No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2020

MELINDA PEARSON,
Applicants/Petitioners,

v.

AUGUSTA, GEORGIA, et. al.
Respondents.

Petition for Writ of Certiorari To the Eleventh Circuit

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Counsel of Record

December 4, 2020

Questions Presented.

I. Was it error for the panel to affirm a grant of summary judgment, finding due process had been provided where a challenged demotion had been effected before or without implementation of the three steps of *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985), particularly the preclusion of a decision by a neutral decision maker; where the panel, in violation of *Tolan v. Cotton*, construed the facts of a public employment investigation about a department's policy on the accrual and use of comp time by salaried employees, to find that due process had been provided to Plaintiff Pearson, who was demoted before being provided the opportunity to show a neutral decisionmaker that she had followed comp time process and policy, that similarly situated males had followed, but who were not facing discipline -- which resulted in the panel's finding that the evidence could show the proffered reason for the demotion was pretext (Appx. 20a-23a) -- where the panel's construction of the evidence about the investigation upon which the due process finding was based, was an investigation by the official who made the demotion recommendation, implicating due process concerns, and where other evidence could show personal or other unlawful motive or bias, and where the panel's construction of the evidence about the investigation to find compliance under *Loudermill*, (Appx. 16a) omitted the need for the process to have had the substantive step of a decision by a neutral decisionmaker, and where the exonerating evidence that could have been presented was the evidence of which the investigator and recommender of demotion was aware, that formed the basis of the panel's pretext finding at Appx. 20a-23a?

List of Parties.

Augusta, Georgia Through its Mayor Hardie Davis, in his official capacity and its commission, in its official capacity.	Respondent/ Appellee/ Defendant.
Doe, John/ Jane Whose true names Are not known, individually And in his or her Individual capacity, Under color of law.	Respondent/ Appellee/ Defendant.
Pearson, Melinda Beazley	Petitioner/ Appellant/ Plaintiff.
Russell, Fred Individually and in his Capacity as City Manager, As final policy maker, Under color of law.	Respondent/ Appellee/ Defendant.
Shanahan, Bill Individually and in his Official capacity, Under color of law.	Respondent/ Appellee/ Defendant.
Smith, Sam Individually, and in his Official capacity, Under color of law.	Respondent/ Appellee/ Defendant.

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Certificate of Interested Persons.

The undersigned certifies that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Augusta, Georgia – Appellee/Defendant.

Batson, John P. – Attorney for Appellant/Plaintiff.

Brown, Wayne – Attorney for Appellee/Defendant Augusta, Georgia.

Carnes, Ed – Eleventh Circuit Judge.

Carnes, Julie – Eleventh Circuit Judge.

Clarke, John - Commissioner of Appellee/Defendant Augusta, Georgia.

Clevenger, Raymond- Federal Circuit Judge.

Davis, Hardie, -- Mayor of Appellee/Defendant Augusta Georgia.

Davis, Mary – Commissioner of Appellee/Defendant Augusta, Georgia.

Fennoy, William – Commissioner of Appellee/Defendant Augusta, Georgia.

Frails, Randolph – Attorney for Appellee/ Defendant.

Frantom, Sean – Commissioner of Appellee/Defendant Augusta, Georgia.

Garreett, Brandon – Commissioner of Appellee/Defendant Augusta, Georgia.

Hasan, Ben – Commissioner of Appellee/Defendant Augusta, Georgia.

Haynes, Tameka – Attorney for Appellee/ Defendant.

Hall, Randal- District Court Judge.

Jefferson, Andrew – Commissioner of Appellee/Defendant Augusta, Georgia.

MacKenzie, Andrew – Attorney for Appellees/Defendants.

Pearson, Melinda Beazley – Appellant/Plaintiff.

Russell, Fred – Appellee/Defendant.

Shanahan, Bill – Appellee/Defendant.

Sias, Sammie – Commissioner of Appellee/Defendant Augusta, Georgia.

Smith, Grady – Commissioner of Appellee/Defendant Augusta, Georgia.

Smith, Sam – Appellee/Defendant.

Smitherman, Jody – Attorney for Appellees/Defendants.

Williams, Bobby – Commissioner of Appellee/Defendant Augusta, Georgia.

Williams, Marion – Commissioner of Appellee/Defendant Augusta, Georgia.

Respectfully submitted this 4th day of December, 2020.

/s/ John P. Batson
John P. Batson
Ga. Bar No. 042150
Attorney for Petitioner

Prepared by:

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List of Proceedings.

This petition involves two cases that were consolidated. The first filed case, *Pearson v. Augusta, Georgia, et al.*, S.D. Ga. 1:14-CV-00110, alleges a violation of Equal Protection, a *Loudermill* due process claim, and a violation of the Fair Labor Standards Act.(Doc. 1). The parties sued are the City of Augusta, City Administrator Russel, Asst. Admin. Shanahan, and Sam Smith, an employee alleged to have conspired with the other named and unnamed Defendants to replace Pearson.

The second filed case is 1:15-CV-00123. This case was only against the City of Augusta, alleging violations under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, 42 U.S.C. 12101.

The two were consolidated under the first case number 1:14-CV-00110. (Doc. 132).

Pearson moved for partial summary judgment on her *Loudermill* claims as to the demotion and termination. Doc. 54-1. This petition concerns only the challenge to the demotion as having been in violation of due process.

Defendants moved for summary judgment on all claims.

The District Court dismissed all the claims except the Title VII retaliation-termination claim, Opinion (Appx. 34a-77a. (Doc.193), which proceeded to trial in October 2017, resulting in a directed verdict for Augusta.

An appeal was timely filed to the Eleventh Circuit. Eleventh Cir. Case 17-15275.

After the panel affirmed the District Court, (Appx. 1a-33a) Pearson sought rehearing which was summarily denied July 7, 2020.

Table of Contents.

Table of Authorities.

