In the

Supreme Court of the United States

CARL D. BISHOP,

Petitioner,

v. No. 74-1303

W. H. WOOD, Chief of Police of the City of Marion, North Carolina, et al.,

Respondents.

Washington, D. C.
March 1, 1976

Pages 1 thru 37

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Washington, D. C.

Monday, March 1, 1976

The above-entitled matter came on for argument at 11:49 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

NORMAN B. SMITH, ESQ., Smith, Patterson, Follin, Curtis & James, 704 Southeastern Building, Greensboro, North Carolina 27401, for the petitioner.

CHARLES E. BURGIN, ESQ., Dameron & Burgin, 14 West Court Street, Marion, North Carolina 28752, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-1303, Bishop against Wood.

Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF NORMAN B. SMITH ON BEHALF OF PETITIONER

MR. SMITH: Mr. Chief Justice, and may it please the Court: I am Norman Smith, from Greensboro, North Carolina, counsel for petitioner in this case.

Petitioner is a former member of the Marion, North Carolina Municipal Police Force. He was dismissed on March 31, 1972, after nearly three years of uninterrupted service as an officer. He had achieved permanent employee status after successfully completing a six-month probationary period. Certain aspects of the Marion personnel ordinance relate to discharge procedure, which I will discuss in a moment, and certain reasons were given to Mr. Bishop for his discharge, which I shall also discuss presently.

The suit was instituted in the United States District Court for the Western District of North Carolina, alleging wrongful discharge without notice and hearing. Cross motions for summary judgment were filed. The district court granted the respondents' motion. The matter was brought to the United States Court of Appeals for the Fourth Circuit where a two-to-one hearing panel decision was in the respondents' favor, and it

was reheard en banc and affirmed by an equally divided court. This petition was granted and now the case is here.

The case, we think, is very critical in that it involves applications of principles announced by this Court in Board of Regents v. Roth and Perry v. Sindermann as further explicated in Arnett v. Kennedy.

First of all, we contend that the petitioner had property rights grounded in statute which gave rise to procedural --

QUESTION: Mr. Smith, let me call your attention on page 19 of your Petitioner for Certiorari, a part of Judge Jones' opinion in the district court, where he says, in about the third paragraph on that page, that one little sentence: "It further appears that the plaintiff held his position at the will and pleasure of the city."

Now, I read that as an interpretation of local ordinance and the State law that was affirmed by the Court of Appeals. How do you get around that in view of the language in Roth and Perry that these kind of things aise as a matter of State law and are regulated by State law?

MR. SMITH: If your Honor please, I don't think those cases said that the United States district judge is a court of last resort as far as determining what State law is.

QUESTION: Here you have got the district judge of North Carolina, who was presumably a North Carolina practitioner

before he took the bench. You have got a panel of the Fourth Circuit which deals with North Carolina law much more regularly than we do. Are you asking us to second-guess those two courts on what North Carolina law is?

MR. SMITH: If your Honor please, the record is before the Court, and we submit there is nothing intuitive about North Carolina law. It's written and whatever of it applies is here, and we think the lower court is manifestly wrong on the record of this case.

QUESTION: Then you do want us to reach a contrary result on the question of North Carolina law as to that reached by Judge Jones.

MR. SMITH: Absolutely. We think there is nothing in the record that supports his conclusion.that the petitioner held his position at the will and pleasure of the city. The Court of Appeals wrote no opinion. The only opinion written by the Court of Appeals was Judge Winter's, in my judgment, compelling a dissenting opinion. Four out of the seven judges in active service would have favored my position.

Now, the statute in question --

QUESTION: Before you leave that point, the respondents' brief cites a couple of North Carolina cases at page 11 of their brief, which they stand for the proposition that the contract is terminable at will. You did not discuss those cases in your reply brief. I wonder if you plan to

discuss them today.

MR. SMITH: If your Honor please, I view those cases as having to do with private employment and employment in the absence of (1) a personnel ordinance such as we have here or anything analogous to it in the way of contracting, (2) in the absence of a fixed probationary period with a maturation into a permanent employment classification. Thus I feel the cases just deal with the common law of employment in the absence of agreement and ordinance to the contrary and are not controlling.

QUESTION: You rely on the face of the statute as giving your client some kind of --

MR. SMITH: Primarily, yes, statute and practices of the city.

QUESTION: Is it customary in the Fourth Circuit in four-to-four affirments, affirments by an equally divided court, for some of the judges to write the dissenting opinion?

