

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1362, 83-1363, 83-6392

TITLE CLEVELAND BOARD OF EDUCATION, Petitioner v. JAMES LOUDERMILL, ET AL.;
PARMA BOARD OF EDUCATION, Petitioner v. RICHARD DONNELLY, ET AL.;
and JAMES LOUDERMILL, Petitioner v. CLEVELAND BOARD OF EDUCATION,
ET AL.

PLACE Washington, D. C.

DATE December 3, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CLEVELAND BOARD OF :
4 EDUCATION, :
5 Petitioner, :
6 V. : No. 83-1362
7 JAMES LOUDERMILL, ET AL.; :
8 PARMA BOARD OF EDUCATION, :
9 Petitioner, :
10 V. : No. 83-1363
11 RICHARD DONNELLY, ET AL.; :
12 and :
13 JAMES ICUDERMILL, :
14 Petitioner, :
15 V. : No. 83-6392
16 CLEVELAND BOARD OF :
17 EDUCATION, ET AL. :

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19 Washington, D.C.
20 Monday, December 3, 1984

21 The above-entitled matter came on for oral
22 argument before the Supreme Court of the United States
23 at 10:00 o'clock a.m.

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APPEARANCES:

JAMES G. WYMAN, ESQ., Cleveland, Ohio; on behalf of the
petitioners in Nos. 83-1362 and 83-1363 and respondents
in No. 83-6392.

ROBERT M. FERTEL, ESQ., Cleveland, Ohio; on behalf of the
respondents in Nos. 83-1362 and 83-1363 and the
petitioner in No. 83-6392.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

JAMES G. WYMAN, ESQ.,

on behalf of the petitioner in
Nos. 83-1362 and 83-1363 and
the respondents in No. 83-6392

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ROBERT M. FERTEL, ESQ.,

on behalf of the respondents in
Nos. 83-1362 and 83-1363 and
the petitioner in No. 83-6392

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JAMES G. WYMAN, ESQ.,

on behalf of the petitioner in
Nos. 83-1362 and 83-1363 and
the respondents in No. 83-6392

- rebuttal -

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Cleveland Board of Education against Loudermill.

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

ORAL ARGUMENT OF JAMES G. WYMAN, ESQ.,
ON BEHALF OF THE PETITIONERS IN
NOS. 83-1362 and 83-1363 AND
THE RESPONDENTS IN NO. 83-6392

MR. WYMAN: Mr. Chief Justice, and may it please the Court, the issue presented by the cases at bar today is whether or not the due process clause of the Fourteenth Amendment required the Cleveland Board of Education and the Parma Board of Education to grant respondents a hearing before they were terminated from their employment.

It is the petitioners' position that the precedents of this Court do not require a pretermination hearing, and further, that the Ohio Revised Code, Section 124.34, comports with the due process clause and adequately protected the respondents' rights.

Mr. Loudermill was a security guard for the Cleveland Board of Education. In order to get that job, he filled out an application form. On that form, he was

1 asked if he had ever been found guilty of any felony.
2 He answered he had not. He further attested at the end
3 of that application that the answers he gave were not
4 only truthful but accurate.

5 A routine check of his record was done by the
6 Cleveland Board of Education. He was found to have had
7 a previous felony conviction, that of grand larceny, and
8 he was terminated.

9 QUESTION: How long after his appointment was
10 that discovery made?

11 MR. WYMAN: After his appointment it was
12 approximately eleven months, Your Honor. What had
13 happened in that case is, we had originally hired on a
14 number of security people during the institution of our
15 desegregation case. We thereafter reorganized our
16 organization and as a part of the reorganization we went
17 through routine checks for a newly created safety and
18 security department.

19 QUESTION: I gather his service was
20 satisfactory during the eleven months before discovery?

21 MR. WYMAN: There were no known reasons or any
22 incidents that had happened with Mr. Loudermill. That
23 is correct. But the Cleveland Board of Education, upon
24 finding out of his criminal past, did in fact release
25 him.

1 Mr. Donnelly was a mechanic for the Parma
2 Board of Education. He was required as a part of that
3 job to have an annual eye examination. He took and
4 failed that eye examination. He was given the
5 opportunity to retake that exam. He declined to do so,
6 and he, too, was fired.

7 The most recent decisions --

8 QUESTION: How long had he been working before
9 his discharge?

10 MR. WYMAN: I am not sure of the actual length
11 of employment. He had been working for not a
12 considerable length of time, but more than two or three
13 years he had been employed.

14 QUESTION: And his service, too, had been
15 satisfactory?

16 MR. WYMAN: As far as I know, yes, that is
17 true. The most recent decisions of this Court have
18 consistently held that in analyzing the requirements of
19 due process vis-a-vis the termination of an employee who
20 has a protected property interest, the Court will take a
21 case-by-case approach based upon the facts of each case,
22 and further, that the timing and the nature of the
23 required due process hearing depend upon an appropriate
24 accommodation of competing interests.

25 Those interests include the private interest

1 of the employee. They include the timing or the length
2 of deprivation, the risk of error that is involved, and
3 the governmental entity's interest.

4 It is petitioners' argument that in weighing
5 and in balancing these particular factors, the Court
6 should determine that the governmental interest
7 outweighs that of the individual employees in this
8 case. The private interest of the individual in this
9 case would be his right to continued employment and the
10 possible interruption of his income.

11 The length of loss in these cases turns out to
12 be exactly ten months. Throughout the administrative
13 procedure, it took ten months for a resolution of the
14 status as to whether or not they had been rightfully or
15 wrongfully terminated --

16 QUESTION: So there was a posttermination
17 hearing?

18 MR. WYMAN: Oh, absolutely, Your Honor.

19 QUESTION: And that went on for ten months in
20 the case of Loudermill?

21 MR. WYMAN: That's correct. And at the end of
22 that ten-month period, the administrative agency
23 determined that he had -- Mr. Loudermill had in fact
24 been dishonest, and there was no appeal taken from that
25 decision, so as it stands, and as of the time of the

1 filing of the complaint in this case, Mr. Loudermill had
2 been adjudicated to have been dishonest.

3 QUESTION: Well, now, Mr. Donnelly was
4 reinstated, I take it.

5 MR. WYMAN: That's correct. Mr. Donnelly was
6 -- his decision was modified by the Parma Civil Service
7 Commission to a suspension for the time of period --
8 length of time that he was off, and he was reinstated,
9 however, to his employment, so he did get his job back.

10 QUESTION: Mr. Wyman, may I inquire, what are
11 the possible remedies for a wrongfully discharged
12 employee in your jurisdiction? Do they have a right of
13 reinstatement if the discharge was erroneous?

14 MR. WYMAN: Absolutely. Under Ohio Revised
15 Code 124.34 they have the right to a full, prompt de
16 novo hearing where they are entitled to --

17 QUESTION: Not the procedural remedies, the
18 substantive remedies available are reinstatement -- how
19 about damages?

20 MR. WYMAN: They are entitled to
21 reinstatement, and if the discharge was found to be
22 wrong, reinstatement and back pay. The Civil Service
23 Commissions, however, also have the right to affirm
24 whatever decision the governmental entity made, or it
25 can modify.