Cases

Citations to the official and unofficial reports of opinions and orders entered.

United States Court of Appeals
For the Eleventh Circuit

Pearson v. Augusta, Georgia, et al., (11th Cir.) No. 17-15275 (Order entered May 11, 2020) (App. 1a- 33a).

Pearson v. Georgia, 806 F. App'x 940 (11th Cir. 2020) (Doc 193).

United States District Court
for the Southern District of Georgia

Pearson v. Augusta, Georgia, et al., No. 1:14-cv-00110-JRH-BKE (S.D. Ga) (Order entered March 9, 2017) (App. 34a-77a).

Pearson v. Augusta, 243 F. Supp. 3d 1344 (S.D. Ga. 2017).

Statement of Jurisdiction.

The District Court order sought to be reviewed was entered March 9, 2017 (Appx. 34a-77a) and after a trial in October 2017, a directed verdict was entered in Defendants' favor rendering a decision on all claims, and judgment was entered October 26, 2017. (Doc. 247). A Notice of Appeal was timely filed on November 27, 2017. (Doc. 248).

The Eleventh Circuit panel decision sought to be reviewed by certiorari grant was entered May 11, 2020. (Appx. 1a-33a). Rehearing was timely sought June 1st and denied July 7, 2020.

This Court's March 19, 2020 order extended the petition filing period under Sup. Ct. R. 13.1, from 90 to 150 days, making this petition for writ of certiorari due December 4, 2020. Sup. Ct. R. 13.1, 13.3 and 30. Jurisdiction to review a timely certiorari petition is under 28 U.S.C. § 1254(1).

Necessary Facts.

Pearson began working for the City of Augusta, or its predecessor Richmond County, as a summer job in 1980, and the next year was hired for a job after school and on weekends. (Doc:31 p.16 Pearson p.60:6-63:3).[1] In 1996 Pearson became the "highest ranking female and the first female to become an Operations Manager." (Doc:50-1 Pearson ¶4).

Pearson (white female) reported directly to Recreation Department Director Tom Beck (white male) until May of 2011 when there was a merger of the Trees and Parks Department with the Recreation Department, (Doc:31 Pearson p. 26, p.100:14-24), when Dennis Stroud (black male) was appointed Deputy Department Director, to whom Pearson then reported. (*Id*. p.64, p.252:4-253:2). Sam Smith, from Trees and Parks, and his subordinates including Millie Armstrong (black female), Vittirio Washington (black male), Angelo Collier (black male), Jeanette Johnson (black female) merged with the Recreation Department, all to be supervised by Pearson. (Doc:31 p.40, Pearson p.155:19-20; Doc:96-1 Joanie Smith p.82-83).[2]

In December 2011, Pearson complained to Beck about Stroud creating a hostile work environment and failing to discipline subordinates like Millie Armstrong and Sam Smith. (Doc:116-6

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[1] Page numbers within citations to depositions refer first to the page number generated by the electronic filing system. Where a transcript is filed in its condensed version, such as the Pearson I deposition, there is a second page number for the deposition page. For example, the citation Doc:31 p. 16-17 Pearson p. 60:6-63:3 refers to the Pearson I condensed transcript, so the text can be found at Doc:31 p. 16, but because there are four pages of deposition text per electronically filed page, there is a second page number indicating which of the four pages the cite can be located. In the above referenced cite, p. 16 contains pages 58-61 and page 17 includes pages 62-65 and the relevant text can be found from line 6 on page 60 through line 3 on page 63.

The following are the document numbers corresponding the depositions: Pearson I (Doc:31); Pearson II (Doc:147-1); Shanahan (Doc:41-1); Russell (Doc:37-1); Sam Smith (Doc:104-1); Clark (Doc:76-1); Foster (Doc:55-5); Joanie Smith P. 1-100 (Doc:96-1), Smith p. 101-200 (Doc:97-1), Smith p. 201-222 (Doc:98-1); Scheuer (Doc:114-1); Houck (Doc:115-1); Misty Smith (Doc:113-1).

[2] The race and gender of the employees are in Doc:110-1.

Memo). Smith "incited hostility from his workers ... against [Pearson]" and "told Mr. Beck he encouraged [his workers] to be insubordinate to [Pearson.]" (Doc:31 p.78 Pearson p.308:2-18).

During this period Pearson sought some time off, and with Stroud's approval, used comp time to take off December 27-30, returning January 3, 2012. (Doc:31 p. 44 Pearson p.171:9-172:17; *id*. p.46, p.179:16-180:3).

Stroud was terminated by Director Beck on January 3, 2012. (Doc:116-6 Memo).

Following Stroud's termination, Sam Smith continued to refuse to work, so Pearson reissued Smith job duties in January and February 2012. (Doc:105-5 p.3-6). Beck attempted to suspend Smith for one day, after GPS evidence showed repeated failures by Smith to meet with Pearson. (Doc:88-6). Pearson recommended Smith's termination on March 5, for continued insubordination after GPS-evidence revealed that Smith was driving his city vehicle for personal reasons during work hours. (Doc:105-8). GPS evidence confirmed that Smith was committing timecard fraud. (Doc:105-10 p.1-4).[3]

Shanahan would present the appearance of following through on Pearson's recommendations to discipline Sam Smith, by telling Ron Clark in HR to get with Pearson and move forward to discipline Smith, but Clark explained that there was "an understanding" between he and Shanahan not to move forward and discipline Smith. (Doc:76-1 Clark p.139-145).

