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Constitutional Law -- Property and Liberty Interests in Public Employment

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If the attorney cannot get the necessary information because of witness hostility or because the moving party has sole control over the information, then he must move for a protective order under rule 56(f). Otherwise, he runs the risk that the testimonial evidence will be afforded credibility as a matter of law and that summary judgment will be granted for the moving party.

In *Kidd v. Early* the North Carolina Supreme Court set out a flexible standard for determining the sufficiency of testimonial evidence on a motion for summary judgment. With the help of this standard, the courts can now determine with greater accuracy whether testimonial evidence has created an issue of fact that must be presented to the jury. This promotes judicial expediency by weeding out cases that contain no factual disputes at the summary judgment level, without jeopardizing the parties' right to a jury trial.

REBECCA WEIANT

Consitutional Law—Property and Liberty Interests in Public Employment

The proposition that a government cannot unreasonably restrict the exercise of constitutional rights by its employees has become a basic tenet of constitutional law.[1] However, in the absence of a specific statute or regulation to the contrary, a government's authority to dismiss its employees for purely arbitrary reasons, or for no reason at all, has remained essentially unchallenged.[2] Except for situations in which the government appears motivated by a desire to stifle constitutional privileges, the maximum protection afforded a public employee against discharge has been some form of hearing at which he can appeal the decision. Moreover, the United States Supreme Court, in the companion

1. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

2. The United States Supreme Court noted in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) that "[t]he Court has consistently recognized that . . . the interest of a government employee in retaining his job can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Id.* at 896.

cases of *Board of Regents v. Roth*[3] and *Perry v. Sinderman*,[4] held that not all employees are entitled to such protection. The discharged employee must show that the loss of his job will deprive him of "liberty" or "property" before he qualifies for the fifth and fourteenth amendments' guarantees of due process.[5]

In determining whether a public employee who is threatened with dismissal has a right to due process, the Supreme Court's standard of inquiry, as set out in *Roth* and *Perry* and reaffirmed in the recent case of *Bishop v. Wood*,[6] is whether the employee has acquired either a liberty or property interest in his employment. Under this test, there are two classes of public employees—those with a sufficient interest in their jobs to warrant some due process protection and those whose claims are inadequate to merit any constitutional consideration. Only after an employee overcomes the threshold barrier of demonstrating a "legitimate interest in employment" is he entitled to any protection at all, and then the form of his due process protection may be far short of a formal adversary proceeding. The required degree of protection will be decided by the court in each case by balancing the employee's interests against those of the government.[7] Although the majority in *Bishop* utilized the *Roth-Perry* test in adjudicating the plaintiff-employee's claim to a due process pretermination hearing, the result reached in that case may indicate a significant reduction in the scope of judicial review of government personnel decisions.

In *Bishop*, officer Carl Bishop, after serving for almost three years on the Marion, North Carolina police force, was dismissed in 1972 by the city manager of Marion upon the recommendation of the chief of police. A city ordinance specified four possible grounds for the dismissal of a "permanent employee," such as Bishop, and further provided that upon request, any dismissed employee could obtain written notice of the date of and reasons for his discharge.[8] The ordinance

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3. 408 U.S. 564 (1972).

4. 408 U.S. 593 (1972).

5. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

6. 96 S. Ct. 2074 (1976).

7. Board of Regents v. Roth, 408 U.S. at 570.

8. The Personnel Ordinance of the city of Marion provides:

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

made no provision for any type of pretermination hearing at which an employee might contest the sufficiency of the alleged cause for his termination, and accordingly, Bishop received no such hearing.

Relying on 42 U.S.C. section 1983, Bishop brought suit against the city manager, chief of police, and city of Marion[9] seeking reinstatement and back pay. In his complaint, he contended that as a "permanent employee" he had a constitutional right to a due process pretermination hearing. The district court granted defendant's motion for summary judgment, holding that Bishop had failed to demonstrate a sufficient liberty or property interest in his job to invoke due process protection.[10] On appeal, the Fourth Circuit Court of Appeals affirmed,[11] and certiorari was granted. The Supreme Court, per Mr. Justice Stevens, upheld Bishop's dismissal and affirmed the district court's view that under the Marion ordinance and North Carolina law, Bishop " 'held his position at the will and pleasure of the city.' "[12] A clear understanding of how the Court disposed of Bishop's claim to property and liberty interests in his job can best be obtained by separate consideration of those issues.