MR. SMITH: If your Honor please, the dissenting opinion was produced by Judge Winter when there was a hearing panel of three. No opinion came out of the four-to-four.

QUESTION: Oh, I see.

MR. SMITH: We assume that Senior Judge Bryan --

QUESTION: When the en banc hearing was granted, that washed out everything that had gone before in the panel, did it not?

MR. SMITH: I presume so. Nonetheless, I think Judge Winter's opinion is very persuasive simply because of Judge Winter's reasoning, and I think that it should be regarded by the Court as being correct.

The ordinance in question is very brief, and I thought I would read it.

"A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager."

Now, to us, it's very clear that this ordinance establishes four causes for dismissal: (1) work not up to standard, (2) negligence, (3) inefficiency, (4) unfitness for duty. And, next, we think it's very clear that this ordinance establishes certain prerequisites to dismissal, procedural prerequisites: (1) that there must be a notification of the deficiency, and (2) a continuance of the performance in a deficient manner, and (3) a statement of explanation.

QUESTION: That you in effect read into the language that you read to us . But wouldn't the sentence, the part of the ordinance, the last sentence of it that you didn't read to us rather cast in some question what you read between the lines?

Because it explicitly says what a discharged employee shall be entitled to. Wouldn't that indicate he is not entitled to anything else? "Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice."

MR. SMITH: That's correct. We think that's an additional procedure that has to be undergone, and I will undertake to discuss it in a moment, I could now if the Court wished, why we feel that the very minimal procedures set forth in section 6 are not binding in the determination of the substantive rights that are created by that section. I feel that at least six Justices of this Court in the Arnett case would so hold.

Now, the respondent concedes at page 10 of their brief that the ordinance is mandatory as to notification. This concession is very important. They say it is mandatory as to notification of the deficiency in performance.

QUESTION: Is that in any event or only if requested by the dischargee?

MR. SMITH: I'm not talking about the post-discharge notice. I think I'm interpreting the respondents' brief correctly. On page 10, the first sentence, "Although the ordinance is mandatory with respect to notifying employees of areas of deficient performance, it is merely permissive as to

their dismissal for failure to adequately perform."

The mandatory provision conceded by the respondents is that requiring the prenotice, the predischarge notice, in other words, the notice that must be followed by an opportunity to reform and amend one's conduct.

The district court assumed, on 15 of the certiorari petition opinion, that the ordinance had been fully complied with. Of course, we think that assumption is manifestly incorrect, for reasons which we will state in a moment. But once it is established by the concession made by the respondents and the assumption of the district court that it is necessary to comply with certain procedures before terminating a public employee's employment, then we think the property rights are confirmed, the property rights that bring due process considerations into play are confirmed.

We have an alternative argument which I will rely upon the briefs for and will not take the Court's time, that the fact alone that this employee was classified as a permanent employee after six-months probationary service, that alone, we feel, gave him a property right to which the 14th amendment --

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

MR. SMITH: Yes, your Honor. Thank you, sir.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Smith.

ORAL ARGUMENT OF NORMAN B. SMITH (RESUMED)

ON BEHALF OF PETITIONER

MR. SMITH: Thank you, your Honor.

If it please the Court, I would like now to turn to the 14th Amendment liberty interests that we feel are identified in this case and which we think provide an alternative basis for procedural due process requirements.

At the time of the discharge, the Chief and City Manager refused to discuss their reasons with the petitioner as to why he was being let go. Later, upon request, and in accordance with the ordinance that we have cited, a written statement of reasons was furnished, stating that petitioner's work had been unsatisfactory and that he had refused to attend certain schools. Of course, the petitioner takes exception to these and says that these statements are false.

QUESTION: Was this furnished the petitioner in private, more or less, by a letter, or was it publicly announced?

MR. SMITH: It was furnished privately in a letter, if your Honor please. The ordinance says that one may ask for written reasons, and the petitioner did so and they were furnished.

QUESTION: At the petitioner's request.

MR. SMITH: Yes, your Honor.

Later on, when --

QUESTION: Would that be of public record?

MR. SMITH: Well, under North Carolina law, I am inclined to think they would. We have a very broad public records statute which is not mentioned in the brief that it has only very narrow exceptions. Without going back and reading it, my inclination would be to say that, yes, this would be a matter of public record.

QUESTION: In any event, there would be a record that could be made available to some new employer if he sought employment after his discharge?

