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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

PETITION FOR CERTIORARI TO COURT OF APPEALS

2012-212952

Moshtaba Vedad, Petitioner,

v.

South Carolina Department of Transportation, Respondent.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Allan R. Holmes, Sr., Esq.
GIBBS & HOLMES
Suite 110, 171 Church Street
Charleston, South Carolina 29401
Telephone: 843-722-0033

ATTORNEY FOR PETITIONER

Natalie J. Moore, Esq.
Office of General Counsel
955 Park Street, Suite 343
Columbia, South Carolina 29201
Telephone: 803-737-1252

ATTORNEY FOR RESPONDENT

Questions Presented for Review

I. Did the South Carolina Employee Grievance Act Provide the Petitioner with a Property Interest in Continued Employment?

II. Did the Agency Terminate the Petitioner's Employment in Violation of Due Process of Law by Failing to Provide Him with a Constitutionally Adequate Post-termination Hearing?

Statements of Issues on Appeal, Brief of Appellant, p. 1.

Factual Summary

The following facts are set out by the Appellant's Brief at pp. 2-4 with references to the Record on Appeal denoted as "R". Moshtaba Vedad, a civil engineer with a Bachelor of Science from The Citadel, was employed by the Department of Transportation for more than 27 years. Final Decision of State Employee Grievance Committee. R. 9. His employment was suspended and terminated. He was terminated effective June 2, 2010. *Id.* The basis for both his suspension and termination is the Agency's contention that he misused the Agency vehicle assigned to him and kept improper records of his vehicle use. *Id.* R. 12, 15. Appellant denied engaging in misconduct. *Id.* R. 12, 14. He timely invoked all his appellate rights, and after an appellate hearing on March 1, 2011, The State Employee Grievance Committee issued its March 21, 2011, decision affirming both his suspension and termination. A copy of this decision is made a part of the Record on Appeal. R. 9-15. A timely appeal was taken to the Administrative Law Court, and that Court affirmed the decision of the Employee Grievance Committee by Order of August 13, 2012. A copy of this Order is made a part

of the Record on Appeal. R. 2-8. Notice of Appeal to the Court of Appeals was timely filed and served. R. 16-17.

The Court of Appeals issued an Opinion affirming the Administrative Law Court on March 5, 2014. Appendix, Exhibit C. Appellant timely filed his Petition for Rehearing. Appendix, Exhibit B. Rehearing was denied by the Court of Appeals on April 11, 2014. Appendix, Exhibit A.

Petitioner contends that his termination violated due process of law because it is in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In essence these contentions are based upon two constitutional arguments. First, Petitioner contends that he had a property interest in continued employment, and, second, Petitioner contends that this property interest was taken away from him without allowing him a constitutionally adequate hearing.

The record is uncontroverted that the Petitioner was suspended and terminated after a summary meeting with representatives of the Agency who accused him of misconduct. See, R. pp. 19-24. This was the type of pre-termination hearing anticipated by *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, Mr. Vedad contends that lawful use of a summary pre-termination procedure requires the opportunity for a post-termination hearing with a full

panoply of due process protections. *Loudermill* at 546-47; see, also, *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, 1349-50 (6th Cir. 1992). "The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity for such a full hearing, so that he may challenge the factual basis for the state's action and may provide reasons why that action should not be taken." *Sutton*, 958 F.2d at 1549-50. Mr. Vedad's post-termination hearing gave him no such opportunity. No witnesses appeared. No testimony was taken. No opportunity for cross examination was provided. No oath was administered. See, R p. 25, l. 24 – p. 30, l. 2; p. 48, l. 12 to p. 51, l. 5; p. 52, l. 14 – p. 53, l. 20.

When this proceeding was described to counsel for the State Employee Grievance Committee, he guessed it to be a "mediation." R p. 49, ll. 12 – 16:

> MR. GANJEHSANI: Wait a minute. Stop. Are we talking about a mediation?
> MS. MOORE: No. We have a bifurcated proceeding like I think most state agencies –
> MR. GANJEHSANI: Okay.
> MS. MOORE: --where it's a non-confrontational . . .

