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SECURITY OF TENURE OF ADMINISTRATIVE LAW JUDGES: HOW MUCH CAN AN ALJ SAY AND STILL STAY AN ALJ?

Professor Allen Shoenberger*

Two somewhat conflicting decisions of United States Courts of Appeals came out within a month of each other this summer regarding the security of tenure of Administrative Law Judges. *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997) concerned a suit brought by a hearing examiner from a municipal regulatory agency, the Commissioner of Municipal Affairs, the main regulatory agency for municipalities in Puerto Rico. *Latessa v. New Jersey Racing Commission*, 113 F.3d 1313 (3rd Cir. 1997) concerned the tenure of a racing judge. Both decisions are interesting in their own right - however the contrast between the decisions (neither referred to the other) is also interesting.

Roldan was an hearing examiner in an agency charged with uncovering, investigating and reporting to municipal mayors any irregularities in the municipalities' management. In that agency certain employees were classified as trust positions for purposes of the Puerto Rico Public Service Personnel Act.¹ When a governor was elected from the New Progressive Party, a new Commissioner of Municipal Affairs was appointed. A month later a new head was appointed to the legal division, and one month after that Roldan received a letter dismissing her effective that same date.

Litigation occurred in the context of a claim that in *Elrod v. Burns*, 427 U.S. 347 (1976) the supreme court had held that governmental employers may not discharge an employee because of political party affiliation without showing a governmental interest that

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¹115 F. 3d at 60.

outweighed the employee's first amendment interest in association. The plurality decision indicated that the government's interest could be adequately served by limiting patronage dismissals to policymaking positions.² A concurrence by Justice Stewart indicated that nonpolicymaking, nonconfidential employees should not be discharged on the basis of their political beliefs.

In subsequent decisions the court held that political affiliation was not an appropriate requirement for the effective performance of an assistant public defender. *Branti v. Finkel*, 445 U.S. 507 (1980). More recently the impact of *Elrod and Branti* was extended to politically motivated promotions, transfers, and recalls. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), and for certain independent entities who contract with the government (trash hauler, *Board of Commissioners, Waubesa County v. Unbeher*, 116 S.Ct. 2342 (1996)) (tow truck operator, *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996)).

The First Circuit has adopted a two part test for discerning when discharge based on political affiliation is permissible. First, do the discharging agency's functions entail decision making on issues where there is room for political disagreement on goals or their implementation? If so, then the court determines whether the particular responsibilities of the plaintiff's position, within the department or agency, resemble those of a policymaker privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is equally appropriate requirement for continued tenure. For the second prong, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders are significant factors.

Roldan conceded the first prong of the test, i.e. That OCMA is an agency whose functions require "decision making on issues where

²Id. at 61.

there is room for political disagreement on goals or their implementation."

However, the second prong was contested. The court looked to duties inherent in the position, not actual functions of past or present officeholders. The job description was considered the best, and sometimes dispositive, source for determining the position's inherent functions.

The job description for the Hearing Examiner detailed five specific responsibilities as well as a designation to carry out other assigned related duties. The five well defined responsibilities make clear that the position of Hearing Examiner "leaves little room for free-ranging actions independent of their limited scope. The narrow duties require application of technical and professional skills in evaluating facts and researching law. These duties are not broad and open-ended, and do not leave room for discretionary policymaking or policy implementation. Nor are they 'hazily defined.' the narrowly circumscribed duties permit the officeholder the opportunity to identify and investigate irregularities, but do not convey power or discretion to take any action as a result of those findings."³

The court found the instant position more akin to that of an internal auditor, addressed in *Cordero v. De Jesus-Mendez*, 867 F.2d 1 (1st Cir. 1989) where the policy maker did not have to engage in policymaking decisions, but instead required that the auditor investigate the financial records of a municipality and make a report to the Mayor and Comptroller. The auditor had no authority to correct the mistakes that he was charged to investigate.⁴

The First Circuit denominated the Hearing Officer in the instant case a mere "technocrat."⁵ After investigating and holding hearings, the Hearing Examiner was charged with reporting to the Commissioner, in whom authority rests to take action. The court considered that the five

³Id. at 62.

⁴867 F. 2d at 17.