MR. SMITH: Oh, yes, sir, certainly.

QUESTION: There is no prohibition against showing it.

MR. SMITH: None whatever.

QUESTION: Is there a requirement that it be shown?

MR. SMITH: No requirement that it be shown, except pursuant to our public records law, I am inclined to think it would be available. The public records law is very explicit and quite simple and quite short. I am just sorry I don't have the citation in my mind. It is relevant, but it somehow or another didn't get into the briefs.

QUESTION: Now, incidentally, while I have you

interrupted, I gather you make this argument as a reason for reversal apart from the finding of the district judge that he was not a permanent employee, even if he were only a temporary employee.

MR. SMITH: Precisely. Even if he were only probationary or temporary, didn't have any property interest, clearly, if his liberty was of a constitutional magnitude, he is entitled to procedural due process.

QUESTION: And this is because of the nature of the reasons given at his request why?

MR. SMITH: Well, the initial reasons, no, your Honor. The initial reasons are not, I think, of the kind that would require that -- unsatisfactory work, refusal to attend schools. At least I don't argue that they are sufficient. Perhaps some would.

But later when this action was brought in the district court, the Chief of Police, under oath, by affidavit, gave his real reasons for discharging the petitioner. These were much more serious and did implicate the liberty interests of the petitioner.

QUESTION: So it's only at that stage, you say, that the liberty interests were implicated?

MR. SMITH: It was only then that it became disclosed to us. But we must assume that the Chief of Police was telling the truth under oath when he filed his affidavit, and

we must further assume that his extrajudicial statement not under oath was false, or else he would have been committing perjury.

QUESTION: Then that leaves you in this position: There was nothing implicating a liberty interest at the time of the discharge or even in response to petitioner's request for a letter. It was only when you sued them that this came out as a legal defense. Do you think that's in the same posture as if they had simply announced it without any lawsuit?

MR. SMITH: I think whenever one reasonably suspects that his liberty interests have been violated, he can go to court and ask the person who fired him, under oath, to say what his reasons were.

QUESTION: But if a liberty interest hadn't been violated at the time you file the lawsuit and the violation occurs only as a result of another party's pleading to the lawsuit that you brought against him, do you think that's on the same footing as if they had publicly announced it at the time of discharge?

MR. SMITH: Well, in response to that, your Honor, it's well known that a lot of times employers will not be candid with employees to their face and say their reasons, but it must be assumed, I think, that for prospective employers and others who inquired about petitioner's conduct, I think it must be assumed that the Chief would have given these real

reasons.

QUESTION: But is there any evidence that he did in fact give them to anybody else before the lawsuit?

MR. SMITH: No, sir, there is not. There is none.

QUESTION: What about the private letter? You are confusing me a little now, Mr. Smith. What about that private letter? Do you claim that places some kind of a stigma on him?

MR. SMITH: I think it would be argued that it did, but in candor I am not satisfied that it did. It said "unsatisfactory work and refusal to attend school." I am hesitant to say that that rises to a liberty interest. Of course, I would not argue with a majority of this Court if they thought otherwise, because that would be a very favorable result. But I am unable to argue that in good conscience.

QUESTION: Mr. Smith, what in the affidavit do you contend affected his liberty interest?

MR. SMITH: Yes, sir. Well, there were four things. Disobedience of orders; insubordination; causing low morale; and engaging in conduct unsuited to an officer. These are on page 32-34 of the Appendix, and these, of course, I think clearly rise to the level of a liberty interest. You are saying that a person is deliberately disobedient, that he is insubordinate, he is causing low morale and engaging in whatever it is, in conduct unsuitable for an officer. It has a certain moral tinge to it, I think.

Now, I think it would be terribly unjust to allow the earlier and now admittedly false reasons to control. I think the true reasons ought to control, and I think it ought to be assumed that prospective employers and others who inquired were given the true reasons.

QUESTION: But there is no evidence in the record that any prospective employer did inquire, is there?

MR. SMITH: No, there is not. Of course, this case comes up on cross motions for summary judgment and presumably if we go to trial, this is one of the issues that would be explored. Clearly, it's a relevant and important issue.

QUESTION: Did you have an opportunity to do any discovery?

MR. SMITH: We engaged in very limited discovery, and I must say that one line of discovery I did not pursue.

QUESTION: Aren't you supposed to think of that at the time it's in the district court rather than at the time it's up here?

