

## **LOUDERMILL HEARINGS: CONDUCTING THE INVESTIGATORY INTERVIEW**

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The rules governing the employment relationship between public employers and their employees are complex and often confusing to those in management, particularly when confronted with an employee disciplinary situation. Can a public employer question a public employee about that employee's misconduct? If so, do any rules exist that govern this process?

This focus of this article is the United States Supreme Court's landmark decision in Cleveland Board of Ed. v. Loudermill et. al., 470 U.S. 532 (1985) and other court decisions that set the framework for employee investigations in the public sector where discipline, particularly termination, may be the end result. The Loudermill decision requires a minimum level of "due process" be provided to public employees before they can be deprived of a constitutionally-protected "property interest" in employment. But when does a public employee — particularly, a Borough employee — have a constitutionally-protected "property interest" in his or her employment and what "process" is "due" to such an employee?

### **I. The Loudermill Decision**

In a case with far-reaching implications to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, two public employees, one a security guard and the other a bus mechanic, were terminated from their jobs without any prior opportunity to respond to charges. Loudermill, 470 U.S. 532. Under Ohio law, both employees could only be terminated "for cause" and were entitled to an administrative review hearing *after* their dismissal. The employees claimed that constitutional due process required that they be afforded notice and an opportunity to be heard *prior* to the termination of their employment, even though state law provided a post-termination hearing.

The U.S. Supreme Court held that because the employees could only be fired for cause under Ohio law, the employees possessed a constitutionally-protected "property" right in their employment. The Court then concluded that because those employees had a property right in their employment under Ohio law, the Due Process Clause required "some form of pretermination hearing," meaning that those employees must be given notice of the charges against them (i.e., the reasons why dismissal was under consideration) and be given a chance to respond to those charges even before the formal post-termination hearing required by state law. In describing the constitutional necessity of such a predecisional hearing, the Court noted that hearings "should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." This pretermination hearing process is now referred to as a "Loudermill" hearing, referring to the Supreme Court's decision.

What must you do to satisfy the Supreme Court's mandate in Loudermill? Courts have repeatedly noted that "very limited" pretermination hearings satisfy the constitutional requirement. In the Gilbert v. Homar, 520 U.S. 924 (1997) decision, for example, the Court noted that the purpose of any pre-suspension hearing is "to assure that there are reasonable

grounds to support the suspension without pay.” “The adequacy of any hearing must be evaluated in reference to the ‘two essential requirements of due process, ... notice and an opportunity to respond.’” Gniotek v. City of Philadelphia, 808 F.2d 241 (3d Cir. 1986) (quoting Loudermill). “Notice” has been found sufficient if: 1) it apprises the vulnerable party of the nature of the charges and general evidence against the individual and 2) it is timely under the particular circumstances of the case. Where an employee has a protected property interest in employment, therefore, the employee must be afforded some minimal notice and an opportunity to be heard prior to most adverse pay employment actions.

## **II. Does a Property Interest Exist for all Borough Employees?**

Which Borough employees have a “property” right in their employment? The answer depends on the employee’s employment classification and whether the employee belongs to a union. The general rule in Pennsylvania is that all employment is at-will, and the primary legal concern in disciplinary situations is to ensure that discipline is not done for discriminatory reasons. Werner v. Zazyczny, 681 A.2d 1331 (Pa. 1996). In Pennsylvania, there are two primary sources of law that constitute exceptions to this general rule resulting in a constitutionally-protected “property” interest in employment: 1) statutes limiting the grounds for discharging employees (such as civil service laws), and 2) collective bargaining agreements that contain a “just cause” provision related to discipline.

### **A. Borough Fire and Police Employees Have a Protected Property Interest**

Under the Borough Code, police and fire employees possess a statutory property interest in their employment. Specifically, under 53 P.S. § 46190, the Code states that these individuals may only be suspended, terminated or reduced in rank (demoted) for a limited number of reasons, and are subject to civil service protection. Similarly, for boroughs (and other municipalities) with fewer than three police employees, another law, the Police Tenure Act, provides similar protections to employees. 53 P.S. § 812. Because these statutes afford specific protection to employees, the employees covered by the statutes possess a property interest in their employment and are therefore subject to the Loudermill requirement.

### **B. Borough Employees Who Are Members of a Bargaining Unit Have a Protected Property Interest**

A collective bargaining agreement can create a property right in employment, particularly where the collective bargaining agreement requires “just cause” for suspension or dismissal. State and federal courts examining disciplinary action in the context of such agreements have almost invariably found that “just cause” provisions serve to infuse employees with a property interest in their public employment. See, e.g., Dee v. Borough of Dunmore, 549 F.3d 225 (3d Cir. 2008) (finding that “just cause” provision in agreement, “created ... a constitutionally protected property interest”). As a result, bargaining unit employees are entitled to a Loudermill hearing prior to any disciplinary suspension without pay. Additionally, a union worker facing any kind of discipline is entitled to union representation during any meeting with the employer that might result in discipline. If an employee may face criminal charges, other constitutional

protections also apply. If criminal charges are even a possibility, the Borough should consult with experienced legal counsel before commencing an investigation.

### **III. Practical Advice**

Even for Borough employees that do not have a constitutionally-protected property interest in employment that triggers Loudermill hearing rights, there are sound reasons to follow the Loudermill process. From a human resources perspective, consistency in addressing employee misconduct is a good practice because it reduces the likelihood that an employee can later prove discriminatory or unfair treatment. It is also good management to inform an employee of why he is being disciplined, and to give him an opportunity to respond before punishment.

*Notice.* The first part of the Loudermill process requires notice to the employee of the basis for the potential discipline. From a practical standpoint, you should already have thoroughly investigated the employee's misconduct from other sources, including from co-workers and documents, before questioning the employee. In some cases the facts will not require extensive investigation, but where investigation is required, it should be completed to the extent possible before conducting the Loudermill.

*Hearing.* An effective Loudermill hearing is essential to the proper handling of employee discipline. The Loudermill is the employer's opportunity to present the employee with the information gathered through any investigation that has occurred, and to ask for the employee's response. Once again, this is a legal requirement before making disciplinary decisions for civil service or bargaining unit employees, but it is good management practice for every Borough employee. The Loudermill puts the employee on notice of the charges against him, and provides an opportunity for response, thereby ensuring that discipline is based on the "full-story." To assist in any subsequent challenge to the discipline, a person other than the management representative conducting the Loudermill hearing should take extensive notes of the questions asked and the employee's responses. If the employee has no response, that too should be included in the hearing notes. Those notes will prove invaluable in unemployment compensation proceedings, grievance arbitration hearings, or other legal challenges.

The Loudermill process can thus serve the important interests of affording legally-required due process to those Borough employees that have a protected property right in their employment, while simultaneously allowing management to investigate allegations of employee misconduct effectively and fairly. Done properly, it is also a powerful tool for making sure disciplinary decision are upheld if challenged.