Memorandum

From: Sid Hemsley, Senior Law Consultant
Date: 11/28/2011
Re: Right of Employees (including Department Heads) to Grieve Adverse Employment Actions and to have Counsel Appear with Them at Grievance Hearings

The Town has several personnel-related questions:

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1. Do all public employees, including department heads, have the right to appeal/grieve adverse employment action?

The answer with respect to Tennessee municipalities organized under the general law mayor-aldermanic government is no. The Town can probably *give* its employees the "right" to grieve some adverse employee actions, although I am not clear exactly what is meant by the term "adverse employment action" in your question. But under the U.S. Supreme Court case of Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), *property rights* in employment arise under *state law. Ge*nerally, the property right of municipal government employees, including department heads, derives from municipal charter or general statute, although they can occasionally arise under a municipal ordinance where the municipal charter or general state law are silent on the question of whether such personnel are "at will" employees. In such cases, apparently a municipality has some leeway to create a property right in employment for such personnel.

Some cities have grievance policies, and some of those are not careful to distinguish between issues that are subject to those policies, and subjects that are not subject to such policies. Generally, where the city in question is an at will employment city, it is difficult for grievance policies to be drafted that intercept the authority of whoever has the personnel powers—whether it is the mayor, the city manager, or the city's governing body—to terminate employees at that authority's will.

In the U.S. Sixth Circuit Court of Appeals (which includes Tennessee), if a municipal charter makes city employees at will, and authorizes no other

options, a municipal ordinance, resolution or policy that gives employees a property right in their jobs must give way to the charter. In Chilingirian v. Boris, 882 F.2d 200 (6th Cir. 1989), a city attorney fired by the city argued that he had a property right in his employment, the basis of which was an implied contract with the city. The Court rejected his argument, reasoning that:

> This argument is devitalized by the fact that the city charter governs the terms of the city attorney's employment and provides for his termination at will. Moreover, the city was not authorized to enter into any contract in contravention of its charter. See *Niles v. Michigan Gas and Elec. Co*., 273 Mich., 255, 262 N.W. 900 (1935) (under Michigan law, a municipality cannot exceed its charter powers). *Accordingly, notwithstanding Chilingirians' protestations to the contrary, no viable means exist for circumventing the termination-at-will language implicit in the charter's section 4.6 provision that the city attorney serves at the pleasure of the council.* [Citation omitted.] [My emphasis.] [At 205]

In the unreported case of McLemore v. City of Adamsville, 1990 WL 30478 (6th Cir. 1990), the chief of police of the City of Adamsville, Tennessee, was fired. Under the city's charter department heads, including the chief of police "shall be appointed for indefinite terms and .... *Shall serve at the pleasure of the commission*." [Court's emphasis.] [At 2] The former chief of police made several related arguments against his dismissal: That he had a property right in his employment; that his due process rights had been violated because the city had not given him the pre-termination hearing required by Cleveland Board of Education v. *Loudermill*, 470 U.S. 539 (1985); that the city charter did not govern the "contours" of his employment because he had been a member of the "classified service," before he became police chief, and retained that status after he became police chief, and that the city fired him in violation of Tennessee state law.

The Court rejected all his arguments. His claim that he was entitled to a *Loudermill* hearing failed, said the Court, citing *Chilingirian*, above, because he did not have a property right in his employment. In Tennessee, said the Court, city charter provisions and ordinances may give rise to property rights for continued employment, citing Huddleston v. City of Murfreesboro, 635 S.W.2d

694 (Tenn. 1982). However, a review of the Adamsville's city charter reveals that, by its specific terms, the chief of police "shall serve at the pleasure of the commission." Sixth Circuit precedent dictates that an employee does not have a protected property interest in his continued employment "when his position is held at the will and pleasure of his superiors." [Citing Chilingirian, above.] [At 2]

His claim of being a permanent member of the classified service failed, said the Court, because "[T]he city charter exclusively controls McLemore's employment relationship with Adamsville. Nothing in the city charter or elsewhere supports McLemore's conclusion that "once a classified city employee always a classified city employee." [At 3] Finally, his claim that the city violated state law in firing him failed because, said the Court:

> [U]nder Tennessee law, an individual is an at-will employee, as long as the city charter or other city regulations do not provide otherwise. *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. App. 181) As previously stated, the Adamsville's city charter clearly provides that McLemore was an at-will employee. [At 3]

That municipal charter language is mandatory in Tennessee, with specific respect to at will provisions in the city charter, is seen in Lewis v. Bowman, 814 S.W.2d 369 (Tenn. App. 1991). There the director of public works claimed he was terminated in violation of the city's personnel policies, which gave him certain procedural rights. However the procedural rights granted to him were in conflict with the city's charter, which made department heads employees at will. In holding the charter superseded the personnel policies, the Court said:

> It has long been the law in this state, as in many other states, that ordinances of the city are subordinate to charter provisions. This was pointed out in the case of *Marshall & Bruce Co. v. City of Nashville*, 109 Tenn. 495, 512, 71 S.W. 815, 819 (1903), wherein it was said, "The provisions of the charter are mandatory and must be obeyed by the city and its agents; and if in conflict with an ordinance, the charter must prevail."

A similar result was reached in Dingham v. Harvell, 814 S.W.2d 362 (Tenn. App. 1991), in which the police chief contested his firing by the Millington Board of Mayor and Aldermen. The Court rejected the chief's argument that he was an employee of the city for the purposes of the city's personnel policies which gave city employees certain job protection. Under the city's charter, the police chief served at the will and pleasure of the board of mayor and aldermen. In a contest between the city's charter and the city's personnel policies, the charter wins, said the Court. [In accord are *Gay v. City of Somerville*, 878 S.W.2d 124 (Tenn. App. 1994); *Mille v. City of Murfreesboro*, 122 S.W.3d 766 (Tenn. Ct. App. 2003); *Trusant v. City of Memphis*, 56 S.W.3d 10 (Tenn. Ct. App. 2001); *Summers v. Thompson*, 764 S.W.2d 182 (Tenn. 1988); *Brown v. City of Niota*, 214 F.2d 718 (6th Cir. 2000) (unreported).]

Those cases tell us that Tennessee is still an at-will state, that a municipal employee or officer claiming a property right in his employment must be able to support his claim with a statute, and that if he makes such a claim in the face of a statute that paints him at-will, his claim will fail. They also tell us that if the statute in question is silent on a municipal officer or employee's employment status, the municipality might have some discretion to adopt an ordinance or other written policy that gives him a property right in his employment. In addition, they tell us that while an at will employment city may be able to give its employees some grievance rights with respect to adverse employment actions, whoever in the city who hold the personnel powers, still has the power to reach down through those "rights," and terminate the employee at issue.

The Town is chartered under the General Law Mayor-Aldermanic Charter, found at Tennessee Code Annotated, § 6-1-101 et seq. Under § 6-1-101, which contains the definitions pertinent to that charter, '"Department head"' means the city administrator, city recorder, treasurer, police chief and any other department heads appointed by the board or mayor." In describing the duties of the mayor, § 6-3-106 says something significant about the property right of employees and department heads:

(b) Unless otherwise designated by the board by ordinance, the mayor shall perform the following duties or may designate a department head or department heads to perform any of the following duties:

(2)(A) Employ, promote, discipline, suspend and discharge all employees and department heads, in accordance with the personnel policies and procedures, if any, adopted by the board.
(B) Nothing in this charter shall be construed as granting a property interest to employees or department heads in their continued employment. [Emphasis is mine.]

Sections (b)(2)(A) and (b)(2)(B) appear to conflict. Under (b)(2)(A) the mayor (or whoever holds the personnel powers) has broad personnel powers, but "in accordance with the personnel policies and procedures, if any, adopted by the board." However, under (b)(2)(B), the city is an at will employment city. But as the above cases make clear, any policies and procedures adopted by the board under (b)(2)(A) that interfere with the at will status of the city's employees and department heads, must give way to their at will status.

As far as I can determine, the board of mayor and aldermen has not delegated the personnel powers of the mayor to any other officer or employee.

