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Constitutional Law - Due Process - Dismissal of State Employees for Refusal to Answer Questions Concerning Membership in Communist Organizations

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CONSTITUTIONAL LAW—DUE PROCESS—DISMISSAL OF STATE EMPLOYEES FOR REFUSAL TO ANSWER QUESTIONS CONCERNING MEMBERSHIP IN COMMUNIST ORGANIZATIONS—In companion cases state employees of Pennsylvania and New York were dismissed on grounds of "incompetency"[1] and "doubtful trust and reliability"[2] for refusing to answer questions by superiors concerning membership in communist organizations. Petitioner Beilan also invoked the Fifth Amendment at a hearing by a congressional investigating committee between the time he refused to answer his superior and the time he was dismissed. Appellant Lerner had invoked the Fifth Amendment when he refused to answer the questions asked by city officials. The highest courts of the states upheld the dismissals, making it clear that they were based on refusal to respond to proper inquiry and not on disloyalty inferred from invocation of the Fifth Amendment. On certiorari to the United States Supreme Court from the Supreme Court of Pennsylvania, *held,* affirmed, four justices dissenting.[3]

[1] Incompetence was one of seven valid causes for dismissal of a tenure teacher. Pa. Stat. Ann. (Purdon, 1950; Supp. 1957) tit. 24, §11-1122.

[2] Dismissal was based on the Security Risk Law, 65 N.Y. Consol. Laws (McKinney, 1949; Supp. 1958) §§1101-1108.

[3] Chief Justice Warren, joined by Justices Black and Douglas, dissented on the grounds

There is no denial of due process in the dismissal of a teacher for "incompetency" because of refusal to answer questions pertaining to fitness. *Beilan v. Board of Education,* 357 U.S. 399 (1958). On appeal to the United States Supreme Court from the Court of Appeals of New York, treated as certiorari, *held,* affirmed, four justices dissenting.[4] Invocation of the Fifth Amendment does not preclude a state from dismissing for "doubtful trust and reliability" an employee who fails to respond to proper inquiry. There was no constitutional violation in the dismissal on the stated grounds. *Lerner v. Casey,* 357 U.S. 468 (1958).

States and their subdivisions may establish qualifications for employment, but they may not dismiss employees for failure to comply with terms which are unreasonable or discriminatory.[5] A state may dismiss an employee who refuses to indicate whether he has ever been a member of a communist organization.[6] A state employee is denied due process, however, when dismissed for failure to take an oath denying membership in subversive organizations if knowledge of the nature and purpose of the organization at the time of membership is not a necessary requirement.[7] Although the Fifth Amendment privilege against self-incrimination cannot be asserted in a state proceeding,[8] the Court in *Slochower v. Board of Higher Education*[9] held that dismissal of an employee solely because of his invocation of the Fifth Amendment before a congressional investigating committee was unreasonable and arbitrary and therefore a violation of due process under the Fourteenth Amendment. If the state courts' findings of fact are accepted in the principal cases, two elements are here present, the absence of which motivated the Court to set aside the dismissal in *Slochower.* First, the employees were given notice that refusal to answer could lead to dismissal and were given opportunities for formal hearings. Thus the elemental requirements of procedural due process were satisfied.[10] Second, the dismissals were based not on inferences of

that the plea of the Fifth Amendment was inextricably involved in the dismissal. Justice Douglas, joined by Justice Black, dissented on the ground that the decisions make fitness for public office turn on political beliefs rather than proven ability. Justice Brennan dissented on the ground that the employee in fact had been branded disloyal without due process.

[4] Justice Douglas, joined by Justice Black, and Justice Brennan, joined by Chief Justice Warren, dissented respectively on the grounds stated in note 3 supra.

[5] See Slochower v. Board of Higher Education, 350 U.S. 551 at 555 (1956).

[6] Garner v. Board of Public Works, 341 U.S. 716 (1951). It should be noted that the employee in Garner did not invoke the Fifth Amendment.

[7] Wieman v. Updegraff, 344 U.S. 183 (1952). See Gerende v. Board of Supervisors, 341 U.S. 56 (1951), and Garner v. Board of Public Works, note 6 supra.

[8] Knapp v. Schweitzer, 357 U.S. 371 (1958); Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).

[9] Note 5 supra. No rational inference of guilt was said to be possible from an invocation of the Fifth Amendment. But see Faxon v. School Committee of Boston, 331 Mass. 531, 120 N.E. (2d) 772 (1954). See 44 A.L.R. (2d) 789 (1955).