⁵115 F. 3d at 63.

enumerated duties require technical and professional skills and do not provide discretion to formulate or implement policy. Accordingly, political affiliation was not an appropriate requirement for the position.⁶

Other indicia also were consistent with this determination. Thus though the salary was the fifth highest of the 13 levels in the OCMA pay scale, a significant number of employees may be paid more than the Hearing Examiner. The trust classification also was fifth-tier, but among 11 tiers. A law degree was not required, and no supervisory responsibility went with the job. No public appearances or speeches on behalf of the Commissioner went with the job. Contact with elected officials only took place in the context of a hearing, and in no other capacity does the Hearing Examiner act as a public spokesperson or as a representative of the agency.⁷

The catch all category, "possibility of additional assignments duty," was rejected as sufficient to distinguish this particular job as policy related. Moreover, the few additional assignments actually given to Roldan were not related to the Hearing Officer job description.⁸

The court abjured a "modicum" of deference to the Puerto Rico's legislature's designation of a particular position as "trust" or "confidential." The narrow grant of power to designate no more than 25 employees in an agency as confidential was not adequately related to the instant agency in which two tiers of secretaries and drivers were labeled as trust or confidential employees, suggesting the category was overly broad.⁹

The court then went on to deny a qualified immunity defense to the defendants. The law may have been blurred at the edges, but the court did not see the instant case as near that edge. The possibility

⁶Id. at 64.

⁷Id.

⁸Id. at 65.

⁹Id. at 65

might exist that at trial there could be a demonstration that the Hearing Examiner's functions included following the course of legislation, and providing legal assistance directly to the municipalities. Were such functions to be demonstrated at trial, the issue of a qualified immunity might again be raised. But summary judgment for the defendants on this issue was inappropriate.¹⁰

Contrast that decision with the third Circuit's decision in *Latessa v. New Jersey Racing Commission*,^{113 F.3d 1313 (1997)}. There the court held that (1) the non reappointment did not result in deprivation of the liberty interest of the judge in remaining free to work as a racing judge, (2) the racing judge failed to demonstrate a property interest in continued employment, (3) but that there was a genuine issue as to whether non-reappointment was motivated by the judge's protected testimony before the Office of Administrative Law on First Amendment retaliation claims, and (4) that summary judgment was also precluded on a claim that nonreappointment was in retaliation for internal complaints about penalty adjudication procedure.

Latessa had been licensed the United States Trotting Association as an Associate Judge with powers to officiate at harness horse meets. He began working as a racing judge in 1985, and continued through 1993. In New Jersey racing judges are appointed on a meet by meet basis and serve at the pleasure of the Commission.¹¹

Penalty decisions are made in the first instance by certain officials employed by the Commission, including panels of judges. The Commission may then itself modify a penalty decision, and an appeal may then lie to the Commission, which also has the power on its own motion to reject or modify a penalty. Sometime in early 1993, Mr. Zanzuccki (Executive Director of the N.J. racing Commission) and Mr. Vukceovich (Deputy Director of the N. J. Racing Commission) began making penalty "recommendations" in horse drugging case prior to the formal action of the three judge panel appointed to take initial action in the case.

¹⁰*Id.* at 66.

¹¹113 F. 3d at 1316.

In July 1993, Mr. Zanzuccki told Mr. Latessa that a 120-day penalty should be imposed by a panel of judges that included Mr. Latessa on a horse trainer accused of administering an illegal drug. Mr. Latessa apparently didn't disagree, and told the other two judges about Mr. Zanzuccki's statements, but the other judges decided otherwise, believing the penalty would be inconsistent with penalties in other cases and imposed a 90-day sentence. Latessa did not vote against this result.¹²

Zanzuccki was displeased and demanded reports from the three judges as to what had happened. Each of the other judges described the substance of their reasoning. Latessa described similar reasoning but indicated he had been outvoted although he advocated Mr. Zanzuccki's position. Follow up questioning of the other judges indicated that Latessa's "advocacy" didn't go much beyond reporting Zanzuccki's statement.¹³

During the course of the summer of 1993 Mr. Zanzuccki continued to make recommendations prior to hearings. Latessa testified about this practice before the Office of Administrative Law about this early intervention in the proceedings. Disagreements about the treatment of the 90-day case continued in the fall. In November Latessa testified to the Office of Administrative Law about the matter, and on the following day, Zanzuccki sent a memorandum to the Chairman of the N.Y. Racing Commission indicating he did not want Latessa reappointed.¹⁴

A week later the Administrative Law Judge credited Mr. Latessa's testimony and issued an opinion critical of the actions of Mr. Zanzuccki and his deputy. That opinion spoke of jeopardizing the impartiality of the agency head - the NJRC- and that the procedure make the proceedings before the OAL seem rather superfluous. "The primary reason for establishing the [OAL] was to 'bring impartiality and objectivity to agency hearings and ultimately to achieve higher

¹²Id.

¹³Id.