Lisa Hall, payroll clerk, Stroud, Misty Smith, and Sam Smith "were all after Melinda," (Doc:91-1 Hall p.93:15-94:12), that Shanahan "had to ... know what was going on," (*Id*. p.96:17-19), that "[a]bsolutely" "Misty [was] interested in getting Mr. Smith in for Melinda and replacing Melinda," (*Id*. p.93), and "it was whatever [Misty] had to do to help [Sam] get to where she thought

[3] Documents "supporting ... time card fraud on the part of Mr. Smith." were sent to deputy city administrator Bill **S**hanahan on April 13. (Doc:106-1 p.1).

he should be," i.e. "[i]n charge" of "[t]he shop." (*Id.* p.114:14-115:2). Lisa Hall was informed about the conspiracy to replace Pearson with Sam, because "Mr. Shanahan and Misty and Sam would all come to my office because they were all my friends ... . I didn't agree with what they were doing, but they could come and talk to me every day." (*Id.* p.96:19-23; p.94:18-19.).

Smith told Pearson that he was smarter than her (Doc:147-1 Pearson II p.16:4-5) and said in deposition he is "sure" of that. (Doc:104-1 S. Smith p.40-41).

Armstrong said, "she 'don't work for no woman' ... , '... not a white woman,'" referring to Pearson. (Doc:89-1 p.1).

Shanahan alleged that he began the investigation based on the complaints of Lisa Hall, sending a memo to City Administrator Russell a memo, "Implementation of Recreation Department Investigation" saying "[t]he Time Card Investigation, within the Recreation Department, was started when Lisa Hall, Payroll Clerk, contacted Onajuanita Foster with the following concerns," including five bullet points about Pearson's use of catastrophic leave and comp time. (Doc:95-5). Shanahan's assertion that the investigation started when Lisa Hall contacted Foster, is "a lie." (Doc. 91-1 Hall p.26-27. Lisa Hall repeatedly requested that Shanahan correct the false statement but he would not. (*Id.* p.43:15-45:2).

Defendant Shanahan, along with personnel in the HR Department Ron Clark and Onajuanita Foster, began an investigation into comp time usage in early 2012, and who should have known whether Plaintiff was ever given notice of the policy change, admits that he has "no idea" whether "through the time that Ms. Pearson had requested the four days, was there any evidence that she had been instructed that she could no longer rely on the practice of the rec department to request comp time off." (Doc:41-1 p.43-44).

On February 28th Plaintiff was told to come to the main office. (Doc:31 Pearson I p.182: 8-10). Before the meeting, Plaintiff sat next to Mr. Beck, and Mr. Beck told her that Bill Shanahan, Ron Clark, Onajuanita Foster were in his office, talking to Renee Kaufman, who kept the payroll records in Plaintiff's absence, and who had the department payroll book that Plaintiff kept. (*Id.* p.182-183). Mr. Beck told Plaintiff they were looking into the comp time record keeping practice. (*Id.* p.183-184). Mr. Shanahan, Mr. Clark, Ms. Foster, and Ms. Kaufman come out and Shanahan told Beck, "[D]on't worry about it . . . I looked into . . . [and] this young lady [referring to Renee Kaufman who was holding the payroll book] explained everything." (*Id.* p.184-185; 185:7-8). Plaintiff asked Shanahan, if he was the one who asked to talk to her, and Shanahan said:

> [O]h, yeah, but I don't need to speak to you . . . just go on back to your job. . . . Don't even worry about it. Don't give it another thought. . . . I solved the problem. . . . I'm just going to get with Fred [Russell]. Nothing we can't fix. . . . [I]t's just something I've got to work out with Fred [Russell].

(*Id*. p.185:16-22). Plaintiff learned that Shanahan was looking into comp time record keeping, but she was not informed that the investigation could lead to disciplinary actions against employees, nor that she might be a suspect. Moreover, Shanahan's statements to Plaintiff, told her she was not a suspect and not being considered for discipline. (Doc:50-1 ¶45).

Jeanette Hurley and Dean Williams told Pearson that Misty Smith, Sam Smith and his crew "Angelo Collier, Jeanette Johnson, Sam Smith, Vittirio Washington, Millie Armstrong ... were going to fabricate a story about [Pearson] creating a hostile work environment," (Doc:31 Pearson p.282:12-285:2), so that "Sam [Smith] was going to be in [Plaintiff's] job." (*Id.* p.284:23-25).

On March 5 there was a News 12 story (Doc.107-1) by reporter Chris Thomas including a letter from a Recreation Department anonymous "whistleblower," who was actually Misty Smith,[4] that falsely accused Pearson: "of creating a hostile work environment," of retaliating against the employee who accused her of creating a hostile work environment, and alleged that Dennis Stroud had been fired due to his race, African American: "[T]hey had to go through the motions with Stroud because they had to at least show an attempt at diversity," ... "Take a look at photos of each and see if you can figure a possible motive." (Doc:107-1 p.2).

When Pearson told Beck that this false allegation was harassment, he encouraged her to seek legal advice and told her that HR (Mr. Shanahan, Mr. Clark, and Ms. Foster) had made inquiries with Beck " asking inappropriate questions ... that targeted management styles of [Pearson]... .)." (Doc:33-1 Appeal Letter p.7).

During this period Pearson sought some time off, and with Stroud's approval, used comp time to take off December 27-30, returning January 3, 2012. (Doc:31 p. 44 Pearson p.171:9-172:17; *id*. p.46, p.179:16-180:3).

Plaintiff was called to meet in about mid-March with Clark, Foster, and Shanahan, a month and a half before her demotion, and they were "bringing [employees] in one-by-one," and she spoke to them for less than "10 minutes." (Doc:31 p. 48 Pearson p.187). Plaintiff told them, "what I'd always been told to do … [which] was to show [the comp time] as if I was there [at work]." (*Id.*). Plaintiff explained, "what they explained to me was … that even though I'm like an exempt employee and I'm out here doing this work that is non-exempt that I can't show it on the comp area [on the payroll time card]." (*Id.*). At no point during the meeting was Plaintiff

[4] Joanie Smith figured out and explains how she knows Sroczynski (Smith) authored the "whistleblower" letter. (Doc:96-1 Joanie Smith p. 90:25-94:13).

informed that the questioning about the Department's comp time recordation method was a disciplinary investigation, much less that she was a suspect in general or for demotion specifically. (Doc:50-1 ¶48).

