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Supreme Court of the United States

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SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

Michael J. Codd, Police Commissioner,
City of New York, Patrick V. Murphy,
Former Police Commissioner, City of
New York, The City Of New York, Harry
I. Bronstein, Personnel Director and
Chairman, New York City Civil Service
Commission, and Baraham D. Beame, As
Comptroller, City of New York,
Petitioners,

No. 75-812

v.

Elliott H. Velger,

Respondent.

Washington, D. C.
December 1, 1976

Pages 1 thru 52

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL J. CODD, Police Commissioner, City of
New York, PATRICK V. MURPHY, Former Police
Commissioner, City of New York, THE CITY OF NEW YORK,
HARRY I. BRONSTEIN, Personnel Director and Chairman,
New York City Civil Service Commission, and
BARAHAM D. BEAME, AS Comptroller, City of New York,

Petitioners,

v.

ELLIOTT H. VELGER,

Respondent.

No. 75-812

Washington, D.C. ,

Monday, December 1, 1976

The above-entitled matter came on for argument at
1:52 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

W. BERNARD RICHLAND, Corporation Counsel of the City
of New York, Municipal Building, New York, N.Y.
10007; on behalf of the Petitioners.

SAM RESNICOFF, ESQ., 666 Third Avenue, New York,
N.Y. 10017; on behalf of the Defendants.

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W. BERNARD RICHLAND, ESQ.,
for the Petitioner.

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SAM RESNICOFF, ESQ.,
for the Respondent.

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REBUTTAL ARGUMENT OF:

W. BERNARD RICHLAND, ESQ.,
for the Petitioner.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 812, Codd and others versus Velger.

Mr. Richland, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF W. BERNARD RICHLAND, ESQ.,

ON BEHALF OF THE PETITIONERS

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

We come here by certiorari to the 2nd Circuit Court of Appeals in a matter of great concern to my city, and a matter which I suggest is and should be of concern to every government official who has it in his power to appoint and to remove non-tenured officials who serve at his will and discretion.

The issue represented in the narrow sense, as I see it, is may a non-tenured municipal employee, who may be dismissed at will, be dismissed without a hearing when his personnel record contains derogatory matter which can be examined by prospective employers only with the written permission of the dismissed employee?

And in the broader sense -- and that arises out of the opinion of the Circuit Court of Appeals here -- can such an employee be so dismissed when his record might at some time in the future be examined by interested prospective

employees with or without such express permission?

QUESTION: Well, how would they get it without his permission? I thought you said, they must have his permission.

MR. RICHLAND: Under the specific rule of this case, under the specific facts of this case, permission was granted. And it was as a result of the permission being granted that the inspection was permitted.

However, there is implicit -- and I think to a considerable degree explicit -- in the opinion of the Circuit Court of Appeals -- which incidentally was decided before this Court decided Paul and Bishop -- that goes quite beyond that.

QUESTION: That's not realistic, is it? It's not realistic when a man applies for a job, and he says, you worked for the city of New York? He says, yes. But why did you leave? And he says, I won't tell you. He won't get employed, will he?

MR. RICHLAND: That's quite true. That's quite true. And this is one of the necessary incidences of exempt positions, of positions to which people are appointed at will.

I suggest as an example, and I've suggested it in my brief, and I think it highlights what our problem is here. Suppose a Justice of this Court has a confidential clerk in whom he has lost confidence because he believes, if you please,

that he has a loose tongue and talks out of Court, and so terminates him. He then applies to the Chief Judge of our Court of Appeals for a position as confidential clerk. And Chief Judge Britell calls the Justice of this Court, and says, what about this man? Under the ruling of this case, I submit, not only could the Justice of this Court not tell him, but there is doubt as to whether or not he was permitted to pick up the telephone to answer the call because of this case --

QUESTION: You don't go a little bit further, and say, or be allowed to live? I mean, how far are you going to go on this? You're talking about policemen.

MR. RICHLAND: I'm talking about policemen.

QUESTION: You're talking about civil service jobs.

MR. RICHLAND: I'm talking about a policeman.

QUESTION: There's no judges on Civil Service rolls. So let's talk about Civil Service.

MR. RICHLAND: I suggest the rule is broader than that. But if you leave it strictly to policemen, and make a special exception so to exempt this Court and its justices--

QUESTION: I didn't say policemen, I said civil service employees.

MR. RICHLAND: Civil service employees? I have 800 civil service employees, many of which --

QUESTION: Did the Court of Appeals limit its

ruling to civil service employees?

MR. RICHLAND: It did not. It did not purport to limit it to anyone.

QUESTION: During the first year -- do I understand correctly, during the first year probation they can be dismissed at any time?

MR. RICHLAND: At any time.

QUESTION: At any time.

MR. RICHLAND: At any time. It's part of the appointing process, as a matter of fact.

QUESTION: The law clerks on the highest court of New York, or other courts in New York, are on the same basis, I suppose? That is, they can be dismissed at will.

MR. RICHLAND: They can be dismissed at will. Just as your own confidential secretary could be dismissed at will. Just as my own confidential assistant can be dismissed at will.

QUESTION: During the first year then, the law clerks are in about the same posture as a probationary employee?

MR. RICHLAND: Exactly, exactly. They are non-tenured. They have no property right in their position. That is exactly what the situation is here. And I suggest that it is utterly impossible to properly operate a government in which confidential assistants are necessary, in which exempt personnel are necessary, under this kind of

ruling.

And I suggest that the ruling is utterly inconsistent with the decisions of this Court last term, both the Paul case and the Bishop case. Obviously there was property right possessed by Mr. Velger in his job. Obviously he held his job at the will of the appointing officer. And he was dismissed.

QUESTION: He is not asserting a right to due process before he was dismissed, is he?

MR. RICHLAND: I suggest that he is not entitled to due process unless his liberty is impinged.

QUESTION: Right. I'm asking what the issue in this case is.

MR. RICHLAND: The issue in this case is whether such a person can be so dismissed without violating his liberties.

QUESTION: Oh, I thought the issue involved a disclosure.

MR. RICHLAND: That's right.

QUESTION: Of personnel files subsequent to this dismissal.

MR. RICHLAND: No, no. The issue is whether or not such a person can be dismissed when his file is likely to be exposed, without having previously enjoyed a hearing. And by hearing, I assume, a hearing with a full panoply of

cross-examination and appearance by counsel.

