10-1984

Cleveland Board of Education v. Loudermill

Lewis F. Powell Jr.

dac 04/19/84

PRELIMINARY MEMORANDUM

April 27, 1984 Conference
List 1 Sheet 2

No. 83-1362

CLEVELAND BD. OF EDUC.
v.

LOUDERMILL, et al.

Cert to CA 6
(Merritt, Wellford [diss.], Timbers)

Federal/Civil

Timely

Deny.

David

No. 83-1363

PARMA BD. OF EDUC.
v.
DONNELLY, et al.

Cert to CA 6
(Merritt, Wellford [diss.], Timbers)

Federal/Civil

Timely

No. 83-6392

LOUDERMILL
v.
CLEVELAND BD. OF EDUC., et al.

Cert to CA 6
(Merritt, Wellford [diss.], Timbers)

Federal/Civil

Timely

1. SUMMARY: Petrs in Nos. 83-1362 and 83-1363 contest the CA's finding that they discharged employees without providing a prior hearing required by the due process clause. Cross-petr in No. 83-6392 contends that he was deprived of liberty and property interests without an adequate post-termination hearing.

2. FACTS AND DECISION BELOW: Resp and cross-petr Loudermill worked as a security guard for petr and cross-resp Bd. of Educ. As a classified civil service employee, petr could be discharged only for cause, but the employment application filed by petr had provided that false statements on the application would be sufficient cause for dismissal. When petr discovered that resp had falsely stated on his employment application that he had never been convicted of a felony, petr advised resp that he would be dismissed. Resp filed a notice of appeal with the

Cleveland Civil Service Comm'n, but was discharged the next day. Three months later, a Comm'n referee held a hearing on the case, and four months after that, the referee recommended that resp be reinstated. Three months thereafter, the Comm'n rejected the referee's recommendation. Petr then filed suit in DC, alleging that his dismissal without a pre-termination hearing and that the inordinate delay in his post-termination hearing violated his due process rights. He sought damages, declaratory relief, reinstatement and backpay. The DC dismissed the complaint, holding that, although petr had a property interest in continued employment, due process did not require a pretermination hearing and that the post-termination hearing was sufficiently prompt to satisfy due process standards.

Resp Donnelly worked as a bus mechanic for the Parma Bd. of Educ. He also was a classified civil service employee. After resp twice failed an eye examination, he was discharged without further notice or hearing. He filed an appeal with the Civil Service Comm'n, that dismissed the appeal as untimely. Resp then sought a writ of mandamus in state court ordering the Comm'n to hear the case. Eventually, the parties agreed to issuance of the writ, and the Comm'n ordered resp reinstated. He then filed suit in state court, seeking damages and backpay on both state and federal grounds. The state court dismissed the case because resp had failed to seek an administrative appeal of the Comm'n decision. Resp then filed suit in federal DC, seeking damages for violation of his due process rights. The DC dismissed.

On consolidated appeal, the CA reversed the DC. It first concluded that the resps need not exhaust state remedies, Patsy v. Bd. of Educ., 457 U.S. 496 (1982), and that the state court judgment against resp Donnelly was not res judicata as to his federal constitutional claims because it was not a judgment on the merits. The CA then held that resps had a property interest in their jobs protected by the Fourteenth Amendment. Applying the three factors of Mathews v. Eldridge, 424 U.S. 319 (1976), the CA concluded that the compelling private interest in retaining government employment, and the usefulness of being able to present evidence prior to dismissal, outweighed the added administrative burden that a pre-termination hearing would impose on the Board. The CA remanded to give resps a chance to prove that they had been damaged by the failure of the Board to provide a pre-termination hearing. The CA held, however, that there was no due process violation as a result of delay in resps' post-termination hearings. The Ohio statute provided for hearings within a month of termination and authorized actions for mandamus to expedite delayed hearings. These protections were adequate to protect an employee's interest in a prompt post-termination hearing. Nor were the liberty interests of resps violated by their discharge: as the reasons for discharge were not published, resps were not stigmatized by petr's actions.

The dissent, citing Arnett v. Kennedy, 416 U.S. 134, 155 (1974), contended that a post-deprivation hearing satisfied the requirements of due process.

3. CONTENTIONS: No. 83-1362: The plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), recognized that a post-termination hearing may suffice to satisfy the due process clause. The CA misapplied the Mathews v. Eldridge factors: the state has a strong interest in prompt termination of an employee who threatens the community's safety; the risk of error is minimal because the case involved matters of public record; and an employee may be reinstated with backpay if a subsequent hearing shows that an error was made. Further, resp had no property right under the due process clause, cf. Bishop v. Wood, 426 U.S. 341 (1976).

The CA holding is in direct conflict with that of the Ohio S. Ct., Parfitt v. Columbus Correctional Facility, 416 N.E.2d 521, that held no pre-termination hearing constitutionally required for termination of Civil Service employees. Other CAs have reached this result. Jackson v. Stinchcomb, 625 F.2d 462 (CA5 1981); Cierchon v. City of Chicago, 634 F.2d 1055 (CA7 1980). Finally, the case poses the same issue as Davis v. Scherer, No. 83-490.

Resp: In Arnett v. Kennedy, the government employee had received notice and an opportunity to comment on charges before his termination. The CA properly applied the Mathews v. Eldridge factors: even if there were a need for prompt action, resp could have been suspended rather than discharged. The CA cases cited by petr deal with suspension, not termination.

No. 83-1363: Petr repeats the arguments made in No. 83-1362. It notes as well that the disputed issue here involved a

medical test, that Mathews had held to be sufficiently reliable so that any risk of erroneous deprivation did not justify a prior evidentiary hearing.

No. 83-6392: The cross-petn contends that an administrative proceeding may be unconstitutional because of excessive delay. See Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973). The interest in continued employment requires a prompt hearing. Further, cross-petr's liberty interests were infringed by termination of his job. Cross-petr was stigmatized because the reasons for termination were communciated to prospective employers.

Cross-resp: Resp's complaint was processed in nine months, an adequate period of time. Ohio provides a mechanism for prompt review. As to the liberty interest claim, cross-petr did not allege that the Bd. of Educ. had disseminated statements about petr.

4. DISCUSSION: The CA decision accords with the line of cases, beginning with Perry v. Sinderman, 408 U.S. 593 (1972), that require some sort of hearing before the state fires an employee with tenure -- i.e., an employee who can be removed only "for cause." The CA cases relied upon by petr concern suspension rather than termination of employment.

The case should not be held for Bd. of Educ. v. Vail, No. 83-87. In Vail, damages were awarded for breach of an employment contract without prior hearing. Petr rested its argument on the fact that the employee, unlike the employees protected in past due process cases (or the resps here) did not enjoy tenure. And, although Vail might shed light on the evaluation

of damages in due process claims, the courts below did not reach the damages issue.

The cross-petn also should be denied. While an exorbitantly dilatory hearing may violate due process, a hearing within nine months of termination would seem to pass constitutional muster where a pre-termination hearing (or damages for failure to hold a pre-termination hearing) also is to be provided. The question is factbound in any event. Cross-petr apparently did not allege facts sufficient to establish violation of his liberty interest in avoiding stigmatization from loss of employment.

IFP Status: Petr has submitted the appropriate affidavit.

5. RECOMMENDATION: I recommend denial.

There is a response.

April 19, 1984 Charny Opin in petn

dac 04/20/84

PRELIMINARY MEMORANDUM

April 17, 1984 Conference
List 1 Sheet 2

No. 83-1363

PARMA BD. OF EDUC.
v.
DONNELLY, et al.

Cert to CA 6
(Merritt, Wellford [diss.], Timbers)

Federal/Civil

Timely

1. SUMMARY: This case is curve-lined with No. 83-1362. Please see the memorandum in that case.

There is a response.

April 20, 1984 Charny

Opin in petn

dac 04/20/84

PRELIMINARY MEMORANDUM

April 17, 1984 Conference
List 1 Sheet 2

No. 83-6392

LOUDERMILL
v.

CLEVELAND BD. OF EDUC., et al.

Cert to CA 6
(Merritt, Wellford [diss.], Timbers)

Federal/Civil

Timely

1. SUMMARY: This case is curve-lined with No. 83-6392. Please see the memorandum in that case.

There is a response.

April 20, 1984 Charny Opin in petn

April 27, 1984

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 83-1363

PARMA BD. OF ED.

vs.

DONNELLY

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B R W

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Stevens, J.													
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April 27, 1984

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
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No. 83-1362

CLEVELAND BD. OF ED.

vs.

LOUDERMILL

Also motion for leave to proceed ifp.

D

Relist
for
BRW

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White, J.		✓											
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Powell, J.			✓										
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O'Connor, J.				J&M3									

Court .....
Argued ....., 19...
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April 27, 1984

No. 83-6392

LOUDERMILL

vs.