2. Do employees have a right to have an attorney and/or witnesses and a friend at a hearing?

Under the General Law Mayor-Aldermanic Charter, city employees have no property interests in their employment; they are employees at will and apparently have no constitutional right to have an attorney, or witnesses or a friend, at a hearing, or even to a termination hearing. Presumably, an at will employment city might provide the right to counsel or other representation in its personnel policies for employees subject to various personnel actions, but with respect to termination of employees who serve at the will of the mayor, the city manager, or the city's governing body, the personnel policy could not prohibit that person or body from terminating the employee "at will," whether or not that employee had the right to a pre-termination or a post-termination hearing, even if he had counsel.

But as a matter of interest, I will outline what the courts have said about the right to counsel with respect to pre-termination and post-termination hearings and the right to counsel

While there appears to be no Tennessee or Sixth Circuit case that directly address that issue, what those courts have said about the limited rights of employees *in Loudermill* pre-termination hearings strongly implies that those rights do not include the right to counsel. Indeed, as the Sixth Circuit reminds us in Duchense v. Williams, 849 F.2d 1004 (1988), *Loudermill* went up to the U.S. Supreme Court through the Sixth Circuit. The question in Duchense, in the Sixth Circuit's own words, was "Does *Cleveland Board of Education v. Loudermill, 470 US. 532, 105 S. Ct. 1487, 84 L.Ed. 2d 494 (1985), aff'g, 721 F.2d 550 (6th Cir. 1983),* require that a discharged municipal employee receive a pre-termination hearing before a neutral and impartial decision maker rather than before the supervisor who fired him"? [At 1005][The city manager had presided over the pre-termination hearing and testified against the employee as well.

No, held that Court, declaring that, "We accept the reasoning of the Fourth and Fifth Circuits in *Garraghty v. Jordan*, 830 F.2d 1295, 1302, (4th Cir. 1987) ("a pre-deprivation proceedings need not be a full evidentiary hearing with witnesses and a neutral decision maker") and *Schaper v. City of Huntsville*, 813 F.2d 709, 715 (5th Cir. 1987) (same), that a right of reply before the official responsible for the discharge is the entitlement contemplated *in Loudermill*.... " [At 1005] The Court went to considerable length to distinguish the purposes of the pre-termination and post-termination hearings. The Court, speaking of the hearings prescribed by *Loudermill*, declared that:

> The Court narrowed the essential ingredients of this pre-termination hearing to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id*. At 546, 15 S.Ct. at 1495. The Court also looked to the municipal employer interest, emphasizing that "[t]o require more than this *prior to termination* would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." (*Id* (emphasis added). This reading of *Loudermill* is reinforced by comparing Justice Marshall's concurring opinion with the majority opinion. The *Loudermill* majority deliberately chose not

to include within its definition of pre-termination hearing rights the panoply of trial-type rights advocated by Justice Marshall, which included a full evidentiary, adversary, adjudicatory hearing with an impartial judge. *Id* at 548, 15 S. Ct. at 1496 (Marshall, J. Concurring in part and concurring in the judgment.)

As the Fourth Circuit recognized in *Garraghty*, 83 F.2d at 1300, this reading of *Loudermill* is also reinforced by the fact that in *Loudermill* the Court suggested that its decision was an application of the principle announced in *Goss v. Lopez*, 419 JU.s. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), a case holding that a public school student must be given a presuspension limited hearing before the "disciplinarian" so that "the *disciplinarian* may informally discuss the alleged misconduct with the student," thus affording the student adequate "notice" and "an opportunity to explain his version of the facts." 419 U.S. at 581-82, 95 S. Ct. at 740 (emphasis added). In *Loudermill* the Court explained what it meant "by giving some opportunity for the employee to present his side of the case" by engaging in an extended discussion of *Goss v. Lopez*, a discussion which began:

> Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such case, the only meaningful opportunity *to invoke the discretion of the decisionmaker* is likely to be before the termination takes effect. See *Goss v. Lopez*, 419 U.S. at 584-84 [95 S.Ct. at 740-41.] [Emphasis is the Court's.]

It is very clear from Duchesne v. Williams that the Sixth Circuit rejects the proposition that an employee is constitutionally entitled to any more at

the pre-termination hearing than what *Loudermill* gave him, and that it does not include the right to counsel.