1 The modification may take the form of denying
2 back wages, or it may take the form of modifying the
3 length of time of any suspension that might be
4 involved.

5 QUESTION: With regard to the procedural
6 remedies available to such an employee, you rely on this
7 Court's decisions in Arnett and in Matthews, and in
8 those cases the Court upheld postdeprivation hearings
9 for employees where there was an opportunity to respond
10 before the discharge.

11 Was there an opportunity to respond given
12 here? And is that part of the scheme in place in your
13 jurisdiction?

14 MR. WYMAN: There is no statutorily provided
15 scheme for response. In both cases there was a time
16 period within which a response could have been granted.

17 QUESTION: Would you state that again?

18 MR. WYMAN: There is no statutorily outlined
19 scheme for requiring or allowing some pretermination
20 process.

21 QUESTION: Then you said but?

22 MR. WYMAN: But the facts in the instant case
23 reflect that there was a time period during which both
24 Mr. Donnelly or Mr. Loudermill may have responded should
25 they have desired to do so.

1 QUESTION: You mean you told them you were
2 about to fire them, and then there was some time?

3 MR. WYMAN: There was a letter sent out in the
4 Loudermill case to the employee, and his discharge was
5 not confirmed by the board of education until November
6 13th, ten days later.

7 QUESTION: But nothing in that letter told him
8 that he could explain or respond or whatever?

9 MR. WYMAN: That's correct, and it's the
10 position of the petitioners that there would have been
11 no purpose to any additional pretermination hearing or
12 process. The factual basis upon which the boards of
13 education made their determination was objective
14 criteria.

15 In Mr. Loudermill's case, we had two documents
16 in front of us. We had a court record which reflected
17 his felony conviction, and we had his application, which
18 reflected his attestation to not only the honesty but
19 the accuracy of the information.

20 QUESTION: What do you do, Mr. Wyman, with
21 what we said in Davis and Scherer last time, that
22 decisions of this Court by 1978 had required some kind
23 of hearing prior to discharge of an employee who had a
24 constitutionally protected property interest in his
25 employment?

1 MR. WYMAN: It is the petitioners' position
2 that --

3 QUESTION: But he didn't get any kind of
4 hearing.

5 MR. WYMAN: He got no kind of hearing, and for
6 the sake of the argument before this Court, because of
7 the status of the pleadings, the way this case has
8 developed up, that has to be taken as true. It is our
9 position that there must be -- a fair reading of the
10 cases indicates there must be a hearing provided before
11 an employee is finally deprived of his rights.

12 And in this case Mr. Donnelly was never
13 finally deprived of his right to employment, because in
14 fact he was reinstated, and in Mr. Loudermill's case he
15 was finally deprived at the end of the posthearing
16 process.

17 QUESTION: Mr. Wyman, do you think that our
18 cases indicate there has to be an opportunity to
19 respond?

20 MR. WYMAN: There are cases that do in fact
21 indicate that there should be an opportunity to
22 respond. It is our position that in this case, or under
23 the facts of this case, the response would have served
24 no purpose, and I would turn to basically the Dixon
25 versus Love type of analogy where the only thing that

1 they could have said was, I didn't mean to do it, or I
2 didn't know that it was a felony. There was no
3 additional --

4 QUESTION: He also said he didn't do it at
5 all, and he wasn't there.

6 MR. WYMAN: He could say that.

7 QUESTION: And he wasn't in court. Didn't
8 he?

9 QUESTION: It is true that he could say that,
10 but we had before --

11 QUESTION: Couldn't that have been true?

12 MR. WYMAN: We believe that the reliability of
13 the objective evidence was such that we had a right --

14 QUESTION: I thought you said all you had was
15 the conviction.

16 MR. WYMAN: We had a court record of the
17 conviction and his application.

18 QUESTION: How do you know it is the same
19 man?

20 MR. WYMAN: Because we have an employee
21 number. We have a number of internal processes that
22 would identify who we had.

23 QUESTION: Like what?

24 MR. WYMAN: We have an employee number. We
25 have a social security number which identifies the

1 employee, which also would be on his -- it would be on
2 his application form, obviously, and we would have
3 identified the person that was involved with the name
4 and also checked it out to make sure that it was in fact
5 the person we were talking about.

6 We would not act arbitrarily. When we
7 terminate someone, we do not just terminate them at a
8 whim. We make sure there is a reason.

9 QUESTION: Did you ever ask him if he was the
10 same person?

11 MR. WYMAN: I cannot honestly answer that,
12 Your Honor.

13 QUESTION: Doesn't he admit that he is the
14 same person, and that it was a misdemeanor and not a
15 felony?

16 MR. WYMAN: Under the facts of this case,
17 certainly. It is in fact admitted that Mr. Loudermill
18 was the person who was convicted of the grand theft
19 felony previously, but again, the important thing, I
20 think, for this Court to realize is that we are talking
21 about the boards' use, both Parma and Cleveland boards'
22 use of objective criteria. We are not using subjective
23 criteria, where the possibility is that we might have
24 made some sort of error, even though again I admit that
25 certainly even with objective criteria there may be an

1 error somewhere in that process.

2 QUESTION: In Donnelly's case, the ultimate
3 disposition was changed from discharge to suspension.

4 MR. WYMAN: That's correct.

5 QUESTION: What was the basis on which the
6 Civil Service Commission made that change?

7 MR. WYMAN: I don't know what the basis of the
8 Civil Service Commission's decision was, because the
9 Parma Civil Service Commission is not a party in any of
10 the cases before the Court.

11 I do understand, though, that it may have been
12 a compromise type of position where they gave him back
13 his job but also failed to grant him the back pay as a
14 half a loaf type of situation.

15 QUESTION: And he accepted that.

16 MR. WYMAN: Apparently he accepted that,
17 although he has -- he went through a process, a court
18 process to try to win back his back pay.

19 QUESTION: Is Donnelly a party to this
20 litigation?

21 MR. WYMAN: Donnelly is, yes, but the
22 post-termination delay issue which is involved in
23 Loudermill is not involved in, I don't believe, the
24 Parma case.

25 QUESTION: Well, in Donnelly's case it may be

1 that if you had given him an opportunity to respond, he
2 never would have been suspended, or laid off.

3 MR. WYMAN: It is the Parma Board of
4 Education's position that they did give him that
5 opportunity. They gave him a chance to retake the eye
6 examination, and said, here, take it again. Before we
7 do anything take the exam again. Maybe there was an
8 erroneous medical determination. Maybe there is
9 something else that can happen.

10 QUESTION: There was a communication back and
11 forth in Donnelly's case?

12 MR. WYMAN: There was at least a communication
13 to him and an apparent refusal to take that second eye
14 examination. What Mr. Donnelly's thinking was as to
15 why --

16 QUESTION: Well, I know, but couldn't at that
17 stage the same reason have been -- couldn't the same
18 reason have emerged to keep him on that later reemployed
19 him?