The Petitioner raised the issue of the unconstitutionality of the Agency procedure but the State Employee Grievance Committee failed to cogently address it. The Committee's Decision evidences its misunderstanding of the relevant law. March 21, 2011, Final Decision, R. p. 15:

> Appellant claimed his due process rights were violated by being deprived of an evidentiary hearing or similar opportunity to cross-examine the SCDOT employees who participated in the decision to discipline him until after he appealed his suspension/termination to the Committee. However, it is well settled that "a full evidentiary hearing is not required prior to termination" of a public employee. *Ross v. Medical University of South Carolina*, 328 S.C. 51, 66, 492 S.E. 2d 62, 70 (1997). Accordingly, the Committee finds Appellant's argument on this issue unavailing.

The August 13, 2012, Order of the Honorable Shirley C. Robinson, Administrative Law Judge, affirms the decision of the State Employee Grievance Committee. Relying upon *Newton v. S.C. Dept. of Public Safety*, No. 6:10-01781, 2011 U.S. Dist. LEXIS 107828, *9 n.1, 2011 WL 4435761 (D.S.C. Sept. 23, 2011), Her Honor found that the South Carolina statutory procedure for appeals of state employee disciplinary actions does not establish a property right for state employees. Order of Administrative Law Court, R. pp. 5-6. Her Honor went on to hold that even if Mr. Vedad had a property interest in his continued employment, the appellate hearing before the State Employee Grievance Committee provided him with adequate due process. *Id.* pp. 6-7. These holdings of the Administrative Law Court were affirmed by the Court of Appeals. Appendix, Exhibit C.

Argument

The South Carolina Employee Grievance Act Provides Petitioner with a Property Interest in Continued Employment

Petitioner believes that this is a constitutional issue of first impression in South Carolina.

The Opinion of the Court of Appeals cites *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) for the inarguable proposition that "property interests" are not created by the Constitution, but from an "independent source such as state law . . ." This citation is provided as the sole basis for affirming the Administrative Law Court decision that the South Carolina State Employee Grievance Act does not create a property interest in continued state employment. There is no discussion of the contrary authority cited in the Appellant's Brief.

In particular, the case of *Detweiller v. Virginia Dept. of Rehabilitative Services*, 705 F.2d 557 (4th Cir. 1983) (considering Virginia public employee grievance law) is on all fours with the case of Mr. Vedad. *Detweiller* explicates the particular aspects of a state employee grievance procedure which give rise to a property interest in an employee's continued employment:

> The statute's distinction between probationary employees and nonprobationary employees, its distinction between disciplinary discharges and discharges for reduction in work force, the Standards' specifications of the breaches of discipline for which an employee may be discharged, and the authority conferred on an impartial panel to reverse the agency's decision and to order reinstatement with back pay establish that a nonprobationary employee has a property interest in continued employment that is created by the state.

705 F.2d at 560.

There is no material difference between the Virginia statutory scheme and that which exists in South Carolina. In South Carolina, a "Covered Employee" must have completed the "probationary period" of employment. Section 8-17-320(7) S.C. Code of Laws (1976), as amended. In the case of Mr. Vedad, specific standards have been promulgated by the Agency specifying the breaches of discipline for which he might be subjected to disciplinary discharge. These are identified within the S.C. Department of Transportation's "Disciplinary Action Policy." State Employee Grievance Committee's Exhibit One, R. pp. 55-62. These standards were applied to him. R. pp. 19-27 and Final Decision of State Employee Grievance Committee, R. pp. 12, 15. The State Employee Grievance Committee is an impartial panel with authority to reverse the Agency's decision and to order reinstatement with back pay. Section 8-17-340(E) S.C. Code of Laws (1976), as amended. A failure of the Agency to comply with "its established personnel policies, procedures, and regulations" is a basis for reversing its decision.

Section 8-17-340(E)(1)(b). There are differences between the standards applied to disciplinary discharges and discharges for reduction in work force. See, Section 8-17-330 S.C. Code of Laws (1976), as amended. "A reduction in force is an adverse employment action considered as a grievance only if the agency, or as an appeal if the State Human Resources Director, determines that there is a material issue of fact that the agency inconsistently or improperly applied its reduction in force policy or plan." The Administrative Law Court is specifically charged with review of the final decision of the Committee. The disciplinary standards are a product of Section 8-11-230(6) S.C. Code of Laws (1976), as amended, which requires the Budget and Control Board and the State Personnel Division to "**[a]fter coordination with agencies served, develop policies and programs concerning** leave with or without pay, hours of work, fringe benefits (except State retirement benefits), employee/management relations, performance appraisals, grievance procedures, employee awards, dual employment, **disciplinary action, separations, reductions in force, and other conditions of employment as may be needed**." (emphasis added). The statutory and regulatory scheme underlying Mr. Vedad's appeal is indistinguishable from that recognized as creating a property right in *Detweiller*.