CLEVELAND BD. OF ED.

With
83-1362
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O'Connor, J.													

Deny The employee here was fired without a pre-termination hearing. The Court will have to overrule a number of cases, including Roth and Perry v. Sinderman, 408 US. 593 (1972), to reverse the Court of Appeals decision in this case. David

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

CLEVELAND BOARD OF EDUCATION
83–1362 *v.*
JAMES LOUDERMILL ET AL.

PARMA BOARD OF EDUCATION
83–1363 *v.*
RICHARD DONNELLY ET AL.

JAMES LOUDERMILL
83–6392 *v.*
CLEVELAND BOARD OF EDUCATION ET AL.

5 Full Deny 5/9

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 83–1362, 83–1363 & 83–6392. Decided May ——, 1984

There was no hearing before the discharge.

JUSTICE WHITE, dissenting.

James Loudermill was employed as a security guard by the Cleveland Board of Education. He was classified as a civil service employee under Ohio law. Accordingly, he could be discharged only for cause and was entitled to a hearing within thirty days of his discharge. Ohio Rev. Code Ann. § 124.34. When he applied for the job, Loudermill filled out an application that required him to respond to the question, "Have you ever been convicted of a crime (felony)?" Loudermill responded, "No." At the end of the application, he signed a certification acknowledging that he was aware that "any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."

Approximately one year later, the Board discovered that Loudermill had been convicted of a felony in 1968. The Board sent Loudermill a letter, explaining that because of his dishonesty in filling out the application, he was being dismissed. Pursuant to § 124.34, Loudermill filed a notice of

appeal with the Cleveland Civil Service Commission but was discharged before the Commission could act. The Commission ultimately upheld the discharge, and Loudermill filed the present suit under 42 U. S. C. §1983, alleging that the failure to afford him a pre-termination hearing violated his due process property rights.[1]

The District Court for the Northern District of Ohio dismissed the complaint for failure to state a claim upon which relief could be granted, ruling that, while Loudermill had a constitutionally-protected property right in continued employment, due process did not require a pre-termination hearing. Shortly thereafter, the same court dismissed a similar complaint filed by Richard Donnelly, a bus mechanic who had been dismissed without a prior hearing by the Parma Board of Education after he twice failed to pass an eye examination.[2]

The two cases were consolidated on appeal, and the Court of Appeals for the Sixth Circuit vacated the relevant portion of the District Court's orders.[3] The court rejected the contention that, under *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), the post-termination procedure outlined in § 124.34 adequately protected the employees' constitutional rights, concluding that Loudermill and Donnelly were entitled to pre-

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[1] Loudermill also alleged that the the Board's failure to afford him an opportunity to respond to the charges violated his due process right to liberty and that the delay in completing his post-termination hearing violated his due process rights. He sought damages and a declaration that § 124.34 was constitutionally invalid because it failed to provide civil service employees with an opportunity to respond to charges prior to removal.

[2] Donnelly also alleged that his equal protection rights had been violated because the Board continued to employ another mechanic who had failed the eye examination. Unlike Loudermill, Donnelly was eventually ordered reinstated by the Commission.

[3] The Court of Appeals affirmed the District Court's dismissal of those parts of the complaints which alleged the violation of a constitutionally protected liberty interest.

termination hearings. The two Boards have sought review of that ruling.

Ever since a divided Court decided *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) (five separate opinions were filed), lower courts have struggled to determine under what circumstances a pre-termination hearing is required before a public employer can constitutionally discharge one of its employees. See, *e. g.*, *Vanelli* v. *Reynolds School District No. 7*, 667 F. 2d 773, 778–779 (CA9 1982); *Cierchon* v. *City of Chicago*, 634 F. 2d 1055, 1058–1060 (CA7 1980); *Louise B.* v. *Coluatti*, 606 F. 2d 392, 401–402 (1979); *Webb* v. *Dillon*, 593 F. 2d 656, 657–658 (CA5 1979); *Bullock* v. *Mumford*, 509 F. 2d 384, 386–387 (1974). A review of those cases indicates that not all lower courts have interpreted our rulings in the same manner. The confusion resulting from these divergent interpretations is clearly apparent in this case. The Court of Appeals held that the post-termination procedure provided by § 124.34 was not constitutionally sufficient to protect the property interest that Ohio civil servants have in their continued employment and that, accordingly, a pre-termination hearing was required. Earlier, however, Chief Justice Celebrezze, writing for himself and the other members of the Ohio Supreme Court, rejected that very argument in a different case challenging the validity of the Ohio law, stating, "[i]n *Arnett* v. *Kennedy* . . . the United States Supreme Court made it clear that a pretermination hearing was not required under the Due Process Clause to remove federal civil service employees. In that case the court approved of a procedure essentially the equivalent of the one provided to classified employees in R. C. Chapter 124." *Parfitt* v. *Columbus Correctional Facility*, 406 N. E. 2d 528, 531 (Ohio 1980).[4] The existence of such a direct conflict evidences the uncertainty that exists in this area of the law. We should not only re-

[4] The Court of Appeals in this case recognized that its ruling was not consistent with the Ohio Supreme Court's ruling in *Parfitt*. —— F. 2d, at —— n. 14.

solve the conflict between the highest court of Ohio and the Court of Appeals for the Circuit in which Ohio is located with respect to the constitutionality of the Ohio procedure, but also provide greater clarification of the appropriate standards to be applied in the numerous cases arising in other states as well. I would grant these petitions,[5] consolidate them, and set the cases for oral argument.

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[5] Loudermill has filed a cross-petition, No. 83–6392, asking us to review the Court of Appeal's dismissal of his claims that the post-termination proceeding was insufficient because it was not completed until nine months after his discharge and that the Board violated his constitutionally-protected liberty interests. I would also grant this petition so that the entire case could be reviewed.

May 10, 1984

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 83-1363

PARMA BD. OF ED.

vs.

DONNELLY

Grant

Robert

for

B R W

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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May 10, 1984

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Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
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No. 83-1362

CLEVELAND BD. OF ED.

vs.

LOUDERMILL

Also motion for leave to proceed ifp.

Granted

Relist
on B R W

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Argued ....., 19...
Submitted ....., 19...

Voted on....., 19... May 10, 1984
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No. 83-6392

LOUDERMILL

vs.

CLEVELAND BD. OF ED.

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	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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May 17, 1984

Court .....
Argued ....., *19*...
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No. 83-6392

LOUDERMILL

vs.

CLEVELAND BD. OF ED.

Grant & remand -

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Court	*Voted on*....., *19*... May 17, 1984
Argued ....., *19*...	*Assigned* ....., *19*... No. 83-1363
Submitted ....., *19*...	*Announced* ....., *19*...

PARMA BD. OF ED.

vs.

DONNELLY

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	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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May 17, 1984

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No. 83-1362

CLEVELAND BD. OF ED.

vs.

LOUDERMILL

Also motion for leave to proceed ifp.

Grant
all Held
& consolidate

83-1363
83 6392

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

dro 12/01/84

Reviewed 12/01

Helpful memo with which I agree.

My opinions in Arnett Mathews & last Term in Davis v Scherer support need for some opportunity to be heard prior to discharge of civil service employee. An evidentiary hearing is not necessary

BENCH MEMORANDUM

Nos. 83-1362, 83-1363, and 83-6392

Cleveland Board of Education v. Loudermill
and
Parma Board of Education v. Donnelly.

Dan

December 1, 1984

Question Presented

Whether due process entitles a tenured state employee to some process before being discharged.

I. Background.

Resps were employees of petr school districts. Under state law, they could be terminated only for cause. Resp Loudermill was discharged for misrepresenting on an initial employment form that he had never been convicted of a felony. Resp Donnelly was discharged for failing an eye test. Loudermill apparently received notice that he would be terminated only on the day of his discharge, while Donnelly received notice a month or so before his. Under Ohio law, each was entitled to a full post-deprivation hearing. Neither, however, was entitled to any pre-termination process at all. The State law denied them not only a pre-termination hearing, but also the right to submit oral or written evidence, information, or arguments before they were fired. During post-termination review, an ALJ recommended that Loudermill be rehired but his discharge was upheld on further appeal. Donnelly, on the other hand, was reinstated but without back pay. Under Ohio law, the State reviewing agency can reinstate wrongfully dismissed employees but not award them back pay.

Resps then filed separate §1983 actions in federal court alleging that the absence of pre-termination process (except the bare notice of termination) violated due process. The DC dismissed the claim by following JUSTICE REHNQUIST'S reasoning in Arnett v. Kennedy, 416 U.S. 341 (1974), that the property interest came with procedural

strings attached. Taking "the bitter with the sweet," resps were entitled to no pre-termination process above what state law provided. Upon reconsideration, the DC issued a subsequent opinion where it found that there was a property interest but that the post-termination hearings provided by Ohio law satisfied due process requirements.