20 MR. WYMAN: I can't answer that, because I
21 don't know what went on in the minds of those in the
22 Civil Service, other than the fact that --

23 QUESTION: Is it your position -- suppose that
24 it was perfectly plain that there was quite a large risk
25 of error in this case.

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MR. WYMAN: Okay.

QUESTION: Is it the board's position that nevertheless a pretermination hearing need not be given? Is it your position that a post-termination hearing always is enough?

MR. WYMAN: You are placing me in your position. My thought would be that the greater the risk of error, obviously, the more useful the pretermination process.

QUESTION: Well, however, you don't suggest that we redo the Arnett case?

MR. WYMAN: It would be our position from the board of educations --

QUESTION: You would like us to.

MR. WYMAN: -- that we would like you to, yes. We realize, obviously, that there are some constraints to that, and with the definition of due process.

Another important point is that the cases of this Court that have come down that dealt with pretermination hearings dealt also with situations where there was a permanency of the effect of the discharge or the effect of the taking of a property right.

We do not have that type of permanency in this case. When we are talking about the deprivation here,

1 we are talking about, assuming we are wrong, which we do
2 not concede, obviously, we are talking about the fact
3 that it is a temporary loss of employment, a temporary
4 loss of wages which, if we are found to have been wrong,
5 he may be reinstated, and he may be entitled to his back
6 pay. He can be made whole entirely.

7 The other cases of this Court which dealt with
8 and, of course, which there is a valid and obvious
9 concern, is when you have a deprivation such as the
10 taking of someone's benefits that might in fact leave
11 them poverty stricken and they would be unable to
12 survive.

13 We are not talking about that type of
14 situation.

15 QUESTION: What about this eye examination?
16 Is it your position that when this man was offered a
17 chance to have a second eye examination, that that met
18 any requirements of due process?

19 MR. WYMAN: We -- the Parma Board of Education
20 would certainly argue that, yes. And those facts, I
21 believe, are in the record, in the pleadings in the
22 complaint.

23 QUESTION: Mr. Wyman --

24 MR. WYMAN: Yes, sir?

25 QUESTION: When was the offer for a second eye

1 examination made? Was it before or after the notice of
2 discharge?

3 MR. WYMAN: It was before, Your Honor. Their
4 offer was made before he was discharged to take a second
5 eye examination. He refused to do so, and he was
6 thereafter discharged.

7 QUESTION: It was at your client's expense?

8 MR. WYMAN: I believe so. I believe it is.
9 It is a benefit that the Parma Board of Education -- it
10 is not only a benefit, but it is a safety factor that is
11 involved with the boards of education, and they provide
12 those examinations for their employees.

13 QUESTION: Including the reexamination.

14 MR. WYMAN: Yes.

15 QUESTION: You assumed the reexamination?

16 MR. WYMAN: Yes. Yes.

17 QUESTION: May I just ask, on the notice of
18 the second -- the right to take a second exam, he
19 alleges, as I remember, that there was another employee
20 who had failed the exam and was still working there. Is
21 it clear that he knew that flunking the eye exam would
22 cause his discharge?

23 MR. WYMAN: It is clear that he knew that
24 flunking the eye exam would cause his discharge. The
25 other gentleman, it was part of a labor negotiation, and

1 had a grandfather status, and was not in fact doing
2 mechanical type chores as Mr. Donnelly was performing.

3 Mr. Donnelly's position directly related -- it
4 is our position that his position directly related to
5 the safety of the children involved. We are talking
6 about both Mr. Loudermill and Mr. Donnelly dealing in
7 very sensitive areas.

8 We have Mr. Loudermill being a security guard,
9 and charged in the Cleveland Board of Education with
10 millions of dollars worth of real estate, and also
11 millions of dollars worth of assets, computers,
12 educational materials, and to find that we have a person
13 who is an ex-felon as our security guard is very
14 distressful to us.

15 We need, and I believe this Court should find,
16 the right to immediately discharge an employee who,
17 pursuant to some objective criteria, in this case again
18 a court order, is found to have -- to pose a risk, a
19 potential threat to the system. We have to be able to
20 immediately act on that.

21 It affects not only the efficiency of our
22 operation and the discipline of our employees, as the
23 Sixth Circuit said, but with boards of education it
24 affects the safety --

25 QUESTION: Mr. Wyman, why wouldn't the boards'

1 interest be adequately served by immediate suspension
2 and an opportunity to make a response in 24 hours, or
3 something like that? What harm would that be?

4 MR. WYMAN: An immediate suspension itself
5 would kick in the same thing. It becomes a semantic
6 game. Whether you call it a suspension pending
7 termination or whether you call it termination, under
8 the Ohio Revised Code the same due process rights are
9 afforded, and I believe under the dictates of this Court
10 the same due process rights would be required.

11 The question would be whether or not there
12 should be a pretermination before the suspension.

13 QUESTION: But you would agree that there
14 would be no prejudice to the board if there were an
15 immediate suspension followed by an option to respond
16 before the suspension ripened into a discharge.

17 MR. WYMAN: I would think that that would be a
18 possible resolution, although it may in fact still be
19 burdensome upon the employer, the boards of education.

20 QUESTION: I suppose it doesn't make a lot of
21 difference to Mr. Loudermill whether he is suspended
22 without pay and then granted a hearing and ultimately
23 discharged after the hearing or whether he is discharged
24 and given a hearing after that. If he doesn't get back
25 pay during the time of suspension, it is six of one and

1 half a dozen of the other.

2 MR. WYMAN: That's correct. That's our
3 position. I mean, technically we could have suspended
4 him without pay, given him the hearings that are
5 required under Ohio Revised Code 124.34, and called them
6 pretermination hearings. And by playing that type of
7 game we could have avoided a pretermination hearing
8 issue.

9 QUESTION: What remedy did the Court of
10 Appeals think Loudermill was going to get?

11 MR. WYMAN: Did the Court of Appeals -- we are
12 unsure. I am unsure.

13 QUESTION: It certainly didn't --

14 MR. WYMAN: The court was unaware of what it
15 could do. I mean, we were -- when we went back to
16 District Court --

17 QUESTION: Under the decision, all he was
18 deprived of is a procedural due process.

19 MR. WYMAN: That's correct, and that was the
20 only issue left, and the question would have been --

21 QUESTION: So under our cases, what remedy
22 would there be? A peppercorn, or a penny, or
23 something?

24 MR. WYMAN: Probably. The time length in this
25 case would have been a short time period, and again,

1 substantively his employment has been properly
2 terminated, the collateral estoppel argument in regards
3 to a substantive issue of employment.

4 QUESTION: Aren't there two aspects to his
5 answer? First, the objective, uncontested objective
6 fact that he was guilty of a felony, and the second one
7 is that he, as he claims, misrepresented this because of
8 a misunderstanding.

9 Now, is the state concerned with the existence
10 of a felony conviction, or concerned that he got
11 confused about it? Which is the basis of the firing?

12 MR. WYMAN: We are concerned that he got
13 confused about it. I think that that adds a little bit
14 of fuel to the fire. While the felony itself might
15 raise some concerns, to find that he had misrepresented
16 that, the felony was relatively old, but the
17 misrepresentation was relatively new.