On March 23, Beck e-mailed Shanahan telling him he was putting an end to further investigation discussions with his staff about whether Joanie Smith and Ms. Pearson were mistreating their employees and the time-card issue. (Doc:46-4). "The time card issue is no secret or mystery," Beck reminded Shanahan, "I have acknowledged as well as several other staff what our process is and has been for 30 years for exempt employee time off for extra hours assigned, and how we have handled the documentation of such." (*Id.*). Beck further indicated that the looked forward to a meeting to "bring closure to the time card issue, and also discuss further the inappropriate questioning from your HR employees." (*Id.*).

During early April 2012, Millie Armstrong, on Sam Smith's crew, came into Pearson's office and "wanted to put [her] in a choke hold." (Doc:147-1 Pearson II p.33:23-34:12). When Pearson told Shanahan, he told her not to go back to the shop alone, (Doc:96-1 Joanie Smith p.40:10-14), said he would talk to the law department about it and check Millie's personnel record. (*Id.* p.41:23-42:14). But Shanahan took no action to ensure Pearson's safety, stating "he thought she was playing." (*Id.* p.44:5-7).

On April 12, at the request of Ron Clark, Pearson gave a statement about comp time use in December 2011 and she indicated that she had requested time off from Dennis Stroud who had approved it and someone else filled out the time card for December 24, 2011 through January 6, 2012 during her absence. (Doc:43-2).

On April 24, Pearson complained to Ronald Clark in Human Resources that Vittirio Washington and Millie Armstrong were causing, "a hostile work environment." (Doc:37-3 p.3-5).

Pearson had overheard Washington say, "all [Pearson] do[es] is sit [her] 'white ass' in the car because [she's] scared and that [she] do[esn't] do any work [her]self. Mr. Washington said that [Pearson] didn't care because [she] live[s] in [her] 'F_____ white neighborhood.'" (*Id*. p.4). Washington said "Sam was F____ in Charge" not Pearson." (*Id*.).

On April 23, Shanahan and Russell recommended the termination of Beck over four charges of misconduct:

(1) that he committed "fraud, waste and abuse in violation of Augusta, Georgia policies";

(2) that he "directed or permitted subordinates to violate a rule, policy or regulation";

(3) that he "intentionally destroyed, stole, possessed Augusta Georgia property, tools or equipment without consent;" and

(4) that he "intentionally and fraudulently falsified an official Augusta, Georgia document."

(Doc:51-1 Beck p.7 ¶ 12).[5]

[5] To fully understand the long-standing Augusta practice for granting compensation time to its employees one must appreciate an undeniable fact, Augusta was classifying employees as exempt who were clearly non-exempt under the Fair Labor Standards Act. (FLSA). (See Doc:53-1 Boyles Affidavit). That is, Augusta was deducting pay from these so-called "exempt" employees "salaries" on an hourly basis, or requiring that they use sick or leave time during all absences.

The system set up by Boyes, Beck's predecessor as Director, was designed to compensate these employees and had to be done in a way that it did not highlight the inconsistent treatment these so-called exempt employees were receiving. (Doc:53-1 Boyles ¶5-6). Thus, as Beck, Pearson and Boyles have testified, the system was set up to compensate these so-called exempt employees for the considerable overtime they worked without calling it overtime and without calling them non-exempt or hourly employees. (*Id*., Doc:52-1 p.2- 5 Beck p. 57- 64 ; Doc:31 p. 22-23 Pearson p.83-87).

The two-step practice evolved over thirty-five years. (*Id*.). First, the employee had to enter time as "at work time" on a time card when, in fact, that employee was taking comp time away from work. (*Id.*). That is because the official practice of Augusta was to make it appear that these employees were actually exempt. (*Id.*). Thus, there was a written prohibition against paying these exempt employees overtime and against granting them compensation time. (*Id.*)

Second, the Recreation Department had to set up a system to track the actual overtime worked by these employees. (*Id.*) This system required that the time cards be printed in triplicate. (*Id.*). The employee would fill out the white copy and enter hours as worked for a period that the employee was actually taking accumulated comp time off from work. (*Id.*) The copy below was then filled out separately and the employee would note that they were taking comp time for that period.

On April 26, Pearson emailed Shanahan complaining about Smith creating a, hostile work environment: "[j]ust this week, we had an incident whereupon several other employees were overheard using profane language ... that had racial overtones" about her and Commissioner Bowles. (Doc:37-3 p.2-5). But Smith and Shanahan had "bonded" by the end of April 2012. (Doc:104-1 p.19-23).

After the mid-March meeting, but before the May 2nd demotion, there was one more meeting. Plaintiff was called to a meeting and found Ron Clark, Onajuanita Foster, and Jody Smitherman in the room. (*Id.* ¶51-54). At this meeting, not only was Plaintiff not informed that Augusta was considering demoting or disciplining her, Ron Clark affirmatively told Plaintiff that the City believed she handled the contested comp time without fault, or more specifically Clark told Plaintiff:

At no point during this hearing was Plaintiff told that she was being considered for demotion. (*Id*. ¶63-65).

The day before Shanahan demoted Pearson he held a meeting with everyone in the Recreation Department – except Pearson – and announced he was removing Pearson from her position, and that they "were not to say anything to Melinda Pearson otherwise [they] would be terminated." (Doc:109-1 Kaufman Dec. ¶88).

It was in Shanahan's interest to demote Pearson instead of terminating her so she would not have a meaningful right to appeal that determination. The City Policy manual provided for no appeals to the personnel board for demotions. (Doc:55-2 p.65-66).

That copy was kept by the employee's supervisor. (*Id.*) . The supervisor would keep track of actual worked hours and would have to authorize the use of comp time in advance of the employee taking it. (*Id.*) Detailed records were prepared to follow this practice.