QUESTION: Right. But if his file had never been disclosed, would there be any case here today?

MR. RICHLAND: If his file -- well, we wouldn't be here today.

QUESTION: Right.

MR. RICHLAND: There's no doubt about that.

QUESTION: So disclosure --

MR. RICHLAND: But we might have been here a year from now. We might have been here four years from now.

QUESTION: But I'm talking about this case --

MR. RICHLAND: Exactly.

QUESTION: -- which involved disclosure of the fire, is that correct?

MR. RICHLAND: If there had been no disclosure, even though the policeman in this case invited disclosure by offering an authorization to his future employee and giving him permission to disclose it, of course we wouldn't be here.

But this is exactly what he did.

QUESTION: And his disclosure, therefore, as my brother Powell suggests, is the critical factor in this case.

MR. RICHLAND: It is the potential of disclosure.

QUESTION: No, it's the fact of disclosure.

MR. RICHLAND: As I read the opinion of the Circuit Court of Appeals --

QUESTION: Had there never been disclosure, and were there never a disclosure, there would never be a cause

of action, would there?

MR. RICHLAND: Of course not.

QUESTION: Well, it's the critical fact.

MR. RICHLAND: What's that?

QUESTION: How did it come to be disclosed?

MR. RICHLAND: It came to be disclosed when an application was made by the discharged employee to the Penn Central police department. They asked him --

QUESTION: It's a private entity.

MR. RICHLAND: It's a private entity. They asked him what his background was. He told them what his background was. They then secured from him a written authorization without which the police department would not have granted them any information. They took that to the police department, and the police department allowed them to see his records.

QUESTION: So you say that he made the disclosure.

MR. RICHLAND: Of course he made the disclosure. As a matter of fact, there was a public disclosure that has been made in this case, has been made by my friend in this case by bringing this suit. Before that there was no public disclosure. There was at most a private disclosure, with the permission of the employee.

QUESTION: Mr. Richland, if that argument is the complete answer to the case, I suppose you'd take the same

position if the trial showed he was guilty of murder?

MR. RICHLAND: Why, of course.

QUESTION: No matter what stigmatizing reason --

MR. RICHLAND: Of course. Of course. And he has his remedy. If that were a false statement, or is a deliberately false statement. He has his remedy in the state courts.

QUESTION: What is his remedy?

MR. RICHLAND: His remedy is action in defamation.

QUESTION: Well, how does he find out what the file showed?

MR. RICHLAND: If nobody finds out what the file shows, what difference does it make?

QUESTION: Well, the practical problem is that if he does not grant access, he cannot get another job.

MR. RICHLAND: Not necessarily.

QUESTION: I thought you conceded that earlier, that if he followed the practice of saying, no, I won't let you look at this, I won't tell you why I was fired, he'll never get another job.

MR. RICHLAND: It doesn't necessarily follow. There may be people that don't ask him. There may be people who don't care what his record was in the police department.

QUESTION: You changed that three times in the last six minutes. You told me distinctly that you recognized that that was the problem. Didn't you?

MR. RICHLAND: No, I'm sorry. If that is the impression that your honor got, then I have certainly misspoken.

QUESTION: Well, that is the impression that Justice Clark had, and he put it in his opinion. He said it was assumed that this man couldn't get a job without it. Didn't he say that?

MR. RICHLAND: I don't think that that assumption is valid anyway. He can get jobs all over the place. Nobody has ever disqualified him. He has never been disqualified. from any of the various civil service lists on which he has been placed. The only other police agency to which he applied, and on which he relies in his appendix to his brief, sent him a letter which says -- which ends up by saying, we thank you for your interest in the Plainfield police division, and wish you success in your future endeavors. And that's not any proof that he was rejected because of a failure to produce his records or anything else. And we're bound here by our record.

QUESTION: Well, New York imposed no requirement that he had to disclose his record in order to get another job. Those were requirements imposed by private employers.

MR. RICHLAND: Of course not. Of course not.

And I submit that --

QUESTION: Just a question, Mr. Richland. Is there any provision in your regulations for disclosure to the

discharged employee of the matter that was given to third parties? In other words, could he have gotten access to the file himself?

MR. RICHLAND: I believe he could have.

QUESTION: I take it there's nothing in the record to show he made a request, other than the written interrogatory that you --

MR. RICHLAND: There was no direct proof that he made such a request. By the way, one strange aspect of this case that I think your honor should know, and that is that Mr. Velger was present at the trial before the trial justice, and heard the statement of the Pennsylvania railroad personnel officer that said that he had read in his file that he had put a gun to his head and attempted suicide. Mr. Velger did not take the stand to deny or dispute it. That fact has never been disputed. And this, it seems to me, shows how tenuous is this whole notion that the circumstance that there is information in a file that is derogatory of some one in itself requires that it not be dismissed at a hearing.

QUESTION: Well, don't you think the state ought to have some reason to say it? Why should he go around -- why should he be bound to disprove anything that anybody says?

MR. RICHLAND: Well, I think --

QUESTION: Does anybody -- is there any witness in this report? No. It's just a blanket statement. That's

all.

MR. RICHLAND: Isn't it something that he could have denied? Isn't it -- wasn't it put upon him to deny it? Wasn't it put upon him to say that didn't happen at all? This is a pure invention.

QUESTION: Why? Why was he obliged to deny it?

MR. RICHLAND: Because he was a provisional employee, and if he is dismissed, he can be dismissed for no reason --

QUESTION: He doesn't have any right not to be maligned?

MR. RICHLAND: Of course he has a right not to be maligned. Of course he has a right not to be maligned. But is this the remedy? Is this the remedy? If he is maligned, he has an action in court. He has an action for slander. He has an action for libel, as this Court held last term, the right to reputation is not protected by the Fourteenth Amendment. It is not one of the liberties that is protected.

QUESTION: Mr. Richland, getting back to the New Jersey one. I understand you say that they were going to hire him. Or they were not going to hire him. Specifically, your footnote 4 of the opinion says that they would have hired him but for this.

MR. RICHLAND: That is something that I do not find any support for in the record.

QUESTION: You think that --

MR. RICHLAND: I found no support for it in the record.

QUESTION: -- Justice Clark just pulled this out of the clear blue?

MR. RICHLAND: I find no support for it in the record. And I don't think your honor will find any support for it in the record.