The CA6 (Merritt, Timbers [sca2]; Wellford conc. & diss.) held that the absence of any pre-termination process violated due process requirements, as interpreted by this Court. It did not find that a pre-termination hearing was required, but rather held that due process required that resps be given "an opportunity to present evidence challenging the proposed discharges ...." App. to Pet. for Cert. A26. It carefully weighed the Mathews v. Eldridge factors and found that "[p]roviding a limited opportunity to present evidence before dismissal is critical to ensure that the proper governmental response ensues." Id., at A24. As to the other two factors, the CA6 found that the individual's interest in continued employment was great and that the government's interest in not providing limited process was small. Although the CA6 never makes explicit exactly what kind of limited pre-termination process is required, its repeated mention of the limited nature of the required process suggests that consideration of written or oral submissions of evidence and arguments against dismissal would probably suffice. The CA6 remanded to the DC to

allow resps to prove that they sustained damages from the State's failure to provide any pre-termination process.

Judge Wellford dissented on two grounds. First, although he admitted that a majority of this Court had never adopted JUSTICE REHNQUIST'S theory of conditional property interests in Arnett v. Kennedy, he found that "[t]he property interest which appellants had in their continued state or public employment 'was itself conditioned by the procedural limitations which had accompanied the grant of that interest.'" Id., at A31 (quoting Arnett v. Kennedy, 416 U.S. 134, 155 (1974) (opinion of REHNQUIST, J.). Second, assuming that there was a limited property interest, he found the overall process provided adequate under this Court's precedents primarily because there was a "reliable pretermination finding." Id., at A33.

II. Discussion.

The case presents two issues: (i) whether the legislature can condition entitlements on receiving certain limited procedural protections and (ii) whether any pre-termination process is required before firing tenured state employees? The first issue presents JUSTICE REHNQUIST'S Arnett v. Kennedy due process theory. Since you, along with a majority of the Court, rejected it then and it stands at odds with your opinion for the Court in Mathews v. Eldridge and other Supreme Court precedents, I will not

discuss it. It would work a major constitutional change and have effects outside the entitlement context.

Given your prior opinions and Supreme Court precedent, the answer to the second question also seems clear. Last Term, for example, in Davis v. Scherer, 52 U.S.L.W. 4956, 4958 n.10 (U.S. June 28, 1984) (citations omitted) you stated:

> "[T]he decisions of this Court by 1978 had required 'some kind of hearing' prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. Such a determination would require a careful balancing of the competing interests--of the employee and the State--implicated in the official decision at issue. As the Court had considered circumstances in which no hearing at all had been provided prior to termination or in which the requirements of due process were met, there had been no occasion to specify any minimally aceptable procedures for termination of employment."

Furthermore, in your opinions in both Arnett and Mathews, you thought significant the fact that some pre-termination process was available. In fact, the second factor of the Eldridge test determines in part "the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. 319, 335 (1976) (emphasis added). Here there were none to begin with--at least prior to termination.

The facts of these two cases emphasize the risk of error when the State provides no pre-termination process at all. Termination "for cause" is discretionary with the State. Although the State can terminate someone's employment on numerous grounds, termination does not appear to be

automatic when one of those grounds is met. In Donnelly's case, for example, the Board had not fired other employees who had failed the same eye test. Although the Board allowed Donnelly to retake the eye test, which he failed again, it did not allow him to argue any of the discretionary factors which appear eventually to have won him his job back. Had the Board initially allowed submission of such arguments, chances are that Donnelly would not have lost his job.

Loudermill presents a somewhat similar, but less sympathetic, situation. He was dismissed for representing on a initial employment form that he had never been convicted of a felony. From the briefs and appendix it is unclear exactly what happened, but there appears to be some doubt whether he actually lied on the form or was genuinely confused as to the nature of the crime. There is no indication, moreover, whether the crime was a violent felony or something like check-kiting. In any event, the Board did not dismiss him for security reasons as it undoubtedly had the right to. Had it done so, it is extremely doubtful that he could claim a right to any pre-termination process. Instead, the Board fired Loudermill solely for misrepresentation. The ALJ who investigated his claim recommended reinstatement but was overruled on appeal. Thus, it does appear that although Loudermill misrepresented his past there may have been some doubt as to the appropriateness of termination. In any case, since full post-termination

hearings did not result in reinstatement, Loudermill will probably be barred on remand from receiving more than nominal damages under Carey v. Piphus.

Both individual cases, particularly Donnelly's, cast doubt on Judge Wellford's belief as to "reliable pretermination findings." There is no question that the findings that Donnelly failed his eye test and that Loudermill misrepresented his past are reliable. Termination is discretionary, however, not automatic. The issue is whether there were "reliable pretermination findings" as to the factors that guide the Board's exercise of its discretion. As to these factors, there appear to be no pretermination findings at all--let alone reliable ones.

III. Summary

Your prior opinions and other cases of this Court indicate that there was a property interest at stake and that some pretermination process was necessary. Unless you or the Court deviate from these prior positions, there is a due process violation here. One issue remains, however. If this Court finds a due process violation, should it describe what kinds of pre-termination process are required in this context? The case certainly presents an opportunity for the Court to do so, but I am not sure it should. For one thing, it is not necessary to do so in order to decide the case. Since the CA6 remanded only for a deter-

mination of damages for lack of <u>any</u> process at all, there is no need to prescribe standards in this case. For another thing, what process is due always depends on the context of the case and the interests involved. The school boards should be given a chance to design their own procedures without unnecessary interference from the courts.

<u>Recommendation</u>

I recommend affirming the CA6.

12/1 L.F.B.

83-1362, 83-1363 Cleveland Bd Ed v. Loudermill + Parma Bd Ed v. Donnelly

Q is whether Ohio Code § 124.34, applicable to tenured state civil service employees, is invalid because it ~~afford~~ affords to hearing or opportunity to respond prior to ~~dismissal~~ termination?

~~Issue~~ Issue is limited in view of concessions or findings not challenged:

1. Notice of ~~discharge~~ termination is OK
2. Post termination hearings ~~are~~ comport with procedural D/P.

CA 6's holding

(a) A tenured employee has a property right (Ross, Sindermann, etc

(b) ~~§~~ § 124.34 (at least as applied) is invalid as no pretermination opportunity to be heard is provided

(c) Holding: ~~Hearing~~ "some opportunity to present evidence on their own behalf prior to termination." Arnett + Eldridge support this holding. But not on a weighing of interests. That of individual is "compelling", while the affording of some opportunity to be heard does not significantly burden the State or municipality.

Dixon v Scheuer

83-1362 CLEVELAND BOARD v. LOUDERMILL
83-1363 PARMA BOARD v. DONNELLY
83-6392 LOUDERMILL v. CLEVELAND BOARD

Argued 12/3/84

Wyman (Pet'r)

Nothing in notice of discharge advised employee of any right or opportunity to be heard prior to effective date of discharge.

Argue that discharge did not become final until adm. review ~~ended~~ ended.

In Donnelly's case, an opportunity was given for second eye exam. This was appended prior to notice of discharge. Donnelly knew flunking eye exam would be followed by discharge

what is the remedy?

B.R.W asked what remedy are available to Resp. if we appear? (no satisfactory answer)

~~J.P.S. suggests~~

pull ev.
1

Fertel (Resps) (a poor speaker!!)

Responding to C.J., counsel said Lowden (security guard) claimed he thought conviction was for misdemeanor

2. Counsel made no intelligible response to J.P.S's Q as to what are the remedies to which Resps are entitled. To extent I understand counsel, he said that only decision before us - under CA 6's opinion - is the denial of D/P. Then would suggest remand.

Wyman (Reply)

Govt. interests includes those of School Bd staff & pupils.

Aff'm 8-1

No. 83-1362, Cleveland Board v. Loudermill Conf. 12/5/84

Parma Bd v Donnelly

The Chief Justice

In Dawn v Scheuer we reaffirmed that some sort of prior hearing is required

As to Loudermill (felony conviction) - a security guard with a hearing would not have prevented his discharge in view of felony.

Justice Brennan Aff'm & remand for further proceedings

Only issue is whether we follow Dawn v Scheuer.

None of other issues is before us.

Justice White Affirm & Remand,

Some kind of hearing is required & Mass Rules had none.

But an evidentiary hearing is not required

Ct/appeal found there was no opportunity to be heard.

Donnelly was reinstated

Justice Marshall

Aff'm on Arnett

(all I'M said)

Justice Blackmun

Affirm

No ~~e~~ hearing

Evidentiary hearing is not required.

