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Constitutional Law - Procedural Due Process - The Rights of a Non-Tenured Teacher upon Non-Renewal of His Contract at a State School

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CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS—THE RIGHTS OF A NON-TENURED TEACHER UPON NON-RENEWAL OF HIS CONTRACT AT A STATE SCHOOL

David F. Roth was employed on probationary status by the Board of Regents of State Colleges as an assistant professor at the Wisconsin State University at Oshkosh[1] for one academic year commencing September 1, 1968. His employment appointment contained the following language:[2]

> 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. . . . Regulations governing tenure are in accord with Chapter 37.31 Wisconsin Statutes.[3]

In February of 1969 Roth was informed without explanation that he would not be rehired for the following year. He brought suit in a federal district court in Wisconsin alleging that he was denied re-employment because of his exercise of constitutionally protected freedom of speech, and also that the decision not to re-employ him without providing a statement of reasons and a hearing thereon violated his procedural due process rights under the fourteenth amendment. The district court stayed proceedings on the claim regarding exercise of first amendment speech rights,

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1. In the 1971 session of the Wisconsin legislature the Regents of the University of Wisconsin were merged with the Board of Regents of State Colleges. The new board is now known as the Board of Regents of the University of Wisconsin System. The State University at Oshkosh is now known as the University of Wisconsin at Oshkosh. WIS. STAT. ANN. § 36.02 (Supp. 1972-73).

2. Petitioner's Brief for Certiorari at 5, Board of Regents v. Roth, 408 U.S. 564 (1972).

3. State tenure laws are the primary source of procedural safeguards for teachers. The pertinent language of WIS. STAT. ANN. § 37.31 (1969), incorporated by reference in Roth's contract, provided clear rights for permanently employed teachers but did not set up detailed procedural protection for newly selected teachers who had not yet acquired tenure: "(1) 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. . . . No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges . . . . [S]uch 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." The legislature has since increased the probationary period to six years. WIS. STAT. ANN. § 37.31 (Supp. 1972-73).

and granted summary judgment in favor of Roth on the procedural issues.[4] This decision, granting non-tenured teachers more extensive rights upon non-retention than they had enjoyed previously, was affirmed by the Court of Appeals for the Seventh Circuit, one judge dissenting,[5] and aroused a great deal of interest from educational institutions and teacher groups.[6] The Supreme Court granted certiorari[7] and subsequently a divided Court reversed on the procedural issues.[8] The majority opinion, delivered by Mr. Justice Stewart, held that only the deprivation of interests encompassed in the fourteenth amendment's protection of liberty and property are subject to the requirements of procedural due process. The respondent did not have a "liberty" interest in re-employment because "[t]he 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 . . . . [Nor had the state] imposed on him . . . [any] other disability that foreclosed his freedom to take advantage of other employment opportunities."[9] The respondent did not have a "property" interest in re-employment because, "to have a property interest in a bene-

4. Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970).

5. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971). This decision went far beyond the already diverse holdings of other courts of appeals in affording probationary teachers procedural rights upon non-retention, thus broadening the conflict among the circuit courts and clearing the way for a great volume of litigation [see Judge Duffy's dissenting opinion, 446 F.2d at 812] brought by non-tenured teachers who are aggrieved when their contracts are not renewed.

6. Nine amici curiae briefs were filed during the course of the litigation in the court of appeals and the Supreme Court. Six briefs were filed on behalf of educational institutions which opposed Roth's claim. They were: A brief in the court of appeals, a brief for a writ of certiorari, and a brief in the Supreme Court all written on behalf of the Board of Governors of State Colleges and Universities of Illinois, the Board of Regents of Regency Universities of Illinois, the Board of Trustees of Southern Illinois University, the American Association of State Colleges and Universities, the American Council on Education, the Association of American Colleges and the National Association of State Universities and Land-Grant Colleges. In the Supreme Court, three briefs were filed opposing Roth's claim by the Board of Trustees of the California State Colleges, the City of New York, and the Commonwealth of Massachusetts. Also in the Supreme Court, three amici curiae briefs were filed in support of Roth's claim. They were written on behalf of the Wisconsin Education Association, the American Federation of Teachers, and the American Association of University Professors.