QUESTION: In New York, would he have had an action against the -- you say, an action for slander or defamation of some kind. There's no immunity for the police department in such an action, is there?

MR. RICHLAND: No, of course not.

QUESTION: Well, in some states there is.

MR. RICHLAND: Besides which, he's not a policeman, he's a former policeman.

QUESTION: No, I'm talking about immunity of the defendants who got up the file. There would be no privileged or --

MR. RICHLAND: There's no such immunity. There's no such immunity.

QUESTION: No privilege for assembling a file, a personnel file, or anything like that.

MR. RICHLAND: People who make false statements -- except for this. Except for the circumstance that when there is communication between a former employer and a future

employer in regards to the conduct of the employer while he was in the employe of the former employer there is a limited privilege.

QUESTION: In other words, there is a privilege insofar as they communicated the information to the Pennsylvania Railroad?

MR. RICHLAND: That's right, there is a limited privilege. But that limited privilege -- that limited privilege does not extend to slander or libel, to unthought about, to deliberate, to reckless statements. And again I say, Velger was right present in the courtroom and made no attempt to deny that the incident took place.

QUESTION: Well, was that an issue? That wasn't an issue in the litigation?

MR. RICHLAND: The issue in this litigation, as framed by the pleadings, was whether or not in such circumstances, a pre-determination hearing was essential in order to dismiss a non-tenured employee who had no property right in his job.

QUESTION: All right, let's -- taking that as the issue, then whether or not this happened wasn't an issue at all, in this litigation.

MR. RICHLAND: Whether or not what, your honor.

QUESTION: Whether or not this actually happened under the circumstances under which it happened, if it did,

were not at all issues in this litigation.

MR. RICHLAND: Yes, but by nattering the issue in that way do you foreclose the rational inquiring as to what we're talking about here? You're dealing with something that is academic.

QUESTION: Well, you talk about his failure to take the stand and deny or explain. That was not an issue in this litigation at all, was it?

MR. RICHLAND: Well, of course it wasn't. It was removed from litigation by the circumstance that he never denied, that he never pretended that anything was otherwise.

QUESTION: Well, I thought the point of the litigation was to establish his right to a hearing somewhere else, rather than that he should have a hearing right in the District Court.

MR. RICHLAND: His right to -- well, it was to establish his right to a pre-determination hearing.

QUESTION: Exactly.

QUESTION: Well, is it not even narrower than that: a right to a hearing before they would put that kind of information in his files without notice to him.

MR. RICHLAND: You know, chief judge, Chief Justice, what would block the point to this. We're not engaged in a--

QUESTION: Well, we're not trying to evaluate the point. We're trying to evaluate

what his claim is. His claim is that that kind of information may not go into his files, consistent with due process, without giving him notice that this information is going in to the files. And then to have an opportunity then and there to deny it.

MR. RICHLAND: No, a hearing is what is required in accordance with the opinion of the Court of Appeals. A hearing. And to my mind, a hearing is a hearing with a full panoply of cross examination --

QUESTION: Well, I think that must be read as an opportunity for a hearing. Not necessarily holding a hearing.

MR. RICHLAND: Well, that is not what I see. Because actually, people always have an opportunity. Now, why was I dismissed? Why did you do this to me? They can always do that. There's nothing wrong with that.

QUESTION: That's not a complete answer. Because he did that. And his answer was, we just decided you weren't doing a good job. They gave him a very vague answer.

MR. RICHLAND: That's right.

QUESTION: So he did not have a right to find out the real reason.

MR. RICHLAND: Except for this: except you must assume that he knew what happened. You must assume --

QUESTION: Well, how does he know what might be in the file? How does he know? If you don't tell him -- and

you don't, as I understand the practice.

MR. RICHLAND: Well, of course, you don't tell him, except that you tell him he was unsatisfactory. Now, what the details are, of course you don't tell him. You tell him it was unsatisfactory.

QUESTION: But that doesn't respond to the Chief Justice's question is, what is his protection against the possibility that you relied on a false, inaccurate, slanderous statement of some kind? He has none, as I understand it.

MR. RICHLAND: Well, that really isn't so. Because he has a right to challenge his dismissal. And in Article 78, we see that our courts are as open as any courts in the land to civil servants. They are the most litigating people in the world.

QUESTION: Did he have a statutory right to some kind of hearing before his dismissal?

MR. RICHLAND: Nope.

QUESTION: Well, then, what is the right you're describing?

MR. RICHLAND: No, but he had a statutory right to review his dismissal in the event his dismissal was for unconstitutional reasons.

QUESTION: Well, how does he know?

MR. RICHLAND: And he has that right in the Supreme Court. Because under our law, a public official cannot

act in so arbitrary or unreasonable a manner, or unconstitutional manner, to discharge anybody.

QUESTION: Even a probationary employee?

QUESTION: Yes, I thought the law was as you explained it to us he can be --

MR. RICHLAND: A probationary employee can be dismissed at will.

QUESTION: For any reason.

MR. RICHLAND: For any reason.

QUESTION: With reason or without reason.

MR. RICHLAND: For any reason. But he cannot be dismissed for a reason that violates his constitutional rights. He cannot be dismissed for exercising his right of free speech. He cannot be dismissed because he is black, or because he was a Jew, or for any other of those reasons that are not permitted under our constitution. And for that he can get relief in our own courts. And to the extent -- in addition to that -- that the reasons asserted for his dismissal were disgraceful or unpleasant or libelous, he has his right of action in slander.

QUESTION: The privilege you referred to a moment ago, Mr. Richland, that an employer has when communicating information to a -- from a former employer receiving -- is that any different for a government employer than it is for a private employer under the law of the State of New York.

In a defamation case.

MR. RICHLAND: No difference. There is no difference. Our files are even more open than the files of private firms.

QUESTION: Well, I was talking about the privilege that could be claimed in a defamation.

MR. RICHLAND: Oh, certainly not. I don't think anyone is suggesting that an orderly employee who holds his job in private industry at will cannot be dismissed for any reason at all, except a reason which, of course, insults the constitution.

QUESTION: Well, no, what I'm talking about is, supposing that an employee brings an action for defamation, of slander, against a former employer for divulging the reasons for which that employer was discharged. Now you said earlier that there was a privilege under New York law, apparently a qualified privilege, that can be asserted in effect passing along a recommendation. And my question is, is that any different -- is the privilege any different for a governmental employer than it is for a private employer?

MR. RICHLAND: I submit that it should not be.

