In the

Supreme Court of the United States

STATE OF TENNESSEE, ET AL.,

Petitioners,

v.

BILLY DON DUNLAP,

Respondent.

No. 75-95

Washington, D.C.

Pages 1 thru 47

March 22, 1976

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v.	:	No. 75-95
BILLY DON DUNLAP, Respondent.	:	

Washington, D. C.,

Monday, March 22, 1976.

The above-entitled matter came on for argument at 1:08 o'clock p.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 PAUL STEVENS, Associate Justice

APPEARANCES:

ALEX B. SHIPLEY, JR., ESQ., 420 Supreme Court Building, Nashville, Tennessee 37219; on behalf of Petitioners

WILLIAM TERRY DENTON, ESQ., 311 Blount National Bank Building, Maryville, Tennessee 37801; on behalf of Respondent

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-95, Tennessee v. Dunlap.

Mr. Shipley, I think you may proceed.

ORAL ARGUMENT OF ALEX B. SHIPLEY, JR., ESQ.,

ON BEHALF OF PETITIONERS

MR. SHIPLEY: Mr. Chief Justice and may it please the Court:

This case was originally brought by the respondent, the plaintiff below, who was a member of the Tennessee National Guard. He also served in a dual capacity, a separate and distinct capacity, as a National Guard technician, which is a federal civil service capacity, exempt from the normal merit competitive civil service because of the requirement that the civil servants must maintain their membership in the Tennessee National Guard.

Now, the plaintiff alleges that he was wrongfully denied his opportunity to reinlist in the Tennessee National Guard, the Air National Guard, asserting that the only reason he was not allowed to reinlist was a sham to deny him his opportunity for continued employment as a technician, as a National Guard technician under 32 U.S.C. Section 709, which creates the National Guard technician positions.

The complaint argued that in this case the military commanders' discretion in determining whether or not to accept

an offer of reinlistment was so broad and vague and lacked objective criteria and was thus unconstitutional, apparently a delegation of authority argument, rather than a 14th Amendment vagueness argument.

The denial of the opportunity then to reinlist denied the plaintiff, according to the complaint, his administrative review which he would have had had he been dismissed for cause from his National Guard technician status. Now, the complaint was dismmissed by the District Court, alluding to the unique relationship between the state militia and one of its members and holding that the judiciary should avoid interference with legitimate military matters.

Now, the Sixth Circuit, to which certiorari was granted, reversed and remanded the case directing the District Court to determine a threshold question, here whether or not this military decision not to reinlist this man was made for a military reason, indicating that you look to the militaryness of the decision rather than to the fact that the decision-maker was a military man.

The National Guard Technicians Act of 1968 was passed in order to create a federal civil service position for National Guard technicians. Prior to that time, they had been called caretakers and they were considered to be state employees, consequently you had a wide diversion of employment benefits, retirement benefits, so Congress in 1968 chose to make these

persons federal civil service employees.

The top-level supervisor of these federal civil service employees with the states is the Adjutant General. Now, he receives that authority from the congressional enactment.

Because of the difficulties which had arisen previously with these caretakers not being military members of the particular units in which they served in their caretaker capacity during the weeks work, as opposed to their weekend warrior capacity, the Congress imposed the basic requirement that a man is to be a National Guardsman in order to hold this civil service position. The Adjutant General, the top-level supervisor, is required by the congressional enactment to promptly separate from employment any technician who fails to maintain his National Guard technician.

Now, of course, a technician might be separated for cause, he might be fired, as it were, and were he separated for cause, a right of appeal would exist up to the Adjutant General, who is the military commander of the state National Guard.

Now, the Sixth Circuit opinion indicates that because this man is a National Guard technician, he has a particular right to continued membership in the National Guard, thus apparently drafting the cause requirement for firing a civil service technician onto the prerequisite for National Guard membership to be maintained in the first instance. So that decision avoided the issue of the required membership in the

National Guard.

Now, a military member of the National Guard can lose his National Guard status for a variety of reasons. He may be too old to continue to serve in the National Guard. He may have a physical illness or injury which would cause him to be separated from the National Guard. He may simply fail to reinlist.

So the loss of guard membership for any of those reasons results in a consequent virtually automatic loss of the technician employment.

QUESTION: What if the National Guard just concludes that he isn't up to par in terms of his technical competence?

MR. SHIPLEY: Are you alluding, Your Honor, to his military capacity?

QUESTION: Technical, in his technician capacity. Do they have two choices, are you telling us, they can dismiss him from that job for cause or they can just simply wait until his enlistment expires and then decline to reinlist him and he is automatically out?

MR. SHIPLEY: Well, Your Honor, a Guard member has no right to reinlist, no more than a member of --

QUESTION: So you have these two avenues to terminate him?

MR. SHIPLEY: Your Honor, exactly. If the National Guard chose not to reinlist him, for whatever purpose, he would

not be able to maintain his technician employment. Now, that is a decision that is what we are here for, because this is a purely military decision on whether or not to determine this man's -- whether the military wants to accept his offer to re-inlist. The Court of Claims case, which considered enlistments have all alluded to the fact that enlistment is a contract and it --

QUESTION: Mr. Shipley, does it makes any difference whether it is military or not? I mean, supposing this was simply a civilian context in a classical employment at will type of thing, doesn't the Board of Regents v. Roth indicate that there is no requirement for a hearing?

MR. SHIPLEY: Your Honor, exactly. Now that is true in this case. We are not dealing necessarily with the employment at will or continued employment at will, but we are dealing with a determination that is made whether to employ in the first instance a reinlistment. So the same would apply whether or not this was a military decision, that is correct.

QUESTION: I thought you said this was civil service.

MR. SHIPLEY: Your Honor, it is civil service, the technician status is civil service, it is civil service --

QUESTION: Then you can't fire at will.