PROPERTY

According to *Roth*, a discharged employee must have "a legitimate claim of entitlement" to continued employment before he has been deprived of "property" under the fourteenth amendment.[13] Such a claim of entitlement cannot be based upon the employee's mere subjective expectations, but must be founded upon "existing rules or understandings"[14] with his employer (the state), as set forth in a statute, ordinance, or contractual provision establishing a definite duration for

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written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

96 S. Ct. at 2077 n.5 (quoting art. II, § 6 of the Ordinance).

The ordinance also provided that all city employees would be considered "probationary" employees when first hired, but could attain the status of a "permanent" employee after six months' satisfactory employment. *See* 96 S. Ct. at 2082 n.5 (dissenting opinion).

9. Justice Stevens' majority opinion points out that the city was not a proper defendant, not being a "person" within the meaning of § 1983. 96 S. Ct. at 2077 n.1. For a more complete analysis of this issue, see Note, *Federal Jurisdiction—The Status of Public Officials as "Persons" Under 42 U.S.C. Section 1983*, 54 N.C.L. REV. 1062 (1976).

10. Bishop v. Wood, 377 F. Supp. 501 (W.D.N.C. 1973).

11. 498 F.2d 1341 (1973).

12. 96 S. Ct. at 2078 (quoting 377 F. Supp. at 504). The decision was five to four, with Justices Brennan, White and Blackmun authoring dissenting opinions. Justice Marshall concurred with the Brennan and White dissents.

13. 408 U.S. at 577.

14. *Id.*

the employment or granting of tenure by some other method. The Court[15] further noted that the Constitution did not create property interests but only extended protection to already existing interests whose "dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[16] Thus, the approach adopted by the Court in *Roth* requires an initial examination of "an independent source such as state law"[17] to characterize the nature of the relationship that exists between the government employer and employee. This relationship, as defined by state law, is then examined under federal law to determine whether it constitutes a protected property interest.[18]

Perry established that an employee who has no written statutory or contractual entitlement to tenure can still claim due process protection by demonstrating the existence of an implied contract or an informal, but widely understood rule of the work-place "that certain employees shall have the equivalent to tenure."[19] With the addition of this "constructive tenure" concept, the *Roth-Perry* standard for determining when an employee has a property interest in his job was left sufficiently nebulous to allow the lower federal courts considerable latitude in applying it. As a result, the large number of suits initiated by public employees claiming a right to a pretermination hearing have received inconsistent treatment.[20]

15. Justice Stewart delivered the opinion of the Court. The vote was five to three, with Justices Douglas, Brennan and Marshall dissenting and Justice Powell taking no part in the case.

16. 408 U.S. at 577.

17. *Id.*

18. Plaintiff in *Roth* was a teacher at Wisconsin State University whose one-year employment contract was not renewed. The Court ruled that the Wisconsin statutes regarding tenure of state university professors and the specific terms of plaintiff's appointment created and controlled any interest Roth might have in his job. *Id.* at 576-78. Since neither the statute nor the contract could support a claim of entitlement to reemployment, the Court concluded that he had no constitutionally protected property interest in being rehired and therefore could not demand a due process hearing reviewing the decision not to renew his contract. *Id.* at 578.

19. *Perry* involved a state college professor who received neither notice, explanation nor a hearing upon his release after the conclusion of the last of four one-year contracts with the university. The college system in which Perry was employed had no official or statutory tenure system for its professors. Perry claimed, however, that the college had a de facto tenure program (the existence of which was intimated in the school's faculty guide), and that he had tenure under that program. Although the Court did not immediately grant him a due process hearing on these grounds, it remanded the case to the district court to give Perry an opportunity to prove that the school's policies were as he alleged. If he could successfully demonstrate a property interest upon remand, then he was to receive a hearing at which he could challenge the sufficiency of the reasons for his release. 408 U.S. at 602-03.

20. In some cases this inconsistency has been manifested by the varying results

The uncertainty generated by the Supreme Court in its formulation of the pliable *Roth-Perry* property interest test was by no means dissipated in its next pronouncement regarding a dismissed public employee's rights to due process. In *Arnett v. Kennedy*,[21] five Justices wrote opinions that displayed widespread disagreement.[22] Justice Rehnquist, writing for the plurality, seemingly abandoned the second criterion in the bifurcated *Roth-Perry* approach, which initially determines *whether* an employee has a sufficient liberty or property interest to merit due process, and then ascertains what level of due process the Federal Constitution requires in the given situation.[23] He concluded that even when a government has accorded its employees a property interest in their jobs, it is not bound by federal notions of due process but still retains the right to set up any type of procedure it desires, no matter how minimal, to safeguard that interest.[24] Under Justice Rehnquist's view, since an employee's entitlement to his job arises under a statute, it may be conditioned by a statutory limitation upon procedural due process protection.