¹⁴Id.

levels of fairness in administrative adjudications.”¹⁵ The agency head was supposed to decide the case solely upon the record established at the hearing. If the NJRC receives information from the Executive Director or his deputy, it would be acting on information that neither the opposing party nor the ALJ had an opportunity to consider.¹⁶

The opinion also criticized the blending of functions within the agency, for Latessa testified he felt he had no option but to follow the recommendations on the proposed penalty. A licensee would appropriately question the impartiality of such a procedure so apparently lacking in fundamental due process. “[T]here is an (sic) least an appearance of impropriety.”¹⁷ Such a practice compromises persons of high integrity, such as Latessa, who serve at the pleasure of the NJRC.¹⁸

Latessa brought suit against various parties including the NJRC, Zanzuccki, and his deputy under 42 U.S.C. § 1983 based upon deprivation of federal constitutional rights. First he alleged deprivation of his 14th amendment due process liberty interest in remaining free to work as a racing judge. Second, he alleged violation of his 14th amendment due process property interest in the position of Presiding Judge for the NJRC. Third, he alleged his free speech rights were violated under the First Amendment.

The court rejected the liberty interest claim, asserting that the liberty interest was not in a specific job. Since Latessa demonstrated no attempts to secure such appointment except for his non-reappointment at the Meadowlands, he failed as a factual matter to create an issue that survived summary judgment.¹⁹

The court rejected the property interest claim, asserting that the property interest in employment had not been demonstrated. Such a

¹⁵Id. at 1316.

¹⁶Id. at 1317

¹⁷Id.

¹⁸Mr. Latessa was not reappointed in 1994. 113 F. 3d at 1323.

¹⁹Indeed, Latessa indicated he worked for a short time as a judge in Maryland, but found that employment unacceptable for geographical reasons.

demonstration required a legitimate claim of entitlement, not just a unilateral expectation. It was undisputed that judges in N.J. work at the pleasure of the Commission, and are paid on a weekly basis, with no fringe benefits. Under the statute there is little to question that this was at will employment. However, the court went further to analyze whether there had been creation of a mutually explicit understanding between the employee and employer that employment would be continuous. Latessa indicated a triable fact existed in the instant case because it was generally understood that if you kept you nose "clean" and met expectations you would be generally reappointed. The court, however, found that generalized statement inadequate either itself or through minimal support in other depositions, to raise a factual question on "tenure."²⁰

Thus the courts decision on these first two claims turned largely upon the service at the pleasure of the Commission nature of the judge's position.

However, the court reached different conclusions on the First Amendment claims and reversed the grant of summary judgement on both of the First Amendment claims to the Defendants.

The court analyzed the first Amendment claims under a three step test: First, the plaintiff must prove that the speech was protected; Second the plaintiff must show that the speech was a motivating factor in the alleged retaliatory action; and, Third, the defendants may defeat the plaintiff's claim by establishing that the adverse action would have been taken even in the absence of the protected speech.²¹

The District Court had found the first prong of the test satisfied, i.e. that the speech related to a matter of public concern, and not an unrelated matter such as employment concerns of the individual employee. *Connick v. Meyers*, 461 U.S. 138 (1983). The Third Circuit had already held that truthful testimony before a government body,

²⁰113 F. 3d at 1318.

²¹*Id.* at 1319.

whether under subpoena or not, was a matter of public concern.²²

A balancing test announced in *Pickering v. Board of Education of Township High Sch. Dist.* 205, 391 U.S. 563 (1968) requires that the expression "must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees."²³ Thus the government must show that the public interest is outweighed by the disruption.

The defendants asserted that Latessa was fired for "lying" in conversation and memoranda, not because the testimony was likely to be disruptive.²⁴ As such, the speech should be treated as unprotected.

The court determined that the combination of two facts, (1) that Latessa had testified on the day prior to the first letter recommending non-reappointment, and (2) that the replacement for Latessa had not been determined upon prior to his testimony, made the issue incapable of resolution as a matter of law. The defense of lying, could also be viewed as mere pretext, i.e. was transmission of Zanzuccki's recommendation by Latessa actual "advocacy" or simple transmission of information.

Supporting the potential view that this was a pretextual reason, was the fact that Latessa had served for many years without challenge to his integrity. Moreover, Latessa was reappointed as Presiding Judge for the fall meet a month after the incidents that allegedly indicated his lack of integrity. The lack of any documentation prior to his testimony of a decision not to retain Latessa, as well as the letter the day after his testimony indicating that Zanzuccki sought the cooperation of the Chairman of the NJRC indicate that the decision had not already been made.²⁵

²²113 F.3d at 1319, citing *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3d Cir. 1997), cert. denied, 118 S.Ct. 64 (1997).