MR. SHIPLEY: He can fire him for cause.

QUESTION: You agree that they can't fire him at will in this case?

MR. SHIPLEY: In technician status, that's right, Your Honor, we agree.

QUESTION: So that if they want to fire him and they arent' willing to go through the normal firing processes, they just refuse to let him reinlist?

MR. SHIPLEY: That's right, Your Honor, they can refuse to let him reinlist.

QUESTION: That is all right?

MR. SHIPLEY: That would be right.

QUESTION: That is all right?

MR. SHIPLEY: Yes, Your Honor.

QUESTION: Now, all the Court of Appeals said was let's go back and find out if there is some hanky-panky in this?

MR. SHIPLEY: Well, Your Honor, I don't think there is any allegation of hanky-panky because I think that the fact of the matter is that a Guard commander in making his determination on whether or not to let the Guardsman reinlist might well consider his --

QUESTION: Well, that is what the court said go find out.

MR. SHIPLEY: Exactly, Your Honor.

QUESTION: The court says go find out whether the reason to fire him, not to let him reinlist, was not to deprive him of his job.

MR. SHIPLEY: That is what the court said, but they

went further, Your Honor, in stating that --

QUESTION: Well, what is wrong with finding that out?

MR. SHIPLEY: Well, Your Honor, the difficulty it creates there is --

QUESTION: Oh, I admit there is a difficulty.

MR. SHIPLEY: -- is that it would create a bifurcated Guard capacity. If I were a weekend warrior who did not serve as a National Guard technician, then I would not have thie additional right to maintain continued membership in the National Guard, but, if on the other hand, I was a National Guard technician --

QUESTION: I thought this case was limited to a man that has the status of the standing job, the civil service job. That is the only one he is limited to.

MR. SHIPLEY: Right.

QUESTION: It doesn't apply to the other one.

MR. SHIPLEY: But the technician status, Your Honor, is subservient to the military status. The whole purpose of the technician program is to maintain, equip, train the weekend warrior personnel.

QUESTION: And to give him civil service status is what you said.

MR. SHIPLEY: It does. He does have certain civil service status. He is not a member of the competitive civil service, but as a result he must maintain his Guard membership,

but there is nothing in the legislative history of this Act which indicates that Congress intended to create a greater right to Guard membership for a National Guard technician as opposed to any other National Guardsman.

QUESTION: What military level is the decision not to permit reinlistment made?

MR. SHIPLEY: Your Honor, the Air Force regulation which is a directive but not binding on the State of Tennessee National Guard, and which I understand is generally followed, is that the decision is made by the unit commander, the initial decision on whether or not to accept --

QUESTION: In this instance, the unit would be what?

MR. SHIPLEY: I would have to refer Your Honor --

QUESTION: I know, but what kind of a unit is it?

MR. SHIPLEY: We are dealing with the basic -- I am an Army man and I am not familiar with the Air Force terminology, and I have to apologize. I don't know whether it is a wing or group, but it is the basic level unit commander that would be a company in the Army.

QUESTION: A company?

MR. SHIPLEY: Yes, Your Honor.

QUESTION: It would be a captain or at most a major?

MR. SHIPLEY: Yes, Your Honor.

QUESTION: But he did in fact in this case, he did in fact in this case consult some sort of advisory group of other

officers, didn't he?

MR. SHIPLEY: Right, Your Honor, and this is in keeping with the normal -- if a man says I want to reinlist and the military says we have decided not to accept your reinlistment, the unit commander or his superior can convene a board of officers just to advise him, do we think this man ought to reinlist.

QUESTION: But he doesn't have to -- I mean there is nothing in the way of review of the initial decision, at whatever level it is made, whether it is captain or major?

MR. SHIPLEY: Your Honor, I would --

QUESTION: The Guardsman has no --

MR. SHIPLEY: Exactly, Your Honor. Now, the Guardsman does not have a right of review. Now, assuming it is a military decision, I am sure if a superior commander decided to countermand the decision of his inferior commander, then that would obtain.

QUESTION: This, I take it, in the Tennessee Guard unit would be the adjutant general, he would be the top --

MR. SHIPLEY: He is the top, Your Honor.

QUESTION: Could it get to him?

MR. SHIPLEY: It could get to him, I believe.

QUESTION: Not a right, so far as the Guardsman is concerned?

MR. SHIPLEY: It is not a right vested in the Guardsman

himself. It is a method by which the military commanders up the chain of command can make this determination.

QUESTION: It is your position, General Shipley, as I understand it, that a reinlistment confers no more rights upon the applicant for reinlistment than would an applicant for original enlistment?

MR. SHIPLEY: Exactly, Your Honor, exactly.

QUESTION: Which are zero.

MR. SHIPLEY: Zero, except you do have a military record to determine, and the commander has seen your --

QUESTION: It may be more to go on, but so far as the rights of the applicant go, they are zero.

MR. SHIPLEY: Start from scratch.

QUESTION: That is your submission, as I understand it.

MR. SHIPLEY: Yes, Your Honor.

QUESTION: And it is for that reason, from your point of view, that there is nothing for any court to review, because they can do this for any reason they desire?

MR. SHIPLEY: Right, Your Honor, and I think that is the danger in the Sixth Circuit precedent in this case that a well pleaded but factually unsubstantial complaint.

QUESTION: One question. The man, the adjutant general is in charge of him as a specialist, right?

MR. SHIPLEY: As a technician.

QUESTION: Technician?

MR. SHIPLEY: Yes, Your Honor.

QUESTION: He is responsible for him as a Guardsman?

MR. SHIPLEY: He is subservient to the governor as commander-in-chief of the state Guard, as a Guardsman.

QUESTION: Well, would you say that the decision to refuse enlistment or reinlistment is wholly discretionary, not subject to review on any ground?