Six of the Justices in *Arnett* rejected the plurality approach and adhered largely to the *Roth-Perry* view. Justice White noted:

> The fact that the origins of the property right are with the State makes no difference for the nature of the procedures required. While the State may define what is and what is not property, once having defined those rights the Constitution defines due

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achieved under this test within a single court. For instance, the Fourth Circuit Court of Appeals (which affirmed the district court opinion in *Bishop*) has vacillated significantly. It strictly construed an employment contract in Kota v. Little, 473 F.2d 1 (1973), and a statute in Brown v. Hirst, 443 F.2d 899 (1971), to deny public employees access to a due process hearing, but liberally found a property interest even in the absence of statutory tenure in Thomas v. Ward, 529 F.2d 916 (1975). Moreover, in Johnson v. Fraley, 470 F.2d 179 (1972), the Fourth Circuit found that under the *Roth-Perry* test, "continuous employment over a significant period of time—such as appellant's 29 years—can amount to the equivalent of tenure." *Id.* at 181. Only two years later, however, the United States District Court for the Middle District of North Carolina refused to follow *Fraley* and held that a teacher with 19 years' service did not have tenure and that "longevity of employment" alone does not establish the existence of a property interest. Cannady v. Person County Bd. of Educ., 375 F. Supp. 689 (1974).

21. 416 U.S. 134 (1974).

22. Justice Rehnquist wrote for the plurality. *Id.* Justice Powell filed a concurring opinion. *Id.* at 164. Justice White concurred in part and dissented in part. *Id.* at 171. Justices Douglas and Marshall filed separate dissents. *Id.* at 203 (Douglas); *id.* at 206 (Marshall).

23. *See* text accompanying note 7 *supra*.

24. 416 U.S. at 152.

> process, and as I understand it six members of the Court are in agreement on this fundamental proposition.[25]

A number of other issues were also under consideration in *Arnett*,[26] and the Court reached such diverse results that Justice Stevens' remark in *Bishop* that "*Arnett* sheds no light on the problem presented by this case"[27] is understandable. It is also evasive, however, since six of the Justices specifically agreed that a statute[28] guaranteeing continued employment absent cause for discharge creates a legitimate claim of entitlement to the job and affords the employee the right to a due process hearing.[29]

Given the facts of *Bishop*, a reasonable application of the *Roth-Perry* standard could easily have justified a finding that Bishop had a legitimate property interest in his job. Under the Marion personnel ordinance, not only was he classified as a "permanent employee," but his removal was conditioned upon the presence of certain enumerated causes.[30] In light of the *Arnett* case, this "for cause" qualification of the ordinance certainly could provide a strong basis for concluding that a property right was present.[31] Although Justice Stevens, in writing for the majority, conceded that the Marion ordinance could be read as creating a property interest in employment,[32] he declined to do so, but relied instead upon the district court's interpretation.

The district court's analysis of Bishop's claim to a property right was less than exhaustive. First, it noted that Bishop had no written contract that conferred tenure and that the city personnel resolution made no express guarantee of tenure or continued employment. The court then ended its review of the case's circumstances and turned to state law for guidance in interpreting the ordinance. Citing *Still v. Lance*,[33] the court found that in North Carolina, a contract for em-

25. *Id.* at 185.

26. The Court also considered whether the applicable personnel statute was unconstitutionally vague, and addressed several questions relating to the nature and timing of the employee's evidentiary due process hearing.

27. 96 S. Ct. at 2078 n.8.

28. The statute involved in *Arnett* provided that a permanent employee could not be removed other than for "such cause as will promote the efficiency of the service." 416 U.S. at 151-52.

29. *See* opinion of Justice White, *id.* at 181, and opinion of Justice Powell, *id.* at 166.

30. *See* note 8 *supra.*

31. *See* note 28 and accompanying text *supra.*

32. 96 S. Ct. at 2078.

