

LEGAL AND REGULATORY NOTES, AUGUST-SEPTEMBER 2015

Vermont Supreme Court Clarifies the Due Process Rights of “For Cause” Municipal Employees

For the second time this year (see also www.vlct.org/assets/Resource/LRN/2015/LRN-town-manager-employment.pdf), the Vermont Supreme Court issued an important decision impacting the relationship between municipalities and their employees. In the case of *Gwendolyn Hallsmith v. City of Montpelier, William Fraser and Jessie Baker*, 2015 VT 83, the Court held that a municipal employee terminable for cause must be afforded the opportunity for a full administrative hearing at the local level.

This case concerns the process used by the City of Montpelier to fire its planning and community development director Gwendolyn Hallsmith. According to the City’s personnel plan, an employee holding such position can only be terminated by “justifiable cause.” There are two classes of employees when it comes to termination: those who are terminable “at-will” and those who can only be fired “for cause.” According to the Vermont Supreme Court, the at-will employment relationship is “terminable at any time, for any reason or for none at all.” *Ross v. Times Mirror, Inc.*, 164 Vt. 13 (1995). In contrast, for an employer to fire a for-cause employee, it must be able to demonstrate “some substantial shortcoming detrimental to the employer’s interests, which the law and a sound public opinion recognize as a good cause for his [sic] dismissal.” *In re Brooks*, 135 Vt. 563 (1977).

In late 2013, City Manager William Fraser placed Hallsmith on administrative leave and sent her a letter informing her that he was considering terminating her employment. The letter also “described various acts of unprofessional behavior and insubordination, damage to relationships with key individuals and governing bodies within city government, and inappropriate use of City resources” and invited her to meet with Fraser to provide a response to those written charges. Hallsmith and her attorney met with Fraser and discussed the situation. After the meeting, Fraser notified Hallsmith that he had decided to fire her.

Hallsmith, in accordance with the City’s personnel plan, filed a grievance with the City to review her termination. The personnel plan called for a hearing before the City Manager or his “designee.” It also provided that the employee “has a right to be represented by counsel and to present any material, witnesses or evidence helpful to the employee’s case.” Everything up to this point was not subject to legal dispute. It’s what happened afterwards that became the subject of litigation.

Fraser designated Assistant City Manager Jessie Baker to conduct the grievance hearing. Though Hallsmith and her witnesses were questioned by the city attorney, Hallsmith was not allowed to cross-examine the City’s witnesses. After the hearing Baker decided to uphold Fraser’s decision to terminate Hallsmith. Hallsmith subsequently sued the City seeking remedies including reinstatement to her former position and reimbursement for lost wages. In her lawsuit Hallsmith

raised several grounds including the lack of evidence to justify termination for cause. The Court's decision, however, did not address whether the City had "cause" to fire Hallsmith. Instead, its focus was on the discrepancy between the process that was used to fire Hallsmith and the one to which she was constitutionally entitled.

The 14th Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Courts have determined that municipal employees who can only be dismissed for cause are protected by the 14th Amendment because they have a "property interest" in their continued employment. Specifically, such employees must be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Both parties in the *Hallsmith* case agreed that Hallsmith was entitled to, and did in fact receive, an adequate pre-termination hearing (also known as a "Loudermill" hearing after the 1985 U.S. Supreme Court case of *Cleveland Bd. of Educ. v. Loudermill*). The parties disagreed as to what should have occurred after her employment was terminated. Hallsmith argued that the post-termination administrative hearing held by Assistant City Manager Baker was an insufficient safeguard of Hallsmith's due process rights because Baker wasn't an impartial adjudicator, Hallsmith was not allowed to cross-examine witnesses, and the city attorney served both as prosecutor of Hallsmith and advisor to Baker.

The City did not contest these arguments and did not assert that its post-termination hearing was constitutionally sufficient. Rather, it countered that Hallsmith was given all the process she was due under the 14th Amendment: a pre-termination hearing and the ability to appeal that decision to a court of law. The trial court rejected the City's argument and ordered it to provide Hallsmith with a post-termination hearing that was more protective of her due process rights. The City appealed to the Vermont Supreme Court, which upheld the lower court's ruling.

The crux of the Vermont Supreme Court's ruling was that the City failed to follow *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), when it denied Hallsmith the opportunity for a full adversarial hearing. The *Loudermill* decision declared that public employees who can be fired only for cause have a constitutionally-protected property interest in their employment and therefore must be afforded due process of law. Specifically, the *Loudermill* decision dictates that the employee must be provided with a full hearing at some point during the termination process. And while it is acceptable to terminate such an employee after only a minimal pre-termination hearing (where the employee receives notice of the charges and an opportunity to respond as a check against mistaken decisions), that employee must be given an opportunity for a full administrative hearing post-termination.

In the *Hallsmith* case, the Vermont Supreme Court ruled that an employee who is terminated for cause should not have to seek due process of law from the court system but rather should be afforded that process by the employer. Such an employee must be given a full administrative hearing with a chance to present evidence, confront witnesses, and have an impartial adjudicator. Otherwise, the Court reasoned, the burden of proof and persuasion would shift from the employer to the terminated employee; the relief available (including reinstatement) would not be timely, and trial courts around the state would be forced to become factfinders and "hearing officers for municipalities" rather than sit in judgment of their actions.

It is important to note that if read in isolation, the *Hallsmith* case appears to offer a template for how to terminate every for-cause municipal employee in every situation. That simply is not the case.

As the U.S. Supreme Court has noted, due process is not a “technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.” *Gilbert v. Homar*, 520 U.S. 924 (1997).

And while a pre-termination hearing followed by a full post-termination administrative hearing may be constitutionally sufficient in most circumstances (e.g., poor performance and non-criminal misconduct), a municipal employer may actually be providing more due process than is legally necessary. The result in some circumstances will be that the employer hurts its own interests by adhering to unnecessary administrative burdens that impede the employer’s ability to act quickly where there is a “significant hazard in keeping the employee on the job.” *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532 at 545 (1985).

Prior to terminating a municipal employee, municipalities are advised to contact their municipal attorneys or VLCT’s Municipal Assistance Center at 1-800-649-7915 for assistance and, if your municipality is a PACIF member, potential referral to VLCT’s Employment Practices Liability program.

The *Hallsmith* decision is archived at <http://info.libraries.vermont.gov/supct/current/op2014-346.html>.

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