QUESTION: Well, I ask you: do you know whether it is.

MR. RICHLAND: I submit that it isn't.

QUESTION: Oh.

QUESTION: What is the relief that you understand

that the 2nd Circuit opinion has given --

MR. RICHLAND: I can only take the interpretation that is provided in the respondent's brief. And that is, reinstatement with full pay and counsel fee.

QUESTION: I take it you can't understand especially the reinstatement part of it?

MR. RICHLAND: I can understand none of it, your honor. We have already been buried under by applications for counsel fees in a variety of cases.

QUESTION: Well, you got 800 lawyers. You ought to be able to take care of it.

MR. RICHLAND: We cannot take care of the counsel fees of our adversary, and they do become a very serious problem.

QUESTION: I just found glancing through the record that there is a mention about the Plainfield, New Jersey job that he was denied.

MR. RICHLAND: That's right. But there was nothing in there that shows that he --

QUESTION: But before you and I get to arguing about what's in there, let's read it, rather than interpret it, huh?

MR. RICHLAND: Of course.

QUESTION: I was called by the Plainfield, New Jersey police department. And I was called down there for a

pre-appointment interview. And I also filled out a personal history questionnaire. And I was told that the hiring date would be three weeks if the investigation was successfully completed. But I was never called back, never called down for hiring. That is in there.

MR. RICHLAND: And he received a letter wishing him success in the future, and I suggest that that does not raise to the level of proof of any such thing.

QUESTION: Have you ever turned down somebody and wrote a nice letter saying, we wish you success at someplace else?

MR. RICHLAND: Not from a police department.

QUESTION: Mr. Richland, let me ask a question, please. Do you understand the respondent here to concede that he had no right not to be terminated?

MR. RICHLAND: Did he concede that he had no right not to be terminated?

QUESTION: I have too many negatives in there.

MR. RICHLAND: I don't know. I hate to argue my adversary's case. I don't think that he takes that position. But that is what the law of this New York State is, that a probationary employee can be dismissed at any time during his probationary period.

QUESTION: Well, I'll certainly ask your adversary. But if he were to concede this, then I wonder where this

reinstatement business comes from?

MR. RICHLAND: I wonder too.

QUESTION: That's not a question for you.

MR. RICHLAND: I wonder too, your honor. I wonder too. I find this a strange case. I find this a strange extension of what was said in the opinions of this Court rather than what was decided in the opinions of this Court. I might suggest that the decisions of this Court, particularly Bishop and Paul, preclude anything but a reversal in this case, unless stare decisis lasts less than a year.

Unless there are any further questions, I would like to reserve a few minutes for any reply that I think might be necessary.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Richland. Mr. Resnicoff.

ORAL ARGUMENT OF SAM RESNICOFF, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Before I proceed, if I may take one moment to introduce co-counsel. Mr. Rappaport, chief counsel to the Patrolmen's Benevolent Association, and Mr. Joe Frost, of Counsel to the PBA.

I was all set, after listening to my young friend's argument about there was nothing in the record pertaining

to Plainfield. But Mr. Justice Marshall referred to this particular part. Which of course -- that was the basis why Judge Clark made that footnote number 4. So that it was in the record. And once Plainfield, once they went down and saw what happened, allegedly, they wouldn't touch this man with a ten foot pole.

Who am I representing in this proceeding? A young man 23 years of age, a brilliant boy, passes all his -- he's interested in law enforcement. He's a student at the John Jay Criminal College. Good record. Never been involved in any difficulty of any kind. He takes the examination for patrolman, police trainee, in 1970. He's only 19 years of age. Passes that, gets a mark of about 88. And he's appointed. Under that announcement for that examination -- my friend speaks of him as a provisional probationer, with no tenure, with nothing -- that announcement stated that once he attained the age of 21 he becomes a patrolman.

He served two years as a police trainee, he becomes of age, 21, on August 8th, '72. And on August 15th, he becomes a patrolman.

And then in 1973, February of '73, he gets a letter, with no notification of any kind, your services are unsatisfactory. And he's terminated, having spent several hundred dollars to quit the school and everything else. He doesn't know why. He's interested in law enforcement.

QUESTION: Are you tell us he was not a probationer at that time, he had tenure?

MR. RESNICOFF: No, no, there was some question. As pointed out, the announcement isn't clear. But we'll proceed on the theory that he is serving a period of probation, even though he has been continuously employed by the police department for more than two years. We'll say he's on probation.

QUESTION: Trainees are in quite a different capacity.

MR. RESNICOFF: They're not peace officers. They're not peace officers, that's right. Otherwise, they do all the investigative work and everything else, but they don't carry a gun and they're not a peace officer.

He's terminated. He's interested in law enforcement, so far as government jobs, state jobs, city jobs, passes 97% of them with marks in excess of 88, 90%. And as your honors know, when a man applies in the government, where were you employed? Were you ever discharged? So he has to state as he did, I was working for the City of New York for a period of three years. Were you terminated? Yes. I don't know. He doesn't know why. Nobody's told him. We didn't know why until the time of the trial in the District Court.

QUESTION: What did the letter say?

MR. RESNICOFF: The letter said, your services are unsatisfactory.

QUESTION: Well, isn't that a reason?

MR. RESNICOFF: That's no reason, Judge. Your letters -- services are -- what does that mean? Could it be attendance? Could it be -- we don't know.

QUESTION: Well, I should say it means, in ordinary language, daily conversation or newspapers, that it's unsatisfactory.

MR. RESNICOFF: Unsatisfactory in what respect?

QUESTION: Well, did he ask for a bill of particulars, then?

MR. RESNICOFF: They don't give bills of --

QUESTION: Well, did he ask?

MR. RESNICOFF: No. He was a young man 22 years -- if he wanted a bill of particulars, they'd think he was out of his mind. Who'd pay attention to him, judge? Nobody would pay attention to him. So he doesn't know of any --

QUESTION: Would it be unreasonably to expect that a highly intelligent -- you say he's 19 years old -- would not have sense enough to say, why? Just one word?

MR. RESNICOFF: He goes down there. He went down there. They wouldn't answer him. They don't answer you.

QUESTION: Did he ask why?

MR. RESNICOFF: This is the same letter that goes out --

QUESTION: Did he ask why?

MR. RESNICOFF: He went down to the clerk's office.

Nobody gave him a reason.

QUESTION: Did he ask why?