33. 279 N.C. 254, 182 S.E.2d 403 (1971). In a short, but well reasoned dissent, Justice Blackmun questioned the applicability of this case to the facts of *Bishop*. 96 S. Ct. at 2085.

ployment with no provision regarding duration or date of termination is terminable at the will of either party and gives an employee no legitimate expectation of continued employment.[34] Thus, the district court ignored Bishop's argument that the ordinance created a property right by providing for dismissal upon *cause*, and held that since there was no express statutory or contractual grant of tenure, he held his job "at the will and pleasure of the city."[35]

By upholding the district court's "tenable" reading of the ordinance even though admitting that its own independent examination of the ordinance "might have justified a different conclusion,"[36] the majority in *Bishop* appears to have significantly narrowed the scope of federal court review of public employee dismissals. Although the *Roth-Perry* test contemplates reference to state law as an aid in defining the nature of the employment relationship in a given context, it is doubtful that the Supreme Court in those cases intended to foreclose further examination of the facts and their logical implications.[37] Indeed, *Roth* and *Perry* allow the court to determine whether the employment relation, as defined by state law, does or does not create a property right.[38]

By discarding the *Roth* rationale as a justification for an active role for federal courts in defining property interests in public employment, the majority in *Bishop* has opted for a more restrained approach. *Bishop* emphasizes that the federal court's primary duty is to look to the intent of the legislature that created the job from which an employee has been removed in order to determine if a property interest has been created. When the statutes are unclear on this issue, *Bishop*

34. 377 F. Supp. at 504.

35. *Id.*

36. 96 S. Ct. at 2078.

37. At least several lower courts have not felt compelled to do so. *See* Vance v. Chester County Bd. of School Trustees, 504 F.2d 820, 824 n.1 (4th Cir. 1974); McNeill v. Butz, 480 F.2d 314, 320 (4th Cir. 1973); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973). *See also* note 20 *supra.*

38. Justice Brennan's dissent argues that *Perry* and *Roth* require court review of such circumstances as the common practices of the employer and expectations of the employee that are based on those practices or upon his probable understanding of the local ordinance. He contends that "at least before a state law is definitively construed as not securing a 'property' interest, *the relevant inquiry is whether it was objectively reasonable for the employee to believe he could rely on continued employment.*" 96 S. Ct. at 2082 (emphasis added).

Justice Brennan's view, that a unilateral expectancy of continued employment creates a property right when objective circumstances justify that expectation, was rejected by the majority and characterized by Justice Stevens as a "remarkably innovative suggestion that we develop a federal common law of property rights . . . ." 96 S. Ct. at 2080 n.14.

suggests that the court defer to state cases for clarification rather than indulge in its own interpretations. Obviously, such an approach will minimize independent examination of the facts in search of a constructive property interest as was found in *Perry*. Thus, Bishop's contention that his understanding of the city ordinance and of his "permanent" status induced a reasonable belief that he enjoyed tenure was given no weight by the court in the absence of specific allegations that such belief was widely held among Marion policemen or fostered by his employer.

If the method of deferring to state law employed by *Bishop* is utilized in the future, it would be difficult for the courts to recognize a property right to employment in many cases even when an ordinance is not worded ambiguously. The common law of almost every state coincides with *Still v. Lance* in construing contracts of employment that mention no period of duration to be terminable at the will of either party.[39] Moreover, since few state legislatures or city councils were aware at the time they created a job that an employee's rights to due process could depend upon their intent, most statutes and ordinances are probably unclear on this issue.[40]

In his dissenting opinion, Justice White accused the majority of adopting Justice Rehnquist's *Arnett* position, previously rejected by a majority of the Court.[41] White read the majority opinion as holding that when the state creates an entitlement to employment, it also has the power to establish any procedure it desires to effect that entitlement, even if such procedure does not meet minimum standards of due process. This interpretation appears somewhat strained. The majority held that Bishop never acquired a property interest and thus had no occasion to determine whether Marion's procedure was adequate for safeguarding such an interest.[42] However, by holding that the ultimate authority to define "property" for purposes of the fourteenth amend-

39. *E.g.*, Land v. Delta Air Lines, Inc., 130 Ga. App. 231, 203 S.E.2d 316 (1973); Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449 (1974); *see* Annot., 161 A.L.R. 706, 707 (1946).

40. Note, *The Due Process Rights of Public Employees*, 50 N.Y.U. L. REV. 310, 348 (1975).

41. 96 S. Ct. at 2083; *see* text accompanying notes 25-27 *supra*. Justice White based his accusation upon language used by both Justice Stevens and the district court to the effect that Bishop's rights were not abrogated since the procedure established in the ordinance—*i.e.*, sending written notice of the date of dismissal, etc.—was followed. 96 S. Ct. at 2083.

