

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

2012-212952

Moshtaba Vedad

Appellant,

v.

South Carolina Department of Transportation,

Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Authorities Cited by the Agency are Inapposite. Respondent continues to argue that South Carolina employees, unlike employees of the State of Virginia, have no property interest in continued employment. This argument relies upon *Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1090 (1981)), *Beckham v. Brown*, 756 F.2d 1032 (4th Cir. 1985), *Bradley v. S. C. Dept. of Corrections*, No. 3:08-2510, 2010 U.S. Dist. LEXIS 19903 (D.S.C. Mar. 5, 2010); *Newton v. S.C. Dept. of Public Safety*, No. 6:10-01781, 2011 U.S. Dist. LEXIS 107828 (D.S.C. Sept. 23, 2011); *Reed v. S.C. State Univ.*, No. 5:08-3022, 2010 U.S. Dist. LEXIS 98820 (D.S.C. Sept. 20, 2010).

First, and most importantly, neither *Bunting* nor *Beckham* involves a State employee or the South Carolina State Employee Grievance Act. Mr. Beckham was a police officer who served “at the pleasure of” the Horry County Police Commission. This signifier of the “at will” nature of his employment was specifically set out in the Act creating the Commission, and in the personnel manual that Beckham claimed created a contract. *Beckham*, 756 F.2d at 1036-1037. In addition, *Beckham* failed to request a hearing in accordance with the terms of the personnel manual. *Id.* The *Beckham* opinion relies upon the holding in *Bunting*, and on another case in which the employment relationship was explicitly “at will.” *Beckham*, 756 F.2d at 1037 n. 9, citing *Rhodes v. Smith*, 273 S.C. 13, 15, 254 S.E.2d 49, 50 (1979).

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).

In *Bradley*, the District Court simply adopted the Magistrate's Report finding that the *pro se* plaintiff was an at-will employee. 2010 U.S. Dist. LEXIS 19903 at *16. The Report of the Magistrate states only the following with regard to the issue: "Bradley has not shown that he had a protected property interest in his employment with SCDC because he fails to show that his employment was not at-will. He argues that he was not an at-will employee because he believed that he could only be terminated for cause. Bradley has submitted nothing to support his assertion other than his own unsigned, unnotarized statement in which he states that he thought he was not an at-will employee. . . . Further, he has not presented anything to show that defendants contractually altered the at-will relationship." *Bradley v. S.C. Dept. of Corrections*, No. 3:08-2510, slip op. at 19-20 (D.S.C. Jan. 15, 2010). *Bradley* does not place the S.C. State Employee Grievance Act at issue.

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. In a footnote, the *Newton* opinion notes that the plaintiff might have filed a grievance under the State Employee Grievance Act but, relying upon *Bunting v. City of Columbia*, *supra*, states that "such grievance rights do not establish a property interest in employment." *Id.* at *9, n.1. However, as shown above, *Bunting* does not support such a holding.

Reed involves the denial of a promotion, and the Court found that the plaintiff was unable to show that the job at issue even existed. 2010 U.S. Dist. LEXIS 98820 at *19-20. *Reed* also notes that assuming there was such a job, and that the plaintiff had a property interest in it, that interest was waived by the plaintiff's failure to pursue the defendant's internal grievance procedure. *Id.* at *21.

In summary, four of the five cases cited by the Respondent do not address the question of whether the S.C. State Employee Grievance Act creates a property interest in employment. In the fifth case, the plaintiff did not even argue against at-will status, and in support of the Court's assumption that such an argument would have been futile, the Court footnotes one of the four other cases cited by the Respondent – a case that does not address the question of whether the S.C. State Employee Grievance Act creates a property interest in employment.

Appellant Vedad's case squarely raises the question of whether the South Carolina State Employee Grievance Act creates a property interest on the part of covered South Carolina public employees. As shown by Appellant's initial brief, the South Carolina State Employee grievance Act contains all of the elements noted in *Detweiller v. Virginia Dept. of Rehabilitative Services*, 705 F.2d 557, 560 (4th Cir. 1983) (considering Virginia public employee grievance law), and this is sufficient to show a property interest in continued employment.