18 And if we are dealing with someone who we
19 can't trust in regards to an application, how can we
20 trust him again, not only with the assets, but the
21 security guards deal with the safety of the children.

22 They deal with part of the educational
23 process. They are part of the providers. That is the
24 difference in these cases, that we are dealing with
25 boards of education. The interests of not only the

1 governmental entity but those to whom it serves merge.

2 We are serving pupils. Education is our
3 business. And we have to get on with the business of
4 that. We don't -- the Civil Service Commissions are
5 totally independent bodies, and once the process kicks
6 into the Civil Service Commission, the board of
7 education has very little to do with it.

8 Under the Ohio Revised Code, promptly
9 afterwards, within ten days he has the right to file an
10 appeal, and it kicks out and is handled by Civil
11 Service. It is not handled by boards of education.
12 Their employees, their time is not spent in that
13 process.

14 QUESTION: May I ask you about the promptness
15 of the postdeprivation hearing? The law says that it
16 will be granted within 30 days, does it not?

17 MR. WYMAN: That's correct.

18 QUESTION: But Ohio courts have said that is
19 not mandatory.

20 MR. WYMAN: That's correct, they've said
21 that --

22 QUESTION: And in this instance it took nine
23 months for a decision.

24 MR. WYMAN: For a decision. Now, we are
25 talking two different issues, Your Honor. For the

1 initial hearing, it took two and a half months, and it
2 is interesting to note also --

3 QUESTION: And the Ohio court simply says that
4 the statutory requirement of 30 days is not binding.

5 MR. WYMAN: That's correct. The courts, the
6 Ohio courts have held that it is not binding because of
7 the tremendous volume --

8 QUESTION: What would assure a prompt
9 postdeprivation hearing under Ohio's scheme then?

10 MR. WYMAN: The assurance is --

11 QUESTION: Even if you are right.

12 MR. WYMAN: Well, our position is that there
13 was in fact a prompt post-termination hearing in this
14 case. There is no question he had a hearing within the
15 two and a half months.

16 Although that might be lengthy to some, in the
17 scheme of the volume, tremendous volume of cases that
18 are heard by that commission, which is well over -- in
19 the thousands, that is not particularly a lengthy time.

20 It is also interesting to note that during
21 that two and a half months you had Thanksgiving, you had
22 Christmas, and you had New Years'.

23 QUESTION: Why are there so many cases in
24 Ohio? Are you firing everybody out there?

25 MR. WYMAN: We have a lot of public employees,

1 Your Honor.

2 QUESTION: May I just ask one other question?
3 If he had had a pretermination opportunity to respond,
4 would the response perhaps have been considered by the
5 school board instead of the Civil Service?

6 MR. WYMAN: Yes.

7 QUESTION: Would it possibly have been a
8 different decisionmaker?

9 MR. WYMAN: We would submit that it would not
10 have. Part of my argument was the fact that the only
11 thing he could say was, I didn't -- I was ignorant of
12 the law. His ignorance of the law did not go to the
13 merits of the decision. Basically it would be a Dixon
14 versus Love type of situation. He would be begging for
15 clemency as opposed to challenging the factual basis for
16 the determination.

17 QUESTION: Isn't that perhaps a relevant
18 point, that maybe there would have been room for
19 clemency immediately before the board, but it wouldn't
20 be a legally sufficient basis for objecting before the
21 Civil Service Commission? Isn't there a possibility of
22 a different disposition, depending on the timing?

23 MR. WYMAN: From the board of education's
24 point of view, no.

25 Thank you.

1 CHIEF JUSTICE BURGER: Mr. Fertel.
2 ORAL ARGUMENT OF ROBERT M. FERTEL, ESQ.,
3 ON BEHALF OF THE RESPONDENTS IN
4 NOS. 83-1362 and 83-1363 AND
5 THE PETITIONER IN NO. 83-6392

6 MR. FERTEL: Thank you. Mr. Chief Justice,
7 and may it please the Court, I think this Court's recent
8 decision in Davis versus Scherer makes clear that the
9 issues in this case are not whether some pretermination
10 procedures are to be required before termination of a
11 discharged employee, but what procedures are to be
12 required.

13 And I think in Note 10 of the case the Court
14 says that we have to consider the factors in Matthews
15 versus Eldridge, and the first factor in Matthews versus
16 Eldridge is the private interest involved, and this
17 Court in Logan versus Zimmerman held that there is a
18 substantial interest in the continued government
19 employment.

20 We are also dealing with 16 million
21 governmental employees, federal, state, and local, and
22 when you are dealing with the dependents of such
23 employees, you are possibly dealing with one-fifth to
24 one-fourth of the population of the United States, so
25 the right to continue governmental employment is clearly

1 a substantial interest.

2 The second factor is the risk of wrongful
3 deprivation, and whether the use of additional
4 procedures would lessen such risk. First of all, under
5 Chic law, there is no procedure whatsoever to guarantee
6 pretermination procedures. It is like a knockout
7 punch.

8 You get a letter that says you are going to be
9 terminated, and you have to get up off your feet and
10 file an appeal within ten days. A lot of times you are
11 without counsel. And you just get this letter and they
12 say, you are hereby being terminated.

13 In the Loudermill case, he received the letter
14 dated November 3rd saying that he was going to be
15 terminated. Then the board of education on November
16 13th rubber stamped it, confirmed it. But all the
17 letter said was, you are here being terminated. In the
18 Donnelly case --

19 QUESTION: What is the time allowed for
20 answer, say, under the Federal Rules of Civil Procedure
21 to answer a complaint?

22 MR. FERTEL: Twenty days.

23 QUESTION: Twenty days. Do you think there is
24 a constitutional difference between 20 days and 10
25 days?

1 MR. FERTEL: Yes, sir, especially in the fact
2 situation where there is no pretermination procedure.
3 All of a sudden you just get a letter. There are no
4 warnings without any pretermination standard to be
5 considered. One day you get a letter.

6 QUESTION: Well, it seems to me your argument
7 defeats itself, because if there are no pretermination
8 procedures, then any amount of notice or no notice at
9 all is really satisfactory, because there is nothing to
10 be done.

11 MR. FERTEL: Well, that is our position, that
12 you need some -- there has to be pretermination
13 procedures.

14 QUESTION: Then the amount of days that go by
15 between the notice and the action isn't really relevant,
16 is it? You are saying that presumably he could have
17 gotten this letter and six months could have gone by
18 before the board acted, and yet if the board hadn't
19 specified that there were pretermination procedures,
20 your argument would be the same, wouldn't it?

21 MR. FERTEL: No, Your Honor. It is just the
22 effect of it, to show how the system lacks due process,
23 the fact that --

24 QUESTION: Let's boil your argument down a
25 little. Supposing that he received exactly this letter

1 that he did receive, but instead of the school board
2 acting in ten days it acted in six months. Wouldn't
3 your argument be pretty much the same, that they didn't
4 specify any pretermination procedures?

5 MR. FERTEL: Right. We would say that without
6 the pretermination, he is denied due process, whether it
7 is ten days or whatever.