MR. RESNICOFF: From what I understand -- he didn't write, if that's what you --

QUESTION: Did he ask why?

MR. RESNICOFF: The answer is no.

QUESTION: Thank you.

MR. RESNICOFF: He brings this suit after he files applications, he's not being appointed, and he finally gets himself a job in a private sector as a private security man for the Pennsylvania Railroad in New York. And he is working there, serving his probationary period, he's asked a question, where were you employed, and he says, police department. Were you terminated? Yes, I don't know why.

They write a letter, the Penn Central, writes a letter to the police department. They say, well, you come on down, look at the records: Man comes down, looks at the records, and he's terminated. We bring the action. I meet these men in the court for the first time, never seen them before, and I'm hearing for the first time what all this is all about. And then we hear one of the man says, he looked at the records, four or five men were involved, there was some statement to the effect that -- let me read the exact testimony. Page 81a: Did you ever sign an authorization

for the Police Department -- no. On page 89a of the record: what happened [after he looked at the records]?

I drew a negative attitude from the New York City Police Department. They advised me to go about it by letter. I explained to them that I had already attempted to do it by letter. I gave up.

Question: as a police officer were you satisfied with that report?

Answer: No, sir.

Question: They wouldn't permit you to investigate or talk to these other policemen that were involved there, the other probationary patrolmen, is that correct? No, they wouldn't permit it. I just drew a blank attitude from the New York City Police Department. I decided that I could never prove or disprove exactly what happened, so I let it go as it stood.

Then what happened? Well I went back, reported it, and the man was terminated.

Now, during the course of the oral argument, Judge Clark --

QUESTION: Mr. Resnicoff, before you get to the oral argument, you mentioned that the first you heard of this was at the trial.

MR. RESNICOFF: That is correct.

QUESTION: You're familiar with the pre-trial

discovery procedures that the federal rules authorize, are you not?

MR. RESNICOFF: Yes, we did, and they wouldn't give it to us.

QUESTION: You asked the question, why, and they gave you an evasive answer?

MR. RESNICOFF: They said, you're not entitled to it.

QUESTION: Did you follow up in any way with asking the judge for more complete answers?

MR. RESNICOFF: No.

QUESTION: Because you would have been entitled to it, I think.

MR. RESNICOFF: We asked for it, they gave us that, and that was that. We pointed that out before Judge Gurfein and before Judge Werker.

QUESTION: But you did make no further attempt to find out --

MR. RESNICOFF: No, I did not. Judge Clark, during the course of the oral argument -- my young friend here, Mr. Richland, did not argue in the Court of Appeals.

A woman argued the appeal there, and Mr. Justice Clark asked the woman, supposing in that letter, which concededly was untruthful -- concededly -- that that was not a correct letter that should have gone out, because his services were satisfactory.

QUESTION: Which letter are you now referring to?

You say the letter --

MR. RESNICOFF: The letter of termination that went out that said, your services are unsatisfactory. And Judge Clark said --

QUESTION: Now, wait a minute, you characterized that as an untruthful letter?

MR. RESNICOFF: Well, in the sense that his services as an employee were satisfactory, there was no question. He had never been served with any charges, he had never been found guilty of anything other than this one incident which allegedly took place in the police academy. Other than that, there was nothing -- nothing of anything derogatory about this man.

QUESTION: Well, how can you know that?

MR. RESNICOFF: Well, there was nothing in the record.

QUESTION: Well, was a probationary employee -- does it have to be in the record?

MR. RESNICOFF: Well, normally, a man serving his probation in the police department, they serve him with charges, they have hearings there in the police department. They have hearings, they give a man hearings in the police department.

QUESTION: Well, then you're saying it's New York practice that unless there's been a hearing for a probationary

employee, the supervisor could not respond to a request such as this, telling an employee had been discharged because his services were unsatisfactory?

MR. RESNICOFF: They have never -- and in my vast experience that I've had with the police department in the City, they have never indicated to a man, other than the standard letter which goes out which says your services have been found to be unsatisfactory, as far as the police department, that is the end of the matter.

QUESTION: So this is a standard letter, then?

MR. RESNICOFF: This is a standard letter, that's right. And Judge Clark said to counsel, if they had indicated the truth which they thought was so, in that letter, that this man allegedly put a gun to his head, would he have been entitled to a hearing? Was that a stigma? Would that have been a stigma? And corporation counsel said yes, said yes.

So then Judge Clark says, well, if that's the case, doesn't it work out that way, when somebody goes and looks at this man's record, and sees something about a gun, what law enforcement agency would employ this man? There's no answer to that. As Mr. Justice Marshall points out, why should this young man 23 years of age go through the rest of his life with an indication of this kind, this kind of a stigma that he attempted suicide, when it never happened, he doesn't know anything about it, and they have made a

mountain out of a molehill here, because I during colloquy, before the Judge and the District Court, I said, it might have been a little horseplay between four or five young men in the academy at the time -- that's the only time that it appeared in the record. There is no testimony about anything like this. They had an opportunity to do that. They could have come forward with that, but they never did.

QUESTION: Well, are you saying that it should have --- that this hearing should have taken place right in the District Court? I understood your opponent to contend that, and several of us thought that was not the case.

MR. RESNICOFF: Well, as long as there was a hearing, Judge Rehnquist, in the District Court, I said it was incumbent upon them at least to come forward with at least some evidence, or at least make an offer of proof that what they allege, or what appears to be in some record of some kind, actually happened. We didn't know what it was.

QUESTION: You thought one of the issues in this federal court case, then, was for them to prove the reasons why they did discharge him.

MR. RESNICOFF: I wanted to know why. And I said that this man was entitled under the decisions of this Court, in the Roth case, in the Sinderman case, before Bishop, that since there was a stigma, that he was entitled to a hearing, a hearing at the agency level before dismissal.

I don't take the position, and my colleagues and I don't take the position, that a man serving a probationary period is entitled, as a matter of course, to a hearing. We're not asking your honors to do that. We're not concerned with that. That issue is not in this case. But we say that in this case, and in the Bishop case--Judge Stevens, you wrote the decision, Judge Rehnquist, you wrote a dissenting opinion--the issue in this type of a case, Judge Marshall is very much concerned with this stigma that attaches to a young man. How can you put a label like that on a man without giving him notice and an opportunity to rebut? This man can't be a lawyer, he's trained, he wants to be a law enforcement officer.