Moreover, the standards for review of employee terminations by the State Employee Grievance Committee are only consistent with the existence of a property interest. If Mr. Vedad's employment is "at will," his termination could never be "arbitrary or capricious or characterized by an unwarranted exercise of discretion." 18-17-340(E)(2)(f). "At will" employment may be terminated with or without cause or reason, and with or without notice. Such a termination may be "arbitrary" and

"irrational." *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 223-224, 337 S.E.2d 213, 215 (1985). By definition, such a termination could not be unlawfully "arbitrary" or "capricious" or be characterized by an "unwarranted exercise of discretion." Similarly, 18-17-340(E)(2)(e) allows reversal of the Committee's decision on a showing that it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." In the context of disciplinary terminations, these grounds for appeal can only mean that the Agency has to make some showing of good cause. This is all that is required to create a property interest.

This Court has held that a public employer's regulatory scheme may create a property right on the part of a public employee to continued employment. *Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E. 2d 606 (2002). In *Connor,* the employee claimed to rely upon disciplinary procedures in the employer's handbook. Despite an "at will" disclaimer, this Court found that whether a contract existed requiring cause for termination had to be submitted to the jury. 348 S.C. at 462-64, 560 S.E.2d at 610-11.

The footnote from *Newton v. S.C. Dept. of Public Safety, supra,* is the only authority cited by the Administrative Law Judge in support of the conclusion that the South Carolina Employee Grievance Act does not create a property interest in continued employment. That footnote is neither persuasive nor binding. In *Newton*, the plaintiff entered into a contract involving his resignation. He conceded his at-will status. 2011 U.S. Dist. LEXIS 107828 at *8. Consequently, any further discussion of this issue within *Newton* is *dicta.* However, in the cited footnote, *Newton* notes that the plaintiff might have filed a grievance under the State Employee Grievance Act, but then cites *Bunting v.*

City of Columbia, 639 F.2d 1090 (4th Cir. 1981), for the proposition that "such grievance rights do not establish a property interest in employment." *Id.* at *9, n.1.

Newton misreads *Bunting.* Mr. Bunting was a City of Columbia police officer who served at the pleasure of the City. Consequently, he had no property interest in continued employment which required due process protection. *Bunting v. City of Columbia,* 639 F.2d 1090, 1094 (4th Cir. 1981).

The Agency Terminated the Petitioner's Employment in Violation of Due Process of Law by Failing to Provide Him with a Constitutionally Adequate Post-termination Hearing.

The Petitioner believes that this is also a constitutional issue of first impression in South Carolina.

The Court of Appeal's Opinion cites *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008), for the inarguable proposition that "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." It is respectfully submitted that the Court of Appeals failed to consider or address the fact that *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), together with the other authorities cited by the appellant, specifically address the type of post-termination hearing required in the context of the termination of a public employee's property interest in public employment. The Court of Appeals' Opinion also cites *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008), which the Court of Appeals recites as having found "no violation of due process when post-termination hearing afforded notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Olson*

addresses due process in relation to dock permits rather than in the context of the termination of a public employee's property interest in continued employment. Perhaps more importantly, *Olson* specifically holds that "'Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) *the right to confront and cross-examine witnesses.*' *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007)." (emphasis added). The Appellant's due process claim is based specifically on his being denied the right to confront and cross-examine witnesses.

