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SB 315

Legal Update

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SB 315 TO BE HEARD ON MARCH 21

A hearing on SB 315 has been scheduled before the House Education Committee on March 21, 2011 at 3:00 p.m. in Room 137 of the Capitol. In the March, 2011 issue of Legal Update, I commented on the bill both respect to the burdens it would impose on school boards to conduct hearings in employment disputes arising under Title 20, MCA and the significant reduction in the due process rights afforded to school employees in such disputes. **If adopted, SB 315 would totally eliminate a school employee's right to any post-termination hearing and would require the tribunal reviewing a school board decision to base its decision entirely on the record made at the board hearing, giving deference to findings of fact made by the school board.** I stated that the bill was constitutionally flawed. In this companion piece, I will examine in greater detail the constitutional problems with this legislation and explain what those problems would mean for school districts should the bill become law.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the United Supreme Court held that a public employee with a property right in continued employment must be given at least a limited pre-termination hearing prior to a deprivation of that right, in addition to a more comprehensive post-termination hearing. In subsequent cases, federal courts have held that the pre-termination hearing need not take place before an impartial tribunal if the post-termination hearing involves a neutral decision-maker.

Current Montana law satisfies these constitutional requirements by providing eligible school employees with a pre-termination hearing before a school board in a proceeding that is not subject to formal rules of evidence and does not involve the right to compel the attendance of witnesses, followed by a more comprehensive post-termination evidentiary hearing before an impartial arbitrator or county superintendent of schools. SB 315 would fundamentally alter this procedure by eliminating any post-termination hearing, making our law unconstitutional under the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution.

The Ninth Circuit Court of Appeals has addressed the due process rights of public employees with a property right in continued employment in several cases. In *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991), the circuit court concluded that while a pre-termination hearing does not require an impartial tribunal, it is a requirement for a post-termination hearing. In that case, the court stated that:

> Walker's due process claim depends on her having had a property right in continued employment. If she did, then the City could not deprive her of her position without due

process. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). *Loudermill* held that respondents had a property interest in their continued employment, because state law provided that they could not be dismissed without cause. . . . Like the respondents in *Loudermill*, Walker was a civil servant who, under City regulations, could be terminated only for cause. She therefore had a property interest in her employment that entitled her to due process protection.

We next consider the degree of protection to which she was entitled. *Loudermill* held that where public employment has due process protection, a hearing is required before termination takes effect. . . . Both sides agree that Walker received a pretermination hearing on November 27, 1985. Walker contends, however, that *Loudermill* also requires an impartial decisionmaker and claims that the decisionmaker at her pretermination hearing did not so qualify.

Although we have been cited no Ninth Circuit cases on this point since *Loudermill*, other circuits have not required that the decisionmaker in a pretermination hearing be impartial, so long as due process is provided in a post-termination hearing. See, e.g., *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (no due process violation where allegedly biased city manager held pretermination hearing for chief building inspector, but Michigan law provided for a full post-termination hearing), *cert. denied*, 489 U.S. 1081, 103 L. Ed. 2d 840, 109 S. Ct. 1535 (1989); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987) (no due process violation where decisionmakers at pretermination stage were allegedly biased, but plaintiff was offered a post-termination hearing before a different body).

We agree that the failure to provide an impartial decisionmaker at the pretermination stage, of itself, does not create liability, so long as the decisionmaker at the post-termination hearing is impartial. As will be seen, the City denied Walker due process at her post-termination hearing. Therefore, the City cannot escape liability by relying on the summary judgment which eliminated the pretermination claim.

In *Clements v. Airport Authority*, 69 F.3d 321 (9th Cir. 1995), the circuit court elaborated on its holding in *Walker* when it stated that:

It is well settled that "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985) . . . . Although the pre-termination hearing need not be elaborate, "some kind of hearing" must be afforded the employee prior to termination. *Id.* The essential requirements of this pre-termination process are notice and an opportunity to respond. . . .

The Board contends that these simple requirements were met by the public hearings on the reorganization. They assert that these hearings provided Sue Clements with notice of the proposed eliminations and that she had opportunities to present her views but declined to do so. Although the Board invokes the magical phrases "notice" and "opportunity to respond," the pre-termination process provided here appears to fall far short

of that required by *Loudermill*. The public hearings to which the Board points apparently gave notice only that certain positions would be eliminated and that others would be created, and did not specify which particular individuals would be terminated. Moreover, the Discussions at the hearings appear to have suggested that the layoff provisions in the manual would be followed. In view of Susan's seniority in the properties department, it appears that the hearings did not provide her with notice that she was in danger of being laid off. Nor, it would appear, did they provide her with an opportunity to respond and to make arguments as to why she had the right to fill one of the newly created positions rather than being terminated. Thus, the procedure followed here appears not to have fulfilled the purpose of the requisite pretermination hearing.