Shanahan's version of the May 2nd meeting is that they gave Pearson the letter indicating she would be demoted for "stealing time" and they "walked her through [the letter]." (Doc:41-1 p. 16 Shanahan p. 60:8-12).He did not reference that he gave her an opportunity to explain it. He did not indicate that he had participated in the investigation nor ask whether she wanted someone to review the decision who had not participated in the decision.[6]

The May 2nd letter is the notice of the demotion, which was given in the meeting telling her she was demoted. She was not given notice of a possible demotion; she was given notice of the demotion for stealing time. (Doc:45-6). No Defendant has claimed that Pearson received

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[6] The panel at 20 – 22 addresses Plaintiff's pretext evidence and finds at 22 that "Pearson has raised a genuine issue of material fact as to whether the Defendants' articulated reason for demoting her was pretextual." (Appx. 20a-22a). Therefore, the text below need not necessarily be considered but is the basis for that finding.

Of the statements obtained by Shanahan's comp time investigation, four of them were fabricated and intentionally falsified to make it appear that Pearson was in the wrong, and the other statements were favorable to Pearson, indicating that exempt employees do accrue comp time.[6]

The four fabricated statements are those attributed to Shirley Osborn, Ron Houck, Dennis Stroud, and Lisa Hall.

Shirley Osborn's alleged statement reads: "Osborn does not know of any exempt employee to include herself that has had the opportunity to use (4) days or a week off for compensatory time." (Doc:46-5 p.3). But Ms. Osborne says this was a "falsif[ied] statement," because she "informed both Clark and Foster that, 'Yes, I had used (5) days of comp time during one week before.'" (Doc:148-1 Osborn Dec. ¶¶11& 34).

Ron Houck allegedly stated "[e]xempt employees do not accrue compensatory time," (Doc:46-5 p.7), but Houck would "not" "have signed such a statement" because "exempt employees did accrue compensatory time in even 2012." (Doc:115-1 Houck p.32:6-15 & 17:4-18:12).

Dennis Stroud wrote a statement denying ever approving exempt-employee comp time, (Doc:79-8), but Clark admits documents showing Stroud's had approved Pearson's comp time. (Doc:76-1 Clark Dep. p.154:12-15). Ron Clark says "it would be clear to Mr. Shanahan that … on the one hand Stroud is saying he did not approve comp time for exempt employees and then you had other documents saying that he did." (*Id* p.157:13-17).

Shanahan sent Russell a memo, "Implementation of Recreation Department Investigation" saying "[t]he Time Card Investigation, within the Recreation Department, was started when Lisa Hall, Payroll Clerk, contacted Onajuanita Foster with the following concerns," including five bullet points about Pearson's use of catastrophic leave and comp time. (Doc:95-5). Shanahan's assertion[6] that the investigation started when Lisa Hall contacted Foster, is "a lie." (Doc:91-1 Hall p.26-27). Lisa Hall repeatedly requested that Shanahan correct the false statement but he would not. (*Id.* p. 43:15-45:2).

notice of the theft charge against her before May 2, 2012.[7] The prior contact about this topic in March, she was left with the impression that there was an institutional problem that had to be worked out between Shanahan and Fred Russell. (Doc:31 p. 185:16-22)

Pearson was told to report as a laborer on May 8 (Doc:31 p.52 Pearson p. 205:1-5). Defendants were aware of injuries to her neck and back. (*Id*. p.22 Pearson p.83).

On May 7, Pearson met with Onajuanita Foster and was given new job duties as a maintenance worker. (*Id.* p.52 Pearson p.205). Her salary decreased from $60,017.88 down to $30,671.44." (Doc:54-2 p.3; Doc:69-3 p.2). During his twelve years as City Administrator, (Doc. 37-1 p. 3 Russell p.7:20-21) Russell does not know of another demotion that resulted in a 50% pay cut. (*Id*. p. 16 p.60:19-21).

On May 8, Pearson was assigned to use a chisel and hammer to chisel tile from a concrete floor at Julian Smith Casino while on her knees. (Doc:30 p.30-31 Pearson p.211, 218). She injured her back and called out of work on Friday May 11. (*Id*. p. 55 Pearson p. 217)

The post-demotion hearing was May 24th. (Doc:37-1 p. 34). Russell who conducted the nominal, May 24th appeal hearing of the demotion, when asked if there was "a previous hearing," states that "I assume so. I don't really know." (Doc:37-1 Russel. Dep. p.34:3-4). When Russell was asked if Shanahan ever gave him a report or record of a previous hearing, says "[n]ot to my knowledge." (*Id*. p.34:8-11).

[7] Russell who conducted the nominal, May 24th appeal hearing of the demotion, when asked if there was "a previous hearing," states that "I assume so. I don't really know." Russel. Dep. p.34:3-4. When Russell was asked if Shanahan ever gave him a report or record of a previous hearing, says "[n]ot to my knowledge." *Id*. p.34:8-11.

According to Defendant City Administrator Russell, who presided over the May 24th meeting admits "it was not a hearing" but "[s]imply [an] administrative review based on the documents that I'd received from both Mr. Shanahan and Ms. Pearson." (Doc:37-1 Russel p.12).

At the meeting on May 24 after Pearson asked to have her witnesses testify, Russell "informed [Pearson] that he wasn't going to allow [her] to have any witnesses or allow [her] to present any evidence and that he (Russell) was only there to provide [Pearson] with his decision." (Doc:156-7 Pearson ¶37).

Russell prevented Pearson from presenting evidence and witnesses at the meeting, she "was not allowed to question Shanahan," who presented the case against her, nor was she informed of the evidence against her. (Doc:50-1 Pearson ¶¶19, 27, 28 37).

As shown by the Panel's opinion at 20-22 there was readily available evidence that Pearson was following department policy on accrual and use of comp time as had likewise been done by five other salaried employees who had submitted time cards in the same manner as Pearson because it was Department policy. (Appx. 20-22a).