MR. SMITH: Yes, sir, I concede that I am. You know, neither I nor any other lawyer can think of everything that ought to be thought of at the trial level, and I don't feel -- I feel that there are ample reasons for remanding this case for a determination on the merits and that this is one of the things that would come out in the evidence.

QUESTION: Was Arnett v. Kennedy cited by the Court

of Appeals in connection with the en banc request?

MR. SMITH: The Arnett case, I believe, your Honor, had not been decided at the time en banc consideration was granted. It had just been decided when we argued the case en banc. It was not cited, as I recall, in either of the briefs.

QUESTION: Was it cited by the court?

MR. SMITH: I do recall Judge Russell asking some questions about the Arnett case, and I do recall that I was not at that time very able to deal with the questions because the case was that new.

QUESTION: I thought the en banc consideration -- it was really heard en banc, wasn't it?

MR. SMITH: That's right.

QUESTION: And it was actually argued.

MR. SMITH: Yes, it was.

QUESTION: And you think Arnett was or was not cited?

MR. SMITH: Arnett was cited in oral argument. The record would not show that, but the recording of the oral argument in the Fourth Circuit would. It was discussed in oral argument.

QUESTION: You didn't cite on that even on the petition for certiorari.

MR. SMITH: If your Honor says so, I assume that is correct. Of course, we did rely on it in our brief.

I do feel this clearly comes under Roth and Sindermann, and that's the reason we are here. Those cases should control the outcome of this case.

Now, as to whether a mere --

QUESTION: But the district judge could be viewed as saying that under State law, even, as long as you fired for cause, that nevertheless by failing to provide any procedure other than notice and reasons, that that determined the procedural entitlement of the employee.

MR. SMITH: Yes, sir.

QUESTION: And that under State law, that's all he is entitled to. How do you think that stands under Arnett?

MR. SMITH: According to your Honor's opinion, six members of the Arnett court, and I suppose five members of this Court, would hold that once the property or liberty interest is defined by State law, that the procedural requirements are constitutionally defined and are not defined by State law. That's my reading of the opinions in Arnett. And we feel quite strongly that this is so, that while State law, of course, creates certain rights, it's the 14th Amendment due process clause that determines how these rights will be adjudicated and how they will be determined in the administrative process.

So we say that the full range of rights from Goldberg v. Kelly and other cases, in other words a trial type hearing, is what is required once the liberty and property

interests of constitutional magnitude are identified.

The respondents have shown no pressing circumstances, such as those present in a prison disciplinary situation or a public high school disciplinary situation, that would require any truncating of the due process requirements or any shrinkage of them. We think that there is ample time and proper place when an employee is to be deprived of a job to which he has a 14th Amendment entitlement, we think there is a time and place for a due process hearing to be held.

Clearly, this was not done in the present case.

Now, even if one were to look at the plurality opinion in Arnett and take the position that whatever source of the property and liberty interests, or I should say property interests at stake, that should also be the source for the procedural requirements, even if one were to take that view, a view which I submit cannot be taken, still the respondents are deficient and were in violation of the petitioner's rights.

In the first place, he was never notified of any deficiency in his work. At least on summary judgment that must be taken because that was petitioner's evidence, although it was in dispute.

Secondly, the written statement didn't contain the true reasons for discharge; they contained false reasons. So we feel that the very procedures outlined by the ordinance were not adhered to.

QUESTION: You are saying they are false or they were just not a complete statement of the reasons.

MR. SMITH: It would be charitable to say that they weren't complete. If one asked for a list of all reasons that he is terminated and is told he is terminated because of unsatisfactory work and refusal to attend school, and later on he finds out that he has been terminated for all these things that implicate his morals and his --

QUESTION: Aren't all those detailed things no more than specific ingredients of the generic reason of unsatisfactory work?

MR. SMITH: I don't think so, your Honor. I think one can be terminated for unsatisfactory work and that alone and that probably doesn't give rise to a liberty interest. But if the unsatisfactory work consists of deliberate refusal to obey orders, insubordination, hostility, all of these sorts of things --

QUESTION: In other words, you are saying those carry a stigma that unsatisfactory work does not.

MR. SMITH: Precisely.

QUESTION: My question was wouldn't they be subsumed under the generic reason of unsatisfactory work?

MR. SMITH: No.

QUESTION: My question is suggesting only that the responses weren't mutually inconsistent but one was just a

bill of particulars, so to speak, and the other was a more generic -- the first one was a more generic basis.