What leg. presumption ~~was~~ ineffective to foreclose DJN

Justice Powell

Aff'm & remand.

See my notes.

Some opportunity to explain is necessary — not an evidentiary hearing

Justice Rehnquist

Reverse

Adheres to view expressed by his opinion in Arnett.

The process described by the State controls if it is reasonable

Justice Stevens

Affirm

As to Loudermill, felons itself would not be disqualified.

Not an evidentiary hearing

Justice O'Connor

Affirm

Disp. to make clear that all that is required is opportunity to respond.

In the balancing, the provisions of State statutes should be considered - but not controlling.

See my letter to BRW of 12/24

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: DEC 31 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–1362, 83–1363 AND 83–6392

CLEVELAND BOARD OF EDUCATION, PETITIONER
83–1362 *v.*
JAMES LOUDERMILL ET AL.

PARMA BOARD OF EDUCATION, PETITIONER
83–1363 *v.*
RICHARD DONNELLY ET AL.

JAMES LOUDERMILL, PETITIONER
83–6392 *v.*
CLEVELAND BOARD OF EDUCATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not af-

forded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was "classified civil servant." Ohio Rev. Code Ann. § 124.11. Such employees can be terminated only for cause, and may obtain administrative review if discharged. § 124.34. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt post-removal hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to state a claim on which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due.

The post-termination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable. App. to Pet. for Cert. in No. 83–1362, pp. A36–A42.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the exam but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without back pay.[1] In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim, relying on its opinion in *Loudermill*.

The District Court denied a joint motion to alter or amend its judgment,[2] and the cases were consolidated for appeal. A divided panel of the Court of Appeals for the Sixth Circuit

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[1] The statute authorizes the Commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev. Code Ann. § 124.34. Petitioner interprets this as authority to reinstate with or without back pay and views the Commission's decision as a compromise. Brief for Petitioner in No. 83–1363, p. 6, n. 3; Tr. of Oral. Arg. 14. The Court of Appeals, however, stated that the Commission lacked the power to award back pay. 721 F. 2d 550, 554 n. 3 (1983). As the decision of the Commission is not in the record, we are unable to determine the reasoning behind it.

[2] In denying the motion, the District Court no longer relied on the principle that the state legislature could define the necessary procedures in the course of creating the property right. Instead, it reached the same result under a balancing test based on JUSTICE POWELL's concurring opinion in *Arnett* v. *Kennedy*, 416 U. S. 134, 168–169 (1974), and the Court's opinion in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). App. to Pet. for Cert. in No. 83–1362, pp. A54–A57.

reversed in part and remanded. 721 F. 2d 550 (1983). After rejecting arguments that the actions were barred by failure to exhaust administrative remedies and by res judicata—arguments that are not renewed here—the Court of Appeals found that both respondents had been deprived of due process. It disagreed with the District Court's original rationale. Instead, it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. *Id.*, at 561–562. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation. *Id.*, at 563–564.

The dissenting Judge argued that respondents' property interests were conditioned by the procedural limitations accompanying the grant thereof. He considered constitutional requirements satisfied because there was a reliable pretermination finding of "cause," coupled with a due process hearing at a meaningful time and in a meaningful manner. *Id.*, at 566–567.

Both employers petitioned for certiorari. Nos. 83–1362 & 83–1363. In a cross-petition, Loudermill sought review of the rulings adverse to him. No. 83–6392. We granted all three petitions, —— U. S. —— (1984), and now affirm in all respects.

II

Respondents' federal constitutional claim depends on their having had a property right in continued employment.[3] *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972); *Reagan* v. *United States*, 182 U. S. 419, 425 (1901). If they

[3] Of course, the Due Process Clause also protects interests of life and liberty. The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest. We address below Loudermill's contention that he has been unconstitutionally deprived of liberty. See n. 12, *infra*.

did, the State could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975).

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, *supra*, at 577. See also *Paul* v. *Davis*, 424 U. S. 693, 709 (1976). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev. Code Ann. § 124.11, entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office," § 124.34.[4] The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.[5]

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[4] The relevant portion of § 124.34 provides that no classified civil servant may be removed except "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections of the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

[5] The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully he would not have been hired. He therefore lacked a "legitimate claim of entitlement" to the position. Brief for Petitioner in No. 83–1362, pp. 14–15.

For several reasons, we must reject this submission. First, it was not raised below. Second, it makes factual assumptions—that Loudermill lied, and that he would not have been hired had he not done so—that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings stage. Finally, the argument relies on a retrospective fiction inconsistent

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. Brief for Petitioner in No. 83–1363, pp. 26–27. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place.[6] The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself." *Id.*, at 27. See also Brief for State of Ohio et al. as *Amici Curiae* 5–10.

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of

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with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

[6] After providing for dismissal only for cause, see n. 4, *supra*, § 124.34 states that the dismissed employee is to be provided with a copy of the order of removal giving the reasons therefor. Within ten days of the filing of the order with the director of administrative services, the employee may file a written appeal with the state personnel board of review or the Commission. "In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." Either side may obtain review of the commission's decision in the state court of common pleas.

> cause. . . . [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.*, at 152–154.

This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. See *id.*, at 166–167 (POWELL, J., joined by BLACKMUN, J.,); *id.*, at 177–178, 185 (WHITE, J.,); *id.*, at 211 (MARSHALL, J., joined by Douglas and BRENNAN, JJ.). Since then, this theory has at times seemed to gather some additional support. See *Bishop* v. *Wood*, 426 U. S. 341 (1976); *id.*, at 355–361 (WHITE, J., dissenting); *Goss* v. *Lopez*, 419 U. S. 565, 586–587 (1975) (POWELL, J., joined by THE CHIEF JUSTICE, and BLACKMUN and REHNQUIST, JJ., dissenting). More recently, however, the Court has clearly rejected it. In *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any

more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett* v. *Kennedy*, *supra*, at 166 (POWELL, J., concurring); see *id.*, at 185 (WHITE, J., concurring).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971) (emphasis in original); see *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents* v. *Roth*, 408 U. S. 564, 569–570 (1972); *Perry* v. *Sinderman*, 408 U. S. 593, 599 (1972). As we pointed out last Term, this rule has been settled for some time now. *Davis* v. *Scherer*, —— U. S. ——, —— n. 10 (1984); *id.*, at —— (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pre-termination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the

material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry* v. *Barchi*, 443 U. S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

The need for some form of pre-termination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See *Fusari* v. *Steinberg*, 419 U. S. 379, 389 (1975); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 83–84 (1973).

Second, some opportunity for the employee to present his side of the case is of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano* v. *Yamasaki*, 442 U. S. 682, 686 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss* v. *Lopez*, 419 U. S. 565, 583–584 (1975);

Gagnon v. *Scarpelli*, 411 U. S. 778, 784–786 (1973).[7]

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referree's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues,[8] and the right to a hearing does not depend on a demonstration of certain success. *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978).

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording

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[7] This is not to say that where state conduct is entirely discretionary the Due Process Clause is brought into play. See *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976). Nor is it to say that a person can insist on a hearing in order to argue that the decisionmaker should be lenient and depart from legal requirements. See *Dixon* v. *Love*, 431 U. S. 105, 114 (1977). The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect. . . . [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss* v. *Lopez*, 419 U. S. 565, 583–584 (1975).

[8] Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction.

the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employee would continue to receive the benefits of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing the employee onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job,[9] it can avoid the problem by suspending with pay.

IV

The foregoing considerations indicate that the pre-termination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971). See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894–895 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews* v. *Eldridge*, 424 U. S., at 343.

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[9] In the cases before us, no such danger seems to have existed. The exam Donnelly failed was related to driving school buses, not repairing them. Tr. of Oral Arg. 39–40. As the Court of Appeals stated, "no emergency was even conceivable with respect to Donnelly." 721 F. 2d, at 562. As for Loudermill, petitioner states that "to find that we have a person who is an ex-felon as our security guard is very distressful to us." Tr. of Oral Arg. 19. But the termination was based on the presumed misrepresentation on the employment form, not on the felony conviction. In fact, Ohio law provides that an employee "shall not be disciplined for acts," including criminal convictions, occuring more than two years previously. See Ohio Admin. Code § 124–3–04. Petitioner concedes that Loudermill's job performance was fully satisfactory.

Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, see *id.*, at 264, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a probable-cause determination as to whether the charges brought against the employee are true and support the proposed action. See *Bell* v. *Burson*, *supra*, at 540.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett* v. *Kennedy*, *supra*, at 170–171 (opinion of POWELL, J.); *id.*, at 195–196 (opinion of WHITE, J.); see also *Goss* v. *Lopez*, 419 U. S. 565, 581 (1975). To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

V

Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation,

that his administrative proceedings took too long.[10] The Court of Appeals held otherwise, and we agree.[11] The Due Process Clause requires provision of a hearing "at a meaningful time." *E. g.*, *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry* v. *Barchi*, 443 U. S. 55, 66 (1979). In the present case, however, the delay stemmed in part from the thoroughness of the procedures. The chronology of the proceedings set out in Loudermill's complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 341–342 (1976) (delay of over a year acceptable); *Arnett* v. *Kennedy*, 416 U. S. 134, 157–158 (1976) (delays of over three months acceptable).[12]

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[10] Loudermill's hearing before the referee occurred two and one-half months after he filed his appeal. The Commission issued its written decision six and one-half months after that. Administrative proceedings in Donnelly's case, once it was determined that they could proceed at all, were swifter. A writ of mandamus requiring the Commission to hold a hearing was issued on May 9, 1978; the hearing took place on May 30; the order of reinstatement was issued on July 6.

Section 124.34 provides that a hearing is to be held within 30 days of the appeal, though the Ohio courts have held that the time limit is not mandatory. *E. g.*, *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N. E. 2d 1345, 1347 (1977). The statute does not provide a time limit for the actual decision.

[11] It might be argued that once we find a due process violation in the denial of a pretermination hearing we need not and should not consider whether the post-termination procedures were adequate. See *Barry* v. *Barchi*, 443 U. S. 55, 72–74 (1979) (BRENNAN, J., dissenting in part). We conclude that it is appopriate to consider it, however, for three reasons. First, the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether. Second, it was decided by the court below and is raised in a cross-petition. Finally, the existence of post-termination procedures is relevant to the scope of pretermination procedures.

[12] The cross-petition also argues that Loudermill was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head during the administrative proceedings. As the Court of Appeals

VI

We conclude that all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed and the case remanded for futher proceedings consistent with this opinion.

So ordered.

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found, 721 F. 2d, at 563, n. 18, the failure to allege that the reasons for the dismissal were published dooms this claim. See *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: DEC 21 1984

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 83–1362, 83–1363 AND 83–6392

CLEVELAND BOARD OF EDUCATION, PETITIONER
83–1362 *v.*
JAMES LOUDERMILL ET AL.

PARMA BOARD OF EDUCATION, PETITIONER
83–1363 *v.*
RICHARD DONNELLY ET AL.

JAMES LOUDERMILL, PETITIONER
83–6392 *v.*
CLEVELAND BOARD OF EDUCATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[January ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not af-

Renewed

A good decision I can join.

I would like to see a language change on p 12. See my letter of 12/26

If BRW doesn't change language, I'll write a brief Concurring Opinion "construing" his opinion as not using "probable cause" in the crim-law sense.

forded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was "classified civil servant." Ohio Rev. Code Ann. § 124.11. Such employees can be terminated only for cause, and may obtain administrative review if discharged. § 124.34. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt post-removal hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to state a claim on which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due.

The post-termination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable. App. to Pet. for Cert. in No. 83–1362, pp. A36–A42.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the exam but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without back pay.[1] In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim, relying on its opinion in *Loudermill*.

The District Court denied a joint motion to alter or amend its judgment,[2] and the cases were consolidated for appeal. A divided panel of the Court of Appeals for the Sixth Circuit

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[1] The statute authorizes the Commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev. Code Ann. § 124.34. Petitioner interprets this as authority to reinstate with or without back pay and views the Commission's decision as a compromise. Brief for Petitioner in No. 83–1363, p. 6, n. 3; Tr. of Oral. Arg. 14. The Court of Appeals, however, stated that the Commission lacked the power to award back pay. 721 F. 2d 550, 554 n. 3 (1983). As the decision of the Commission is not in the record, we are unable to determine the reasoning behind it.

[2] In denying the motion, the District Court no longer relied on the principle that the state legislature could define the necessary procedures in the course of creating the property right. Instead, it reached the same result under a balancing test based on JUSTICE POWELL's concurring opinion in *Arnett* v. *Kennedy*, 416 U. S. 134, 168–169 (1974), and the Court's opinion in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). App. to Pet. for Cert. in No. 83–1362, pp. A54–A57.

reversed in part and remanded. 721 F. 2d 550 (1983). After rejecting arguments that the actions were barred by failure to exhaust administrative remedies and by res judicata—arguments that are not renewed here—the Court of Appeals found that both respondents had been deprived of due process. It disagreed with the District Court's original rationale. Instead, it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. *Id.*, at 561–562. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation. *Id.*, at 563–564.

The dissenting Judge argued that respondents' property interests were conditioned by the procedural limitations accompanying the grant thereof. He considered constitutional requirements satisfied because there was a reliable pretermination finding of "cause," coupled with a due process hearing at a meaningful time and in a meaningful manner. *Id.*, at 566–567.

Both employers petitioned for certiorari. Nos. 83–1362 & 83–1363. In a cross-petition, Loudermill sought review of the rulings adverse to him. No. 83–6392. We granted all three petitions, —— U. S. —— (1984), and now affirm in all respects.

II

Respondents' federal constitutional claim depends on their having had a property right in continued employment.[3] *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972); *Reagan* v. *United States*, 182 U. S. 419, 425 (1901). If they

[3] Of course, the Due Process Clause also protects interests of life and liberty. The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest. We address below Loudermill's contention that he has been unconstitutionally deprived of liberty. See n. 12, *infra*.

did, the State could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975).

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, *supra*, at 577. See also *Paul* v. *Davis*, 424 U. S. 693, 709 (1976). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev. Code Ann. § 124.11, entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office," § 124.34.[4] The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.[5]

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[4] The relevant portion of § 124.34 provides that no classified civil servant may be removed except "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections of the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

[5] The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully he would not have been hired. He therefore lacked a "legitimate claim of entitlement" to the position. Brief for Petitioner in No. 83–1362, pp. 14–15.

For several reasons, we must reject this submission. First, it was not raised below. Second, it makes factual assumptions—that Loudermill lied, and that he would not have been hired had he not done so—that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings stage. Finally, the argument relies on a retrospective fiction inconsistent

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. Brief for Petitioner in No. 83–1363, pp. 26–27. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place.[6] The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself." *Id.*, at 27. See also Brief for State of Ohio et al. as *Amici Curiae* 5–10.

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of

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with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

[6] After providing for dismissal only for cause, see n. 4, *supra*, § 124.34 states that the dismissed employee is to be provided with a copy of the order of removal giving the reasons therefor. Within ten days of the filing of the order with the director of administrative services, the employee may file a written appeal with the state personnel board of review or the Commission. "In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." Either side may obtain review of the commission's decision in the state court of common pleas.

> cause. . . . [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.*, at 152–154.

This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. See *id.*, at 166–167 (POWELL, J., joined by BLACKMUN, J.,); *id.*, at 177–178, 185 (WHITE, J.,); *id.*, at 211 (MARSHALL, J., joined by Douglas and BRENNAN, JJ.). Since then, this theory has at times seemed to gather some additional support. See *Bishop* v. *Wood*, 426 U. S. 341 (1976); *id.*, at 355–361 (WHITE, J., dissenting); *Goss* v. *Lopez*, 419 U. S. 565, 586–587 (1975) (POWELL, J., joined by THE CHIEF JUSTICE, and BLACKMUN and REHNQUIST, JJ., dissenting). More recently, however, the Court has clearly rejected it. In *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any

more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett* v. *Kennedy*, *supra*, at 166 (POWELL, J., concurring); see *id.*, at 185 (WHITE, J., concurring).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971) (emphasis in original); see *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents* v. *Roth*, 408 U. S. 564, 569–570 (1972); *Perry* v. *Sinderman*, 408 U. S. 593, 599 (1972). As we pointed out last Term, this rule has been settled for some time now. *Davis* v. *Scherer*, —— U. S. ——, —— n. 10 (1984); *id.*, at —— (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pre-termination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the

my opinion

material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry* v. *Barchi*, 443 U. S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

The need for some form of pre-termination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See *Fusari* v. *Steinberg*, 419 U. S. 379, 389 (1975); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 83–84 (1973).

Second, some opportunity for the employee to present his side of the case is of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano* v. *Yamasaki*, 442 U. S. 682, 686 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss* v. *Lopez*, 419 U. S. 565, 583–584 (1975);

Gagnon v. *Scarpelli*, 411 U. S. 778, 784–786 (1973).[7]

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referree's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues,[8] and the right to a hearing does not depend on a demonstration of certain success. *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978).