In addition, a number of courts in other jurisdictions have expressly held that an employee is not constitutionally entitled to counsel at his pre-termination hearing. In Panozzo v. Rhoades, 905 F.2d 135 (7th Cir. 1990), the plaintiff argued, among other things, that he was given only one hour to obtain an attorney to represent him at the hearing, and that the short time violated his right to counsel and the provision in the Police Department Manual that guaranteed him such representation. The Seventh Circuit rejected that argument, reasoning that:

> The district judge correctly rejected this argument on the ground that an employee has no constitutional right to counsel at a pre-termination hearing (citing Buschi v. Kirven, 775 F.2d 1240, 1254-1256 (4th Cir. 1985)). States and municipalities are of course free to provide greater procedural protections than those offered by the federal constitution, but it does not follow that these enhanced protections enlarge federal rights.... [At 140] Likewise in White v. Health Midwest Development Group, 889 F.Supp. 1439 (U.S. Dist Ct. D. Kansas1995), the Court, citing *Panozzo*, above, held that a secretary terminated for breach of an employment contract, had no right to confer with her attorney before performing certain tasks. "Plaintiff," declared the Court, "has provided no legal support for this purported right, and the court has failed to discover any authority for such a proposition. Plaintiff suggested that the right to counsel in criminal cases should be extended to civil cases. We disagree. Even in the public employment context an employee has no constitutional right to counsel at a pre-termination hearing." [At 1445]

Similarly, a corrections officer challenged the denial of his right to counsel at his pre-termination hearing following his refusal to answer questions during an internal affairs investigation, in Williams v. Pima County, 791 P.2d 1053 (Ct. App. Ariz. 1989). The court rejected that challenge, reasoning that:

> The trial court also erroneously concluded that Williams' right to counsel under the sixth and fourteenth amendments to the United Sates Constitution and Article 2, § 24 of the Arizona constitution were violated when he was required to answer his employer's questions in the absence of his attorney. [Those amendments] apply only to criminal proceedings. [Citation omitted by me.]
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> In the contexts of employer/employee relationships, the fourteenth amendment does not confer on an employee the right to counsel in a pre-termination interview with his employer. Pretermination interviews which are informal should not unduly intrude on the employers' right to terminate an unsatisfactory employee. Loudermill, supra, 470 U.S. at 546, 105 S. Ct. at 1495; c. *Wilson v. Swing*, 463 F. Supp. 555 (M.D.N.C). Williams did have an attorney at his formal hearing in compliance with due process requirements. [At 1057]

The same result was reached in unpublished Taysom v. Lilly, 20000 WL 33710847 (U.S. Dist. Ct. Utah), unreported Bricker v. Ausable Valley Community Mental Health Services, 20063542694(U.S. Dist. Ct. E.D. Mich.); Moses v. City of Evanston, 1995 WL 625431 (U.S. Dist. Ct. N.D. Ill. ED) (citing Panozza v. Rhoads, above).

At the same time, the question of whether a terminated employee has received a hearing that meets constitutional standards turns on the question of whether the *post termination* hearing is constitutionally adequate. The Sixth Circuit and the Tennessee courts have addressed the relationship between the pre-termination hearing and the post-termination hearing. In

Mitchell v. Frankhauser, 375 F.2d 477 (6th Cir. 2004), which involved a Kentucky public school employee dismissed for theft of school property, it said this:

> In the context of employment *rights*, the Supreme Court has explained that "the root requirement of the Due Process Clause" is "that an individual be given the opportunity for a hearing *before* he is deprived of any significant property interest." *Loudermill*. 470 US. At 542, 105 S.Ct. 1487 (quotation marks and citation omitted) (emphasis in original).... Pre-termination hearings "need not be elaborate." *Id* at 545, 105 S.Ct. 1487. "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id*. At 546, 105 S.Ct. 1487. This "initial check against mistaken decisions" is all that is necessary where the employee is provided with a full post-termination hearing. Id at 545, 105 S.Ct. 1487; *Brickerner v. Vonivich*, 977 F.2d 235, 237 (7thCir. 1992)) ("The Supreme Court has held that, depending on the circumstances, a pre-termination hearing, although necessary, may not need to be elaborate, as long as the plaintiff is entitled to a full hearing with the possibility of judicial review at the post-termination stage.") Post-termination hearings, on the other hand "serve to ferret out bias, pretext, deception and corruption by the employer in discharging the employee." *Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir.1988). [At 480]