MR. SMITH: Well, it is conceivable. I view them as being a change of approach, and I view them as the Police Chief coming out with the real reasons and reasons which are basically inconsistent with those first disclosed. But they could be regarded as--

QUESTION: But were the first set of reasons false?

MR. SMITH: I think so, if your Honor please. I think that such a material difference makes them clearly incomplete, in my view false. I don't think the falsity of the first set is necessary. I think the incompleteness suffices if those reasons which were not disclosed are liberty implicating reasons or reasons which carry a stigma and tend to degrade the petitioner's good name, reputation, and honor.

QUESTION: Under your theory, suppose you have a Sindermann type case where the plaintiff sues claiming a guarantee of some sort of tenure plus a deprivation of First Amendment rights, that he was fired for reasons impermissible under the First Amendment, and no reason is ever furnished at all for his discharge. He is simply discharged and nothing more is said. And then at the hearing on the motion for summary judgment in the case, in order to rebuff the First Amendment argument made by the plaintiff, the respondent employer sets forth the real reasons that he discharged him, which had

not been made known to anybody up to now. Do you think at that point the employee has an additional claim based on a deprivation of a liberty interest because of something the respondent --

MR. SMITH: I think if the real reasons are stigmatizing that that brings the right to a hearing into play. I don't think that the employer should be allowed to benefit or to be shielded as a result of either his falsehood or his inaccuracy of his first description. I think that would be unfair.

QUESTION: Even though it never would have come out unless the employee had brought a lawsuit?

MR. SMITH: I certainly believe that, your Honor. I think whenever or however it comes out, if it comes out in such a way as to come within the test set up in Perry and Roth, I think then he is to be accorded his rights.

QUESTION: I rather thought that Perry and Roth -- Perry specifically -- held that if a government, State or Federal, terminated an employee upon the purported ground of some stigmatizing reason, such as you are being fired because you embezzled money, that the termination upon that purported and publicized ground is what invaded a colorable liberty interest and that what entitled the employee to a hearing to show whether or not he might have been terminated, he didn't embezzle the money.

But here, as my Brother Rehnquist suggests, we don't

have that situation.

MR. SMITH: That's right.

QUESTION: You don't have a termination of employment upon any purported stigmatizing ground, according to your own submission.

MR. SMITH: But you have an employer who is covering up the --

QUESTION: And it was at that point that you brought your lawsuit.

MR. SMITH: When you have an employer who is covering up and concealing the truth and you think he is, and you bring him into court and you get him to tell the truth, I think you ought to be able to benefit by whatever truth --

QUESTION: If it's the truth, that's the end of it. The only purpose of the hearing is to show that it isn't true.

MR. SMITH: If your Honor please, I am talking about the true state of the employer's mind, the true reasons the employer had. Of course, the due process hearing would determine whether they are in fact true. And we most emphatically deny that any of these charges are true as set forth in the record.

QUESTION: What motive does an employee have who is given no reason for his discharge to sue his employer in order to induce his employer to libel him, really which is what you are saying, it seems to me.

MR. SMITH: If he feels he is being terminated because of his liberty interests, I submit that's a perfectly valid reason for him to go to court.

QUESTION: He hasn't been, by definition under the Amendment, if that wasn't the reason given.

MR. SMITH: He thinks that is, although that is the reason it's not. But why shouldn't he be permitted to go into court and have the parties tell the truth about the situation? I feel that it would just be unjust to hold one should not be bound by what he says is the truth in court.

I see my time has almost run out, and I will save whatever remaining time I have for rebuttal, if I may.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Burgin.

ORAL ARGUMENT OF CHARLES E. BURGIN

ON BEHALF OF RESPONDENTS

MR. BURGIN: Mr. Chief Justice, and may it please the Court: I begin my presentation to this Court with an assumption. I am here on behalf of the City of Marion and its two officials who were sued in their representative capacities under the Civil Rights Act and under the amount-in-controversy statute 28 U.S.C. 1331.

The first assumption that I make is that by the reply brief filed by the petitioner, the petitioner has now conceded that the city cannot be reached under 42 U.S.C. 1983

in this case.

The second concession that the petitioner has made in his reply brief is that the state of the record at this point is not sufficient for a proper determination of whether or not jurisdiction exists under 28 U.S. 1331. And unless the Court has some questions with regard to those two matters, then I shall attempt to confine my discussion of the case to other portions of the case.

