Opinion No. 88-05

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OPINION OF: HAL STRATTON, Attorney General

BY: Andrea R. Buzzard, Assistant Attorney General

TO: Honorable Gary Hocevar, State Representative, 5110 Camino Vista, NW, Albuquerque, NM 87120

QUESTIONS

Do the hearing procedures, enacted by 1986 N.M. Laws, ch. 33, contained in the Certified School Personnel Act, comport with the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

CONCLUSIONS

Yes.

ANALYSIS

New Mexico Laws 1986, chapter 33, sections 19 to 26, extensively revised those sections of the Certified School Personnel Act, Sections 22-10-1 to 22-10-26 NMSA 1978, that govern the rights and remedies of certified school personnel who are discharged or not reemployed. Pursuant to Section 22-10-14 (as further amended by 1987 N.M. Laws, chapter 320, section 5), a school district may not refuse to reemploy a certified school instructor who the district has employed for three consecutive years if the reasons for the refusal are arbitrary, capricious, or legally impermissible, as those terms are defined therein. The instructor may obtain a hearing before the local school board if he believes his reemployment decision was arbitrary, capricious or based on legally impermissible reasons. Id.

If the instructor remains dissatisfied after this hearing, Section 22-10-14.1 permits him to obtain a de novo hearing before an independent arbitrator. The issue is whether the board's decision not to reemploy the instructor was arbitrary, capricious, or based on legally impermissible grounds. At the hearing, the school and the instructor may be represented by counsel, and call and cross-examine witnesses. The arbitrator's decision is final and nonappealable, except where the decision was procured by corruption, fraud, deception or collusion, in which case the decision may be appealed to the district court.

Section 22-10-17 provides procedures for discharging a certified school instructor or administrator. A school board may discharge such personnel only for "good or just cause." Upon receipt of a "notice of intent to discharge," the instructor or administrator

may obtain an informal hearing before the school board. If he remains dissatisfied with the school board's decision to discharge him after this hearing, he may obtain a de novo hearing before an independent arbitrator. Section 22-10-17.1. At the de novo hearing, both sides may be represented by lawyers, and may call and cross-examine witnesses. The parties also may conduct discovery before the hearing. The arbitrator's decision is final and nonappealable except where the decision was procured by corruption, fraud, deception, or collusion, in which case it may be appealed to the court of appeals.

The Constitution of the United States does not create a teacher's property right in continued employment. Rather, property interests "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." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it." Roth, 408 U.S. at 577. Where a civil service statute entitled public employees to retain their positions "during good behavior and efficient service" and specified "cause" for removal, the Supreme Court of the United States declared: "[T]he statute plainly supports the conclusion ... that respondents possessed property rights in continued employment." Loudermill, 470 U.S. at 539.

A school board may not deprive a teacher of a property right to continued employment except pursuant to constitutionally adequate procedures. "The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" Loudermill, 470 U.S. at 541 (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974)). A teacher's legitimate claim to continued employment absent "sufficient cause," Perry v. Sindermann, 408 U.S. 593, 602-03 (1972), entitles him to a hearing "where he could be informed of the grounds for his non-retention and challenge their sufficiency." Id. at 603.

Subsection 22-10-14F provides that "[n]othing in this section or section 22-10-14.1 NMSA 1978 shall be construed as creating any statutorily created property right." Thus, the legislature has evidenced its intent not to create a property right to continued employment, and the teachers' hearing procedures thus clearly satisfy due process requirements. We note, however, that Sections 22-10-17 and 22-10-17.1 contain no similar language.

Assuming, without deciding, that the hearing provisions create a property right, the hearing procedures satisfy the Supreme Court's standards for procedural due process requirements. A pre-termination opportunity to respond, coupled with a post-termination administrative hearing, provides all the process that is due. Loudermill, 470 U.S. at 547-48. A pre-termination "hearing" need not be elaborate. It serves as an "initial check against mistaken decisions"; the employee "is entitled to oral or written notice of the

charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 545-46. And any due process requirement that there be a full adversarial evidentiary hearing is satisfied by a full post-termination hearing, where a pre-termination hearing has been provided. Id. at 546. Cf. Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985) (a discharged employee's informal meeting with the city manager after discharge was not sufficient to satisfy procedural due process requirements).

In summary, we conclude that Sections 22-10-14, 22-10-14.1, 22-10-17, and 22-10-17.1 NMSA 1978 satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

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