Pearson's appeal evidence was a notebook with hundreds of pages, including an opening statement defending herself from the charge of comp time theft, and accusing Shanahan and other conspirators of creating a hostile work environment, and including 25 attachments, which Pearson sent to all of the commissioners and Shanahan and Russell. (Doc:37-1 Russel p.12; Doc:156-7 Pearson ¶37).

Pearson had major back surgery November 8, 2012 and was to be reevaluated with a fitness for duty exam March 2013 and the Department had approved leave until then. (Doc. 50-1 p. 13 Pearson ¶ 71; Doc. 147-1 Pearson II p.47:5-17).

On February 13, 2013, Pearson met with clerks Styles and Godbee in Human Resources about returning to work and was told she had been retired since February 1, 2013. (Doc. 50-1 p. 13 Pearson ¶ 71.). Pearson sought an extension on leave so that she could talk to the doctor about the fitness for duty evaluation, where the clerks promised help but it was not provided to get an extension to go to the doctor. (Doc. 147-1 Pearson II p.48:7-12; p. 50:7-23). Clerk Godbee told her she was already terminated. (*Id*. p. 50). Based on these events , disability and retaliation claims were filed which eventually led to the October 2017 trial and then the appeal.

According to Defendants, the newly revised City Policy Manual, which was issued to Recreation Department members on December 16, 2011,[8] prohibited exempt employee comp time such that Pearson's use of already-accrued comp time for December 27-30 constituted stealing time.[9] (Doc:37-1 Russell p.19:7-20:5; Doc:116-9 *Accord* Russell's Letter Upholding Demotion; Doc.41-1 Shanahan p.62:6-19; Doc:45-6 Demotion Notice Letter).

The new City policy manual itself, ordinance Sec. 1-7-51, states that it does not become effective in relevant part until February 2012. *See* Joint Trial Ex. 1 p. 1 ("This ordinance shall become effective … in accordance with Augusta, GA. Code Section 1-7-51."); Ga. Code §1-7-51 (doc:55-2 p.5) ("[a]mendments … that requires programming modifications shall become effective at the ... second month," following Commission approval i.e. where these "include amendments pertaining to … compensation, leave accrual …."). These programming

[8] (Doc:36-13. Pearson was not at the meeting and did not receive a copy of the manual then, and Shanahan and Russell admit they do not know whether Pearson received the manual before December 27, 2011. Doc:37-1 Russel p.42; Doc:41-1 Shanahan p.100:10-17).

[9] After Lisa Hall's deposition testimony exposed it as a lie, as discussed above, Defendants "have not proffered the catastrophic leave theory" as a basis for concluding Pearson's four days off were improper. Pl.'s Br. (Doc:129 n.3).

modifications were not implemented until Shanahan provided notice of the change at the July 10, 2012, meeting.

It is undisputed that: (1) Pearson was a public employee with a protected property interest in her position; (2) Pearson was demoted from Operations Manager to a Maintenance Worker with a salary decrease of approximately $30,000; and (3) the Defendants City and Shanahan personally imposed the demotion on May 2, 2012 (Doc:69-3 at 1 #3; Doc:54-2 at 1 #3. *Accord* Doc:41-1 Shanahan p.59:19-60:3; Doc:156-7 Pearson ¶3-5), when Shanahan called a meeting and read Pearson the Demotion Notice Letter, which was inaptly entitled "Notice of *Proposed* Disciplinary Action – Demotion." (Doc:45-6).

Defendants try to argue that three encounters with Pearson in the Spring of 2012, during Defendants' inquiry into the Recreation Department's comp time can be deemed adequate *Loudermill* pre-deprivation process. But the evidence undisputedly shows that before the May 2nd demotion, Pearson (1) was not informed of any disciplinary charge against her, nor the nature nor gravity of the charges against her, i.e. that she was being charged with stealing time and that she was being considered for severe discipline up to an including termination;[10] (2) Pearson was never provided any explanation of any evidence against her;[11] and (3) Pearson never had a chance to respond.

[10] Doc:31 Pearson p.182:6-186:21 (first event); Doc:50-1 Pearson ¶43-45 (similar); Doc:31 Pearson p.187:1-188:4 & 277:13-19 (second event); Doc:50-1 Pearson ¶47-48 (similar); Doc:31 Pearson p.278:5-280:20 (third event); *see also* Doc:76-1 Clark p.52 (Clark, although he participated in the investigation, did not take part in the decision to demote Pearson.)

[11] (Doc:50-1 Pearson ¶41-66 (absence in description of events leading up to demotion)).

Argument Amplifying Reasons Certiorari Should be Granted.

I. Explanation of the proceedings leading to the panel's errors by which they reached the decision to construe the investigation and recommendation for adverse action by the investigator in the light most favorable to defendants, to meet due process notwithstanding *Tolan v. Cotton* and *Loudermill* and other cases finding that the pre-adverse action decision must be made by a neutral decision maker, who pass judgment on exonerating facts from the employee or such facts known from the investigation, that would correct mistakes imposing fundamental unfairness of the deprivation of liberty and property interests of public employees, affirming the goals of due process and equal protection and the remedial intent of § 1983, to promote governance under color of law, not prone to arbitrary, capricious, and abusive corruption.

Plaintiff moved for partial summary judgment on the denial of due process as to causing the demotion on May 2nd, after an investigation by Shanahan also disclosed that proffered reasons for the demotion were pretext, (Appx. 20a-23a) where the demotion was effected without notice of specific for the reasons, without an opportunity to present evidence that Plaintiff was following policy like others (Appx. 20a-23a) and without a decision by a neutral decision maker, where Shanahan's recommendation to demote was the May 2nd letter and effective demotion. (Doc. 54; Doc. 54-1 (Brf.); Doc. 54-2 (Material Facts)).

