discovery. ***580**

B. Confidentiality

As an additional ground for its refusal to provide Officer Diaz before his interrogation with its notes of the Ford interview, the Department claimed that the notes were confidential. Subdivision (f) of section 3033 does exempt from disclosure any reports and complaints "deemed by the investigating agency to be confidential." The Department, however, did not assert a statutory basis for confidentiality (e.g., Evid. Code, § 1040; Pen. Code, § 832.7, subd. (a)). Rather, it argued that the notes were "confidential" because their disclosure to Diaz before his interrogation would impair the investigator's ability to evaluate the credibility of Diaz. In view of our conclusion that subdivision (f) does not require disclosure of reports and complaints until after interrogation, we need not address the Department's claim of confidentiality.

C. Department's Past Practice

In the trial court, PPOA alleged that the Department had a practice of preinterrogation disclosure, an allegation the Department denies. Other than noting that the relevant facts were in dispute, the superior court did not address this issue; instead, it relied solely on subdivision (f) of section 3033 as its basis for issuing the injunction against the Department. At oral argument before this court, the Department acknowledged that the issue of its past practice remains to be decided in this case.

We need not determine whether the Department did have such a practice and, if so, whether that practice would entitle Officer Diaz to have access to the notes of the Ford interview before the Department's interrogation of him. But because the issue has not yet been resolved in the superior court, the matter is remanded to allow that court to decide whether PPOA is entitled to injunctive relief on that ground.

Disposition

The judgment of the Court of Appeal is reversed with directions to vacate the order of the superior court granting a preliminary injunction and to

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remand the case to that court for proceedings consistent with this opinion.

Lucas, C. J., Mosk, J., Broussard, J., Eagleson, J., and Arabian, J., concurred. *581

PANELLI, J.,

Concurring and Dissenting.

I concur with that portion of the majority opinion that concludes that the matter must be remanded to allow the trial court to decide whether the Pasadena Police Officers Association (PPOA) is entitled to injunctive relief on the ground that the City of Pasadena (City) had a practice of preinterrogation disclosure of reports and complaints. However, I am not in accord with the remainder of the majority's opinion and, accordingly, I respectfully dissent.

In my view, fairness and Government Code section 3303, subdivision (f) (hereafter section 3303(f)) [FN1] entitle an accused officer to preinterrogation disclosure of nonconfidential reports and complaints made by investigators or other persons. Accordingly, I would affirm the judgment of the Court of Appeal.

FN1 All further statutory references are to the Government Code unless otherwise indicated.

Section 3303(f) provides that: "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential. No notes or reports which are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation."

My analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (People v. Woodhead (1987) 43 Cal.3d 1002, 1007 [239 Cal.Rptr. 656, 741 P.2d 154]; People v. Overstreet (1986) 42 Cal.3d 891, 895 [231 Cal.Rptr. 213, 726 P.2d 1288]; People ex rel. Younger v. Superior Court (1976) 16 Cal.3d 30, 40 [127 Cal.Rptr. 122, 544 P.2d 1322].) In determining intent, we look first to the language of the statute. (Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal.3d 211, 218-219 [188 Cal.Rptr. 115, 655 P.2d 317].) When the statutory language is clear and unambiguous, there is no need for statutory construction and the courts should not indulge in it. (Woodhead, supra, 43 Cal.3d at pp. 1007-1008; Overstreet, supra, 42 Cal.3d at p. 1008.)

Section 3303 sets forth a detailed exposition of the manner and method by which investigations and interrogations are to be conducted. Section *582 3303(f) is primarily concerned with an officer's right to have a record of his or her interrogation and access to nonconfidential documents. The section clearly provides that if a tape recording is made of the proceedings, the officer "shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time." (Ibid.) The statute, however, does not specify the timing of the required disclosure of investigatory notes, reports, statements and complaints in the same language as the provision regarding tape recordings. In my view, the words themselves, therefore, provide no determinative answer as to when these materials are to become available to an officer.

It is a well-recognized principle of statutory construction that every word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function. (Clements v. T. R. Bechtel Co. (1954) 43 Cal.2d 227, 233 [273 P.2d 5].) Moreover, "[i]nterpretive constructions which render some words surplusage ... are to be avoided." (California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].)