42. What *Bishop* does appear to conclude is that if an ordinance provides for any type of dismissal procedure, even if it does not confer a property right, then the government-employer must still comply with the procedure. *See* 96 S. Ct. at 2077-79.

ment resides with the states, the majority clearly intimates that government employers may now avoid any due process limitation upon their powers to fire their employees merely by deciding that the jobs do not constitute "property."[43]

LIBERTY

Board of Regents v. Roth[44] also developed the Supreme Court's standard for determining when an interest in "liberty" has been impaired to the extent that due process protection is mandated. According to *Roth*, a public employee is entitled to a due process hearing if the dismissal imposes a social stigma upon him or is carried out in a manner that may deprive him of future employment. That this two-pronged test has proved as difficult to apply with exactness as the *Roth-Perry* deprivation of property standard is evidenced by the widely divergent results reached in the lower courts.[45]

For discharge to amount to a social stigma, the employer must make charges against the employee "that might seriously damage his standing and associations in his community."[46] Although *Roth* did not provide a definite indication of what degree of stigma requires a hearing affording the employee a chance to clear his name,[47] it did clearly require that some potentially damaging reason for dismissal be given. This requirement seemingly furnishes employers with an incentive for not notifying the employee of the reasons for his dismissal, since in the Court's view there can be no social stigma when there are no allegations made.[48] In applying this "social stigma" test to the facts of *Bishop*, Justice Stevens found that Bishop could not claim that his good name was stigmatized since there was no public disclosure of the reasons for his dismissal.[49]

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43. *See* dissenting opinion of Justice Brennan, *id.* at 2082 n.4.

44. 408 U.S. 564 (1972).

45. For a survey of cases representing this disparity, see Note, *supra* note 40, at 330-35.

46. 408 U.S. at 573. The Court indicated that allegations of dishonest or immoral conduct would constitute such charges. *Id.*

47. The Court gave no more precise statement of what would constitute social stigma than a quotation from *Wisconsin v. Constantineau*: " 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' " 408 U.S. at 573 (quoting 400 U.S. 433, 437 (1971)).

48. *But see* Suarez v. Weaver, 484 F.2d 678 (7th Cir. 1973), in which the court noted that "silence will often work greater damage to the dismissed person's reputation than the worst of reasons." *Id.* at 680.

49. The alleged reasons for Bishop's dismissal—insubordination, causing low

The second type of situation in which dismissal can violate an employee's right to liberty as described by *Roth* occurs when the termination "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[50] To meet this standard, a dismissed employee's proof must go beyond a mere showing that he is "somewhat less attractive to other employers"[51] as a result of being fired. The majority opinion in *Bishop* omitted any discussion of this "harm to future employment" test and focused exclusively upon the question of disclosure to the general public. Justice Brennan's dissent pointed out this omission and argued that disclosure of the damaging reasons for Bishop's dismissal[52] would probably be made to future employers. Consequently, he reasoned that Bishop was thus entitled to a hearing at which he could challenge the merits of the accusations against him.

The effectiveness of Justice Brennan's incisive argument may have been diluted by the apparent lack of proof at the trial level that other police departments routinely request the reasons for a potential employee's prior dismissal or that the city of Marion would disclose those reasons.[53] Clearly, such proof would have provided Bishop a strong basis for arguing deprivation of liberty under the "harm to future employment" test. If the omission of that test means that the Supreme Court has dropped the second tier from the *Roth* liberty test sub silentio, then the implications for public employees may be grave indeed. Obviously, substantial damage to future employment opportunities can occur if stigmatizing reasons for dismissal are disclosed to potential employers.[54] Although many states have enacted legislation that protects the privacy of state and local government employee personnel re-

morale and poor attendance at training classes—were privately communicated to him by the city manager. Even though these reasons did eventually become public as the result of Bishop's lawsuit, the Court held that the disclosure must precede the filing of the claim. 96 S. Ct. at 2080.

50. 408 U.S. at 573.

51. *Id.* at 574 n.13.

52. See note 49 *supra* for a list of those reasons, the gravity of which prompted Justice Brennan to remark: "It is difficult to imagine a greater 'badge of infamy' that could be imposed on one following petitioner's calling; in a provision [*sic*] in which prospective employees are invariably investigated, petitioner's job prospects will be severely constricted by governmental action in this case." 96 S. Ct. at 2080.

