

# PUBLIC PERSONNEL LAW

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Cary M. Grant, Editor

## **SUPREME COURT RULES ON DUE PROCESS RIGHTS OF SUSPENDED EMPLOYEES**

► Stephen Allred

Public agencies sometimes find themselves faced with allegations that employees have engaged in criminal misconduct, either on or off duty. The immediate need is to investigate the allegation, but because there is some chance the employee may indeed have acted inappropriately, the agency wants to remove the employee from the workplace while the investigation proceeds. The question then arises: what due process, if any, is due the employee who is to be suspended during the investigation?

The United States Supreme Court has answered this question with its decision in *Gilbert v. Homar*.<sup>1</sup> This bulletin provides a summary of the decision and its implications for public agencies.

### **Background and Lower Court Decisions**

Homar worked as a police officer at East Stroudsburg University (ESU) in Pennsylvania. He was arrested on August 26, 1992, and charged with a drug felony. The university 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 that the university's failure to provide him with notice and a hearing before suspending him without pay violated due process. The District Court granted ESU's motion summary judgment, but the Third Circuit reversed.

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1. No. 96-651. (U.S. June 9, 1997).

## The Supreme Court Ruling

In a unanimous ruling authored by Justice Scalia, the Court held that the university, as a public agency, did not violate due process by failing to provide notice and a hearing before suspending *Homar* without pay. The Court noted that in *Cleveland Bd. of Ed. v. Loudermill*,<sup>2</sup> it established the rule that an employee with a property right in employment is entitled to a limited pre-termination hearing, to be followed by a more comprehensive post-termination hearing.<sup>3</sup> The Third Circuit erred, the Court held, in relying on dictum in *Loudermill* to conclude that a suspension without pay must also be preceded by notice and a hearing. Rather, the Court noted, due process is flexible and calls for such procedural protections as the particular situation demands.

Drawing from its seminal decision in *Mathews v. Eldridge*,<sup>4</sup> the Court held that 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. In this case, the employee's interest was in an uninterrupted paycheck; but the Court noted that account must be taken of the length and finality of the temporary deprivation of his pay. So long as a suspended employee receives a sufficiently prompt post-suspension hearing, the Court held, the lost income is relatively insubstantial, and fringe benefits such as

2. 470 U.S. 532 (1985).

3. A complete discussion of *Loudermill's* pre-termination hearing requirements is in: A Practical Guide to Conducting an Adequate Predissmissal Hearing for North Carolina State Agencies (Institute of Government, Public Personnel Law Bulletin, No. 1, June 1994).

4. 424 U.S. 319 (1976).

health and life insurance are often not affected at all. On the other side of the balance, stated the Court, 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 *Homar* with pay, the Constitution does not require the government to give an employee charged with a felony paid leave at taxpayer expense.

The Court then addressed the third *Mathews* factor and cited it as 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—had already been assured by the arrest and the filing of charges. That there may have been discretion not to suspend does not mean that *Homar* had to be given the opportunity to persuade officials of his innocence before the decision was made, the Court held.

The Court remanded the case to the Third Circuit to determine whether the employee received an adequately prompt post-suspension hearing.

## Implications of the Decision

The Court's decision means that state and local government agencies in North Carolina may suspend an employee suspected of criminal misconduct without pay for a reasonable period of time while they conduct an investigation. But the suspension must be for a brief period of time—thirty days is suggested as a maximum. And it is critical that the employee be given a prompt opportunity for appeal and review of the final decision shortly after the investigatory suspension is completed. What the decision permits, on the other hand, is the freedom for management to promptly remove an employee from the workplace and find out the facts if it has reasonable grounds to suspect that the employee has been involved in criminal misconduct.

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