Respondent misapprehends the Appellant's reliance on *Connor v. City of Forest Acres*, 438 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. 438 S.C. at 462-64, 560 S.E.2d at 610-11. The point of the *Connor* case is that, in it, this Court recognizes that a South Carolina public employee may legitimately claim a property interest in continued employment when that employment is not "at will." This distinguishes *Connor* and the case of Mr. Vedad from every case cited by the Respondent.

Importantly, the State Employee Grievance Committee decision does not reject the appellant's claim that he was entitled to due process of law. Rather, it denies that the due process provided him was insufficient. The only inference to be drawn from the review by the Committee of the disciplinary standards and the evidence of record is that the Committee did not believe Mr. Vedad to be an at will employee.

II. Appellant Expressly Contended that His Termination Was without any Factual Basis. Indeed, the State Employee Grievance Committee explicitly noted that Mr. Vedad:

[S]tates that he did not violate any SCDOT policies. . . . Appellant contends that there is no evidence indicating that he improperly completed the mileage log and time sheets. In addition, Appellant stated that he properly completed the mileage log and time sheets. Further, he states that the charges of "Destruction, Alteration or Falsification of Records" and "Unauthorized Use of State Equipment or Property for Personal Gain" are inaccurate and unfounded. . . .

March 21, 2011, Final Decision, R. p.12. See, also, R.pp. 30-47 (testimony of Appellant).

Contrary to the contention of the Respondent, Appellant does contend that the factual basis for his termination was erroneous. Consequently, this appeal goes to the merits of the Agency decision.

III. Appellate Review by the State Employee Grievance Committee Is Not Equivalent to the Post-Termination Hearing Required by Due Process. As Appellant 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 Appellant 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 attempts 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.

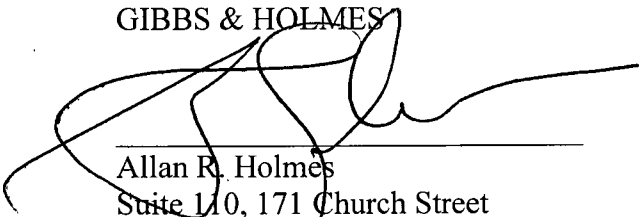
It is in this context that *Garraghty, Langley, and Cole v. Litz*, 562 S.W.2d 795 (Mo. App. 1978), were decided. *Garraghty* holds that a public employee has a constitutional right to confront and examine witnesses at a post-termination hearing. 52 F.3d at 1283. *Garraghty* holds that this right is so 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.

IV. A Simple Remand Would Be Inappropriate. Because of the Agency’s violation of his due process rights, Mr. Vedad was terminated from his employment unconstitutionally. The findings of fact in his case were contested, and they are infirm. Also, he has been required to incur attorneys’ fees in order to appeal and correct the Agency’s misconduct. If the matter is to be remanded, it should be remanded while providing Mr. Vedad appropriate relief. It has been recognized that the termination of a

public employee in violation of the due process requirements of *Loudermill* requires the employee's reinstatement and backpay for the period from the date of the employee's termination until the date of the provision of a constitutionally adequate hearing. *Irizarry v. Cleveland Public Library*, 727 F. Supp. 357, 363-366 (N.D. Ohio 1989). See, also, *Lightfoot v. District of Columbia*, 355 F. Supp. 2d 414, 439-440 (D.D.C. 2005). Mr. Vedad should be awarded back pay and attorneys' fees, and he should be granted reinstatement pending a hearing. Without such a remedy, there is no real incentive for the Agency to render its procedures constitutional.

All of which is respectfully submitted.

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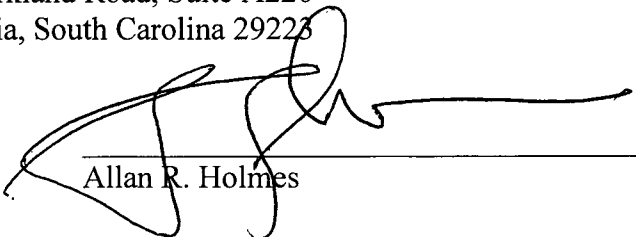
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I hereby certify that I this day served the foregoing reply brief by mailing a copy, postage prepaid to:

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DONE this 24th day of April, 2013.



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