QUESTION: Mr. Resnicoff, in your vast experience with the police department, as you characterized it a moment ago, can you think of any reason for discharging a probationary employee which would not be some sort of stigma in the way you're describing it now?

MR. RESNICOFF: If he doesn't perform satisfactorily, if his attendance -- or if he refuses to carry out an order.

QUESTION: Well, aren't those stigmas?

MR. RESNICOFF: No, I don't think that's a stigma.

QUESTION: How does one draw the line between a stigma and a non-stigma?

MR. RESNICOFF: Well, it's a little difficult, judge,

to lay down a definitive rule. But I think, as Judge Clark, in this luminous opinion of his -- and incidentally, I say -- which -- his opinion has heart, and compassion and understanding -- he says, this case reeks with stigma. And that's exactly what it is. You don't say to a man that he's a suicide --

QUESTION: You smell it rather than --

MR. RESNICOFF: You smell it. That's exactly it. I'm using your words, Judge Rehnquist, that's exactly it.

QUESTION: Mr. Resnicoff, I just glanced through your papers here. And have you at any time -- you say this is a horrible stigma of adding this on his record. And I don't find anything here where you've asked for any release, or having that taken off these records.

MR. RESNICOFF: Well, I couldn't, because we were never aware of what it was, Judge.

QUESTION: Well, after you became aware of it, did you make any moves?

MR. RESNICOFF: No, we first became aware of it at the hearing in the District Court.

QUESTION: Well, why -- up until this moment, you haven't asked for it?

MR. RESNICOFF: No.

QUESTION: Why not?

MR. RESNICOFF: I'm asking for his --

QUESTION: Why not? If the stigma's so bad, why don't you ask that it be taken off his record?

MR. RESNICOFF: If this man -- I won't say, if -- this man should be reinstated, that's the end of the matter.

QUESTION: Even if that's still on his record.

MR. RESNICOFF: That record goes by the board.
That --

QUESTION: That doesn't automatically go by the board.

MR. RESNICOFF: If he is reinstated, I think that would be no problem, Judge Marshall. That would be no problem at all. If this man is reinstated, that's the end of the matter.

QUESTION: But you keep saying that. It would look better if you would ask for it some time. You haven't asked for it yet.

MR. RESNICOFF: Well, I --

QUESTION: Would you like for it to be done, now?

MR. RESNICOFF: I think that what they -- we're not dealing with --

QUESTION: Withdraw the question.

MR. RESNICOFF: I would like it of course, for this man's future, yes. Yes, judge. I say that we're not proceeding on any theory that what they did -- or in addition to being arbitrary and capricious or unreasonable, we take

the position what was done here was a violation of this man's constitutional rights.

QUESTION: Mr. Resnicoff, let me ask you a question about that. Supposing the file showed -- nobody knows what it shows, because nobody seems to want to get it into the record. But suppose the file showed that he was in fact terminated because he was late to work, or something like that. But it also showed that there was this incident in the police academy where he allegedly put a gun to his head, in an apparent suicide attempt. But it doesn't indicate that the police department relied on that as a cause for discharge. Would your case be any different?

MR. RESNICOFF: Well, of course there you've got a combination of stigmatizing material, and other material that is not stigmatizing material.

QUESTION: That's right. Do they have to give him a hearing before they let any stigmatizing material creep into the files?

MR. RESNICOFF: Yes, I believe so. I believe there, because then -- and I'm only using the language of your honors in these previous cases -- in the

QUESTION: Which previous cases?

MR. RESNICOFF: The Roth and the Sindeman cases, because then you're depriving a man of his life and his liberty

and right to employment.

QUESTION: And -- but even though he may keep the job for the next twenty years, too. You'd still have to give him a hearing before you let the stigmatizing material get into the files, if I understand you.

MR. RESNICOFF: Yes, I think that's the least they can do is when you get the stigmatizing material, there, I think, where it's going to affect his right to earn a livelihood, there I think he's entitled to some kind of a hearing.

QUESTION: Suppose the information was that he was found by superior officers intoxicated while on duty. Would you regard that as stigmatizing?

MR. RESNICOFF: I don't think so. I don't think being -- I've been under the influence of liquor. I don't think that's --

QUESTION: On duty. That's not bad in the New York Police Department?

MR. RESNICOFF: Well, I don't want to limit it only to the police department. I think a man who may be under the influence of -- now, look, a cop is not a second rate citizen. It's not a question of privileges and all that. You're dealing -- it may be hard to say what is or what is not, but I think that is a decision that has to be made by the agency. Is it stigmatizing? As Judge Marshall -- they

got enough lawyers over there to say, look, is this stigmatizing? If it is, let's be careful. Let's give him a hearing. Whatharm is there?

QUESTION: Mr. Resnicoff, let me change the subject a little bit by asking you a different hypothetical. Let's assume the police department had a policy, an unbending policy, of sealing all personnel files and not making them available to anyone under any circumstances. Would you be content with that?

MR. RESNICOFF: I think that would be all right. And then, of course, the man -- as Judge Clark points out -- he's damned if he does and damned if he doesn't. If he's asked a question, did you? and he doesn't want to give an answer, nobody is going to hire him. There's no question about it. Furthermore, if he says no, or leaves it blank, he's guilty of fraud. If he's asked the question, were you employed, were you ever discharged, and he -- leaves that open, he's guilty of an act of omission. So that if they were to adopt a policy of that kind where they would seal it, yes.

QUESTION: That's all right?

MR. RESNICOFF: That would be one way out, sure. That would be one way out. But as long as it's made available, and they can't come in under the umbrella of disclosure and say, well, we wouldn't give it unless he authorizes it. Well, of course he authorizes it. He has to

authorize it. To get any kind of a job, he's got to say, I authorize you to look at my records. This is what he has to do. This is the practice, for every state, city, local municipality, job, he must do that. And I say with all the sincerity of my command, under these circumstances, this is the stigma on this case. It would be enough of a problem deciding what is or what is not. But we've got this case, and that's why this case is here, and that's what this case is all about, the stigma to this young man. And I say it's unfair. And there is nothing in this record -- and when I say nothing in the record, I mean absolutely nothing in the record -- which indicates that this man anywhere along the line said that I put a gun to my -- this is nonsense. This is but a fabric of fancy. There is nothing to this argument. And he has been labelled without giving a chance to be heard.