As the City points out, there are three contexts in section 3303, apart from section 3303(f), in which the timing of certain conduct and behavior of law enforcement agencies is explicitly set forth. [FN2] The City argues that had the Legislature intended to entitle a police officer to investigatory materials before the initial interrogation of the officer, it

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would have expressed that intention in terms as clear and unmistakable as it did in section 3303, subdivisions (b), (c), and (g). This position is accepted by the majority in its opinion.

FN2. Section 3303, subdivision (b): "The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, ... " Section 3303, subdivision (c): "The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation ...." Section 3303, subdivision (g): "If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights." (Italics added.)

The City's argument is not without logic, but, as the Court of Appeal noted, a closer examination of section 3303 reveals it is fallacious. For example, section 3303, subdivision (e), provides, inter alia, that "... an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action." Although there is no explicit requirement that this admonition be given before interrogation, no reasonable person would argue that because of the omission of the words "prior to the termination of the interrogation" the Legislature intended ***583** such an admonition to be given only after the interrogation has concluded, a time when it would be of no benefit to a suspected officer. Similarly, the Legislature's silence regarding the timing of the disclosure at issue in the instant case does not convincingly indicate a legislative intent to have the disclosure follow the interrogation. On the contrary, it would be most reasonable to assume the legislative silence was attributable to the Legislature's belief that the timing of the disclosure, being a condition to interrogation, was self-evident.

The majority advances its interpretation of section 3303(f) as an attempt to "harmonize" the statutory treatment of "reports and complaints" with that of "recordings and notes." (Maj. opn., ante, at pp. 575-576.) The majority relies, however, on the flawed premise that because such recordings and notes memorialize the interrogation, "[i]t follows, therefore, that access to them would be after the interrogation." (Maj. opn., ante, at p. 576.) Contrary to the majority's reasoning, it is possible to grant access to recordings and notes as soon as they are made, which certainly might be well before the investigation has concluded. A "harmonious" interpretation that recognizes this fact would require disclosure of reports and complaints at the same time, i.e., at the time they come into the physical possession of the investigators, whether that is before, during or after the investigation has formally concluded.

In sum, I would find that the City has not demonstrated that its reading is the only reasonable interpretation of the statutory language. To discern and effectuate the Legislature's intent we therefore must look to extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. (People v. Woodhead, supra, 43 Cal.3d at p. 1008; People v. Shirokow (1980) 26 Cal.3d 301, 306-307 [162 Cal.Rptr. 30, 605 P.2d 859]; Morse v. Municipal Court (1974) 13 Cal.3d 149 [118 Cal.Rptr. 14, 529 P.2d 46].)

The purpose of the Public Safety Officers Procedural Bill of Rights Act was articulated by the Legislature in section 3301, which provides: "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers."

This court has determined that the general purpose of the act was "to secure basic rights and protections to a segment of public employees who ***584** were thought unable to secure them for themselves." (Baggett v. Gates (1982) 32 Cal.3d 128, 140 [185 Cal.Rptr. 232, 649 P.2d 874].) Specifically, there "can be no doubt that the act is concerned primarily with affording individual police officers certain procedural rights during the course of proceedings which might lead to the imposition of penalties against them, ..." (White v. City of Sacramento (1982) 31 Cal.3d 676, 681 [183 Cal.Rptr. 520, 646 P.2d 191].) These procedural protections, which encompass the initial interrogation as well as all subsequent disciplinary proceedings, serve the

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legislative goal of stable employer-employee relations, for "[e]rroneous action can only foster disharmony, adversely affect discipline and morale in the workplace, and, thus ultimately impair employer-employee relations and the effectiveness of law enforcement services." (White v. City of Sacramento, supra, 31 Cal.3d at p. 683.)

The majority argues that preinterrogation disclosure of an investigator's notes would compromise the truth-finding process by impairing the reliability of the investigation. I am not persuaded.

While there is no guaranty that an officer under investigation will not attempt to prevaricate, the investigating agency is vested with an array of tools to ferret out the truth. The investigating agency controls the resources to be expended on the investigation, the range of charges to be considered, the timing of various phases (including interrogations), and has the power to order the accused officer to answer questions under the threat of discipline. Section 3303, subdivision (e) provides that an officer who refuses to respond to questions or submit to interrogations is subject to punitive action by his employer. (See Lybarger v. City of Los Angeles (1985) 40 Cal.3d 822, 827 [221 Cal.Rptr. 529, 710 P.2d 329].)

