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Public Safety Employee Right to "Name-Clearing" Hearings

❖ Introduction

The article is intended to serve as an introduction to the topic of "name-clearing" hearings, a right that terminated public employees, even those without a constitutionally protected property interest in continued public employment have when their termination is accompanied by the public circulation of serious stigmatizing accusations of misconduct which they contend are false and that can have a negative impact on their ability to obtain future employment. The article discusses what is generally required to be entitled to such a hearing as well as what such a hearing entails. At the conclusion of the article, there is a brief listing of relevant resources and references.

❖ When is a "Name-Clearing" Hearing Required?

Some public employees may have a constitutionally protected property interest in continuation of their employment. To decide whether such a property right exists, courts generally look at whether there was a **reasonable expectation** that their employment could only be ended for good cause. Such a reasonable expectation can come into being in a variety of ways including by a law which classifies some employees who can only be terminated for cause, by mutual understanding created

by an enforceable contract, such as a collective bargaining agreement, or when the employer expresses an unequivocal intent to be bound to a contractual relationship with the employee, which sometimes can be shown by clear unqualified language in an employee handbook or departmental policy.

When a public employee is determined to have a property interest in their continued employment, employers have to at least give the employee notice and an opportunity to be heard prior to termination. Under *Loudermill v. Cleveland Board of Education*, #83-1362, 470 U.S. 532 (1985), non-probationary civil servants have a property right to continued employment and such employment cannot be denied to employees unless they were given an opportunity to hear and respond to the charges against them prior to being deprived of continued employment.

The underlying principle in *Loudermill* is that because dismissals often involve factual disputes, a hearing provides the employee an opportunity to explain and refute any conclusions the employer reached which caused the employee's discharge.

Terminating employees who have a constitutionally projected property interest in their continued employment without notice and the opportunity to be heard may violate the employee's procedural due process rights and expose the public employer to litigation, which can result in a variety of equitable and legal remedies, including reinstatement, back pay, and money damages. In addition to a pretermination (*Loudermill*) hearing, an employee must be afforded a full evidentiary hearing, after the termination takes effect. However, the scope of the pretermination hearing depends upon the scope of the post-termination hearing available to the employee. If a full post-termination hearing is available, the *Loudermill* pretermination hearing may be minimal.

But what about public employees without a constitutionally protected property interest in their continued employment, such as untenured and probationary employees? What rights do they have when they are fired? Sometimes termination may be based on allegations of serious misconduct and the accusations may follow them around, stigmatizing them and making it difficult or indeed impossible to obtain other public employment in their chosen field, or any employment at all.

Courts have ruled that all public employees, even those without a constitutionally protected property right to continued employment, have a constitutionally protected

liberty interest in their reputation, good name, honor, and integrity. When a public employee is deprived of any one of these in connection with being terminated from their job, they are entitled to due process of the law in the form of a "name-clearing" hearing. Many courts require that the employee must *request* a name-clearing hearing in order for the employer to be liable for violating the employee's liberty interest.

When the termination or failure to renew employment imposes a stigma that limits the person's future employment opportunities, the employee is entitled to notice and a "name-clearing" hearing. *Board of Regents v. Roth*, #71-182, 408 U.S. 564 (1972). It is not enough, howeer, that the allegations or action against the person merely damages the person's reputation. "Stigma plus" – a stigma to one's reputation plus deprivation of some additional right or interest – is required.

Illustrating this is *Hill v. Borough of Kutztown*, #05-1356, 455 F.3d 225 (3d Cir. 2006), in which a plaintiff borough manager alleged that he resigned after intense harassment and defamatory statements by the mayor. As a policy-making employee, the plaintiff did not have a property interest in his job. However, a federal appeals court concluded that the plaintiff had sufficiently alleged a liberty interest claim, under the "stigma-plus" test. When an employer "'creates and disseminates a false and defamatory impression about the employee in connection with his termination,' it deprives the employee of a protected liberty interest," the court stated, and an employee deprived of his protected liberty interest is entitled to a name-clearing hearing, even though he has no protectable property interest in continued employment.

See also *Codd v. Velger*, #75-812, 429 U.S. 624 (1977), a U.S. Supreme Court decision holding that the probationary employee failed to allege that the report of an apparent attempted suicide that was included in his personnel file was false. Since there was no factual dispute, a hearing mandated by due process would have served no purpose.

Usually there are five elements that a fired employee must satisfy in order to show they were deprived of a liberty interest entitling them to a publicly held "name-clearing" hearing:

1. There have to be stigmatizing statements uttered together with the employee's termination.

2. The statements must charge more than improper or inadequate performance, incompetence, neglect of duty, or malfeasance. Examples are stigmatizing accusations of criminal acts, dishonesty, sexual misconduct, etc.
3. The stigmatizing statements or charges must be made public.
4. The employee must assert that the charges made were false.
5. The employer's circulation of the information must have been voluntary, as opposed to those circumstances in which the disclosure and circulation is mandated by law.

When all of these elements are shown and the employee requests a name-clearing hearing, the employer is required to provide the employee a name-clearing hearing at which they can attempt to provide evidence that the allegations against them are false. Failure to do so may violate the employee's due process rights.