7. Board of Regents v. Roth, 404 U.S. 909 (1971).

8. "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." Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

9. *Id.* Justices Stewart, Burger, White, Blackmun and Rehnquist joined in the majority opinion. Justices Marshall and Brennan, with whom Mr. Justice Douglas joined, filed dissenting opinions. Justice Powell abstained.

fit, a person . . . must . . . have a legitimate claim of entitlement to it . . . . [T]he terms of the respondent's appointment secured absolutely . . . no possible claim of entitlement to re-employment."[10] The courts below, therefore, erred in granting summary judgment for the respondent on the procedural due process issue. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

The scope of the *Roth* decision is clarified by the decision of the Supreme Court in *Perry v. Sindermann*,[11] a companion case decided on the same day as *Roth* which presented a different facet of the same due process claim to notice and a hearing upon the state school's failure to renew a non-tenured teacher's employment contract. Sindermann had been employed in the Texas college and university system, which had no formal tenure policy, for a period of ten years, the last four of which were under successive annual contracts at Odessa Junior College. The Regents then declined to renew his contract for the following year without giving him a statement of reasons for the action. The respondent alleged that the non-renewal was in retaliation for his public criticism of the college administration, and he claimed an expectancy in re-employment based on a de facto tenure policy officially promulgated by the college. He offered to prove that a teacher with his long employment at Odessa Junior College had as much a "property" right to continued employment as did a formally tenured teacher at a college which operated on a statutory tenure system, and therefore he was entitled to procedural safeguards (*i.e.*, a statement of reasons and a hearing) under the due process clause of the fourteenth amendment upon non-renewal of his contract. The district court granted summary judgment in favor of the school board on the grounds that Sindermann's contract had expired. This decision was reversed by the court of appeals,[12] which held that if nonretention was based upon free speech rights then he was entitled to constitutional protection. The Supreme Court affirmed this result and held:

> [T]he respondent alleged that the college had a *de facto* tenure program . . . [based on] [r]ules and understandings, promulgated and fostered by state officials . . . [and he] [m]ust be given an opportunity to prove the legitimacy of his claim . . . . [S]uch proof 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.[13]

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10. *Id.* at 573-78.

11. 408 U.S. 593 (1972).

12. Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 402 U.S. 917 (1971).

13. Perry v. Sindermann, 408 U.S. at 597-603 (1972).

These are the first cases in which the Supreme Court examined the question of the re-employment rights of probationary public school teachers whose contracts are not renewed. This note will examine the conflict concerning the re-employment rights of non-tenured teachers which existed before *Roth* among the courts of appeals, analyze the Supreme Court decisions in *Roth* and *Sindermann* and point out the significance of these decisions in the area of public employment generally.

Originally, a teaching job at a state school, like all government employment, was considered a privilege not a right, and was excluded from due process protections because such employment did not come within the literal interpretation of the terms "life," "liberty" or "property" under the fourteenth amendment.[14] However, this privilege theory[15] has been eroded by the decisions in a number of "loyalty oath" cases[16] in which the Supreme Court recognized that interests in public employment are protected by due process in certain situations.

At the time of the *Roth* litigation, the most recent guidelines from the Supreme Court regarding the requirements of procedural due process in the dismissal of a public employee were contained in *Cafeteria Workers v. McElroy*.[17] In this case the Court used a "balancing test" in which the procedural safeguards necessary to satisfy due process upon termination of public employment would be determined by balancing the government and private interests involved in each particular case. Under this test the precise procedural requirements can vary depending on the importance of the competing interests and do not depend upon the definition of "liberty" or "property" which was the case under the "privilege doctrine."[18]

It is well settled that a non-tenured public school teacher cannot be terminated for reasons that are constitutionally impermissible. Courts have held that dismissal on racial grounds,[19] or termination which is an

14. Adler v. Board of Education, 342 U.S. 485 (1952).

15. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892); Bailey v. Richardson, 182 F.2d 46 (D.D.C. 1950), *aff'd mem.*, 341 U.S. 918 (1951).

16. Wieman v. Updegraff, 344 U.S. 474 (1952); Greene v. McElroy, 360 U.S. 474 (1959); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See also*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

17. 367 U.S. 886 (1961).

18. K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.12 (1958).

19. Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Franklin v. County School Board, 360 F.2d 325 (4th Cir. 1966).

infringement on the employee's right against self-incrimination,[20] or on his first amendment rights of free religion,[21] association[22] and speech[23] are clearly unconstitutional. The current controversy regarding non-tenured teachers is centered on the issue of whether they are entitled to a statement of reasons and a hearing thereon as a constitutional right under the fourteenth amendment when their contracts are not renewed and no right to renewal is provided by state statute or by academic policy of the school. The courts of appeals which have decided cases involving this question have formulated three divergent views.