MR. SHIPLEY: Yes, Your Honor.

QUESTION: Well, what if a --

MR. SHIPLEY: Absent a constitutionally protected ground, such as race or First Amendment --

QUESTION: I know, that is a pretty big absent, isn't it?

MR. SHIPLEY: Yes, Your Honor.

QUESTION: And I suppose if there was a statutory, if the statute regulating this technician job expressly says that you cannot refuse to reinlist because of your job performance --

MR. SHIPLEY: Then that would be a statutory created right, and there is none.

QUESTION: Exactly. Well, the argument here is that -- the argument on the other side is that that is what the statute means. But you say that they could have refused reinlistment even if whoever refused reinlistment said expressly the reason I am refusing reinlistment is because we are unsatisfied with your performance as a technician?

MR. SHIPLEY: Your Honor, I think that that would be an appropriate military determination. Now, in --

QUESTION: Well, don't we have to judge the case on this basis?

MR. SHIPLEY: Certainly, Your Honor, but there is no allegation here other than -- the only allegation here is that they chose not to reinlist him because --

QUESTION: I know, but the Court of Appeals apparently thought, as I understand it, thought that the real reason they were refusing to reinlist was that they were unsatisfied with his job performance.

MR. SHIPLEY: Well, Your Honor, the allegation was that --

QUESTION: And I thought your position was that even if that is the case, there is no judicial review of that decision.

MR. SHIPLEY: We think so, Your Honor. But under the complaint in this case, the complaint asserts that the only reason they chose not to reinlist him, the cause, the underlying cause may be there, but the only reason was to deny him any administrative review available to him in his technician status. So what we have here is there are no charges against this man, there are -- nobody coming in making statements against him that he is being denied the opportunity to refute. It is merely a military determination that they decide that it was not in the best interests of the Tennessee Air National Guard to opt for

his reinlistment.

QUESTION: Which doesn't require any charges?

MR. SHIPLEY: Right. Right, Your Honor. It is a military decision which --

QUESTION: General Shipley, as I understand you, you would agree that if he were terminated or refused reinlistment for a constitutionally impermissible reason, that he would be entitled to some hearing?

MR. SHIPLEY: Oh, exactly, Your Honor. But we are not here --

QUESTION: In other words, if the purpose was to deny him a constitutional right, he would be entitled to some kind of hearing?

MR. SHIPLEY: Yes.

QUESTION: Supposing he has alleged -- and I think one might read his complaint this way -- that the statute gave him a right not to be discharged except for cause, which gave him a property interest in his job, and that that entitled him constitutionally to a hearing in connection with a discharge, and that the purpose of the refusal to reinlist was to deny him his constitutional right to a hearing in connection with his discharge.

MR. SHIPLEY: That might be so, Your Honor, except for the statute itself and the legislative history itself indicates that the technician status is subservient to the military status.

The whole purpose of the technician program is to support the military, not vice versa, and the requirement that he maintain his Guard membership is in 709(b) and in (e)(1) it states that the adjutant general shall separate him, and it is not until (e)(3) where they say if they want to fire him for cause they may do so and later on in the statute it says any appeal from that decision goes only as far as the adjutant general.

QUESTION: Would you agree that if he were terminated for any reason other than failure to continue his status in the Reserve, that he would be entitled constitutionally to a hearing?

MR. SHIPLEY: Well, Your Honor, there are several other reasons, but if he were separated for cause from his technician job, certainly --

QUESTION: He would have a constitutional right to a hearing, that is my question.

QUESTION: But do you have to call on the Constitution when the statute says he has that right?

MR. SHIPLEY: Well, I don't think we get to the question of whether he has a constitutional right, and I think maybe that if we are looking at the statute to see whether it does create a right to continue Guard membership.

QUESTION: Well, does the statute create the right to a hearing from an administrative dismissal as a technician for cause?

MR. SHIPLEY: For cause.

QUESTION: I suppose it is your position that for all we know, the military mind said this man is not a suitable man for the military, we don't want him in the Guard, maybe he is a fine technician but he is not a good Guardsman, and therefore he --

MR. SHIPLEY: Exactly, Your Honor.

QUESTION: And that there is no review of that kind from your --

MR. SHIPLEY: Yes, Your Honor, that is where the complex subtle and complex decisions concerning the composition of --

QUESTION: Well, what is the difference between the military and civilian judgments? The only trouble with this case is the same man is both the civilian and the military.

MR. SHIPLEY: In this particular instance --

QUESTION: The adjutant general is both, isn't he?

MR. SHIPLEY: In this particular instance, he may well be both.

QUESTION: He is both.

MR. SHIPLEY: He actually wears two hats, Your Honor, because, as a National Guard technician, his supervisor is a civil service technician.

QUESTION: He says while I've got the hat on as supervisor of this man, I can't fire him without a hearing, so I will put my other hat on and fire him without a hearing.

MR. SHIPLEY: No, Your Honor, because he didn't fire him in this case, he chose not to reinlist him, and there is no right to reinlistment.

QUESTION: Which is firing him.

MR. SHIPLEY: Now, Your Honor, if during his term of enlistment, during his six-year period, apparently which this man had enlisted for a six-year period in the Guard, that he had chosen to boot him out, then there are certain administrative rights available to Guard members before a man can be separated from the Guard for cause, but this is not the case here. This is a case where his term was up, his contract term was up, and he maintained he has no right to continued employment, to renewed employment.

QUESTION: And he had been in the Guard for 17-1/2 years?

MR. SHIPLEY: No, Your Honor. He apparently -- now, this was not alleged in the complaint below -- he had been in the Guard, as I understand it -- and all I know is what is in the complaint, frankly -- for six years. He was apparently enlisted in the Guard and hired as a civil service technician at the same time. He apparently had prior military experience.