8 QUESTION: So what difference does the amount
9 of time between the notice and the action of the school
10 board make to your argument?

11 MR. FERTEL: It isn't. There is no -- the
12 point being that I am just saying the inadequacy of the
13 state procedure is that there is no pretermination
14 procedures whatsoever, and all of a sudden you get a
15 letter for termination, and then you have to react in
16 ten days by filing an appeal. There is no guarantee in
17 Ohio of either a pretermination procedure or any prompt
18 termination procedure.

19 QUESTION: When did this explanation that he
20 was confused between a felony conviction and a
21 misdemeanor conviction first appear?

22 MR. FERTEL: It first appeared at the time of
23 the hearing, before the referee at the Civil Service
24 Commission, where he testified that he thought he was
25 convicted of a misdemeanor, and when he saw the

1 application, it said were you ever --

2 QUESTION: What was the conduct? Is that
3 shown by the record? What was the conduct for which he
4 was convicted?

5 MR. FERTEL: It was a grand theft conviction
6 approximately eleven years prior to the filling out of
7 the application, and there are administrative code
8 sections in Ohio saying that more than two years is
9 insufficient. You can't -- somebody can't be terminated
10 for a felony conviction prior -- for two years prior to
11 the date of the termination.

12 QUESTION: You contend this termination was in
13 violation of that section of Ohio law?

14 MR. FERTEL: It was a violation, plus the fact
15 that his defense was that he thought he was convicted of
16 a misdemeanor and not a felony.

17 QUESTION: What if the school board's approach
18 was, we are not so worried about the felony, we are
19 worried you lied about the felony?

20 MR. FERTEL: Well, that is the whole issue of
21 the case. It is whether or not he was dishonest. He
22 was not terminated for the felony conviction. He was
23 terminated for being dishonest, and there is a factual
24 question whether or not he was dishonest at the
25 hearing.

1 QUESTION: Well, so then the school board's
2 action doesn't violate Ohio law. The two-year section
3 that you mention, if they are terminating for dishonesty
4 rather than for a conviction of a felony.

5 MR. FERTEL: Right, but then you have to have
6 an opportunity to explain the reason it is a factual
7 conviction. Just because they have the order of
8 conviction, there is still a fact issue in this case
9 whether or not he believed that he was convicted of a
10 felony or whether he thought he was convicted of a
11 misdemeanor.

12 QUESTION: What if the school board had
13 followed the action which Mr. Wyman, your opponent, was
14 quizzed about, if they had simply, when this information
15 came to their attention, they had suspended him without
16 pay, and he had then gotten a hearing in the same manner
17 that he did, and the hearing board, the Civil Service
18 Commission says, well, we are converting your suspension
19 into a discharge?

20 He had an opportunity to testify and all that
21 before the Civil Service Commission. Would that have
22 comported with due process?

23 MR. FERTEL: No. First of all, he didn't have
24 an opportunity for two and a half months, and then the
25 referee didn't file his report for another two and a

1 half months, and then by the time the Civil Service
2 Commission made its "hearing," even though there were no
3 -- it was just arguments of counsel in July for nine
4 months until the -- by the time he got his letter of
5 termination until his actual resolution, and that is one
6 of the issues we raise. That is a delay issue, that
7 there wasn't a prompt hearing, that you are entitled to
8 a prompt hearing.

9 QUESTION: Well, supposing then that there had
10 been a suspension without pay followed by a hearing
11 which would meet your definition of a prompt hearing,
12 and the Civil Service Commission then said, we convert
13 the suspension into a discharge. Would that have
14 comported with due process?

15 MR. FERTEL: Well, I think first of all you
16 have to have a hearing in front of the -- I think it is
17 an opportunity to respond to the school board. I think
18 not only is there a question of whether or not the
19 facts, I think there is a question of the appropriate
20 sanctions, and I think it could have made the
21 opportunity --

22 QUESTION: Well, but you are saying in effect
23 that Ohio can't channel all of these Civil Service
24 questions to the Civil Service Commission. You are
25 saying that initially it has to be a hearing before the

1 employer who is taking action rather than the Civil
2 Service Commission.

3 MR. FERTEL: I think it has to be a decision
4 -- prior to termination, he has to have a hearing in
5 front of an impartial decision-maker, and then appeal,
6 because I think you have different standards when you go
7 to an appeal, because first of all the decision is
8 already made. There is a different standard. You have
9 to show abuse of discretion before maybe the Civil
10 Service Commission will change.

11 But if, let us say, the employer, especially
12 with the fact that it is eleven years between the time
13 of the conviction and the time he filed his application,
14 and there is nothing in the record to show that he
15 was --

16 QUESTION: So if Ohio wants to channel these
17 personnel matters to the Civil Service Commission, then
18 the Civil Service Commission would have to make the
19 initial suspension decision.

20 MR. FERTEL: No, I say the school board would
21 have to make the initial suspension.

22 QUESTION: Supposing Ohio says, we want all
23 these personnel matters to be considered by a uniform
24 body in the jurisdiction, to wit, the Civil Service
25 Commission. Nobody can be suspended or discharged

1 except by the Civil Service Commission.

2 Now, then would you say it is all right if the
3 Civil Service Commission made both the decision to
4 suspend and the decision to discharge?

5 MR. FERTEL: Well, it was the impartial
6 decision-maker, because it should be made -- the initial
7 termination decision should be made by an impartial
8 decision-maker.

9 QUESTION: Do you contend the Civil Service
10 Commission in your case was not an impartial
11 decision-maker?

12 MR. FERTEL: The Civil Service is an impartial
13 decision-maker, but you are dealing within the appeal,
14 right, instead of the initial decision. I think that
15 would have the employer then -- had he had the
16 opportunity to respond to the employer, he could have
17 said, well, there could have been maybe only suspension
18 or maybe no action at all, saying it was eleven years
19 prior. He says I did think I was convicted of a
20 misdemeanor. My service record is clean. I have been
21 employed for eleven months and nothing has happened.
22 You know, Mr. Wyman kept saying there was a big risk, a
23 big risk. In eleven months, there was no -- there was
24 nothing, no incidents.

25 QUESTION: Loudermill -- excuse me.

1 Loudermill's claim is that he thought he was convicted
2 of a misdemeanor. Does the record show whether he
3 actually served time?

4 MR. FERTEL: I believe he was sentenced to six
5 months in the workhouse and fined.

6 QUESTION: Did he actually serve for six
7 months?

8 MR. FERTEL: I believe they were suspended. I
9 don't think he actually served them.

10 QUESTION: Suspended for all of it?

11 MR. FERTEL: Right. Also, I would like to say
12 that you have to have a prompt, full hearing prior to
13 termination. I think first of all you have the awesome
14 power of the government going against the individual,
15 who is a lot of times not represented by counsel. I
16 think the procedure now in Ohio where you file an appeal
17 and have a hearing and go through the courts, you've got
18 the awesome power of the government, who has all their
19 attorneys, against the individual.