The fourth,[24] sixth,[25] eighth[26] and tenth[27] circuits have held that neither a statement of reasons nor a hearing is required because the non-tenured teacher who is terminated has no claim for these safeguards based on the fourteenth amendment. These circuits viewed the issue as a matter to be resolved on the basis of state tenure law.

The fifth circuit has held in several recent cases that non-tenured teachers are entitled to both a statement of reasons and a hearing if they can show that they have an "expectancy" of continued employment even though there was no formal tenure system in effect.[28] When there is an official tenure system in operation the "expectancy" requirement can never be met by a non-tenured teacher.[29]

The first circuit[30] has held that upon non-renewal of a contract the probationary teacher is entitled to a statement of the reasons for the decision of the school authorities but not a hearing; the seventh circuit[31]

20. Slochower v. Board of Educ., 350 U.S. 551 (1956).

21. Torcaso v. Watkins, 367 U.S. 488 (1961).

22. Shelton v. Tucker, 364 U.S. 479 (1960).

23. Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952). *But see* Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1969).

24. Parker v. Board of Educ., 237 F. Supp. 222 (D. Md. 1965), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965).

25. Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971).

26. Freeman v. Gould Special School District, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969).

27. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

28. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970); Sinderman v. Perry, 430 F.2d 939 (5th Cir. 1970), *aff'd*, 408 U.S. 593 (1972).

29. Thaw v. Board of Public Instruction, 432 F.2d 98 (5th Cir. 1970).

30. Drown v. Portsmouth School District, 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971).

31. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972); Shirck v. Thomas, 447 F.2d 1025 (7th Cir. 1971).

held that the teacher is entitled to both reasons and a hearing. These two circuits base their reasoning on the "balancing of interest" test introduced by the Supreme Court in *Cafeteria Workers*, and the difference in the procedures required by due process outlined by the respective courts is the result of the different values which were assigned to the competing governmental and private interests.[32]

It was against this background of diversity at the appellate level that the Supreme Court considered the question of the procedural rights of non-tenured teachers. In addition to fourteenth amendment procedural due process rights the Court was confronted with related issues of state tenure laws,[33] first amendment rights,[34] academic freedom[35] and latent issues affecting public employees generally.[36] However, the Court declined judgment on the related issues and instead based its decision on an analysis of the fourteenth amendment, which had not been argued by the parties or suggested by the amici curiae briefs filed in the proceedings.[37]

The majority in *Roth* noted that under the state law in Wisconsin[38] and under the terms of his contract, Roth was entitled to nothing beyond his one year appointment,[39] and therefore the decision whether or not to

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32. In *Drown* the court found: "[T]he interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and . . . the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention . . . however . . . a hearing is not constitutionally compelled [because of the expense and great additional burden which would be placed on the board]." 435 F.2d 1182, 1185-86 (1970).

In *Roth* the court of appeals found that a probationary teacher is entitled to both reasons and a hearing because "the substantial adverse effect non-retention is likely to have upon the career interests of an individual professor . . . [outweighs] the governmental interest in unembarrassed exercise of discretion in pruning a faculty. . . ." 446 F.2d at 809.

33. This issue was raised in the brief of the petitioner, the Board of Regents of State Colleges, and in the four amici curiae briefs filed in opposition to Roth's claim. *See supra* note 6.

34. This issue was argued by the respondent, Roth, and by Justice Brennan in his dissenting opinion (joined by Justice Douglas).

35. This issue was raised in the three amici curiae briefs filed in support of Roth's claim. *See supra* note 6. It was also argued by Justice Brennan (joined by Justice Douglas) in his dissenting opinion.

36. *See* Petitioner's Brief for Certiorari, Board of Regents v. Roth, 408 U.S. 564 (1972).

37. *See* text *supra*, at 2-3.

38. *See supra* note 3.

39. "[The terms of his appointment] 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 . . . . [T]hey

rehire him was left to the discretion of university officials. The majority's decision turned on the fact that because the respondent had made no showing that the determination not to rehire him had somehow deprived him of an interest in "liberty"[40] or "property,"[41] he was therefore unable to base his claim for a statement of reasons and a hearing on the procedural due process clause of the fourteenth amendment.