In illustrating the interplay between the termination hearing, the Court pointed to *Carter v. Western Reserve Psychiatric Habitation Center*, 767 F.2d 270 (6th Cir. 1985) (per curium), in which the plaintiff argued that *both* his pre-termination and post-termination hearing were constitutionally inadequate. In that case, the district court had held that the plaintiff's *pre-termination*

hearing was constitutionally adequate. The Sixth circuit reversed the district court's grant of summary judgment to the employer and sent it back to the district court for a determination of whether the *post-termination* hearing was constitutionally adequate, reasoning that:

> Where, as here, a court has approved of an abbreviated pre-termination hearing due process requires that a discharged employee's post-termination hearing be substantially more "meaningful." At a minimum, this requires that the discharged employee be permitted to attend the hearing, to have the assistance of counsel, to call witnesses and produce evidence on his own behalf and to know and have an opportunity to challenge the evidence against him.

Returning to Mitchell, the Court declared that the plaintiff' in Carter and Mitchell were in similar positions: In Carter, the plaintiff had alleged that neither the pre-termination nor the post-termination hearings were adequate, and in Mitchell, the plaintiff was not even entitled to a full blown hearing after the pre-termination hearing; the school system provided no post-termination hearings, its brief declaring that "its hearings policy "was intended to take care of all the requirements of the due process *pre-termination*." (The court's emphasis) Obviously, under *Loudermill's* language even if the *abbreviated* pre-termination hearing is constitutionally adequate but there is no post-termination hearing, the latter cannot be adequate.

But the Court continued: "This is not to say that two hearings are always required to satisfy due process. If the pre-termination hearing is more "meaningful, as described in Carter, then no post termination hearing would be necessary…." [At 481] Indeed, today some cities bifurcate the hearing process: they give terminated employees an abbreviated *Loudermill* pre-termination hearing, and a subsequent full-blown post-termination hearing. Other cities give employees one hearing: a full-blown termination hearing. Under Mitchell, whichever method the city uses to satisfy *Loudermill*, it must give the terminated employee the full panoply of rights inherent in a full-blown hearing.

The express question of what rights a civil service employee who had a property right in his employment had at his pre-termination hearing arose in Case v. Shelby County Civil Service Board, 98 S.W.3d 167 (Tenn. Ct. App. 2002). There an electrical inspector was subject to a *Loudermill* pre-termination hearing by the Deputy Administrator of Codes Enforcement and the Chief Electrical Inspector. In the Court's words:

> … Mr. Case's representative at the hearing was Mr. Jerry Smith, who was permitted to observe and take notes, but not to otherwise participate. Mr. Case was advised that the purpose of the hearing was to provide him with an opportunity to respond to the accusations against him… Mr. Case presented his account of the incident giving rise to accusations of aggressive behavior toward a supervisor, as well as explanations concerning allegations of unsatisfactory work, disregard of orders and failure to carry out instructions. In short, Mr. Case was afforded the "opportunity to fully present "his side of the story*, although he was not permitted to confront his supervisors directly*. [At170] [Emphasis is mine.]

The Court declared that "*Loudermill* and its progeny have recognized that where the pre-termination hearing has been less than a full evidentiary hearing, a more formal post termination hearing is required. *Id. Brock v. Roadway Express, Inc*. 481 U.S. 252, 261, 107 S.Ct.1740, 95 L.Ed.2d 239 (1987)," but citing the Sixth Circuit case of *Carter*, discussed in Mitchell, above, declared that both the pre-termination and the post-termination hearings must be reviewed to determine whether the due process required by *Loudermill* had been met. Focusing on the plaintiff's allegation that he had not had the right to confront and cross examine witnesses (which logically implicates the right to counsel), the Court declared that "We agree with our sister jurisdictions that have held that where the decision to terminate employment turns on determinations of issues of fact, due process requires an opportunity to confront and cross examine witnesses. See *Bartlett v. Krause*, 209 Conn 352, 551 A.2d 710 (1988); *Ohio Assoc. of Public Sch. Emp. v. Lakewood City Sch Dist Bd. Of Educ*, 68 Ohio St. 3d 175, 624 N.E.2d 1043

(1994)."   [At 174]   However, concluded the Court the plaintiff had fully been given that right at his post-termination hearing.