QUESTION: Of 17-1/2 years?

MR. SHIPLEY: Apparently so. Now, this came up on the first time --

QUESTION: And all of a sudden he becomes inefficient?

MR. SHIPLEY: Your Honor, this came up, the 17-1/2 years of service, came up for the first time at the Sixth Circuit level. There is no allegation in the complaint that he had any more time than his six years as a technician and as a Guardsman.

QUESTION: General Shipley, I am not sure I understood your answer to my question. If he were terminated for reason other than failure to obtain reinlistment, would you agree that he does or does not have a constitutional right to a hearing? I understand he has a right to an administrative right to a hearing, but does he also have a constitutional right?

MR. SHIPLEY: As a technician, he would have a statutory right to a hearing.

QUESTION: Does he have a constitutional right to a hearing?

MR. SHIPLEY: If dismissed for cause, I think under Board of Regents and even under Sindermann, I think that both of those cases would indicate he has, if he has the entitlement and if he has charges brought against him --

QUESTION: So he would have --

MR. SHIPLEY: -- then he would have his constitutional right. But we have neither of those present here.

QUESTION: I take it you think the situation here is like the non-tenured teacher, say, who is hired for a year and during the term, during that year he might be entitled under his

contract to a hearing if his contract was terminated before the year is over, but at the end of the year they might refuse renewal of the contract --

MR. SHIPLEY: Right.

QUESTION: -- for a reason that, if made during the term would entitle him to a hearing, which at the end of the term doesn't?

MR. SHIPLEY: Right. And in opposition to Perry v. Sindermann, there is no allegation here of any de facto tenure, any de facto opportunity to automatically have a right to renew that contract absent any charges or statements against him. And I think that is what the crux of this case is, is that this decision is purely a military decision, purely whether or not the military, given the discretion given to the military by the Constitution, given the authority to run the military to the Congress --

QUESTION: The responsibility as technicians are essentially military responsibilities, aren't they?

MR. SHIPLEY: They are for military --

QUESTION: In a time of war, you wouldn't have those. He would be on active duty, wouldn't he, doing the very same thing he is now doing as a civilian?

MR. SHIPLEY: Not necessarily the very same thing, but in the same unit, and generally at a rank in the National Guard--

QUESTION: I thought the government has advised us

that these men form a cadre in the event we suddenly had a war, they train and enlarge the group doing the same kind of things for the military, and that he does on weekends, as a weekend warrior, the same things he does during the week but he is definitely military on weekends?

MR. SHIPLEY: He is definitely military on the weekends.

QUESTION: He is doing the same thing as he is doing during the week as a civilian?

MR. SHIPLEY: Your Honor, not necessarily the same thing but generally working in the same area. During the week, he may be dealing more in personnel matters, whereas on the weekend he may have a job as a legal clerk, for instance, a military occupational specialist, some -- but generally a similar capacity.

QUESTION: This is only a peacetime program, isn't it?

MR. SHIPLEY: That is right, Your Honor. This is a continuing operation of the military. These men are the ones that during the week maintain the equipment, who keep the personnel up, paperwork straight.

QUESTION: Well, they maintain combat readiness of the unit, don't they?

MR. SHIPLEY: Exactly.

QUESTION: Isn't that their job?

MR. SHIPLEY: That is their job, and they provide

training schedules and matter of that type, so when the weekend warrior comes in on Saturday morning to do his monthly drill, he doesn't have to start from scratch, he is ready to go and train militarily.

QUESTION: Could I put my question just a little differently. It is a different question. Supposing he asked for a statement of reasons for not being allowed to reinlist and he received a letter which said, one, we've heard from our technical people and they think you are kind of an average technician and they would like to get rid of you; and, two, they don't want to take the trouble to have a hearing, so we have decided just not to let you reinlist. Would that be all right?

MR. SHIPLEY: Your Honor, that is not the factual situation here.

QUESTION: Well, if you read that into the complaint.

MR. SHIPLEY: And under Roth, if you are putting the blot on the discussion, so to speak, perhaps he does have some constitutionally protected right to some kind of hearing in his technician status. Now, in his military status, I don't believe that has ever been determined. I believe that the military commander --

QUESTION: No, my hypothetical letter is written by a military man, saying this is why we are not going to let you reinlist. You would say that is perfectly all right?

MR. SHIPLEY: I don't believe, Your Honor, and I

think historically the courts have chosen not to get into that area of military decision-making and not to review the military decision. Now --

QUESTION: Why don't you just answer? I thought your position at the outset of your argument was that the answer to that question you were just asked is yes, plain simple yes, that they could -- or that there is no constitutional right, and that he would not get a hearing, even for that express reason? I thought that was the position you took?

MR. SHIPLEY: Your Honor, as I recall, the first argument of the question was could it consider his technician capacity.

QUESTION: When I asked you the question a while ago, if they told him expressly that the reason they were refusing reinlistment was because of his poor performance as a technician, would there be any review, judicial review, and you said no, there would not be judicial review.

MR. SHIPLEY: There is my --

QUESTION: Now, isn't that still the same answer to Mr. Justice Stevens? Isn't it or not?

MR. SHIPLEY: Well, I felt like the situation, the question was differently, I don't know. I hope I haven't answered the same question two different ways. I certainly didn't intend to.

QUESTION: Well, it certainly sounds like it.

QUESTION: The only additional fact is they say (a) we understand you are not a very good technician, and (b) we don't want to be bothered with a lot of hearings, so instead of having a hearing on the technician side of the coin, we are simply not going to let you reinlist. You say that is perfectly all right?

MR. SHIPLEY: I think that is all right at the end of the term of reinlistment, at the end of the enlistment term.

QUESTION: And they might put a p.s. on the letter and say you are lucky that we waited this long.