20 You have an employer who is all of a sudden --
21 who has geared his lifestyle to a certain income, who
22 all of a sudden has lost wages. We are not just dealing
23 with monetary damage. We are dealing with emotional
24 damages.

25 QUESTION: Mr. Fertel, in both Arnett and in

1 Mathews, this Court found no due process violation,
2 despite the evidence that at least some of the hearings
3 weren't completed for more than a year after the
4 deprivation occurred. How do you distinguish those
5 cases then in making your argument about a prompt
6 hearing?

7 MR. FERTEL: In Mathews versus Eldridge it was
8 a -- the question was liability. First of all, the
9 issue in Mathews versus Eldridge was not whether a
10 hearing was required, but whether a prior evidentiary
11 hearing was required. There was no issue of
12 pretermination procedures.

13 Number Two, in Mathews versus Eldridge, the
14 question was -- basically the Court said it was a
15 straightforward medical determination. It was just
16 whether or not the person -- all those -- it was by a
17 medical doctor's medical reports, so basically it was a
18 straightforward medical determination.

19 In this it was dealing with a fact standing,
20 whether or not there were certain facts. Also, in
21 Donnelly's case, it wasn't just a medical
22 determination. There was a question of whether or not a
23 prior employee, who also could not pass the eye test,
24 was still employed, and that was a defense which was
25 raised in front of the Civil Service Commission, that

1 another employee who also could not pass the test, that
2 plus the reasonableness, because he was a bus mechanic,
3 he was not a bus driver, and the reasonableness of why a
4 bus mechanic would have to pass the eye test was also
5 raised, so those were the two issues.

6 Also, in Arnett versus Kennedy, they talked
7 about -- I think the hearings was three months, the --
8 proceedings was three months, but I think in the fact in
9 this case it was nine months before the termination and
10 the actual notice, and I think you have -- first of all,
11 you have a question -- you have the great emotional
12 damage to the employee. He is without wages. Loss of
13 self-esteem.

14 In these cases, you go with the awesome power
15 of the government. You have a hearing in front of the
16 Civil Service Commission. You take ten or eleven months
17 to go through the administrative procedures, and you
18 have to file it through the courts. It could be another
19 two or three years with the courts.

20 And then you also have problems with future
21 employees. A future employer, you have to train
22 somebody, you have to train another employee.

23 QUESTION: May I ask, Mr. Fertel, what remedy
24 do you think your clients are entitled to at the end of
25 the road, and what do you think the issues would be at

1 trial? I have in mind the Mount Healthy problem, that
2 say they proved they would have fired him anyway, even
3 if --

4 MR. FERTEL: Well, first of all, you can't
5 tell whether they would fire somebody, you know. It is
6 after the fact. Had they come up to Mr. Loudermill and
7 stated, well, you were convicted eleven months, and he
8 said, well, I didn't know, plus, the only -- the only
9 adjudicated --

10 QUESTION: What if he had a trial and the
11 federal judge or the jury decided, well, we don't
12 believe his story, just as apparently the Civil Service
13 Commission did?

14 MR. FERTEL: First of all, he was convicted of
15 dishonesty, so he would have to have an opportunity to
16 -- you know, it is just -- you know, it is after the
17 fact. First of all, it was eleven -- the conviction was
18 eleven years previous. There was nothing on his record.

19 QUESTION: I understand, but supposing at this
20 trial that you seek to have now the determination is
21 that, well, we analyze the facts exactly like the Civil
22 Service Board did, that he was in fact dishonest. Then
23 what -- would you be entitled to any remedy then?

24 MR. FERTEL: I think you would be entitled to
25 damages for denial of due process. First of all, there

1 was a full hearing in front of a referee. The referee
2 determined that Mr. Loudermill was credible, and
3 recommended that he be reinstated without back pay. The
4 Civil Service Commission never held a hearing.

5 It just made a determination without holding a
6 hearing, so the only really adjudicated facts you have
7 in this case was that Mr. Loudermill was credible, and
8 that he was -- that he honestly believed that he was
9 convicted of a misdemeanor.

10 So, on the record of this case, the only
11 determination made after a full factual hearing was by
12 the referee, who stated that he believed that Mr.
13 Loudermill was sincere in knowing that he was convicted
14 of a misdemeanor instead of a felony.

15 QUESTION: Did you make the point that bad
16 eyesight is not important for a mechanic, but only for a
17 driver?

18 MR. FERTEL: Yes, Your Honor, I raised that
19 issue in front of the Civil Service Commission.

20 QUESTION: Do you think that would be true of
21 airplane mechanics as well as automobile mechanics?

22 MR. FERTEL: The rationale they gave was that
23 sometimes there is bad weather and they need substitute
24 drivers, and therefore they should have -- that
25 sometimes they supposedly would have bus mechanics drive

1 buses, and so I made the Point Number One, I thought if
2 you are going to terminate everybody who can't pass an
3 eye test, if you terminate somebody, you have to
4 terminate everybody.

5 You can't single out between one employee and
6 another. So, the fact that one employee who -- another
7 employee who also can't pass an eye exam was not
8 terminated, I thought that was a defense, plus the fact
9 that I think they could hire substitute bus drivers
10 instead of having the bus mechanics.

11 I thought it was very unreasonable to also
12 require the bus mechanic to also be a bus driver. He
13 was hired to be a bus mechanic and not to be a bus
14 driver, so I argued basically the fact that, Number One,
15 another employee who could not pass an eye exam was not
16 terminated, and Number Two, that it was unreasonable to
17 have bus mechanics be substitute bus drivers.

18 QUESTION: I suppose there are degrees of eye
19 defects, too. Two people could have different defects,
20 one of which would not warrant termination, and the
21 other one such a defect that it would.

22 MR. FERTEL: Well, obviously --

23 QUESTION: Is that not so?

24 MR. FERTEL: The only defect was that he
25 couldn't pass the state requirements for a bus driver.

1 That is why he was terminated. And because when they
2 needed substitute bus drivers they could not use him as
3 a substitute bus driver. His work as a bus mechanic has
4 never been questioned.

5 I would also like -- as far as the delay
6 issue, we are dealing here with nine months. During the
7 nine months he said there was no right to unemployment,
8 there was no right to welfare unless he sells his
9 assets, like his house and his car, which, you know, if
10 you are dealing with somebody who has geared his
11 lifestyle to a certain level and all of a sudden gets a
12 notice saying he is being terminated, you have a long,
13 drawn out proceeding where the person not only loses
14 wages, might not be able to get welfare, has to sell his
15 house, has to probably sell his car, will probably lose
16 his marriage and his children, basically the decisions
17 of this Court say that a person should be given a full
18 and fair hearing prior to final deprivation.

19 In this case Mr. Wyman says, well, it is
20 temporary deprivation, ten or eleven months, if he is
21 proven lawful, you get your back wages, but during those
22 ten or eleven months, the person probably loses his
23 house, he probably loses his car, his family, he loses
24 his self-esteem, plus the right of the government, which
25 is the third factor in Mathews versus Eldridge.

1 They have to decide when -- they have to train
2 somebody else. What happens if the government says the
3 termination is proved lawful? Then they have already
4 somebody hired who may reach tenured status and this
5 employee, so it is not just an issue of back pay.