Confrontation of witnesses and testimony under oath are required elements of post-termination hearings. The Constitution of the United States allows a public employer to terminate a public employee from his or her employment with less than a full-blown due process hearing provided minimal requirements of due process precede the termination. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542-43, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). However, in such a case, summary suspension or termination must be followed by a post-termination hearing which comports with due process The constitutionality of a bare-bones pre-termination hearing is dependent on the existence of a full-blown post-termination hearing. *Loudermill* at 546-47; see, also, *Sutton v. Cleveland Bd. of Education*, 958 F.2d 1339, 1349-50 (6th Cir. 1992). "The severity of depriving a person of the means of livelihood requires that such person have at least one opportunity for such a full hearing, so that he may challenge the factual basis for the state's action and may provide reasons why that action should not be taken." *Sutton*, 958 F.2d at 1549-50.

In the case of Mr. Vedad, there was no full, post-termination hearing. Rather, there was a "conference." No evidence was presented on behalf of the Agency, no testimony was taken, no investigation was conducted, and no facts were found. No witnesses were sworn. Indeed, no witnesses appeared in the presence of Mr. Vedad. Needless to say, there was no opportunity for cross-examination or any record of a proceeding upon which a trier of fact might make findings of credibility and fact. Rather, the person designated as the Department's Representative at the conference simply followed the conference with a letter stating that "the Department acted within its policies and procedures for your client's termination." There was no explanation from the person designated to have the conference as to what, if anything, was to be addressed.

The subsequent hearing before the State Employee Grievance Committee was not an adequate post-*Loudermill* proceeding. The Employee Grievance Committee procedure is constrained by statute to review findings of fact under the equivalent of an "appellate" standard. In other words, the statutory scheme presupposes the correctness of the Agency's findings. This may not be permitted unless those findings meet both the pre- and post-termination due process requirements of *Loudermill*. *Sutton v. Cleveland Bd. of Education, supra.*

However, the Employee Grievance Committee could have provided relief to Mr. Vedad by reversing the decision of the Agency on account of: its violation of constitutional and statutory provisions; its actions in excess of the statutory authority of the agency; its findings made upon unlawful procedure; its failures to comply with the law; and on account of its arbitrariness and capriciousness. All of these stemmed from

the Agency's failure to follow procedure and to provide Mr. Vedad with due process of law.

The Committee's citation to *Ross v. Medical University of South Carolina*, 328 S.C. 51, 66, 492 S.E. 2d 62, 70 (1997), is ironic. Reading one page further in the *Ross* opinion one finds unequivocal support for Appellant Vedad's position - a summary pre-termination hearing requires a post-termination hearing that affords the employee with "full and meaningful participation." *Ross v. Medical University of South Carolina*, 328 S.C. 51, 67, 492 S.E. 2d 62, 71 (1997):

> Nonetheless, although the pretermination procedures afforded Dr. Ross did not comply with minimum due process requirements, the error was remedied by the subsequent Committee hearing. Dr. Ross received notice of a post-termination hearing, a written list of specific charges against him, and references to the sections in the faculty handbook and South Carolina Code his conduct was alleged to have violated. The hearing as originally scheduled was postponed at Dr. Ross' request. Thereafter, while represented by counsel, Dr. Ross fully participated in the seven-day hearing. He presented his own witnesses and evidence and cross-examined MUSC's witnesses. Any lack of opportunity to respond to charges in a pretermination hearing was clearly remedied by Dr. Ross' full and meaningful participation in the post-termination hearing. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980)(any error in pretermination hearing cured by subsequent hearing); *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504 (8th Cir. 1986)(even if employee did not receive all procedural safeguards during initial proceeding, his right to due process was not violated due to later hearing); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994)(state may cure procedural deprivation of due process rights by providing later procedural remedy); *Jones v. Chatham County*, 223 Ga. App. 455, 477 S.E.2d 889 (1996)(available post-termination procedures cured employer's failure to have pretermination hearing).

Dr. Ross's rights of cross-examination and confrontation must be contrasted with the complete absence of any similar rights in the "bifurcated", "non-confrontational", dual venue "conference" provided Petitioner Vedad.

The "full evidentiary" post-termination hearing required by *Loudermill* includes the right of the discharged employee to cross examine witnesses even where the facts giving rise to discharge are undisputed. *Garraghty v. Virginia, Dep't of Corrections*, 52 F.3d 1274, 1282-1283 (4th Cir. 1995). See, also, *Langley v. Adams Co., Colo.*, 987 F.2d 1473, 1480-1481 (10th Cir. 1993) (affirming denial of qualified immunity to officer who terminated plaintiff and officer who affirmed termination because no opportunity for post-termination hearing that included right to confront and examine witnesses). Consequently, there is no question but that the Agency's procedures do not comport with the requirements of *Loudermill*.