Plaintiff argued that when Shanahan, the Asst. City Manager and Interim HR Director, individually and as a final policy maker of personnel decisions,[12] made the decision to present Plaintiff with a letter that should have been notice of a right to a hearing by an impartial adjudicator,

[12] It was in Shanahan's interest to demote Pearson instead of terminating her so she would not have a meaningful right to appeal that demotion outside of the Department, where other officials could correct and detect the fundamental unfairness of the decision. The City Policy manual provided for no appeals to the personnel board for demotions. (Doc:55-2 p.65-66).

prior to the demotion, where Plaintiff was deprived of her pre-demotion hearing and decision by a neutral decisionmaker, with the demotion effective May 2nd. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). (Doc:54-1 p.1).

Defendant Shanahan read a letter announcing Plaintiff's demotion on May 2, 2012, preventing her from continuing as the Operations Manager, making Plaintiff report to work as a maintenance worker or laborer on May 8, supervised by a former subordinate, and her salary was immediately cut in half, solidifying the demotion. (Doc. 50-1 ¶66, ¶69).

Without credibility determinations, there was no decisionmaker as to a lawful *Loudermill* pre-demotion process, putting aside the post-demotion problems referenced as to the May 24th hearing. The actual demotion was caused by Shanahan's recommendation following his investigation, where he testified that he presented Plaintiff with the May 2nd letter indicating Plaintiff was demoted (Doc:41-1 p 16 Shanahan p. 60:8-12) and that after that, he did not review materials presented by Plaintiff, (Id. p. 18 Shanahan p. 67-69) and by May 11 Plaintiff had been injured and had to miss work because of an injury suffered in her assignment as a laborer. (Doc:30 p.30-31 Pearson p.211, 218).

Even though a hearing was held post-demotion on May 24th, Russell was not making an original decision, he was just reviewing and looking for whether there was some evidence to support the position Shanahan took, without reviewing the evidence that he claimed he assumed Shanahan reviewed. (Doc:37-1 Russel p.12&34). Nowhere during the process did Shanahan or Russell admit to considering the evidence acknowledged by the panel as plausibly showing that Plaintiff was just following policy, like others and yet others were not being disciplined. (Appx. 20a-23a).

Before the demotion, Russell was aware that for "years in the past" the Recreation Department kept records of "extra hours for exempt employees." (Doc:37-1 Russell p.15:13- 20; 49: 18-23; p. 50:8-11). Russell admits that he knew "[t]hat we had a policy that at that point in time was

being followed," (*Id*. p.31:5:12), and that "other exempt employees in the department were accruing and taking comp time" not just Pearson. (*Id*. p.36:5-8). Russell knew that Person had been following policy and did not correct it in the post-demotion hearing.

The denial of due process resulting in the demotion based on the recommendation of Shanahan that occurred May 2nd before any Loudermill process was provided was the basis for Plaintiff's motion for partial summary judgment.

The district court found, "Thus, if Defendants deprived Plaintiff of an adequate opportunity to challenge her demotion (or her termination), and she was clearly entitled to such an opportunity — as she contends she was — then she could have sought a writ a [sic] mandamus to compel Defendants to provide her that opportunity." (Appx. 59a).

The panel noted that the "district court relied on *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), to deny both of her procedural due process claims on the ground that state law, through a mandamus petition, provided a means to remedy any procedural deprivation she may have suffered, yet she failed to file one." (Appx. 14a). Pearson's challenge on appeal was that "the *McKinney* rule does not relieve the City from providing her with the pre-deprivation process she was guaranteed under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)." (*Id*.).

Relying on *Thomas v. Cooper Lighting, Inc*., 506 F.3d 1361, 1364 (11th Cir. 2007) the panel noted that affirmance may occur "on any ground found in the record," even if not relied upon below. (Appx. 15a). The court found that a hearing does not "need to be elaborate" and "need not definitively resolve the propriety of the discharge," citing C*leveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985). The panel noted that the pre-demotion hearing "should be an initial check ... the government's interest in quickly removing an unsatisfactory employee." *Id*." (Appx. 15a).

The panel then deemed without citing to authority as to why it could make this legal conclusion, that the fact addressed below supported the conclusion that due process had been provided by the investigation, even though it is clear that when the demotion was actually effected on May 2nd, there had not been a decision by any decision maker about the propriety of the demotion in light of the known evidence of the policy allowing accrual and use of comp time by salaried persons within the Recreation Department, as noted by the panel at Appx. 20a-23a,. Also it would be undisputed that Pearson was not provided an opportunity to present the evidence in response to notice that there could be a demotion, that she was following policy, where the record reflects no independent decision by a neutral decisionmaker, as to the demotion effected on May 2nd.

The following is the panel's factual justification to find that Pearson received adequate due process.

> Pearson received at least that much process before her demotion.5 She was demoted in May 2012. As early as March 2012 she knew that Shanahan was investigating her December 2011 use of comp time. Around that time, Shanahan met with her and gave her the opportunity to explain her comp time use. She also knew that the investigators were looking at her payroll binder to see if she had falsified her timecards. And she knew that falsifying a timecard could warrant discipline up to and including termination. In April 2012, one month before her demotion, Pearson was given the opportunity to submit a written statement about her December 2011 use of comp time, and she took advantage of that opportunity. Taken together, all of this means Pearson knew she was being investigated for an infraction that could result in her demotion, and she had a chance to respond to the accusations verbally and in writing and did so.

Appx. 16a.

When this paragraph at Appx.16a, is read as a whole, it reflects an interpretation of the general investigation drawn in a light favorable to Defendants in violation of *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), to deem without citation to such deeming authority, outside of the intent of *Loudermill* and the remedial purpose of § 1983 to remedy deprivations of property and liberty caused under color of state authority, by providing an opportunity pre-adverse action for not only notice of

the specific allegations and possible degree of discipline and the opportunity to present facts or grounds why the adverse action would be a mistake or fundamentally unfair, but to have a decision made on that evidence by a neutral decisionmaker before the adverse action is actually implemented and the property or liberty interests deprived.