6 The final deprivation when a person loses his
7 house, loses his car, loses all his assets, and probably
8 loses his family, is already taken prior to the
9 administrative procedure being over, and this Court has
10 said that the purposes of the due process is before
11 final deprivation, so back pay, a person has to give up
12 his house, has to give up his car, probably loses his
13 family, loses his self-esteem, plus he is in limbo.

14 He doesn't know whether or not he should try
15 to get other employment, and also the reasons for his
16 termination, like in Donnelly's, or, excuse me,
17 Loudermill, he was terminated for dishonesty. Every
18 time he filed another application, what is your last
19 employment, Cleveland Board of Education, was terminated
20 for dishonesty. So how do you expect somebody to get
21 another job?

22 And so here you are dealing with a lengthy
23 period where actually the effects, the deprivation is
24 final. He loses his house, he loses his family. There
25 is definitely final deprivation before you get -- prior

1 to resolution. So it is not just a temporary
2 termination and back wages. I think there is very
3 emotional -- I think it is not just monetary damages,
4 but the emotional --

5 QUESTION: Mr. Fertel, you have said several
6 times that a person in Loudermill's situation loses his
7 wife and children. Is that what in fact happened to Mr.
8 Loudermill?

9 MR. FERTEL: He was already divorced, but he
10 lost his house. He had to stay in his sister's house.
11 He was, obviously, his daughter -- he couldn't support
12 his daughter, so he lost --

13 QUESTION: So you are referring to this
14 particular case?

15 MR. FERTEL: I am talking to all employees.

16 QUESTION: Are there statistics that show that
17 if a person becomes unemployed he is very likely to lose
18 his wife and his children?

19 MR. FERTEL: I don't know if there are
20 statistics. I think that is -- I think in the briefs we
21 stated about the emotional damage, and I think that a
22 lot of people, when there is loss of income, all of a
23 sudden a person in fact who may be a fairly well paid
24 employer all of a sudden gets a letter saying, you are
25 being terminated.

1 QUESTION: That's the time his wife divorces
2 him?

3 MR. FERTEL: Well, not then, but when it drags
4 on and drags on and drags on.

5 QUESTION: Counsel, may I ask this question?
6 Do you think our cases require a full evidentiary
7 hearing before a discharge?

8 MR. FERTEL: Well, Arnett versus Kennedy did
9 not, but this case is different, because in that case
10 there is a question about proper service, and in Arnett
11 versus Kennedy he made libelous statements, and there
12 was a question whether or not there was a danger to
13 employees or to morale, the other employees.

14 In this case, there is nothing in the record
15 showing that there was any lack of service, good service
16 by either Mr. Donnelly or Mr. Loudermill. There was no
17 danger to the work force by having --

18 QUESTION: Do you think our cases require an
19 evidentiary hearing before discharge? And if so, which
20 case?

21 MR. FERTEL: Well, I think the Court in Davis
22 versus Scherer said there has to be -- you have to
23 consider the three factors in Mathews versus Eldridge.

24 QUESTION: An evidentiary hearing?

25 MR. FERTEL: Well, I think --

1 QUESTION: A full evidentiary hearing, right
2 to call witnesses?

3 MR. FERTEL: Well, I think that's what I
4 said. I think when we consider the factors in Mathews
5 versus Eldridge, under the facts of this case a full
6 evidentiary hearing is required.

7 QUESTION: Is required?

8 MR. FERTEL: Right, that is the position
9 that --

10 QUESTION: We didn't say that in Arnett.

11 MR. FERTEL: No, but I think you need clarity
12 in this case. I think here you are dealing with 16
13 million employees. Like in Miranda warnings, when an
14 alleged criminal is arrested, you said you have to give
15 him warning, so I think that is clarity. I think we
16 need clarity so that every Civil Service employee,
17 federal, state, or local, and every government knows
18 exactly what procedures have to be employed.

19 And I think by considering the factors, I
20 think -- first of all I think the government's interest
21 also would be furthered in having a full evidentiary
22 hearing, first of all because there is no two-tier
23 procedure where they have to have one hearing at an
24 administrative level, and another hearing where you go
25 to two hearings, plus the fact that if there is a

1 decision to be made, that the employer -- at least there
2 could be finality.

3 The employer could make a determination, this
4 employer is going to be discharged. Then we could hire
5 somebody else. There is no position where they have to
6 hire somebody else and go through, pay for training
7 while this, while the appeals process, and then when the
8 appeals process is done and determines that he has to be
9 rehired and you have two people for the same position,
10 plus the fact that he said there may be excessive back
11 pay. The longer the procedure takes, the longer back
12 pay. So, especially if you get a court judgment, then
13 you have interest.

14 QUESTION: Mr. Fertel, I suppose our inquiry
15 for the purposes of due process, the procedural due
16 process requirements is to determine what is
17 fundamentally fair in this area, right?

18 MR. FERTEL: Right, Your Honor.

19 QUESTION: Is that the thrust of the inquiry?

20 MR. FERTEL: That is my position.

21 QUESTION: All right, and if that is so,
22 should we consider as part of the fairness inquiry the
23 fact that the state had established certain
24 post-termination procedures of which the employee was
25 aware when he accepted the position of employment with

1 the state? Does that have any impact at all in our
2 fairness inquiry?

3 MR. FERTEL: That was the basis of the
4 plurality decision in Arnett versus Kennedy, that the
5 state procedures are bound with the procedural -- or the
6 property interest is bound up with certain procedures,
7 and the employer is bound by those procedures. You have
8 to take the bitter with the sweet, and I think the
9 majority of this Court --

10 QUESTION: Well, even if you don't accept that
11 fully, that all he can ever get is what the state
12 provides, even if you don't accept that, do you think
13 that it has any role at all in the process of
14 determining what is basically fair?

15 MR. FERTEL: I think you have a right to a
16 prompt post-termination hearing, if there is a
17 promptness. I think you have to -- if this Court
18 doesn't -- if there is not a full evidentiary hearing,
19 there has to be at least some pretermination procedures
20 with the full evidentiary hearing promptly.

21 It is our position that a full evidentiary
22 hearing is required, but if the Court takes the position
23 that a full evidentiary hearing is not required, there
24 at least has to be a pretermination procedure to
25 respond --

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QUESTION: Opportunity to respond.

MR. FERTEL: Right, and then a prompt --

QUESTION: Do you think that has to be a statutory opportunity, expressed in statute, or can it be given in fact?

MR. FERTEL: I think it has to be given in the statute. Otherwise there is no guarantee.

QUESTION: Counsel, has -- what I think Justice C'Connor is referring to is the so-called bitter with the sweet theory that Professor, now Judge Easterbrook and others have espoused. Has this Court ever adopted that?

MR. FERTEL: No, Your Honor. I think in Vitek versus Jones, Santowski versus Kramer, and Lobin versus Zimmerman, the Court has specifically rejected that principle.

QUESTION: Arnett, too?

MR. FERTEL: And Arnett, too.

QUESTION: The majority of the Court.