53. Justice Brennan based his speculations on "common sense." 96 S. Ct. at 2081 n.2.

54. *Roth* held that such a disclosure was a deprivation of liberty and emphasized the seriousness of the consequences by quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*: " 'To be deprived not only of present government employment but of future opportunity for it certainly is no small injury.' " 408 U.S. at 574 (quoting 341 U.S. 123, 185 (1951)).

cords,[55] such statutes often contain exceptions that permit inspections of these records by other governmental units.[56] Moreover, some states still classify personnel files as "public documents," and thus place no restrictions upon the number of people who can discover the reasons for an employee's discharge.[57]

As a final argument petitioner Bishop alleged that he was dismissed on the grounds of false accusations. He submitted affidavits of fellow officers specifically refuting the charges made by the chief of police; the Supreme Court, in considering defendant's motion for summary judgment, had to accept the statements contained therein as true. Nonetheless, the majority concluded that even if he were fired for false or erroneous reasons, Bishop had no claim to judicial relief since the false statements were never released to the public. In explaining this holding, Justice Stevens revealed a fear that appears to underlie the majority's philosophy in *Bishop*—that federal courts may be inundated by an ever-increasing tide of lawsuits by discharged public employees. As to Bishop's argument regarding the falsity of the reasons for his dismissal, Justice Stevens observed: "A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake."[58] Justice Stevens acknowledged that public employers will always make "incorrect or ill-advised personnel decisions," but that "the federal court is not the appropriate forum" for granting relief to the victims of such decisions.[59]

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55. *E.g.*, N.C. GEN. STAT. § 160A-168 (Cum. Supp. 1975); *see* CONN. GEN. STAT. ANN. § 5-199 (West Cum. Supp. 1976).

56. For instance, N.C. GEN. STAT. § 160A-168(c)(5) (Cum. Supp. 1975) provides:

> An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be inspected to be necessary and essential to the pursuance of a proper function of the inspecting agency . . . .

Thus, if an employee who was dismissed by one city applied for employment in another city, the first city could find that it is "necessary . . . to the pursuance of a proper function" of the personnel office of the second city to allow inspection of the employee's file. *See id.*

57. *See, e.g.*, FLA. STAT. ANN. §§ 119.01, .012 (Harrison 1975 & Cum. Supp. 1975). Florida's Attorney General has interpreted the Florida Public Records Act to require that personnel files of public employees be maintained as public records, open to inspection by all. OP. ATT'Y GEN. FLA. 073-212, 073-51 (1973). *See generally* Note, *Privacy of Information in Florida Public Employee Personnel Files*, 27 U. FLA. L. REV. 481 (1975).

58. 96 S. Ct. at 2080.

59. *Id.*

CONCLUSION

To effectuate its desire to reduce federal court involvement in public employee personnel cases, the Supreme Court in *Bishop* established that state law is the final arbiter of a public employee's status. *Bishop* did not completely abandon the principles of *Roth* and *Perry*, but attempted to streamline the courts' application of those principles by deferring to state law as a substitute for independent federal court analysis of a plaintiff's "property interest" in his employment. Furthermore, it narrowed the scope of an employee's loss of "liberty" to situations where potentially damning reasons for dismissal are made public.[60] Although *Bishop* plainly reaffirms the settled principle that absent special circumstances, a public employee's general interest in keeping his job is not sufficient to entitle him to due process of law, government employers, by avoiding public disclosure of "stigmatizing" reasons for dismissal, and by wording their personnel ordinances unambiguously either to guarantee or to deny employees a property right to their jobs, can determine the legal rights of their employees. Hopefully, in making these choices, government employers will be motivated by principles of fairness and good personnel management rather than merely a desire to comply with the now minimal Supreme Court requirements.

Removal of judicial checks upon the government's power to dismiss its employees could lead to abuses; and if employees have only a limited right to question the grounds for a dismissal, employee fear of being disciplined arbitrarily may inhibit their activities in areas of their lives where the government has no right to be. Although the Court still recognizes its duty to prevent dismissals of public employees that are based on the employer's desire "to curtail or to penalize the exercise of an employee's constitutionally protected rights,"[61] its decision in *Bishop* could indirectly result in such curtailments by creating a "chilling effect" upon the exercise of the freedoms of speech, religion, or association.

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60. The notion that free grants of tenure to public employees could reduce efficiency and promote elitism may have been an underlying consideration in the Court's approach, although its primary motive apparently was to insure that federal courts do not become "super-legislatures" with power over state and local personnel policies.

61. 96 S. Ct. at 2080.