Even though *Loudermill* may say that the process need not be elaborate or conclusive, the whole point of *Loudermill* and the pre-adverse action decision making process is to effect a decision by a neutral decisionmaker that would prevent mistakes of fundamental unfairness, and violations of due process or equal protection, such as disciplining a public sector employee on the arbitrary and capricious grounds that the employee was following policy, where other similarly situated employees also followed that policy, but they were not disciplined.

Loudermill's recognition that the process due need not be formal and should be flexible is not the same as saying the process may skip the critical and substantive step of having a neutral and independent decisionmaker pass judgment on facts and evidence which the decisionmaker knows or should know by virtue of evidence from the employee, or from their own internal investigation, that should prevent the implementation of adverse treatment that is fundamentally unfair.

1. Certiorari should be granted to enforce *Loudermill* by reaffirming that the critical step in *Loudermill* is a substantive decision by a neutral decisionmaker on evidence presented or known that could show the adverse action would be a mistake, and that *Loudermill* is not just notice of the charges and an opportunity to be heard in some degree.

There is a need for an independent decisionmaker. *In re Murchison*, 349 U.S. 133, 136 (1955). The Loudermill Court held that where discharge of public employees triggers due process protection, a hearing is required before termination takes effect. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48. (1985).

The pretermination or in this case the pre-demotion hearing, is part of an overall due process scheme that includes a full hearing at some point in the termination process. Specifically, the *Loudermill* Court held that even when a full hearing is provided after termination, the employee is still entitled to an abbreviated hearing before discharge takes effect. See *id*. at 546-48. Accordingly, absent post-termination process, the employee is entitled to a full hearing before termination. See *Salisbury v. Housing Auth.*, 615 F. Supp. 1433, 1442 n.7 (E.D. Ky. 1985). Plaintiff was injured before the May 24th hearing and the May 24th hearing also ignored the evidence.

The facts in *Loudermill* did not involve biased decisionmakers, but the substantive point of *Loudermill* is that the steps of a three part process should be provided so that a decisionmaker, presumably acting consistent within the bounds of the Constitution, laws and its own policies, is to pass judgment on the information that the employee is given opportunity to provide, in order to prevent "mistakes" and deprivations of liberty and property in an arbitrary and capricious manner in the public sector employment setting.

For, if *Loudermill* is only notice and an opportunity to be heard, with no decision of substance by neutral decisionmakers, preventing fundamental mistakes, like the unfair and fundamental mistake of applying policy about the accrual and use of comp time one way as to employee and the opposite as to similarly situated others, as noted by the panel (Appx. 20a-23a) there is no fundamental fairness for pre-adverse action decisions for public employees, there is no *Loudermill*.

The panel's decision at Appx.16a shows only that this investigation can be deemed to have two of the three legs of the three legged stool, noting only notice and opportunity to respond, , (which are still substantively challenged by Plaintiff as insufficient for due process purpose) where the

panel's decision is erroneous in that even in its construction of the evidence of the investigation and effective demotion, the investigation did not provide a decision by a neutral decisionmaker on facts that the investigation showed would prove to a neutral decisionmaker that implementing the demotion as against Pearson, for following policy also followed by others, (Appx. 20a-23a) would be a mistake and fundamentally unfair.

The panel can cite no authority that would allow this deviation from *Loudermill* of omitting from the analysis of whether pre-adverse action due process was followed or omitting the step of having a neutral decisionmaker weigh facts known and evidence presented and thus it was accomplished by a factual deeming inconsistent with *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) and that undermines Loudermill and invites other courts to follow suit.

2. Certiorari should be granted to apply *Tolan v. Cotton* 134 S. Ct. 1861 (2014) and protect the three legs of the three-legged stool of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and *Arnett v. Kennedy*, 416 U.S. 134 (1974) requiring a neutral decisionmaker.

In our case, in one construction of the facts, there was no decisionmaker as to the pre-adverse action demotion decision, as there was only an investigation and the recommendation that was effected before *Loudermill* due process and a neutral decisionmaker considered the facts that would have prevented the mistake of demoting Pearson for that which the male counterparts were also doing.

In another construction of our case, Shanahan was a biased decisionmaker, which will be addressed below.

Certiorari should be granted to apply *Tolan v. Cotton* 134 S. Ct. 1861 (2014) to show that the panel's decision omits the necessary and critical substantive ingredient of a neutral decisionmaker's

decision on the known facts or facts that could have been presented to prevent the mistake of disciplining a public sector employee for following department policy.

3. Certiorari should be granted to address the issue left open in *Loudermill* as to whether the initial pre-adverse action decision must be carried out by a decisionmaker independent of the investigator who did the investigation who caused the recommended charges, or by an otherwise unbiased neutral decisionmaker, where evidence supports the bias of Shanahan.

While the dual role within the same agency does not ordinarily offend due process, different considerations arise when the individual decisionmaker reviews his own decision. *Withrow v. Larkin*, 421 U.S. 35, 58 n. 25 (1975). For example, a welfare official who participates in the determination that a recipient no longer qualifies for benefits may not preside over that recipient's hearing. See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); see also *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (independent decisionmaker required in probation revocation hearing); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (same requirement applies to parole revocation hearings). In such a case, a decisionmaker who has made a decision before the hearing is less likely to reverse himself. *Kendall v. Board of Educ*., 627 F.2d 1, 5 (6th Cir. 1980). While due process allows an agency to perform a dual function, an individual within that agency may not.

Personal bias also violates due process. See *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part) (disputes should not be adjudicated by persons with substantial personal or financial interest in the outcome).

Statement of District Court Jurisdiction.

The district court had jurisdiction to hear Plaintiff's claims under 28 U.S.C. § 1331 (federal question jurisdiction).

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted this 4th day of December, 2020.

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