In *Bellard v. Gautreaux*, #10-31266, 675 F.3d 454 (5th Cir. 2012), a law enforcement cadet enrolled in a training academy was terminated for allegedly making sexual remarks to female cadets as well as falling asleep in class and showing up late. Addressing his complaint that he was improperly denied a name-clearing hearing on the sexual harassment accusations, a federal appeals court agreed that even an at will public employee has a right to notice and an opportunity to be heard when they are fired "in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities." In this case, however, the ex-cadet did not demonstrate that the sheriff had publicized the allegedly defamatory statements about him and why he was being fired.

In *Rothstein v. City of Dallas*, #87-1888, 901 F.2d 61 (5th Cir. 1990), a probationary police officer in Dallas was fired for allegedly making obscene telephone calls. He requested an appeal and although he did not explicitly ask for a "name clearing hearing" he did deny the charge against him and asked for administrative review of his termination. The Fifth Circuit in an en banc decision affirmed the award against the city stating that it was not necessary to "say the magic words" when requesting a name-clearing hearing**.**

Other cases of interest in this area include:

- *Budd v. Kelly*, #5169, 14 A.D. 3d 437, 788 NYS 2d 114 (2005), holding that when unrefuted evidence revealed that a probationary employee was absent from duty and dishonestly charged it to his annual leave thereby extending his probationary period, he can be terminated without a hearing. Since he did not admit the essential findings, however, he was entitled to a name-clearing hearing.
- *Graham v. City of Philadelphia*, #03-3372, 402 F. 3d 139 (3d Cir. 2005), in which a probationary police officer was terminated after being arrested and charged with having sex with a minor. Following acquittal at trial, the employee requested a "name-clearing hearing" which was denied. The court ruled that the employee had the opportunity to protect his reputation at the criminal trial and that negated his entitlement to a name clearing hearing.
- *Purdy v. Cole*, 317 So.2d 820, 1975 Fla. App. Lexis 13837, holding that a probationary police officer was entitled to a name-clearing hearing based on his termination for allegedly misrepresenting his prior employment record and his draft status.

❖ What Procedures Must Be Followed?

The only requirements of a name-clearing hearing are very minimal--it must provide an opportunity to clear one's name. The requirements of a particular hearing will depend on a fact-intensive review of the circumstances of the termination and how the employee's good name, reputation, honor, and integrity were affected. Notice of the hearing must be provided to the employee, along with an opportunity to be heard, in front of an impartial tribunal. A full evidentiary hearing is not required, and name-clearing hearings have been strongly criticized in recent years for failing to provide effective remedies for terminated employees falsely accused of highly stigmatizing misconduct, such as sexual harassment or assault. See Name-Clearing Hearings: How This "Remedy" Fails to Safeguard the Procedural Due Process Rights of Employees Accused of Sexual Harassment, by Chiaman Wang, 20 Georgia State University Law Review No. 4 (Summer 2010).

Among other issues, that article notes, while citing relevant caselaw, that:

- There are no clear procedural guidelines as to how to conduct the hearing.

- A deficiency is the lack of a right to confront one's accuser.
- The requirement of an impartial tribunal may be illusory when it is often the case that the individuals presiding over the name-clearing hearing are the same individuals who the employee believes wrongfully accused them of misconduct.
- The employee who succeeds in presenting information that shows that the accusations against them were false has no substantial remedy to compensate them or make them whole.

The author of that article suggests that a substantial remedy for name-clearing hearings to provide would be that any determination that the accusations were false should be disseminated at least as widely as the original accusations, as well as providing mechanisms for the removal of any false accusation from the terminated employee's personnel file, or the issuance of a letter of exoneration and apology to the terminated employee. Some written policies of municipalities and agencies do make reference to the possibility of the removal of stigmatizing information from public records following a name-clearing hearing, but generally without spelling this out in detail.

❖ Resources

The following are some useful resources related to the subject of this article:

- City of Miami Florida policy on name-clearing hearings (Aug. 1997).
- City of Rockledge, Florida Personnel Policies and Procedures Manual (page 21 covers name-clearing hearings (April 1, 2008).
- Disciplinary Hearings - Loudermill Rights. AELE Case Summaries.
- Disciplinary Hearings - Untenured. AELE Case Summaries.
- Newton County Georgia Personnel Policy (contains section on name-clearing hearings, pages 78-80).
- Probationary Employment. AELE Case Summaries.
- Procedural Due Process for Public Employees, Allen, Norton, and Blue.

❖ **Relevant Monthly Law Journal Articles**

- Defamation Claims Against and By Public Safety Personnel - Part 1, 2018 (5) AELE Mo. L. J. 101.
- Defamation Claims Against and By Public Safety Personnel - Part 2, 2018 (6) AELE Mo. L. J. 101.
- Defamation Claims Against and By Public Safety Personnel - Part 3, 2018 (7) AELE Mo. L. J. 101.
- Public Safety Employee Discipline and State Bill of Rights Laws - Part 1, 2017 (9) AELE Mo. L. J. 201.
- Public Safety Employee Discipline and State Bill of Rights Laws - Part 2, 2017 (10) AELE Mo. L. J. 201.

❖ **References:** (*Chronological*)

1. Name-Clearing Hearings: How This "Remedy" Fails to Safeguard the Procedural Due Process Rights of Employees Accused of Sexual Harassment, by Chiaman Wang, 20 Georgia State University Law Review No. 4 (Summer 2010).
2. Name-Clearing Hearings: Two Wrongs Make a Right by Brian S. Currey The Urban Lawyer Vol. 14, No. 2 (Spring, 1982), pp. 303-324

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web sites are welcome to link to this article.

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