²³113 F. 3d 1319.

²⁴*Id.*

²⁵*Id.* at 1320.

Thus a factual issue exists as to whether Latessa's testimony contributed to the decision not to renew his employment.

The Third Circuit also rejected the *Mt Healthy School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) alternative explanation relied upon by the district court, that he would have been fired in any event.²⁶

The court was unclear as to whether Latessa contended that his vote was itself protected speech, but does allege that the right to vote freely in other cases was chilled by Zanzuccki's pressure. His concerns about the procedure, the court ruled, were issues of public concern, but not his generalized allegation that he could not vote as he wished.²⁷

The objection about interference with penalty decisions was a more substantial issue, even for those objections raised only internally within the agency.²⁸ Such internal expression may also be protected. *See, Connick v. Meyers*. The issue was remanded to the District Court to apply the three step analysis outlined above. (1) The defendants, for example, had not alleged any disruption to the governmental functions as a result of Latessa's objections. (2) The court found the balance of interests unclear. (3) The District Court didn't address whether the public concern portion of the internal speech, rather than the testimony alone, was a motivating factor in non-reappointment.²⁹

This decision, however, had attached to it a strong concurring and dissenting opinion by Circuit Judge Mansmann.³⁰ His disagreement was with the First Amendment portions of the decision, for he found adequate evidence to support a summary judgement in favor of the defendants. While the details differ in a few matters, Judge Mansmann simply found that there was enough demonstration through depositions of Zanzuccki that a decision not to reemploy had been made sometime

²⁶*Id.* at 1321.

²⁷*Id.*

²⁸*Id.*

²⁹*Id.* at 1321-22.

³⁰*Id.* at 1322.

in the early fall of 1993, sufficiently so as to make the Latessa's testimony irrelevant.³¹ The dissenting judge didn't directly address the internal complaint issue.

If one compares the treatment of the Assistant District Attorney's questionnaire in *Connick v. Meyers*, as indicating her personal interest in employment and not the public interest,³² it should be clear that this is a narrow victory for Latessa. Only one question in that ADA's questionnaire was treated as raising an interest of public concern, the question was whether any other ADA's felt pressure to work in political campaigns.³³

However, Meyers's questionnaire was considered so disruptive to the efficiency of the office so as to disrupt close working relationships.³⁴ A wide degree of deference is due to such employer judgements. Moreover, Meyer's raising of the issue in the context of a job reassignment that she did not like, tipped the balance against her "public interest" assertion.³⁵ Thus the public concern aspect of Meyer's questionnaire which only in a most limited way turned upon an issue of public concern, was overbalanced by the disruptive impact reasonably believed to inhere in the situation by her employer.³⁶

On the other hand, an off the cuff remark by a probationary clerical employee in a county constable's office after an attempted assassination of President Reagan, "If they go for him again, I hope they get him,"³⁷ did not justify dismissal. *Rankin v. McPherson*, 483 U.S. 378 (1987). This remark constituted speech on a matter of public concern.³⁸ Moreover, the employee served no confidential, policymaking or public contact role.³⁹ The dissenting opinion thought

³¹Id. at 1325.

³²461 U.S. at 148.

³³461 U.S. at 149.

³⁴461 U.S. at 151.

³⁵461 U.S. at 153-4.

³⁶Only one of the four dissenting justices in *Connick* remains on the court.

³⁷Even though *McPherson* could be dismissed for any reason or for no reason.

483 U.S. at 383.

³⁸483 U.S. at 386.

³⁹483 U.S. at 390-1.

it inappropriate that a law enforcement employee could be permitted to cheer for the bad guys, and the speech itself "so near the category of completely unprotected speech"⁴⁰ that it should not be permitted to outweigh the interest of the employer against disruption.⁴¹

Thus ALJ's speak, even internally, at their peril, particularly, as in Latessa's case when no system of tenure exists. On the other hand, there are serious threats that first amendment based causes of actions exist against persons who rely upon speech as grounds for disciplinary action. The practical burden is likely to be on the ALJ, however, particularly if employment and salary is terminated. Alternative employment may be hard to come by, or be "geographically inconvenient" as it was for Latessa. Thus the rights recognized in these two cases are quite tentative rights, rights not likely to reassure, but rather perplex, a conscientious ALJ.

⁴⁰483 U.S. at 397-8.

⁴¹*See also, Waters v. Churchill*, 511 U.S. 661 (1994), (an employer may discharge on the basis of what he reasonably believes was said, even if something else was said. *Caveat Orator*).