MR. SHIPLEY: They might, Your Honor.

QUESTION: Unless they waited that long, they could have removed him a technician only with a hearing, because during his term of enlistment he would have had tenure in the National Guard.

MR. SHIPLEY: Exactly, Your Honor, and I would reiterate that in this case there is no such allegation and the military statement was that we have chosen not to reinlist you in the best interests of the National Guard, and that is the purely military decision that was made by the military commander. And we think that the question that the Sixth Circuit posed is and of itself a military decision.

If the Court has no further questions at this time, I would like to reserve any remaining time I have for rebuttal, Your Honors.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Denton.

ORAL ARGUMENT OF WILLIAM TERRY DENTON, ESQ.,

ON BEHALF OF RESPONDENT

MR. DENTON: Mr. Chief Justice, and may it please the Court:

I feel at the outset of this argument that I should point out that the Court of Appeals correctly noted that one must look not to the nature of the decision or must look to the nature of the decision and not the mere identity of the decision maker. This is where we feel that the petitioners are incorrect in that they are alleging that the mere fact that it was a military commander who made the decision, that it was a military decision.

Our allegations are to the effect that it was a military commander who made the decision, but it made for a non-military purpose, that purpose being a sham to remove the respondent from his technician employment.

QUESTION: You say it is not a military decision if the commander reaches the conclusion that his performance as a technician is not supportive of the military mission of the unit?

MR. DENTON: No, sir, and that instance, it would be --

QUESTION: That is not a military decision?

MR. DENTON: -- it would be a military decision in

that instance. But where he wants to remove the man for other than a military purpose, this would be for benefit, to answer your question, his decision in that instance would be for the benefit of the military.

QUESTION: Well, as I hear you, you have really answered the question both ways.

MR. DENTON: It can work both ways. It is capable of working both ways. That is why you must look to the nature of the decision and not merely the decision maker.

QUESTION: Well, suppose when his reinlistment came up, reinlistment was refused and he was notified expressly that we are not reinlisting you because we think you are only an average technician and we can do better, we are not saying that there is anything wrong with your performance in the sense that we could have fired you during the term --

MR. DENTON: Okay.

QUESTION: -- but we just think we can do better, so we are going to not reinlist you.

MR. DENTON: In that instance, I feel that the commander's decision would then be within the purview of a military decision.

QUESTION: But it is only if you think that they are firing him because of some reason --

MR. DENTON: Some reason other than a military purpose.

QUESTION: Well, like some -- suppose they have another

fellow and say the reason we aren't reinlisting you is because of your performance on a certain day which was -- you just weren't a good technician on that day, we could have fired you then for cause, but we just waited until now?

MR. DENTON: If they had an ability to fire the technician for cause on any day, then I think, under the dictates of Congress, and Congress, in providing the portion of a provision in the statute for removal for cause, then they must remove for cause.

QUESTION: Well, they didn't go ahead and do it but they just waited until the end of the term.

MR. DENTON: Then I think it is impermissible conduct.

QUESTION: Then why did Congress give them this right to --

MR. DENTON: I don't think Congress ever intended for them to have this dual capacity. I think this is something that --

QUESTION: Well, to read the statute, the statute says an enlistment in the Guard is the base of the employment, does it not?

MR. DENTON: It is a requisite. But a man could also have an outstanding military performance record and could be dismissed by military commander.

QUESTION: Well, why can't the statute be read as simply saying that if you terminated within the six-year enlistment

period, you have got to give them a hearing or perhaps, alternatively, dismissal by a court martial?

MR. DENTON: If it is --

QUESTION: I suppose that could be done, too, couldn't it?

MR. DENTON: I'm sorry, I didn't --

QUESTION: I mean he could be terminated within the six years if he were found guilty of some offense by a court martial?

MR. DENTON: Yes, Your Honor, he could. If he were court martialed and dismissed from the service as a result of the court martial, he could be.

QUESTION: Then he wouldn't have any administrative appeal on the other side, would he?

MR. DENTON: No, Your Honor, he would not.

QUESTION: Then why can't this statute be read as meaning only that if he is terminated within the period of his enlistment, he gets an administrative hearing, but when his enlistment expires, that is not renewed, that is the end of it?

MR. DENTON: I don't think I follow Your Honor in his question.

QUESTION: I will repeat it then. Why does the statute -- why can't the statute be read as meaning simply that if he is terminated during the six-year period of his enlistment, then they must give him the administrative hearing? But if he isn't

reinlisted, he is in the same posture as the man who just said he didn't want to reinlist but he wanted to keep his job.

MR. DENTON: The statute deals specifically with the technician's employment and does not deal with the military aspect of which the technician's employment does rest upon the military aspect. The commander, as far as the sham, could, for political purposes, or through friendship, design to place someone else in the technician's position and therefore refuse reinlistment on that basis.

QUESTION: But that wouldn't have to be a constitutionally impermissible reason, would it? It might be one that wouldn't meet the standard of cause.

MR. DENTON: According to our argument, they would be constitutionally impermissible because it would involve an abuse of discretion -- maybe not constitutionally impermissible, it would be statutory and regulatory impermissible.

QUESTION: Okay. But if it is not constitutionally impermissible and simply would be a violation of the cause requirement if it had been done under the cause section, what is your argument for the proposition that since they haven't proceeded under the cause section, nonetheless the provisions of that section are somehow imported into what otherwise seems to be a rather unlimited discretion?

MR. DENTON: Our argument would be that if they desired to remove the respondent from the technician's employment, they

should have done so for cause, have done so through the statute.

QUESTION: But the statute gives them two ways, doesn't it? It says you can remove him for cause or you could deny him reinlistment.