May it please the Court, Mr. Bishop, the petitioner in this case, was hired as a policeman by the City of Marion in June of 1969. At the time he was hired, there was no Personnel Ordinance. This Personnel Ordinance that we are now talking about was adopted on April 4, 1970, some 10 months later. The petitioner was discharged after having been employed for two years and 10 months. He was discharged on March 31, 1972. He thereafter brought suit against the city and he brought suit against the two officials in their representative capacity.

Now, we make a point about that in our brief, and we have from the very start of these proceedings, that -- before I get into that, I have the permission of my brother counsellor here to advise the Court of two more facts.

The Chief of Police, one of the respondents in this case, Mr. Wood, was disabled by a stroke and is no longer employed by the City of Marion. He ceased working on November 17,

1972. The other respondent, the City Manager, left the City of Marion on November 30, 1972, and has taken a position as City Manager with another city in North Carolina.

QUESTION: You represent these two individuals, I take it. You are their attorney, in other words.

MR. BURGIN: Yes, your Honor. Yes, sir.

We have contended in part one of our brief that because this suit has been directed against the municipality and against two of its officers in their representative capacities, that the Federal district court had no jurisdiction under 42 U.S.C. 1983 by its jurisdictional counterpart 28 U.S. 1543.

We have contended throughout, and we do still contend, that this suit is not only in form but is in substance against the city and that these officials who are named, the City Manager and the Chief of Police, are named only in their nominal capacities as representatives.

QUESTION: What do you mean, nominal capacities as representatives?

MR. BURGIN: That they were the agents of the city, your Honor. They carried out the provisions of the ordinance. They are named to get to the city.

QUESTION: But if you take Monroe v. Pape, a case like that where they held you couldn't recover against the City of Chicago, this Court held; you could, I take it, recover

against individual policemen in that case. I would think in your case, although you can't recover against the city, you could recovery against the named individuals if they were city officials. Monetary damages are sought, as I understand it.

MR. BURGIN: Your Honor, we take issue with that point. We think that monetary damages are not sought.

QUESTION: Who fired the man?

MR. BURGIN: The Chief of Police, your Honor.

QUESTION: But you said he is suing the city. I would assume he is suing whoever fired him.

MR. BURGIN: Well, the --

QUESTION: Who filed the affidavit?

MR. BURGIN: The Chief of Police, and the City Manager.

QUESTION: So they are not responsible for that?

MR. BURGIN: They are responsible for the affidavit, yes.

QUESTION: And responsible for firing him.

MR. BURGIN: They are responsible for firing him only in the sense that they were acting in a representative capacity as only the city could act. They carried out the provisions of the ordinance which was their duty to do so.

QUESTION: But they did the firing.

MR. BURGIN: Yes, sir.

QUESTION: You say it goes to representative capacity when he sued them for damages for firing him, and I

understand the petitioner's position to be that what he said in that letter amounted to libel. Am I right? The city wouldn't be responsible for that, would it?

MR. BURGIN: For the libel?

QUESTION: Yes, sir.

MR. BURGIN: No, sir.

QUESTION: Who would be --

MR. BURGIN: We say it is not in fact a libel.

QUESTION: If it was, who would be liable?

MR. BURGIN: Well --

QUESTION: The man who wrote the libel would be.

MR. BURGIN: Absolutely, but not in his individual capacity.

QUESTION: But you say he's not in this case.

MR. BURGIN: He is not in this case in his individual capacity.

Your Honor, to get back to your question, Mr. Justice Rehnquist, damages against these individuals as individuals we contend are not requested.

QUESTION: Mr. Burgin, Judge Jones' opinion at page 12 of the petition for writ of certiorari, first paragraph of his opinion, says, referring to the petitioner, "He seeks an order requiring the defendants to reemploy him and a monetary award of damages consisting of his wages from March 31, 1972, to the date of judgment."

MR. BURGIN: Yes, your Honor.

QUESTION: Don't you regard that as a prayer for damages?

MR. BURGIN: No, your Honor. I regard that as a prayer for back wages. I think the petitioner regards it thusly also, because in his brief, and we have put this in our brief -- in the petitioner's brief on page 6 of the petitioner's brief, he states that he is seeking reinstatement and back pay.

QUESTION: What's the difference between back pay or back wages and damages in a case like this?

MR. BURGIN: Well, in our mind, if your Honor please, there is a great deal of difference. Back pay can only come from the city.