Now I say that under the circumstances --

QUESTION: But your opponent says he could have gotten on the witness stand and explained that?

MR. RESNICOFF: Why should -- why -- how can he go to the witness stand? What am I going to put him on the witness stand? There was nothing there about it?

QUESTION: Well, he can say -- he could say that there's apparently something in my file that indicates I did this, and the fact of the matter is, I did not.

MR. RESNICOFF: The only one who brought that out is the officer who testified, this man from the Penn Central, and he said -- he even said -- I asked him, as a policeman, were you satisfied with what you read? He says, no. But I have no choice. I tried to talk to somebody in the police department, but nobody paid any attention to me. So I went back and recommended -- what else could I do.

QUESTION: As a matter of fact, your man did take the witness stand.

MR. RESNICOFF: Sure, he did. He pointed out --

QUESTION: And he neither volunteered nor did you ask him?

MR. RESNICOFF: No, it hadn't been raised. I only put him on the stand to show his background, the hundred examinations he took and passed, the ratings that he got, that he was never appointed, that he couldn't get a job not only in government, he couldn't get a job --

QUESTION: Does the record show after he was terminated by the Pennsylvania Railroad, he asked them, why was I was terminated? Did he ask them why he was terminated?

MR. RESNICOFF: There's nothing -- no. All they said to him is in the record. The man says, from what we say at the police department, we terminated you. And I asked him, was his services good? He says, oh, yes, there's no trouble with him.

QUESTION: But the question is, did your client make an effort to find out from them the reason --

MR. RESNICOFF: Yes, it's in the record. But as you said, no, they didn't give -- they didn't spell it out for him. All they indicated in there was, they looked at the records and from what they saw, they had no choice but to terminate him. He was a dead pigeon after that. And this was the way it was, every government agency that went down and looked at the police department records, with his approval, and in some instances, without his approval, if it was a government agency, as the testimony went. They let them come in, they looked at the records, that was it. No matter if he'd got 85 or he'd got 90.

Now my friend has dragged in something by the heels about a judge and a clerk -- this is all prejudicial. I don't know what this has to do with it at all. And Judge Marshall, you stopped him. We're interested in civil service. We're not interested in exempt positions. We're not interested in confidential positions. We're interested in a man who takes a civil service exam who is looking for tenure, promotion, pension. That's what we're concerned about, not with a secretary, or a confidant to a judge.

QUESTION: But this man never was a tenured civil servant.

MR. RESNICOFF: No, no. I took the position although

the notice wasn't clear, it said he would become a patrolman, which he did, without taking another examination.

But I say, as far as what your honors have said, that we're dealing with a situation of this kind, in view of this stigma, I say that at the least he was entitled to a hearing.

And I say this: it may be wrong, but I think from a practical point of view, there is no necessity for a remand. It would be an absolute waste of time. They had their opportunity. Had they come forward with any kind of proof, any evidence or any offer of proof, that this man had attempted suicide, we would then have been in a position -- how could I meet something I don't even know what it was all about.

QUESTION: You try to get it by getting a deposition.

MR. RESNICOFF: Well, I asked -- it's in there -- I filed for the interrogatories, and they said, no, you are not entitled to them.

QUESTION: Well, you could have gotten a deposition. Couldn't you?

MR. RESNICOFF: I guess I could have. But once they said no -- once they said no -- they said that in their answer --

QUESTION: Oh, they scared you.

MR. RESNICOFF: Well, they said no. It was the end of the matter.

QUESTION: I mean, you know what the rules are. You knew you had a right to do it, or you are presumed to have known it. And you didn't. You could have gotten all the information, all that information. By deposition. And if not, you could have gone to -- and I assume you and I agree that Judge Gurfein knows his rules?

MR. RESNICOFF: Oh, yes. And Judge --

QUESTION: Well, why didn't you do it? You just didn't do it, huh?

MR. RESNICOFF: No, on the contrary, that was enough. Once they said, I'm not entitled to it, this was their position, there was nothing further for me to litigate, that was the end of that. Because this was what their position. It was a -- they interposed that in their answer.

QUESTION: Well, who's running your side of the lawsuit, those lawyers or you?

MR. RESNICOFF: No, no, we, we. Well, maybe I have erred there, but I think that when they said to me, you're not entitled to it and we're not going to give it to you, that was the end of the matter. So I was anxious to go ahead with the lawsuit.

QUESTION: Mr. Resnicoff, may I ask you maybe a more basic question in this lawsuit?

The District Court dismissed your amended complaint without a trial. Dismissed it, correct?

MR. RESNICOFF: No, no, no. The -- it was dismissed after a trial by Judge Werker.

QUESTION: Dismissed after a trial.

MR. RESNICOFF: After trial by Judge Werker, that's correct.

QUESTION: The complaint was dismissed.

MR. RESNICOFF: That's right.

QUESTION: And then the Court of Appeals for the 2nd Circuit reversed that judgement of dismissal.

MR. RESNICOFF: Unanimously reversed, right.

QUESTION: And in your amended complaint, you ask for a variety of different kinds of relief, including among others, reinstatement and monetary damages.

What do you think the posture of the case would now be in if we had not granted certiorari, what would happen?

Or put it this way, let's say we affirm the Court of Appeals, the judgement is affirmed. Now what will happen?

MR. RESNICOFF: I would have moved for reinstatement.

QUESTION: And how about money damages?

MR. RESNICOFF: He'd be entitled to the back pay less anything he may have earned on the outside.

QUESTION: Well, what about the \$50,000?

MR. RESNICOFF: Well --

QUESTION: Well, I'll tell you now, the answer is no. If you're going to say that automatically you're going

get the \$50,000, if you say, automatically, you're going to get \$50,000.

MR. RESNICOFF: If you say no, it's no. I think what has happened to this man, believe me when I say --

QUESTION: So you're scared of me too. You're scared of everybody.

MR. RESNICOFF: Let me say this, Judge. When Judge Clark wrote that decision, everybody newspaper in the country took it up. All civil service papers commented. It was a very favorable -- it was well received.

Because they felt that most people in civil service, when you reach something like that, you're going to throw him out and give him a label the rest of his life, the least you can do is Good God, give him a chance to be heard.

QUESTION: Well, may we come back to my question because I am puzzled.

The Court of Appeals opinion didn't indicate what, if any relief, should be considered by the trial court, did it?

MR. RESNICOFF: No.