MR. DENTON: No, Your Honor, the statute doesn't say you can deny him reinlistment. The statute only deals with removal for cause. I don't think Congress, in enacting the statute, ever meant to give the National Guard the means of removal for other than cause.

QUESTION: You say then as a matter of statutory constructure of the Act of Congress, he is entitled to a hearing even though he is told he is being denied reinlistment rather than being dismissed from the technician's job?

MR. DENTON: I don't think you can read that itself into the statute. I think that reading into the Sixth Circuit's decision that this comes from that, it would be permissible or it would be necessary to give him a hearing, especially in this case where the commander convened a board which we allege was to hear charges and statements against the respondent, to make a determination as to whether or not he should be allowed to reinlist, then the respondent, upon the commander convening the board, requested to be allowed to appear before this board.

QUESTION: Do you think the Sixth Circuit's decision is based on the United States Constitution? Do you think the

Sixth Circuit intended its decision to be based on the U.S. Constitution?

MR. DENTON: I think so and, of course, the statute and regulations.

QUESTION: And your argument here is based in part on the Constitution as well as on the statute?

MR. DENTON: And part on the Constitution, also regulations, also statutory.

QUESTION: And what is your constitutional point precisely?

MR. DENTON: It being that once a commander convened the board of officers to hear charges and statements ant his refusal to allow the respondent to appear before this board, also his refusal to furnish the respondent with a copy of any charges or statements, that was constitutionally impermissible.

QUESTION: Why?

MR. DENTON: Because it denied the respondent his rights of procedural due process. It attaches a stigma to him before other people who were passing upon his conduct and his performance.

QUESTION: But there was never any public statement, or, so far as I can tell, any private statement as to why your client was denied reinlistment.

MR. DENTON: Well, quite often, though, under the law, there are not public statements or public hearings possibly held

where people had been entitled to procedural due process. There are different methods of denying a person procedural due process.

QUESTION: But you don't contend there was any damaging reason publicly --

MR. DENTON: Most certainly we do.

QUESTION: Well, what was it?

MR. DENTON: It was damaging to the respondent in that he lost his technician's position --

QUESTION: I mean a reason given by the people who refused reinlistment to him.

MR. DENTON: I think the mere statement of saying that it was not in the best interest of the Tennessee National Guard to allow his reinlistment, especially in light of the fact that he had 17-1/2 years of employment or military expertise employment --

QUESTION: Does the record show that he had 17-1/2 years?

MR. DENTON: Your Honor, as Shipley correctly brought before this Court's attention, that was first raised in the Sixth Circuit.

QUESTION: Well, I am not quite sure I understand. Does the record show that he had 17 years?

MR. DENTON: Do you mean his military record or --

QUESTION: Does anything before us show this?

MR. DENTON: It would only be in the brief, it would not be in the technical record itself.

QUESTION: So the answer is no then?

MR. DENTON: Well, the brief, the brief in the --

QUESTION: The brief is not a part of the record, is it?

QUESTION: I think there is some mention of it in the opinion of the Sixth Circuit, isn't there, or not?

MR. DENTON: I believe it is, Your Honor.

QUESTION: But that is really not --

QUESTION: Well, how much time is in the record? The record shows how much time he served in the National Guard?

MR. DENTON: Actual credible time, I am not sure that it is National Guard time, all National Guard time is 17-1/2 years credible time.

QUESTION: Is that in the record?

MR. DENTON: It would only be possibly in the record as far as the decision of the Sixth Circuit.

QUESTION: Well, taking out the decision of the Sixth Circuit, where is there in the testimony, evidence, affidavits or anything else the time that he was in the National Guard?

MR. DENTON: Of course, there is no testimony. The only thing to rely on is --

QUESTION: There is no testimony on --

MR. DENTON: -- would be the complaint. The complaint

was dismissed without an evidentiary hearing. Of course, then, from there, there was no brief filed.

QUESTION: It was never in the record to show how long he was in?

MR. DENTON: No, Your Honor, other than the briefs which have been filed. That would be the only thing.

QUESTION: And the brief is not evidence to me.

MR. DENTON: No, Your Honor, it is not.

QUESTION: Mr. Denton, as I understand your position, it is that once a member of the National Guard becomes a technician, he then can never be denied the right to reinlist without a prior hearing? Is that right?

MR. DENTON: He can be if it is not, the denial of reinlistment is not a mere sham to get rid of him from his technician's employment.

QUESTION: Well, how does one determine --

MR. DENTON: This is to an evidentiary hearing at least, and if there is sufficient allegations in the complaint, then this is our contention, that the federal courts should review at least to make a determination of whether or not a decision made by a military commander for a non-military reason, as noted in the Sixth Circuit's opinion.

QUESTION: The answer to my question then is yes?

MR. DENTON: That is correct.

QUESTION: And that is that once the status of

technician is attained, it may be the first month he is a member of the National Guard, from then on he can never be denied the right or the claim to reinlist without a prior evidentiary hearing?

MR. DENTON: The answer is not yes, it is yes if his denial to reinlist or the denial to reinlist is a sham to get rid of him from his technician's job.

QUESTION: But suppose the commanding general, the adjutant general just said you are the worst soldier we've ever had and totally incompetent --

MR. DENTON: That would be a military decision and you would have no --

QUESTION: Wouldn't you have to have a hearing to determine whether that was a sham?

MR. DENTON: No, Your Honor, not in that instance, because it would be a military decision and not merely a military decision-maker making a decision for a non-military purpose.

QUESTION: But suppose he believed that that was the real reason, the point that he says that is what you told me, but I know the real reason you fired me or wouldn't let me reinlist is because you didn't like my work as a technician? Wouldn't he always be free to make that allegation in a complaint?

MR. DENTON: He could, he could make that allegation and then it would be up to the court to determine whether or not he had sufficient or made sufficient allegation --

QUESTION: Well, he could make that allegation, regardless of what the commanding officer said to him.