QUESTION: Well, that may be true, but Judge Jones' opinion talked about damages. I take it if one of the individual defendants in this case wrongfully and unconstitutionally fired the petitioner, he might be libel for damages even though he, not being the city, could not pay "wages."

MR. BURGIN: That's correct.

QUESTION: Damages would be measured by the lost pay.

MR. BURGIN: That's right. But we say, if your Honor please, that that's not what they are asking for, that they are asking for -- that the word "damages" is not

controlling. The word "back pay" is. They don't say "damages in the form of back pay," they say "damages consisting of back pay."

QUESTION: In any event, I hope you are going to save sufficient time to argue the merits.

MR. BURGIN: Yes, your Honor. I will get to the merits at this time.

I simply point out one case in support of our position which we think that the principles enunciated in the case are in support of the principles which I have just stated, and that was a case decided by this Court in 1949, Larson v. Domestic and Foreign Commerce Corporation in 337 U.S. 682 in which it was stated that the actions of an officer, if not in conflict with the terms of his valid statutory authority are the actions of the sovereign.

With regard to part three of our brief, the question of whether or not this policeman had a property interest, we start with the premise of the Federal district court which we think is a correct premise that the respondents complied with this ordinance and applicable State law in discharging Mr. Bishop. We say that the Court --

QUESTION: Would it have complied with the State if in response to a request to give the reason for the discharge the city said, "We didn't have any"?

MR. BURGIN: Yes, sir, I think it would.

QUESTION: So that you can be fired at will without cause at all under the Ordinance.

MR. BURGIN: Yes, sir.

QUESTION: And if you said you didn't have any, that's the end of the case.

MR. BURGIN: I think so.

QUESTION: Do you think that's what the district court meant when he said that employees may be fired at will?

MR. BURGIN: I think yes, sir. There is no question in my mind that that was the meaning and the intent of the word used by the district judge.

QUESTION: What if in response to the request they say, "You were fired for inefficiency."

MR. BURGIN: Inefficiency? I think, if your Honor please, that is something that does not rise to the level of a protected constitutional property interest. That is something that should be handled purely and simply by the supervisor --

QUESTION: What if the answer was you were fired because you were habitually negligent?

MR. BURGIN: I still say that has no more implication than inefficiency.

If your Honor please, I know you alluded to that very thing in the Arnett case. I think this is a case somewhat like this. I think the principle would apply here.

I think you also alluded in the Arnett case to an 1856 case, Ex parte Secum, in which employment was conditioned upon maintaining proper respect for courts and court officials. Now, we say that this man was discharged for unsatisfactory work. Satisfactory work would be on a par with satisfactory respect that was to be paid to someone. We do think that the State law -- Mr. Bishop has maintained throughout this proceeding, as I understand his contention, that he had a property interest in his job because, number one, he was a permanent employee, number two, that during the entire term of his employment no other policeman on the 17-man police force had been discharged, and number three, because he reasonably believed that he would not be discharged. Now that, I understand from the pleadings in the case and from the briefs that they have filed, is his position.

We say that North Carolina law disposes of his strongest argument in that respect, his strongest argument being the fact that he was a permanent employee. Our law in the State of North Carolina holds that permanent employment without more means nothing more than an indefinite general hiring which may be terminable at the will of either party irrespective of quality of performance. We say that Mr. Bishop had no more than a subjective expectancy that he would continue to be employed and that that is not protected by procedural due process of the 14th Amendment.

With regard to the liberty interest we have maintained that the statute was followed,and the district court judge,on page 15 of the petition for writ of certiorari, states there is no contention that the provisions of this article were not complied with by the defendant.

QUESTION: Does that answer the claim of the deprivation of liberty? Let's say that the statute provided that an employee could be discharged only on the basis of gross dishonesty or immorality, and let's assume an employee was terminated on the basis of a claim that he had embezzled some money and therefore was grossly dishonest. That would be in scrupulous accord with the statute, but still might deprive him of a liberty interest that would entitle him to a hearing to see whether or not he had been guilty of embezzlement or not. In other words, following the statute doesn't really fully respond to the claim of a deprivation of liberty without due process of law, does it?

MR. BURGIN: I concur in that statement completely, but I do say that we have in discharging him implicated his liberty in no way.

QUESTION: That's a different point.

MR. BURGIN: Yes, sir. We have -- I think that the time to determine whether or not a liberty interest is implicated is at the time of his discharge. I do not think that the cases of -- well, I do not think that the reasons for

discharge implicate his liberty in any manner.