I believe that preinterrogation disclosure may in fact further the truth- finding purpose of the investigation. Interrogations may take place weeks or months after the alleged misconduct. It is not difficult to envision an officer having trouble remembering the events surrounding the conduct in question. As the Court of Appeal properly noted: "Access to this information may properly refresh an officer's recollection regardless of whether the information is favorable to his position. Rather than impeding the defendant's search for truth, informing a suspected officer of the information provided by others will permit him to meet the charges head on."

The majority argues that only by reading section 3303(f) as entitling an officer to an investigator's notes after the interrogation will the proper balance be struck between the interest in reliable investigations and the interest in fairness to officers under investigation. As the legislative history *585 demonstrates, however, the Legislature itself sought to, and did, strike the balance between the public's interest and the police officer's individual rights by providing police agencies the right to withhold confidential reports and complaints while at the same time giving police officers access to a wide range of nonconfidential documentary evidence.

The first version of Assembly Bill No. 301, 1975-1976 Regular Session, which resulted in the enactment of the Public Safety Officers Procedural Bill of Rights Act, was introduced on December 19, 1974. It did not provide the employing agency with any protection for confidential documents, stating only that: "The public safety officer shall be entitled to a transcribed copy of any notes by a stenographer or to any reports made by investigators." On August 25, 1975, proposed section 3303(f) was amended to provide: "The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports made by investigators, except those which are deemed by the agency to be confidential. No notes or reports which are deemed to be confidential may be entered into the officer's personnel file." (Sen. Amend. to Assem. Bill No. 301 (1975-1976 Reg. Sess.) Aug. 25, 1975, italics added.)

The final amendment to proposed section 3303(f) was made in conference in August of 1976.It maintained the basic structure of the section but expanded the material to which the public safety officer was entitled. Thus the final amendment provided: "The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons except those which are deemed by the investigating agency to be confidential." (Conference Amend. to Assem. Bill No. 301 (1975-1976 Reg. Sess.)Aug. 12, 1976.)

The amendments during the legislative process reflect the Legislature's express concern with balancing the competing interests implicated by the statute. The public's interest in a well-disciplined police force is protected by allowing a police agency to withhold matter it deems confidential. On the other hand, such matter may not be entered into the officer's personnel file and the officer's procedural rights are protected by entitling him or her to discover a wide range of documentary evidence. I therefore cannot agree with the City's contention that the timing of disclosure is critical to a proper balancing of the competing interests. Nor do I agree that preinterrogation disclosure of an investigator's

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documents will unduly hamper or burden employing police agencies:

The legislative purpose of the act, which is remedial, and prior case law call for a liberal construction of the rights guaranteed by section 3303(f). *586 (See Baggett v. Gates, supra, 32 Cal.3d 128; Lybarger v. City of Los Angeles, supra, 40 Cal.3d 822; White v. City of Sacramento, supra, 31 Cal.3d 676.) A statute must be construed "in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts" (People v. Shirokow, supra, 26 Cal.3d 301, 307; see also Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224]), and any doubt that the Legislature intended a more restrictive reading of section 3303(f) is dispelled by reference to the act as a whole.

The introductory paragraph to section 3303 provides: "When any public safety officer is under investigation and subjected to interrogation ... which could lead to punitive action, such interrogation shall be conducted under the following conditions ...." (Italics added.) Following this introductory paragraph, there are nine subparagraphs articulating in considerable detail the conditions under which a public safety officer may be interrogated. Review of the nine subdivisions together with the introductory paragraph reveals that the language specifies what is to occur before or during the interrogation of the police officer. One of these, section 3303(f), sets forth that the officer " shall be entitled to" any nonconfidential reports or complaints made by investigators. The interpretation suggested by the City, that a public safety officer is entitled to such reports and complaints only after the interrogation, when it would be of little use to him or her, would make little sense and would be contrary to the structure and the purpose of the section and the act as a whole. Such an incongruous interpretation should be avoided. (Nunn v. State (1984) 35 Cal.3d 616, 624-625 [200 Cal.Rptr. 440, 677 P.2d 846].)

For the foregoing reasons, I conclude that a police officer is entitled under section 3303(f) to preinterrogation disclosure of nonconfidential reports or complaints made by investigators or other persons.

Accordingly, I would affirm the judgment of the Court of Appeal. *587

Cal.,1990.