QUESTION: And the trial court, of course, didn't, because it dismissed the complaint. Correct?

MR. RESNICOFF: Right.

QUESTION: And among other prayers, in your amended complaint, is one for reinstatement. Now, why should the

City of New York be required to reinstate an employee that it had a complete right to terminate with or without any reason whatsoever? Why should it be saddled now with employing a probationary employee, perhaps for the rest of his occupational life, that it had a complete right to terminate, with or without a reason?

QUESTION: Now, this is the question I asked your opposition.

QUESTION: Yes.

QUESTION: And regard me as asking it with Mr. Justice Stewart.

MR. RESNICOFF: Yes, I know. You said you certainly will ask that of me.

All right, now, let me say this, to the first question that was made, the first statement. I have submitted a judgement to Judge Werker based on the reversal mandate of the U.S. Court of Appeals, and an affidavit had been submitted in opposition, which is now pending before Judge Werker, to hold it in abeyance because they have indicated that a petition for certiorari was being submitted. So the judgement which I had submitted, which was requesting reinstatement, in answer to your honor's question and Mr. Chief Justice, I was asking for reinstatement and for the monetary relief.

QUESTION: I see.

MR. RESNICOFF: So that's pending whatever happens here.

Now, I am not in the position to concede, as a matter of law, that a man serving a probationary period can serve at the mere -- as my adversary says, at the mere whim or at the mere sufferance, and arbitrarily can be terminated. I don't say that. Then, he can go into the state courts.

QUESTION: That's what the District Court held in this case, that that was the term of his employment, that it was employment at will, at the will of the employer, and that finding was not disturbed by the Court of Appeals. So presumably we accept that here.

MR. RESNICOFF: All right, you accept it. Then I won't quarrel with that.

QUESTION: Correct, all right.

MR. RESNICOFF: I won't quarrel with that. But I say in this case we're not concerned with the arbitrariness, we're concerned with the inequality and the unconstitutionality of what happened here. In other words, a deprivation of this man's constitutional rights, and it was contrary to federal decisional law; that this man has been stigmatized under these circumstances, and he is entitled to notice, and that comes within the panoply of due process.

QUESTION: All right, let's assume we accept all of that, and affirm the judgement of the Court of Appeals. Why is he entitled to reinstatement, that's my question?

MR. RESNICOFF: Because he was improperly removed.

That's why he'd be entitled to reinstatement.

QUESTION: Then you're saying he has a property interest in a probationary job.

QUESTION: Right.

MR. RESNICOFF: Once -- that's right, if they acted illegally, and in violation of his constitutional rights, and summarily removed him without due process, that is correct, they should then pay for their mistake. This man has been hurt in the community.

QUESTION: Paying for their mistake is one thing, reinstating him is something else, reinstating an employee that they terminated, and that they had a perfect right to terminate, with or without a cause.

MR. RESNICOFF: If your honors -- let me say this, if your honors after deliberation should feel that this man should be reinstated and should be given a hearing on that particular issue, of course, there's nothing for me to do but accept it. And we will need that at the proper time if that's raised. They can't meet that. They can't possibly substantiate something like that.

But in any event, if this is what your honors feel, all right, let's reinstate him and give him a hearing on that point. And if it's substantiated, then all right.

QUESTION: Well, it's quite possible to read Roth and Perry as not having anything to do with reinstatement

when you're talking about stigmatization, that he's simply entitled to a hearing, and then he's fired, and you get the hearing. But he doesn't get reinstatement.

MR. RESNICOFF: Well, the only thing is this, the only thing is this: if the Court should remand, without reinstating -- exactly he's not within their jurisdiction -- supposing he doesn't show up? Who are they going to try? They got to put a man on trial who's a patrolman, as a probationary --

QUESTION: Well, he would have the opportunity for a hearing.

MR. RESNICOFF: Well, if your honors should feel that that is the way out, I'm not going to -- we'll meet it, if your honors should feel it should go back for a pre-hearing and not a post-hearing, well, --

QUESTION: You can't go back for a pre-hearing after the event has occurred.

MR. RESNICOFF: Well, then, you're talking about a hearing now. Going back for a hearing. This is something they should have given him before they dismissed him.

QUESTION: Well, if they give him the hearing now, you might have to -- perhaps be entitled to have the record expunged from this stigma that you described. Would that take care of your problem?

MR. RESNICOFF: It might, it might. Let me just

say this in conclusion --

MR. CHIEF JUSTICE BURGER: Make it very brief, if you will.

MR. RESNICOFF: Yes.

I just want to say this, that I'm not -- of course their position is that this is a very important case, it's going to have an impact, this that and the other thing. And we don't think so at all. We're interested in this particular case, and the stigma that arose here. And I say that a pronouncement by this Court on the stigma -- because in Bishop it was left open --

MR. CHIEF JUSTICE BURGER: Well, you've covered that already, counsel.

Do you have any further comments?

REBUTTAL ARGUMENT OF W. BERNARD RICHLAND, ESQ.,
ON BEHALF OF THE PETITIONERS.

MR. RICHLAND: I think I had just three very brief comments that I think are essential.

In the first place, Chief Justice, I assure you that a New York City policeman found drunk on his post would be fired.

Second, my friend suggests that the first time we heard that there was discreditable material in Mr. Velger's record was when a witness took the stand. But if you will look at page 53a, paragraph 18 of the amended complaints --

and I will read it to you -- it says, the action on the part of the police department employees by inserting derogatory matter, comments and remarks in plaintiff's personnel folder without affording him an opportunity to see, inspect and reply, damaged his standing in the community and foreclosed his freedom to take advantage of other employment opportunities.

Third, in response to Justice Powell's question, or suggestion, as to the sealing of records, total sealing of all personnel records of terminated probationaries, or terminated non-tenured employees. That, I submit, would redound to the disfavor of persons who were terminated for perfectly benign reasons related to their capacity in particular respect to aspects of their job that didn't in the least stigmatize them. Like for instance a policeman who was found to be too compassionate, or kindly disposed. Or to an assistant corporation counsel who seemed somewhat sluggish at the time. Or who didn't fit somebody's personal predilections, or in the case of a confidential clerk in this Court, that he was sluggish.

I suggest that a reversal is absolutely essential in this case for the proper conduct of my government and, I suggest, for the conduct of the government in this land.

And I thank you, your honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:51 p.m., the case in the above-entitled matter was submitted.]