[10] The Court in Slochower, note 5 supra, at 559, stated that the employee's "summary

disloyalty but on the refusal, in itself, to answer proper questions. The majority opinions in the instant cases were quite careful to point out that the *designated* bases for the discharges did not violate due process. Thus the state's characterization of the grounds for dismissal becomes extremely critical. The important issue in these cases must then be whether the Supreme Court should accept the findings of the state courts that the dismissals were based on evidence sufficient to show "incompetency" or "doubtful trust and reliability."[11] It has been indicated that the Supreme Court will review the findings of a state court on questions of fact where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it, and where a conclusion of law as to a federal right is so intermingled with the findings of fact as to make it necessary, in order to pass upon the federal question, to analyze the facts.[12] Recently the Court has extended this willingness to review findings of fact where it is asserted that a person has been deprived by a state court of a "fundamental" right secured by the Fourteenth Amendment.[13] In *Konigsberg v. State Bar of California,*[14] where an applicant for admission to the state bar refused to answer questions concerning his communist affiliations, the Supreme Court reversed the state court and on a re-examination of the record held that there was not sufficient evidence to support a finding that the applicant had failed to establish his "good moral character." Yet the majority of the Court in *Konigsberg* made it clear that it did not consider the question there before it to be whether mere refusal to answer such questions would constitute a sufficient basis for denial of admission to the bar.[15] It may be that the thorough review of the record in *Konigsberg* was compelled by the sidestepping of the "mere refusal" issue.[16] In the instant cases, once the Court accepted the

dismissal" violated due process. See concurring opinion of Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 160-174 (1951), and Hagar v. Reclamation District No. 108, 111 U.S. 701 at 708 (1884).

11 In this connection the dissenting opinion of Justice Brennan should be considered. It was his contention that the employees were in fact discharged because of disloyalty, and that there was no evidence in the record to sustain such a conclusion.

12 United Gas Co. v. Texas, 303 U.S. 123 at 143 (1938); Norris v. Alabama, 294 U.S. 587 at 590 (1935); Northern Pac. Ry. Co. v. North Dakota, 236 U.S. 585 at 593 (1915); Creswill v. Knights of Pythias, 225 U.S. 246 at 261 (1912).

13 Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232 (1957); Craig v. Harney, 331 U.S. 367 (1947). Cases involving coerced confessions represent one specific area. See, e.g., Gallegos v. Nebraska, 342 U.S. 55 (1951); Watts v. Indiana, 338 U.S. 49 (1949).

14 Note 13 supra.

15 Justice Black stated in his majority opinion in the Konigsberg case, note 13 supra, at 261: "If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible."

16 See the dissenting opinion of Justice Harlan in the Konigsberg case, note 13 supra, at 280. See also comment, 56 MICH. L. REV. 415 at 420-422 (1958).

states' determinations of the *grounds* for dismissal, it was squarely faced with the "mere refusal" issue as it relates to discharge from state employment. Thus, since the questions asked were considered relevant to the fitness of the state employees to continue in their positions, the Court apparently felt it necessary to refrain from evaluating the evidence presented in the record. This restraint has much to commend it. The Court should be hesitant to challenge the determinations of a state court of review,[17] especially where the power of a state to control its internal management is involved.[18] The states quite properly have enjoyed broad powers in the selection and discharge of employees.[19] It may now be asserted that the principal cases are a reassurance that the Supreme Court will respect state court evaluations of evidence and findings of fact. The recent change in Court personnel, however, possibly leaves this question open to some doubt.[20]

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[17] This is especially true where the state court of review has upheld the findings of the lower court or administrative body which has had a first-hand view of the evidence and witnesses. See Lammers v. Nissen, 154 U.S. 650 (1879). In addition the Court cannot afford, timewise, to encourage petitions for review of findings of fact.

[18] In his dissenting opinion in the Konigsberg case, note 13 supra, at 276, Justice Harlan warned that the Court should be especially reluctant to establish and administer bar admission standards. The argument against interference with the formation and administration of state employment standards would seem to be even stronger.

[19] See Slochower v. Board of Higher Education, note 5 supra, at 559.

[20] Inasmuch as Justice Burton had cast the deciding vote in both the Konigsberg case and the principal cases, some degree of uncertainty in this area may continue to exist.