Pasadena Police Officers Ass'n v. City of Pasadena

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JOHN F. SKELLY, Plaintiff and Appellant,
v.
STATE PERSONNEL BOARD et al., Defendants and Respondents

S.F. No. 23241.

Supreme Court of California.

September 16, 1975.

SUMMARY

After receiving a written notice from the State Department of Health Care Services terminating his employment on the grounds of intemperance, inexcusable absences and other failures, a physician with the status of a permanent civil service employee was accorded a hearing before a representative of the State Personnel Board which adopted the representative's recommendation and dismissed the physician from employment. The trial court denied the physician's application for a writ of mandate to compel the board to set aside the dismissal. (Superior Court of Sacramento County, No. 232477, Lloyd Allan Phillips, Jr., Judge.)

The Supreme Court reversed and remanded for further proceedings. Preliminarily, it was noted that the state statutory scheme regulating civil service employment confers on a permanent civil service employee a property interest in continuation of his employment and that this interest is protected by due process. Concluding, from the record, that the basis of the dismissal had been the physician's conduct in extending his alloted lunch time by five to fifteen minutes and in twice leaving his office for several hours without permission, the court held that the dismissal constituted an abuse of discretion in view of the record's failure to show that these deviations adversely affected public service. Further, it was held that provisions of the Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, relating to punitive action against a permanent employee, violate federal and state constitutional due process provisions. Thus, the dismissal had been improper as excessive punishment, and as having been effectuated under procedures which denied the physician due process. (In Bank. Opinion by Sullivan, J., expressing the unanimous view of the court.) *195

HEADNOTES

Classified to California Digest of Official Reports

(1) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal-- Permanent Employee Status as Protected by Due Process.
The California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process.

(2) Constitutional Law § 102--Due Process--Right to Governmental Benefit as Protected by Due Process.
A person's legally enforcible right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(3) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal--Due Process.
Due process does not require the state to provide a permanent civil service employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, but does require, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline..

(4) Civil Service § 7--Discharge, Demotion, Suspension, and Dismissal-- Statutes--Constitutionality.
Provisions of the State Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, concerning the taking of punitive action against a permanent civil service employee, violate the due process clauses of U.S. Const. 5th and 14th Amends. and of Cal. Const., art. I, §§ 7, 15.

(5) Administrative Law § 114--Judicial Review--Limited Nature--Review of State Personnel Board's Findings.
Inasmuch as the State Personnel Board is a

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statewide agency deriving its adjudicating powers from the state Constitution, the board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence.

[See Cal.Jur.3d, Administrative Law, § 287; Am.Jur.2d, Administrative Law, § 659.] *196

(6) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Sufficiency of Evidence.
The State Personnel Board's findings that certain of a permanent civil service employee's absences on certain working days were due to his drinking of intoxicating liquors, rather than due to illness, were sustained by testimony of two apparently credible witnesses that they had seen him at a bar drinking on those days, and by his own testimony that at lunch on one of those days, he had consumed two martinis despite his assertions of illness.

(7) Public Officers and Employees § 27--Duration and Termination of Tenure--Administrative Body's Discretion.
Although an administrative body has broad discretion as to imposition of discipline it must exercise legal discretion which, in the circumstances, is judicial discretion. And in determining whether such discretion has been abused in the context of public employee discipline, the overriding consideration is the extent to which his conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence.

(8) Civil Service § 11--Discharge, Demotion, Suspension, and Dismissal-- Judicial Review--Abuse of Discretion.
In dismissing a physician with the status of a permanent civil service employee on the basis of his extension of his alloted lunch time by five to fifteen minutes, and in twice leaving his office for several hours without permission, the State Personnel Board abused its discretion, where the record failed to show that such deviations adversely affected the public service, but did disclose that he more than made up the lost time by working during nonworking periods, and that he was informative, cooperative, helpful, extremely thorough, and productive.

COUNSEL

Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent. *197

SULLIVAN, J.

Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department). [FN1] In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution.

FN1 Petitioner also named as defendants the Department and its director.

In July 1972 petitioner was employed by the Department as a medical consultant, [FN2] He held that position for about seven years and was a permanent civil service employee of the state. (See Gov. Code, § 18528.) [FN3] About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance, (2) inexcusable absence without leave, and (3) other failure of good behavior during duty hours which caused discredit to the Department. [FN4] It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action *198 would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the

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