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording

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[7] This is not to say that where state conduct is entirely discretionary the Due Process Clause is brought into play. See *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976). Nor is it to say that a person can insist on a hearing in order to argue that the decisionmaker should be lenient and depart from legal requirements. See *Dixon* v. *Love*, 431 U. S. 105, 114 (1977). The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect. . . . [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss* v. *Lopez*, 419 U. S. 565, 583–584 (1975).

[8] Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction.

the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employee would continue to receive the benefits of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing the employee onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job,[9] it can avoid the problem by suspending with pay.

IV

The foregoing considerations indicate that the pre-termination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U. S. 371, 378 (1971). See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894–895 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews* v. *Eldridge*, 424 U. S., at 343.

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[9] In the cases before us, no such danger seems to have existed. The exam Donnelly failed was related to driving school buses, not repairing them. Tr. of Oral Arg. 39–40. As the Court of Appeals stated, "no emergency was even conceivable with respect to Donnelly." 721 F. 2d, at 562. As for Loudermill, petitioner states that "to find that we have a person who is an ex-felon as our security guard is very distressful to us." Tr. of Oral Arg. 19. But the termination was based on the presumed misrepresentation on the employment form, not on the felony conviction. In fact, Ohio law provides that an employee "shall not be disciplined for acts," including criminal convictions, occuring more than two years previously. See Ohio Admin. Code § 124–3–04. Petitioner concedes that Loudermill's job performance was fully satisfactory.

Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, see *id.*, at 264, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a probable-cause determination as to whether the charges brought against the employee are true and support the proposed action. See *Bell* v. *Burson*, *supra*, at 540.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett* v. *Kennedy*, *supra*, at 170–171 (opinion of POWELL, J.); *id.*, at 195–196 (opinion of WHITE, J.); see also *Goss* v. *Lopez*, 419 U. S. 565, 581 (1975). To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

V

Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation,

that his administrative proceedings took too long.[10] The Court of Appeals held otherwise, and we agree.[11] The Due Process Clause requires provision of a hearing "at a meaningful time." *E. g.*, *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry* v. *Barchi*, 443 U. S. 55, 66 (1979). In the present case, however, the delay stemmed in part from the thoroughness of the procedures. The chronology of the proceedings set out in Loudermill's complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 341–342 (1976) (delay of over a year acceptable); *Arnett* v. *Kennedy*, 416 U. S. 134, 157–158 (1976) (delays of over three months acceptable).[12]

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[10] Loudermill's hearing before the referee occurred two and one-half months after he filed his appeal. The Commission issued its written decision six and one-half months after that. Administrative proceedings in Donnelly's case, once it was determined that they could proceed at all, were swifter. A writ of mandamus requiring the Commission to hold a hearing was issued on May 9, 1978; the hearing took place on May 30; the order of reinstatement was issued on July 6.

Section 124.34 provides that a hearing is to be held within 30 days of the appeal, though the Ohio courts have held that the time limit is not mandatory. *E. g.*, *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N. E. 2d 1345, 1347 (1977). The statute does not provide a time limit for the actual decision.

[11] It might be argued that once we find a due process violation in the denial of a pretermination hearing we need not and should not consider whether the post-termination procedures were adequate. See *Barry* v. *Barchi*, 443 U. S. 55, 72–74 (1979) (BRENNAN, J., dissenting in part). We conclude that it is appopriate to consider it, however, for three reasons. First, the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether. Second, it was decided by the court below and is raised in a cross-petition. Finally, the existence of post-termination procedures is relevant to the scope of pretermination procedures.

[12] The cross-petition also argues that Loudermill was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head during the administrative proceedings. As the Court of Appeals

VI

We conclude that all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed and the case remanded for futher proceedings consistent with this opinion.

So ordered.

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found, 721 F. 2d, at 563, n. 18, the failure to allege that the reasons for the dismissal were published dooms this claim. See *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

dro 12/21/84

MEMORANDUM

See my letter to B.R.W.

To: JUSTICE POWELL

From: Dan

Re: JUSTICE WHITE'S 1st Draft of Cleveland Bd. of Education v. Loudermill, No. 83-1362, and companion cases.

JUSTICE WHITE has written a very good opinion which finally puts to rest the "bitter with the sweet" theory propounded by JUSTICE REHNQUIST in Arnett v. Kennedy, 416 U.S. 134 (1974). I recommend you join after possibly asking JUSTICE WHITE to consider dropping part of one sentence in the opinion. On page 12 of the slip opinion, JUSTICE WHITE states that "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a probable-cause determination as to whether the charges brought against the employee are true and support the proposed action. See Bell v. Burson, supra, at 540." My only worry concerns his characterization of the hearing as involving "essentially, a probable-cause determination." The Bell v. Burson citation states that a motorist cannot be required to post security covering all claims made against him as a result of an accident unless the State determines that there is a "reasonable possbility" that he will eventually be found liable on

the claims. Although I agree that in the employment context the pretermination determination would look something like a probable-cause determination, I fear that this term is so loaded with meaning from the Fourth Amendment that it would be unwise to use it here--especially when there is no real need to. Not only might use of the term yoke conceptions of due process to evolving Fourth Amendment jurisprudence, but it might also short-circuit serious Mathews v. Eldridge analysis in the lower courts. Since all District Court judges have experience with probable-cause hearings, there may be a great temptation to require these kinds of pretermination hearings to resemble them in many respects. In other words, once the lower courts are given a "model" of the process required, they may overapply it. I recommend that you suggest dropping the reference to the "probable-cause determination." Otherwise, the opinion is fine.

December 26, 1984

83-1362 Cleveland Board of Education v. Loudermill

Dear Byron:

I suggest one change in your fine opinion. On p. 12, after saying that the pretermination hearing need not definitively resolve the propriety of the discharge, you refer to this hearing as essentially a "probable-cause determination".

Bell v. Burson is cited for this statement. In Burson the standard is characterized as "reasonable possibility." My concern about requiring a "probable-cause determination" is that this is Fourth Amendment language, and language that is the subject of a great deal of litigation. Our use of it may invite reliance on criminal law decisions in employment termination cases where the question is simply whether in light of the showing made by the employee the termination still seemed reasonable.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 28, 1984

Re: No. 83-1362) Cleveland Board of Education v. Loudermill
No. 83-1363) Parma Board of Education v. Donnelly
No. 83-6392) Loudermill v. Cleveland Board of Education

Dear Byron:

Please join me.

There is one confusing typo on page 11. Should not the word "employee" in the fifth line on that page be "employer"?

Sincerely,

Harry

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 31, 1984

Re: 83-1362 - Cleveland Board of Education v. Loudermill

Dear Lewis,

You are correct that Bell v. Burson spoke of "a reasonable possibility" rather than probable cause, but we later spoke of "probable cause" in Barry v. Barchi, 443 U.S. at 64-66 -- "Even if the States' presuspension procedures ... were not adequate finally to resolve the issue fairly and accurately, they sufficed for the purposes of probable cause and interim suspension." I note also that Barry cited to Gerstein v. Pugh, 445 U.S., at 64. I am not wed to either formulation, however, and would be glad to refer to a standard of "reasonable grounds to believe." This would not necessarily implicate criminal law decisions.

Sincerely,

Byron

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 2, 1985

Re: 83-1362 Cleveland Board of Education v. Loudermill, et al.
83-1363 Parma Board of Education v. Donnelly, et al.
83-6392 Loudermill v. Cleveland Board of Education, et al.

Dear Byron,

Please join me. I also agree with Lewis' suggestion about avoiding use of the term "probable cause."

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 2, 1985

Re: No. 83-1362) Cleveland Board of Education v. Loudermill
83-1363) Parma Board of Education v. Donnelly
83-6392) Loudermill v. Cleveland Board of Education

Dear Byron,

In due course I will circulate a dissent.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 3, 1985

Re: Cleveland Board of Educ. v. Loudermill, No. 83-1362
Parma Board of Educ. v. Donnelly, No. 83-1363
Loudermill v. Cleveland Board of Educ., No. 83-6392

Dear Byron,

I'm inclined to join parts I-IV of your opinion, but do have some questions regarding part V, which addresses the length of time between the filing of Loudermill's appeal and a final decision from the Commission.

My initial problem arises from uncertainty as to exactly what question is addressed in part V. Is it whether a nine-month delay following a termination that was accomplished with no pretermination opportunity to respond is constitutional? That is the situation actually presented by the facts of Loudermill's case. So stated, I would think that the result in parts I-IV necessarily answers the question, in that we already find that the lack of pretermination procedure alone violated Loudermill's rights. Or is the question in part V instead whether the delay in Loudermill's case constitutes an additional constitutional claim, even after he is compensated for the violation of his right to a pretermination hearing under the holding of parts I-IV? If this latter question is indeed the one you intend to answer, I wonder if you would consider recasting the current language so as to allay my confusion?