Despite the apparent inadequacy of the pre-termination process, the defendants urge that the numerous post-termination hearings provided Sue with all the process she was due. They are incorrect. In the context of process due a terminated public employee, a full post-deprivation hearing does not substitute for the required pre-termination hearing. . . . Indeed, *Loudermill* itself reveals that post-termination administrative hearings, even if followed by judicial review, are ordinarily insufficient standing alone to satisfy procedural due process in the public employee context. . . . Although the nature of subsequent proceedings may lessen the amount of process that the state must provide pretermination, subsequent proceedings cannot serve to eliminate the essential requirement of a pre-termination notice and opportunity to respond.

Although the denial of a pre-termination hearing is a constitutional violation sufficient to support damages, *cf. Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987), we must also independently assess the adequacy of the post-termination proceedings. For not only is such an assessment usually required to determine the necessary scope of pre-termination procedures, but the inadequacy of post-termination process may itself be the source of a distinct due process violation. *Loudermill*, 105 S. Ct. at 1496 n.12. Sue argues that the post-termination proceedings provided her were constitutionally infirm. She asserts that the post-termination process was flawed because it was infected with bias at the administrative level when Executive Director White set aside the grievance panel decisions, and the Board affirmed the director's actions. Sue alleges that these actors were biased because they harbored malice towards her stemming from her prior whistleblowing activities. If Sue's allegations are true, then she has stated a valid due process claim premised on the flawed post-deprivation procedures.

A biased proceeding is not a procedurally adequate one. At a minimum, Due Process requires a hearing before an impartial tribunal. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267 (1972). This impartial tribunal requirement applies in both civil and criminal cases. Indeed, the requirement that proceedings which adjudicate individuals' interests in life, liberty, or property be free from bias and partiality has been "jealously guarded." *Marshall v. Jerrico*, 446 U.S. 238, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980). Thus, this neutrality principle has been applied to a variety of settings, including administrative adjudications, in order to protect the "independent constitutional interest in fair adjudicative procedure." 100 S. Ct. at 1613 n.2. And, it has been invoked in the context of post-termination administrative proceedings. See *Walker v. City of Berkeley*, 951 F.2d 182, 184 (9th Cir. 1991) (failure to provide impartial

decisionmaker at the post-termination hearing constitutes constitutional error).

Moreover, any bias in the administrative process in Sue's case was not "cured" by the subsequent judicial review in state court. Generally, an adjudication that is tainted by bias can not be constitutionally redeemed by review in an unbiased tribunal. See *Ward*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267.

Finally, in *Levine v. City of Alameda*, 525 F.3d 903 (9th Cir. 2008), the Ninth Circuit noted that:

The district court did not err in granting summary judgment for Levine in part and finding that the defendants violated his Fourteenth Amendment due process rights under 42 U.S.C. § 1983. To establish a § 1983 claim, a plaintiff must show that an individual acting under the color of state law deprived him of a right, privilege, or immunity protected by the United States Constitution or federal law. *Lopez v. Dept. of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991). To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due. *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 331 (9th Cir. 1995).

In this case, the district court properly found that Levine was a civil servant who had a property interest in continued employment under the Due Process Clause. *See id.; Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985). As an employee with a property interest under the Due Process Clause, Levine was entitled to have a hearing before his lay off to allow him to present his side of the story. . . . Defendants refused to provide a hearing. The Director of Human Resources' offer to meet with Levine to discuss lay off procedure, and the random five-minute encounter between Levine and the Director, failed to give Levine a meaningful opportunity to respond to the lay off decision. See *Clements*, 69 F.3d at 331-32. Thus, Levine's due process rights were violated by the failure to provide a pretermination hearing. *See id.; Loudermill*, 470 U.S. at 542-45.

Because Levine's due process rights were violated, it was not improper for the district court to order a full evidentiary hearing to remedy the violation. See *Brady v. Gebbie*, 859 F.2d 1543, 1551 (9th Cir. 1988) (stating that the appropriate remedy for the deprivation of due process rights is to order the process which was due). The Supreme Court has held that an employee with a property interest is entitled to a limited pre-termination hearing which is to be followed by a more comprehensive post-termination hearing. *Loudermill*, 470 U.S. at 547. Levine was entitled to a full post-termination hearing because there was no way to give Levine the process that he had been due, which was an opportunity to respond before the termination occurred. *Cf. Loudermill*, 470 U.S. at 547 n.1 (noting that the adequacy of pretermination and post-termination hearings are interrelated and that the scope of one affects the scope of the other). Thus, it was reasonable for the district court to order that a full evidentiary hearing be held. *See id. at 547.*

It was also not improper for the district court to order that the hearing be held before a neutral third-party. This court has held that for post-termination hearings an impartial

decisionmaker is required. *Walker v. City of Berkeley*, 951 F.2d 182, 184 (9th Cir. 1991). The district court made a finding that persons working for the City would not be sufficiently neutral in this case after the extensive litigation between the City and Levine. Because this finding was not clearly erroneous, and an impartial decisionmaker is required, the district court did not err in ordering that a neutral third-party preside over the hearing.