MR. DENTON: He could.

QUESTION: So then he always would have an opportunity of a hearing?

MR. DENTON: Also he would have to show sufficient allegation before the court would be willing to review it, under our argument.

QUESTION: Well, his allegation would be exactly what you put in this complaint, namely that the real reason you said that is you didn't like my work --

MR. DENTON: True

QUESTION: -- and you didn't want to give me a hearing.

QUESTION: If your client were not a technician, would you assert that he had any claim for complaint upon denial of reinlistment?

MR. DENTON: If he were not a technician, merely he was a military personnel?

QUESTION: Just an ordinary National Guardsman?

MR. DENTON: No, Your Honor, he would not have a right to a hearing in this instance then if he were merely a military personnel.

QUESTION: Your position is bottomed on the fact that your client is a technician or was a technician?

MR. DENTON: Right, Your Honor. I think the facts in

the decision of this case are unique to my client's type of employment. It doesn't apply across the board to all military personnel. It applies in the instance where you have civilian technicians in employment based upon military employment.

QUESTION: You recognize, of course, that before one may attain the position of technician, he must be a member of the National Guard?

MR. DENTON: That is correct. We have no argument with that. That is by operation of law. If he loses his Guard membership, he loses his technician's employment.

QUESTION: How many days a week is he a technician?

MR. DENTON: He is a technician five days a week.

QUESTION: And the other two?

MR. DENTON: The other two, he is off duty actually. He has one weekend I think per month that he performs services as a National Guardsman.

QUESTION: And on that day he performs services, military --

MR. DENTON: Yes, Your Honor.

QUESTION: -- military services?

MR. DENTON: Yes.

QUESTION: And are they the same functions that he performs during the week as a civilian technician?

MR. DENTON: Basically, as I understand, most of them are. In this particular instance, the respondent did perform

the very same functions.

QUESTION: And if the commander had said, we are not allowing you to reinlist because in one weekend of the month you performed so poorly we decided that you ought not reinlist, we ought not permit you to reinlist, somewhat the situation?

MR. DENTON: If it is made for a military purpose, where in that case it is --

QUESTION: On that day, performing military duties, you didn't perform satisfactorily --

MR. DENTON: Right.

QUESTION: -- for that reason, we arenot permitting you to reinlist.

MR. DENTON: But again, too, then there would not be a sham to get him out of his technician's job.

QUESTION: So that --

MR. DENTON: It would be for military reasons.

QUESTION: -- it would be very simple then, instead of denying him reinlistment as they did, if they merely said we deny you reinlistment because on the one weekend of the month that you have to report as a military person, you did not perform satisfactorily.

MR. DENTON: That is correct.

QUESTION: Let me take you outside the military. I think as U.S. Attorney is appointed for four years. Suppose the four-year period expires and he isn't reappointed, is he entitled

to a hearing?

MR. DENTON: I don't believe so, Your Honor. I believe that would probably fall -- I don't remember the exact name of the case, but it was in regard to Heaven or something of that nature, where the District Court's law clerk, or maybe the clerk of the District Court was not retained by the Federal District Judge, and the court held that there was not --

QUESTION: Well, I am speaking of a normal U.S. Attorney, normally appointed by the Executive.

MR. DENTON: Right.

QUESTION: Sometimes there is a vacancy, why, the District Court steps in, but I am just speaking of the usual situation.

MR. DENTON: It would be a purely discretionary matter. Possibly it could attach, if the U.S. Attorney had performed such a job for such period of time whereby he became vested with a property interest in continued employment. This is another aspect of this in that we feel that due to the respondent's past military record, awards, citations, being within --

QUESTION: Let me see if I understand you. Are you saying that a U.S. Attorney can acquire some kind of tenure in his job beyond his period of appointment?

MR. DENTON: If you want to relate tenure and a vested property interest, if you want to say they have the same

connotation, yes. I don't feel they have the same connotation. I think of tenure as being somewhat different from a vested property interest by virtue of things that have been performance of the employee-employer relationship, whatever over the past. It would be probably somewhat akin to Perry v. Sindermann, where it was found that there was a tenure program, although not spelled out, and the professor became vested with a right of property interest and continued employment and renewal of his contract.

QUESTION: Mr. Denton, you are familiar with Roth, I take it, the Board of Regents v. Roth?

MR. DENTON: Yes, sir.

QUESTION: Are you aware that there in that case, when it had been in the Seventh Circuit, the board got here, although Roth had no claim of entitlement to be rehired, it was simply a tenure at will, the Seventh Circuit held that as a prophylactic matter to make sure that the refual to rehire wasn't for impermissible purposes, he was entitled to a hearing either in federal court or administratively, and this Court disapproved that, as I read the opinion. Now, it seems to me that your argument that there is a prophylactic necessity for this sort of hearing to make sure that it wasn't improper reasons is very much the position that the Seventh Circuit took in Roth and that was not followed in this Court.

MR. DENTON: I think the distinction in that case was

that the Seventh Circuit held that a mere subjective expectancy was protected, and this Court disagreed, saying that a mere subjective expectancy was not. I agree with that, that mere subjective expectancy is not protected, but we think that the respondent had a justifiable and reasonable expectancy, based upon 17-1/2 years of credible time, based upon previous reinlistments, based upon military record, awards and citations, that they have created in him a reasonable justifiable expectation that he would be allowed to reinlist.

QUESTION: Is there any way to get you off of that 17-1/2 years?

MR. DENTON: I will get off of it, Your Honor.

QUESTION: Well, doesn't that argument depend on factors other than his being a technician? I thought I understood you to answer Mr. Justice Powell by saying that you relied entirely on his status as a technician? And if that is true, I don't see whether it makes any difference whether he was one year or 17-1/2 years.