And I point out to the Court this fact. When Mr. Bishop was discharged, at his request he was given a letter setting forth the reasons. Now, he had that letter in his possession, and if he wanted to show it to a prospective future employer, he very well could, and the public records statute, I believe it's General Statute 33, would give any employer, prospective future employer, the right to see that.

QUESTION: I gather what you are saying, getting back to Mr. Justice Stewart's question, if in the judicial proceeding, rather than as he did testify, the police chief testified, "Well, really, we discharged him because he was an embezzler." You would still say that there was no invasion of liberty.

MR. BURGIN: Absolutely. Yes, your Honor. I would say there had been no invasion of his liberty.

QUESTION: Because they didn't tell him the truth when they said they discharged him only for unsatisfactory work.

MR. BURGIN: Well, your Honor, respectfully I think that may be an assumption.

QUESTION: I'm putting to you a question, a hypothetical. They gave him the letter they gave him. The fact the Chief testified on in the judicial proceeding was that, no, that wasn't the reason; the real reason was he was an embezzler.

MR. BURGIN: I do not think, if your Honor please, number one, because it's a judicial proceeding; number two, because it would have been brought by the petitioner, that the liberty interests would be implicated in that case.

I think the liberty interests are implicated and I cannot recall, but I believe there is some language in the Roth case or Sindermann case, maybe the Arnett case that implies, at least implies, that at the time of discharge is what is important. If at that time his liberty interests were implicated, that's one thing. In this case they were not.

QUESTION: Suppose the situation had been that there were a lot of rumors around town that he had embezzled funds, then the Police Chief -- I say suppose this -- then the Police Chief discharges him with a letter which simply says, "You are discharged for unsatisfactory work."

MR. BURGIN: There would be no difference in that hypothesis than the one you posed earlier, in my mind.

QUESTION: How long after the new ordinance was passed did his termination occur? Was it 10 months?

MR. BURGIN: About two years, a little over two years. The ordinance was adopted in April of '70 and he was terminated in March, end of March, '72.

QUESTION: You say that his rights, his situation is different from that of a person employed on the same job after the ordinance was passed, or are they in the same boat?

MR. BURGIN: No, your Honor. I would say that I have not intended that below this Court. I would not contend now that Mr. Bishop is not a permanent employee and that the situation would be the same with regard to the hypothesis that you put to me if the two individuals had passed the six-month period.

Unless the Court has some further questions of me, that concludes my presentation.

MR. CHIEF JUSTICE BURGER: Very well.

You have a minute left, Mr. Smith.

REBUTTAL ARGUMENT OF NORMAN B. SMITH ON BEHALF OF PETITIONER

MR. SMITH: If your Honor please, I did save the time, but I know of no particular comment I wish to make. I think I covered the points in my opening argument, unless there any remaining questions.

We thank the Court.

QUESTION: Well, counsel, your colleague says that under the controlling ordinance the city needn't have any cause for discharge at all.

MR. SMITH: I think he is just plain wrong. I think you can look at the ordinance and see that you have to fall into one of four categories before you can be --

QUESTION: Well, how do you explain the judge's statement that an employee may be discharged at will?

MR. SMITH: The judge is just wrong. He is not reading the statute or not reading it correctly. But it just seems to me that in any way --

QUESTION: He didn't say that he could be fired without cause. He said he could be fired at will, which could mean with only notice without a hearing.

MR. SMITH: I presume that "at will" and "without cause" is the same thing. It would be wrong to think that one had to have cause to discharge someone and then say he could do it at will anyway. That would negate the force of the clause.

QUESTION: Well, he could do it at will, just on notice.

MR. SMITH: I suppose that's a possible construction, but not of this ordinance. Any way you turn this ordinance, it says that there must be one --

QUESTION: That isn't what the district judge says.

MR. SMITH: Your Honor, I respectfully contend he is wrong and that Judge Winter is right and that this Court ought to reverse. Work not up to standard, negligence, inefficiency, or unfitness have to exist.

QUESTION: If we agree with the district judge, on your reading of the district judge, I take it that you would say that if we agreed with him, that you lose.

MR. SMITH: I think if you agreed with everything he

said in that opinion, I would lose.

QUESTION: Except on the liberty.

MR. SMITH: Well, he --

QUESTION: Even then.

MR. SMITH: He said the liberty interests weren't implicated. He covered the whole thing. He just didn't do it right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:39 p.m., oral arguments in the above-entitled matter were concluded.)