Essentially, the Administrative Law Court has ruled that the South Carolina legislature's provision of the State Employee Grievance Committee hearing satisfies the need for a full fledged post termination hearing. This ruling is incorrect. Insofar as the Administrative Law Court contends that the Agency procedure prior to the State Employee Grievance Committee was constitutionally adequate, the ruling is incorrect as shown by *Garraghty*. Also, insofar as the Administrative Law Court holds the "fact finding" standard utilized by the State Employee Grievance Committee is adequate --- an appellate standard --- that holding is erroneous. Even burden shifting has been found to violate due process in this context. A Missouri case addresses this very issue. *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978). In *Cole*, the public employee was dismissed by his agency and sought a hearing before the Civil Service Commission. The Commission in *Cole* merely shifted the burden of proof, but the *Cole* opinion nonetheless found this to violate Due Process. 562 S.W.2d at 797-798:

> Under the heading "Conclusions of Law and Decision", the commission noted that, according to its own rule, its policy is to support appointing

authorities in requiring efficient service from merit system employees. The commission then stated:

"It is tempting for the Commission in a case of this character to substitute our judgment for that of the responsible party.

"Although we are sympathetic with Appellant we are compelled to conclude that the judgment of the Department must be upheld. To hold otherwise would be to substitute the judgment of the Commission for that of the appointing authority and we do not feel that we should do that in the absence of some compelling evidence that the judgment of the appointing authority was unsound or improperly motivated. There is no such evidence here."

Thus, by the terms of the commission's decision, Mrs. Cole could not have prevailed unless there appeared "compelling evidence that the judgment of the appointing authority was unsound or improperly motivated . . ." even though the commission found the independent exercise of judgment "tempting". The appointing authority was entitled to no such position of evidentiary advantage; evidence presented by the department did not, simply by virtue of its source, deserve more credit than that presented by the appellant.

A similar situation appeared in *Heidebur v. Parker*, 505 S.W.2d 440 (Mo. App. 1974) in which a police officer demanded a hearing before the board of police commissioners after the superintendent of police ordered his dismissal. Under a board rule, a dismissed officer was required to open and close the hearing. The officer argued that the rule unfairly shifted the burden of proof; and this court, speaking through Judge McMillian, agreed. The following appears at page 444:

"In the instant case the evidence is undisputed that plaintiff was discharged by the Superintendent based not upon a hearing, but only upon an Inspector's Report. His first evidentiary hearing, although styled an appeal, was before the Board. It was at this hearing that pursuant to the Board's procedure that defendant was required to put on his proof that he had not violated any of the department regulations contained in the Code of Discipline and Ethics. In other words, defendant had the burden of proving that his discharge was improper. Here what is styled by the Board as an appeal, is, in fact, even from a cursory reading of the transcript a de novo hearing of the entire controversy. Thus, since the Board hearing was the first evidentiary hearing of an adversary nature, we hold that the Superintendent has the burden of proof and should have been required to put on his case first; . . . It is only fair since the Superintendent filed the

> charges that he be required to prove them before ordering plaintiff's discharge."
>
> The court then concluded that the procedure dictated by the rule "failed to afford plaintiff due process."
>
> In the instant case, it is clear that the department undertook the burden of proof by going forward with the evidence. The problem arises here in the commission's own concept of its function and its refusal to "substitute" its "judgment" for that of the appointing authority. The commission was the finder of fact and the arbiter of disciplinary measures to be imposed, if any. It could not abdicate that responsibility. By requiring appellant to come forward with compelling evidence of her innocence of the charges, it unfairly shifted the burden of proof, thus failing to afford appellant due process. *Heidebur, supra.*

In the instant case, the Administrative Law Court would go far beyond shifting the burden of proof at the post-termination hearing. That Court would require Mr. Vedad to show error under an appellate standard of review in order to avoid the Agency's pre-termination decision. No authority supports this position, and it is inconsistent with the very notion of the "full evidentiary hearing" required by *Loudermill.* Under the Administrative Law Court's scenario, the State Employee Grievance Committee would not weigh the evidence and find the facts material to the Agency's decision to terminate Mr. Vedad. Rather, the Committee would determine whether the Agency's decision was "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The "Agency decision" --- reached without the full evidentiary hearing required by *Loudermill* --- would be deemed presumptively dispositive. Consequently, the ruling is constitutionally infirm as is its affirmance by the Court of Appeals.