MR. FERTEL: Right, the courts say that -- those cases held that the majority Court has never accepted the bitter with the sweet.

QUESTION: Does Ohio have a statute comparable to the federal statute that makes it a crime to give a false answer an an application for employment?

1 MR. FERTEL: I don't believe there is a
2 specific statute. Of course, the whole point being there
3 is a question of whether or not it was actually a felony
4 or a false answer. Also, I think there is a big point
5 here about the promptness. I think that the Court of
6 Appeals stated that Mr. Loudermill had a hearing two and
7 a half months. However, the decision was not made until
8 nine months.

9 And I think you can't just say give a hearing
10 and then allow an unreasonable time for resolution.
11 This Court has stated you are not only entitled to a
12 prompt hearing, but you are also entitled to a prompt
13 disposition, and I think just the fact that a person was
14 given a hearing in two and a half months when the whole
15 procedure took ten months, I think, is very
16 unreasonable.

17 Also, the Court of Appeals mentioned the
18 procedure used of mandamus. I think that is a very
19 extraordinary remedy. It is discretionary whether or
20 not the Court would grant it. You don't know how many
21 months it would be, especially when you are dealing with
22 somebody who doesn't have counsel. You are dealing with
23 the government on one hand, the awesome power of the
24 government against the individual, who a lot of time
25 isn't represented by counsel.

1 Also, this Court in *Minonite Board of*
2 Admissions versus Adams stated that the fact that an
3 individual can protect his rights still doesn't relieve
4 the government of its responsibility to guarantee due
5 process rights.

6 Also, the Sixth Circuit held that there was no
7 liberty interest violated because the grounds for Mr.
8 Loudermill's and Donnelly's terminations weren't
9 published, and it is our position with the Court that it
10 was communicated to the employers, that when Mr.
11 Loudermill filed employment applications prior to --
12 this is his past employer, Cleveland Board of Education,
13 they said, well, he was terminated for dishonesty, and
14 was unable to get any future employment.

15 So there was communication. This Court in
16 Paul versus Davis stated that the constitutional
17 violation is defamation in -- deprivation of a
18 governmental interest. Here he was terminated. He had
19 a right to continued employment.

20 Therefore he had a governmental interest, and
21 he was terminated in there, so that the procedures,
22 constitutional requirements would be provided by the
23 publication. It doesn't have to be "publicized," but
24 there was publication because other employees,
25 employers, or potential employers were notified.

1 I would like to say that in Gaus versus Lopez,
2 where there was suspension of high school students, they
3 said that there would be a liberty interest, because
4 future employment opportunities would be involved, and
5 in their case it wasn't "published," but yet this Court
6 found a violation of a liberty interest.

7 I would like to point out to this Court in
8 Parrott versus Taylor you said that there are only two
9 instances where no pretermination procedures would be
10 provided. One is where there is implausibility of
11 pretermination procedures, which is certainly not the
12 case.

13 And Number Two, where there is necessity for
14 quick action, and I think if there is an emergency
15 situation, which we deny, because there was no prior
16 violations or disciplinary procedures, that a suspension
17 could be made with the opportunity to respond to the
18 charges.

19 So therefore the two requirements in Parrott
20 versus Taylor to dispose of any pretermination
21 procedures will not be applicable herein.

22 The main thing that we need -- basically is
23 that we need clarity, that there has to be some -- that
24 public employers have to know what exactly the
25 procedures are before they can terminate somebody. As

1 you know, the police know that they have to have
2 probable cause. They have to know that they give the
3 Miranda warnings. And so we need clarity.

4 I would also like to say that you can't really
5 have due process on a case by case basis. Mr. Wyman
6 says, well, the greater the risk, the more the need for
7 pretermination procedures. You leave it up to the
8 employer to determine whether or not there are risks
9 involved. There is no statutory right to grant
10 pretermination procedures.

11 Well, this case there is a big risk so we have
12 hearings. This case we won't. I think you need a
13 statutory right that says you are going to give them
14 notice, you are going to give them an opportunity to
15 present witnesses, and have a decision by an impartial
16 decision-maker, and also that you need a prompt
17 procedure, it has to be held within 30 days, so not only
18 the government can make its determination of whether or
19 not they are going to have to hire somebody, but also
20 the employer can get on with the rest of his life.

21 Thank you.

22 CHIEF JUSTICE BURGER: Do you have anything
23 further, Mr. Wyman?

24 ORAL ARGUMENT OF JAMES G. WYMAN, ESQ.,

25 ON BEHALF OF THE PETITIONERS IN

1 NOS. 83-1362 AND 83-1363 AND
2 RESPONDENTS IN NO. 83-6392

3 MR. WYMAN: Yes, I do, Your Honor, a number of
4 statements, possibly factual clarifications. First of
5 all, the liberty interest is not at issue here. There
6 are no facts in the complaint or the pleadings before
7 this Court which would reflect that there was any
8 communication of any of the allegations or the charges
9 made by the board of education in regards to
10 dishonesty.

11 In further way of clarification, Mr.
12 Donnelly's initial hearing was well within the 30-day
13 time limitation. I think it is important for this Court
14 to know that.

15 Very briefly, Mr. Fertel has chastised me
16 possibly, and with all due respect to him, concerning
17 the what-ifs and the fact that Mr. Loudermill would have
18 in fact been fired even if we had had some sort of
19 pretermination, but he has then gone on with a number of
20 his own what-ifs, what if he loses his house, his wife,
21 his children. I don't think that is valid for the Court
22 to consider. I don't think those facts are before it.

23 We have one issue before this Court, and that
24 is due process, and what is fundamentally fair to the
25 employees involved. It must be kept in mind, and I

1 would urge this Court to keep in mind the fact that the
2 due process rights impact not only upon the governmental
3 entity in this case but also upon those whom we serve,
4 which are the pupils.

5 We are in the business of education, as I said
6 before, and there are treatises out that consider us to
7 be a nation at risk. It is important for us to get on
8 with the business of education, not with establishing
9 elaborate routines and procedures for our employees.

10 That is taken care of under Ohio Revised Code
11 124.34. It provides for due process hearings. They are
12 de novo hearings. They are hearings that are by an
13 objective board. We feel they are appropriate
14 underneath the Ohio Revised Code and the due process
15 standards of the Fourteenth Amendment.

16 We respectfully request this Court to affirm
17 the District Court's decisions of the dismissal, to
18 reverse the Sixth Circuit in regards to the
19 pretermination issue, to find that Ohio Revised Code
20 Section 124.34 is in fact constitutional and adequately
21 protects the rights of those that are affected.

22 The process that the respondents were due was
23 given. Thank you.

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

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(Whereupon, at 10:56 o'clock a.m., the case in
the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of The United States in the Matter of:

#83-1362-CLEVELAND BOARD OF EDUCATION, Petitioner v. JAMES LOUDERMILL, ET AL.;

#83-1363-PARMA BOARD OF EDUCATION, Petitioner v. RICHARD DONNELLY, ET AL.; and

#83-6392-JAMES LOUDERMILL, Petitioner v. CLEVELAND BOARD OF EDUCATION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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