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Constitutional Law - Loyalty Program - Right of Discharged Federal Employee to Judicial Hearing

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RECENT CASES

CONSTITUTIONAL LAW—LOYALTY PROGRAM—RIGHT OF DISCHARGED FEDERAL EMPLOYEE TO JUDICIAL HEARING. Appellant had been employed in the classified civil service of the United States government and had been given a temporary reappointment to her former position pending a loyalty investigation pursuant to Executive Order 9835.[1] Two months subsequent to her temporary reappointment, she was informed of the existence of doubt as to her loyalty to the United States government. Following a series of hearings, culminating in a decision by the Loyalty Review Board affirming that reasonable grounds for belief of her disloyalty existed, she was rated ineligible for federal employment and was barred from competing in civil service examinations for three years. At no time during the course of the hearings was she confronted by her accusers and it was admitted that the charges were made by persons not under oath. In this action she sought a declaratory judgment and an order reinstating her in government employment, claiming that she did not receive a fair trial before the Loyalty Review Board. The Circuit Court *held,* one justice dissenting, that a party seeking federal employment is not entitled of right to a judicial hearing where there exists reasonable doubt as to that party's loyalty to the United States government and therefore alleged irregularities in the Loyalty Board hearing were not grounds for reversal of that Board's findings. The court reversed, on authority of United States v. Lovett,[2] so much of the Board's decision which precluded appellant from participation in civil service examinations for three years. On appeal to the Supreme Court, Mr. Justice Clark, not participating, the decision of the Circuit Court was affirmed by an equally divided court. *Bailey v. Richardson,* 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam,* 71 Sup. Ct. 669 (1951).

Although appellant in the instant case largely relies upon the insufficiency of her hearing before the Loyalty Board, the Circuit Court decision points out[3] that the important question is whether she was in fact entitled to the hearing. There would seem to be little doubt that in the exercise of proper procedure, the executive department has the power to remove its employees,[4] which power is subject only to statutory limitations.[5] Under the existing Civil Service regulations[6] appellant's right to a hearing is wholly

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[1] 12 Fed. Reg. 1935, No. 9835 (1947).
By this order reinstatements were made subject to the condition that the applicants could be removed if within 18 months investigation disclosed certain disqualifications and among these was "(7) On all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

[2] 328 U. S. 303 (1946).

[3] 182 F.2d 46, 51 (D.C. Cir. 1950) ("But the question is not whether she had a trial. The question is whether she should have had one.")

[4] Eberlein v. United States, 257 U.S. 82 (1921); Keim v. United States, 177 U.S. 290 (1900); Pawell v. Unemployment Compensation Bd. of Review, 146 Pa. Super. 147, 22 A.2d 43 (1941). But where proper procedure was not followed, see Gadsden v. United States, 78 F. Supp. 126 (Ct. of Cl. 1948); Elchibegoff v. United States, 106 Ct. of Cl. 541 (1946) (like the instant case, the employee had only temporary appointment.

[5] 37 Stat. 555 (1912), as amended, 5 U.S.C. §652 (1948 supp.). Under authority of this act Executive Order 9835 was issued.

[6] *Ibid.*

within the discretion of the removing officer.[7] The constitutionality of such a result, however, must be considered further in light of the Fifth and Sixth Amendments to the Federal Constitution. The Fifth Amendment has been violated only if the appellant has been deprived of life, liberty or property without due process of law.[8] It would seem settled now that government employ is not property[9] but the early Supreme Court case of *Cummings v. The State of Missouri*[10] disputed this finding.[11] There is no question of deprivation of life or liberty in the instant case. The Sixth amendment, which protects the right of a trial by jury in case of criminal prosecution, has been violated only if the effect of the decision of the Loyalty Board is to punish the appellant for her past misconduct. Such a result could only be obtained by a trial by jury.[12]

In *United States v. Lovett*,[13] it was held that persons could not be permanently excluded from government employ by act of Congress since this was punishment, for which accused was entitled to a trial by jury.[14] In the instant case the court found that the three-year proscription was punishment[15] but refused to extend this rule to include mere dismissal.[16] In support of this position, it has been said that dismissal from office constitutes no added punishment in case of larceny but is the mere consequence of the conviction;[17] that removal of a state official according to procedure prescribed by the legislature is not a criminal proceeding and not intended as punishment;[18] that there was no punishment in a criminal sense where a state law provided that a teacher could be removed for membership in a subversive organization;[19] that a person has no constitutional right to hold office and thus may be dismissed just as any other employee;[20] and that a federal employee may be dismissed for pol-

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[7] *Ibid.* "No . . . hearing shall be required except in the discretion of the officer . . . directing the removal."

