DUE PROCESS AND LOCAL ORDINANCES

ORDINANCE CANNOT SUPERCEDE EMPLOYEE'S RIGHT TO DUE PROCESS

In the field of municipal employment law, the Vermont Supreme Court recently held that an ordinance calling for the automatic termination of an employee cannot limit that employee's constitutional right to due process under the Fourteenth Amendment of the U.S. Constitution. *Sean Quinn v. Barbara Grimes, et al*, 2004 VT 89 (Sep. 10, 2004).

On August 30, 2000, plaintiff Sean Quinn was hit on the elbow by a car while working for the Burlington Electric Department (BED). As had been the practice at BED, Quinn was assigned light duty work, as he was unable to withstand the physical labor required of his job as a line worker. Six days following surgery on November 13, 2001, Quinn was examined by Burlington's city medical examiner who concluded that he was "[n]ot medically qualified currently for the position of Line Worker …" The defendant, Barbara Grimes, manager of the BED, sent Quinn a letter informing him that pursuant to Burlington Code of Ordinances § 24-2, his last day of work would be November 30, 2001. The ordinance, which calls for a medical examination of an employee disabled for a period of three months, goes on to say that, "[i]f the medical board member advises the department head . . . that, in the board's opinion, it is not reasonably probable that the employee will return to full duty within six (6) months of the onset of injury or illness, the department head . . . shall immediately notify the employee of the medical board's decision and take steps to terminate the employee's employment, effective not earlier than ninety (90) days following the onset of illness or injury . . ." Quinn was subsequently terminated, but not before meeting with Grimes on November 27, 2001.

Quinn filed a § 1983 claim against Grimes and the City of Burlington for violation of his procedural due process rights. Section 1983 of the Civil Rights Act of 1871 affords, "Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. § 1983. In order to obtain remedies under § 1983 in this context, Quinn had to show that he had a constitutionally-protected property right to continued employment with BED and that BED denied him this right without notice and a hearing. While federal constitutional procedural requirements govern termination of an employee with a property interest in continued employment, it is state law which determines whether the employee actually has a property interest in his employment.

Defendants countered that Quinn had no property right to continued employment because he was physically unable to perform his job and that even if such a right existed no process was due because Burlington's Ordinance prescribed automatic termination.

The Court rejected defendants' arguments, holding, in accordance with the U.S. Supreme Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) that an "employee's procedural protections are controlled by the due process clause and can not be limited in the ordinance on the theory that the procedural rights define the property interest." After all, the purpose of due process is not to ensure that the facts an employee presents will change his employer's mind, only that the employee be

provided with the opportunity to try. Additionally, "a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one."

The Court buttressed its holding by drawing comparisons between this case and the California Supreme Court case of *Coleman v. Dept. of Pers. Admin*., 805 P.2d 300 (Cal. 1991). In that case, a state employee was terminated for violating a state statute, which stated that "absence without leave, whether voluntary or involuntary for five consecutive days is an automatic resignation from state service." Rejecting the state's argument that the employee had no property interest in his job once the five-day period was reached because there was no matter to be disputed in a pretermination hearing, the California Supreme Court held that the law was not self-executing in that it still required the state to make factual determinations before exercising its discretion to invoke the statute.

Applying this reasoning to the case at hand, the Vermont Supreme Court submitted that because the city neglected to first make factual determinations and then decide whether the ordinance applied, it was "arguable whether plaintiff was disabled from his employment within the meaning of [Burlington's] ordinance."

The matters of whether Quinn was supplied with notice and opportunity to be heard and whether his meeting with Grimes amounted to a sufficient pretermination hearing were remanded to Superior Court.

This case is important for Vermont municipalities with automatic termination ordinances or applicable provisions in their personnel policies because it states unequivocally that they do not supersede the procedural due process rights of an employee with a constitutionally protected property interest. Here, the Court reaffirmed the U.S. Supreme Court's holding in *Loudermill* that such an employee must be given notice and an opportunity to be heard prior to termination. Furthermore, it is incumbent upon municipalities with these provisions in place to first make the factual determinations necessary for statutory resignation and then decide whether they apply. Remember, "[e]ven if it appears almost certain that the employee will be unable to . . . [present facts that might weigh against termination], due process requires that she be given the opportunity to try."

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