The Agency has violated Petitioner's Constitutional entitlement to the protection of due process of law. The Decision of the State Employee Grievance Committee should be reversed.

Appellate Review by the State Employee Grievance Committee Is Not Equivalent to the Post-Termination Hearing Required by Due Process. As Petitioner has explained, the "full evidentiary" post-termination hearing required by *Loudermill* includes the right of the discharged employee to cross examine witnesses even where the facts giving rise to discharge are undisputed. *Garraghty v. Virginia, Dep't of Corrections*, 52 F.3d 1274, 1282-1283 (4th Cir. 1995). See, also, *Langley v. Adams Co., Colo.*, 987 F.2d 1473, 1480-1481 (10th Cir. 1993) (affirming denial of qualified immunity to officer who terminated plaintiff and officer who affirmed termination because no opportunity for post-termination hearing that included right to confront and examine witnesses). Consequently, there is no question but that the Agency's procedures do not comport with the requirements of *Loudermill*. However, this is not to say that Petitioner Vedad does not dispute the facts which are claimed to have justified the termination of his employment. As noted above, he provided testimony at every opportunity in which he denied violating the Agency policies upon which his termination was based.

In its brief, the Respondent attempted to argue that an employee's due process rights in defense of a property interest created by statute are limited to whatever limited procedural protections may be granted by the statutory scheme creating the property interest. Thus, Respondent argues, if the statutory scheme shifts the burden of proof to the employee and requires the employee to meet an appellate standard of review, this is within the prerogative of the State. This argument ignores the Constitutional underpinnings of the Due Process Clause, and it was expressly rejected by *Cleveland Bd. of Education v. Loudermill*, 740 U.S. 532, 541, 84 L. E.2d 494, 105 S. Ct. 1487 (1985):

> In *Vitek v. Jones*, 445 U.S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they

> are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.
>
> In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: .the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. 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." *Arnett v. Kennedy, supra*, at 167 (POWELL, J., concurring in part and concurring in result in part); *see id.*, at 185 (WHITE, J., concurring in part and dissenting in part).
>
> In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

It is in this context that *Garraghty, Langley,* and *Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978), were decided. *Garraghty* holds that a public employee has a constitutional right to confront and examine witnesses at a post-termination hearing. 52 F.3d at 1283. *Garraghty* holds that this right is so firmly established as to deny the defendants' claim of qualified immunity. *Id.* It is in this context that the Mr. Vedad's appeal should be decided.

The Opinion of the Court of Appeals finds that there was evidence sufficient to allow reasonable minds to reach the conclusion the Agency reached. Petitioner testified

that he did not violate any policies of the Agency. As noted above, the Petitioner's appeal is based upon the failure to be afforded due process of law in violation of the Constitution. "Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 10011, 25 L.Ed.2d 287 (1970). Procedural due process often requires confrontation and cross-examination of one whose word deprives a person of his or her livelihood. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)." *Brown v. South Carolina State Board of Education*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990).

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

All of which is respectfully submitted.

May 12, 2014

Allan R. Holmes, Sr.
SC Bar No. 2576
GIBBS & HOLMES
Suite 110, 171 Church Street
Charleston, South Carolina 29401
Telephone: 843-722-0033

ATTORNEY FOR APPELLANT

Certificate Regarding Petition for Rehearing

I hereby certify that a Petition for Rehearing was made in the within case and finally ruled on by the Court of Appeals.

Allan R. Holmes

Certificate of Service

I hereby certify that I this day served the within Petition for Writ of Certiorari in the matter of Mohammed Vedad, Petitioner, v. South Carolina Department of Transportation, Respondent, S.C. Court of Appeals, No. 2012-212952, by sending a copy, first class mail, postage prepaid, to the following:

Natalie J. Moore, Esq.
Office of General Counsel
955 Park Street, Suite 343
Columbia, South Carolina 29201

DONE this 12th day of May, 2014.