I should perhaps just briefly expand on my difficulty. It would seem to me that the injury stemming from the lack of some pretermination hearing arguably runs, at most, from the date of termination until the time Loudermill actually received a hearing, some 11 weeks after he filed his appeal. (In fact, this limitation on the scope of the injury might be worth stating explicitly.) That injury presumably will be compensated on remand in light of parts I-IV. It is possible to imagine, however, that Loudermill may also contend that even if such compensation is forthcoming, he was still constitutionally injured by the additional delay after his hearing until written notice of a final decision was issued. (As I note below, I am not sure that Loudermill has actually made such a claim.) In this case, that additional period is claimed to be approximately seven months, although I note that the Commission actually announced its decision orally on July 20, 1981, less than six months after the initial hearing. If, as I suspect, it is this second possible claim that you are attempting to head off in part V, rather than some claim premised as was Loudermill's initial complaint on an uncompensated failure to provide a pretermination hearing, I wonder if the opinion should so state?

Next, I wonder if we need address this second, theoretically distinct claim at all? My Conference notes indicate that no one expressed any position on this issue. Indeed, it was my sense that we would not have to reach the issue, once we found that Loudermill's rights were violated by the lack of pretermination procedures. I am not at all certain that Loudermill's complaint must be read to state the delay issue as a "separate claim altogether," as you suggest on page 13 n.11. The complaint itself is not divided into separate counts or claims and, as written, I think it can fairly be read to state the issues in the alternative -- that is, if the lack of pretermination procedures were found constitutional, then the delay before hearing would be unconstitutional. Because we find to the contrary regarding the premise of this proposition, the alternative question as pleaded really need not be reached.

In this regard, it is also significant that Loudermill's complaint alleges only that the Ohio statute "is unconstitutional as applied ... because classified civil service employees are not given sufficiently prompt post-removal or post-suspension hearings." JA 11 (emphasis supplied). Thus the additional issue of delay preceeding the Commission's final decision was not even fairly raised by Loudermill's complaint. Finally, while you are of course correct that the delay issue was raised in Loudermill's cross-petition for certiorari which we granted, I agree with your notation in your draft dissent from denial last Term that the cross-petition should be granted merely "so that the entire case could be reviewed." As you also pointed out then, the only substantive inter-Circuit conflict requiring our review is "under what circumstances a pre-termination hearing is required." Because we did not focus on the subsidiary question of post-termination delay either at oral argument or at Conference, would it not be best not to address it, especially when there is no unavoidable need to do so in this case?

Finally, if you decide that the second issue must be reached despite Loudermill's failure to plead it, I wonder if you would consider specifying in some greater detail the reasons for finding that his allegations present no constitutional claim? As you note on page 13, the post-hearing procedures afforded Loudermill were quite thorough; some explication might be in order. For example, for the first month, the hearing officer, whose decision Loudermill cites with pleasure, was busy writing his decision. Then, presumably, the parties compiled and filed their objections and legal memoranda supporting their positions. Then the full Commission held another hearing. Immediately after that hearing, the Commission orally announced its decision -- thus Loudermill knew the final outcome in his case at that time, although it took the Commission another five weeks to issue its written decision.

Furthermore, and significantly in my mind, as far as this record shows Loudermill never raised an objection to this alleged "delay" while it was ongoing, nor did he or does he now contend

that the procedures were unfairly complicated, intentionally lengthy, or to his disadvantage. A party cannot await what he thinks will be a favorable outcome silently and patiently, and then complain of delay when he discovers the decision is not to his liking. Moreover, Loudermill alleges no bad faith on the part of the Commission, nor does he allege that there exists some pattern of overly long delay in the Ohio Commission's disposition of like claims. Absent more specific allegations along these lines, I am disposed to agree with you that the bare allegation that Loudermill had "too long a wait" fails to state a constitutional claim in these circumstances.

I might finally add that your citation to Matthews and Arnett in support of the conclusion in part V strikes me as incomplete without at least a "cf." to Barchi (in which we disapproved a statutory requirement for a "prompt" hearing with no more than a 30-day delay before final decision). At bottom, as is usually the case when considering due process issues, claims regarding post-deprivation procedural delay can be resolved only after detailed review of the facts of each case. In light of this reality, perhaps no citations at all would be preferable?

In sum, I think that the issue addressed in part V really need not be reached. But if part V is to remain, I hope you might consider stating the issue more clearly for me and adding a bit more detail to its resolution, so that I may join your otherwise sound opinion.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 2, 1985

Re: 83-1362 - Cleveland Board of Education v. Loudermillal
83-1363 - Parma Board of Education v. Donnelly

Dear Byron:

If you can make two rather minor changes, I will join you.

First, can you omit the citation to the majority opinion in Bishop v. Wood on page 7? That opinion did not endorse the "bitter with the sweet" theory, and I cannot join a Court opinion that implies that it did. I, of course, have no objection to your citation of your dissent in Bishop.

Second, should you not note that there are some situations in which a post-deprivation hearing will satisfy due process reqirements? E.g. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); see Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972).

Respectfully,

John

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 4, 1985

Re: 83-1362 - Cleveland Board of Education v. Loudermillal
83-1363 - Parma Board of Education v. Donnelly

Dear Byron:

Please join me.

Respectfully,

John

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 24, 1985

Re: 83-1862, 83-1363, 83-6392 -

Cleveland Board of Education v. Loudermill

Dear Bill,

In response to your letter of January 3, I much prefer to retain Part V. It is clear enough to me that Loudermill pleaded and continues to insist that he was entitled not only to a pre-termination opportunity to respond but also to a reasonably prompt full hearing after termination. Nor do I have any doubt that it is advisable to address both questions.

As for the content of Part V, the chronology you recount is contained earlier in the draft. I have added, however, your point that Loudermill never complained about undue delay during the hearing and decision process. Also, as you suggest, I have removed the citations at the end of Part V.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

Dan - get Joins
note out today.
2/14

: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice White**

Circulated: _____

JAN 31 1985

Recirculated: _____

Stylistic and pp. 13-14

2/13/85
Joined by SOC

3rd DRAFT

Reviewed
2/14

SUPREME COURT OF THE UNITED STATES

Nos. 83–1362, 83–1363 AND 83–6392

CLEVELAND BOARD OF EDUCATION, PETITIONER
83–1362 *v.*
JAMES LOUDERMILL ET AL.

PARMA BOARD OF EDUCATION, PETITIONER
83–1363 *v.*
RICHARD DONNELLY ET AL.

JAMES LOUDERMILL, PETITIONER
83–6392 *v.*
CLEVELAND BOARD OF EDUCATION ET AL.

BRW made change I suggested

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

Join

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not af-

This version incorporates your suggestion and responds to Justice Brennan. I recommend joining.
—Dan

forded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." Ohio Rev. Code Ann. § 124.11 (1984). Such employees can be terminated only for cause, and may obtain administrative review if discharged. § 124.34 (1984). Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt post-removal hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to state a claim on which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). It held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loud-

ermill was, by definition, afforded all the process due. The post-termination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable. App. to Pet. for Cert. in No. 83–1362, pp. A36–A42.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the exam but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without backpay.[1] In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim, relying on its opinion in *Loudermill*.

The District Court denied a joint motion to alter or amend its judgment,[2] and the cases were consolidated for appeal.

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[1] The statute authorizes the Commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev. Code Ann. § 124.34 (1984). Petitioner interprets this as authority to reinstate with or without back pay and views the Commission's decision as a compromise. Brief for Petitioner in No. 83–1363, p. 6, n. 3; Tr. of Oral. Arg. 14. The Court of Appeals, however, stated that the Commission lacked the power to award back pay. 721 F. 2d 550, 554, n. 3 (1983). As the decision of the Commission is not in the record, we are unable to determine the reasoning behind it.

[2] In denying the motion, the District Court no longer relied on the principle that the state legislature could define the necessary procedures in the course of creating the property right. Instead, it reached the same result under a balancing test based on JUSTICE POWELL's concurring opinion in *Arnett* v. *Kennedy*, 416 U. S. 134, 168–169 (1974), and the Court's opinion in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). App. to Pet. for Cert. in No. 83–1362, pp. A54–A57.

A divided panel of the Court of Appeals for the Sixth Circuit reversed in part and remanded. 721 F. 2d 550 (1983). After rejecting arguments that the actions were barred by failure to exhaust administrative remedies and by res judicata—arguments that are not renewed here—the Court of Appeals found that both respondents had been deprived of due process. It disagreed with the District Court's original rationale. Instead, it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. *Id.*, at 561–562. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation. *Id.*, at 563–564.