This determination prompted two sharp dissents. Mr. Justice Brennan, joined by Mr. Justice Douglas, pointed out that a major issue in the course of the litigation was whether or not the case should have been decided on the basis of first amendment rights. He noted that the action had been initiated in the district court under 42 U.S.C. § 1983,[42] claiming in part, that the decision not to rehire the respondent was in retaliation for exercising his right of free speech. Consequently, he argued that the majority's denial of relief to Roth's claim for a statement of reasons and an opportunity to be heard left him, as a practical matter, without constitutional protection for the alleged deprivation of his first amendment rights since there were no safeguards against abuse of discretion by the school's officials in their rehiring practices. Justice Brennan, as Justice Douglas, places a high value on academic freedom[43] and advocates affording teach-

made no provision for renewal whatsoever." Board of Regents v. Roth, 408 U.S. at 578.

40. "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 reemploy the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . Had it done so, this, again, would be a different case. . . . 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." *Id.* at 573-75.

41. "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 . . . . [T]he respondent's 'property' interest in employment at the Wisconsin State University-Oshkosh was created and defined by the terms of his appointment. . . . 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." *Id.* at 577-78. *See also* Lynch v. Household Finance Corp., 405 U.S. 538 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

42. "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 liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

43. "We repeated that warning in Keyishian v. Board of Regents, 385 U.S. 589,

ers, whether tenured or not, protection of their constitutional rights by making the non-renewal of a teaching contract in itself the basis for invoking procedural safeguards.[44]

Mr. Justice Marshall, conversely, agreed in a separate dissent that Roth's first amendment claim was properly extracted from the litigation and that the majority's framework for the decision according to the terms of "liberty" and "property" under the fourteenth amendment was well reasoned. However, his concept of public employment[45] and his desire to insure against abuse in the area[46] impelled him to argue in favor of Roth. Justice Marshall advocates a broader definition for the terms "liberty" and "property" in order to enable the respondent to state a claim under the fourteenth amendment.[47]

The key to the majority's decision in both *Roth* and *Sindermann* is contained in Chief Justice Burger's concurring opinion filed in the *Sindermann* case:

> [T]here is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. Thus whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of *state law*.[48]

603: '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. . . .' 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." 408 U.S. at 581-82 (Douglas, J., dissenting).

44. *See generally* Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447, 457 (1963). *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957).

45. "Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life." 408 U.S. at 589.

46. "[W]hen 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." *Id.* at 589.

47. "I would go further than the Court does in defining the terms 'liberty' and 'property'. . . . 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 cannot be denied 'without due process of law.' And it is also liberty—liberty to work—which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment." *Id.* at 588, 589.

48. Perry v. Sindermann, 408 U.S. at 603-04 [emphasis added].

Sindermann, who had ten years of teaching experience in the Texas State College System, alleged an entitlement to continued employment based on a de facto tenure policy arising from officially promulgated rules and an understanding fostered at the college where he was formerly employed.[49] Since the majority felt he had alleged a sufficient "property" interest under state law he was entitled to reasons and a hearing upon non-renewal of his annual contract. Roth, who had about six months of experience at the State University at Oshkosh before he was notified that he would not be rehired, alleged that he was constitutionally entitled to a statement of reasons and a hearing under the procedural due process clause of the fourteenth amendment before the school board could make the decision not to rehire him. He was afforded neither reasons nor a hearing upon non-retention because he had alleged no "liberty" or "property" right based on *state law.*

The decisions in *Roth* and *Sindermann* thus indicate situations where due process procedures should be invoked to protect a probationary teacher upon non-retention by applying tests as to what employment interests are encompassed within the terms "liberty" and "property" under the fourteenth amendment. In *Roth* the Court held that a person's interest in re-employment is included under "liberty" only if his non-retention by the state seriously damaged his reputation or foreclosed other employment by the state.[50] A person's interest in re-employment is included under "property" if he has a "legitimate claim of entitlement"[51] to re-employment. In *Sindermann* the Court held that a person has a "property" interest for due process purposes if there are such rules of "mutually explicit understandings"[52] promulgated by the state that support his claim to re-employment.

By deciding *Roth* and *Sindermann* on this basis the Supreme Court settled the question of when due process protections apply but declined

49. "'*Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.' Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System. . . ." *Id.* at 600. The relevant provision of the guidelines in effect was: "(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education." *Id.* at 600, note 6.

50. Board of Regents v. Roth, 408 U.S. at 573.

51. *Id.* at 577.