MR. DENTON: I'm sorry, I don't follow you.

QUESTION: Do you rely on any -- would you say he had a claim if he were not a technician?

MR. DENTON: If he were not a technician, does he have a claim?

QUESTION: Yes.

MR. DENTON: No, Your Honor.

QUESTION: If you rely entirely upon his status as a technician, what difference does it make whether he was in the service for 17 years or only for six weeks?

MR. DENTON: If I rely on his status as a technician?

QUESTION: Yes, your point being that when his term of reinlistment comes up, his status as a technician entitles him to a special protection. It seems to me that is completely independent of the 17-1/2 year point, and vice versa. If 17-1/2 years gives him an expectancy under Roth and all the rest of it, then he doesn't need to be a technician.

MR. DENTON: His 17-1/2 years gives him an expectancy of reinlistment. Once he reinlists, then his technician's employment continues unless dismissed for cause.

QUESTION: I have to confess I am confused.

MR. DENTON: If I may, I go back to the idea that once the board was convened, the respondent became clothed by the right to appear before this board, a right to have a copy of the charges or statements made against him, all of which were denied to him. This was set forth in the complaint, also set forth that the commander exceeded his scope of authority and abused the authority, if it is in fact vested in him, the complaint just set out the alleged vested discretion or prerogative. Our position is that this discretion or prerogative does not in fact exist. If it does in fact exist, we would have expected the petitioners to set forth specifically where that regulation or

statute vesting the commander with this discretion or prerogative, where we can locate it, something they have totally failed to do, which would have been very simple. I think possibly it could have foreclosed the issues in this case.

Of course, we feel that the commander overstepped his authority and abused it and acted in an arbitrary and capricious and unreasonable manner when he used the military aspect of the respondent's employment in order to terminate his technician's job.

Also if the military commander is given unfretted authority or prerogative or discretion, without judicial restraint or the possibility of review by the judiciary, then the decision of a military commander would be left to stand even if it were made on constitutionally impermissible or statutory or regulatory impermissible grounds, such as race, religion or sex, to deny review would then or allow the military commander to do that which the Constitution and statutes and regulations says he cannot do.

QUESTION: But you didn't allege that here, did you, in your complaint? You didn't allege that the refusal to allow reinlistment was because of race, religion, something like that?

MR. DENTON: No, Your Honor, we did not. That issue has not been raised in the complaint.

We would say that once sufficient allegations have been made before a court, allegations of a nature that the

commander had exceeded his statutory and regulatory authority, that the commander had violated the constitutional rights of the respondent or a petitioner, plaintiff, that then the courts could review, they have a right to review in the first instance, to determine if there has been a violation, and if this violation is --

QUESTION: Mr. Denton, let's take a period -- now, this man's enlistment period is up.

MR. DENTON: Correct.

QUESTION: He is no longer a technician?

MR. DENTON: That is correct.

QUESTION: Now, if he comes back, what is the difference then between when he originally applied?

MR. DENTON: If he comes back now?

QUESTION: Yes. There is a little biatus between the end and the reinlistment, isn't there, sort of a no man's land there.

MR. DENTON: Are you talking about in this particular instance if the respondent went back and asked to reinlist --

QUESTION: No, in this particular case, isn't he just right in the Roth case?

MR. DENTON: I'm sorry, I didn't understand.

QUESTION: Isn't he right in the Roth case? His enlistment is up. He is asking for a new enlistment.

MR. DENTON: Right.

QUESTION: And in the meantime he is not a technician.

MR. DENTON: It is done, Your Honor, so as not to -- so there will not be a void in his employment either as a military personnel or a technician.

QUESTION: Or if he had been allowed to reinlist, there would have been a continuous situation --

MR. DENTON: Right, he would have --

QUESTION: -- both in the National Guard and as a technician?

MR. DENTON: Right.

QUESTION: What is the term of enlistment in the National Guard? I don't think that --

MR. DENTON: The term of enlistment --

QUESTION: In terms of years, I mean.

MR. DENTON: -- varies. I believe under the regulations, the Secretary can allow enlistment for periods as short as one-hald or six months, maybe even possibly shorter, where -- up to I think the maximum of six years, something like that.

QUESTION: And that is what, at the option of the applicant or of the particular unit or what? Do you know?

MR. DENTON: These depend upon various things, such as the age of the applicant, if he is eligible within a matter of a short time, possibly six months he would be eligible for retirement, then they may reinlist him for six month periods.

QUESTION: Is there a normal term of six years or

something like that?

MR. DENTON: I am really not that familiar with it, Your Honor, to be able to answer that.

We feel that the Sixth Circuit's decision does not go outside the old bounds of non-reviewability, but actually is remunerative of that. They just set forth a method of review, if there are sufficient allegations. We feel that the Sixth Circuit's decision is judicially correct.

QUESTION: The opinion written for the Court of Appeals was written by a former member of the Court of Military Appeals, wasn't it?

MR. DENTON: Judge Duncan was formerly the Chief Justice, as I understand it, of the United States Court of Military Appeals and as such I would feel that he does possess some expertise in the area of military matters.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further?

ORAL ARGUMENT OF ALEX B. SHIPLEY, JR., ESQ. -- REBUTTAL

MR. SHIPLEY: Briefly, Your Honor, I would like to reiterate that this was a purely military decision and to refer Your Honors to the prayers of the complaint. He wants to be reinstated in his employment, he wants to be reinstated in the National Guard, he wants full back pay for any period of time after which he was terminated in his Guard technician status, and he is seeking $100,000 in damages from his military

commander. And we would assert that to subject military commanders to the possibility of these types of suits would severely interfere with the military preparedness of this country through the National Guard program.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:05 o'clock p.m., the above-entitled case was submitted.]

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