The dissenting Judge argued that respondents' property interests were conditioned by the procedural limitations accompanying the grant thereof. He considered constitutional requirements satisfied because there was a reliable pretermination finding of "cause," coupled with a due process hearing at a meaningful time and in a meaningful manner. *Id.*, at 566.

Both employers petitioned for certiorari. Nos. 83–1362 and 83–1363. In a cross-petition, Loudermill sought review of the rulings adverse to him. No. 83–6392. We granted all three petitions, 467 U. S. —— (1984), and now affirm in all respects.

II

Respondents' federal constitutional claim depends on their having had a property right in continued employment.[3] *Board of Regents* v. *Roth*, 408 U. S. 564, 576–578 (1972);

[3] Of course, the Due Process Clause also protects interests of life and liberty. The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest. We address below Loudermill's contention that he has been unconstitutionally deprived of liberty. See n. 12, *infra*.

Reagan v. *United States*, 182 U. S. 419, 425 (1901). If they did, the State could not deprive them of this property without due process. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975).

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, *supra*, at 577. See also *Paul* v. *Davis*, 424 U. S. 693, 709 (1976). The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev. Code Ann. § 124.11 (1984), entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office," § 124.34.[4] The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.[5]

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[4] The relevant portion of § 124.34 provides that no classified civil servant may be removed except "for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

[5] The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully he would not have been hired. He therefore lacked a "legitimate claim of entitlement" to the position. Brief for Petitioner in No. 83–1362, pp. 14–15.

For several reasons, we must reject this submission. First, it was not raised below. Second, it makes factual assumptions—that Loudermill lied, and that he would not have been hired had he not done so—that are inconsistent with the allegations of the complaint and inappropriate at this stage of the litigation, which has not proceeded past the initial pleadings

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. Brief for Petitioner in No. 83–1363, pp. 26–27. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place.[6] The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself." *Id.*, at 27. See also Brief for State of Ohio et al. as *Amici Curiae* 5–10.

This argument, which was accepted by the District Court, has its genesis in the plurality opinion in *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). *Arnett* involved a challenge by a former federal employee to the procedures by which he was dismissed. The plurality reasoned that where the legislation conferring the substantive right also sets out the procedural mechanism for enforcing that right, the two cannot be separated:

> "The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.

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stage. Finally, the argument relies on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligations by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place.

[6] After providing for dismissal only for cause, see n. 4, *supra*, § 124.34 states that the dismissed employee is to be provided with a copy of the order of removal giving the reasons therefor. Within ten days of the filing of the order with the director of administrative services, the employee may file a written appeal with the state personnel board of review or the Commission. "In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority." Either side may obtain review of the Commission's decision in the state court of common pleas.

. . . . .

". . . [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.*, at 152–154.

This view garnered three votes in *Arnett*, but was specifically rejected by the other six Justices. See *id.*, at 166–167 (POWELL, J., joined by BLACKMUN, J.,); *id.*, at 177–178, 185 (WHITE, J.,); *id.*, at 211 (MARSHALL, J., joined by Douglas and BRENNAN, JJ.). Since then, this theory has at times seemed to gather some additional support. See *Bishop* v. *Wood*, 426 U. S. 341, 355–361 (1976) (WHITE, J., dissenting); *Goss* v. *Lopez*, 419 U. S., at 586–587 (POWELL, J., joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., dissenting). More recently, however, the Court has clearly rejected it. In *Vitek* v. *Jones*, 445 U. S. 480, 491 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432 (1982), where we reversed the lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.

In light of these holdings, it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot

be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Arnett* v. *Kennedy*, *supra*, at 167 (POWELL, J., concurring in part and concurring in result in part); see *id.*, at 185 (WHITE, J., concurring in part and dissenting in part).

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest."[7] *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971) (emphasis in original); see *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents* v. *Roth*, 408 U. S., at 569–570; *Perry* v. *Sinderman*, 408 U. S. 593, 599 (1972). As we pointed out last Term, this rule has been settled for some time now. *Davis* v. *Scherer*, 468 U. S. ——, ——, n. 10

[7] There are, of course, some situations in which a post-deprivation hearing will satisfy due process requirements. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908).

(1984); *id.*, at —— (BRENNAN, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. See also *Barry* v. *Barchi*, 443 U. S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. See *Fusari* v. *Steinberg*, 419 U. S. 379, 389 (1975); *Bell* v. *Burson*, *supra*, at 539; *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 83–84 (1973).

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Cf. *Califano* v. *Yamasaki*, 442 U. S. 682, 686 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases,

the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss* v. *Lopez*, 419 U. S., at 583–584; *Gagnon* v. *Scarpelli*, 411 U. S. 778, 784–786 (1973).[8]

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referree's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues,[9] and the right to a hearing does not depend on a dem-

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[8] This is not to say that where state conduct is entirely discretionary the Due Process Clause is brought into play. See *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976). Nor is it to say that a person can insist on a hearing in order to argue that the decisionmaker should be lenient and depart from legal requirements. See *Dixon* v. *Love*, 431 U. S. 105, 114 (1977). The point is that where there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect. . . . [H]is discretion will be more informed and we think the risk of error substantially reduced." *Goss* v. *Lopez*, 419 U. S. 565, 583–584 (1975).

[9] Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction. Tr. of Oral Arg. 35.

onstration of certain success. *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978).

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job,[10] it can avoid the problem by suspending with pay.

IV

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Boddie* v. *Connecticut*, 401 U. S., at

[10] In the cases before us, no such danger seems to have existed. The exam Donnelly failed was related to driving school buses, not repairing them. *Id.*, 39–40. As the Court of Appeals stated, "[n]o emergency was even conceivable with respect to Donnelly." 721 F. 2d, at 562. As for Loudermill, petitioner states that "to find that we have a person who is an ex-felon as our security guard is very distressful to us." Tr. of Oral Arg. 19. But the termination was based on the presumed misrepresentation on the employment form, not on the felony conviction. In fact, Ohio law provides that an employee "shall not be disciplined for acts," including criminal convictions, occuring more than two years previously. See Ohio Admin. Code § 124–3–04 (1979). Petitioner concedes that Loudermill's job performance was fully satisfactory.

378. See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894–895 (1961). In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews* v. *Eldridge*, 424 U. S., at 343. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, see *id.*, at 264, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell* v. *Burson*, 402 U. S., at 540.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett* v. *Kennedy*, 416 U. S., at 170–171 (opinion of POWELL, J.); *id.*, at 195–196 (opinion of WHITE, J.); see also *Goss* v. *Lopez*, 419 U. S., at 581. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

V

Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation, that his administrative proceedings took too long.[11] The Court of Appeals held otherwise, and we agree.[12] The Due Process Clause requires provision of a hearing "at a meaningful time." *E. g.*, *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). At some point, a delay in the post-termination hearing would become a constitutional violation. See *Barry* v. *Barchi*, 443 U. S., at 66. In the present case, however, the delay stemmed in part from the thoroughness of the procedures. Moreover, Loudermill at the time did not complain of undue delay or assert any unfairness in the hearing and decisionmaking process. The chronology of the proceedings set out in Loudermill's complaint, coupled with the assertion that

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[11] Loudermill's hearing before the referee occurred two and one-half months after he filed his appeal. The Commission issued its written decision six and one-half months after that. Administrative proceedings in Donnelly's case, once it was determined that they could proceed at all, were swifter. A writ of mandamus requiring the Commission to hold a hearing was issued on May 9, 1978; the hearing took place on May 30; the order of reinstatement was issued on July 6.

Section 124.34 provides that a hearing is to be held within 30 days of the appeal, though the Ohio courts have ruled that the time limit is not mandatory. *E. g.*, *In re Bronkar*, 53 Ohio Misc. 13, 17, 372 N. E. 2d 1345, 1347 (1977). The statute does not provide a time limit for the actual decision.

[12] It might be argued that once we find a due process violation in the denial of a pretermination hearing we need not and should not consider whether the post-termination procedures were adequate. See *Barry* v. *Barchi*, 443 U. S. 55, 72–74 (1979) (BRENNAN, J., concurring in part). We conclude that it is appropriate to consider this issue, however, for three reasons. First, the allegation of a distinct due process violation in the administrative delay is not an alternative theory supporting the same relief, but a separate claim altogether. Second, it was decided by the court below and is raised in the cross-petition. Finally, the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.

nine months is too long to wait, does not state a claim of a constitutional deprivation.[13]

VI

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[13] The cross-petition also argues that Loudermill was unconstitutionally deprived of liberty because of the accusation of dishonesty that hung over his head during the administrative proceedings. As the Court of Appeals found, 721 F. 2d, at 563, n. 18, the failure to allege that the reasons for the dismissal were published dooms this claim. See *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).