[8] U.S. Const. Amend. V.

[9] *See* Taylor v. Beckham, 178 U.S. 548, 576 (1900).

[10] 4 Wall. 277 (U.S. 1886).

[11] *Id.* at 320: "We do not agree with counsel . . . that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all'. The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to law. He does not include under liberty freedom from outrage on the feelings as well as restraint on the person. He does not include under property those estates which one may acquire in professions."

[12] United States v. Lovett, 328 U.S. 303 (1946).

[13] 328 U.S. 303 (1946).

[14] *Id.* at 314: "What is involved here is a congressional proscription of Lovett . . . prohibiting (his) ever holding a government job. Were this case to be not justiciable, congressional action, aimed at three individuals, which stigmatized their reputations and seriously impaired their chance to earn a living, could never be challenged in any court. Our constitution did not contemplate such a result."

[15] 182 F.2d 46, 54 (D.C. Cir. 1950).

[16] The court, for this purpose, conceded appellant's contention that she was not a temporary employee but within the classified civil service.

[17] State v. Jones, 82 N.C. 685 (1880).

[18] Rankin v. Jauman, 4 Idaho 53, 36 Pac. 502 (1894).

[19] L'Hommedieu v. Board of Regents, 276 App. Div. 494, 95 N.Y. Supp. 443 (1950), *aff'd sub nom.* Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950).

[20] McAuliffe v. New Bedford, 155 Mass. 216, 220 N.E. 517 (1892) ("The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman.")

itical activity under the Hatch Act and this is not punishment. On the other hand, several state courts,[21] including the 1951 Utah court in *Taylor v. Lee*,[22] have reached another conclusion and there is wording in Supreme Court decisions[23] which would seem to take a view contra to the instant case.

As was powerfully laid out in the dissent of the instant case,[24] appellant would appear to have been convicted of disloyalty by the proceedings in the Loyalty Board hearings.[25] This misleading effect, however, would not seem to have a bearing upon her right to a judicial trial since other instances of injury without remedy can be found in the decisions.[26] The result is certainly unfortunate, as was conceded in the instant case,[27] but the pressing need for governmental security in view of the present world conditions[28] makes insignificant the slight to appellant's reputation. Appellant's standing in law is untenable; otherwise her plight is only regrettable.

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[21] State v. Walbridge, 119 Mo. 383, 24 S.W. 457 (1893) (where constitution said removal from office was punishment for misconduct in office); Harris v. Terry, 98 N.C. 131, 3 S.E. 745 (1887) ("Imprisonment is infamous under the laws of the United States and the disqualification to hold office is certainly a punishment that implies disgrace and infamy . . . It is difficult to conceive of a punishment more galling and degrading in this country than disqualification to hold office whether one be an office seeker or not"); Taylor v. Lee, 226 P.2d 531 (Utah 1951); where the court cited with approval this excerpt from a previous Utah case: "A removal for cause is a judicial act which affects the reputation and rights of the accused. It is in law a punishment for crime, and the proceeding provided by statute can no more be dispensed with in such a case than a court can disregard the statutory provisions in the trial of a cause where a person is charged with the commission of an offense."

[22] 226 P.2d 531 (Utah 1951).

[23] See note 11, *supra;* also see United Public Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion): "The punishment provided is immediate discharge and a permanent ban against reemployment in the same position . . ."; *Ex parte* Garland, 4 Wall. 333 (1866): "But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right is to enforce a punishment for that offense notwithstanding the pardon" (a case where the appellant was excluded from practice of law before Supreme Court). Also see Washington v. Clark, 84 F. Supp. 964 (D.C. Cir. 1949), *aff'd.* 182 F.2d 375 (D.C. Cir. 1950): "A government employee has no right to appeal to the courts from an order dismissing him from the service. I say so with the full realization of the fact that such a dismissal may have very serious and even devastating consequences to the employee in question."

[24] 182 F.2d 46, 66 (1950).

[25] The Loyalty Board hearing was given wide notoriety in newspapers, as was the subsequent Supreme Court decision and it is quite possible that misconceptions resulted.

[26] Anyone may be attacked with impunity by a Congressman while he is on the floor of Congress. Cochran v. Couzens, 42 F.2d 783 (App. D.C. 1930), *cert. denied,* 282 U.S. 874 (1930).

[27] 182 F.2d 46, 50 (1950): "She was not given a trial in any sense of the word and she does not know who informed upon her. Thus viewed, her situation appeals powerfully to our sense of the fair and just. But the case must be placed in context and in perspective".

[28] The court takes judicial notice of the fact that the United States is presently threatened by an adversary government which seeks to infiltrate our government with its own agents.