These holdings on the constitutional requirement for a post-termination hearing before an impartial tribunal are consistent with the decisions made by courts in other jurisdictions. See, for example, *Farhat v. Jopke*, 370 F.3d 580, 2004 Fed.App. 0158P (6th Cir. 2004), in which the Sixth Circuit Court of Appeals stated that:

> The next issue presented is Appellant's claim that he was denied procedural due process because the school district did not meet the Constitutional due process requirements for pretermination and post-termination hearings. In support of these claims, Appellant states that he never received a hearing before a neutral decisionmaker. He further states that he was not permitted to present his grievance directly to the school board which, he asserts, is required by Michigan statute.
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> Due process requires some sort of pretermination hearing, the formality of which depends upon the importance of the interest and the nature of the subsequent proceedings. . . . For public employees who can only be fired for cause, the Supreme Court has held, specifically, that a pretermination proceeding is required. . . .
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> In *Loudermill*, the Supreme Court held that a full evidentiary hearing is not required prior to termination. Rather, the pretermination hearing is to provide an initial check against mistaken conclusions, "essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-46. The essential elements required for due process are notice and an opportunity to respond, either in writing or in person. . . .
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> In the Sixth Circuit, we have held that prior to termination of a public employee who has a property interest in his employment, the due process clause requires that the employee be given "oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer." *Buckner v. City of Highland Park*, 901 F.2d 491, 494 (6th Cir.) (citing *Loudermill v. Cleveland Bd. of Educ.*, 844 F.2d 304 (6th Cir. 1988)), cert. denied, 498 U.S. 848 (1990). "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.
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> We also have held that in the pretermination stage, the employee does not have a right to, and the Constitution does not require, a neutral and impartial decisionmaker. The "right of reply" before the official responsible for the discharge is sufficient. . . .It is at the post-deprivation stage where a neutral decisionmaker is needed to adjudicate the evidence. Where there is a system of post-termination procedures available to the

employee that includes a neutral decisionmaker and/or arbitration, coupled with a pretermination "right of reply" hearing, then the employee has received all the process due under the Constitution. . . .

The law is well-established that it is the opportunity for a post-deprivation hearing before a neutral decisionmaker that is required for due process. As long as the procedural requirements are reasonable and give the employee notice and an opportunity to participate meaningfully, they are constitutionally adequate. See *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1256 (10th Cir. 1998). As succinctly stated by the Seventh Circuit, the "availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure." *Dusanek v. Hannon*, 677 F. 2d 538, 542-43 (7th Cir.) (citations omitted), *cert. denied sub nom Dusanek v. O'Donnell*, 459 U.S. 1017 (1982). Consequently, where the employee refuses to participate or chooses not to participate in the post-termination proceedings, then the employee has waived his procedural due process claim. See *Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 904 (8th Cir. 2000) (citations omitted).

"The law is also clear that grievance procedures provided by a collective bargaining agreement can satisfy a plaintiff's entitlement to post-deprivation due process." *Hennigh*, 155 F.3d at 1256; American Postal Workers Union Columbus Area Local AFL-CIO v. U.S. Postal Service, 736 F. 2d 317, 319 (6th Cir. 1984). As we stated in *Buckner*, the opportunity to challenge the termination in a more detailed post-termination proceeding, under the collective bargaining agreement, satisfies the employee's constitutional due process rights.

So what is the practical consequence for school districts should SB 315 become law? Because our teacher tenure statutes would no longer permit a post-termination evidentiary hearing before an impartial tribunal, discharged employees entitled to a good cause post-termination hearing under the Constitution would have standing to assert a violation of their constitutional right to due process in either state or federal court. This is precisely what happened when the Twin Bridges school board discharged Mark Weber without a pre-termination hearing. In *Weber v. Twin Bridges School District*, 332 Fed.Appx. 439 (9th Cir. 2009), the Ninth Circuit held that, because of the due process violation, Weber was not required to submit his claim to final and binding arbitration, but could instead present his case to a jury where he could obtain attorney fees and damages for emotional distress that would not have been available in an arbitration proceeding brought pursuant to Mont. Code Ann. §20-4-204. In a case that consumed five years and multiple court rulings, the school district's insurer paid Weber $240,000 and an undisclosed amount to its own attorneys.

In sum, if SB 315 becomes law, it will almost certainly be challenged on constitutional grounds. If declared unconstitutional, then a system of adjudication which prohibits arbitrators and county superintendents from ordering school districts to provide compensation for punitive damages, pain and suffering, emotional distress, compensatory damages, or attorney fees will be replaced with one which will grant tenured employees the right to challenge their school board's decision in a civil jury trial. Legislation that has been represented as furthering the interests of school boards will actually work against those interests and the interests of school employees who benefit from a process that can be concluded in a period of months, rather than years. Now is the time to let your legislators know what you think of this legislation.