52. Perry v. Sindermann, 408 U.S. at 601.

to decide the constitutional issue of what specific procedures were required under the fourteenth amendment to protect a non-tenured teacher who is not rehired. A resolution of this issue was sought by the amici curiae on behalf of both the school administrations and the teacher groups and was the most significant question left unanswered by the Court. Such procedural safeguards were left for a determination on a case-by-case basis after the non-tenured teacher could initially show that the source of his alleged "property" interest was based on state law (tenure law or de facto tenure provisions promulgated by state officials).

While both cases involved university professors, the Court's language regarding the application of due process protections would appear applicable to a broader group of public employees, whose rights upon job termination are still unsettled. Public employees subject to some type of statutory provision for continued employment clearly have a "legitimate claim of entitlement" to their jobs under the *Roth* test which gives rise to due process protections upon termination, but this will not greatly enlarge the basis for procedural due process claims under the fourteenth amendment because these employees already receive job protection under civil service laws.[53] However, the absence of such statutory provisions is not conclusive as to whether a discharged employee is entitled to due process protections. The broader "mutually explicit understandings" test in *Sindermann* will provide a basis for due process claims by persons who do not have express contractual or statutory guarantees of continued employment if they can prove the state employer officially fostered some sort of de facto job expectancy policy. In the case of *Norlander v. Schleck*,[54] a federal district court in essence extended the "mutually explicit understandings" language of *Sindermann* to protect against arbitrary removal from a civil service list—a potential employment status. There the plaintiff, not yet employed, was removed from a civil service employment list because of alleged unsatisfactory references, the substance of which were not disclosed to her. The court found:

> [E]xistence of a civil service system implies a right to, or an interest in, fair consideration for public employment. . . . [T]he due process clause requires the source

53. *But see* Christian v. Department of Labor, 347 F. Supp. 1158 (S.D.N.Y. 1972) in which Judge Frankel's dissenting opinion suggests that the distinction between permanent and probationary status is a shaky ground on which to exclude a small group of federal employees from due process protections. The majority opinion upheld a denial of state unemployment compensation and a hearing thereon to a federal probationary employee based on findings by his former federal employer that the dismissal was because of misconduct. *But see* Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

54. 345 F. Supp. 595 (D.D.C. 1972).

and substance of the references which are unsatisfactory be revealed so that they may be refuted if possible and a reasonable opportunity afforded so to do.[55]

The question of remedies available to a terminated public employee once he shows that he is entitled to due process protection was presented to a federal district court in the case of *Kennedy v. Sanchez*.[56] Kennedy was a discharged federal employee, who was entitled to due process protections under the *Roth* "legitimate claim of entitlement" test, because a civil service statute applicable to him provided that he could be removed "only for such cause as will promote the efficiency of the service."[57] The court found that the procedure by which Kennedy could be discharged must include the following due process requirements:

> [A] full evidentiary hearing *prior* to termination, with the right to be heard by an impartial hearing officer; the right to present witnesses; the right to confront and cross-examine adverse witnesses; and the right to a written decision indicating the reasons for discharge or suspension and the evidence relied upon . . . . [T]hese rights are basic to a fair and effective hearing and must be provided if the employee's interest is to be adequately protected.[58]

In so far as the procedure by which *Kennedy* was terminated lacked the above requirements the action was declared unconstitutional and an order was entered to reinstate him to his former position with back pay.

It is thus possible that many public employees terminated without explanation will be able to state a claim within the fourteenth amendment procedural due process safeguards—especially under the "mutually explicit understandings" test of *Sindermann* which, as the *Norlander* opinion indicates, may prove to be quite extensive. This would entitle the employee to a full evidentiary hearing followed by a statement of reasons for the decision finally reached as required by *Kennedy*.

Loss of public employment is a critical event for the individual concerned and fair treatment is important from both the standpoint of the general public as well as the terminated employee. Yet because of the great number of public employees and the high cost to the employer of affording all who are terminated a full evidentiary hearing it is questionable whether the existing judicial guidelines furnish an adequate practical standard for handling termination cases. Undoubtedly a consideration of this problem will be the subject of future cases, and possible legislative action may be required to establish procedures that are fair to all.

William E. Kenny

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55. *Id.* at 598, 600.

56. 349 F. Supp. 863 (N.D. Ill. 1972).

57. *Id.* at 865.

58. *Id.* at 864, 865. *See also* Goldberg v. Kelly, 397 U.S. 254 (1970).